CMS Legal Services EEIG is a European Economic Interest Grouping that coordinates an organisation of independent member firms. CMS Legal Services EEIG provides no client services. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, CMS is used as a brand or business name of some or all of the member firms. CMS Legal Services EEIG and its member firms are legally distinct and separate entities. They do not have, and nothing contained here shall be construed to place these entities in, the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to bind CMS Legal Services EEIG or any other member firm in any manner whatsoever.

CMS member firms are:

- CMS Adonnino Ascoli & Cavasola Scamoni (Italy);
- CMS Albiñana & Suárez de Lezo, S.l.p. (Spain);
- CMS Bureau Francis Lefebvre S.E. (France);
- CMS Cameron McKenna LLP (UK);
- CMS DeBacker SCRL/CVBA (Belgium);
- CMS Derks Star Busmann N.V. (The Netherlands);
- CMS von Erlach Henrici Ltd (Switzerland);
- CMS Hasche Sigle, Partnerschaft von Rechtsanwälten und Steuerberatern (Germany);
- CMS Reich-Rohrwig Hainz Rechtsanwalte GmbH (Austria) and
- CMS Rui Peña, Arnaut & Associados RL (Portugal).


With contributions from law firms Herguner Bilgen Özke Attorney Partnership, Khaitan & Co, Minter Ellison and Setterwalls

Fourth Edition
The CMS Guide to Arbitration is also available online at eguides.cmslegal.com/arbitration

DISCLAIMER

The information provided in the CMS Guide to Arbitration is general and may not apply in a specific situation. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. Whilst every effort has been taken to ensure the accuracy of this publication, the editors and authors accept no responsibility for any inaccuracies or omissions contained herein.

CMS does not recommend the particular use of any arbitral rules or model clauses that are reproduced in this book. Legal advice should always be sought before taking any legal action based on the information provided.

© CMS Legal Services EEIG (2012)
## VOLUME I: COUNTRY CHAPTERS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td></td>
<td>XI</td>
</tr>
<tr>
<td></td>
<td>Acknowledgements</td>
<td>XIII</td>
</tr>
<tr>
<td></td>
<td>Common Terms</td>
<td>XIV</td>
</tr>
<tr>
<td>CHAPTER 1:</td>
<td>International Arbitration – An Overview</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER 2:</td>
<td>Argentina</td>
<td>29</td>
</tr>
<tr>
<td>CHAPTER 3:</td>
<td>Australia</td>
<td>49</td>
</tr>
<tr>
<td>CHAPTER 4:</td>
<td>Austria</td>
<td>77</td>
</tr>
<tr>
<td>CHAPTER 5:</td>
<td>Belgium</td>
<td>105</td>
</tr>
<tr>
<td>CHAPTER 6:</td>
<td>Bosnia and Herzegovina</td>
<td>129</td>
</tr>
<tr>
<td>CHAPTER 7:</td>
<td>Brazil</td>
<td>149</td>
</tr>
<tr>
<td>CHAPTER 8:</td>
<td>Bulgaria</td>
<td>175</td>
</tr>
<tr>
<td>CHAPTER 9:</td>
<td>China</td>
<td>205</td>
</tr>
<tr>
<td>CHAPTER 10:</td>
<td>Croatia</td>
<td>237</td>
</tr>
<tr>
<td>CHAPTER 11:</td>
<td>Czech Republic</td>
<td>261</td>
</tr>
<tr>
<td>CHAPTER 12:</td>
<td>England and Wales</td>
<td>295</td>
</tr>
<tr>
<td>CHAPTER 13:</td>
<td>France</td>
<td>329</td>
</tr>
<tr>
<td>CHAPTER 14:</td>
<td>Germany</td>
<td>363</td>
</tr>
<tr>
<td>CHAPTER 15:</td>
<td>Hungary</td>
<td>389</td>
</tr>
</tbody>
</table>
CHAPTER 16: India 417
CHAPTER 17: Italy 459
CHAPTER 18: The Netherlands 495
CHAPTER 19: New York 517
CHAPTER 20: Poland 559
CHAPTER 21: Portugal 587
CHAPTER 22: Romania 613
CHAPTER 23: Russia 649
CHAPTER 24: Scotland 685
CHAPTER 25: Serbia 717
CHAPTER 26: Singapore 743
CHAPTER 27: Slovakia 773
CHAPTER 28: Slovenia 799
CHAPTER 29: Spain 821
CHAPTER 30: Sweden 843
CHAPTER 31: Switzerland 875
CHAPTER 32: Turkey 903
CHAPTER 33: Ukraine 931
VOLUME II: RESOURCES AND MATERIALS

APPENDIX 1: International Arbitration Conventions 1

1.1 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 3

1.2 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) 1965 9

1.3 Table of Ratifications of the Main Multilateral International Arbitration Conventions 29
   — 1927 Geneva Convention 29
   — 1958 New York Convention 29
   — 1961 European Convention 29
   — 1965 Washington Convention 29
   — 1975 Panama Convention 29
   — 1994 Energy Charter Treaty 29

APPENDIX 2: UNCITRAL Model Law 41

2.1 1985 UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) 43

APPENDIX 3: Arbitration Rules 63

Ad Hoc Arbitration Rules

3.1 UNCITRAL Arbitration Rules 1976 65

3.2 UNCITRAL Arbitration Rules 2010 83
Principal Institutional Rules

3.3 CAS – Court of Arbitration for Sport Rules 107
3.4 DIAC – Dubai International Arbitration Centre Rules 135
3.5 DIS – German Institution of Arbitration Arbitration Rules 163
3.6 HKIAC – Hong Kong International Arbitration Centre administered Arbitration Rules 181
3.7 ICC – International Chamber of Commerce Arbitration Rules 211
3.8 ICDR – International Centre for Dispute Resolution Arbitration Rules 251
3.9 ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) 271
3.11 ICSID Additional Facility Rules 301
3.12 LCIA Arbitration Rules 349
3.13 SCC – Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 375
3.14 SIAC – Singapore International Arbitration Centre Rules 397
3.15 Swiss Rules – Swiss Rules of International Arbitration 421
3.16 VIAC – Vienna International Arbitral Centre Rules of Arbitration 451
APPENDIX 4: Guidance Materials

4.1 IBA Rules on the Taking of Evidence in International Arbitration

4.2 IBA Guidelines on Conflict of Interests in International Arbitration

4.3 ICC Techniques for Controlling Time and Costs in Arbitration

4.4 UNCITRAL Notes on Organizing Arbitral Proceedings

APPENDIX 5: Model Arbitration Clauses

5.1 Ad Hoc Arbitration Clauses
   — UNCITRAL model arbitration clause (2010)

5.2 Principal Institutions’ Model Arbitration Clauses
   — CAS – Court of Arbitration for Sport
   — DIAC – Dubai International Arbitration Centre
   — DIS – German Institution of Arbitration
   — HKIAC – Hong Kong International Arbitration Centre
   — ICC – International Chamber of Commerce
   — ICDR – International Centre for Dispute Resolution
   — ICSID – International Centre for Settlement of Investment Disputes
   — LCIA
   — SCC – Arbitration Institute of the Stockholm Chamber of Commerce
   — SIAC – Singapore International Arbitration Centre
   — SWISS – Swiss Rules of International Arbitration
   — VIAC – Vienna International Arbitration Centre
   — WIPO – World Intellectual Property Organisation Arbitration and Mediation Centre
5.3  Other Institutions’ Model Arbitration Clauses

— Australia – Australian Centre for International Commercial Arbitration (ACICA) 595
— Belgium – Belgian Centre for Mediation and Arbitration (CEPANI) 595
— Czech Republic – Arbitration Court attached to the Economic Chamber and Agricultural Chamber 595
— Egypt – Cairo Regional Centre for International Commercial Arbitration (CRCICA) 596
— England and Wales – Chartered Institute of Arbitrators (CIarb) 596
— France – Association Française d’Arbitrage (AFA) 596
— Hungary – Court of Arbitration Attached to the Hungarian Chamber of Commerce and Industry 596
— Italy – Chamber of Arbitration of Milan (CAM) 597
— JAMS 597
— The Netherlands – Netherlands Arbitration Institute (NAI) 597
— PCA – Permanent Court of Arbitration 597
— Poland – Court of Arbitration at the Polish Chamber of Commerce in Warsaw 598
— Romania – The Court of International Commercial Arbitration 598
— Russian Federation – The International Commercial Arbitration Court of the Chamber of Commerce and Industry (ICAC) 598

5.4  Model ADR/Escalation Clauses 599

— CEDR Combined Mediation/Arbitration Clause 599
— DIS Conflict Management 599
— World Intellectual Property Organisation Arbitration and Mediation Centre (WIPO) 599
— UNCITRAL Conciliation Clause 600
— ICSID Model Clause for Conciliation 600

The CMS Guide to Arbitration is also available online at eguides.cmslegal.com/arbitration
ARBIRTRATION IN ARGENTINA

By Marcelo Cippitelli and Sergio Villamayor Alemán, CMS
Table of Contents

1. Historical background 33

2. Scope of application and general provisions of chapter VI of the CCCP 34
   2.1 Subject matter 34
   2.2 General principles 34

3. The arbitration agreement 34
   3.1 Formal requirements 34
   3.2 Special tests and requirements of the jurisdiction 35
   3.3 Separability 35
   3.4 Legal consequences of a binding arbitration agreement 36

4. Composition of the arbitral tribunal 36
   4.1 Constitution of the arbitral tribunal 36
   4.2 The challenge of arbitrators 36
   4.3 Responsibility of the arbitrators 37
   4.4 Arbitration fees 38
   4.5 Arbitrator immunity 38

5. Jurisdiction of the arbitral tribunal 38
   5.1 Competence to rule on jurisdiction 38
   5.2 Power to order interim measures 38

6. Conduct of the proceedings 38
   6.1 Commencement of arbitration 38
   6.2 General procedural principles 39
   6.3 Seat and language of arbitration 39
   6.4 Multi-party issues 39
   6.5 Oral hearings and written proceedings 39
   6.6 Evidence generally 40
   6.7 Appointment of experts 40
   6.8 Confidentiality 40
   6.9 Court assistance in taking evidence 40
7. Making of the award and termination of proceedings 41
   7.1 Choice of law 41
   7.2 Timing, form, content and notification of the award 41
   7.3 Settlement 42
   7.4 Power to award interest and costs 42
   7.5 Termination of the proceedings 42
   7.6 Correction, clarification and issue of a supplemental award 42

8. Role of the courts 43
   8.1 Jurisdiction of the courts 43
   8.2 Stay of court proceedings 43
   8.3 Preliminary rulings on jurisdiction 43
   8.4 Interim protective measures 44
   8.5 Obtaining evidence and other court assistance 44

9. Challenging and appealing an award through the courts 44
   9.1 Appeals 44
   9.2 Applications to set aside an award 44

10. Recognition and enforcement of awards 46
    10.1 Domestic awards 46
    10.2 Foreign awards 46

11. Special provisions and considerations 47
    11.1 Consumers 47
    11.2 Labour Disputes 47

12. Concluding thoughts and themes 47

13. Contacts 48
1. Historical background

1.1 Arbitration in Argentina is based on Article 1197 of the Argentinian Civil Code, which provides that the terms of an agreement are binding in the same way as law. Consequently, contracting parties should be free to determine how they wish to resolve their disputes.

1.2 Pursuant to the Argentinian National Constitution, and because Argentina is a federal country, the National Congress can only enact international arbitration rules for the whole country. Each province has its own procedural code for arbitration.

1.3 In the city of Buenos Aires, the rules governing arbitration are set out in Chapter VI of the National Code of Civil and Commercial Procedure (CCCP), which also apply to federal courts. Since the CCCP was enacted, most of the individual provinces of Argentina have included similar provisions in their provincial procedural codes. Moreover some provinces like La Pampa and Tierra del Fuego have adopted more modern legislation.

1.4 At present, three different arbitration bills are being discussed in the National Congress that adapt Chapter VI of the CCCP to the UNCITRAL Arbitration Rules.

1.5 Argentina has many historic precedents relating to arbitration and the recognition of foreign awards. For example, the Montevideo Treaty of 1889 (revised in 1940) on International Procedural Law, between Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay, gives foreign awards from the contracting states the same status as judicial decisions.

1.6 Argentina ratified the New York Convention on 28 September 1988. Although Argentina is a party to several other arbitration-related treaties, none of those other treaties provide better material benefits or are more important to international arbitration in Argentina than the New York Convention.

---

1 Argentinian National Constitution, s 121.
3 Montevideo Treaty on International Procedural Law (adopted 11 January 1889, ratified by Argentina by Law 3192); Montevideo Treaty on International Procedural Law (adopted 19 March 1940; ratified by Argentina by Law 7771). The original treaty remains in force and official citation is usually to that treaty rather than to the 1940 treaty.
4 The New York Convention was ratified by Law 23.619 and came into force in Argentina on 14 March 1989 (see CMS Guide to Arbitration, vol II, appendix 1.1).
2. Scope of application and general provisions of chapter VI of the CCCP

2.1 Subject matter
2.1.1 The provisions of Chapter VI of the CCCP apply to all kinds of arbitration including institutional arbitration, ad hoc arbitration, arbitration at law and *ex aequo et bono* arbitration.

2.2 General principles
2.2.1 The CCCP, as well as the Argentinian Civil Code, sets forth several principles that should be respected in any national arbitral proceedings, as well as in any international arbitral proceedings where the award is to be enforced in Argentina.

*Agreement of the parties*
2.2.2 Pursuant to Article 1197 of the Civil Code, the basis for the arbitration procedure is the agreement of the parties to settle their dispute by arbitration. Similar to the New York Convention it is not possible to enforce an award in Argentina where the decision exceeded the scope of the arbitration agreement.

*Due process*
2.2.3 Article 18 of the Argentinian Civil Code guarantees each party the right to due process. This principle is of great importance as it may be used to challenge the enforcement of a national or international award.

*Role of the courts*
2.2.4 The courts can enforce the interim measures and decisions of the arbitral tribunal, but it cannot review the basis of them.

3. The arbitration agreement

3.1 Formal requirements
3.1.1 No specific wording is required to constitute an arbitration agreement.\(^5\)

3.1.2 An arbitration agreement must be in writing.\(^6\) It can be included as a clause in a larger agreement or drafted as a stand-alone agreement.

---

\(^5\) Argentinian Civil Code, art 974.

\(^6\) CCCP, art 739.
3.1.3 An arbitration agreement will be deemed to be in writing if it is concluded between the parties through an exchange of letters, facsimiles, telexes or by such other means of telecommunication that produces a permanent record of the agreement.

3.1.4 It should be noted, however, that prior to the commencement of any arbitral proceedings – even in the presence of an arbitration clause – the parties are required to execute an arbitration commitment (Compromiso Arbitral) confirming their commitment to submit their dispute to arbitration.\(^7\)

3.1.5 The Compromiso Arbitral should contain all the necessary requirements for commencing arbitral proceedings, such as provision for the appointment of arbitrators, the selection of any institutional rules (if any) and a statement of the issues to be submitted to the arbitral tribunal.\(^8\)

3.1.6 The execution of the Compromiso Arbitral will exclude the jurisdiction of the courts to resolve the dispute. In the event that one of the parties brings a claim which falls within the scope of the Compromiso Arbitral before the local courts, the other party will be able to invoke the existence of the Compromiso Arbitral and the court must stay its proceedings.

3.2 Special tests and requirements of the jurisdiction

3.2.1 Family law disputes and testamentary matters (with the exception of certain patrimonial matters) and criminal law matters (excluding civil indemnification) cannot be resolved by way of arbitration in Argentina, even if the parties are willing to do so.

3.2.2 Pursuant to the CCCP, only international matters may be decided in a foreign jurisdiction.\(^9\) In general terms, an arbitration is “international” when it exceeds the framework of one country; for example, the parties are domiciled in different countries, or a significant part of the object of the contract will be carried out in a foreign country.

3.3 Separability

3.3.1 Chapter VI of the CCCP does not expressly provide that an agreement to arbitrate within a contract is separable from the contract itself. However, the courts have upheld the autonomy of the arbitration clause in many judicial precedents.\(^10\)

---

7 Ibid, art 739.
8 Ibid, art 740.
9 Ibid, art 1.
3.4 Legal consequences of a binding arbitration agreement
3.4.1 If the parties have concluded a valid and enforceable arbitration agreement, they are required to arbitrate all disputes that fall within the scope of that agreement and cannot submit such disputes to the Argentinian courts.

3.4.2 If one of the parties to a valid arbitration agreement refuses to execute the Compromiso Arbitral, the other party can request that the courts do so on behalf of the defaulting party.11

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal
4.1.1 The parties are free to decide how many arbitrators will constitute the arbitral tribunal. The parties can appoint an odd or even number of arbitrators, although the former is more common.

4.1.2 Most institutional arbitral rules have specific proceedings for the appointment of arbitrators. If the parties cannot agree upon the number of arbitrators to be appointed in an ad hoc arbitration, then a court will determine the size of the arbitral tribunal.

4.1.3 Anyone can be appointed as an arbitrator so long as the person is capable of exercising his/her civil rights. Pursuant to the Argentinean Civil Code, people under the age of 18, people of unsound mind12 and persons who have been declared unable to exercise their rights by a judge for the abuse of drugs, alcohol or a temporary mental illness are considered incapable of exercising their civil rights for these purposes.13

4.1.4 If the parties agree to refer to the rules of an arbitral institution, the institution will set out the procedure for appointing the arbitrators. In certain Argentinian institutions, the parties may agree to vary these procedures.

4.2 The challenge of arbitrators
4.2.1 Arbitrators may be challenged by the parties on the same grounds as judges.14 Those grounds include where the arbitrator:

---

11 CCCP, art 742.
12 Argentinian Civil Code, art 54.
13 Ibid, art 152(bis).
14 CCCP, art 746.
— has a personal or business relationship with one of the parties or their lawyer(s);
— has an interest in the outcome of the dispute;
— has expressed a prior opinion or recommendation on issues regarding the dispute; or
— has received an “important benefit” from one of the parties.

4.2.2 Arbitrators appointed by agreement of both parties may only be challenged where the grounds for the challenge occurred after their appointment.\textsuperscript{15}

4.2.3 The rules of most arbitral institutions set out the procedure for challenging arbitrators. In ad hoc proceedings, the arbitral tribunal is competent to rule on any challenge within five days of its appointment. If the challenged arbitrators refuse to hear the challenge, a judge is entitled to determine the issue and the decision cannot be appealed. The proceedings will be suspended pending the resolution of the challenge.\textsuperscript{16}

4.3 Responsibility of the arbitrators

4.3.1 Once the \textit{Compromiso Arbitral} has been executed, notice of that fact will be given to the potential arbitrators who – once they have accepted their appointments – must fulfil their duties and obligations.

4.3.2 Arbitrators may be liable for any damage or loss suffered by the parties as a result of their failure to perform their duties and obligations.\textsuperscript{17} The Argentinian Civil Code states that the arbitrators also have a general obligation to compensate third parties for damage caused by their negligence or wilful misconduct.\textsuperscript{18}

4.3.3 In addition, in the event that the arbitral tribunal does not issue its award within the time limit stipulated in the \textit{Compromiso Arbitral}, it will forfeit its right to be paid and may be liable for any damage or loss caused by the delay.\textsuperscript{19}

4.3.4 Finally, arbitrators who issue awards that are contrary to established legal principles, or that are based on a false factual analysis, may be subject to criminal prosecution under which judges may apply fines ranging from ARS 3,000 to ARS 75,000 (approximately USD 1,850 to USD 21,500) and/or receive a life-long disqualification from acting as an arbitrator.\textsuperscript{20}

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid, art 747.
\textsuperscript{17} Ibid, art 745.
\textsuperscript{18} Argentinian Civil Code, art 511 and 1068.
\textsuperscript{19} CCCP, art 756.
\textsuperscript{20} Argentinian Criminal Code, art 269.
4.4 Arbitration fees
4.4.1 In institutional arbitration, each institution typically has rules governing the payment of administrative fees and the remuneration of arbitrators. However, in ad hoc arbitration, there will be no administrative fees and the remuneration of the arbitrators will be agreed between the parties and the arbitrators (usually in the *Compromiso Arbitral*). If the parties do not agree on such remuneration and fees, a court may fix them.

4.5 Arbitrator immunity
4.5.1 There is no provision in Argentinian law granting immunity to arbitrators. As detailed above, arbitrators may face significant liability depending upon their conduct.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction
5.1.1 There is no express provision in the CCCP governing the competence of the arbitral tribunal to rule on its own jurisdiction. Most jurisprudence, however, accepts that the arbitral tribunal has this authority, suggesting that the principle of competence-competence would apply. Nevertheless, in a case where a court also decides that it is competent to determine the issue of the arbitral tribunal’s jurisdiction, only the Supreme Court is entitled to rule on the matter.

5.2 Power to order interim measures
5.2.1 Arbitral Tribunals are empowered to grant interim measures to protect the parties’ rights and the integrity of the arbitral proceedings. The courts can enforce the interim measures and decisions of the arbitral tribunal, but cannot review the basis of them.

6. Conduct of the proceedings

6.1 Commencement of arbitration
6.1.1 Arbitral proceedings commence with the constitution of the arbitral tribunal.

6.1.2 It is important to note, however, that in order to stop time running for the statute of limitations, a clear and valid act of one party to constitute the arbitral tribunal should be completed (provided that an arbitration agreement exists).
6.2 General procedural principles

6.2.1 The parties are free to choose the procedure to be followed by the arbitrators. If the parties do not agree upon the procedure to be applied – and unless the parties have agreed otherwise – the arbitral tribunal should apply the same procedural rules as are used in judicial proceedings.

6.3 Seat and language of arbitration

6.3.1 The parties are also free to choose the seat of the arbitration. In the absence of any choice, the seat will be deemed to be the place at which the Compromiso Arbitral was executed.

6.3.2 There is no express provision in the CCCP governing the language of the arbitration. It is generally accepted, however, that the parties are free to choose the language to be used in their arbitral proceedings.

6.4 Multi-party issues

6.4.1 Multiple parties may participate in the arbitral proceedings. Nevertheless, due process guarantees should be observed, and each party must participate for the award to be binding. In this regard, all the parties to the arbitral proceedings should also be party to the Compromiso Arbitral.

6.5 Oral hearings and written proceedings

6.5.1 The parties are free to decide whether to hold an oral hearing or whether to conduct the arbitration on a documents only basis. Most arbitral institutions in Argentina have adopted the UNCITRAL Arbitration Rules for proceedings.

6.5.2 The arbitral tribunal must allow the parties the opportunity to make oral submissions, if so requested by either party. The tribunal will also hear all witnesses and experts (if they are summoned by the tribunal upon the request of the parties to explain their written testimony).

6.5.3 The parties must be given sufficient prior notice of any hearings or of any procedural actions to be taken by the arbitral tribunal.

---

21 CCCP, art 741.
22 Ibid, art 751.
23 Ibid, art 741(1).
24 For the full text of the UNCITRAL Arbitration Rules (1976) and (2010), see CMS Guide to Arbitration, vol II, appendix 3.1 and 3.2.
6.6 Evidence generally

6.6.1 The parties have an obligation to provide the arbitrators with all the evidence needed for the arbitral proceedings.\(^2\)\(^5\)

6.6.2 Pursuant to Argentinian jurisprudence, a dynamic burden of proof applies, meaning that the party who is in the best position to provide the evidence has the burden of proof to evidence that fact.\(^2\)\(^6\)

6.7 Appointment of experts

6.7.1 The arbitral tribunal may take the parties’ depositions, hear witnesses and determine the appointment of expert witnesses, either of its own volition or at the parties’ request.

6.7.2 In certain circumstances, the arbitrators may request the courts’ support in the appointment of certain expert witnesses, ensuring the tribunal has sufficient access to information.

6.8 Confidentiality

6.8.1 The rules of most arbitral institutions in Argentina include express provisions regarding confidentiality.

6.8.2 Chapter VI of the CCCP contains no express provision regarding confidentiality. Nevertheless by virtue of Article 741(a) of the CCCP, the parties are free to decide to include in their *Compromiso Arbitral* provisions to assure the confidentiality of the proceedings.

6.9 Court assistance in taking evidence

6.9.1 The arbitrators may request the assistance of the courts in obtaining evidence. For example, they may request the courts to summon witnesses that have refused to voluntarily attend and give evidence. However, the power to determine the admissibility of evidence and the weight to be given to it lies within the exclusive remit of the arbitral tribunal.

---

\(^2\)\(^5\) CCCP, art 387.

\(^2\)\(^6\) See, for example, Argentinian Supreme Court, “Gallis de Mazzucci, Luisa c/ Correa, Miguel y otro”, 6 February 2001, published by La Ley 2001-C, 959.
7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 In international arbitrations, the parties are free to determine the applicable substantive law according to which the arbitral tribunal must make its award. If the parties fail to determine the applicable law, it shall be determined by the arbitral tribunal.\(^{27}\)

7.1.2 The parties may authorise the arbitral tribunal to make its decision *ex aequo et bono* (instead of rendering the decision on the basis of an applicable law).

7.2 Timing, form, content and notification of the award

7.2.1 The parties can stipulate in the *Compromiso Arbitral* the time within which the award is to be issued. In the absence of any agreement on this issue, the court shall decide.\(^{28}\)

7.2.2 Any award based on law (rather than *ex aequo et bono*) must be properly reasoned both in fact and in law. It must deal with all the issues submitted to arbitration as well as ancillary matters such as the costs of the proceedings.

7.2.3 The award itself must be in writing and state the place and date of its issuance. It must also be signed by a majority of the arbitrators.\(^{29}\) If no majority decision can be reached on some or all of the issues – for example, if an even number of arbitrators has been appointed – a new arbitrator will be appointed to resolve such issues.\(^{30}\) If the majority of the arbitrators agree upon some of the issues, a decision will be rendered on those issues in which there is a majority, leaving the rest of the issues for the determination of the newly appointed arbitrator.

7.2.4 In this situation, the parties will have to decide the appointment of a new arbitrator and a fixed term for him to render the award for the matters for which there was no majority, and failing to do so, a judge may appoint the new arbitrator. This new arbitrator will make a determination only upon the basis of the evidence already presented in the proceedings.

---

\(^{27}\) CCCP, art 49(2).

\(^{28}\) Ibid, art 741.

\(^{29}\) Ibid, art 755.

\(^{30}\) Ibid, art 757.
7.3 Settlement

7.3.1 The proceedings will terminate if the parties settle their dispute. The arbitral tribunal will record the settlement in the form of an award on agreed terms if so requested by the parties, provided that the arbitral tribunal considers that the settlement is in accordance with the law. An award on agreed terms has the same effect as any other award made by an arbitral tribunal.\(^\text{31}\)

7.3.2 The arbitrators may schedule one or more settlement hearings at the outset or during the proceedings to encourage the parties to settle their dispute amicably. In keeping with the powers of judges in judicial proceedings in Argentina, the arbitrators may be actively involved (as quasi-conciliators) in any settlement discussions that result from the settlement hearings. These possibilities may vary depending on the procedural rules agreed by the parties.

7.4 Power to award interest and costs

7.4.1 The parties can decide in the *Compromiso Arbitral* by which party and to which extent the costs of the arbitration, including the arbitrators’ fees and the parties’ legal fees, will be borne.

7.4.2 In the absence of any prior agreement between the parties on this issue, the arbitrators will determine the costs of the arbitration in their award and allocate the responsibility for paying such costs between the parties.\(^\text{32}\) As a general rule, the winning party is entitled to recover its costs from the losing party.

7.5 Termination of the proceedings

7.5.1 The arbitral proceedings terminate when the final award is issued. The arbitral proceedings will also be terminated in the following circumstances:

- by agreement between the parties;
- upon the expiration of the term indicated in the *Compromiso Arbitral* or where otherwise stated by the court; or
- if neither the parties nor the arbitrators take any steps in the proceedings for a period of three months.\(^\text{33}\)

7.6 Correction, clarification and issue of a supplemental award

7.6.1 Any party to the arbitral proceedings may file a motion requesting the arbitral tribunal to clarify the terms of the award.\(^\text{34}\) This motion should be filed within

---

\(^{31}\) *Ibid*, art 741.
\(^{32}\) *Ibid*, art 760.
\(^{33}\) *Ibid*, art 748.
\(^{34}\) *Ibid*, art 166.
Arbitration in Argentina

three days of receipt of the award, and should invite the arbitral tribunal to correct any typographical error or omission or clarify the grounds on which the award has been made. Arbitral institutions set forth longer terms (e.g. 30 days) for this motion.

7.6.2 Either party may request an additional award if the arbitral tribunal failed to make an award on any claim submitted to the arbitral tribunal for consideration. This motion should also be filed within three days of receipt of the award. Nevertheless the failure of the arbitral tribunal to include essential points in the proceeding may be a ground for a request to set aside the award.

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 If a valid and binding arbitration agreement has been agreed by the parties, the courts are required to decline jurisdiction over the subject matter specified in the arbitration agreement. However, the CCCP gives the courts limited jurisdiction to provide legal assistance to the arbitral process in certain circumstances. The courts can, amongst other things, assist in relation to the appointment and challenge of arbitrators, in obtaining evidence as well as in the enforcement of interim measures granted by the arbitral tribunal.

8.2 Stay of court proceedings
8.2.1 The court will decline jurisdiction over a claim that falls within the scope of an arbitration agreement, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

8.3 Preliminary rulings on jurisdiction
8.3.1 If the arbitral tribunal is unable to decide whether or not it has jurisdiction over the dispute, a party may request that the competent court decides on the jurisdiction of the arbitral tribunal. The proceedings are suspended until a party files a copy of the court’s decision with the arbitral tribunal.

8.3.2 The court also has jurisdiction to review the arbitral tribunal’s assumption of jurisdiction upon application by a party.

36 Ibid, art 753.
37 Ibid, art 752.
38 Ibid, art 742.
8.4 **Interim protective measures**

8.4.1 The courts in Argentina have jurisdiction to grant interim measures in support of arbitral proceedings both before and after the constitution of the arbitral tribunal.

8.4.2 The courts also have exclusive competence in enforcing interim measures granted by the arbitral tribunal.

8.5 **Obtaining evidence and other court assistance**

8.5.1 The courts have jurisdiction to assist the arbitral tribunal in obtaining evidence.\(^{39}\) As an example, courts may summon witnesses in a compulsory manner. In addition, courts may also assist the arbitral tribunal in obtaining information from third parties, including public authorities, using their legal authority to compel such information.\(^{40}\)

9. **Challenging and appealing an award through the courts**

9.1 **Appeals**

9.1.1 Most arbitral institutions consider awards as final and binding and not subject to appeal.

9.1.2 In ad hoc arbitration however, unless the parties agree otherwise, awards can be appealed by the parties on the same grounds as court judgments unless the parties have waived such a right or the arbitration was conducted on an *ex aequo et bono* basis.\(^{41}\)

9.2 **Applications to set aside an award**

9.2.1 The parties are not entitled to waive the right to apply to set aside an award. The grounds upon which an award can be set aside are the following:

- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award was granted after the deadline fixed in the *Compromiso Arbitral*;
- the award contains decisions on matters beyond the scope of the *Compromiso Arbitral*; decisions that exceed the arbitral tribunal’s jurisdiction will be null and void;

---

39 \(ibid\), art 753.
40 \(ibid\), art 398.
41 \(ibid\), art 758 and 771(1).
— the party which concluded the arbitration agreement did not have legal capacity;
— the arbitration agreement is not valid under the law which the parties have chosen, or failing any indication thereof, under Argentinian law;
— the subject matter of the dispute is not capable of settlement by arbitration under Argentinian law; or
— the award is in conflict with the rules of Argentinian public policy.  

9.2.2 The application to set aside the award must be submitted within five days of receipt of the award by the parties.  

9.2.3 In arbitrations decided on the basis of substantive law, any application to set aside an award should be filed before the arbitral tribunal. If the tribunal decides to grant the application, it will remit the file to the Ordinary Appeal Court, which will rule on the application without the participation of the other party (albeit that this method has recently been considered unconstitutional). If the arbitral tribunal rejects the application, the party challenging the award may file an application to set aside the award before the Ordinary Appeal Court.  

9.2.4 In cases decided ex aequo et bono, an application to set aside the award should be filed before the competent First Instance Court. The only valid grounds for such a challenge are:
— the award was rendered after the deadline fixed in the Compromiso Arbitral; or
— the award contains decisions on matters beyond the scope of the Compromiso Arbitral.  

9.2.5 No appeal may be lodged against the decision of the court on an application to set aside an award, but a party may apply to the Supreme Court of the Republic of Argentina for so-called judicial revision of the decision if the court committed a substantial breach of law.  

9.2.6 It is important to note that the filing of an application to set aside the award will not have the effect of suspending enforcement of the award in ex aequo et bono proceedings. Enforcement may, however, be suspended if an appeal is filed in the context of an arbitration at law.

---

42 Ibid, art 760 and 761.
43 Ibid, art 759.
44 Ibid, art 282 and 283.
10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 The effect of an award is the same as that of a final and binding (non-appealable) court judgment. The court with jurisdiction to enforce a domestic award is the local court agreed by the parties in the Compromiso Arbitral. In the absence of agreement between the parties on this issue, the competent court will be the one which would have been competent to hear the dispute if no arbitration agreement had been concluded.

10.2 Foreign awards

10.2.1 Foreign awards are enforceable in Argentina in accordance with the provisions of multilateral conventions and bilateral treaties ratified by Argentina. The most important arbitration convention to which Argentina is a party is the New York Convention.

10.2.2 Procedurally, the party seeking enforcement of a foreign award will need to obtain an order of exequatur from the local courts in order to enforce the award. The court will only refuse to grant such an order if:
— the subject matter of the dispute is not arbitrable under Argentinian law; or
— the award is contrary to Argentinian public policy.

10.2.3 The scope of Argentinian public policy may be modified depending on whether the Argentinian state is a party or not. While in commercial arbitration, only certain public policy breaches may be a ground for succeeding with a setting aside application, the criteria may be wider when the Argentinian state is party to the dispute.

10.2.4 As an example, in Estado Nacional – Procuración del Tesoro v/ Cámara de Comercio Internacional (deci. 15-XII-05) s/ proceso de conocimiento, on July 17 2008 Argentinian Federal Administrative Appeals Court considered itself competent to review a decision by the ICC that rejected a challenge to an arbitrator that had been requested by the Argentinian state, ordering the arbitration court as well as the other party to suspend the proceeding until the challenge was decided by such Court.

46 Ibid, art 499.
48 Ibid, art 517.
10.2.5 There is no express provision governing which court is competent to hear applications for the recognition and enforcement of foreign awards. However, in principle, such an application should be lodged with the court that would have been competent to hear the dispute in the absence of an arbitration agreement.

11. Special provisions and considerations

11.1 Consumers
11.1.1 Arbitration is encouraged for the resolution of domestic consumer disputes under Argentinian consumer law.\textsuperscript{50} There are specialised arbitration courts to solve disputes of this nature arising from product liability claims.

11.1.2 For international arbitration, any dispute arising from a credit sale to a consumer will be dealt with by the competent court in the consumer’s jurisdiction.\textsuperscript{51}

11.2 Labour Disputes
11.2.1 Mediation with a conciliator is mandatory before any labour dispute. The conciliator may propose the parties to resolve their dispute by means of arbitration and request they execute a \textit{Compromiso Arbitral}.\textsuperscript{52} The arbitral proceedings then should be carried out under similar terms of Chapter VI of the CCCP.

11.2.2 Awards in labour disputes may be appealed to the National Labour Appeals Court.

12. Concluding thoughts and themes

12.1.1 Arbitration in Argentina is still in the process of development. Nevertheless, the present legal framework – including the CCCP, the arbitration rules of the principal Argentinian arbitral institutions, and the international conventions to which Argentina is party – provide a solid foundation for the future and serve to ensure that both domestic and foreign awards are enforceable in Argentina.

12.1.2 Commercial arbitration has been encouraged by Argentinian courts as a safe means of resolving disputes.

\textsuperscript{50} Law 24.240, s 59.
\textsuperscript{51} Ibid, s 36.
\textsuperscript{52} Law 24.635, s 28.
12.1.3 Nevertheless, due to the wide variety of legal procedure codes in the different provinces, and the undetermined scope of the public policy that may jeopardise the enforcement of the awards, it is recommended that local advice is sought both in cases where the arbitration will be held in Argentina and when an international award requires enforcement in Argentina.

13. Contacts

CMS Bureau Francis Lefebvre
Marcelo T. de Alvear 612 Piso 1
C1058AAH Capital Federal
Buenos Aires
Argentina

Marcelo Cippitelli
T +54 11 4311 1008
E mcippitelli@cms-bfl.com.ar

Patrick Patelin
T +54 11 4311 1008
E ppatelin@cms-bfl.com.ar
ARBITRATION IN AUSTRALIA

By Peter Wood, Phillip Greenham and Roman Rozenberg, Minter Ellison
# Table of Contents

1. **Overview and historical background** 53

2. **Scope of application and general provisions of the Australian Arbitration Act** 54  
   2.1 Scope of application 54  
   2.2 General principles 55

3. **The arbitration agreement** 56  
   3.1 Formal requirements 56  
   3.2 Applicable rules 56  
   3.3 Separability 57  
   3.4 Legal consequences of a binding arbitration agreement 57

4. **Composition of the arbitral tribunal** 57  
   4.1 Constitution of the arbitral tribunal 57  
   4.2 Procedure for challenging and substituting arbitrators 58  
   4.3 Arbitration fees 59  
   4.4 Arbitrator immunity 59

5. **Jurisdiction of the arbitral tribunal** 59  
   5.1 Competence to rule on jurisdiction 59  
   5.2 Power to order interim measures 60

6. **Conduct of proceedings** 61  
   6.1 Common law tradition 61  
   6.2 Commencement of arbitration 61  
   6.3 Seat, place of hearings and language of arbitration 61  
   6.4 Multi-party issues 62  
   6.5 Submissions 62  
   6.6 Oral hearings and written proceedings 63  
   6.7 Evidence generally 63  
   6.8 Appointment of experts 64  
   6.9 Confidentiality 64
7. **Making of the award and termination of proceedings**
   - 7.1 Choice of law
   - 7.2 Timing, form, content and notification of an award
   - 7.3 Settlement
   - 7.4 Power to award costs and interest
   - 7.5 Termination
   - 7.6 Effect of the award
   - 7.7 Correction, clarification and issue of a additional award
   - 7.8 Remedies

8. **Role of the courts**
   - 8.1 Jurisdiction of the courts
   - 8.2 Stay of court proceedings and preliminary rulings on jurisdiction
   - 8.3 Interim protective measures
   - 8.4 Obtaining evidence and other court assistance

9. **Challenging and appealing an award before the courts**
   - 9.1 Jurisdiction of the courts
   - 9.2 Appeals
   - 9.3 Applications to set aside an award

10. **Recognition and enforcement of awards**
    - 10.1 Domestic awards
    - 10.2 Foreign awards

11. **Special provisions and considerations**
    - 11.1 Sources of further information

12. **Conclusions**

13. **Contacts**
1. Overview and historical background

1.1.1 Australia’s legislative powers are divided between the Commonwealth of Australia (as the federal entity), the six states and the two federal territories.

1.1.2 The provisions governing international arbitration in Australia are found in the International Arbitration Act (1974) (**Australian Arbitration Act**).

1.1.3 For domestic arbitration, each state and territory has its own Commercial Arbitration Act (**CAA**). The CAAs are largely uniform and while they have historically been quite different to the Australian Arbitration Act, there have been recent amendments aimed at harmonising and achieving uniformity between the international and domestic arbitration regimes.

1.1.4 The Australian Arbitration Act came into force in 1974 and implemented Australia’s obligations under the New York Convention to enforce and recognise foreign arbitration agreements and awards. The Australian Arbitration Act also gave the force of law to the Model Law (1985) as the law governing international arbitrations in Australia.

1.1.5 The Australian Arbitration Act was amended in July 2010 to ensure that it remains at the forefront of international arbitration practice. This involved updating the Australian Arbitration Act to incorporate amendments made to the Model Law (1985) by the Model Law (2006), and also clarifying the circumstances in which a court may refuse to enforce a foreign award.

1.1.6 The most significant reform is that the Australian Arbitration Act now makes it clear that the Model Law (2006) is the exclusive law governing international commercial arbitrations that take place in Australia. Previously, parties had been able to opt out of the Model Law (1985) and apply one of the CAAs to the arbitration. Accordingly, the Model Law (2006) will now govern any future international arbitration in Australia.

1.1.7 For domestic arbitration, historically the laws varied from state to state. In 1984, the first uniform CAAs were implemented in Victoria and New South Wales

---


2 For the text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 2.1.


The other jurisdictions followed and, by 1990, the state laws were mostly uniform. These reforms removed the confusion surrounding cross jurisdictional disputes within Australia and removed the barriers that were previously affecting the enforcement of awards between Australian states.

1.1.8 Recently, the Australian Standing Committee of Attorneys-General – comprised of Attorneys-General from each state, federal territory and the Commonwealth – agreed to overhaul Australia’s domestic commercial arbitration regime, with the adoption of new uniform laws based on the Model Law (2006). The legislation in NSW has been passed and came into effect on 1 October 2010. This legislation essentially updates the NSW CAA by adopting the Model Law (2006) as the basis for domestic arbitration. The NSW CAA contains some areas of difference from the Model Law (2006). These differences are largely the result of the NSW CAA’s exclusive application to domestic arbitration, but there are also a number of other departures from the Model Law (2006). These include provisions for situations not covered in the Model Law (2006) where the parties fail to agree on the method to appoint arbitrators and additional detail on the powers given to arbitral tribunals. It is anticipated that the other states and territories will follow suit and enact legislation that is similar to the NSW CAA.

2. Scope of application and general provisions of the Australian Arbitration Act

2.1 Scope of application

International disputes

2.1.1 The Australian Arbitration Act governs all “international arbitrations”, the legal seat or place of which is in Australia, irrespective of whether the dispute is the subject of institutional or ad hoc arbitration. An arbitration is “international” where the parties’ places of business are in different countries. Where a party has places of business in more than one country, the relevant place of business is the one most closely connected to the dispute. If a party has no place of business, reference is made to its habitual residence.

2.1.2 If the parties’ places of business are in the same country, an arbitration can still be regarded as international if:

---

5 Standing Committee of Attorneys-General, Communiqué, 7 May 2010.
6 NSW CAA, s 11(3)(c).
7 Ibid, s 19(4)–(6).
— it is conducted in a different country;
— a substantial proportion of the obligations owed under the commercial relationship are to be performed in a different country;
— the subject matter of the dispute is most closely connected to a different country; or
— the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Domestic disputes

2.1.3 Individual CAAs, as enacted by the states and territories, apply to domestic disputes. Due to the wide definition given to “arbitration agreement” in the CAAs they are not necessarily limited to arbitration in a commercial context.

2.1.4 The recently amended NSW CAA applies to domestic commercial arbitrations where the place of the arbitration is in NSW. In addition, some provisions – such as those relating to interim measures and to the enforcement of awards – are relevant to applications to NSW courts in relation to domestic commercial arbitrations where the place of the arbitration is outside NSW.

2.2 General principles

2.2.1 Provided that the parties do not agree otherwise, an arbitral tribunal is free to conduct the arbitral proceedings as it deems appropriate. This principle applies under both the Australian Arbitration Act and the CAAs. However, there are certain mandatory provisions from which the parties cannot derogate by agreement.

2.2.2 The mandatory provisions exist to preserve and protect due process and natural justice. By way of example, the Australian Arbitration Act mandates, among other things, that:
— each party is given a full opportunity to present its case;
— the parties are treated with equality; and
— the parties are given sufficient notice prior to any hearing of the arbitral tribunal.8

2.2.3 There are only a few mandatory provisions in the context of domestic arbitral procedure, as provided for in the CAAs. However, some common law principles – such as principles of natural justice and due process – are also applicable.

---

3. The arbitration agreement

3.1 Formal requirements
3.1.1 The CAAs, the Australian Arbitration Act, the Model Law (2006) and the New York Convention provide that parties to a legal relationship must agree in writing to resolve all or certain disputes by arbitration in order for there to be a binding arbitration agreement. The arbitration agreement may be a separate, stand alone agreement or it may be a clause within another substantive agreement between the parties.

3.1.2 The Australian Arbitration Act specifically requires that an arbitration agreement is either signed by the parties or is contained in an exchange of letters, telex or telegrams.

3.2 Applicable rules
3.2.1 The parties are free to agree on the procedure to be followed by the arbitral tribunal. Therefore, parties may agree to a set of institutional or ad hoc rules which they can modify so as to tailor the procedural rules to their particular circumstances and needs.

3.2.2 Where the parties fail to agree on a particular set of rules, the Model Law (2006) provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. This power includes an ability to determine the admissibility, relevance, materiality and weight of any evidence.

3.2.3 In the case of domestic arbitrations, subject to the arbitration agreement and any mandatory provisions in the relevant CAA, the arbitral tribunal may conduct the arbitral proceedings in such manner as it thinks fit.

9 CAAs, part 2.
10 Australian Arbitration Act, sch 1, art II.
12 New York Convention, art II (see CMS Guide to Arbitration, vol II, appendix 1.1).
16 As discussed in para 4.1.5, under Australian law, the default position in domestic arbitration is to have a sole arbitrator. References in this chapter to an “arbitral tribunal” in domestic arbitrations are to circumstances in which the arbitral tribunal could comprise of one or more arbitrators. References to an “arbitrator” are to an individual arbitrator’s duties or responsibilities or to a sole arbitrator, depending on the context.
17 CAAs, s 14.
3.3 Separability

3.3.1 Australian law adopts the principle of separability, whereby arbitration clauses are considered to be independent from the contract in which they appear and, accordingly, are not void simply by reason of the substantive contract being void.

3.4 Legal consequences of a binding arbitration agreement

3.4.1 In the case of both domestic and international arbitrations, if a civil action which is the subject of an arbitration agreement is brought before a court, that court must refer the parties to arbitration if a party to the dispute so requests. This does not apply if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.18

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The parties are free to agree on the appointment of arbitrators, the number of arbitrators required to constitute the arbitral tribunal and the appointment procedure to be followed.19 There are default procedures for the appointment of arbitrators that will apply if no procedure is stipulated.20

4.1.2 In relation to international arbitrations, the parties are free to determine the number of arbitrators and, failing such a determination, the default number of arbitrators is three.21

4.1.3 Where the number of arbitrators is, by default, three, and there is no procedure for the appointment of the arbitral tribunal, the parties will each choose an arbitrator, and those arbitrators will choose the third arbitrator.22 Where the parties or the party-appointed arbitrators fail to act as required in this procedure, or where the number of arbitrators is one, the Supreme Court of the relevant state or territory shall appoint the arbitrator(s).

4.1.4 Arbitrators who are approached for appointment to the arbitral tribunal are compelled to disclose circumstances that may affect their impartiality or independence.23

18 Ibid, s 8 and Australian Arbitration Act, s 17(2) and (5).
4.1.5 In relation to domestic arbitrations, in the event that the arbitration agreement does not provide for the composition of the arbitral tribunal, there is a presumption that the dispute will be heard by a single arbitrator, jointly appointed by the parties to the agreement.24

4.2 Procedure for challenging and substituting arbitrators

The challenge of arbitrators

4.2.1 There are two circumstances in which an arbitrator may be removed, namely:
(i) where there are justifiable doubts as to the arbitrator’s impartiality or independence; or
(ii) where the arbitrator does not have the qualifications agreed to by the parties.25

4.2.2 In determining whether there are justifiable doubts as to the arbitrator’s impartiality, Australian courts apply the common law reasonable apprehension test. This test provides that suspicion is established if a member of the public would reasonably consider that the arbitrator would not decide the dispute in a fair and unprejudiced manner.26

Procedure for challenge

4.2.3 The parties can agree on the procedure for challenging arbitrators. Where there is no agreement on the procedure, a party may challenge the appointment of an arbitrator (if either of the circumstances listed in paragraph 4.2.1 above arise) within 15 days of the appointment, or within 15 days of becoming aware of the circumstances listed in paragraph 4.2.1. A party may only challenge its appointed arbitrator if that party became aware of the grounds for a challenge after the appointment was made.

4.2.4 The challenge is made by sending a written statement to the arbitral tribunal outlining the reasons for the challenge. The parties can then agree on the challenge or the arbitrator can withdraw from the arbitral tribunal voluntarily. If the other party does not agree to the challenge or the arbitrator does not withdraw from the arbitral tribunal voluntarily, then the arbitral tribunal may decide the challenge.27

4.2.5 Where a challenge fails, the challenging party may apply to the Supreme Court to make a final decision on the challenge. While such an application is pending in the court the arbitral tribunal may continue with proceedings and make an award.

24 This default procedure is provided for by CAAs, s 6–8.
26 Australian Arbitration Act, s 18A.
4.2.6 Where an arbitrator can no longer act, or fails to act without undue delay, the parties may agree to terminate the arbitrator’s mandate. Alternatively, the arbitrator can withdraw from the arbitral tribunal voluntarily. Where the termination of an arbitrator’s mandate occurs or the arbitrator withdraws from the arbitral tribunal for these reasons, it does not imply that there are justifiable doubts as to an arbitrator’s impartiality or independence or that the arbitrator does not have the agreed qualifications.

4.2.7 In relation to domestic arbitration, the position is somewhat different. The test to be applied under the NSW CAA is whether there is a real danger of bias. The Model Law (2006) provides what is arguably a higher threshold test for whether there are justifiable doubts as to the impartiality or independence of an arbitrator.

The appointment of substitute arbitrators

4.2.8 Where the tenure of an arbitrator ceases due to a successful challenge, or where that arbitrator is unable to perform his or her duties, a substitute arbitrator will be appointed in accordance with the rules that were applied to appoint the arbitrator that is being replaced.

4.3 Arbitration fees

4.3.1 The allocation of costs is similar under both the Australian Arbitration Act and the CAAs. Costs are discussed in further detail in section 7.4 below.

4.4 Arbitrator immunity

4.4.1 Arbitrators are not liable for anything done or omitted to be done in good faith in their capacity as arbitrators. The CAAs contain similar provisions for domestic arbitrations.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 An arbitral tribunal may rule on its own jurisdiction by virtue of Article 16 of the Model Law (2006), which incorporates the principle of competence-competence. This includes the ability to rule on any challenges to the validity of the arbitration clause or the arbitration agreement.

---

29 NSW CAA, art 12.
32 Australian Arbitration Act, s 28(1).
5.1.2 A plea that the arbitral tribunal does not have jurisdiction must be raised no later than in the submission of the statement of defence, while a challenge that asserts that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of the tribunal’s authority is raised during the arbitral proceedings. However, the arbitral tribunal has the discretion to hear a late plea if it considers that the delay is justified.\(^{33}\)

5.2 Power to order interim measures

5.2.1 In international arbitrations, provided that the arbitration agreement does not specify otherwise, the arbitral tribunal has the power to order any party to take such interim measures of protection as it considers necessary in respect of the subject matter of the dispute.\(^{34}\)

5.2.2 An interim measure is a temporary measure which either maintains or restores the status quo while the dispute is determined, or prevents harm or prejudice to the arbitral process. Examples include ordering a party to preserve assets or evidence pending the issue of a final award by the arbitral tribunal. The power to order interim measures of protection also includes the power to require a party to provide security in connection with such a measure.

5.2.3 Except in limited circumstances, an interim measure will be recognised and enforced by the Australian courts, irrespective of the country in which it was issued.\(^{35}\)

5.2.4 The Australian courts have the power to order interim measures to support an arbitration, where they are requested to do so by the parties to an international arbitration taking place anywhere in the world. An Australian court has the same power to order interim measures in arbitral proceedings as it does in relation to proceedings in that court (see section 8 below).

5.2.5 The only part of the Model Law (2006) that Australia did not adopt is the right to obtain preliminary orders from the arbitral tribunal on an *ex parte* basis.

5.2.6 In relation to domestic arbitration, the CAAs also generally provide the arbitral tribunal with an ability to make an interim award, unless a contrary intention is expressed in the arbitration agreement.

\(^{33}\) Model Law (2006), art 16(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{34}\) Model Law (2006), art 17 (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{35}\) Australian Arbitration Act, s 8.
6. **Conduct of proceedings**

6.1 **Common law tradition**

6.1.1 Australia is a common law jurisdiction. The legal process has traditionally emphasised the importance of procedural issues. A number of Australian procedural concepts, although familiar in other common law jurisdiction such as the United Kingdom, United States, Canada and most other Commonwealth states, are not part of the civil law tradition. These concepts include the disclosure and inspection of documents, the exchange of witness statements, cross-examination of witnesses and the use of party-appointed experts.

6.1.2 While some Australian states have adopted a more proactive approach in respect of case management by the courts, e.g. via the introduction of the Civil Procedure Act 2010 in Victoria, Australian legal proceedings are unequivocally adversarial in their approach (i.e. party-driven with the judge adopting the position of arbiter between the opposing parties) rather than inquisitorial (i.e. more reliant on the judge taking charge of progressing the case). Australian arbitral proceedings are not tied to Australian court procedure. Indeed, the parties may agree on the procedure of the arbitral proceedings.\(^{36}\) Where no procedure is agreed upon, the arbitral tribunal is granted wide ranging powers to decide on the procedure, including issues relating to the admissibility, relevance, materiality and weight of any evidence.\(^{37}\)

6.2 **Commencement of arbitration**

6.2.1 The parties are free to agree on the commencement date of the arbitral proceedings. Where parties have not prescribed a commencement date, arbitral proceedings commence when the respondent receives the request for arbitration.\(^{38}\)

6.3 **Seat, place of hearings and language of arbitration**

6.3.1 Where no agreement is made by the parties on the seat of arbitration, the arbitral tribunal may decide the seat of arbitration, taking into consideration what is convenient for both parties and the circumstances of the case.\(^{39}\) Further, unless otherwise agreed by the parties, the arbitral tribunal may decide to meet at any location for consultation, hearing evidence or inspection of goods and documents.


\(^{37}\) See section 3.2 above on this point.


6.3.2 The parties may select the language of the arbitration. Where no language is chosen, the arbitral tribunal will select the language. All correspondence must accord with the applicable language and the arbitral tribunal may order any documentary evidence to be translated.

6.4 Multi-party issues
6.4.1 Parties to an arbitration agreement may agree, either in a provision of the arbitration agreement itself or otherwise in writing, that Section 24 of the Australian Arbitration Act will apply. Section 24 allows a party to arbitral proceedings to apply to the arbitral tribunal to make orders in relation to other related arbitral proceedings if a common fact or question of law exists, the rights to relief of both proceedings arise out of a common transaction or series of transactions, or for some other reason.

6.4.2 The arbitral tribunal can make orders to consolidate arbitral proceedings or hear related arbitral proceedings together or in sequence. Otherwise, the arbitral tribunal can stay arbitral proceedings, pending the determination of the related arbitral proceedings. Where an arbitral tribunal receives such an application, it must inform the arbitral tribunal hearing the related arbitral proceedings so that both arbitral tribunals can deliberate on the application. Where an agreement is reached on the application, the arbitral tribunals will jointly make an order dealing with the related arbitral proceedings.

6.4.3 Where arbitral proceedings are consolidated, a new arbitral tribunal must be established in accordance with Articles 10 and 11 of the Model Law (2006). Where no agreement is made, the related arbitral proceedings will continue to be heard by separate arbitral tribunals.

6.5 Submissions
6.5.1 The parties may determine the format and timetable for submissions. In the event that there is no agreement between the parties, the arbitral tribunal may determine these matters.

6.5.2 Within the set timeframe, the claimant must submit the points of issue and identify what remedy is sought. Unless otherwise agreed by the parties, the arbitral proceedings will be terminated where the claimant does not communicate its submissions in this way without “sufficient cause” for its failure to do so. The respondent must provide its defence in relation to the claimant’s points of issue.

---

41 Australian Arbitration Act, s 22(5).
(unless the elements of this submission are otherwise agreed between the parties) but, unlike the claimant, failure to communicate its submissions without “sufficient cause” will not result in termination of the arbitration. Despite the failure of a party to make submissions, an arbitral tribunal may still make an award on the basis of the evidence before it.

6.5.3 A party’s submission may be amended during the arbitral proceedings, unless the arbitral tribunal considers it inappropriate or the parties agree otherwise.

6.5.4 All submissions, evidence and other information provided to the arbitral tribunal must be communicated to the other parties to the arbitral proceedings.

6.6 Oral hearings and written proceedings

6.6.1 Article 24 of the Model Law (2006) governs oral hearings and written proceedings. Parties may agree on whether proceedings are to be oral or written. In the absence of any such agreement, the arbitral tribunal will decide. The arbitral tribunal must hold oral hearings if requested by any party. Parties must be given “sufficient advance notice” of any oral hearings or meetings for the inspection of property or documentation.

6.6.2 Parties are entitled to representation of their choice. The representative need not be a legal practitioner and can be from any jurisdiction.

6.7 Evidence generally

6.7.1 Arbitral tribunals conducting arbitral proceedings under the Model Law (2006) have the power to determine the admissibility, relevance, materiality and weight of the evidence and are not bound by local rules of evidence.

6.7.2 In relation to domestic arbitrations, the CAAs also provide a liberal approach in applying the rules of evidence. The arbitral tribunal may inform itself in such a manner as it thinks fit. However, the parties can, by agreement, require the arbitral tribunal to apply certain rules of evidence.

---

43 Ibid.
44 Ibid.
48 Australian Arbitration Act, s 29.
50 CAAs, s 19(3).
6.8 Appointment of experts

6.8.1 Parties may agree on the appointment of expert witnesses or, where there is no agreement, the arbitral tribunal may appoint expert witnesses.\(^{51}\) Parties may request that an expert attends the arbitral proceedings in order to testify and take questions, but only if the arbitral tribunal considers it necessary.\(^{52}\)

6.9 Confidentiality

6.9.1 Parties to arbitral proceedings must not disclose confidential information in relation to arbitral proceedings,\(^ {53}\) except in situations where:
- all parties consent to disclosure;
- the information is disclosed to a professional or other adviser to any of the parties;
- disclosure is necessary to enable a party to fully present its case;
- disclosure is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party;
- disclosure is necessary for the purposes of enforcing an award;
- disclosure is necessary for the purposes of the Australian Arbitration Act;
- disclosure is required by a subpoena or order made by a court; or
- another relevant law or regulatory body authorises or requires disclosure.\(^ {54}\)

6.9.2 The arbitral tribunal may also make an order for disclosure of confidential information by a party to the arbitral proceedings upon a request from the other party. This need not necessarily be for any of the reasons outlined in paragraph 6.9.1. Before making such an order, each party to the arbitral proceedings must be given the opportunity to be heard.\(^ {55}\)

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 In relation to international arbitral proceedings, the arbitral tribunal must decide the dispute in accordance with the “rules of law” chosen by the parties as applicable to the substance of the dispute.\(^ {56}\) In the absence of choice by the parties, the arbitral tribunal must apply the law determined by whichever conflict

---


\(^{52}\) Model Law (2006), art 26(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{53}\) Australian Arbitration Act, s 23C.

\(^{54}\) Ibid, s 23D.

\(^{55}\) Ibid, s 23E.

of laws rules it considers applicable,\textsuperscript{57} and will usually (although not always) apply the law of the seat of arbitration.

7.1.2 In the context of domestic arbitral proceedings, an arbitral tribunal is required to make any determination in accordance with the law.\textsuperscript{58} However, if the parties to an arbitration agreement so agree in writing, the arbitral tribunal may determine any question that arises for determination in the course of the arbitral proceedings by reference to considerations of general justice and fairness.\textsuperscript{59}

7.2 Timing, form, content and notification of an award

7.2.1 In relation to international arbitration, awards must:
— be in writing;
— state the date and forum of the arbitration;
— be signed by all members of the arbitral tribunal, or by the majority with reasons outlining why signatures were omitted; and
— unless parties agree otherwise, provide reasons for the decision.\textsuperscript{60}

7.2.2 After the award is made, a copy which complies with the form requirements described in paragraph 7.2.1 above must be delivered to each party.\textsuperscript{61}

7.2.3 In the context of domestic arbitrations, an award must also be in writing.\textsuperscript{62} Where an arbitral tribunal makes an award other than in writing, the arbitral tribunal must, upon request by a party, within seven days after making the award, give to the party a statement in writing signed by the arbitral tribunal that contains the determination and reasons for making the award.\textsuperscript{63}

7.2.4 The High Court of Australia has recently clarified the extent to which an arbitral tribunal must provide reasons for an award and the test to be applied to determine the sufficiency of those reasons.\textsuperscript{64} The High Court held that an arbitral tribunal is not required to provide reasons which are equivalent to those that would be provided by a judge in court proceedings, but that an award must:

\textsuperscript{57} Model Law (2006), art 28(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{58} CAAs, s 22(1).
\textsuperscript{59} \textit{ibid}, s 22(2).
\textsuperscript{60} Model Law (2006), art 31 (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{61} \textit{ibid}.
\textsuperscript{62} CAAs, s 29(1).
\textsuperscript{63} \textit{ibid}, s 29(2).
\textsuperscript{64} Westport Insurance Corporation & Ors v Gordian Runoff Limited [2011] HCA 37.
— set out the arbitral tribunal’s determination – based on the arbitral tribunal’s view of the evidence – of what did or did not happen;
— explain succinctly why, in the light of what happened, the arbitral tribunal reached its decision; and
— state what the arbitral tribunal’s decision is.  

7.3 Settlement

7.3.1 If the parties to arbitral proceedings settle their dispute, the arbitral tribunal shall terminate the arbitral proceedings. If the parties so request, and the arbitral tribunal agrees, the settlement will be recorded in the form of an award.

7.4 Power to award costs and interest

Costs

7.4.1 Parties to an arbitration agreement have the option to incorporate Section 27 of the Australian Arbitration Act, which provides that the costs of an arbitration will be at the discretion of the arbitral tribunal.

7.4.2 This option must be exercised in writing, either through the parties’ arbitration agreement or any other document. The arbitral tribunal has a general discretion to award costs, except where otherwise agreed by the parties.

7.4.3 In exercising its general discretion to award costs, the arbitral tribunal may:
— direct to whom, by whom, and in what manner costs are to be paid;
— determine the amount of costs to be paid, or arrange for an assessment of costs; or
— award that costs are to be assessed or settled as between the parties or as between a legal practitioner and client.

7.4.4 In the context of domestic arbitration, in exercising the above discretion, the arbitral tribunal must take into account any refusal or failure by a party to do all things required by the arbitral tribunal to enable a just award to be made.

65 Ibid.
67 Australian Arbitration Act, s 22.
68 Ibid, s 27.
69 Ibid.
70 CAAs, s 34(7).
7.4.5 Where an award is silent on the issue of costs, a party to the arbitral proceedings has 14 days after receiving the award to apply to the arbitral tribunal for directions as to the payment of costs. The arbitral tribunal must then hear the parties and amend the award to include provision for costs.

Interest

7.4.6 Sections 25 and 26 of the Australian Arbitration Act apply to the question of interest, unless the parties to the arbitration agreement have agreed to the contrary. The arbitral tribunal is allowed to make an award for the payment of money, which includes interest at such reasonable rate as the arbitral tribunal determines. Interest upon interest is not permitted and orders for interest do not affect damages recoverable for the dishonour of a bill of exchange. If an arbitral tribunal makes an award for the payment of money and under that award the amount is to be paid by a particular date, the arbitral tribunal may direct that interest (including compound interest) is payable if the amount is not paid by that due date.

7.4.7 In relation to domestic arbitration, the provisions of the CAAs are similar to those under the Australian Arbitration Act and they also empower an arbitral tribunal to award interest.

7.4.8 It is important to note that interest may also be available under common law. Australian courts have held that interest and opportunity cost are not too remote to amount to a claim in damages. Accordingly, an arbitral tribunal may award, as damages, an amount that compensates a party for financing charges incurred or the lost opportunity to earn interest, provided that the arbitration agreement does not exclude the common law right to interest.

7.5 Termination

7.5.1 Arbitral proceedings are terminated where:
— a party withdraws its claim (unless the respondent objects to termination);
— the parties agree to terminate the proceedings; or
— arbitral proceedings become impossible or unnecessary.

---

71 Australian Arbitration Act, s 22.
72 Ibid, s 25(2).
73 Ibid, s 26.
74 CAAs, s 31 and Australian Arbitration Act, s 25.
7.6  **Effect of the award**

7.6.1  An award made by an arbitral tribunal must be recognised as binding and be enforced by the relevant court.\(^{77}\)

7.6.2  A court may refuse to recognise or enforce an award upon the request of a party against whom it is invoked if it can be proved that:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law of the country in which the award was made, or alternatively the law to which the parties have subjected it;
- the award deals with a dispute beyond the scope of the parties' original submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country in which the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.

7.6.3  Additionally, a court may refuse to recognise or enforce an award if it finds that doing so would be contrary to the public policy of the state, or if the subject matter of the dispute is not capable of settlement by arbitration under the relevant law.\(^{78}\)

7.7  **Correction, clarification and issue of a additional award**

7.7.1  A party may, within 30 days of receiving an award, request the arbitral tribunal to correct any typographical errors in the award, or – provided that the other parties consent – give an interpretation of a specific point in the award.\(^{79}\) If the arbitral tribunal considers the request to be justified, it must comply with the request within 30 days.\(^{80}\)

7.7.2  Alternatively, the arbitral tribunal may correct typographical errors without the request of a party within 30 days of the date of the award.\(^{81}\)


7.7.3 Additional awards

Within 30 days of receipt of an award, a party may request that a further award be made concerning matters not dealt with in the original award. The requesting party must provide notice to the other parties of any such request. The arbitral tribunal may thereafter make an additional award within 60 days, or, if necessary, an extended period if it considers the request to be justified.

7.8 Remedies

7.8.1 While the Australian courts are yet to consider whether an arbitral tribunal can award punitive or exemplary damages, there are generally no limits on the remedies that an arbitral tribunal can award, provided that the parties do not agree otherwise.

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 Generally, Australian courts are reluctant to interfere with arbitral proceedings. The courts tend to focus on assisting arbitral proceedings with a view to preserving and respecting the jurisdiction of the arbitral tribunal.

8.1.2 In international arbitrations, the circumstances in which a court can intervene in the arbitral process are quite limited by virtue of Article 5 of the Model Law (2006), which provides for greater autonomy of the arbitration. Article 5 of the Model Law (2006) specifically states that no court shall intervene in matters governed by the Model Law (2006), except where provided for in the Model Law (2006) itself.

8.1.3 Notwithstanding the intention of the Model Law (2006) for minimal judicial interference in the arbitral process, the Supreme Court may supervise arbitrations in relation to certain procedural issues. The Supreme Court may:

— appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator;
— decide on a challenge of an arbitrator if so requested by the challenging party;
— decide, upon request by a party, on the termination of the mandate of an arbitrator.

84 Model Law (2006), art 11(3) and (4) (see CMS Guide to Arbitration, vol II, appendix 2.1).
— assist in the taking of evidence;\textsuperscript{87}
— grant interim measures of protection;\textsuperscript{88}
— decide on the jurisdiction of the arbitral tribunal, where the tribunal has ruled on a plea as a preliminary question and a party has requested the Supreme Court to make a final determination on its jurisdiction;\textsuperscript{89} and
— set aside an award.\textsuperscript{90}

8.1.4 If the arbitral tribunal has decided on the issue of jurisdiction as a preliminary question, either party may, within 30 days, request the Supreme Court of the state or territory in which the arbitration had its seat, or alternatively the Federal Court of Australia, to finally decide on the issue.\textsuperscript{91}

8.1.5 The powers of the Australian courts to intervene in arbitral proceedings are more extensive in respect of domestic arbitrations under the CAAs. For example, courts have the power to review an award on a question of law.\textsuperscript{92}

8.2 Stay of court proceedings and preliminary rulings on jurisdiction

8.2.1 Article 8 of the Model Law (2006) governs the approach of national courts in Australia where a party commences court proceedings in apparent breach of an arbitration agreement. This provision requires an Australian court to stay its proceedings and refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Arbitral proceedings may be continued or commenced, and an award may be made, while the dispute is pending before a court. A court may grant an interim measure before or during arbitral proceedings.\textsuperscript{93}

8.2.2 Similarly, under Section 7 of the Australian Arbitration Act, where pending court proceedings have been instituted by certain parties to an arbitration agreement concerning a dispute that is capable of being settled through arbitration, the court must stay those court proceedings and refer the dispute to arbitration (unless the arbitration agreement is null and void, inoperative or incapable of being performed).\textsuperscript{94}

\textsuperscript{87} Model Law (2006), art 27 (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{88} Model Law (2006), art 9 (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{89} Model Law (2006), art 16(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{90} Model Law (2006), art 34(2) (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{91} Model Law (2006), art 16(3) (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{92} CAAs, s 38; see section 9.3 below for further details.
\textsuperscript{93} Model Law (2006), art 9 (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{94} Australian Arbitration Act, s 7.
8.2.3 Section 7 of the Australian Arbitration Act only applies where:
— the procedure of the arbitral proceedings is governed by the law of a New York Convention country;
— the arbitral proceedings are not governed by the law of a New York Convention country, but a party to the arbitral proceedings is Australian, or is a state (meaning, Australia or any foreign country), or is a person domiciled or ordinarily resident in Australia at the time that the arbitration agreement was made;
— a party to the arbitration is part of the government, or is the government of a New York Convention country; or
— a party to the arbitration is a person domiciled or ordinarily resident in a New York Convention country at the time that the arbitration agreement was made.

8.2.4 For domestic arbitrations, the court has a discretionary power to stay its proceedings. This power may be exercised where the court is satisfied that:
— there is no sufficient reason why the matter should not be referred to arbitration; and
— the applicant is ready and willing to do all things necessary for the proper conduct of the arbitration.

8.2.5 In NSW, this position has been substantially amended to ensure that NSW courts no longer have discretion as to whether to enforce an agreement to arbitrate. Instead, the NSW provision mirrors the Model Law (2006) and requires that a NSW court must stay any court proceedings that have been commenced in breach of an arbitration agreement, unless the agreement is null and void, inoperative or incapable of being performed.

8.3 Interim protective measures
8.3.1 It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, an interim measure of protection from a court and for the court to grant such a measure.

8.3.2 In relation to domestic arbitration, the recently amended NSW CAA arguably allows for a higher level of intervention by the courts than the Model Law (2006). Section 47 of the NSW CAA confers on the court the same power to make interlocutory orders for the purposes of, and in relation to, arbitral proceedings as it has for court proceedings.

---

95 CAAs, s 53.
96 NSW CAA, s 8.
8.4 Obtaining evidence and other court assistance
8.4.1 The arbitral tribunal – or a party acting with the approval of the arbitral tribunal – may request assistance from the court in the taking of evidence. The court may execute the request within its competence and according to its rules on taking evidence.

8.4.2 The CAAs allow any party to an arbitration agreement to obtain an order from the Supreme Court requiring a person to produce to the arbitral tribunal the documents specified in the order. There is also scope to require any person who refuses or fails to attend before an arbitral tribunal (including witnesses) to appear before the Supreme Court.

9. Challenging and appealing an award before the courts

9.1 Jurisdiction of the courts
9.1.1 In relation to international arbitrations, the grounds upon which an award may be set aside are found in Article 34 of the Model Law (2006), which provides the exclusive avenue of recourse against an award. In summary, the Supreme Court may set aside an award where a party makes an application proving that:
— they were under “some incapacity”;
— the arbitration agreement was not valid under the applicable law, or alternatively, the law of the state or territory in Australia in which the arbitration is held;
— they were not provided with “proper notice” of the appointment of the arbitral tribunal or any of its members;
— they were “unable to present their case”;
— the award deals with matters not falling within the terms of the submission to arbitration;
— the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
— the dispute is not capable of settlement by arbitration or the award is in conflict with the public policy of Australia.

9.1.2 An award is in conflict with public policy if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award.

99 CAAs, s 17.
100 Ibid, s 18.
101 Australian Arbitration Act, s 19.
9.2 **Appeals**

9.2.1 In relation to international arbitrations, otherwise than described in section 9.1 above, an award cannot be appealed to the Supreme Court.

9.2.2 In relation to domestic arbitration, an appeal may be made to the Supreme Court on any question of law arising out of an award.\(^{102}\) However, such an appeal must be made either with the consent of all parties to the arbitration agreement or with the leave of the Supreme Court.\(^ {103}\)

9.2.3 Provided that they do so after the commencement of the arbitration, the parties are allowed to exclude or limit the rights of appeal under Section 38 of the CAAs.\(^ {104}\)

9.3 **Applications to set aside an award**

9.3.1 An application to set aside an award must be made within three months from the date on which the party making the application received the award, a corrected award or an interpretation of the award.\(^ {105}\) Where appropriate, and if so requested by a party, a court may suspend the proceedings to set aside the award for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitration or to take other action that will eliminate the grounds for setting aside the award.

9.3.2 In relation to domestic arbitrations, the party seeking to appeal an award will have to make an application for leave to appeal to the competent Supreme Court of the relevant state or territory.\(^ {106}\) The Supreme Court will not grant leave unless it considers that:

- the determination of the question of law concerned would substantially affect the rights of a party to the arbitration agreement;
- there is either a manifest error of law on the face of the award or strong evidence that the arbitral tribunal made an error of law; and
- the determination of the question may add substantially to the certainty of commercial law.\(^ {107}\)

\(^{102}\) CAAs, s 38.

\(^{103}\) Ibid, s 34A.

\(^{104}\) Ibid, s 40.


\(^{106}\) CAAs, s 38(4).

\(^{107}\) Ibid, s 38(5).
10. Recognition and enforcement of awards

10.1 Domestic awards
10.1.1 The most common procedure for enforcing a domestic award under Australian law is found in Section 35 of the CAAs. Under this provision, an award may, with the leave of the court, be enforced in the same manner as a judgment of the court.\(^\text{108}\)

10.2 Foreign awards
10.2.1 In relation to the enforcement of foreign awards, Section 8(2) of the Australian Arbitration Act effectively equates a foreign award with a domestic award for the purposes of enforcement by providing that a foreign award may be enforced in the court of a state or territory of Australia as if the award has been made in that state or territory, in accordance with the law of that state or territory.

10.2.2 The party applying for enforcement must supply the authenticated original foreign award with the original arbitration agreement, or duly certified copies thereof.\(^\text{109}\) Australian courts may, without the application of a party, refuse to enforce an award if it finds that the dispute is not capable of settlement through arbitration in the relevant state or territory of the court, or enforcement of the award is against Australian public policy.\(^\text{110}\)

10.2.3 If the Australian court is satisfied that an application to set aside or suspend an award has been made to an appropriate authority in the country which, or under the law of which, the award was made, the court may adjourn enforcement proceedings relating to the award.\(^\text{111}\) The court may also order a party to provide suitable security.\(^\text{112}\)

11. Special provisions and considerations

11.1 Sources of further information
11.1.1 Further information on international arbitration seated in Australia is generally available from the Australian Centre for International Arbitration Limited (ACICA), which is arguably the most prominent arbitral institution in Australia. ACICA was

\(^{108}\) Ibid, s 35.

\(^{109}\) Australian Arbitration Act, s 9.


\(^{111}\) Australian Arbitration Act, s 8(8).

\(^{112}\) Ibid.
established to support and facilitate international arbitration and promote Australia as a venue for international commercial arbitration. It administers domestic and international arbitrations and also provides a range of other arbitration-related services.

11.1.2 Other relevant bodies include the Australian Commercial Dispute Centre Limited, the Chartered Institute of Arbitrators (Australia) Limited, the Institute of Arbitrators and Mediators Australia and the International Chamber of Commerce’s Australian branch.

12. Conclusions

12.1.1 Both foreign and Australian companies are becoming increasingly aware of the advantages of arbitration in Australia. Australia has, therefore, placed considerable importance on the process of both domestic and international arbitration, evidenced by the wide adoption of the New York Convention and the recent overhaul of the CAAs, which it is hoped will make Australia a more attractive forum for the determination of international arbitrations.
13. Contacts

Minter Ellison
Rialto Towers
525 Collins Street
Melbourne, Victoria, 3000
Australia

Peter Wood
Partner
T +61 3 8608 2537
E peter.wood@minterellison.com

Phillip Greenham
Partner
T +61 3 8608 2540
E phillip.greenham@minterellison.com

Roman Rozenberg
Lawyer
T +61 3 8608 2661
E roman.rozenberg@minterellison.com
ARBITRATION IN AUSTRIA

By Daniela Karollus-Bruner, CMS
# Table of Contents

1. **Historical background and overview** 81  
   1.1 Historical background 81  
   1.2 Overview of arbitration in Austria 81  

2. **Scope of application and general provisions of the Austrian Arbitration Act** 82  
   2.1 Subject matter 82  
   2.2 Structure of the law 83  
   2.3 General principles 83  

3. **The arbitration agreement** 84  
   3.1 Definitions 84  
   3.2 Formal requirements 84  
   3.3 Special tests and requirements of the jurisdiction 85  
   3.4 Separability 85  
   3.5 Legal consequences of a binding arbitration agreement 86  

4. **Composition of the arbitral tribunal** 86  
   4.1 Constitution of the arbitral tribunal 86  
   4.2 Procedure for challenging and substituting arbitrators 87  
   4.3 Responsibilities of an arbitrator 89  
   4.4 Arbitration fees and expenses 89  
   4.5 Arbitrator immunity 89  

5. **Jurisdiction of the arbitral tribunal** 89  
   5.1 Competence to rule on jurisdiction 89  
   5.2 Power to order interim measures 90  

6. **Conduct of proceedings** 90  
   6.1 Commencing an arbitration 90  
   6.2 General procedural principles 90  
   6.3 Seat, place of hearings and language of arbitration 91  
   6.4 Multi-party issues 91  
   6.5 Oral hearings and written proceedings 92  
   6.6 Default by one of the parties 92  
   6.7 Taking of evidence 92
6.8 Appointment of experts 93
6.9 Confidentiality 93

7. Making of the award and termination of proceedings 93
7.1 Choice of law 93
7.2 Timing, form, content and notification of an award 94
7.3 Settlement 95
7.4 Power to award interest and costs 95
7.5 Termination of the proceedings 95
7.6 Effect of an award 96
7.7 Correction, clarification and issuance of a supplemental award 96

8. Role of the courts 97
8.1 Jurisdiction of the courts 97
8.2 Dismissal of court proceedings 97
8.3 Preliminary rulings on jurisdiction 97
8.4 Interim protective measures 98
8.5 Obtaining evidence and other court assistance 99

9. Challenging and appealing an award through the courts 99
9.1 Jurisdiction of the courts 99
9.2 Appeals 100
9.3 Applications to set aside an award 100

10. Recognition and enforcement of awards 101
10.1 Domestic awards 101
10.2 Foreign awards 101

11. Special provisions and considerations 101
11.1 Consumers 101
11.2 Employment law 102

12. Concluding thoughts 102

13. Contacts 103
1. Historical background and overview

1.1 Historical background

1.1.1 Austria has a relatively long tradition of arbitration. The first provisions relating to arbitration were included within the Austrian Code of Civil Procedure from 1895. Austria has benefited and continues to benefit from its reputation as a neutral setting and convenient location in the centre of Europe, which is evidenced by the continued increase in the number of international commercial arbitrations with the seat of the arbitration in Vienna. In many cases, the arbitral proceedings do not involve an Austrian party. The International Arbitral Centre of the Austrian Federal Economic Chamber, better known as the Vienna International Arbitral Centre (VIAC), has benefited from Vienna being an attractive, yet less expensive venue (compared to Zurich, Paris or Stockholm) and has recently celebrated its 35th anniversary.

1.1.2 In 2006, a new arbitration law came into effect, bringing the Austrian arbitration law in line with the Model Law (2006).\(^1\)

1.2 Overview of arbitration in Austria

1.2.1 The law of arbitration in Austria is contained in the Austrian Code of Civil Procedure (Zivilprozessordnung) (CCP), originally enacted in 1895, which sets out the provisions relating to arbitration in its fourth section.

1.2.2 After several partial amendments of the old provisions relating to arbitration, with the last major amendment in 1983, the new Austrian Arbitration Act (Schiedsrechtsgesetz-Änderungsgesetz 2006) (Austrian Arbitration Act)\(^2\) came into force on 1 July 2006, comprehensively amending the old law on arbitration. The main purpose of the new Austrian Arbitration Act is to create a modern arbitration law which incorporates the principal features of the Model Law (2006).

1.2.3 The Austrian Arbitration Act was not codified in a separate act, but continues to be part of the CCP. The former provisions of Articles 577–599 of the CCP have been replaced by the new provisions of Articles 577–618 of the CCP. The efficacy of arbitration agreements that were concluded prior to 1 July 2006 is still governed by the former provisions of Articles 577–599 of the CCP.

---


\(^2\) Federal Law Gazette I 2006/7.
1.2.4 Originally, Austrian arbitration law was intended for domestic arbitrations only, but over the years it has proved flexible enough for international arbitral proceedings as well.

1.2.5 In 1975, the Austrian Federal Economic Chamber established the VIAC. Undoubtedly the success of the arbitral centre, with its own conciliation and arbitration rules (VIAC Arbitration Rules),\textsuperscript{3} was due to the fact that Vienna provided a convenient middle ground during the thaw in East-West relations in the 1970s and 1980s.

1.2.6 The VIAC administers the settlement of disputes by arbitration, provided that the jurisdiction of the centre has been agreed upon by the parties. Furthermore, the dispute needs to have an international character. This will be the case in situations where either of the contracting parties to an arbitration agreement had their place of business or normal residence outside of Austria at the time of the conclusion of that agreement (a cross-border element) or the subject matter of the dispute between the parties, whose place of business or normal residence is in Austria, has an international character.

1.2.7 If the parties have agreed to the jurisdiction of the VIAC, the VIAC Arbitration Rules apply in the version valid at the time of commencement of the proceedings. The VIAC Arbitration Rules were recently updated to take into account the amendments that were made to the law by the Austrian Arbitration Act. The present version of the VIAC Arbitration Rules was adopted on 3 May 2006 with effect from 1 July 2006.

2. Scope of application and general provisions of the Austrian Arbitration Act

2.1 Subject matter

2.1.1 Unlike the Model Law (2006), the provisions of the Austrian Arbitration Act do not distinguish between domestic and international arbitration or between commercial and non-commercial arbitral proceedings. The provisions of Articles 577 et seq of the CCP apply to all arbitrable disputes.

---

\textsuperscript{3} For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.
2.2 Structure of the law
2.2.1 The structure of the law closely follows the Model Law (2006):
(i) the first chapter contains general provisions about the scope of application and service of written proceedings;
(ii) the second chapter deals with the arbitration agreement itself;
(iii) the third chapter deals with the formation of the arbitral tribunal and the challenge of arbitrators;
(iv) the fourth chapter deals with jurisdiction;
(v) the fifth and sixth chapters set out provisions relating to the conduct of proceedings and the rendering of awards;
(vi) the seventh chapter deals with setting aside an award;
(vii) the eighth chapter regulates the recognition and enforcement of foreign awards;
(viii) the ninth chapter covers state court proceedings relating to arbitration; and
(ix) the tenth chapter contains special provisions concerning consumer-related and employment-related issues.

2.3 General principles
2.3.1 The general principles underlying the Austrian Arbitration Act are equality and objectivity, autonomy and due process.

Equality and objectivity
2.3.2 All parties must be treated fairly and shall have the right to be heard.\(^4\)

Autonomy
2.3.3 The parties enjoy great autonomy. There are only a few mandatory legal provisions that cannot be varied by agreement of the parties.\(^5\)

Due process
2.3.4 All parties must have the opportunity to present their case.\(^6\)

---

\(^4\) CCP, art 594(2).

\(^5\) The following provisions cannot be varied: CCP, art 585 (interim measures); CCP, art 588 (requirement of impartiality of the arbitrators); CCP, art 589(3) (mandatory right to go to court to obtain a decision on a previously unsuccessful challenge); CCP, art 590 (early termination of an arbitrator’s mandate); CCP, art 591 (appointment of a substitute arbitrator); CCP, art 594(2) (fair and equal treatment of all parties and the right to be heard); CCP, art 594(3) (right to be represented); CCP, art 599 (proceedings and taking of evidence); CCP, art 607 (effects of the arbitration award); CCP, art 608 (termination of the arbitration proceedings); CCP, art 610 (adjustment, clarification and amendment of an arbitral award); CCP, art 611 (motion to set aside an award); CCP, art 613 (courts are not bound to awards which violate public policy or concern matters that are not arbitrable under Austrian law); CCP, art 615 (jurisdiction of the courts); CCP, art 616 (rules of procedure); CCP, art 617 (special provisions regarding consumers); and CCP, art 618 (special provisions regarding labour law).

\(^6\) CCP, art 594(2).
3. The arbitration agreement

3.1 Definitions

3.1.1 The definition of an arbitration agreement is set out in Article 581 of the CCP, which corresponds with the definition in Article 7(1) of the Model Law (2006). An arbitration agreement may be concluded by a separate agreement or may be included as an arbitration clause within a contract. It must be set out in writing and clearly express the intention of both parties to submit the dispute in question to arbitration.

3.1.2 An arbitration agreement must specify which of the disputes that may arise in respect of a defined legal relationship are to be resolved by arbitration. Thus, without a defined legal relationship, general arbitration agreements which refer all future disputes between the parties to arbitration, regardless of the origin or nature of the dispute, are null and void.

3.1.3 It is an accepted principle that the arbitration agreement binds only the parties to the agreement. Austrian courts are very reluctant to bind third parties to arbitration agreements.7

3.2 Formal requirements

3.2.1 Article 583 of the CCP governs all arbitration agreements concluded on or after 1 July 2006. The formal requirements of a written arbitration agreement correspond with those set out in Article 7(2) of the Model Law (2006). The document must either be signed by the parties to the agreement or it can be contained in correspondence between the parties which provides a record of the agreement (e.g. letters, facsimiles, e-mails or other means of communication).8

3.2.2 Under Austrian law, the arbitration agreement may also be validly concluded by a party representative other than the managing director or the company officer (Prokurist), but only if that person holds a special power of attorney stating their empowerment to conclude an arbitration agreement.

3.2.3 A reference in a contract to another document containing the arbitration clause amounts to a valid arbitration agreement if it satisfies the general requirements of a contractual reference to a separate document.9 It should be noted that a defect

---

7 OGH 01.10.2008, 6 Ob 170/08f.
8 CCP, art 583(1).
9 Ibid, art 583(2).
in the form of the arbitration agreement is cured if the parties do not contest it before entering into the merits of the case in arbitral proceedings.\textsuperscript{10}

3.3 \textbf{Special tests and requirements of the jurisdiction}

3.3.1 Generally, a pecuniary claim that lies within the jurisdiction of the courts is capable of being subject to an arbitration agreement.

3.3.2 Disputes relating to non-pecuniary claims can also be arbitrable.\textsuperscript{11} However, a number of matters are excluded from arbitrability, even though they may include pecuniary claims. Claims in family law, claims relating to the lease of real property and to co-operative apartment ownership cannot be resolved by arbitral proceedings.\textsuperscript{12} In regard to consumer-related or employment-related matters, special provisions apply.\textsuperscript{13}

3.3.3 Furthermore, it is highly controversial as to whether a number of specific (Austrian) company law issues are arbitrable. For example, a claim for compensation against the managing director of a limited liability company or a claim for payment of the capital invested according to Article 10 of the Austrian Limited Liability Company Law (GmbH-Gesetz) are historically not considered arbitrable by the Austrian courts. However, it has been claimed by recent legal doctrine that this view is no longer applicable.\textsuperscript{14}

3.4 \textbf{Separability}

3.4.1 It is important to note that the CCP omits the second and third sentence of Article 16(1) of the Model Law (2006) concerning the doctrine of separability.\textsuperscript{15} This does not mean that arbitration agreements in Austria are invalid just because the main contract in which they are contained is invalid. Numerous court decisions in Austria have stated that in many cases an arbitration clause survives the termination of the contract.\textsuperscript{16}

\begin{enumerate}
\item \textsuperscript{10} Ibid, art 583(3).
\item \textsuperscript{11} Ibid, art 582(1). The definition used in relation to the arbitrability of pecuniary claims is expanded with regard to non-pecuniary claims, allowing for the fallback to “a matter capable of settlement”, as had been included in the old law.
\item \textsuperscript{12} CCP, art 582(2).
\item \textsuperscript{13} Ibid, art 617–618. See further section 11 below.
\item \textsuperscript{14} See C Hausmaninger, “Sections 577–618 ZPO” in H W Fasching/A Konecny, \textit{Kommentar zu den Zivilprozeßgesetzen} (2nd Edition, 2007), and in particular, CCP art 582 at paras 39–41.
\item \textsuperscript{15} See CMS Guide to Arbitration, vol II, appendix 2.1.
\end{enumerate}
Therefore, in Austria, the concept of separability between the contract and the arbitration clause seems to be in line with the provisions of the Model Law (2006).

3.5 Legal consequences of a binding arbitration agreement

3.5.1 If the arbitration agreement is binding and capable of being performed, a national court must dismiss a claim brought before the court which deals with a matter which is subject to the arbitration agreement between the parties. Once arbitral proceedings are commenced, no claim concerning the same subject matter may be brought before a national court. The general consequence is that a court must dismiss any claim which is subject to an arbitration agreement and/or arbitral proceedings.  

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 Only a natural person who has full contractual capacity may be appointed as an arbitrator. There is no requirement that an arbitrator must be qualified as a lawyer or a registered member of the bar. Active Austrian judges are prohibited from accepting appointments as arbitrators during their tenure of judicial office. An arbitrator may be appointed either as a result of being specifically named in the arbitration agreement (a contractually appointed arbitrator) or by an appointment in compliance with the form of appointment provided for in the arbitration agreement, taking into account the number of arbitrators agreed. The latter method of nomination is in line with general practice in Austria.

4.1.2 The parties are free to agree on the number of arbitrators. If the parties agree on an even number, the arbitrators shall appoint an additional arbitrator as chair. If the parties do not agree on the number of arbitrators, the number shall be three. The parties are also free to agree on the procedure for appointing the arbitrator(s). If the parties fail to agree on such a procedure, the following default provisions are applicable: in arbitral proceedings with a sole arbitrator, the arbitrator is appointed by the national court if the parties fail to agree within four weeks after receipt of a written request by the other party to appoint the arbitrator;  

---

17 CCP, art 584.
18 Ibid, art 586(1).
19 Ibid, art 586(2).
20 Ibid, art 587.
21 Ibid. art 587(2).
22 Ibid, art 587(2)(1).
— if there are to be three arbitrators, each party appoints one arbitrator and the party-appointed arbitrators shall choose a third arbitrator to act as chair;\(^{23}\)
— in arbitral proceedings with more than three arbitrators, each party shall appoint an equal number and the party-appointed arbitrators shall appoint another arbitrator to act as chair;\(^{24}\)
— if the party or the equal number of party-appointed arbitrators fail to nominate an arbitrator (or chair) within four weeks of receipt of a written request to do so, the missing arbitrator shall be appointed by the national court;\(^{25}\) and
— parties are bound to their appointment as soon as the written communication has been received by the other party.\(^{26}\)

4.1.3 In further derogation from the Model Law (2006),\(^{27}\) the Austrian Arbitration Act contains special provisions in case of multi-party arbitrations. If several parties fail to appoint a common arbitrator or multiple arbitrators within four weeks, the appointment shall be made by the court (upon one party’s request), unless the arbitration agreement calls for other measures.\(^{28}\)

4.2 Procedure for challenging and substituting arbitrators

**Challenge of arbitrators**

4.2.1 Article 588 of the CCP sets out the grounds for the challenge of arbitrators. Similar to the provision in Article 12 of the Model Law (2006),\(^ {29}\) Article 558 of the CCP is a mandatory provision. It provides that arbitrators may be challenged if there are justifiable doubts as to their impartiality or independence. No actual lack of impartiality or lack of independence is required. The challenge of an arbitrator is also possible if an arbitrator does not possess the qualifications agreed by the parties (e.g. professional qualifications, experience or language skills).

**Procedure and early termination of mandate**

4.2.2 The parties are free to decide on the procedural rules for challenging arbitrators.\(^ {30}\) If the parties fail to do so, the statutory provisions of Article 589(2) of the CCP apply. These provisions follow Article 13(2) of the Model Law 2006.\(^ {31}\) Where a

---

\(^{23}\) Ibid, art 587(2)(2).

\(^{24}\) Ibid, art 587(2)(3).

\(^{25}\) Ibid, art 587(2)(4).

\(^{26}\) Ibid, art 587(2)(5).

\(^{27}\) See CMS Guide to Arbitration, vol II, appendix 2.1.

\(^{28}\) CCP, art 587(5).


\(^{30}\) CCP, art 589(1).

challenge to an arbitrator is unsuccessful, the challenging party may, within four
weeks of the arbitral tribunal’s decision, apply to the court for a final decision. This
is a mandatory provision, the parties may not exclude this right in their agreed
procedural rules or otherwise waive such right.  

4.2.3 For arbitrations under the VIAC Arbitration Rules, the VIAC Board decides on any
challenge of an arbitrator. Nevertheless, an unsuccessful challenge may be
subsequently brought to court.

4.2.4 Early termination of an arbitrator’s mandate is possible if the parties so agree or if
the arbitrator withdraws from office. Furthermore, the court may (upon one
party’s request) terminate the arbitrator’s mandate in case the arbitrator is unable
to or fails to exercise his or her function in due time and one of the following
conditions is satisfied:
(i) the arbitrator does not resign;
(ii) the parties cannot agree on the termination of the arbitrator’s mandate; or
(iii) if the agreed procedure does not lead to the termination of the arbitrator’s
mandate.

Appointment of a substitute arbitrator

4.2.5 If the mandate of an arbitrator is terminated for any reason whatsoever, a substitute
arbitrator must be appointed in accordance with the rules applicable to the former
appointment. The arbitral tribunal, at its own discretion, may continue with the
proceedings without the repetition of any procedural steps that have already been
taken.

4.2.6 Court decisions on the substitute appointment of arbitrators are made in
accordance with the provisions of Articles 587(8)–(9) of the CCP and are not
subject to appeal. The courts must refrain from making a substitute appointment
if the party in default of its appointment obligations appoints the missing arbitrator
in the interim.

32 CCP, art 589(3).
33 VIAC Arbitration Rules, art 16. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II,
appendix 3.16.
34 CCP, art 590(1).
36 Ibid, art 591(1).
37 Ibid, art 591(2).
38 Ibid, art 587(7).
4.3 Responsibilities of an arbitrator
4.3.1 The Austrian Arbitration Act provides that arbitrators must:
— be neutral and independent from the parties;
— disclose all circumstances which could raise doubts as to their impartiality and independence;\(^{39}\)
— not unduly delay the proceedings (otherwise they may become liable for the damage resulting from such delay);\(^{40}\) and
— treat the parties equally and fairly which entails providing the parties an opportunity to present their case.\(^{41}\)

4.4 Arbitration fees and expenses
4.4.1 The costs of arbitration usually comprise the fees and expenses of the arbitrators, as well as administrative fees, translation costs, etc. In institutional arbitration the institution determines the cost of arbitration and the parties are asked to pay a deposit upfront. In ad hoc arbitration the practice is similar. The arbitrators conclude an arbitrator’s agreement with the parties, which contains provisions concerning their fees. Usually arbitrators do not start arbitral proceedings before a deposit of the agreed fees is paid.

4.5 Arbitrator immunity
4.5.1 If an arbitrator does not fulfil the duty assumed by the acceptance of his or her appointment or does not fulfil this duty in a timely manner, he or she is liable to the parties for all damages caused by the refusal or delay, if he or she acted, at least, negligently.\(^{42}\)

4.5.2 The VIAC Arbitration Rules exclude liability of the arbitrators for acts or omissions in relation to arbitral proceedings.\(^{43}\)

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction
5.1.1 The arbitral tribunal shall decide on the issue of its jurisdiction (competence-competence). Pursuant to Article 592(1) of the CCP, the decision shall be made in

---

\(^{39}\) Ibid, art 588(1).
\(^{40}\) Ibid, art 594(4).
\(^{41}\) Ibid, art 594(2).
\(^{42}\) Ibid, art 594(4).
an award on the merits or in a separate award. This provision follows the wording of Article 16 of the Model Law (2006).

5.2 Power to order interim measures

5.2.1 After having heard both parties, an arbitral tribunal is entitled to order interim or protective measures against a party that it considers necessary in respect of the subject matter of the proceedings. *Ex parte* applications for interim or protective measures are not allowed, as the other opposing party must be heard before measures may be ordered against it.\(^{44}\)

5.2.2 Interim or protective measures may be ordered if the enforcement of the subject matter of the claim would otherwise be frustrated or if there is danger of irretrievable damage to one of the parties to the arbitration.

5.2.3 The interim or protective measures are enforceable in Austria upon one party’s request to the competent court.\(^{45}\)

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 The Austrian Arbitration Act does not define the commencement of arbitration. Under the VIAC Arbitration Rules, an arbitration commences once the statement of claim is filed with the VIAC Secretariat.\(^{46}\)

6.2 General procedural principles

6.2.1 Aside from the limited number of mandatory provisions of the Austrian Arbitration Act,\(^{47}\) the parties are free to agree on the procedure to be followed in conducting the proceedings.\(^{48}\) Therefore, the parties are free to refer to the rules of an arbitral institution. In the absence of such an agreement, non-mandatory law applies or, in the absence of non-mandatory law, the arbitrators are free to conduct the proceedings at their own discretion.

---

\(^{44}\) CCP, art 593.

\(^{45}\) Ibid, art 593(3)–(6).

\(^{46}\) VIAC Arbitration Rules, art 9(1). For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

\(^{47}\) See for example CCP, art 594(2)–(3), 597(1), 599(1), 602 and 617.

\(^{48}\) CCP, art 594(1).
6.2.2 The parties shall be treated fairly.\textsuperscript{49} This requirement derives from Article 6 of the European Convention on Human Rights and also contains the requirement of equal treatment of the parties. Furthermore, each party has the right to be heard. This does not mean that oral hearings are mandatory, only that the parties must have an opportunity to present their case.

6.2.3 The parties also have the right to be represented by persons of their choice in the proceedings.\textsuperscript{50}

6.3 Seat, place of hearings and language of arbitration

6.3.1 The parties are free to agree on the seat of the arbitration.\textsuperscript{51} This provision does not refer to the actual place for oral hearings, but to the legal seat of the arbitration. This is important in deciding the question of whether the Austrian Arbitration Act applies,\textsuperscript{52} as the procedural law follows that of the seat of the arbitration. Accordingly, the Austrian Arbitration Act will only be applicable if the seat of the arbitration is within Austria. The actual oral hearings may be conducted at any place that the arbitral tribunal considers to be appropriate.

6.3.2 Corresponding with Article 22 of the Model Law (2006), the parties are free to choose the language of the arbitral proceedings. Failing such agreement, the language is determined by the arbitral tribunal.\textsuperscript{53}

6.4 Multi-party issues

6.4.1 The Austrian Arbitration Act does not contain provisions for multi-party proceedings. Whether third parties can be joined to or intervene in arbitral proceedings will depend on the applicable procedure of the arbitration. However it is an accepted principle that the arbitration agreement binds only the parties to the agreement. Austrian courts are very reluctant to bind third parties to arbitration agreements.\textsuperscript{54}

6.4.2 Unlike the Austrian Arbitration Act, the VIAC Arbitration Rules contain detailed provisions in relation to multi-party proceedings.\textsuperscript{55}

\textsuperscript{49} Ibid, art 594(2).
\textsuperscript{50} Ibid, art 594(3).
\textsuperscript{51} Ibid, art 595(1).
\textsuperscript{52} Ibid, art 577.
\textsuperscript{53} Ibid, art 596.
\textsuperscript{54} See paragraph 3.1.3 above.
\textsuperscript{55} VIAC Arbitration Rules, art 15. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.
6.5 **Oral hearings and written proceedings**

6.5.1 The parties are free to agree whether the arbitral proceedings shall be conducted only in writing or whether there shall be an oral hearing. In the absence of agreement by the parties, the tribunal may order an oral hearing at an appropriate stage, if a party requests for it to do so.\(^5^6\)

*Statements of claim and defence*

6.5.2 The claimant has the duty to submit its statement of claim and to state the facts on which the claim is based. Notwithstanding Article 23(1) of the Model Law (2006), the Austrian Arbitration Act does not stipulate that the claimant shall present the points at issue in its statement of claim. It is not a matter for the claimant to anticipate which of its particulars of claim the respondent may take issue with. Instead, throughout the proceedings, both parties may amend or supplement their claims or positions, unless the tribunal rejects this due to delay.\(^5^7\) The points at issue between the parties will, therefore, become clear throughout the course of proceedings.

6.6 **Default by one of the parties**

6.6.1 Article 600 of the CCP deals with the issues that may arise if there is a default by a party in the arbitral proceedings. If the claimant fails to submit its statement of claim, the proceedings shall be terminated by the arbitral tribunal. If the respondent fails to respond within the agreed or ordered term, this does not automatically mean that the failure itself shall be treated as an admission by the respondent. The arbitral tribunal may continue with the arbitral proceedings and decide on the basis of the evidence taken by the arbitral tribunal. Furthermore, the default may be cured at a later stage if the party in default participates in the proceedings again, provided that the arbitral tribunal finds the default to be sufficiently excused.

6.7 **Taking of evidence**

6.7.1 The arbitral tribunal has the power to decide on the admissibility of evidence, to take such evidence and to determine its relevance.\(^5^8\) The parties are entitled to receive sufficient notice concerning hearings and meetings of the arbitral tribunal for the taking of evidence.\(^5^9\) Furthermore, the parties have the right to receive all submissions, documents or communications supplied to the arbitral tribunal by the other party, as well as expert reports or other evidence upon which the arbitral tribunal may rely.\(^6^0\)

\(^{56}\) CCP, art 598.

\(^{57}\) Ibid, art 597.

\(^{58}\) Ibid, art 599(1).

\(^{59}\) Ibid, art 599(2).

\(^{60}\) Ibid, art 599(3).
6.7.2 Both Articles 598 and 599 of the CCP are in line with the Model Law (2006), even though the Austrian Arbitration Act uses slightly different wording.

6.8 Appointment of experts
6.8.1 Unless otherwise agreed by the parties, the arbitral tribunal has the authority to appoint experts to supply the arbitral tribunal with a report on specific issues. Furthermore, the arbitral tribunal may require the parties to give the tribunal-appointed expert(s) any relevant information or to produce and provide documents relevant to the proceedings.

6.8.2 Parties have the right to present the expert reports of their own expert witnesses.

6.9 Confidentiality
6.9.1 Even though the Austrian Arbitration Act does not expressly stipulate that the arbitral proceedings are private, this prevailing principle in arbitration applies in Austria. Therefore, unless agreed otherwise, the public is excluded from the arbitral proceedings.

6.9.2 This principle is stipulated in connection with court proceedings concerning arbitration matters as well (i.e. the public may be excluded at the request of a party if a justified interest in the exclusion of the public is shown).

6.9.3 Since neither the Austrian Arbitration Act nor the VIAC Arbitration Rules expressly impose a duty on the parties to keep documents and materials produced in (or for the purposes of) arbitral proceedings confidential, it is advisable to include such provisions in the arbitration agreement.

7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 The arbitral tribunal shall make its decision based on the applicable law as agreed by the parties. The parties are free to decide on the applicable law. Failing an agreement of the parties, the arbitral tribunal has full discretion to determine

---

62 CCP, art 601(1).
63 Ibid, art 601(4).
64 Ibid, art 616(2).
65 Ibid, art 603(1).
which law(s) it considers to be applicable. The parties may also authorise the arbitral tribunal in writing to make the decision based on principles of equity.

### 7.2 Timing, form, content and notification of an award

#### 7.2.1 The arbitral tribunal may render final awards regarding all claims in the case, as well as partial or interim awards. There is no statutory time limit within which an award must be issued. However, arbitrators have the duty not to unduly delay the proceedings. The award shall state the reasons on which it is based, the date of issue and the seat of arbitration. Each party has the right to receive a copy signed by the arbitrators and to request the arbitral tribunal to confirm that the award is final and enforceable.

#### 7.2.2 The award shall be made in writing and shall be signed by all of the arbitrators. If the arbitral tribunal consists of more than one arbitrator, the decision must be made by a majority of its members, unless the arbitration agreement determines otherwise.

#### 7.2.3 Abstention by one or more arbitrators is possible under the Austrian Arbitration Act. If there is more than one arbitrator and one of the arbitrators fails to sign the award, then the majority of arbitrators (including the chair) shall sign the award and note the reason which prevented the missing signature on the award.

#### 7.2.4 Even though the parties are free to agree on the decision making provisions, it is not acceptable under Austrian law to decrease the necessary quorum to a minority or to give a certain arbitrator’s vote a special weight.

#### 7.2.5 A signed copy of the award shall be sent to each party. There are no further specific provisions for the notification of awards.

---

66 Ibid, art 603(2).
67 Ibid, art 603(3).
68 Ibid, art 606(2).
69 Ibid, art 606(3).
70 Ibid, art 606(4).
71 Ibid, art 606(6).
72 Ibid, art 604(1).
73 Ibid, art 604(2).
74 Ibid, art 604(1).
75 Ibid, art 604(2).
76 Ibid, art 606(4).
7.3 Settlement
7.3.1 The parties may conclude a settlement during the arbitral proceedings and may request that the arbitral tribunal either:
— record the settlement and sign the record afterwards; or
— render an award on agreed terms, which has the same effect as an award on the merits of the case.77

7.3.2 With regard to enforcement in Austria, the difference between these two settlement options is not of great importance. However, if enforcement is sought in another signatory state of the New York Convention, the parties will require an award by consent rather than a mere settlement agreement. A settlement agreement or record of this agreement does not have the same status as an award and is not enforceable under the provisions of the New York Convention.78

7.4 Power to award interest and costs
7.4.1 The arbitrators may, at their discretion, decide on the obligation to reimburse the costs of the arbitral proceedings, provided that the parties have not agreed otherwise.79 However, it is common practice that the losing party pays the total amount of the arbitrators’ fees and the costs of the arbitral proceedings, including the other party’s reasonable costs of legal representation (i.e. the costs follow the event). The decision on the obligation for reimbursement of costs and the determination of the amount of costs shall be made in the form of an award.80 This can also be made in a separate award.81

7.4.2 The power to award interest will depend on the applicable law, there are no specific provisions in the Austrian Arbitration Act in this respect.

7.5 Termination of the proceedings
7.5.1 Under the Austrian Arbitration Act, arbitral proceedings may be terminated either as a result of settlement, a final award on the merits or by an order of the arbitral tribunal where:
— the claimant fails to file a statement of claim in accordance with the provisions of the Austrian Arbitration Act;

77 Ibid, art 605.
79 CCP, art 609(1)–(3).
80 Ibid, art 609(4).
81 Ibid, art 609(5).
— the claimant withdraws its claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent’s part in obtaining a final award;
— the parties agree on the termination of arbitral proceedings; or
— the continuation of the arbitral proceedings is impossible (e.g. because the parties fail to pursue the proceedings any further).82

7.5.2 The termination of the arbitral proceedings also terminates the mandate of the arbitral tribunal.83

7.6 Effect of an award84

7.6.1 Between the parties, the award has the effect of a legally binding and final judgment.85 In general, the finality and enforceability of an award does not differ from that of a binding judgment of an Austrian court.

7.7 Correction, clarification and issuance of a supplemental award

7.7.1 The arbitrators may correct clerical mistakes, typographical errors and mathematical errors at the request of any of the parties.86 The arbitrators may do so within four weeks of the receipt of the award by the parties. Furthermore, the arbitrators may correct such errors of their own initiative within four weeks from the date of the award.87

7.7.2 The parties can request the interpretation of the award by the arbitrators within four weeks of receipt of the award. The parties can also request that the arbitral tribunal issues an additional award concerning claims that have been asserted but have not been decided by the award.88 Any such interpretation or correction is considered to form part of the award itself.89

7.7.3 The provisions of the Austrian Arbitration Act generally follow those of the Model Law (2006)90 on this issue. However, there are some exceptions. For example, the arbitral tribunal only has four weeks (rather than 30 days) to correct any error,
either on the request of a party (from the date of receipt) or on its own initiative (from the date of the award) and no provision is made for allowing for an extension of this time period.\(^91\)

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 Article 615 of the CCP establishes regional courts (Landesgericht) as the general competent courts for judicial tasks in relation to arbitration matters. If the seat of arbitration has not been determined or, in instances of claims for a declaration of the existence of an award,\(^92\) the seat is outside Austria, the competent court is the Vienna Commercial Court (Handelsgericht Wien).\(^93\)

8.1.2 Court proceedings concerning the third chapter of the Austrian Arbitration Act,\(^94\) relating to the formation of the arbitral tribunal, are governed by the general provisions of the so-called Act on Non-Litigious Matters (Außerstreitgesetz). Other court proceedings in connection with arbitration, such as proceedings regarding an application to set aside an award or the application for determination of the existence or non-existence of an award, are governed by the CCP.\(^95\)

8.2 Dismissal of court proceedings

8.2.1 Austrian courts have consistently dismissed court proceedings where an arbitration agreement is deemed to exist. It is generally acknowledged that arbitration enjoys a privileged position within the Austrian legal system, with a prevailing “arbitration-friendly” regime.

8.3 Preliminary rulings on jurisdiction

8.3.1 The Austrian Arbitration Act removes arbitration matters almost completely from the supervision of the national courts and affords the parties and arbitrators wide autonomy to conduct the arbitration as they consider appropriate.

8.3.2 The provisions of the CCP regarding substantive claims brought before national courts in a matter that is the subject of an arbitration agreement correspond with Article 8 of the Model Law (2006). The provisions provide that the dispute is to be

---


\(^{92}\) CCP, art 612.

\(^{93}\) Ibid, art 615(1).

\(^{94}\) Ibid, art 586–591.

\(^{95}\) Ibid, art 616(1).
referred to arbitration if an arbitration agreement exists. However, there are additional provisions which state that the national courts may, in specific situations, deal with the merits of a claim, even if an arbitration agreement was originally concluded.  

8.3.3 As discussed in section 5.1 above, Articles 584 and 592 of the CCP set out one of the most important principles of arbitration: the power of the arbitral tribunal to rule on its own jurisdiction (competence-competence). Unless the arbitration clause is null and void, inoperative or incapable of being performed, a national court must dismiss a claim brought before it if that claim is subject to an arbitration agreement between the parties. Once arbitral proceedings have commenced, no claim concerning the subject matter in dispute may be brought before a national court. The general consequence is that a court must dismiss any claim concerning the same subject matter as the subject matter in the arbitral proceedings. However, if the jurisdiction of the arbitral tribunal has been challenged before going to the merits of the case and the arbitral tribunal cannot be expected to reach a decision within a reasonable time, then the national court may proceed to deal with the issue of the arbitral tribunal’s jurisdiction.

8.3.4 The arbitral tribunal decides on its own jurisdiction in the form of an award. However, it should be noted that an award may still be challenged by way of an application to set aside an award on the issue of jurisdiction.

8.4 Interim protective measures
8.4.1 Except where the Austrian Arbitration Act so provides, the courts shall refrain from intervening in arbitration matters altogether. As a consequence, matters such as anti-suit injunctions against arbitrators or parties to arbitration are not admissible.

8.4.2 Austrian courts are still able to grant interim or protective measures, even if a valid arbitration agreement exists and even while arbitral proceedings are pending.

8.4.3 The VIAC Arbitration Rules contain a similar provision, which states that a request for interim measures of protection to a national court does not constitute an

---

96 CCP, art 584.
97 Ibid, art 584(3).
98 Ibid, art 611.
99 Ibid, art 578.
100 Ibid, art 585.
Arbitration in Austria

infringement or waiver of the arbitration agreement.\textsuperscript{101} Arbitral tribunals may order interim or protective measures at the request of a party.\textsuperscript{102}

8.5 Obtaining evidence and other court assistance

8.5.1 The arbitral tribunal may request court assistance for the performance of judicial acts for which the arbitral tribunal does not have authority (e.g. legal assistance by a foreign court or by another authority). If the taking of evidence before a court is the subject of the request for court assistance, the arbitrators and the parties are entitled to participate in this taking of evidence before the court and to put questions to witnesses and experts.\textsuperscript{103}

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

9.1.1 The recourse against an award (including recourse against awards concerning the jurisdiction of the tribunal) may only be made in an application to set aside the award. This procedure is set out in the seventh chapter of the Austrian Arbitration Act\textsuperscript{104} and follows Article 34 of the Model Law (2006).

9.1.2 An award will be set aside if:

— a valid arbitration agreement does not exist, the agreement has become invalid before the award was rendered or ceased to have effect for the particular case, the arbitral tribunal denied its jurisdiction despite the existence of a valid arbitration agreement or a party was unable to conclude the arbitration agreement because of its status or lack of capacity,\textsuperscript{105}

— a party was not given proper notice of the appointment of arbitrators or of the proceedings or was otherwise unable to present its case;

— the arbitral tribunal either rendered an award on a dispute not covered by the arbitration agreement or raised by the parties or made decisions on matters which are not subject to the arbitration agreement or were not claimed by the parties.\textsuperscript{106}

\textsuperscript{101} VIAC Arbitration Rules, art 22. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

\textsuperscript{102} CCP, art 593. See section 5.2 above.

\textsuperscript{103} \textit{Ibid}, art 602.

\textsuperscript{104} \textit{Ibid}, art 611–613.

\textsuperscript{105} \textit{Ibid}, art 611(2).

\textsuperscript{106} The court may, to the extent possible, sever the offending part of the award rather than set aside the entire award.
— the arbitral tribunal was not constituted or composed in accordance with contractual or statutory provisions;
— the arbitral proceedings were conducted in a way that violates Austrian public policy or if the award itself violates public policy;
— the matter in dispute is not arbitrable under Austrian law;
— the conditions are present whereby a request may be made for a court judgment to be set aside and the case re-opened by means of a claim of revision in accordance with Article 530(1) numbers 1–5 of the CCP.¹⁰⁷

9.2 Appeals

9.2.1 In general, awards are not subject to appeal, unless the parties provide for measures of appeal in their arbitration agreement. The parties can agree on an appeal to another arbitral tribunal or to the courts.

9.3 Applications to set aside an award

9.3.1 The application to set aside an award shall be filed within three months of receipt of the arbitral or additional award.¹⁰⁸ However, the setting aside of the award does not automatically invalidate the underlying arbitration agreement. If an award concerning the same subject matter has been set aside twice and is likely to be set aside again, the court may declare the arbitration agreement invalid in relation to this subject matter upon the request of one of the parties.¹⁰⁹

9.3.2 A request to determine the existence or non-existence of an award is possible if the applicant shows that it has a legitimate legal interest in such a declaration.¹¹⁰

9.3.3 An award that violates public policy or concerns matters which are not arbitrable under Austrian law does not have any effect in other proceedings. Therefore, courts or other authorities are not bound by such an award, even if it has not been set aside.¹¹¹

9.3.4 It should be noted that, in general, the Austrian courts are very restrictive in setting aside awards.

¹⁰⁷ CCP, art 611(2).
¹⁰⁸ Ibid, art 611(4).
¹⁰⁹ Ibid, art 611(5).
¹¹⁰ Ibid, art 612.
¹¹¹ Ibid, art 613.
10. Recognition and enforcement of awards

10.1 Domestic awards
10.1.1 Domestic awards are those which were issued by an arbitral tribunal seated in Austria. These awards are equivalent to domestic court judgments and, therefore, do not need to be separately declared enforceable. Domestic awards are directly enforceable in accordance with the Austrian Enforcement Act (Exekutionsordnung) (EA).\(^{112}\)

10.2 Foreign awards
10.2.1 Austria is a signatory state to the New York Convention.\(^{113}\) The recognition and enforcement of foreign awards is governed by the provisions of the EA to the extent that these issues are not determined by international law or legal acts of the European Union. When determining the formal validity of an arbitration agreement that is subject to a foreign law, that arbitration agreement will also be considered valid if it complies with the formalities of Article 583 of the CCP and with the formalities of the law applicable to the arbitration agreement.

10.2.2 The original arbitration agreement – or a certified copy of the agreement – only has to be submitted if requested by the court.\(^{114}\)

10.2.3 The grounds for refusing the enforcement of an award, as laid down in Article 36 of the Model Law (2006), have not been specifically included in the provisions of the Austrian Arbitration Act.

10.2.4 To date, the enforcement of foreign awards in Austria has not presented a problem.

11. Special provisions and considerations

11.1 Consumers
11.1.1 There are special provisions for arbitration matters between a business, usually referred to as an entrepreneur (Unternehmer) and a consumer.\(^{115}\) A consumer is a

\(^{112}\) EA, art 1 para 16.


\(^{114}\) CCP, art 614(2). This goes a step further than the Model Law (2006), art 35(2) and the New York Convention, art IV(1)(b), which require the original or certified copy of the arbitration agreement to be submitted in all instances. For the full text of the Model Law (2006) and the New York Convention see CMS Guide to Arbitration, vol II, appendices 2.1 and 1.1, respectively.

\(^{115}\) CCP, art 617.
person for whom the transaction is not part of his business. Unlike the Model Law (2006), Austrian law offers protection for consumers who are involved in arbitration. Therefore, an arbitration agreement between an entrepreneur and a consumer can only be effectively concluded after the dispute has arisen.

11.1.2 The agreement must be contained in a document directly signed by the consumer.\(^{116}\) Furthermore, a written legal instruction pointing out the differences between arbitration and state court litigation has to be provided to the consumer before the conclusion of the arbitration agreement.\(^{117}\) Geographical proximity between the place of arbitration and the consumer is another requirement. In addition to the general grounds for setting aside awards, an award, in cases involving consumers, may be set aside if:

- mandatory provisions of the law have been violated;
- the requirements for the re-opening of proceedings are fulfilled as set out in Article 530 of the CCP;\(^ {118}\) and
- a written legal instruction pointing out the differences between arbitration and state court litigation has not been provided to the consumer.\(^ {119}\)

### 11.2 Employment law

11.2.1 Article 618 of the CCP is not based on the Model Law (2006). The protection that is granted to consumers under Articles 617(2)–(7) of the CCP is extended to certain employment matters by the Act on the Procedure before the Labour and Social Court (\textit{ASGG}).\(^ {120}\) Such matters include, amongst others:

- civil claims regarding the rights and duties arising out of an employment contract;
- civil claims regarding all kinds of social services and company benefits; and
- demands arising out of holiday entitlements.\(^ {121}\)

### 12. Concluding thoughts

12.1.1 By substantially amending and modernising the Austrian Arbitration Act, Austria will be able to remain a significant arbitration centre, benefitting from its privileged location in the very heart of Europe and its long tradition as an arbitration-friendly jurisdiction.

\(^{116}\) \textit{ibid} art 617(2).

\(^{117}\) \textit{ibid} art 617(3).

\(^{118}\) See paragraph 9.1.2. above.

\(^{119}\) CCP, art 617(6)–(7).

\(^{120}\) \textit{ibid}, art 618.

\(^{121}\) \textit{ASGG}, s 50.
13. Contacts

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Ebendorferstraße 3
1010 Vienna
Austria

Daniela Karollus-Bruner
Partner

T +43 1 40443 2550
E daniela.karollus-bruner@cms-rrh.com
ARBITRATION IN BELGIUM

By Marie Canivet and Jean-François Goffin, CMS
Table of Contents

1. Historical background and legislative framework 109

2. Scope of application and general provisions of the judicial code 110
   2.1 Scope of application 110
   2.2 General rules 110

3. The arbitration agreement 110
   3.1 Formal requirements 110
   3.2 Other requirements 111
   3.3 Arbitrability 111
   3.4 Separability 112
   3.5 Legal consequences of a binding arbitration agreement 112

4. Composition of the arbitral tribunal 113
   4.1 Constitution of the arbitral tribunal 113
   4.2 Procedure for challenging and substituting arbitrators 113
   4.3 Arbitration fees and expenses 113
   4.4 Arbitrator immunity 114

5. Jurisdiction of the arbitral tribunal 114
   5.1 Competence to rule on jurisdiction 114
   5.2 Power to order interim measures 114

6. Conduct of proceedings 115
   6.1 Commencing an arbitration 115
   6.2 General procedural principles and the seat of arbitration 115
   6.3 Language of the arbitration 117
   6.4 Multi-party issues 117
   6.5 Oral hearings and written proceedings 118
   6.6 Default by one of the parties 118
   6.7 Taking of evidence 118
   6.8 Procedural powers of the arbitral tribunal 118

7. Making of the award and termination of proceedings 119
   7.1 Choice of law 119
   7.2 Decision making by the arbitral tribunal 120
7.3 Form, content, notification and effect of the award 120
7.4 Settlement 121
7.5 Termination of the proceedings 121
7.6 Power to award costs 121
7.7 Correction and interpretation of the award 122

8. **Role of the courts** 122
8.1 Jurisdiction of the courts 122
8.2 Stay of court proceedings 123
8.3 Preliminary rulings on jurisdiction 123
8.4 Interim protective measures 123
8.5 Obtaining evidence and other court assistance 124

9. **Challenging and appealing an award through the courts** 124
9.1 Appeals 124
9.2 Applications to set aside an award 124

10. **Recognition and enforcement of awards** 125
10.1 Domestic awards 125
10.2 Foreign awards 126

11. **Concluding thoughts and themes** 127

12. **Contacts** 128
1. Historical background and legislative framework

1.1 The Belgian legislation on arbitration dates from 1972. It is contained in Articles 1676–1723 of the Code Judiciaire/Gerechtelijk Wetboek (Judicial Code). It is based on the model law annexed to the European Convention providing a Uniform Law on Arbitration (Strasbourg Convention) signed by Belgium on 20 January 1966.

1.1.1 The Belgian legislation on arbitration has been amended twice:
(i) by the Law of 27 March 1985 concerning the annulment of awards, which provided that Belgian courts could hear applications to set aside an award only if one of the parties to the dispute was either: an individual with Belgian nationality or having a residence in Belgium; or a legal entity incorporated in Belgium or having a branch or place of business there; and
(ii) by the Law of 19 May 1998, which replaced the amendments introduced by the Law of 27 March 1985 in relation to proceedings for the setting aside of an award with a system of opting-out. It also introduced a number of amendments to the existing legislation, several of which were derived from the Model Law (1985), as well as from Dutch, French and Swiss arbitration laws, in order to make the legislation more flexible, to improve its efficiency and, generally speaking, to adapt it in line with the evolution of international arbitration.

1.1.2 The Belgian legislation on arbitration also reflects the provisions of certain international conventions to which Belgium is party. For example, the New York Convention and the 1927 Geneva Convention were implemented in Belgian legislation. Belgium has also signed bilateral agreements on the recognition and enforcement of awards with France, the Netherlands, Germany, Switzerland and Austria.

1.1.3 Arbitration in Belgium may be conducted on an ad hoc basis or under the auspices of arbitral institutions. The main Belgian arbitral institution is the Belgian Centre for Arbitration and Mediation (CEPANI).

---

2 Ibid., appendix 1.1.
3 See the CEPANI website (www.cepani.be) (accessed 15 December 2011).
2. **Scope of application and general provisions of the judicial code**

2.1 **Scope of application**

2.1.1 The Belgian legislation on arbitration does not contain any provisions concerning its scope of application. In accordance with general principles of Belgian law, Belgium procedural rules normally apply to all arbitral proceedings taking place in Belgium, unless the parties have expressly or impliedly excluded the application of all or part of such rules (e.g. by making reference to institutional arbitration rules). However, if the arbitration has its seat in Belgium, the exclusion of Belgian procedural rules will only be valid to the extent that the excluded provisions are not of mandatory provisions.

2.2 **General rules**

2.2.1 The Belgian legislation on arbitration is founded on the following principles:
- equality of the parties and due process;
- party autonomy;
- non-intervention by local courts;
- the parties’ freedom to determine the arbitral procedure;
- confidentiality; and
- flexibility.

3. **The arbitration agreement**

3.1 **Formal requirements**

3.1.1 In accordance with Article 1677 of the Judicial Code (and in addition to the necessary conditions for any contracts, such as valid consent of the parties and the power and capacity to contract), an arbitration agreement shall be either in writing and signed by the parties or contained in other documents which are binding on the parties and evidence their intention to refer their disputes to arbitration. Article 1677 of the Judicial Code has been construed by the courts, however, as a rule *ad probationem* and non *ad validatem*, (i.e. it is a rule of evidence and the parties’ failure to fulfil these formal requirements does not affect the validity of the arbitration agreement). In other words, subject to the more stringent requirements of Article II(2) of the New York Convention⁴ (where applicable), an oral arbitration agreement is perfectly valid under Belgian law, although its existence may be difficult to prove if one of the parties denies having entered into the agreement.

---

3.2 Other requirements

3.2.1 An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator(s).\textsuperscript{5}

3.3 Arbitrability

3.3.1 Like most legal systems, Belgian law contains provisions which restrict, to a limited extent, the possibility for the parties to arbitrate certain types of disputes (objective arbitrability) or for the State or public legal entities to enter into an arbitration agreement (subjective arbitrability).

**Objective arbitrability**

3.3.2 The arbitrability of commercial disputes is widely recognised in Belgium. Any dispute which has arisen or may arise out of a legal relationship, which is capable of settlement by arbitration, may be the subject of an arbitration agreement.\textsuperscript{6}

3.3.3 Subject to certain restrictions and limitations, which are generally recognised in most European countries, reserving exclusive competence over certain issues to the ECJ or national courts or authorities, even antitrust, intellectual property and bankruptcy disputes are arbitrable.

3.3.4 Specific legislation restricts the arbitrability of disputes in certain areas of law, such as:

- labour law;\textsuperscript{7}
- insurance law;\textsuperscript{8} or
- patents law (i.e. disputes relating to mandatory licences are excluded from arbitration).\textsuperscript{9}

3.3.5 The legal position is not, however, always entirely clear. For example, there is some debate as to the arbitrability of disputes arising from: the termination of exclusive distribution agreements of indefinite duration.\textsuperscript{10} Similarly, there is some debate in relation to the Law of 13 April 1995 on commercial agents, although in this case the overwhelming majority of legal commentators seem to consider that such disputes are arbitrable.

\textsuperscript{5} Judicial Code, art 1678(1).

\textsuperscript{6} Ibid, art 1676(1).

\textsuperscript{7} See Law of 3 July 1976 on employment contracts, art 13; and Judicial Code, art 1678.2 (pursuant to which an agreement to arbitrate labour disputes falling within the competence of the Labour Courts, as determined by Articles 578–583 of the Judicial Code, may only be concluded after the dispute has arisen).

\textsuperscript{8} See Law of 25 June 1992 on insurance contracts, art 36.

\textsuperscript{9} See Law of 28 March 1984.

Subjective arbitrability

3.3.6 According to Article 1676.2 of the Judicial Code: “Anyone who has the capacity or power to contract may conclude an arbitration agreement”.

3.3.7 Hence, the right to conclude an arbitration agreement is bound to the capacity and power to contract. However, some exceptions may be stipulated by law. For example, Belgian public legal entities may not, in principle, conclude arbitration agreements. However, the Judicial Code stipulates two exceptions, as follows:

(i) public legal entities are authorised to conclude an arbitration agreement, provided that it relates to the settlement of disputes arising out of the formation or the performance of a contract. The validity of an arbitration agreement is determined in accordance with the same conditions as the underlying agreement, whose formation or performance forms the subject matter of the arbitration agreement; and

(ii) public legal entities may be authorised to conclude an arbitration agreement in respect of any matter, provided that the authorisation is derived from law or a Royal Decree deliberated by the Council of Ministers.\footnote{11}

3.4 Separability

3.4.1 According to Belgian law, an arbitration clause is entirely autonomous from the underlying contract. Therefore, unless the arbitration clause itself is avoided, it remains valid even if the underlying contract is null, void or has been terminated. Article 1697.2 of the Judicial Code provides that “[a] ruling that a contract is invalid shall not \textit{ipso jure} entail the nullity of the arbitration agreement contained in it.”\footnote{12} In other words, the validity of the arbitration clause has to be determined separately from the validity of the main agreement.

3.5 Legal consequences of a binding arbitration agreement

3.5.1 The arbitration agreement obliges the parties to comply with the agreement and prevents the courts from hearing disputes submitted to arbitration, provided that objection is raised in \textit{limine litis} (i.e. in the first written submissions) by one of the involved parties.

\footnote{11}{See Judicial Code, art 1676.2 (new).}
\footnote{12}{(Emphasis added).}
4. **Composition of the arbitral tribunal**

4.1 **Constitution of the arbitral tribunal**

4.1.1 The arbitral tribunal must be composed of a sole arbitrator or another uneven number of arbitrators.\(^{13}\)

4.1.2 The arbitrator or arbitrators are appointed by the parties themselves or by an arbitral institution as provided by the parties in their arbitration agreement.\(^{14}\)

4.2 **Procedure for challenging and substituting arbitrators**

4.2.1 Arbitrators may be challenged when circumstances exist that give rise to justifiable doubts as to their impartiality or independence.\(^{15}\) However, an arbitrator appointed by a party may be challenged by the appointing party only for reasons the appointing party discovered after making such appointment.\(^{16}\) When institutional arbitration rules apply, the challenge is normally governed by the procedures contained in these arbitration rules. In an ad hoc arbitration, Article 1691.2 of the Judicial Code provides for notification of the challenge to the arbitrator concerned. If the arbitrator does not resign, the issue must be brought before the Court of First Instance (Tribunal de Première Instance) by the party bringing the challenge. The decision of the court may be appealed.

4.2.2 If the arbitrator resigns, or if the challenge is allowed by the court, the arbitrator shall be replaced according to the same rules as those pursuant to which the arbitrator was appointed. However, if the arbitrator is named in the arbitration agreement, the arbitration agreement shall be terminated *ipso jure*, unless the parties have provided otherwise.\(^{17}\)

4.3 **Arbitration fees and expenses**

4.3.1 There is no specific provision in Belgian arbitration law which deals with the issue of arbitrators’ fees and expenses. It is, therefore, up to the parties to determine in their arbitration agreement how the fees and expenses will be advanced by and finally allocated between the parties. If the arbitration agreement does not address this issue, it is generally accepted that the arbitrators have the power to determine the amount of their fees\(^{18}\) as well as the party or parties who will

---

\(^{13}\) Judicial Code, art 1681.

\(^{14}\) *Ibid*, art 1682.

\(^{15}\) *Ibid*, art 1690.1.

\(^{16}\) *Ibid*, art 1690.2.

\(^{17}\) *Ibid*, art 1691.3.

\(^{18}\) According to custom, the arbitrators have to be moderate and rational when fixing the amount of their fees. This power is subject to court review.
finally bear them. In practice, the general rule is that “costs follow the event” (i.e. the losing party pays).

4.3.2 In arbitrations conducted under the rules of an arbitral institution, the matter will generally be dealt with by the rules of the relevant arbitral institution.

4.4 Arbitrator immunity
4.4.1 There is no general immunity protecting arbitrators from claims by the parties. Arbitrators may be liable in cases of wrongful performance of their duties (e.g. non-compliance with certain deadlines, refusal to file the original copy of the award with the Court of First Instance, failure to decide certain issues and non-observance of certain mandatory provisions relating to the award). As in any other case of wrongful performance, the claimant will have to prove the existence of a default committed by the arbitrator, the existence of damage and the causal link between the default and the damage. The arbitrator’s liability is not limited but it is worth noting that a wrong decision or a mistake in law cannot engage the liability of an arbitrator, except in cases of fraud or gross negligence equivalent to fraud.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction
5.1.1 Pursuant to Article 1697.1 of the Judicial Code, “[t]he arbitral tribunal may rule on its own jurisdiction and may, for this purpose, examine the validity of the arbitration agreement”.

5.1.2 Article 1697.3 further provides that “[t]he decision by which the arbitral tribunal declares that it has jurisdiction may only be challenged … together with the final award and by the same procedure …”. Arbitrators, therefore, have competence to rule on their own jurisdiction (principle of competence-competence). However, such a ruling is subject to judicial control.¹⁹

5.2 Power to order interim measures
5.2.1 Upon request of a party, arbitrators have the power to order interim or protective measures, with the exception of attachment orders (which remain within the exclusive jurisdiction of the courts).²⁰ These orders are enforceable under the same conditions as the final award.²¹

¹⁹ See paragraph 8.3.1 below.
²¹ See section 10 below.
5.2.2 However, this provision does not bar the parties from introducing an action for interim or protective measures before the State courts, provided that the parties did not waive this right. Where parties have waived this right they will, therefore, only be able to apply to the arbitral tribunal for any interim protective measures they may require. This could potentially result in delay of enforcement of such measures, if a party were to choose not to voluntarily comply with the arbitral tribunal’s interim measure. In such cases, the party seeking enforcement would have to apply for the *exequatur* (a formal authorisation of enforcement) of the order which can take time.

6. **Conduct of proceedings**

6.1 **Commencing an arbitration**

6.1.1 A party that wishes to initiate arbitral proceedings must give notice to the other party. The notification, which will take the form of a request (*requête*), must refer to the arbitration agreement and specify the subject matter of the dispute.

6.1.2 Where more than one arbitrator has to be appointed by the parties, the notification must also specify the name(s) of the arbitrator(s) to be appointed by the claimant. It must also contain an invitation for the respondent to nominate the arbitrator(s) he or she intends to appoint. If the arbitral tribunal is to be appointed by a third party (e.g. an arbitral institution, the court or another appointing body) that third party should also be notified and invited to make the required appointment(s).

6.1.3 The appointment of an arbitrator may not be withdrawn once notification has been given. The notification must be in writing and sent by registered post. It has the effect of setting the arbitral proceedings in motion.

6.2 **General procedural principles and the seat of arbitration**

6.2.1 Article 1693.1 of the Judicial Code provides that “[w]ithout prejudice to the provisions of Article 1694, the parties may determine the rules of the arbitral procedure and the place of arbitration”. The parties and the arbitral tribunal are free to organise the arbitral procedure as they see fit, as long as the procedure

---

22 Judicial Code, art 1679.2.
23 Ibid, art 1683.1.
24 Ibid, art 1683.2.
25 Ibid, art 1683.4.
26 Ibid, art 32.
respects the principle of equality between the parties, the right of defence and the right to a fair hearing.

6.2.2 In an institutional arbitration, the procedure will be determined by the arbitration rules of the relevant institution such as CEPANI.

6.2.3 The terms of reference agreed upon by the parties will often provide that, for any matters which are not covered by the chosen institutional rules, the procedure will be determined by the arbitral tribunal after consultation with the parties. In this case, the procedural rules at the seat of the arbitration will only be of subsidiary relevance and will apply only to the extent that they are mandatory.

6.2.4 In ad hoc arbitral proceedings, the parties may refer to the rules of arbitration procedure contained in the sixth part of the Judicial Code, the UNCITRAL Rules (1976) or UNCITRAL Rules (2010).

6.2.5 Failing such an agreement between the parties within the time limits fixed by the arbitral tribunal, the arbitral procedure and the seat of arbitration are determined by the arbitrators. If an award is rendered following arbitral proceedings in which the seat of arbitration was never formally determined by the parties or the arbitrators, the place stated in the award shall be deemed to be the seat of arbitration.

6.2.6 Unless the parties have agreed otherwise, the arbitral tribunal may, after consultation with the parties, hold hearings and meetings at any other place which seems appropriate.

6.2.7 The chair of the arbitral tribunal presides at the hearings and conducts the proceedings.

6.2.8 The arbitral tribunal shall “give each party an opportunity to substantiate its claims and to present its case.” Each party may appear in person or be represented by a lawyer or any person of his choice, approved by the arbitral tribunal.

---

28 Ibid, appendix 3.2.
29 Judicial Code, art 1693.1.
30 Ibid, art 1693.2.
31 Ibid, art 1693.3.
32 Ibid, art 1694.1.
33 Ibid, art 1694.4.
6.3 Language of the arbitration

6.3.1 The language of the arbitration is determined by the parties. In the absence of agreement between the parties, the arbitral tribunal decides the applicable language, taking into consideration all the circumstances of the case (e.g. language of the file, knowledge of languages by the parties, etc). It is quite common in Belgium to have arbitral proceedings conducted in more than one language (e.g. French and English).

6.4 Multi-party issues

6.4.1 Any affected third party may, upon written request addressed to the arbitral tribunal, intervene in the arbitral proceedings. The arbitral tribunal shall communicate the request to the parties.\(^{34}\) A party may also serve a notice of intervention on a third party.\(^{35}\)

6.4.2 In order to be admitted, the intervention or joinder of a third party requires an arbitration agreement between the third party and the original parties to the dispute. Furthermore, it is subject to the unanimous consent of the arbitral tribunal.

6.4.3 As far as multi-party arbitrations and consolidation of proceedings are concerned, the CEPANI Arbitration Rules provide as follows:

When several contracts containing the CEPANI arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman of CEPANI shall be empowered to order the consolidation of the arbitration proceedings. This decision shall be taken, either at the request of the arbitrator or arbitrators, or, prior to any other measure, at the request of the parties or of the earliest petitioner, or even on CEPANI’s own motion.

If the request is granted, the Appointments Committee or the Chairman of CEPANI shall appoint the arbitrator or arbitrators who shall decide the consolidated disputes. If necessary, the said Committee or said Chairman shall increase the number of arbitrators to a maximum of five.

The Appointments Committee or the Chairman of CEPANI shall make their decision after having summoned the parties and, if need be, the arbitrators already appointed.

\(^{34}\) Ibid, art 1696 bis.1.

\(^{35}\) Ibid, art 1696 bis.2.
They may not order the consolidation of disputes in which an interim award, or an award on admissibility, or an award on the merits of the claim has already been rendered.  

6.5  **Oral hearings and written proceedings**

6.5.1  The arbitral tribunal shall give each party an opportunity to substantiate its claims and to present its case. It will usually render its award after holding an oral hearing. However, the proceedings may be in writing where the parties have so agreed or if they have waived the requirement for an oral hearing.

6.6  **Default by one of the parties**

6.6.1  Default proceedings are dealt with in Article 1695 of the Judicial Code, which provides that if, without legitimate cause, a party properly summoned does not appear, or does not present its case at the date determined for the hearing, the arbitral tribunal may proceed and render an award, unless the other party requests a postponement. The arbitral tribunal has discretion to decide whether to grant a postponement. In exercising its discretion, the arbitral tribunal has to take account of all of the circumstances of the proceedings.

6.7  **Taking of evidence**

6.7.1  While it is not common to call witnesses in court proceedings in Belgium, this is becoming increasingly common in arbitral proceedings, especially if the parties have elected to adopt common law style proceedings.

6.7.2  The new Article 1696.2 of the Judicial Code provides that “unless the parties have agreed otherwise, the arbitral tribunal is free to determine the admissibility of evidence and its evidentiary weight”, allowing maximum flexibility in the organisation of the arbitral procedure.

6.8  **Procedural powers of the arbitral tribunal**

6.8.1  The arbitral tribunal is free to determine the admissibility of evidence and its evidentiary weight, unless the parties have agreed otherwise. It may order the hearing of witnesses, appointment of experts, a site visit or the appearance of parties in person. It may also accept an oath as being decisive or may request a supplementary oath. Finally, it may order the production of documents held by a party in accordance with the conditions provided in Article 877 of the Judicial

---

36 CEPANI Arbitration Rules, art 12.
37 Judicial Code, art 1694.1.
Arbitration in Belgium

Code (i.e. where there are serious, accurate and concordant presumptions that a party or a third party holds a document containing proof of a relevant fact).

6.8.2 The arbitral tribunal may not, however, order the verification of signatures or order the production of documents held by a third party. In these cases, the arbitral tribunal will leave it to the parties to take the matter to the Court of First Instance for a ruling and the arbitration will ipso jure be suspended until the date on which the arbitral tribunal receives notification of the final decision on the matter.

6.8.3 Finally, Article 1709bis of the Judicial Code authorises the arbitrators to impose a fine (astreinte) on a party which does not comply with its decisions or orders. This unusual feature of the Belgian legislation has proven very effective in persuading parties to comply with decisions/orders by arbitral tribunals. In the event of non-compliance, the fine has to be paid to the party concerned. Fines may not be imposed, however, to ensure compliance with decisions ordering the payment of sums of money.

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 Unless the parties have agreed otherwise, the arbitrators shall decide a dispute in accordance with the chosen rules of law. The section on arbitration in the Judicial Code does not contain any rules regarding the method of how to choose the law applicable to the substance of the dispute. This issue is governed by the general conflict of law rules under Belgian law. If the parties have agreed to submit their dispute to a specific law, this choice will be upheld by the arbitral tribunal. However, the arbitrators may not apply a provision which derogates from Belgian public policy.

7.1.2 The parties may agree in the arbitration agreement that the arbitrators will settle the dispute as “amiable compositeur”. The possibility for the arbitral tribunal to sit as amiable compositeur is no longer restricted, except when a public legal entity is a party to the arbitration agreement. In that case, the arbitrator must apply strict rules of law (except if a law expressly authorises the arbitral tribunal to sit as amiable compositeur).

40 Ibid, art 1700.
41 Under the former Article 1700 of the Judicial Code, a provision stating that the arbitrators would decide the case as amiables compositeurs was valid only if agreed upon after the dispute had arisen.
7.1.3 In the absence of a choice of law by the parties, the arbitral tribunal will determine the applicable law, according to the Judicial Code. 42

7.2 Decision making by the arbitral tribunal
7.2.1 The parties may set out in their arbitration agreement the rules to be followed by the arbitral tribunal in order to reach a decision. In the absence of such an agreement the following rules apply:
— all the arbitrators must participate in the deliberations;
— the decision must be made by an absolute majority of votes except if otherwise agreed by the parties;
— in situations where the parties agree on a higher majority threshold, the chair of the arbitral tribunal shall have the casting vote; and
— in monetary matters, if a majority cannot agree on a specific amount, the votes expressed for the highest amount shall be counted as votes for the next lowest sum, until a majority is obtained. 43

7.2.2 In addition, it is important to note that dissenting opinions are not authorised in Belgium and that the deliberations of the arbitral tribunal are confidential.

7.3 Form, content, notification and effect of the award
7.3.1 An award must be in writing and must be signed by the arbitrators or at least by a majority of them. If an arbitrator is unable or unwilling to sign the award, that fact must be recorded in the award (no reasons are necessary).

7.3.2 In addition to the operative part, the award must contain the following information:
— the name(s) and address(es) of the arbitrator(s);
— the names and addresses of the parties;
— a description of the subject matter of the dispute;
— the date on which the award was made; and
— the seat of arbitration as well as the place where the award was made. 44

7.3.3 The reasons for the award must be stated, 45 even where the arbitrators act as amiables compositeurs. The parties may not discharge the arbitrators from this obligation.

7.3.4 The chair of the arbitral tribunal must notify the parties of the award (by sending them a signed copy of the award) and deposit the original award with the registrar.

42 Ibid, art. 1700.1
43 Ibid, art 1701.1–1701.3.
44 Ibid, art 1701.5.
of the Court of First Instance at the seat of the arbitration. The parties may waive this latter requirement.

7.3.5 Unless the award is contrary to public policy, or the dispute was not capable of settlement by arbitration, an award has the force of *res judicata* once it has been notified to the parties and may no longer be contested before the arbitrators.

7.3.6 Even in the event that the parties have agreed in their arbitration agreement that an award can be appealed, the award may still be provisionally enforced, notwithstanding the existence of any appeal, if the arbitrators have so ordered. The arbitral tribunal may also order that the provisional enforcement of the award shall be subject to provision of a guarantee.

7.4 Settlement
7.4.1 The parties may settle their dispute at any time. At their request, the arbitral tribunal may record their settlement in a consent award. The parties should include in their settlement a provision for the final allocation of the costs of the arbitration between them.

7.5 Termination of the proceedings
7.5.1 The arbitrators’ appointment comes to an end when the final award terminating the proceedings has been notified to the parties and deposited with the registrar of the Court of First Instance (save where the parties have waived this latter requirement).

7.5.2 Besides this, the mandate of the arbitrators may come to an end by several events either linked to the arbitration agreement (e.g. the end of the arbitration clause gives rise to the end of the mandate and the parties have to launch a judicial procedure), to the parties (e.g. termination or waiver of the arbitration) or to the arbitrators (death, impediment, refusal, default, renunciation or successful challenge).

7.6 Power to award costs
7.6.1 The Judicial Code does not deal with the issue of the costs of the arbitration. It is up to the parties to provide for the allocation of costs in their arbitration agreement. If there is no such provision, the final allocation of costs of the arbitration will be decided by the arbitrators. In practice, the general rule is that “costs follow the event” (i.e. the losing party pays).

---

49 *Ibid*, art 1702.3.
7.7 Correction and interpretation of the award
7.7.1 Any party may, within 30 days of notification of the award (unless the parties have agreed another time limit), request the arbitral tribunal to correct any clerical error, error in computation, typographical error or any other error of a similar nature in the award. If so agreed by the parties, a party may request that the arbitral tribunal give an interpretation of a specific point or part of the award. In all cases, the request must be notified to the other party.50

7.7.2 If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request (or within such other period of time as decided by the arbitral tribunal). The arbitral tribunal’s decision is deemed to be a part of the award.

7.7.3 The arbitral tribunal may also, within 30 days of the award, correct the award on its own initiative.51

7.7.4 When it is no longer possible to bring together the arbitrators, a request for correction or interpretation of the award shall be made to the President of the Court of First Instance (President) who has jurisdiction to grant the exequatur (a formal authorisation of enforcement) in accordance with the provisions of the Judicial Code.52

8. Role of the courts
8.1 Jurisdiction of the courts
8.1.1 The court designated in the arbitration agreement or in a later agreement, concluded before the parties have chosen the seat of arbitration, is competent to apply the arbitration provisions of the Judicial Code. In the absence of such an agreement between the parties, the court which has jurisdiction is the court at the seat of the arbitration.53 If the parties have not chosen a seat of arbitration, jurisdiction lies with the court which would have been competent to decide the dispute had it not been submitted to arbitration.54
8.1.2 Various provisions of the Judicial Code give jurisdiction to local courts to deal with specific issues upon application by one of the parties, including:
- appointment of an arbitrator;\(^{55}\)
- challenge of an arbitrator;\(^{56}\)
- refusal of a witness to appear;\(^{57}\)
- verification of signatures and objections relating to the production of documents or the alleged falseness of documents;\(^{58}\) and
- determination of the time period within which the award must be rendered.\(^{59}\)

8.2 Stay of court proceedings
8.2.1 A court “seized of a dispute which is the subject of an arbitration agreement shall, at the request of a party, declare that it has no jurisdiction, unless, in relation to the dispute, the agreement is not valid or has come to an end”.\(^{60}\) Such a request must be made in \textit{limine litis} (i.e. in the first written submissions).

8.2.2 A party to a valid arbitration agreement may, therefore, invoke lack of jurisdiction if the other party starts court proceedings in relation to a matter which is the subject of an arbitration agreement. This is in line with the provision of Article II of the New York Convention.\(^{61}\)

8.3 Preliminary rulings on jurisdiction
8.3.1 As already mentioned above,\(^{62}\) the arbitral tribunal is competent to determine its jurisdiction to decide a dispute, subject to judicial review in the context of the procedure for setting aside an award.

8.4 Interim protective measures
8.4.1 An application to the court for conservatory or provisional (interim) measures is not incompatible with an arbitration agreement and shall not imply a waiver of the agreement.\(^{63}\) Such an application can also be made in the course of arbitral proceedings.\(^{64}\)

\(^{55}\) Ibid, art 1684.
\(^{56}\) Ibid, art 1691.
\(^{57}\) Ibid, art 1696.4.
\(^{58}\) Ibid, art 1696.5.
\(^{59}\) Ibid, art 1698.
\(^{60}\) Ibid, art 1679.1.
\(^{62}\) See section 5.1.
\(^{63}\) Judicial Code, art 1679.2.
\(^{64}\) See section 5.
8.5 Obtaining evidence and other court assistance

8.5.1 When the arbitral tribunal has ordered a hearing and the witnesses do not appear voluntarily, or refuse to take the oath or to testify, the arbitral tribunal will authorise the parties, or one of them, to request the Court of First Instance to appoint a juge-commissaire who will be in charge of hearing the testimony. It is also possible, albeit unusual, for a party to the arbitral proceedings to apply to the local courts to obtain an order for the production of documents, including from a third party.

9. Challenging and appealing an award through the courts

9.1 Appeals

9.1.1 An appeal against an award may only be made if the parties have expressly provided for such possibility in the arbitration agreement and provided that such appeal is to be submitted to arbitration. Such provisions are unusual except in some industry-specific arbitrations.

9.2 Applications to set aside an award

9.2.1 Article 1717.4 of the Judicial Code provides that: “The parties may, by an express statement in the arbitration agreement, or by a subsequent agreement, exclude any right to apply for an award to be set aside when none of the parties is an individual having Belgian citizenship or who resides in Belgium, or a legal person having its principal place of business or a branch there.”

9.2.2 The notion of an “express statement” in Article 1717.4 is strictly interpreted: a reference by the parties in the arbitration agreement or in the terms of reference to arbitration rules which provide for a waiver of any right of recourse does not amount to such an “express statement”. Parties wanting to waive all rights to challenge the award should, therefore, expressly state that they waive all rights to apply to have the award set aside, either in the arbitration agreement or in the terms of reference.

9.2.3 Assuming that the parties have not waived their right to challenge the award, they may launch such a challenge only in the circumstances mentioned in Article 1704 of the Judicial Code, which provides for the following circumstances:

---

65 Judicial Code, art 1696.4.
66 Ibid, art 1703.2.
— the award is contrary to public policy;
— the non-arbitrability of the dispute;
— the non-existence of a valid arbitration agreement;
— the arbitral tribunal exceeded its jurisdiction;
— the arbitral tribunal failed to decide one or more of the issues in dispute;
— irregularity in the constitution of the arbitral tribunal;
— the arbitral tribunal failed to observe a mandatory rule of arbitral procedure;
— the arbitral tribunal disregarded the formalities set out in Article 1701.4 of the Judicial Code (which provides that an award shall be in writing and signed by the arbitrators, that if one or more arbitrators are unable or unwilling to sign, this must be recorded in the award and that the number of signatures on the award must at least represent a majority of the arbitrators);
— an absence of reasons or contradictions in the reasons; or
— the award was obtained by fraud.

9.2.4 Applications to set aside an award are, however, very rare. Those applications which are made are rarely successful.

9.2.5 Proceedings for setting aside an award are commenced by way of request (requête) before the Court of First Instance. The decision of the Court of First Instance is subject to appeal before the Court of Appeal.

10. Recognition and enforcement of awards

10.1 Domestic awards
10.1.1 In order to be enforceable, a domestic award must be granted exequatur (a formal authorisation of enforcement) by the President at the seat of the arbitration, acting upon the request of one of the parties. At this stage, the party against whom enforcement is sought is not a party to the application.

10.1.2 The petitioner must submit the original award and the original arbitration agreement, or certified copies thereof, as well as sworn translations in the language of the relevant region (depending on the circumstances, French, Flemish or German) if it is in a language other than that used in the courts of that region.

10.1.3 The President will grant the exequatur when the award is no longer open to appeal before the arbitrators or if the latter have made an order granting provisional

---

67 See ibid, art 1710–1718 (governing the enforcement of domestic awards).
68 As defined in paragraph 7.7.1 above.
The President’s decision is enforceable notwithstanding an appeal. The President’s decision is enforceable notwithstanding the existence of any appeal.

10.1.4 The President shall dismiss the request if the award or its enforcement is contrary to public policy or if the dispute was not capable of settlement by arbitration. If the request is dismissed, the petitioner may (within one month of the notification of the dismissal of the request) lodge an appeal against the decision before the Court of Appeal. The party against whom enforcement is sought receives notification of the appeal and the proceedings thereafter continue inter partes.

10.1.5 If the President grants the exequatur, his decision must be served on the party against whom enforcement is sought. The latter has one month from the date of such service to oppose the decision (Opposition). The Opposition is heard by the Court of First Instance. Its decision is subject to appeal by the losing party to the Court of Appeal.

10.2 Foreign awards

10.2.1 Belgium has ratified the New York Convention and the 1961 European Convention.

10.2.2 In relation to awards originating from countries which have not ratified the New York Convention, the enforcement procedure is set out in Articles 1719–1723 of the Judicial Code, which provisions are to a large extent similar to those applicable to the enforcement of domestic awards. A party seeking enforcement of a foreign award may always base its request on these provisions, in accordance with Article VII of the New York Convention, even if the latter would apply, if it considers that the above rules are more favourable than those contained in the New York Convention.

10.2.3 The request for exequatur must be submitted to the President at the place where the party against whom enforcement is sought has its domicile or residence or, if it has no domicile or residence in Belgium, the place where the award will be enforced. In the latter case, the petitioner has to elect domicile within the Judicial Arrondissement of the place where the award will be enforced.

10.2.4 The petitioner must submit the original award and the original arbitration agreement, or certified copies thereof, as well as sworn translations of the said documents where required.

10.2.5 Unlike in the procedure for the enforcement of domestic awards, the President may call the parties to make submissions on the request. However, even in the

unusual event that the President takes this step, the procedure remains *ex parte* at this stage.

10.2.6 The President can refuse to grant *exequatur* if:
(i) the award is still open to appeal before the arbitrators and if the arbitrators have not ordered provisional enforcement notwithstanding any such appeal;
(ii) the award or its enforcement is contrary to international public policy;
(iii) the dispute was not capable of settlement by arbitration; or
(iv) the ground for setting aside the award as provided for in Article 1704 is met.70

10.2.7 Unlike the first three causes of refusal, the fourth is only examined by the judge if one of the parties requests it.

10.2.8 If the application is refused, the petitioner may (within one month of the notification of the dismissal of the request) lodge an appeal against the decision at the Court of Appeal. The appeal has to be notified to the party against whom enforcement is sought and the proceedings thereafter continue *inter partes*.

10.2.9 If the President grants *exequatur*, his decision must be served on the party against whom enforcement is sought. The latter has one month from the date of service to oppose the decision. The opposition will be heard by the Court of First Instance. Its decision is subject to appeal to the Court of Appeal.

10.2.10 All decisions of the Court of Appeal are subject to review by the Supreme Court (*Cour de Cassation*) in a very limited number of cases (e.g. violation of a point of law or of substantial legal formalities).

11. **Concluding thoughts and themes**

11.1.1 The Belgian law on arbitration may be characterised as modern and flexible. It gives the parties wide discretion as to the arbitral procedure to be followed.

11.1.2 There is no tradition in Belgium of intervention by local courts in arbitral proceedings. Moreover, the courts’ attitude in proceedings for the setting aside or enforcement of awards is invariably inclined in *favorem arbitrandum*. This probably explains why Brussels is frequently chosen as the seat of major international arbitrations.

70 Judicial Code, Article 1723. See also paragraph 9.2.3 above.
12. Contacts

CMS DeBacker
Chaussée de La Hulpe 178
1170 Brussels
Belgium

Marie Canivet
T +32 2 74369 16
E marie.canivet@cms-db.com

Jean-François Goffin
T +32 2 74369 21
E jeanfrancois.goffin@cms-db.com
ARBITRATION IN BOSNIA AND HERZEGOVINA

By Emina Saračević, Adis Gazibegović and Indir Osmić, CMS
# Table of Contents

1. **Legislative framework**  
   
2. **Scope of application and general provisions of the Federation CPA**  
   2.1 Subject matter  
   2.2 Structure of the law  
   2.3 General principles  
3. **The arbitration agreement**  
   3.1 Definitions  
   3.2 Formal requirements  
   3.3 Special tests and requirements of the jurisdiction  
   3.4 Separability  
   3.5 Legal consequences of a binding arbitration agreement  
4. **Composition of the arbitral tribunal**  
   4.1 Constitution of the arbitral tribunal  
   4.2 Challenging the arbitrators  
   4.3 Responsibility of the arbitrators  
   4.4 Arbitrator immunity  
5. **Jurisdiction of the arbitral tribunal**  
   5.1 Competence to rule on jurisdiction  
   5.2 Power to order interim measures  
6. **Conduct of proceedings**  
   6.1 Commencement of arbitration  
   6.2 Seat, place of hearings and language of arbitration  
   6.3 Multi-party issues  
   6.4 Oral hearings and written proceedings  
   6.5 Default by one of the parties  
   6.6 Evidence generally  
   6.7 Appointment of experts  
   6.8 Confidentiality
7. Making of the award and termination of proceedings
   7.1 Choice of law
   7.2 Timing, form, content and notification of award
   7.3 Settlement
   7.4 Power to award interest and costs
   7.5 Termination of the proceedings
   7.6 Effect of the award
   7.7 Correction, clarification and issue of a supplemental award

8. Role of the courts
   8.1 Involvement of the courts
   8.2 Stay of court proceedings
   8.3 Preliminary rulings on jurisdiction
   8.4 Obtaining evidence and other court assistance

9. Challenging an award before the courts
   9.1 Jurisdiction of the courts
   9.2 Applications to set aside an award
   9.3 Appeals

10. Recognition and enforcement of awards
    10.1 Domestic awards
    10.2 Foreign awards

11. Concluding thoughts and themes

12. Contacts
1. Legislative framework

1.1.1 Following the Dayton Agreement of 1995, Bosnia and Herzegovina consists of two entities, each presiding over one half of the territory of the Federation of Bosnia and Herzegovina and the Republic of Srpska. Together with the Brčko District, a self-governing administrative unit under the sovereignty of Bosnia and Herzegovina, all three entities have authority to legislate on matters of civil procedure. As a result, there are three separate acts governing the area of civil procedure. The law on arbitration is contained within the Civil Procedure Act of the Federation of Bosnia and Herzegovina 2003 (*Federation CPA*),¹ the Civil Procedure Act of the Republic of Srpska 2003 (*Republic CPA*),² and the Civil Procedure Act of the Brčko District 2003 (*District CPA*).³ As the provisions governing arbitration in each of these Acts are exactly the same, this Chapter will use the Federation CPA to analyse the issues concerning arbitration. The provisions on arbitral proceedings and the procedure for setting aside an award can be found in Chapter V of the Federation CPA. Additionally, the procedure for the recognition and enforcement of foreign awards can be found in Chapter IV of the Conflict of Laws Act (*CLA*).⁴

1.1.2 In the same year as the new civil procedure acts were enacted, the Arbitration Court with the Foreign Trade Chamber of Bosnia and Herzegovina (*Bosnia and Herzegovina Arbitration Court*) adopted its Rulebook on Arbitration (*Rulebook*). The rules of arbitration for the Bosnia and Herzegovina Arbitration Court are set out in this Rulebook. The Rulebook covers issues regarding the organisation of the Bosnia and Herzegovina Arbitration Court, the language of arbitration, the jurisdiction of an arbitral tribunal, the commencement of arbitral proceedings, the appointment of an arbitral tribunal and arbitrators, the arbitral proceedings, the award and the costs of arbitration.⁵ However, it is only applicable where parties have contractually agreed that the matter in dispute shall be settled before the Bosnia and Herzegovina Arbitration Court.

---

¹ *Federation CPA*, art 434–453.
² *Republic CPA*, art 434–453.
³ *District CPA*, art 380–399.
⁴ *CLA*, ch IV, art 97–101.
⁵ *Rulebook*, art 1–59.
2. Scope of application and general provisions of the Federation CPA

2.1 Subject matter
2.1.1 Articles 434–453 of the Federation CPA apply to a procedure in which the parties agree to resolve their dispute through arbitration. Such agreement must be in accordance with the mandatory provisions of the relevant law. For example, disputes are arbitrable only if they fall outside the exclusive jurisdiction of the state courts.

2.2 Structure of the law
2.2.1 As noted above, the laws governing arbitration are contained in three civil procedure acts: the Federation CPA, the Republic CPA and the District CPA. The provisions are exactly the same in each act. The acts cover issues relating to the parties and the arbitration agreement, the appointment of an arbitral tribunal and its members, general rules regarding the arbitral proceedings and the involvement of the state courts.

2.3 General principles
2.3.1 While there is no express statement of the principles governing arbitral proceedings in Bosnia and Herzegovina, some general principles can be taken from the Federation CPA. For example, Article 443 of the Federation CPA establishes party autonomy to agree upon the rules of arbitration. Bearing in mind that the law on arbitration is contained in the Federation CPA, it can be assumed that the general principles of civil procedure listed in Chapter I of the Federation CPA, such as due process, will apply to arbitral proceedings so long as they are not waived by the contractual agreement of the parties.

3. The arbitration agreement

3.1 Definitions
3.1.1 An arbitration agreement may be concluded in respect of any present or future dispute that may arise out of a legal relationship established between the parties. Furthermore, an arbitration agreement is deemed to exist when the claimant asserts that such an agreement exists and the respondent does not challenge this assertion in its defence. Additionally, an arbitration agreement exists when it is

---

6 Federation CPA, art 443.
7 Ibid, art 435, para 1.
contained in the general terms and conditions that apply to the legal relationship existing between the parties.\textsuperscript{8}

\section*{3.2 Formal requirements}

\subsection*{3.2.1 An arbitration agreement must be in writing and signed by all parties to the agreement, as Bosnia and Herzegovina laws require that the existence of an arbitration agreement be evidenced by written documents.\textsuperscript{9} This formal requirement can also be fulfilled if an arbitration agreement is either contained in a larger document signed by the parties or concluded by an exchange of messages via a means of communication that provides a written record of the parties’ agreement.\textsuperscript{10}}

\subsection*{3.2.2 If an action is brought before the court where the matter in dispute is the subject of an arbitration agreement, the respondent may apply to the court to dismiss the action for lack of jurisdiction. This application must be submitted, at the latest, as part of the respondent’s answer to the claim.\textsuperscript{11}}

\subsection*{3.2.3 Either party may file a request with the court to terminate the arbitration agreement in the following cases:}

\begin{itemize}
  \item where the parties fail to agree on the arbitrator, in cases where the arbitrator is to be appointed jointly by the parties;
  \item where a person who should be an arbitrator according to the arbitration agreement cannot or does not want to perform that duty;
  \item where the parties do not wish to exercise their right to request the court to appoint the arbitrator or the presiding arbitrator; or
  \item when the arbitrators cannot render an award by majority vote and the parties have not agreed on how to resolve the dispute.\textsuperscript{12}
\end{itemize}

\section*{3.3 Special tests and requirements of the jurisdiction}

\subsection*{3.3.1 In order for a matter to be arbitrable, the claim must be disposable by the parties, i.e. the claims must not contravene mandatory regulations.\textsuperscript{13} Furthermore, disputes are arbitrable only if they do not fall under the exclusive jurisdiction of the state courts. The state courts in Bosnia and Herzegovina have established jurisdiction over disputes relating to real estate located in Bosnia and Herzegovina, disputes

\begin{footnotes}
  \item Ibid, art 436.
  \item Ibid, art 435, para 1 and 4.
  \item Ibid, art 435, para 2.
  \item Ibid, art 438.
  \item Ibid, art 440, 441 and 446.
  \item Ibid, art 3, para 2.
\end{footnotes}
relating to the ownership and other rights connected to airplanes and ships registered in Bosnia and Herzegovina, as well as disputes that have arisen in the course of enforcement or bankruptcy proceedings.14

3.4 Separability
3.4.1 An arbitration agreement can be concluded:
— after a dispute has arisen between the parties (i.e. in the form of a compromise);
or
— before a dispute has arisen between the parties, usually at the moment of conclusion of the main agreement, where the arbitration agreement is mostly only a part (chapter, section, etc.) of the main agreement (i.e. in the form of a compromissory clause).

3.4.2 An arbitration agreement concluded in the form of a compromissory clause is an independent legal act in respect of the agreement in which this clause is contained. For this reason, the arbitral tribunal shall be competent to decide on disputes relating to the legal validity of the main agreement.15

3.5 Legal consequences of a binding arbitration agreement
3.5.1 The conclusion of an arbitration agreement binds the parties to undertake all necessary actions that will allow the arbitral tribunal to function.16 Furthermore, a compromissory clause – according to which the parties agreed that an arbitral tribunal shall decide on legal validity and enforceability of the main agreement – also authorises the arbitral tribunal to settle disputes on compensation for damages which have arisen from the non-fulfilment of contractual obligations provided in the main agreement.17

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal
4.1.1 The parties are free to determine the number of arbitrators to conduct the arbitral proceedings. However, there must be an odd number of arbitrators. If the number of arbitrators is not determined by agreement between the parties, then the

14 Ibid, art 42–45.
default position is that there will be three arbitrators. In that case, each party will appoint one arbitrator and the appointed arbitrators will then jointly choose the third and presiding arbitrator.

4.1.2 Once a party has appointed its arbitrator and notified the other party, it may then request the other party to appoint its arbitrator within 15 days and provide notification of such appointment. In the event that the other party does not appoint its arbitrator on time, the court will, upon the request of a party, decide on the appointment of that member of the arbitral tribunal. If the arbitrators fail to agree on the chair, any of the parties or any of the appointed arbitrators can individually request the court to nominate the chair.

4.1.3 If a party fails to appoint an arbitrator, as required under the arbitration agreement, it may be summoned by the other party to perform the appointment and notify the issuing party of its chosen arbitrator within 15 days. The summons is only valid if the issuing party has already notified the respondent party of the appointment of its own arbitrator.

4.1.4 Where a third independent party is obliged to perform the appointment of an arbitrator, each party may send the summons to that appointing party. This third party is bound to his or her appointment from the moment one of the parties has been notified of the appointment. If an arbitrator has not been appointed on time, and the arbitration agreement does not state otherwise, the arbitrator shall be appointed by the court upon proposal by any of the parties. After the appointment of the arbitrators, the arbitral proceedings may begin if there are no other legal obstacles.

4.2 Challenging the arbitrators
4.2.1 An arbitrator’s appointment can be challenged on the same grounds that prevent judges from performing their judicial function. Accordingly, an arbitrator’s appointment may be challenged if:

---

18 Federation CPA, art 437, para 1.
19 Ibid, art 437, para 2.
20 Ibid, art 439.
21 Ibid, art 440, para 1.
22 Ibid, art 440, para 2.
23 Ibid, art 439, para 1 and 2.
— the arbitrator is a party to the procedure, a legal representative or an attorney of a party, is in a co-attorney relationship with a party or is questioned as a witness or expert in the same case;
— any of the parties, their legal representatives or attorneys are the arbitrator’s lineal relative to any degree, lateral relative to the fourth degree or the arbitrator’s spouse or common-law spouse or in-law, regardless of whether the marriage has ended or not;
— the arbitrator is a guardian, adoptive parent or adopted child of a party to the procedure, their legal representative or attorney;
— the arbitrator participated in the handing down of a ruling of a lower instance court or other authority in the same case; or
— existing circumstances raise doubts regarding the arbitrator’s impartiality.\textsuperscript{26}

4.2.2 An arbitrator may be challenged only if grounds for the challenge have occurred, or the party making the challenge becomes aware of those grounds, after the arbitrator was appointed.\textsuperscript{27} The Federation CPA expressly provides that these are mandatory provisions and cannot be waived by the agreement of the parties.\textsuperscript{28}

4.3 **Responsibility of the arbitrators**

4.3.1 Each arbitrator of an arbitral tribunal is obliged to exempt himself/herself from the duty of the arbitrator when the reasons for challenging an arbitrator stipulated in Article 357 of the Federation CPA exist. Once the arbitrator learns that a request for his/her exemption has been put forward or learns that there is a reason for challenging an arbitrator under Article 357, then that arbitrator shall immediately notify the court that would have had jurisdiction over the dispute in the absence of an arbitration agreement. This court will make a determination regarding the challenge of the particular arbitrator, provided that the parties have not agreed otherwise.\textsuperscript{29}

4.4 **Arbitrator immunity**

4.4.1 According to Article 451 in connection with Article 255 of the Federation CPA, the existence of a criminal judgment against an arbitrator is prescribed as one of the reasons the parties may request the setting aside of an award. Therefore, it may be concluded that there is no absolute arbitrator immunity. However, the domestic laws and regulations do not provide explicit terms on the issue of arbitrator immunity.

\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid, art 442, para 2.
\textsuperscript{28} Ibid, art 453.
\textsuperscript{29} Ibid, art 360 and 442.
5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction
5.1.1 Bosnia and Herzegovina legislation does not contain any provisions regarding the jurisdiction of the arbitral tribunal or its competence to rule on its own jurisdiction. For this reason, parties should set out the arbitral tribunal’s competence to rule on its own jurisdiction in the arbitration agreement.

5.2 Power to order interim measures
5.2.1 Bosnia and Herzegovina legislation does not contain any provisions regarding the power of the arbitral tribunal to order interim measures. However, the parties may agree that the arbitral tribunal should have the right to impose interim measures, provided that they are in accordance with the mandatory provisions of Bosnia and Herzegovina laws.

6. Conduct of proceedings

6.1 Commencement of arbitration
6.1.1 Bosnia and Herzegovina legislation does not contain any provisions regarding the commencement of arbitration. For this reason, the manner of initiation of arbitral proceedings depends on the arbitral rules which have been agreed by the parties or, in case there is no such agreement, the arbitral rules that have been determined by the arbitrators.

6.1.2 In the event that one party initiates a court action, where there is a relevant arbitration clause in place, the respondent party may object to the court. Provided that the claim concerns a dispute between the same parties that is within the scope of the arbitration clause, the court will, upon the respondent’s objection, proclaim itself to lack jurisdiction and dismiss the complaint.  

6.2 Seat, place of hearings and language of arbitration
6.2.1 There are no provisions in Bosnia and Herzegovina legislation regarding the seat and language of arbitration. The parties are free to choose both. Accordingly, the parties are also free to choose whether any part of arbitral proceedings shall take place at another place other than the seat of arbitration, e.g. inspection of property. However, if the parties have not agreed on the seat and language of arbitration, the arbitral tribunal will have the power to decide these matters. 

31 Ibid, art 443.
6.3 Multi-party issues
6.3.1 Although Bosnia and Herzegovina legislation does not contain any provisions regarding multi-party issues, these issues can be regulated by the parties in the arbitration agreement.

6.4 Oral hearings and written proceedings
6.4.1 The use of oral hearings or written proceedings is subject to the parties’ agreement. If the parties have not made such an agreement then the arbitral tribunal shall determine the procedure and whether the oral hearing is necessary.\(^{32}\)

6.5 Default by one of the parties
6.5.1 Bosnia and Herzegovina legislation does not contain any provisions in regard to the default of one of the parties. It is for the parties themselves to assess the arbitral tribunal’s authority if this occurs (i.e. to address it in the arbitration agreement). However, the courts have the ability to appoint an arbitrator if a party fails to do so (see paragraph 4.1.4 above).\(^{33}\)

6.5.2 The Federation CPA does address circumstances where a party fails to acknowledge the existence of an arbitration agreement (i.e. defaults on the obligation to arbitrate a particular claim). It stipulates that where a matter that is the subject of an arbitration agreement is brought before a court, the court shall, upon the application of the respondent, dismiss the action for lack of jurisdiction. This application must be submitted, at the latest, as part of the respondent’s answer to the claim.\(^{34}\)

6.6 Evidence generally
6.6.1 There are no explicit provisions that regulate evidence in arbitral proceedings. However, the Federation CPA provides for court assistance in arbitral proceedings.\(^{35}\) The arbitral tribunal may, for example, request court assistance in the taking of evidence.

6.7 Appointment of experts
6.7.1 The appointment of experts by the arbitral tribunal is not regulated by Bosnia and Herzegovina legislation. However, the arbitral tribunal may appoint experts where such a possibility is provided for in the arbitration agreement or in the arbitral rules that have been selected by the parties.

\(^{32}\) Ibid.
\(^{33}\) Ibid, art 439 and 440.
\(^{34}\) Ibid, art 438.
\(^{35}\) Ibid, art 444.
6.8 Confidentiality
6.8.1 In most cases, parties are at least partially motivated to arbitrate their dispute for reasons related to confidentiality of the proceedings. However, confidentiality of arbitral proceedings is not provided by Bosnia and Herzegovina legislation. Accordingly, it is for the parties to agree to incorporate confidentiality clauses into their arbitration agreement.

7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 The parties are free to choose the law to govern the dispute. The arbitral tribunal can also decide *ex aequo et bono* if expressly agreed to by the parties.\(^{36}\)

7.2 Timing, form, content and notification of award
7.2.1 The award must be reasoned unless the parties have agreed otherwise. Typically, all arbitrators sign the original award, as well as all transcripts of the award. The award is deemed to be valid even if an arbitrator refuses to sign it, provided that it has been signed by the majority of the arbitrators and it is indicated on the award itself that the signature is missing.\(^{37}\) In accordance with the provisions of Bosnia and Herzegovina law, copies of the award are served on the parties through the court.\(^{38}\)

7.3 Settlement
7.3.1 Bosnia and Herzegovina legislation contains no provisions on settlement before an arbitral tribunal. However, if the parties agree that their dispute can also be resolved by settlement, the arbitral tribunal will accept the settlement and issue a consent award. The Enforcement Procedure Act of the Federation of Bosnia and Herzegovina 2003 (*Federation EPA*), whose provisions are very similar to those in the Republic of Srpska and the Brčko District, provides that the enforceability of a settlement before the arbitral tribunal will be treated as equal to settlements before the courts.\(^{39}\)

7.4 Power to award interest and costs
7.4.1 There are no explicit provisions relating to the arbitral tribunal’s power to award interest and costs, but the parties can agree that the arbitral tribunal shall consider this issue in the award.

---


\(^{37}\) *Ibid*, art 447, para 1 and 2.

\(^{38}\) *Ibid*, art 447, para 3; see paragraph 8.5.2 below.

\(^{39}\) Federation EPA, art 24.
7.5 Termination of the proceedings

7.5.1 Although there are no explicit legal provisions relating to termination of the proceedings, this issue can be regulated by the parties in the arbitration agreement.

7.5.2 Also, as described at paragraph 3.2.3 above, the entire arbitration agreement – and proceedings – may be terminated at the request of one of the parties in certain circumstances.

7.6 Effect of the award

7.6.1 Unless the possibility of contesting the award before a higher instance arbitral tribunal has been envisaged by the arbitration agreement, the award will be considered a final award. At the request of any of the parties, the court will note on the award that it is enforceable as a final award and is not subject to appeal.

7.7 Correction, clarification and issue of a supplemental award

7.7.1 There are no explicit legal provisions relating to the correction, clarification or issue of a supplemental award. However, the Federation CPA states that the award must be reasoned unless the parties have agreed otherwise. This requirement would also be applied to supplemental awards if they are permitted by mutual agreement of the parties.

8. Role of the courts

8.1 Involvement of the courts

8.1.1 While the laws of Bosnia and Herzegovina do not set out the involvement of the courts in detail, some matters are regulated. For example, the court can appoint an arbitrator if one has not been appointed in time and a party requests the assistance of the court in the appointment. Further, if the arbitrators cannot agree on the election of the chair of the arbitral tribunal, and the agreement does not state otherwise, the chair can be appointed by the court upon the proposal of either arbitrator or a party. The competent court to appoint an arbitrator or the chair of the arbitral tribunal is the court which would have been competent to hear the first instance proceedings if the arbitration agreement was not in existence.

---

40 Federation CPA, art 449, para 1.
41 Ibid.
42 Ibid, art 447.
43 Ibid, art 440, para 1.
44 Ibid, art 440, para 2.
8.2 Stay of court proceedings
8.2.1 The courts do not have the power or discretion to stay court proceedings in favour of arbitral proceedings. As indicated above at paragraph 6.5.2, the proper remedy is for the court to dismiss a claim that should be heard before an arbitral tribunal (although this must be requested by the opposing party prior to, or within, the answer to the claim).

8.3 Preliminary rulings on jurisdiction
8.3.1 The courts do not have the power or discretion to make preliminary rulings on the jurisdiction of the arbitral tribunal.

8.4 Obtaining evidence and other court assistance
8.4.1 Although the procedure of taking evidence before an arbitral tribunal is not regulated by the Bosnia and Herzegovina legislation, the arbitral tribunal may take evidence as agreed between the parties or provided for in the arbitral rules that have been agreed to by the parties. However, the arbitral tribunal cannot impose coercive measures, fines or penalties on witnesses, parties, experts or other participants in the arbitral proceedings in order to obtain evidence.\(^46\) For this reason, the arbitral tribunal may request court assistance in the arbitral proceedings, using the court to collect evidence that cannot be adduced before the arbitral tribunal.\(^47\) For example, the arbitral tribunal is entitled to request court assistance in the taking of evidence. In such case, the Federation CPA rules of the procedure of taking evidence before a court shall be applicable.\(^48\)

8.4.2 The Federation CPA provides that the court should deliver the award to the parties.\(^49\) The relevant court is the one that would have had jurisdiction over the dispute in the absence of the arbitration agreement. The award and proof of its delivery is kept by that court.\(^50\)

9. Challenging an award before the courts

9.1 Jurisdiction of the courts
9.1.1 The court with jurisdiction to set aside an award is the court that would have had jurisdiction over the dispute in the absence of an arbitration agreement.\(^51\)

\(^{46}\) Ibid, art 444, para 1.
\(^{47}\) Ibid, art 444, para 2.
\(^{48}\) Ibid, art 444, para 3.
\(^{49}\) Ibid, art 447.
\(^{50}\) Ibid, art 448.
\(^{51}\) Ibid, art 450.
9.2 Applications to set aside an award

9.2.1 The application for setting aside an award must be filed within 30 days from the date on which the award was rendered to a party, or from the date when a party has become aware of any of the grounds for setting aside an award, but in any case not later than one year from the validity of the award.\textsuperscript{52}

9.2.2 The grounds for setting aside the award are:
- if no arbitration agreement was concluded or if the arbitration agreement was invalid or ineffective;
- if there was any violation of the rules concerning the composition of the arbitral tribunal, the conduct of the arbitral proceedings or the rendering of the award;
- if the award does not contain reasons or if the original award or its copies have not been signed in the prescribed manner;
- if the arbitral tribunal has exceeded its powers;
- if the statement of reasons in the award is inadequate or contradicts the arbitral tribunal’s findings as set out in the award;
- if the award is contrary to the Constitution of Bosnia and Herzegovina or one of its entities; or
- if any of the reasons for re-hearing the dispute pursuant to Article 255 of the Federation CPA exist.\textsuperscript{53}

9.2.3 The reasons for re-hearing the dispute pursuant to Article 255 of the Federation CPA are:
- if a judge who had to be excluded in accordance with law was involved in the adoption of a decision;
- if a party did not have an opportunity to argue before the court due to an illegal action;
- if a person who cannot be a party to the proceedings took part in the proceedings as the claimant or respondent;
- if a party who is a legal entity was not represented by an authorised person, if a party incompetent for litigation was not represented by a legal representative, or if a legal representative or attorney of a party was not properly authorised to participate in the proceedings or as regards certain actions in the proceedings, unless their participation in the proceedings or certain actions was later approved;

\textsuperscript{52} Ibid, art 452.
\textsuperscript{53} Ibid, art 451.
— if a decision of the court was founded on a false testimony of a witness or expert witness or if a decision of the court was based on a counterfeited document or document certifying false contents;
— if a decision of the court was made through a criminal offence of the judge, legal representative or attorney of either party or a third party; or
— if a party learns about new facts or finds or obtains the ability to use new evidence, which could have resulted in a more favourable decision for such party had it been used in the previous proceedings.

9.2.4 The provisions relating to the procedure for setting aside an award are mandatory and cannot be waived by agreement of the parties.\textsuperscript{54}

9.3 Appeals

9.3.1 In cases where the parties agree that an appeal to the award is allowed,\textsuperscript{55} they must define the deadline for an appeal to be commenced, the composition of the appellate tribunal and the scope of review of the particular award.\textsuperscript{56}

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 An award has the effect of a final judgment, unless the parties have agreed that the award can be appealed. The court that would have had jurisdiction over the dispute if the parties had not agreed to arbitration can make a note on the award declaring it to be valid and enforceable, if so requested by any party.\textsuperscript{57} In this regard, an enforcement procedure starts by filing a motion for enforcement before the competent court, which shall contain:
— a request for enforcement with an enforceable or authentic document that provides the basis for requesting the enforcement;
— the names of the judgment creditor and the judgment debtor;
— the claim whose satisfaction is requested;
— the means of the enforcement;
— the object of the enforcement if known; and
— other information necessary to execute the enforcement.\textsuperscript{58}

\textsuperscript{54} Ibid, art 453.
\textsuperscript{55} Ibid, art 449.
\textsuperscript{56} “KOMENTARI zakona o parničnom postupku u Federaciji Bosne i Hercegovine i Republici Srpskoj”, Zlatko Kulenović, et al., Sarajevo, Savjet/Vijeće Evrope – Evropska komisija, 2005, 682.
\textsuperscript{57} Federation CPA, art 449.
\textsuperscript{58} Federation EPA, art 36.
10.1.2 Under the Federation EPA, an enforceable document is, amongst others, an enforceable court ruling or an enforceable court settlement.\textsuperscript{59} The Federation EPA subsequently specifies that a court ruling denotes a judgment, decision or other ruling issued in proceedings before a court or an arbitral tribunal, and a court settlement denotes a settlement reached during proceedings before a court or an arbitral tribunal.\textsuperscript{60} If all legal requirements have been fulfilled, the court will issue a decision on enforcement which must contain references to the information listed in paragraph 10.1.1 above. A decision on enforcement need not contain an explanation and it may be issued by affixing a seal to the motion for enforcement.\textsuperscript{61}

10.2 Foreign awards

10.2.1 Bosnia and Herzegovina is a signatory to the New York Convention.\textsuperscript{62} However, when ratifying the New York Convention, Bosnia and Herzegovina expressly declared that:

\begin{itemize}
  \item the local courts will only recognise and enforce awards rendered in other states that are party to the New York Convention; and
  \item the local courts will only recognise and enforce awards relating to disputes that qualify as “commercial” under local law.\textsuperscript{63}
\end{itemize}

10.2.2 The procedure for recognition and enforcement of foreign awards is regulated by Articles 97–101 of the CLA. According to these provisions, a foreign award is defined as an award rendered abroad, as well as an award rendered in arbitral proceedings held in Bosnia and Herzegovina with a foreign governing law.\textsuperscript{64} When requesting recognition and enforcement of a foreign award, a party must submit the original or a certified copy of the award and the arbitration agreement (as well as a certified translation of them, if required).\textsuperscript{65}

10.2.3 The recognition and enforcement of a foreign award may be refused at the request of the party against whom it is invoked, if that party supplies evidence proving that:\textsuperscript{66}

\begin{itemize}
  \item \textsuperscript{59} Ibid, art 23.
  \item \textsuperscript{60} Ibid, art 24.
  \item \textsuperscript{61} Ibid, art 39.
  \item The New York Convention entered into force on 6 March 1992 by means of Bosnia and Herzegovina being one of the successors of the Socialistic Federative Republic of Yugoslavia that was initially the party to the convention (see Table of Ratifications at CMS Guide to Arbitration, vol II, appendix 1.3).
  \item Under local law, commercial disputes are disputes which arise from commercial contracts concluded between business entities within the scope of their registered business activities.
  \item CLA, art 97.
  \item Ibid, art 98.
  \item Ibid, art 99.
\end{itemize}
— the subject matter of the dispute is not arbitrable;
— the Bosnia and Herzegovina courts have exclusive jurisdiction over the subject matter of the dispute;
— the recognition and enforcement of the award would be contrary to public policy;
— the local courts in the country in which the award was rendered do not reciprocally enforce awards rendered in the territory of Bosnia and Herzegovina;
— the arbitral agreement does not fulfil the formal requirements provided under Article 435 of the Federation CPA, Article 435 of the Republic CPA and Article 380 of the District CPA;
— the arbitration agreement is not legally valid;
— the party against whom the award was rendered was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
— the arbitral tribunal was not appointed or the arbitral proceedings were not conducted in accordance with the arbitration agreement;
— the award deals with a dispute not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of that agreement (any part of the award that exceeds the scope of the arbitration agreement may be severed from the remaining part of the award);
— the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
— the award is unclear or contradictory.

10.2.4 The court with territorial jurisdiction to hear applications for the recognition and enforcement of foreign awards is the court in the territory in which enforcement of the award is sought. An appeal against a court decision on the enforcement of a foreign award can be filed within 15 days from the date of delivery of the court’s decision.\(^67\)

11. Concluding thoughts and themes

11.1.1 There is no complete law which governs issues regarding arbitration in Bosnia and Herzegovina. There is no national arbitration act, but there are instead Civil Procedure Acts, which contain certain provisions on arbitration. These provisions are not always sufficient to fill in the gap on certain issues where the parties have not agreed on that issue in their arbitration agreement. Since the Bosnia and

\(^67\) Ibid, art 101.
Herzegovina legislation does not provide a complete code on arbitration, all matters not regulated by the arbitration agreement will remain unresolved, except in cases where the arbitral tribunal is authorised to regulate the matters which have not been regulated by the parties.

11.1.2 Considering the legal position of Bosnia and Herzegovina in relation to arbitration, it is common for parties to provide for a foreign law as the governing law for their arbitration. It is also common for parties to provide that the arbitral proceedings will take place before an arbitral tribunal outside of Bosnia and Herzegovina, meaning that, in most cases, parties agree that their disputes shall be settled before, for example, the ICC Arbitration Court or the Arbitration Court of the Austrian Chamber of Commerce.

12. Contacts

CMS Reich-Rohrwig Hainz d.o.o.
Ul. Fra Andela Zvizdovića 1
71000 Sarajevo
Bosnia and Herzegovina

Emina Saračević
Attorney at Law in cooperation with CMS Reich-Rohrwig Hainz d.o.o.
T +387 33 2964 08
E emina.saracevic@cms-rrh.com

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Ebendorferstraße 3
1010 Vienna
Austria

Daniela Karollus-Bruner
T +43 1 40443 255
E daniela.karollus-bruner@cms-rrh.com
# Table of Contents

1. **Historical background and overview** 153

2. **Legislative framework** 153

3. **Scope of application and general provisions of the Brazilian Arbitration Act** 154
   - 3.1 Subject matter 154
   - 3.2 Structure of the law 155

4. **The arbitration agreement** 155
   - 4.1 Formal requirements 155
   - 4.2 Special tests and requirements of the jurisdiction 156
   - 4.3 Separability 157
   - 4.4 Legal consequences of a binding arbitration agreement 157

5. **Composition of the arbitral tribunal** 158
   - 5.1 Constitution of the arbitral tribunal 158
   - 5.2 Procedure for challenging and substituting arbitrators 158
   - 5.3 Responsibilities of an arbitrator 160
   - 5.4 Arbitration fees 160
   - 5.5 Arbitrator immunity 160

6. **Jurisdiction of the arbitral tribunal** 161
   - 6.1 Competence to rule on jurisdiction 161
   - 6.2 Power to order interim measures 161

7. **Conduct of proceedings** 161
   - 7.1 Commencing an arbitration 161
   - 7.2 General procedural principles 162
   - 7.3 Seat and language of the arbitration 162
   - 7.4 Multi-party issues 163
   - 7.5 Oral hearings and written proceedings 163
   - 7.6 Default by one of the parties 163
   - 7.7 Evidence generally 164
   - 7.8 Appointment of experts 164
   - 7.9 Confidentiality 165
   - 7.10 Court assistance in taking evidence 165
8. Making of the award and termination of arbitral proceedings
   8.1 Choice of law
   8.2 Time, form, content and notification of the award
   8.3 Settlement
   8.4 Power to award interest and costs
   8.5 Termination of the proceedings
   8.6 Effect of an award
   8.7 Correction, clarification and issuance of a supplemental award

9. Role of the courts
   9.1 Jurisdiction of the courts
   9.2 Dismissal of court proceedings
   9.3 Preliminary rulings on jurisdiction
   9.4 Interim protective measures
   9.5 Obtaining evidence and other court assistance

10. Challenging and appealing an award through the courts
    10.1 Jurisdiction of the courts
    10.2 Appeals
    10.3 Applications to set aside an award

11. Recognition and enforcement of awards
    11.1 Domestic awards
    11.2 Foreign awards

12. Special provisions and considerations
    12.1 Consumers
    12.2 Employment law
    12.3 Government participation in arbitration

13. Concluding thoughts and themes

14. Contacts
1. Historical background and overview

1.1.1 Historically, Brazil was well known within the international community for its hostility towards the enforcement of foreign awards. However, over the last two decades, the legal framework of international commercial arbitration in Brazil has improved remarkably. The enactment of a modern arbitration law in 1996, the Federal Supreme Court’s judgment confirming the constitutionality of that new arbitration law in 2001, and the ratification of the New York Convention in 2002 were all key milestones in making Brazil a more arbitration-friendly jurisdiction.\(^1\)

1.1.2 Brazil has experienced a very rapid expansion in the use of arbitration as a method of dispute resolution and has become one of the key centres for arbitration in Latin America. One of the main drivers behind this expansion has been the growth of the Brazilian economy over this period. With it, there has been an unprecedented surge in foreign investment and foreign acquisitions made by Brazilian multinational companies. These transactions almost invariably involve arbitration agreements.\(^2\)

1.1.3 Another important factor behind the growth in arbitration in Brazil is the crisis in the Brazilian judiciary. In 2010, some seventy million cases were pending before the Brazilian courts (one for every three people in Brazil). As a result of the backlog of pending cases, it currently takes, on average, ten years for a case to be finally decided by the Brazilian courts.\(^3\) Faced with the prospect of such delays, it is unsurprising that commercial parties are increasingly opting to have their disputes resolved though arbitration.

2. Legislative framework

2.1.1 Arbitration in Brazil is governed by Law no. 9307 of 23 September 1996 (Brazilian Arbitration Act), which is based on the UNCITRAL Model Law (1985)\(^4\) and various provisions of the Brazilian Code of Civil Procedure that relate to the enforceability and challenge of awards.

---


2 Over this period, Brazil also approved and brought into force a number of other international treaties which enhanced its reputation as an arbitration-friendly jurisdiction, including the Panama Convention in 1996, the 1992 Protocol on Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters (Las Leñas Protocol) in 1996 and the Mercosul Protocol on International Commercial Arbitration in 2003.


2.1.2 Arbitration in Brazil may be conducted on an ad hoc basis or under the auspices of arbitral institutions. The main Brazilian arbitral institutions are the São Paulo Chamber of Mediation and Arbitration (FIESP/CIESP), the Getúlio Vargas Foundation Chamber of Conciliation and Arbitration (FGV), the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CCBC), the Corporate Chamber of Commerce in Brazil (CAMARD) and the Arbitration and Mediation Centre of the American Chamber of Commerce in São Paulo (AMCHAM).

2.1.3 Since the enactment of Law No. 9307/96 (Brazilian Arbitration Act), the number of domestic and international arbitrations has increased significantly, with the full support of the Brazilian courts.

3. Scope of application and general provisions of the Brazilian Arbitration Act

3.1 Subject matter
3.1.1 The provisions of the Brazilian Arbitration Act apply to all kinds of arbitration including institutional and ad hoc arbitration, arbitration at law and arbitration ex aequo et bono, provided that the seat of the arbitration is in Brazil.\(^5\)

3.1.2 The provisions of the Brazilian Arbitration Act apply both to domestic and to international arbitration and include rules for the enforcement of foreign awards.\(^6\)

3.1.3 Parties may choose arbitration as a dispute resolution mechanism for disputes relating to freely transferable rights.\(^7\) Under Brazilian law, transferable or disposable rights are rights that the parties can freely negotiate, transfer, assign, waive or settle.

3.1.4 Disputes relating to family law issues, tax, criminal cases and testamentary matters, for example, do not arise out of freely transferable rights and may not be submitted to arbitration.\(^8\)

---

\(^5\) Brazilian Arbitration Act, art 2.
\(^6\) Ibid, art 34 to 40.
\(^7\) Ibid, art 1.
\(^8\) Ibid, art 1.
3.2 Structure of the law

3.2.1 The Brazilian Arbitration Act is divided into seven chapters:
- Chapter I – general provisions;
- Chapter II – the arbitration agreement and its effects;
- Chapter III – the arbitrators;
- Chapter IV – the arbitral proceedings;
- Chapter V – the award;
- Chapter VI – recognition and enforcement of foreign awards; and
- Chapter VII – final provisions.

4. The arbitration agreement

4.1 Formal requirements

4.1.1 In order to be valid, the arbitration agreement must be in writing. The agreement must be contained in the contract itself or in a separate document.

4.1.2 The arbitration agreement may consist of a separate agreement or form part of a clause within the relevant contract. An arbitration agreement will be valid and binding, even where it is included in agreements that were executed prior to the enactment of the Brazilian Arbitration Act in 1996.

4.1.3 In a contrato de adesão (an “adhesion” or standard form contract), the arbitration agreement will only be valid if:
- the weaker party initiates the arbitral proceedings or agrees expressly to the initiation of the proceedings;
- the arbitration agreement is in a separate document or is marked in bold in the contrato de adesão; or
- the arbitration agreement is specifically signed or endorsed by the weaker party.

4.1.4 The Brazilian Code of Civil Procedure provides that a valid and enforceable arbitration agreement deprives the courts of any jurisdiction to determine the dispute. In the event that a party to an arbitration agreement commences proceedings in the courts, the other party will be able to rely on the existence of

---

9 Ibid, art 4(1).
10 Conflict of Jurisdiction (cc) no. III230/DF.
11 Brazilian Arbitration Act, art 4 (2).
12 Subject to the Brazilian Code of Civil Procedure, art 267 VII.
the arbitration agreement to persuade the court to dismiss those proceedings for lack of jurisdiction to hear the merits of the dispute.\footnote{Ibid, art 301 IX.}

4.1.5 Even where there is an arbitration agreement, the parties are required to execute a submission to arbitration (Compromisso Arbitral) prior to the commencement of any arbitral proceedings. The Compromisso Arbitral is a commitment by the parties to grant effectiveness to the arbitration agreement.

4.1.6 The Compromisso Arbitral will contain all of the specific provisions necessary to give effect to the arbitral proceedings, including provisions dealing with the appointment of arbitrators, the selection of any institutional rules (if any) and a statement of the issues to be submitted to the arbitral tribunal.\footnote{Brazilian Arbitration Act, art 10.}

4.1.7 If a party refuses to execute the Compromisso Arbitral, the other party may apply to the relevant court for an order for specific performance to that effect.\footnote{Brazilian Arbitration Act, art 1.} At the hearing, the court will first attempt conciliation, failing which it will try to convince the respondent to sign the Compromisso Arbitral, ruling as to any issues on which parties may still disagree and appointing a sole arbitrator if the clause does not specify otherwise. The order made at this hearing will take effect as a valid and binding Compromisso Arbitral, even if not signed by the respondent. A judgment of this nature may be appealed, but the arbitration will proceed while the appeal is pending.\footnote{Subject to the Brazilian Code of Civil Procedure, art 513 and 520.}

4.2 Special tests and requirements of the jurisdiction

4.2.1 Only disputes relating to parties’ freely transferable rights, that is “patrimonial rights” (i.e. pecuniary or economic rights) that are capable of being negotiated and agreed by parties, are capable of being determined by arbitration.\footnote{Brazilian Arbitration Act, art 1.} No guidance is given as to what exactly is meant by “patrimonial rights”. In practice, most commercial disputes will be arbitrable, including most disputes relating to industrial property (patents, trademarks, etc).

4.2.2 It is well established that the state government and other public bodies may agree to resort to domestic or international arbitration, provided that the dispute relates
to patrimonial rights of which they may dispose. However, where the government or a government controlled entity enters into a contract representing the authority of the state, the arbitrability of the dispute may, under certain circumstances, be challenged or subject to additional formal requirements (such as local venue and language: see section 12.3 below).

4.2.3 Family matters, certain public law matters and possibly individual employment-related matters are not capable of being determined by arbitrations. Similarly, disputes involving issues of “massive public interest”, such as cases involving antitrust and unfair competition issues or those relating to environmental regulations, are not arbitrable.

4.2.4 The procedure of officially declaring a bankruptcy is a privilege reserved to the courts. In contrast, a bankrupt estate, acting through its legal representative or “administrator” (Síndico) may engage in arbitrations dealing with patrimonial rights over which the estate may dispose.

4.3 Separability
4.3.1 The arbitration agreement is considered separate from the main contract. The validity and enforceability of the arbitration agreement will be assessed independently of the validity and enforceability of the main contract. The arbitral tribunal should decide on the existence and validity of the arbitration agreement and whether or not it is binding.

4.4 Legal consequences of a binding arbitration agreement
4.4.1 If the parties have concluded a valid and enforceable arbitration agreement, they are required to arbitrate all disputes that fall within the scope of that agreement and cannot submit such disputes to the Brazilian courts. If, notwithstanding the existence of a valid arbitration agreement, court proceedings are initiated, the Brazilian courts are required to refer the case to arbitration and dismiss the court proceedings without hearing the merits of the dispute.

---

18 See, for example, Agravo de Instrumento no. 52.181 of 14 November 1973; Federal Supreme Court; and Statutory Instrument no. 1312 of 15 February 1974.

19 Brazilian Arbitration Act, art 8.

20 Brazilian Code of Civil Procedure, art 267 VII.
5. Composition of the arbitral tribunal

5.1 Constitution of the arbitral tribunal

5.1.1 The Brazilian Arbitration Act sets forth that parties are free to decide how many arbitrators will constitute the arbitral tribunal, provided that it is an odd number (usually three). Should the parties indicate an even number of members, the arbitrators are automatically authorised to nominate a further arbitrator.\(^\text{21}\)

5.1.2 The arbitral tribunal shall be appointed by any method agreed to by the parties or in accordance with the rules of the arbitral institution chosen by them.\(^\text{22}\) The usual practice for appointing an arbitral tribunal comprising of three arbitrators is for each of the parties to nominate one arbitrator and mutually agree upon the third. Alternatively, the parties may agree that the two arbitrators can appoint the third arbitrator. In the event that the parties fail to reach an agreement on this process, the court shall decide how many arbitrators may constitute the arbitral tribunal and will have the authority to appoint those arbitrators.\(^\text{23}\)

5.1.3 Once several arbitrators have been appointed they shall elect, by majority, the chair of the arbitral tribunal. Failing consensus, the eldest shall become the chair.\(^\text{24}\)

5.1.4 Anyone can be appointed as an arbitrator so long as they are capable of exercising their civil rights. However, once appointed, an arbitrator has a duty to behave competently and to act independently and impartially at all times.\(^\text{25}\) Pursuant to the Brazilian Civil Code,\(^\text{26}\) in general terms people under the age of 18, unsound mind and persons who have been declared unable to exercise their rights by a judge because of an abuse of drugs, alcohol, temporary mental illness, etc can not exercise their civil rights.

5.2 Procedure for challenging and substituting arbitrators

5.2.1 Arbitrators may be challenged by the parties on the same grounds as judges.\(^\text{27}\) Those grounds include if the arbitrator:
   — is a party to the dispute;
   — has acted as legal counsel or given testimony in the dispute;

\(^{21}\) Brazilian Arbitration Act, art 13(1).
\(^{22}\) Ibid, art 13(4).
\(^{23}\) Ibid, art 13.
\(^{24}\) Ibid, art 13(4).
\(^{25}\) Ibid, art 13(6).
\(^{26}\) Law no. 10406 of 10 January 2002.
\(^{27}\) Brazilian Arbitration Act, art 14.
— has rendered a decision as a judge of first instance in the same dispute;
— has a personal or business relationship with one of the parties or their lawyers;
or
— is a member of the board of a corporation that is a party to the dispute.  

5.2.2 Prior to accepting an appointment, an arbitrator must disclose to the parties any facts that may be deemed to affect his or her impartiality or independence.  

5.2.3 In principle, challenges may only be raised against party-appointed arbitrators for reasons arising after their appointment. In the event that the reason for the challenge against the arbitrator only became apparent after the appointment, an arbitrator may be challenged for a reason that occurred prior to the appointment.  

5.2.4 Arbitrators are competent to rule upon any challenge, which must be filed at the first hearing after the constitution of the arbitral tribunal. If the challenged arbitrator refuses to hear the challenge, a judge is entitled to determine the issue and his or her decision cannot be appealed. In these circumstances, the arbitral proceedings will be suspended pending the resolution of the challenge.  

5.2.5 If the arbitral tribunal rejects the challenge against the arbitrator, the arbitration will proceed as normal. However, once the outcome of the arbitration is known, the challenging party may, on the basis of the rejected challenge, make an application to the courts to set aside the award rendered by the arbitral tribunal. If the court finds that the arbitral tribunal should have accepted the challenge, the award will be set aside.  

5.2.6 In the event of a successful challenge against an arbitrator, that arbitrator’s position shall be filled by the alternate member nominated by the parties prior to the constitution of the arbitral tribunal, if any. If such a nomination has not occurred, the agreed procedure for nominating arbitrators should apply.  

29 Brazilian Arbitration Act, art 14(1).
30 Ibid, art 14(2).
31 Ibid, art 15.
32 Ibid, art 33 and 20; see also appeal no. 70005797774, 12th Civil Chamber of the Rio de Janeiro Court of Appeal.
33 Pursuant to Brazilian Arbitration Act, art 13(1), when appointing an arbitrator, parties may also nominate an alternate arbitrator.
34 Brazilian Arbitration Act, art 20(1) and 16.
5.3 **Responsibilities of an arbitrator**

5.3.1 Arbitrators who breach the duties set out above have a general obligation to compensate third parties for damages caused by negligence or wilful misconduct.\(^{35}\)

5.3.2 As well as civil liability for breaching these duties, the criminal law provisions that specifically apply to public servants apply to arbitrators.\(^{36}\) For example, arbitrators who do not properly exercise their function, or illegally delay their duties to satisfy their interests, may be subject to the penalty of prison from three months to one year, plus fines.\(^{37}\)

5.4 **Arbitration fees**

5.4.1 The Brazilian Arbitration Act contains no express provisions on arbitrators’ fees. Arbitrators may only secure payment of their fees if the arbitration agreement establishes this possibility. Generally, payment of arbitrators is contingent on rendering the award.

5.4.2 In practical terms, payment of a part of the arbitrator’s fee is used as a guarantee. If no specific amount is agreed upfront, the parties and the arbitrators can set the amount based on the number of hours that the arbitrators are expected to work.

5.4.3 In respect of institutional arbitral proceedings, each arbitral institution has its own rules governing the payment of administrative fees and the remuneration of arbitrators. For ad hoc arbitrations, there will be no administrative fees payable and the remuneration of the arbitrators will be agreed between the parties and the arbitrators (usually in the *Compromisso Arbitral*).

5.5 **Arbitrator immunity**

5.5.1 There are no specific legal provisions dealing with the immunity of arbitrators. However, as the function of an arbitrator is equivalent to that of a judge, the legal principles applying to the immunity of judges will, by analogy, be applicable to arbitrators.

\(^{35}\) *Ibid*, art 14 and Brazilian Code of Civil Procedure, art 133.

\(^{36}\) Brazilian Arbitration Act, art 17.

\(^{37}\) Law-decree no 2848, 7 December 1940, art 319.
6. Jurisdiction of the arbitral tribunal

6.1 Competence to rule on jurisdiction
6.1.1 The arbitral tribunal is entitled to rule on its own jurisdiction, including on the existence and validity of the arbitration agreement.\(^{38}\)

6.1.2 An arbitration agreement which is part of another agreement is treated as an independent (and severable) arbitration agreement (see paragraph 4.3.1 above). The invalidity of the agreement containing the arbitration agreement will therefore not automatically affect the validity of the arbitration agreement.

6.2 Power to order interim measures
6.2.1 Unless the parties have agreed otherwise, the arbitral tribunal is empowered to grant any interim measures to protect the parties’ rights and the integrity of the arbitral proceedings.\(^{39}\)

6.2.2 However, no decision or order on interim measures by the arbitral tribunal is directly enforceable. Instead, the competent state court must order the enforcement of the interim measures granted by the arbitral tribunal.\(^{40}\)

6.2.3 The Brazilian Arbitration Act does not expressly deal with the situation where parties may wish to apply directly to the state courts for interim measures, including any urgent interim measures of protection that may be necessary before an arbitral tribunal can be constituted (see paragraph 9.4.1 below).

7. Conduct of proceedings

7.1 Commencing an arbitration
7.1.1 Arbitral proceedings are deemed to commence when all of the arbitrators have accepted their appointment.\(^{41}\)

\(^{38}\) Brazilian Arbitration Act, art 8.

\(^{39}\) Ibid, art 22.

\(^{40}\) Ibid, art 22(4).

\(^{41}\) Ibid, art 19.
7.2 General procedural principles
7.2.1 Parties are free to choose the procedure to be followed by the arbitral tribunal.\textsuperscript{42}

7.2.2 If the parties do not agree upon the procedure to be applied – and unless the parties have agreed otherwise – the arbitral tribunal may choose the rules of procedure it considers most appropriate under the Brazilian Arbitration Act.\textsuperscript{43}

7.2.3 However, it should be noted that there is a tension between the unfettered discretion accorded by the Brazilian Arbitration Act and the provisions of the Panama Convention, which stipulate that, absent an express choice of procedural rules by the parties, the rules of procedure of the Inter-American Commercial Arbitration Commission shall apply.\textsuperscript{44}

7.2.4 Strictly speaking, the provisions of the Brazilian Arbitration Act prevail over those of the Panama Convention.\textsuperscript{45} It follows that, in an arbitration seated in Brazil to which the Panama Convention applies,\textsuperscript{46} the arbitral tribunal may choose the rules of procedure that it considers appropriate. Nevertheless, in such circumstances, arbitral tribunals may well elect to exercise their discretion in favour of adopting the rules of procedure of the Inter-American Commercial Arbitration Commission.

7.3 Seat and language of the arbitration
7.3.1 In general, parties are free to choose the seat and language of the arbitration. However, disputes arising under or out of certain types of contracts entered into with public bodies or government entities may only be resolved by arbitration if the seat of the arbitration is in Brazil and the language of the arbitration is Portuguese (see paragraph 12.3.4 below for further details).

7.3.2 The seat of the arbitration must be set out in the \textit{Compromisso Arbitral} and stated in the award.\textsuperscript{47}

\textsuperscript{42} Ibid, art 21.
\textsuperscript{43} Ibid, art 21(1).
\textsuperscript{44} Panama Convention, art 3.
\textsuperscript{45} International treaties ratified by Brazil have the same status as internal laws in Brazil and are subject to the principle \textit{lex posterior derogat priori} (the later law abrogates the inconsistent earlier law): see RE 80.004-SE. The Brazilian Arbitration Act was passed after the presidential decree bringing the Panama Convention into force in Brazil (Statutory Instrument no 1902 of 9 May 1996).
\textsuperscript{46} The Panama Convention applies to international commercial arbitrations between parties of the following signatory States: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela.
\textsuperscript{47} Brazilian Arbitration Act, art 10 and art 26, IV respectively.
7.4 Multi-party issues

7.4.1 There are no specific rules under the Brazilian Arbitration Act regarding the effects of an arbitration agreement on third parties. As a matter of doctrine, third parties cannot be included in arbitrations, even in cases of compulsory joinder, permissive joinder or third party intervention. However, the jurisprudence on this issue is not unanimous. The courts have been prepared to accept third party intervention in certain limited circumstances, such as where the third party is an interested member of one of the party's corporate groups, or where there is commonality of issues.

7.5 Oral hearings and written proceedings

7.5.1 The Brazilian Arbitration Act provides that the parties are free to decide whether to hold an oral hearing or whether to conduct the arbitration on a documents only basis.

7.5.2 The arbitral tribunal must hear the parties and give them the opportunity to make oral submissions, if so requested. The arbitral tribunal must also hear all the witnesses and experts (if they are called by the arbitral tribunal upon the request of the parties to explain their written reports). The parties are to be given sufficient prior notice of any hearings and any procedural action of the arbitral tribunal which involves the inspection of property or documents.

7.6 Default by one of the parties

7.6.1 Where there is an arbitration agreement but one of the parties shows resistance as to the initiation of arbitration, the interested party may apply to court for an order that the other party shall appear in court in order to prepare the Compromisso Arbitral. Depending on the wording of the arbitration agreement, the judge may then appoint a sole arbitrator to decide the merits of the case.

7.6.2 When a respondent fails to participate in an arbitration, the respondent's default will not prevent the award being issued.

---

48 Appeal no. 267450.4/6-00, 7th Chamber of Private Law of the São Paulo Civil Court.
49 RESp no. 653733.
50 Brazilian Arbitration Act, art 21.
51 Ibid, art 22(1).
52 Ibid, art 7.
53 Ibid, art 22(3).
7.7 Evidence generally

7.7.1 Any evidence lawfully obtained may be disclosed during the production of evidence stage of the arbitral proceedings.\textsuperscript{54} Apart from the principles of due process, equal treatment of the parties and ensuring the independence of the arbitrators,\textsuperscript{55} there are no mandatory rules of evidence.

7.7.2 Nevertheless, arbitration in Brazil continues to be strongly influenced by the local civil procedure rules. Many local arbitrators and counsel adopt the methods for taking evidence used before the state courts.

7.7.3 The arbitral tribunal may hear the testimony of parties and witnesses, request expert opinions or the production of evidence, either at the request of one of the parties, or of its own initiative. If an arbitrator is substituted during the arbitral procedure, his or her substitute may, at his or her discretion, determine what evidence shall be repeated.\textsuperscript{56}

7.7.4 Finally, it should be noted that the cross-examination of witnesses in Brazil, whilst possible, is different from the concept of cross-examination, as understood in common law jurisdictions. Based on the civil court’s approach to the examination of witnesses, the standard procedure in arbitral proceedings is for parties to seek the permission of the arbitral tribunal to ask the witness a particular question, with the arbitral tribunal freely deciding whether the question is justified or not.

7.8 Appointment of experts

7.8.1 The parties may rely on expert evidence in support of their case. Subject to any procedural rules agreed by the parties, an independent expert witness may also be appointed by the arbitral tribunal, at the request of the parties or of its own initiative.\textsuperscript{57}

7.8.2 There is no need for the arbitral tribunal to consult with the parties as to the questions to be submitted to experts. Arbitral tribunals will usually give the parties the opportunity to make their own observations on any expert report.

7.8.3 Where the arbitral tribunal appoints its own independent expert, the parties may also appoint “technical assistants” to that expert. The technical assistants may also produce reports, which will be taken into consideration by the arbitral tribunal.

\textsuperscript{54} Ibid, art 21.
\textsuperscript{55} Ibid, art 21(2).
\textsuperscript{56} Ibid, art 22(5).
\textsuperscript{57} Ibid, art 22.
Alternatively, the arbitral tribunal’s expert and the parties’ technical assistants may decide to issue a collegiate decision. Both the arbitral tribunal’s expert and/or any technical assistants appointed by the parties may be obliged to appear in hearings to answer questions from the arbitral tribunal and/or the parties.

7.9 Confidentiality

7.9.1 Brazilian law does not expressly deal with the confidentiality of arbitral proceedings. However, the general consensus is that awards are confidential and may only be published with the consent of the parties.

7.9.2 There are also no rules that prevent a party from using and referring to information disclosed in other arbitral proceedings.

7.9.3 The parties are free to provide for confidentiality themselves through a confidentiality agreement. Many of the institutional arbitration rules in Brazil include confidentiality obligations.58

7.10 Court assistance in taking evidence

7.10.1 The arbitral tribunal may request the assistance of the state courts to obtain evidence. For instance, they may ask the court to summon witnesses that have refused to attend voluntarily and give evidence. If a witness fails, without good cause, to comply with the arbitral tribunal’s request to give oral testimony, the arbitral tribunal may take such behaviour into account when determining the weight to be given to that witness’s evidence.59

8. Making of the award and termination of arbitral proceedings

8.1 Choice of law

8.1.1 Parties are free to choose the rules that shall be applied to the arbitration procedure, provided that they do not violate Brazilian public policy. Parties may also agree that the award shall be granted based on basic principles of law, common practice, or rules of international commerce.60

---

58 See, for example, the São Paulo Chamber of Mediation and Arbitration Rules, the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce Rules or the Corporate Chamber of Commerce in Brazil Rules.

59 Brazilian Arbitration Act, art 22(2) and 22(4).

60 Ibid, art 2.
8.1.2 As an alternative, the parties may authorise the arbitral tribunal to decide *ex aequo et bono* (instead of pursuant to the applicable law).\(^{61}\)

### 8.2 Time, form, content and notification of the award

8.2.1 The parties can stipulate the timeframe within which the award is to be issued, in accordance with the *Compromisso Arbitral*. In the absence of such provision, the award shall be rendered in writing within six months of the constitution of the arbitral tribunal. However, during the course of the arbitration, the parties and the arbitral tribunal may agree to extend this period.\(^{62}\)

8.2.2 Any award based on law (rather than *ex aequo et bono*) must be properly reasoned both in fact and in law. It must deal with all the issues submitted to arbitration as well as ancillary matters such as the costs of the arbitral proceedings.\(^{63}\) Where there are several arbitrators, the decision shall be reached by a majority vote. Where there is no majority, the decision of the chair shall prevail.\(^{64}\)

8.2.3 The award itself must be in writing and must contain the following:
- a report containing the names of the parties and a summary of the dispute;
- the reasoning of the decision, including the reasons for an award made by an arbitral tribunal acting as *amiable compositeur*;
- the actual decision, or *dispositive*, including the time limit for the fulfilment of obligations imposed on the parties; and
- date and place of making the award.\(^{65}\)

8.2.4 The award must be signed by all of the arbitrators. If one or more arbitrators cannot or do not wish to sign the award, the chair of the arbitral tribunal must certify this fact.\(^{66}\)

### 8.3 Settlement

8.3.1 Where the parties settle their dispute, the arbitral proceedings will terminate. At the request of the parties, the arbitral tribunal shall record the settlement in the form of an award on agreed terms.\(^ {67}\) An award on agreed terms has the same

---

\(^{63}\) *Ibid*, art 27.
\(^{64}\) *Ibid*, art 24 (1).
\(^{66}\) *Ibid*, art 26, sole paragraph.
\(^{67}\) *Ibid*, art 28.
effect as any other award made by an arbitral tribunal and must comply with the
requirements set out in paragraph 8.2.3 above.

8.4 Power to award interest and costs
8.4.1 The parties can decide in the Compromisso Arbitral how future costs of the
arbitration will be borne (including the arbitrators’ fees and the parties’ legal fees).68

8.4.2 In the absence of any prior agreement between the parties on this issue, the
arbitral tribunal will determine the costs of the arbitration and allocate the
responsibility for paying such costs between the parties.69 The arbitral tribunal may
order the parties to make deposits to cover expenses and actions as it deems
necessary.70

8.4.3 As a general rule, the winning party is entitled to recover its costs from the losing
party. However, if the winning party is only partly successful, its recovery may be
limited to those costs attributable to the extent of its success.

8.5 Termination of the proceedings
8.5.1 The arbitral proceedings terminate when the final award is issued. In certain
limited circumstances, the arbitral proceedings may terminate before the rendering
of the final award (for example, where an arbitrator dies or excuses him or herself
prior to being appointed and cannot be replaced).

8.6 Effect of an award
8.6.1 The award is effective and binding on the parties to the arbitration, as well as their
successors, in the same way as if the award was a court judgment. Once approved,
a foreign award has the same effect as a Brazilian court judgment (for further
details of the approval process, please see section 11.2 below).71

8.6.2 The courts do not have the power to re-hear and re-decide as between the parties
findings of fact and law previously determined by an arbitral tribunal.

8.7 Correction, clarification and issuance of a supplemental award
8.7.1 Any party may, within five days of receipt of an award, file a motion for the arbitral
tribunal to clarify the terms of the award.72 Such motion may request that the

68 Ibid, art 11.
69 Ibid, art 27.
70 Ibid, art 13 (7).
71 Law no. 5869 of 11 January 1973, art 484.
72 Brazilian Arbitration Act, art 30.
arbitral tribunal correct any material error and/or clarify the grounds on which the award has been determined. Less commonly, such motion may be used to request that the arbitral tribunal decide a claim presented in the arbitral proceedings that it had failed to determine in its award. Such motions may be submitted even where the party expressly confirms that it will not be appealing the award. If accepted, the arbitral tribunal shall issue the corrected award or addendum to the parties within ten days of the request.  

9. Role of the courts

9.1 Jurisdiction of the courts

9.1.1 The courts are excluded from assuming jurisdiction over disputes that the parties have agreed to submit to arbitration (as explained in paragraph 4.1.4 above).

9.1.2 However, the Brazilian Arbitration Act gives the courts limited jurisdiction to provide legal assistance to the arbitral process in certain circumstances.

9.1.3 In addition to the courts’ powers to enforce interim measures in relation to the appointment and challenge of arbitrators (as discussed above), the courts have the power to determine whether the agreement is null and void, inoperative, or incapable of being performed.

9.1.4 The courts may also assist in the enforcement of interim measures rendered by the arbitral tribunal.

9.2 Dismissal of court proceedings

9.2.1 In the event that an action regarding a matter which is subject to an arbitration agreement is brought before a court, the court is required to immediately terminate the proceeding without decision on the merits.  If the court fails to terminate the proceedings, the respondent can raise the existence of the arbitration agreement as a defence. The court will terminate the proceedings unless it considers the arbitration agreement to be null and void, inoperative, or incapable of being performed.

---

73 Ibid, art 30, sole paragraph.
74 Brazilian Code of Civil Procedure, art 267 VII.
75 Ibid, art 301 IX.
9.3 Preliminary rulings on jurisdiction
9.3.1 A party has 90 days from the date of receipt of the arbitral tribunal’s ruling on jurisdiction in which to request that the competent court renders a decision on whether or not the arbitral tribunal has jurisdiction.\(^{76}\)

9.4 Interim protective measures
9.4.1 The courts in Brazil have jurisdiction to grant interim measures in support of arbitral proceedings both before and after the constitution of the arbitral tribunal.\(^{77}\) In practice, any decision or order on interim measures issued by the arbitral tribunal is not enforceable (only the final award is enforceable). The arbitral tribunal may, therefore, request any court having jurisdiction to assist with enforcing such interim measures.

9.5 Obtaining evidence and other court assistance
9.5.1 The local courts have jurisdiction to assist the arbitral tribunal in obtaining evidence.\(^{78}\)

10. Challenging and appealing an award through the courts

10.1 Jurisdiction of the courts
10.1.1 After the award is made, a party has 90 days from the date the award is rendered or modified to apply to the court for an order nullifying the award.\(^{79}\) Such application should be made to the court which would ordinarily have had jurisdiction over the substantive dispute in arbitration, were it not for the arbitration agreement.

10.2 Appeals
10.2.1 The arbitrator acts as judge of fact and law. Awards are not generally subject to appeal by the courts.\(^{80}\) An award may however be annulled if one of the limited grounds set out in paragraph 10.3.1 below applies.

\(^{76}\) Brazilian Arbitration Act, art 20 and art 33 (1).

\(^{77}\) Examples of such powers are discussed at paragraph 5.2.4 in relation to challenging the appointment of an arbitrator and paragraph 9.5.1 in relation to obtaining evidence.

\(^{78}\) Brazilian Arbitration Act, art 22 (4).

\(^{79}\) ibid, art 33 (1).

\(^{80}\) ibid, art 18.
10.3 Applications to set aside an award

10.3.1 The award may be challenged before the competent court and set aside for any one or more of the following reasons:

(i) the arbitration agreement is null and void, inoperative or incapable of being performed;
(ii) the award is issued by one or more individuals who are not capable of acting as an arbitrator;
(iii) the award does not comply with the requirements provided in the Brazilian Arbitration Act as set out in paragraph 8.2.3 above;
(iv) the award extends to issues that fall outside the scope of the arbitration agreement;
(v) the award does not decide all issues submitted to the arbitral tribunal for resolution;
(vi) it is proved that the award was rendered under illegal circumstances (extortion, corruption, etc);
(vii) the award was issued after the agreed time limit; or
(viii) an arbitrator failed to act impartially or independently when rendering the award, or disregarded the obligation to treat the parties equally.  

10.3.2 The application for setting aside the award must be submitted to the relevant court within 90 days of receipt by the party of the award.  

10.3.3 The competent state court may either declare the award null and void in the case of grounds (i), (ii), (vi), (vii) and (viii) above, or order the arbitral tribunal to make a new award.  

11. Recognition and enforcement of awards

11.1 Domestic awards

11.1.1 Awards rendered in Brazil are treated as domestic awards. This is the case even where the parties have selected foreign arbitration rules, such as the ICC Rules, to govern the procedure of the arbitration.  

---

81 Ibid, art 32.
82 Ibid, art 33(1).
83 Ibid, art 33(2) I.
84 Ibid, art 34, sole paragraph.
85 REsp 1231554.
11.1.2 An award has the same effect as a final, binding and non-appealable court judgment.\textsuperscript{86} The court which has jurisdiction for enforcement is the local court where the arbitration procedure was held, except in respect of a foreign award, which shall follow the enforcement procedure set out below.

11.2 Foreign awards

11.2.1 Awards rendered outside of Brazil are enforceable in Brazil according to international treaties ratified by Brazil (principally the New York Convention – see paragraph 11.2.3 below). In the absence of any applicable treaty, foreign awards shall be recognised and enforced in accordance with the rules provided in the Brazilian Arbitration Act.

11.2.2 Foreign awards are subject to approval by the Superior Court of Justice.\textsuperscript{87} The approval of the award by the Superior Court of Justice is subject to confirmation of:

- the capacity of the parties to the arbitration agreement;
- the validity of the arbitration agreement according to the law to which the parties have submitted it or, in the absence of an express choice of law, according to the law of the seat where the award was issued;
- the respondent having been given proper notice of the arbitration procedure, including the right to submit its defence;
- the award not exceeding the scope of the arbitration agreement (unless it is possible to sever those excesses from the valid part of the award);
- the award being duly enforceable and not having been set aside or suspended by a court of the jurisdiction in which it has been issued;
- the award not involving a dispute which, according to Brazilian law, may not be resolved by means of arbitration; and
- the award not being contrary to Brazilian public policy.

11.2.3 The grounds for refusal set out above are virtually identical to those set out in the New York Convention and the Panama Convention, two treaties on the enforcement of foreign awards to which Brazil is a signatory party. Brazil has been a signatory to the New York Convention since 2002. The provisions of the New York Convention are in force in Brazil and apply to the recognition and enforcement of foreign awards. Brazil has not made any reservations to the New York Convention.

\textsuperscript{86} Brazilian Arbitration Act, art 18.

\textsuperscript{87} Ibid, art 35. Jurisdiction to hear approval applications was transferred from the Brazilian Supreme Court to the Superior Court of Justice under Constitutional Amendment No.45 of 8 December 2004. However, the text of the Brazilian Arbitration Act has yet to be amended to reflect this change.
Convention,\textsuperscript{88} therefore all foreign awards should in principle be recognised and enforced in Brazil under the New York Convention (even if made in the territory of a non-signatory State).

11.2.4 Once the award is approved by the Superior Court of Justice, it shall be enforced by a lower Brazilian federal court. It should be noted that the approval process renders the award public.

12. Special provisions and considerations

12.1 Consumers
12.1.1 The requirements set out in paragraph 4.1.3 above for an arbitration clause which appears in a \textit{contrato de adesão} or adhesion/standard form contract are equally applicable where the weaker party is a consumer. As such, a consumer will not be bound by any arbitration agreement in a \textit{contrato de adesão} unless the requirements set out in paragraph 4.1.3 above have been satisfied.\textsuperscript{89}

12.2 Employment law
12.2.1 For the purposes of Brazilian labour law, a distinction is drawn between collective and individual labour disputes. Collective labour disputes (i.e. those involving a group of employees and an employer or a group of employers) may be submitted to arbitration.\textsuperscript{90} In contrast, with limited exceptions, individual labour or employment disputes may not be resolved by arbitration.\textsuperscript{91}

12.3 Government participation in arbitration
12.3.1 Historically, rights of the government were non-disputable under Brazilian law and, as such, could not be subject to arbitration. However, over the last decade, there has been a shift in this area. Legislative changes have made it possible for parties contracting with public authorities to provide for arbitration (or other private dispute resolution methods) as a means of resolving disputes.

12.3.2 One of the most important laws for foreign investors in Brazil is the 2004 Public Private Partnerships Law (\textit{PPP Law}),\textsuperscript{92} which sets out the general rules for bidding


\textsuperscript{89} Brazilian Arbitration Act, art 4(2).

\textsuperscript{90} Brazilian Constitution, art 14(2).

\textsuperscript{91} See, for example, Law Decree no. 5.452 of 1 May 1943, art 9; TST-RR-79500-61.2006.5.05.0028.

\textsuperscript{92} Law no. 11079 of 30 December 2004.
and contracting public private partnerships (which are arrangements between public authorities and the private sector for the performance of large-sized works and utility services, by means of sponsored or administrative concessions, sharing the venture risks and primarily counting on private funding). Parties to contracts entered into under the auspices of the PPP Law are allowed to resolve disputes arising under or out of such contracts using alternative dispute resolution methods, including arbitration.93

12.3.3 Similarly, the law governing the concession of public services94 was amended in 2005 to allow for the use of alternative dispute resolution methods, including arbitration, to resolve disputes arising out of this type of agreements.95

12.3.4 However, both the PPP Law and the law governing the concession of public services stipulate that:
   — any such arbitral proceedings must be held in Brazil;
   — the language of the arbitration must be Portuguese; and
   — the arbitration be conducted in accordance with the Brazilian Arbitration Act.96

13. Concluding thoughts and themes

13.1.1 As noted in the introduction, arbitration has grown exponentially in Brazil over the last ten years and is now perceived as the natural method of dispute resolution among private contracting parties in Brazil.

13.1.2 Although the Brazilian Arbitration Act may not always have been applied uniformly by the courts in the 26 states of Brazil, the Brazilian judiciary has an excellent track record of upholding arbitration agreements and supporting the arbitral process, where called upon to do so.

13.1.3 These days, the vast majority of arbitral proceedings in Brazil run smoothly without any major obstacles, with the parties complying voluntarily with the award. Few awards are the subject of an application for annulment. On the rare occasion that an application for annulment is upheld by the state court, this tends to be for technical reasons, respecting the jurisdiction of the arbitral tribunal, the scope of the Brazilian Arbitration Act and of the arbitration agreement.

93 Ibid, art 11, III.
95 Law no. 11196 of 21 November 2005, art 120.
96 See Law no. 11079 of 30 December 2004, art 11, III; and Law no. 8987 of 13 February 1995, art 23-A respectively.
13.1.4 Turning to future developments in arbitration procedure in Brazil, the Brazilian Senate passed the New Civil Procedure Code Bill on 15 December 2010. The bill is expected to be the subject of significant debate in the House of Representatives. The New Civil Procedure Code Bill includes certain provisions relating specifically to arbitration, such as the introduction of a complaints procedure to challenge the existence of arbitration agreements and a procedure for bringing interlocutory appeals.

14. Contacts

CMS Bureau Francis Lefebvre
Marcelo T. de Alvear 612 Piso 1
C1058AAH Capital Federal
Buenos Aires
Argentina

Marcelo Cippitelli
T +54 11 4311 1008
E mcippitelli@cms-bfl.com.ar

CMS Cameron McKenna LLP
Consultores em Direito Estrangeiro
Travessa do Ouvidor, 5 – Sala 6.01
Centro, Rio de Janeiro, RJ
CEP 20040-040
Brazil

Ted Rhodes
T +55 21 3723 6151
E ted.rhodes@cms-cmck.com
ARBITRATION IN BULGARIA

By Kostadin Sirleshtov and Pavlin Stoyanoff, CMS
Table of Contents

1. Historical background and overview 179

2. Scope of application and general provisions of the Bulgarian Arbitration Act 180
   2.1 Subject matter 180
   2.2 Structure of the law 181
   2.3 General principles 181

3. The arbitration agreement 183
   3.1 Definitions 183
   3.2 Formal requirements 184
   3.3 Special tests and requirements of the jurisdiction 184
   3.4 Separability 185
   3.5 Legal consequences of a binding arbitration agreement 185

4. Composition of the arbitral tribunal 185
   4.1 Constitution of the arbitral tribunal 185
   4.2 Procedure for challenging and substituting arbitrators 186
   4.3 Arbitration fees and expenses 187

5. Jurisdiction of the arbitral tribunal 188
   5.1 Competence to rule on jurisdiction 188
   5.2 Power to order interim measures 189

6. Conduct of proceedings 189
   6.1 Commencing an arbitration 189
   6.2 General procedural principles 189
   6.3 Seat, place of hearings and language of arbitration 190
   6.4 Multi-party issues 190
   6.5 Oral hearings and written proceedings 191
   6.6 Submission of written statements 191
   6.7 Notice of hearings and inspections 192
   6.8 Default by one of the parties 192
   6.9 Taking of evidence 193
   6.10 Appointment of experts 193
   6.11 Confidentiality 193
   6.12 Court assistance in taking evidence 194
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Making of the award and termination of proceedings</td>
<td>194</td>
</tr>
<tr>
<td>7.1 Choice of law</td>
<td>194</td>
</tr>
<tr>
<td>7.2 Timing, form, content and notification of an award</td>
<td>195</td>
</tr>
<tr>
<td>7.3 Settlement</td>
<td>195</td>
</tr>
<tr>
<td>7.4 Power to award interest and costs</td>
<td>196</td>
</tr>
<tr>
<td>7.5 Termination of the proceedings</td>
<td>196</td>
</tr>
<tr>
<td>7.6 Effect of an award</td>
<td>196</td>
</tr>
<tr>
<td>7.7 Correction, clarification and issuance of a supplemental award</td>
<td>197</td>
</tr>
<tr>
<td>8. Role of the courts</td>
<td>198</td>
</tr>
<tr>
<td>8.1 Jurisdiction of the courts</td>
<td>198</td>
</tr>
<tr>
<td>8.2 Termination of court proceedings and preliminary rulings on</td>
<td>198</td>
</tr>
<tr>
<td>jurisdiction</td>
<td></td>
</tr>
<tr>
<td>8.3 Interim protective measures, obtaining evidence and other court assistance</td>
<td>198</td>
</tr>
<tr>
<td>9. Challenging and appealing an award through the courts</td>
<td>198</td>
</tr>
<tr>
<td>10. Recognition and enforcement of awards</td>
<td>200</td>
</tr>
<tr>
<td>10.1 Domestic awards</td>
<td>200</td>
</tr>
<tr>
<td>10.2 Foreign awards</td>
<td>200</td>
</tr>
<tr>
<td>11. Special provisions and considerations</td>
<td>201</td>
</tr>
<tr>
<td>11.1 Consumers</td>
<td>201</td>
</tr>
<tr>
<td>11.2 Employment law</td>
<td>202</td>
</tr>
<tr>
<td>12. Concluding thoughts and themes</td>
<td>202</td>
</tr>
<tr>
<td>13. Contacts</td>
<td>203</td>
</tr>
</tbody>
</table>
1. Historical background and overview

1.1.1 For a considerable period of time (1952–1988), arbitration in Bulgaria was largely unregulated and domestic arbitration was forbidden.

1.1.2 The Bulgarian International Commercial Arbitration Act 1988 (Bulgarian Arbitration Act) (as amended),\(^1\) which adopted in large part, the provisions of the Model Law (1985),\(^2\) now regulates in detail international arbitration in Bulgaria. In 1989, the Bulgarian State Council issued Decree No 56 on Economic Activity allowing, for the first time since 1952, the arbitration of domestic disputes, although only between commercial entities. In the period 1992–1993, arbitration became an option for almost all civil disputes and the rules applicable to domestic arbitration were amended to bring them closer in line with the rules applicable to international arbitration.

1.1.3 Thus, despite its official title, the Bulgarian Arbitration Act now allows and regulates both international and domestic arbitration.

1.1.4 Other relevant national legal instruments relating to arbitration include the Bulgarian Civil Procedural Code 2007 (Bulgarian CPC) and the Private International Law Code 2005 (Bulgarian PILC).

1.1.5 These national legal instruments are complemented, inter alia, by two important international conventions: the New York Convention,\(^3\) ratified by Bulgaria in 1961; and the 1961 European Convention, ratified by Bulgaria in 1964.

1.1.6 Currently, the most important and well established arbitral institutions in Bulgaria are the Arbitration Court of the Bulgarian Chamber of Commerce and Industry (BCCI) and the Arbitration Court of the Bulgarian Industrial Association (BIA), both of which have jurisdiction to hear a wide range of arbitration disputes.

---

1 Law on International Commercial Arbitration (Published in State Gazette No 60 of 5 August 1988), as amended by the Law amending the Law on International Commercial Arbitration (Published in State Gazette No 93 of 2 November 1993).


2. Scope of application and general provisions of the Bulgarian Arbitration Act

2.1 Subject matter

2.1.1 The Bulgarian Arbitration Act is a general legal instrument applicable to all types of commercial arbitration where the seat of the arbitration is in Bulgaria, including:
— institutional and ad hoc arbitration;
— international and domestic arbitration (the Bulgarian Arbitration Act defines domestic arbitration as arbitration between parties both of whom have their place of residence or registration in Bulgaria, unless, in some cases, one party is predominantly owned by a foreign person or entity); and
— arbitration at law and arbitration ex aequo et bono (i.e. in accordance with what is fair and equitable), although the Bulgarian Arbitration Act only permits the latter in the context of contractual disputes where there is no express contractual provision dealing with the issue in dispute or where there is a need to adjust the terms of a contract to take into account new facts that have arisen since signature.

2.1.2 The Bulgarian Arbitration Act does not apply to disputes that solely concern proving the existence or non-existence of certain facts (e.g. disputes about the quality of goods, completion of construction works, existence and causation of damage, etc, which are qualified as non-legal disputes by legal doctrine).

2.1.3 The Bulgarian Arbitration Act expressly provides that a state, state institution or state agency may be party to international commercial arbitral proceedings.

2.1.4 In contrast to the law governing national court proceedings (contained in the Bulgarian CPC), the Bulgarian Arbitration Act contains predominantly non-mandatory provisions from which the parties are free to derogate by agreement. The arbitral institutions adopt a similar approach, allowing the parties to derogate from their rules of procedure. The arbitral institutions are also entitled to deviate from the non-mandatory provisions in the Bulgarian Arbitration Act when creating their rules of procedure.

---

5 Bulgarian Arbitration Act, s 1(2).
7 Bulgarian Arbitration Act, s 3.
2.1.5 The Bulgarian Arbitration Act does not provide for the automatic application of the Bulgarian CPC in the event of gaps in the Bulgarian Arbitration Act. However, in practice, where there is no provision of certain procedural matters by the parties’ arbitration agreement, the rules of procedure of the relevant arbitral institution or arbitrators tend to apply the rules of the Bulgarian CPC.

2.2 Structure of the law

2.2.1 The Bulgarian Arbitration Act contains seven chapters, which are structured as follows:

(i) general provisions;
(ii) arbitration agreement;
(iii) composition of the arbitral tribunal;
(iv) jurisdiction of the arbitral tribunal;
(v) conduct of the arbitral proceedings;
(vi) making of the award and termination of the arbitral proceedings; and
(vii) setting aside, recognition and enforcement of the award.

2.3 General principles

2.3.1 The Bulgarian Arbitration Act does not expressly list the principles governing the regulation and organisation of arbitral proceedings. However, the following general principles can be inferred from legal sources and day-to-day practice.\(^8\)

Equality and due process

2.3.2 The principles of equality between the parties and due process are the cornerstones of arbitration practice in Bulgaria. Pursuant to these principles, the parties must be given an opportunity to participate in the proceedings and be granted an equal opportunity to present their case.\(^9\) These two principles are mandatory in nature and cannot be derogated from by agreement of the parties. Any agreement violating these principles is invalid and constitutes a ground for setting aside the award.\(^10\)

Party autonomy

2.3.3 The principle of party autonomy is embodied in many provisions of the Bulgarian Arbitration Act. For example:

— the parties’ right to determine the constitution and composition of the arbitral tribunal;\(^11\)

---


\(^9\) Bulgarian Arbitration Act, s 22 and 24.

\(^10\) Ibid, s 47, items 3 and 5.

\(^11\) Ibid, s 12.
— the right to the challenge and substitution of arbitrators;\textsuperscript{12}
— the right to determine the number of arbitrators;\textsuperscript{13} and
— the right to determine the procedure to be followed during the arbitration.\textsuperscript{14}

*The arbitral tribunal must not exceed its authority*

2.3.4 This principle derives from and is a precondition to the effective application of the principle of party autonomy. In essence, the principle that the arbitral tribunal must not exceed its authority dictates that an arbitral tribunal must only rule on the issues submitted to it by the parties and shall not decide on issues beyond the scope of the submission to arbitration or beyond the scope of the arbitration agreement. A related principle is that the arbitral tribunal shall ensure that it rules on all issues submitted to arbitration by the parties.

2.3.5 To allow the arbitral tribunal to go beyond the matters agreed by the parties would be to undermine the principle of “consensus”, which lies at the heart of the arbitral process. The violation of this principle can lead to the setting aside of the award.\textsuperscript{15}

*Right of defence*

2.3.6 The right of defence is a basic principle of Bulgarian procedural law. The parties must be given an opportunity to participate in the arbitral proceedings and to present and prove their case by advancing facts and arguments to defend their substantive rights and interests. If a party has not been given an opportunity to participate in the proceedings, the award may be set aside.\textsuperscript{16}

*The right to an oral hearing*

2.3.7 Whilst commonly respected in practice, the right to an oral hearing is not absolute in arbitral proceedings in Bulgaria. The arbitral tribunal may, with the agreement of the parties, determine a dispute solely on the basis of written evidence and without convening an oral hearing. If the parties have not determined the procedure to be followed, the arbitral tribunal shall determine whether or not it considers an oral hearing to be necessary,\textsuperscript{17} provided that the right of defence of the parties is not breached or impeded. Nevertheless, oral hearings are held in most arbitral proceedings.

\textsuperscript{12} Ibid, s 15.
\textsuperscript{13} Ibid, s 11(1).
\textsuperscript{14} Ibid, s 24–26, 30 and 33(1).
\textsuperscript{15} Ibid, s 47, item 3.
\textsuperscript{16} Ibid, s 47, item 4.
\textsuperscript{17} Ibid, s 30.
The parties’ unrestricted right to choose a representative

2.3.8 In national court proceedings, parties must be represented by a lawyer. Conversely, in arbitral proceedings the parties can be represented by any natural person. Representatives may, therefore, include economists, technical or IT specialists and other professionals. In addition, a party may be represented by a non-Bulgarian lawyer in arbitral proceedings.

3. The arbitration agreement

3.1 Definitions

3.1.1 The Bulgarian Arbitration Act defines the term “arbitration agreement” as: “…the parties’ agreement to submit to arbitration all, or some, of the parties’ disputes that may arise, or have arisen, in respect of a particular contractual or non-contractual legal relationship between them.”

3.1.2 This definition sets out the minimum requirements for an arbitration agreement to be valid. The parties may not stipulate that all of their potential future disputes arising out of any undetermined relationship shall be settled through arbitration. The arbitration agreement must specify the dispute, or at least the legal relationship out of which a dispute may arise. Subject to certain restrictions imposed by mandatory provisions of Bulgarian legislation or the chosen arbitral institution’s procedural rules, the arbitration agreement may also include provisions relating to:
— the composition of the arbitral tribunal;
— the appointment, challenge and replacement of arbitrators;
— the time and seat of the arbitral proceedings;
— the procedural norms to be followed by the arbitral tribunal (including a possible preliminary recourse to conciliation);
— the allocation of costs between the parties;
— the form and content of the award; and
— the language of the arbitration.

3.1.3 An arbitration agreement may take the form of a discrete contract or be included as a clause in a larger contract that has been entered into between the parties. It may be entered into either in the form of a submission agreement (i.e. in relation...
to a specific dispute that has already arisen) or an arbitration clause in a larger agreement (i.e. in relation to future disputes arising out of a defined relationship).

3.2 **Formal requirements**

3.2.1 The arbitration agreement must be signed and be in writing. This requirement is deemed to have been satisfied if the arbitration agreement is contained in a document that has been signed by the parties (e.g. a letter, telex, telegram or any other means of communication). The parties must have full legal capacity in order for the arbitration agreement to be binding.

3.2.2 There is also a valid arbitration agreement if the respondent consents to the dispute being settled by arbitration after the commencement of the arbitral proceedings or if the respondent participates in the arbitral proceedings without contesting the jurisdiction of the arbitral tribunal. The declaration of consent should be made in writing or pronounced before the arbitral tribunal and evidenced in the minutes of the hearing.

3.2.3 Bulgarian law permits parties to an international arbitration agreement to select the applicable law governing the arbitration agreement, which would apply for example, in the event of a dispute as to the validity or scope of the arbitration agreement. If the parties have not explicitly chosen a law to apply to the arbitration agreement, the *lex loci* will apply. In respect of domestic arbitration, the parties may not choose another law to govern the arbitration agreement which will automatically be governed by the Bulgarian Arbitration Act.

3.3 **Special tests and requirements of the jurisdiction**

3.3.1 Only civil “property disputes” may be the subject of arbitral proceedings. Therefore, no public law disputes may be referred to arbitral tribunals under the Bulgarian Arbitration Act, even if they concern civil persons. The term “property dispute” is defined as any dispute relating to a material interest capable of valuation in monetary terms. Such dispute may not be a non-legal type of dispute.

---

19 Bulgarian Arbitration Act, s 7(2).
20 Ibid.
21 Ibid, s 7(3).
23 ИМУЩЕСТВЕНИ СПОРОВЕ, free translation, Bulgarian Arbitration Act, s 1(2); and Bulgarian CPC s 19(1).
25 See paragraph 2.1.2 above.
3.3.2 However, under the Bulgarian CPC some civil property disputes are non-arbitrable. Such disputes concern interests in and rights to possession of real estate property, maintenance obligations and employment relationships.\textsuperscript{26}

3.4 \textbf{Separability}

3.4.1 The arbitration clause in a contract is considered to be “separate” from the main contract of which it forms a part and, as such, survives the termination of that contract. This is known as the principle of separability. This principle also dictates that any assignment of rights under the main contract does not automatically assign the rights under the arbitration clause.\textsuperscript{27} However, the parties may agree that any assignment of rights under the main contract shall also apply to the arbitration agreement. If there is any ambiguity as to whether the arbitration clause has been assigned or not, the court or arbitral tribunal shall look at the parties' actual intentions and the general rules of interpretation of contracts apply. The validity of an arbitration agreement shall be determined by the law governing that arbitration agreement.

3.5 \textbf{Legal consequences of a binding arbitration agreement}

3.5.1 The most obvious consequence of a binding arbitration agreement will be to allow the parties to resolve their dispute by way of arbitration, rather than through litigation before a national court.

3.5.2 Secondly, as the arbitration agreement is contractual in nature and therefore only binding on the parties to that contract, in principle no third party may join the arbitral proceedings without the consent of the parties.

3.5.3 Finally, the arbitration agreement has contractual force between the parties and, therefore, obliges the parties to adhere to its terms and conditions. In the event of any breach of the arbitration agreement, the party in breach may be liable in damages to the other party in accordance with normal contract law principles.

4. \textbf{Composition of the arbitral tribunal}

4.1 \textbf{Constitution of the arbitral tribunal}

4.1.1 The parties may determine the number of arbitrators and may appoint an even number of arbitrators if they wish. If the parties do not agree upon the number of arbitrators, the number of arbitrators shall be three.\textsuperscript{28}

\textsuperscript{26} Bulgarian CPC, s 19(1).
\textsuperscript{27} Bulgarian Arbitration Act, s 19(2).
\textsuperscript{28} \textit{Ibid}, s 11(1).
4.1.2 The parties may stipulate a procedure for appointing the arbitrators. If they fail to do so, each party shall appoint an arbitrator and these arbitrators shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days from the receipt of the other party’s request to do so, or the two arbitrators appointed by the parties fail to appoint a third arbitrator within 30 days from the date of their appointment, the president of the BCCI, upon the request of either party, shall appoint the final arbitrator(s). The decision of the president is final. This rule applies to institutional arbitral proceedings as well as to ad hoc arbitral proceedings, unless the rules of the particular arbitral institution provide otherwise.

4.1.3 If a dispute is to be determined by a sole arbitrator and the parties cannot agree upon his/her identity, such arbitrator shall be appointed in the same manner as for the final arbitrator(s) forming an arbitral tribunal.

4.1.4 The parties may appoint a non-Bulgarian arbitrator in international arbitral proceedings. However, in domestic arbitral proceedings, the parties may not appoint a non-Bulgarian arbitrator.

4.1.5 There are no formal requirements in respect of who may be an arbitrator. However, minors are not able to be arbitrators because they do not have full legal capacity.

4.2 Procedure for challenging and substituting arbitrators

4.2.1 The general principles of independence and impartiality apply in the context of arbitral proceedings and arbitrators can be challenged if they fail to respect these principles. Arbitrators must disclose any facts which may raise reasonable doubts as to their independence or impartiality. This obligation applies from the time of the arbitrator’s appointment and continues to apply throughout the duration of the arbitration.

4.2.2 Arbitrators can only be challenged if there are reasonable doubts as to their independence or impartiality, or if they fail to meet the qualification requirements stipulated in the arbitration agreement. A party who has participated in the

---

29 Ibid, s 12(1).
30 Ibid, s 12(2).
31 Ibid, s 12(4).
32 See paragraph 4.1.2 above.
33 Bulgarian Arbitration Act, s 11(2).
34 Ibid, s 13.
35 Ibid.
36 Bulgarian Arbitration Act, s 14(1).
appointment of an arbitrator may only challenge that appointment on grounds that have come to its knowledge after the date of such appointment.\textsuperscript{37}

4.2.3 The procedure for challenging arbitrators may be stipulated in the arbitration agreement. If such procedure has not been agreed by the parties, a party may challenge an arbitrator no later than 15 days from the date of the constitution of the arbitral tribunal or from the date on which the party becomes aware of the facts justifying the challenge. Any challenge should be reasoned and in writing. The challenge should be submitted to the arbitral tribunal. The arbitral tribunal must rule on the challenge, unless the challenged arbitrator withdraws voluntarily or all of the parties consent to the challenge.\textsuperscript{38}

4.2.4 If the arbitral tribunal dismisses the challenge, the challenging party may, within seven days from the notification of the arbitral tribunal’s ruling, submit an appeal against that ruling to the City Court of Sofia.\textsuperscript{39} The proceedings before the City Court of Sofia are governed by the Bulgarian CPC and the City Court of Sofia’s decision is final. The challenge and the appeal to the City Court of Sofia do not have the effect of staying the arbitral proceedings and the arbitral tribunal may issue a final award despite the existence of the challenge and an appeal.

4.2.5 If arbitrators are not able to perform or unreasonably omit to perform their duties, their powers may be terminated.\textsuperscript{40} If arbitrators do not withdraw voluntarily or the parties do not reach an agreement on the termination of their powers, each party may refer to the City Court of Sofia to rule on this matter. The City Court of Sofia’s decision is final.\textsuperscript{41}

4.2.6 If an arbitrator’s powers have been terminated, the appointment of a new arbitrator must be made in accordance with the same procedure as is used to appoint the original arbitrator,\textsuperscript{42} unless the parties have stipulated a different procedure or have agreed the names of possible replacement arbitrators in advance.

4.3 Arbitration fees and expenses
4.3.1 The Bulgarian Arbitration Act does not provide any general rules regarding the fixing, quantum or payment of arbitrators’ fees and expenses. These should be

\begin{itemize}
\item \textsuperscript{37} Ibid, s 14(2).
\item \textsuperscript{38} Ibid, s 15.
\item \textsuperscript{39} Ibid, s 16.
\item \textsuperscript{40} Ibid, s 17(1).
\item \textsuperscript{41} Ibid, s 17(2).
\item \textsuperscript{42} Ibid, s 18.
\end{itemize}
determined between the parties and the arbitrators prior to appointment, either on an ad hoc basis or in accordance with the procedural rules of any arbitral institution agreed by the parties.

4.3.2 The procedural rules of the arbitral institutions usually follow the principle that costs “follow the event”, which means that the losing party shall pay the reasonable costs of the arbitration.

4.3.3 Some of the arbitral institutions differentiate their fees according to whether the arbitration is international or domestic (e.g. BCCI). The costs shall normally include:
— the arbitration fee, which is proportionate to the value of the claim and covers the remuneration of the arbitrators and the general expenses of the institution;
— other expenses (sometimes paid as a deposit), which cover, for example, the costs incurred for the delivery of documents and notifications, experts, translators, stenographers, issuance of certificates and collection of evidence; and
— the parties’ legal costs and disbursements.

4.3.4 The arbitral tribunal may refuse to award a party all of the claimed arbitration costs if it decides that they are excessive in light of the circumstances of a particular case.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The arbitral tribunal may rule on its own jurisdiction, even if the challenge to its jurisdiction is based on the alleged absence or invalidity of the arbitration agreement.\(^{43}\)

5.1.2 Any challenge to the arbitral tribunal’s jurisdiction should, in principle, be raised no later than in the statement of defence.\(^{44}\) A party who has participated in the appointment of the arbitrator(s) may also challenge the jurisdiction of the arbitral tribunal. A challenge to the arbitral tribunal’s jurisdiction in respect of a particular issue must be made immediately after such issue becomes apparent during the proceedings.\(^{45}\) Despite these rules, the arbitral tribunal may accept a later challenge if there are justifiable reasons for the delay.\(^{46}\)

---

\(^{43}\) Ibid, s 19(1).

\(^{44}\) Ibid, s 20(1).

\(^{45}\) Ibid, s 20(2).

\(^{46}\) Ibid, s 20(3).
5.1.3 The arbitral tribunal may rule on the challenge to its jurisdiction in a preliminary ruling or in the final award.\textsuperscript{47} This ruling is not subject to appeal before a national court.

5.2 Power to order interim measures

5.2.1 Provided that the parties have not agreed otherwise, the arbitral tribunal may, upon a request by one of the parties, order preliminary measures against the other party in order to protect the requesting party’s rights. The arbitral tribunal may require the requesting party to provide security in support of any such order.\textsuperscript{48}

5.2.2 In addition, each of the parties to an arbitration agreement may seek a preliminary injunction or other interim measures from a national court during the course of the arbitral proceedings in order to preserve the claim or evidence.\textsuperscript{49}

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 In respect of ad hoc arbitration, the arbitral proceedings begin on the day when the respondent receives the claimant’s request for arbitration.\textsuperscript{50} The procedural rules of the arbitral institutions usually provide that institutional arbitral proceedings commence on the date when the claim is filed at the offices of the relevant arbitral institution.

6.2 General procedural principles

6.2.1 The parties may agree on the procedure that the arbitral tribunal shall follow. Arbitral institutions normally allow the parties to deviate from their procedural rules by consent. Unless the parties agree otherwise, the arbitral tribunal shall proceed with the case expeditiously and in accordance with such procedural rules as it considers are applicable. In any event, the arbitral tribunal must grant each of the parties the opportunity to defend its rights, based on the principle of equality of the parties.\textsuperscript{51}

\textsuperscript{47} Ibid, s 20(4).
\textsuperscript{48} Ibid, s 21.
\textsuperscript{49} Ibid, s 9.
\textsuperscript{50} Ibid, s 23.
\textsuperscript{51} Ibid, s 24.
6.3 **Seat, place of hearings and language of arbitration**

6.3.1 The seat of domestic arbitration may only be in Bulgaria. The parties to an international arbitration may choose its seat outside Bulgaria. The Bulgarian Arbitration Act only applies if the seat of arbitration is in Bulgaria.

6.3.2 The seat of the arbitral proceedings may be agreed between the parties. In the absence of agreement, the seat of the proceedings shall be determined by the arbitral tribunal, taking into consideration the circumstances of the case and convenience for the parties. The procedural rules of the arbitral institutions usually allow the parties to choose a place of arbitration that is different from the city in which the arbitral institution is situated.

6.3.3 The parties to an international arbitration may agree on the language or languages that will be used in the arbitral proceedings. In the absence of agreement, the language or languages shall be determined by the arbitral tribunal or in any other manner provided for under any relevant procedural rules. The arbitral tribunal may require all written evidence to be accompanied by a translation into the language to be used in the arbitral proceedings.

6.4 **Multi-party issues**

6.4.1 The Bulgarian Arbitration Act does not contain express provisions relating to multi-party arbitration. As a result, the general requirements for arbitrability, valid multi-party arbitration agreement(s) and the jurisdiction of the arbitral tribunal to consider all raised disputes shall apply. All of the parties to a multi-party arbitration must have agreed to participate in the arbitration.

6.4.2 In the event that multiple parties have agreed to participate in an arbitration but have not agreed on the procedures relating to joinder, intervention and consolidation, the arbitrators shall apply a procedure that they deem appropriate. The arbitration practice in Bulgaria shows that it is very likely that arbitrators would apply the relevant provisions of the Bulgarian CPC. Although there is no express provision of the Bulgarian Arbitration Act that refers to an automatic application of the Bulgarian CPC in such case, arbitrators usually choose the procedure under the Bulgarian CPC as it is familiar to them and the parties’ counsel, rather than

---

52 Bulgarian CPC, s 19(2).
53 Bulgarian Arbitration Act, s 1.
54 Ibid, s 25.
56 Ibid, s 24.
inventing a new one. In such cases, the arbitrators communicate to the parties the applicable procedure.

6.5 Oral hearings and written proceedings

Hearings

6.5.1 The Bulgarian Arbitration Act allows the parties to agree that their dispute can be decided on a documents only basis, without the need for an oral hearing before the arbitral tribunal. In practice, the customary procedure is to hold an oral hearing, unless otherwise agreed by the parties.

6.5.2 Despite the fact that the Bulgarian Arbitration Act does not expressly require oral hearings, the rules of procedure of the BCCI and the BIA require an oral hearing to be held unless the parties have agreed to the contrary. Even if the parties have agreed to conduct the arbitration on a documents only basis, pursuant to Section 30 of the Bulgarian Arbitration Act, an arbitral tribunal may schedule a hearing if it considers this necessary for the just and fair disposal of the case.

6.6 Submission of written statements

6.6.1 The arbitral institutions usually determine the form and content of the claim in their rules of procedure. In ad hoc arbitral proceedings, the claim must be made in writing and must state:
— the names and addresses of the parties;
— the facts on which the claim is based; and
— the essence of the claim.

6.6.2 The respondent’s written response must set out its position with respect to the facts and claims submitted by the claimant.

6.6.3 The claim and the response shall be submitted within a time period agreed by the parties or determined by the arbitral tribunal. Together with the claim and the response, the parties must also produce their written evidence and list any other evidence that they intend to submit.

6.6.4 The respondent may submit a counterclaim with its response to the claim. The arbitrability of the counterclaim(s) is determined according to the same principles as for the claim. The respondent may seek a set-off of sums due under an

---

57 Ibid, s 30.
58 Ibid, s 27(1).
59 Ibid, s 27(3).
60 Ibid, s 28.
“objection for set-off” against any sums ultimately found to be due to the claimant under the claim, provided that the rights raised in the objection are arbitrable, admitted by the claimant or settled by a court decision which has entered into force.

6.6.5 The claim and/or the defence may be amended or supplemented during the arbitral proceedings. The arbitral tribunal may only disregard the requested changes if it considers that the other party would be unduly prejudiced by such changes.62

6.7 Notice of hearings and inspections

6.7.1 The arbitral tribunal must notify the parties of any hearing and any scheduled inspection by the arbitral tribunal of documents, goods or other objects. The arbitral tribunal has the obligation to distribute to the parties copies of all evidence, statements and expert reports submitted for the purposes of the arbitral proceedings.63

6.7.2 If the seat, domicile, residence or address of any of the parties cannot be found after a thorough search, the notice will be considered as received if the arbitral tribunal sent it to the previous known seat, domicile, residence or address of the party by registered letter or by any other means that demonstrate an attempt to deliver the notice to the party. The same shall apply if the party does not, or refuses to accept delivery of documents (e.g. by refusing to go to the post office to receive the notice and the post office confirms this).64

6.8 Default by one of the parties

6.8.1 The arbitral tribunal must consider the case even if the respondent fails to submit a defence to the claim. The arbitral tribunal shall continue to hear the case and render an award on the basis of the evidence presented even if some or all of the summoned parties have unreasonably failed to appear at the hearing. However, the award may be set aside if any of the parties have not been duly given an opportunity to participate in the proceedings, including any oral hearings.65

61 Възражение за прихващане, free translation; and Z Stalev, A Mingova, V Popova, R Ivanova, Bulgarian Civil Procedural Law (8th Edition 2004), p 691, last para.
62 Bulgarian Arbitration Act, s 29.
63 Ibid, s 31.
64 Ibid, s 32.
65 Ibid, s 34–35.
6.9 Taking of evidence
6.9.1 Any form of evidence can be admitted in arbitral proceedings. The Bulgarian Arbitration Act requires that, by the statement of claim or the response thereto, the parties shall submit their written evidence and point out the other evidence they will submit.\(^{66}\) There are no further rules and restrictions in respect of the evidence collection. Therefore, the parties may determine the rules and deadlines regarding the collection and presentation of evidence. In the absence of such an agreement, the arbitral tribunal shall proceed as it deems appropriate when deciding whether to hear witnesses, experts and parties’ representatives, request any written evidence or inspect documents or goods.

6.9.2 The Bulgarian Arbitration Act does not repeat the stringent rules of the Bulgarian CPC, which restrict the parties’ ability to prove certain facts. In arbitration, electronic mail is generally accepted as evidence, which is less possible in national court proceedings. These rules reflect the flexibility of arbitration compared to national court litigation. However, the parties may stipulate restrictions on the types of evidence that can be adduced and the manner in which issues can be proven. In any event, the arbitrators shall be free to determine the weight to be given to the evidence in question.

6.10 Appointment of experts
6.10.1 The Bulgarian Arbitration Act deviates slightly from the principle that the arbitral tribunal shall not intervene in the parties’ right to determine the arbitral procedure. The arbitral tribunal may, at its own discretion appoint one or more experts to clarify certain issues for which special expertise is necessary. For this purpose, the arbitral tribunal may order the parties to submit relevant evidence to the tribunal-appointed expert and/or to provide the tribunal-appointed expert with necessary access to examine documents, goods or other objects.\(^{67}\) If further clarification is required after submission of the tribunal-appointed expert’s assessment, the tribunal-appointed expert may be compelled to attend a hearing, either upon the parties’ request or of the arbitral tribunal’s own motion. Following a request from the parties, the arbitral tribunal may also appoint other experts to give their opinion on issues arising for consideration as part of the dispute.\(^{68}\)

6.11 Confidentiality
6.11.1 There is no requirement for the arbitral proceedings to be held in public, as is the case for national court proceedings. The parties can, therefore, ensure that the

\(^{66}\) Ibid, s 27(3).

\(^{67}\) Ibid, s 36(1).

\(^{68}\) Ibid, s 36(2).
arbitral proceedings are conducted in private. The arbitrators shall comply with the general legal requirements for privacy of the professional and personal information of the parties (i.e. under personal data protection legislation and criminal law). The arbitrators, when appointed, usually sign a declaration of confidentiality. Arbitral institutions typically do not disclose the materials under arbitration cases to third parties. The legal reports include only the *ratio decidendi* of the award. It is therefore seldom for parties in institutional arbitrations to put an express obligation for the arbitrators’ confidentiality in the arbitration clause.

6.12 Court assistance in taking evidence
6.12.1 The arbitral tribunal or any of the parties (subject to the arbitral tribunal’s approval) may request the competent national court to collect and/or secure in advance the collection of certain evidence necessary for the just disposal of the case. The regional court of the place in which the evidence is located is deemed to be the competent national court that is obliged to comply with such a request.

7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 The arbitral tribunal must settle the dispute according to the parties’ choice of applicable law. Unless otherwise provided, the parties’ choice of law relates to the substantive law and does not oblige the arbitral tribunal to apply the conflict of law rules of the country whose applicable law is chosen. According to the Bulgarian Arbitration Act, foreign substantive law may only be applied to a domestic arbitration dispute if the legal relationship between the parties has an international element.

7.1.2 If the parties have not stated their choice of applicable law, the arbitral tribunal shall apply the substantive law as indicated by the conflict of law rules that the arbitral tribunal deems to be applicable in the circumstances. In any event, the arbitral tribunal shall honour the agreement of the parties as reflected in the terms of the arbitration agreement and take into account any relevant commercial customs.

---

69 *Ibid*, s 9 and 37.
70 *Ibid*, s 38(1).
71 TFP, para 3, item 3.
72 Bulgarian Arbitration Act, s 38(2).
7.2 **Timing, form, content and notification of an award**

7.2.1 The Bulgarian Arbitration Act contains the minimal requirements for the making, form and content of the award.

**Timing**

7.2.2 There are no time limits for the arbitral tribunal to render the award under the Bulgarian Arbitration Act or in the procedural rules of the main arbitral institutions in Bulgaria. However, some institutions have internal rules specifying instructive terms for issuing a final award after the closing of a hearing.\(^7\) Such rules take into consideration the complexity of the particular case.

**Form, content and notification\(^7\)**

7.2.3 The award shall be in writing. If there is more than one arbitrator, the award must be taken and signed by a majority of the arbitrators unless the parties have agreed otherwise. The award must state the reason for which one or more arbitrators have not signed it.\(^7\) If no majority exists, the presiding arbitrator shall approve the award.\(^7\)

7.2.4 The award must be reasoned, unless the parties have agreed otherwise, or unless the award is drafted in accordance with the conditions of a settlement agreement.\(^7\) The award must contain the date and the seat of arbitration. After the arbitrators have signed the award, it shall be sent to the parties. The award is final and terminates the dispute.\(^7\) The award is considered to be declared upon delivery to either of the parties, at which time it becomes effective and enforceable against the parties.\(^7\)

7.3 **Settlement**

7.3.1 If the parties reach a settlement of their dispute, the arbitral proceedings are terminated. The parties may request the arbitral tribunal to record such an agreement in the form of an award. Such award shall have the effect of an award on the merits of the case.

---

\(^7\) E.g. the Rules of Arbitration of the BCCI, s 40(2), although note that these rules are currently being updated.

\(^7\) Bulgarian Arbitration Act, s 39–41.

\(^7\) Ibid, s 41(2).

\(^7\) Ibid, s 39.

\(^7\) Ibid, s 41(1).

\(^7\) Ibid, s 38(4).

\(^7\) Ibid, s 41(3).
7.4 **Power to award interest and costs**

7.4.1 The Bulgarian Arbitration Act does not contain any express provisions relating to the arbitral tribunal’s power to award interest or costs.

7.4.2 An arbitral tribunal has the power to award interest if it has been claimed by the claimant. The parties can agree in their arbitration agreement on the rules to be applied by the arbitral tribunal concerning costs. The procedural rules of the arbitral institutions normally provide that the arbitrators shall have the power to award costs and expenses.\(^80\)

7.5 **Termination of the proceedings**

7.5.1 The arbitral proceedings shall be terminated if the parties reach an agreement to settle the dispute.\(^81\)

7.5.2 The Bulgarian Arbitration Act sets out three additional grounds upon which the arbitral tribunal may decide to bring the proceedings to an end, namely if:

(i) the claimant withdraws its claim (except when the respondent objects to the withdrawal and the arbitral tribunal finds that the respondent has a lawful interest in obtaining a final award);

(ii) the parties agree that the arbitral proceedings shall be brought to an end; or

(iii) the arbitral tribunal finds that there is another obstacle to considering the dispute on its merits. Examples of such an obstacle would be: the absence or invalidity of the arbitration agreement; when the claimant does not have the capacity or standing to bring the claim; or if there is an earlier court or arbitral decision on the same dispute between the same parties.\(^82\)

7.5.3 Furthermore, the arbitral tribunal may terminate the arbitral proceedings if it finds that it does not have the jurisdiction to decide the dispute.

7.6 **Effect of an award**

7.6.1 The award has the same force and effect as a court judgment.\(^83\) As a result, the same dispute (i.e. arising out of the same facts and between the same parties) may not be re-tried before a national court. If the claim seeks to change the legal relationship between the parties (e.g. by annulling or terminating a contract), a favourable award will have the effect of changing that legal relationship.

---

\(^80\) See section 4.3 above, which discusses the allocation of costs between the parties.

\(^81\) See paragraph 7.3.1 above.

\(^82\) Bulgarian Arbitration Act, s 42.

\(^83\) Ibid, s 38(4) and 41(3).
7.7 Correction, clarification and issuance of a supplemental award

7.7.1 The arbitral tribunal may, upon the request of any of the parties or of its own motion, introduce corrections to rectify any clerical, computational, typographical or other obvious error in the award. The other party shall be notified of any request for correction.84 A party may likewise request the interpretation of the award, provided that it notifies the other party first.85

7.7.2 A request for the correction or interpretation of an award must be made within 60 days after the parties received the award, unless the parties have agreed on a different timeframe. The same 60 day period for correction of the award must be observed when the arbitral tribunal acts of its own motion. The arbitral tribunal must hear the parties’ questions regarding the correction and interpretation of the award or allow them to file written submissions within a timeframe to be determined by the arbitral tribunal. The arbitral tribunal must rule on the requested correction or interpretation within 30 days of the submission of the request. A ruling on these issues shall be rendered on the basis of the general rules for making an award. A ruling on the correction and/or interpretation of the award becomes an integral part of the award.86

7.7.3 The arbitral tribunal may also, upon the request of either party, render a supplemental award for claims which the arbitral tribunal failed to address in its award. The requesting party must notify the other party of such a request within 30 days of receiving the award. If the request is well grounded, the arbitral tribunal shall render the supplemental award within 60 days of receipt of the request.87

7.7.4 The arbitral tribunal may extend the time limits within which a party can apply for a supplemental award or for the correction or interpretation of an award.88 The powers of the arbitral tribunal cease at the end of the arbitral proceedings, except in circumstances where correction, interpretation or a supplemental award is sought.89 The award is final and is not subject to appeal before the national courts or any other body unless the parties have agreed otherwise.

---

84 Ibid, s 43(1).
85 Ibid, s 43(2).
86 Ibid, s 43(4).
87 Ibid, s 44.
88 Ibid, s 45.
89 Ibid, s 46.
8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 The national courts in Bulgaria have exclusive jurisdiction to hear cases concerning rights in and possession of real estate property, maintenance obligations and employment relationships.90

8.1.2 National courts shall also have non-exclusive jurisdiction to hear cases which fall within the jurisdiction of arbitration courts. If there is an arbitration clause, the respondent cannot object to the court’s jurisdiction once the period for submitting the written response to the claim to a national court (which is two weeks for commercial cases) has expired.91

8.2 Termination of court proceedings and preliminary rulings on jurisdiction
8.2.1 If the respondent objects to the national court’s jurisdiction within the permitted timeframe for doing so,92 the court is obliged to terminate the court proceedings. However, the national court has the right to decide on its own jurisdiction including deciding not to terminate the court proceedings, if it considers that the arbitration clause is invalid, unenforceable or inoperative.93

8.3 Interim protective measures, obtaining evidence and other court assistance
8.3.1 The national courts in Bulgaria perform various functions in assisting the arbitral proceedings by, for example, granting interim measures and collecting or ensuring the collection of evidence.94

9. Challenging and appealing an award through the courts

9.1.1 The judgment of a national court in Bulgaria can be appealed to a court of appeal and subsequently to the Supreme Court of Cassation. Conversely, an award is final and cannot be appealed unless otherwise agreed by the parties in their arbitration

90 See paragraph 3.3.2 above.
91 Bulgarian CPC, s 119(3).
92 See paragraph 8.1.2 above.
93 Bulgarian Arbitration Act, s 8(1).
94 Ibid, s 9–10 and 37. See also section 5.2 above.
agreement. The avoidance of a lengthy appeal process is one of the key advantages of arbitration over national court litigation. There are, nevertheless, certain limited bases upon which the Supreme Court of Cassation may set aside the award. In particular, the Supreme Court of Cassation may set aside an award if the party filing the application to set aside can prove that:

(i) the parties lacked the legal capacity to conclude the arbitration agreement;
(ii) no arbitration agreement was concluded or the arbitration agreement is void pursuant to the applicable law chosen by the parties or, if the parties had not made such a choice, pursuant to the Bulgarian Arbitration Act;
(iii) the subject matter of the dispute is not capable of settlement by arbitration or the award is contrary to Bulgarian public policy;
(iv) the party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or the party was unable to participate in the proceedings due to reasons beyond its control;
(v) the award settles a dispute that was not contemplated by – or not falling within – the arbitration agreement or contains decisions on issues beyond the scope of the submission to arbitration; or
(vi) the constitution of the arbitral tribunal or the arbitral procedure did not conform to the parties’ agreement, provided that such agreement does not contradict the mandatory provisions of the Bulgarian Arbitration Act or, in the absence of provisions setting out the arbitral procedure in the arbitration agreement, did not conform to the provisions of the Bulgarian Arbitration Act.

9.1.2 An application to set aside an award must be submitted within three months from the date on which the party received the award. Where a request for correction or interpretation of an award, or for a supplemental award has been made, the time period starts to run from the date on which the arbitral tribunal ruled on that request. These time limits cannot be extended or curtailed by agreement between the parties.

9.1.3 The existence of an application to set aside an award does not automatically suspend enforcement proceedings. The Supreme Court of Cassation may allow the suspension of enforcement proceedings in the exercise of its discretion but the applicant should first provide a guarantee equal to the amount of its liability under the award, should the application to set aside ultimately fail.

---

95 Bulgarian Arbitration Act, s 47.
96 Ibid.
97 Bulgarian Arbitration Act, s 48(1).
9.1.4 If the Supreme Court of Cassation sets aside an award on any of the grounds under items (i)–(iii) of paragraph 9.1.1 above in a decision which has entered into force, a party may file a claim before a competent national court seeking a re-hearing of the same dispute. If the award is set aside on any of the grounds under items (iv)–(vi) of paragraph 9.1.1 above, the Supreme Court of Cassation must return the case to the arbitral tribunal for reconsideration. Any of the parties may request that the case be heard by arbitrators different from the arbitrators that first heard the dispute.

10. Recognition and enforcement of awards

10.1 Domestic awards
10.1.1 Following a request from the relevant party, the City Court of Sofia will issue a writ of execution of an award that has entered into force. The award, together with proof that it has been delivered to the debtor, shall be enclosed with the request for enforcement. The City Court of Sofia shall consider whether the award is formally in order and that it awards an enforceable right. The City Court of Sofia has seven days in which to consider the application and decide whether to issue the writ of execution.

10.2 Foreign awards
10.2.1 The recognition and enforcement of foreign awards is regulated by the international agreements to which Bulgaria is party, principally the New York Convention. However, Bulgaria entered certain reservations when signing the New York Convention, with the consequence that the Bulgarian courts are only obliged to recognise and enforce foreign awards that have been rendered in states that are also party to the New York Convention. Where an award has been rendered in a state that is not party to the New York Convention, the Bulgarian courts will only apply the provisions of the New York Convention to the extent that the other state grants reciprocal treatment.

10.2.2 In circumstances in which the New York Convention does not apply, or if the enforcing party considers that Bulgarian law offers a more favourable recognition and enforcement regime than that provided under the New York Convention the enforcing party may invoke the provisions of the Bulgarian PILC. Under these

---

98 Ibid, s 51.
100 See New York Convention, art VII(1).
101 Bulgarian PILC, s 118–120.
provisions, the court can only refuse enforcement of a foreign or domestic award if one of the following conditions has been satisfied:
— the foreign arbitral tribunal did not have jurisdiction to hear the dispute;
— the respondent did not receive a copy of the claim, the parties were not duly summoned and the basic principles of Bulgarian law in respect of the right of defence have not been respected;
— the same dispute between the same parties has been determined by a judgment of a Bulgarian court which has entered into force;
— the same dispute between the same parties is the subject of pending proceedings before a Bulgarian court which commenced before the initiation of the arbitral proceedings; or
— the recognition or the enforcement of the award is contrary to Bulgarian public policy.

10.2.3 Unless otherwise provided in an international agreement, the application for recognition and enforcement of foreign awards and of any settlement agreement recorded in a foreign award should be brought before the City Court of Sofia. Unlike the enforcement of domestic awards, the procedure for recognition and enforcement of foreign awards follows the general procedure under the Bulgarian CPC (subject to the special provisions of the Bulgarian PILC concerning, for example, the conduct of hearings and collection of evidence).¹⁰²

11. Special provisions and considerations

11.1 Consumers

11.1.1 The Consumers Protection Act 2005 (Bulgarian Consumers Act) provides only for a conciliation procedure in respect of consumers’ disputes. Pursuant to the Bulgarian Consumers Act, the Minister of Economy, Energy and Tourism has created regional conciliatory commissions to assist in the settlement of disputes between consumers and traders through mediation. The mediators are approved by a decision of the Minister of Economy, Energy and Tourism and are employees of the conciliatory commissions. The conciliation procedure begins when an application is made by a consumer. The purpose of the procedure is for an agreement to be reached by the consumer and the trader, thereby settling the dispute.

11.1.2 The conciliation procedure is not a necessary precondition to be fulfilled before court proceedings can commence.

¹⁰² Bulgarian Arbitration Act, s 51(3); and Bulgarian PILC, s 118–122.
11.2 Employment law

11.2.1 Bulgarian “employment law”\(^{103}\) is codified by the Labour Code 1986 (Bulgarian Labour Code), which is supplemented by various legislative acts. Generally, Bulgarian employment law does not provide for arbitral proceedings concerning “individual labour contracts”\(^{104}\) (i.e. bilateral contracts between an employer and an employee). However, the Bulgarian Labour Code and the Settlement of Collective Labour Disputes Act 1990 stipulate that collective disputes between employers and employees can be settled through arbitration by professional organisations, syndicates or the National Institute for Conciliation and Arbitration. All “collective labour contracts”\(^{105}\) shall be registered at the National Institute for Conciliation and Arbitration.

11.2.2 Arbitral proceedings are only started upon the mutual agreement of the parties. The dispute shall be heard at no more than two open hearings, to be held within a period of no more than seven days, unless otherwise agreed by the parties. Any evidence is allowed, including evidence given by expert witnesses.

12. Concluding thoughts and themes

12.1.1 Arbitration is the most successful and popular ADR procedure in Bulgaria. It is generally considered to be quicker and more cost-effective for the parties than litigation before local courts. The parties also benefit from the privacy of the arbitral process, the less formal rules of procedure and the ability to agree between themselves on the constitution of the arbitral tribunal, the procedural rules and the timetable for the arbitration.

12.1.2 The arbitral institutions publish lists of recommended arbitrators which include highly reputable and experienced practitioners and professors. They are qualified in the sphere of commercial law and possess good industry knowledge. As a result, arbitral tribunals tend to be focused and accurate in their approach to the issues that they are asked to determine. Currently there are no foreign citizens listed by the BCCI or BIA. However, the parties may nominate any arbitrator, even if not included in the lists of arbitrators, who will have to comply with certain requirements of the institutional arbitration court in order to be appointed. Thus pursuing arbitral proceedings according to the procedural rules of the Bulgarian arbitral institutions is considered to be a good option for resolving commercial disputes.

\(^{103}\) Трудово право, free translation.

\(^{104}\) Индивидуални трудови договори, free translation.

\(^{105}\) Колективните трудови договори, free translation.
13. Contacts

CMS Cameron McKenna LLP – Bulgaria
14 Tzar Osvoboditel Blvd.
1000 Sofia
Bulgaria

Kostadin Sirleshtov
T +359 2 92199 42
E kostadin.sirleshtov@cms-cmck.com

Pavlin Stoyanoff
T +359 2 92343 61
E pavlin.stoyanoff@cms-cmck.com
## Table of Contents

1. **Overview**
   - 1.1 Legal framework 209
   - 1.2 Distinction between domestic, foreign-related and foreign arbitration in the PRC 209

2. **The role of arbitral institutions**
   - 2.1 Non-recognition of ad hoc arbitration in the PRC 210
   - 2.2 Domestic arbitral institutions (arbitration commissions) 211
   - 2.3 Foreign-related arbitral institutions 212
   - 2.4 Foreign arbitral institutions 214

3. **Scope of application and general provisions of the PRC Arbitration Law**
   - 3.1 Scope of application 215
   - 3.2 General principles 215

4. **The arbitration agreement**
   - 4.1 Formal requirements 215
   - 4.2 Arbitrability 217
   - 4.3 Separability 217

5. **Composition of the arbitral tribunal**
   - 5.1 Composition of the arbitral tribunal 218
   - 5.2 Procedure for challenging and substituting arbitrators 219
   - 5.3 Request for arbitration 220
   - 5.4 Arbitration fees 220
   - 5.5 Arbitrator immunity 220

6. **Jurisdiction of the arbitral tribunal**
   - 6.1 Competence to rule on jurisdiction 221
   - 6.2 Power to order interim measures 221

7. **Conduct of proceedings**
   - 7.1 Commencement of arbitration 221
   - 7.2 Language of arbitration 222
   - 7.3 Multi-party issues 222
7.4 Oral hearings and written procedures 223
7.5 Default by one of the parties 223
7.6 Confidentiality 223

8. Making of the award and termination of proceedings 223
8.1 Choice of law 223
8.2 Timing, form, content and notification of award 225
8.3 Settlement 226
8.4 Power to award interest and costs 226
8.5 Termination of the proceedings 227
8.6 Effect of the award 227
8.7 Correction, clarification and issue of a supplemental award 227

9. Role of the courts 227
9.1 Jurisdiction of the courts 227
9.2 Stay of court proceedings and rulings on jurisdiction 227
9.3 Interim protective measures 227

10. Challenging and appealing an award through the courts 228
10.1 Appeals 228
10.2 Applications to set aside an award 228

11. Recognition and enforcement of awards 229
11.1 Domestic awards and foreign-related awards rendered in the PRC 229
11.2 Foreign awards 231

12. Concluding thoughts and themes 235

13. Contacts 235
1. Overview

1.1 Legal framework

1.1.1 The People’s Republic of China (PRC) Arbitration Law 1994 (PRC Arbitration Law) was promulgated by the Standing Committee of the National People’s Congress of the PRC on 31 August 1994 and came into force on 1 September 1995.

1.1.2 In the PRC, civil legal disputes that are not resolved through pre-action negotiations between the parties can be finally resolved by either litigation or arbitration. As a matter of principle, jurisdiction over civil cases will be exercised by the PRC People’s Courts.

1.1.3 Arbitration is the preferred method of dispute resolution for foreign parties and foreign-invested enterprises (FIE) in the PRC for the following reasons:

— proceedings brought before the ordinary PRC People’s Courts can be risky, particularly for foreign parties and FIEs. Judges may be inclined to follow the instructions of PRC administrative bodies which may protect the interests of the local party or may be susceptible to outside influences;

— whilst it is theoretically possible under PRC law to agree to submit a dispute to the jurisdiction of a foreign court, the judgments of most foreign courts are still not recognised and not enforceable in the PRC due to a lack of reciprocity;

— arbitration offers the parties a means of resolving their disputes in private, whereas most PRC People’s Court proceedings are public; and

— arbitration also offers more flexibility to parties in relation to procedures and formalities such as the adoption of proceedings in a foreign language.

1.2 Distinction between domestic, foreign-related and foreign arbitration in the PRC

1.2.1 There is a crucial distinction between domestic arbitration, foreign-related arbitration and foreign arbitration in the PRC. These concepts have developed separately over time and, as discussed in paragraph 3.1.1 below, the PRC Arbitration Law maintains a distinction between how domestic and foreign-related arbitration is treated under PRC law.

---

1 The following refers to the law of the People’s Republic of China with the exclusion of the law of Taiwan and the Special Administration Regions of Hong Kong and Macao.


3 For further discussion on FIEs, see paragraph 1.2.5 below.
Domestic arbitration

1.2.2 Rules pertaining to domestic arbitrations apply to all circumstances in which there are no foreign elements to the dispute. Consequently, domestic arbitral proceedings will not form a major focus of this chapter.

Foreign-related arbitration

1.2.3 Rules relating to foreign-related arbitrations apply in circumstances where there is a “foreign interest” in the dispute, but where the arbitral proceedings are governed by an arbitral institution that is established in the PRC.

1.2.4 There is no definition of “foreign-related arbitration” in the PRC Arbitration Law, but a definition of the term “foreign-related dispute” can be located in other sources of PRC law. According to Article 304 of the Opinions on Certain Questions Concerning the Application of the Civil Procedure Law issued by the PRC Supreme People’s Court on 14 July 1992 (Opinions), a dispute involves a “foreign interest” where:

— one or both parties are foreigners, foreign entities or foreign organisations;
— the legal circumstances relating to the conclusion, modification or termination of a contractual relationship took place in a foreign country; or
— the subject matter of the dispute is located in a foreign country.

1.2.5 A FIE that is incorporated as a legal person in the PRC constitutes a PRC domestic entity. Therefore, as a general rule, any arbitration in which a FIE is a party should be considered to be domestic and governed by the provisions of the PRC Arbitration Law that relate to domestic arbitration rather than a foreign-related arbitration, unless any of the circumstances set out in paragraph 1.2.4 apply in relation to the other party. The mere fact that a FIE is invested in by a foreign party is not sufficient to transform the dispute into one involving “foreign interests”.

Foreign arbitration

1.2.6 Rules pertaining to foreign arbitrations apply in circumstances where there is a dispute with foreign interests that is conducted by a foreign arbitral institution (on which see paragraph 2.4 below) or an ad hoc arbitration that takes place outside of the PRC.

2. The role of arbitral institutions

2.1 Non-recognition of ad hoc arbitration in the PRC

2.1.1 In order to be valid and binding, Article 16 of the PRC Arbitration Law requires an arbitration agreement to contain a designated arbitral institution that will govern
the arbitration. This requirement applies to both domestic and foreign-related arbitration in the PRC.

2.1.2 An arbitration agreement providing for ad hoc arbitration will be considered to be invalid (due to failing to fulfil the requirements in Article 16 of the PRC Arbitration Law) and will not prevent a PRC People’s Court from accepting jurisdiction to hear a dispute arising between the parties to it. As a result, ad hoc arbitration is not practised in the PRC.

2.1.3 As to possible exemptions regarding the enforcement of ad hoc awards made under foreign arbitral proceedings, see paragraphs 11.2.8 to 11.2.10 below.

2.2 Domestic arbitral institutions (arbitration commissions)

2.2.1 It is widely acknowledged that the term “arbitration commission” that is used in the PRC Arbitration Law refers to the more commonly used term “arbitral institution”. Based on the wording of Article 10 of the PRC Arbitration Law, commentators have concluded that reference to an “arbitration commission” is to an arbitral institution that is established in the PRC.

2.2.2 Before the introduction of the PRC Arbitration Law, domestic arbitral institutions were not independent from government authorities. The PRC Arbitration Law aimed to reform arbitration in the PRC, to transform it into a more commercial form of dispute resolution that was independent from judicial and administrative interference. As a result, the structure of domestic arbitral institutions was amended, and any domestic arbitral institutions that did not comply with the new provisions of the PRC Arbitration Law were abolished.

2.2.3 Under the PRC Arbitration Law, domestic arbitral institutions may be set up directly under the provincial governments of provinces and autonomous regions and are organised by the local Chamber of Commerce at the provincial level. They may also be established in other municipalities with districts. However, in contrast to arbitral institutions organised under the previous law, the PRC Arbitration Law expressly provides that domestic arbitral institutions must be independent from government authorities.

---

4 As to the meaning of “foreign arbitration”, see paragraph 1.2.6 above.
6 PRC Arbitration Law, art 10(1).
7 Ibid, art 10(3).
8 Ibid, art 10(1).
administrative authorities. There must be no subordinate relationships between domestic arbitral institutions and administrative authorities.9

2.2.4 Following the entry into force of the PRC Arbitration Law, more than 200 domestic arbitral institutions have been established in the PRC, including the Beijing Arbitration Commission, Shanghai Arbitration Commission, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission and Wuhan Arbitration Commission.

2.2.5 Since the promulgation of a PRC State Council notice in 1996 (which was implemented in Chapter VII of the PRC Arbitration Law), domestic arbitral institutions are also entitled to administer foreign-related disputes, if so agreed by the parties.

2.2.6 While the legislation requires a strict legal separation between the administrative authorities and these domestic arbitral institutions, it should be noted that, in reality, these legal safeguards are not always effective. Not all domestic arbitral institutions are free from judicial and administrative interference. Local protectionism and political influence are common problems. Parties should strongly consider choosing a foreign arbitral institution (if possible) or one of the reputable foreign-related arbitration commissions (such as CIETAC, discussed below at paragraph 2.3.4).

2.3 Foreign-related arbitral institutions

2.3.1 Foreign-related arbitral institutions were established to administer foreign-related disputes.

2.3.2 In contrast to the organisational structure of domestic arbitral institutions,10 the PRC Arbitration Law requires foreign-related arbitral institutions to be organised and established by the China Chamber of International Commerce.11

2.3.3 A distinction concerning the manner in which domestic and foreign-related arbitral institutions may govern arbitral proceedings arises in regard to the restrictions upon who may be appointed as an arbitrator by those arbitral institutions. Foreign-related arbitral institutions may appoint arbitrators from “among foreigners with special knowledge in the fields of law, economy and trade, science and technology,

9 Ibid, art 14.
10 See section 2.2 above.
11 PRC Arbitration Law, art 66(1).
etc”. However, domestic arbitral institutions must appoint arbitrators from among “righteous, upright persons”, who must meet a list of express conditions. This demonstrates the reduced flexibility and autonomy that a domestic arbitral institution may exercise in certain circumstances, in comparison with a foreign-related arbitral institution.

2.3.4 The best known foreign-related arbitral institution is the China International Economic and Trade Arbitration Commission (CIETAC), which was established in 1956 to resolve economic and trade disputes between a foreign entity and a PRC entity. CIETAC is also one of the largest arbitral centres in the world. It is headquartered in Beijing with Sub-Commissions in Shanghai (established in 1989), Shenzhen (established in 1990), Tianjin (established in 2008), and Chongqing (established in 2009).

2.3.5 Before the adoption of the PRC Arbitration Law, CIETAC and the China Maritime Arbitration Commission (CMAC) were the only arbitral institutions in the PRC that were qualified to administer foreign-related arbitral proceedings. These two arbitral institutions survived the reforms under the PRC Arbitration Law and remain distinct from domestic arbitral institutions. Even though domestic arbitral institutions are now able to hear international cases, CIETAC maintains its leading position in international arbitration with a high volume of cases. In addition, CIETAC and CMAC have extended their sphere of competence so as to encompass domestic as well as foreign-related disputes, if so agreed by the parties.

2.3.6 Arbitration before CIETAC is governed by the CIETAC Arbitration Rules. Over the years, these rules have been amended several times. The latest revision, effective as of May 2005, introduced further amendments to modernise the CIETAC Arbitration Rules. One of the innovations is that the parties are not only entitled to agree on the application of other arbitral rules, such as the UNCITRAL Arbitration Rules 1976, but also on modifications to the CIETAC Arbitral Rules. Another version of the CIETAC Arbitration Rules is expected in 2012.

2.3.7 In light of the recent expansion in the roles of both domestic arbitral institutions (into foreign-related disputes) and foreign-related arbitral institutions (into ...
domestic disputes), the traditional distinction between these two forms of arbitral institution has diminished considerably. A positive aspect of this development is the increased competitive relationship between foreign-related and certain domestic arbitral institutions, which can be expected to result in an improvement in the quality of arbitration in the PRC.

2.3.8 As a result of this expansion, the main distinction between domestic and foreign-related arbitrations under the PRC Arbitration Law is now focussed upon the nature of the underlying dispute, rather than on the arbitral institution that is administering the arbitral proceedings. This distinction is particularly apparent in relation to the enforcement of awards (see further section 11 below). Consequently, references in this chapter to an “arbitral institution”, unless expressly stated otherwise, shall encompass both domestic and foreign-related arbitral institutions.

2.4 Foreign arbitral institutions

2.4.1 There is no definition of “foreign arbitral institutions” under law in the PRC. Reference to a “foreign arbitral institution” is, therefore, considered to cover arbitral institutions that are established outside of the PRC, such as the ICC, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre, Stockholm Chamber of Commerce, Zurich Chamber of Commerce, DIS and LCIA.

2.4.2 There are currently no foreign arbitral institutions operating in the PRC and it is rare for a foreign arbitral institution to administer an arbitration that has its seat in the PRC. This results from the fact that in the past, a foreign award made in the PRC by a foreign arbitral institution was very unlikely to be acknowledged and enforced in the PRC. However, despite the challenges that have traditionally been faced by parties seeking to enforce awards rendered in arbitral proceedings that are governed by foreign arbitral institutions with their seat of arbitration in the PRC, recent case law indicates that the judiciary in the PRC may be demonstrating a changing attitude to such circumstances. See further the discussion at paragraph 11.2.11 below.

2.4.3 However, there are certain circumstances in which the parties may agree that their arbitral proceedings shall be governed by a foreign arbitral tribunal. Parties to a contract involving “foreign interests” are entitled to agree on arbitration before a foreign arbitral institution. The circumstances in which a foreign interest may arise in a dispute are set out in paragraphs 1.2.3 and 1.2.4 above.

---

18 PRC Contract Law, art 128.
3. **Scope of application and general provisions of the PRC Arbitration Law**

3.1 **Scope of application**

3.1.1 The PRC Arbitration Law maintains what PRC legal scholars describe as a “dual track system”, which distinguishes between domestic and foreign-related arbitration. Chapter VII of the PRC Arbitration Law contains special provisions for foreign-related arbitration. Where matters arising out of an arbitration are not expressly covered by Chapter VII, the other provisions of the PRC Arbitration Law shall apply to all arbitral proceedings which have their seat of arbitration in the PRC. In practice, the arbitral rules of the relevant arbitral institution (for example, the CIETAC Arbitration Rules, which are the most commonly used institutional arbitral rules for foreign-related disputes) are more detailed and supplement the provisions on arbitral procedure described in the PRC Arbitration Law.

3.2 **General principles**

3.2.1 The PRC Arbitration Law is not based on the Model Law (1985), although certain provisions reflect the fundamental principles of modern international arbitration, such as procedural fairness and the independence of arbitrators. Unlike the Model Law (1985), the PRC Arbitration Law does not endeavour to recognise the contractual freedom of the parties to resolve their disputes, but instead attempts to protect the “legitimate rights and interests of the parties and to safeguard the development of the socialist market economy.”

4. **The arbitration agreement**

4.1 **Formal requirements**

4.1.1 It is only possible for FIEs or any domestic PRC parties to avoid litigation before a PRC People’s Court if the parties to the dispute have entered into a binding agreement to submit that dispute to arbitration. Such an agreement can be entered into before or after the dispute has arisen in the form of a valid arbitration clause in a contract or as a separate, stand-alone arbitration agreement. A PRC

---


20 PRC Arbitration Law, art 65.


22 PRC Arbitration Law, art 1 and 14.

People’s Court shall decline jurisdiction over a dispute if the parties have concluded a valid arbitration agreement in respect of the dispute in question.\textsuperscript{24}

4.1.2 An arbitration clause contained in a contract or, alternatively, a stand-alone arbitration agreement must be in writing.\textsuperscript{25} Under the law of the PRC, “in writing” includes by letter, telegram, telex, fax, electronic data interchange and email.\textsuperscript{26} Reference to an arbitration clause contained in standard terms and conditions is sufficient, provided that the general terms and conditions have been validly incorporated into the contract.\textsuperscript{27}

\textit{Requirements under Article 16 of the PRC Arbitration Law}

4.1.3 A valid arbitration agreement must contain the following particulars:

- an expression of the intention to apply for arbitration;
- the matters for arbitration; and
- a designated arbitral institution.\textsuperscript{28}

4.1.4 If the issues to be decided in the arbitration are not clearly stipulated in the arbitration agreement, and the parties fail to clarify the position through a supplemental agreement, the arbitration agreement shall be invalid.\textsuperscript{29}

4.1.5 As referred to in paragraph 2.1 above, ad hoc arbitrations are not permitted under the PRC Arbitration Law. There is currently a debate in the PRC as to whether or not an arbitration agreement which only refers to the arbitral rules of a specific arbitral institution, but which does not expressly provide for the jurisdiction of that specific arbitral institution, constitutes an agreement to pursue ad hoc arbitration or institutional arbitration.

4.1.6 The Interpretations of the PRC Supreme People’s Court concerning Some Issues on the Application of the PRC Arbitration Law of 23 August 2006, effective as of 8 September 2006 (\textbf{Interpretations}) provide guidance for circumstances in which an arbitration agreement contains errors that could potentially invalidate it under Article 16 of the PRC Arbitration Law. In particular, the Interpretations state that

\textsuperscript{24} Ibid, art 5 and 26.
\textsuperscript{25} Ibid, art 16.
\textsuperscript{26} PRC Contract Law, art 11 and Interpretations of the PRC Supreme People’s Court concerning Some Issues on the Application of the PRC Arbitration Law, 23 August 2006, art 1.
\textsuperscript{27} PRC Contract Law, art 39 and 40.
\textsuperscript{28} PRC Arbitration Law, art 16.
\textsuperscript{29} Ibid, art 18.
where the name of an arbitral institution as agreed in the arbitration agreement is not accurate, but the specific arbitral institution can nevertheless be determined, it shall be deemed that the arbitral institution has been designated.\textsuperscript{30} The Interpretations also state that an arbitration agreement will not be invalid if the arbitral institution is clearly identifiable by the arbitral rules contained in the arbitration agreement.\textsuperscript{31} The Interpretations – and their effect upon potentially deficient arbitration agreements – suggest a relaxation under PRC law of the requirement that the parties must expressly designate an arbitral institution in their arbitration agreement. Nevertheless, to ensure that the validity of the arbitration agreement is upheld, it is advisable for parties to expressly name a competent arbitral institution in their arbitration agreement.

4.2 Arbitrability

4.2.1 Under the PRC Arbitration Law, contractual disputes and disputes over property rights between citizens, legal persons and other organisations are arbitrable.\textsuperscript{32} FIEs can, therefore, be party to arbitral proceedings under the PRC Arbitration Law, provided that they are validly incorporated in the form of a legal person.\textsuperscript{33} In practice most FIEs, such as Sino-foreign equity joint venture companies and wholly foreign-owned enterprises, are validly incorporated in the form of a legal person under PRC law.

4.2.2 The following disputes are non-arbitrable under the PRC Arbitration Law:
— marriage, adoption, guardianship, support and succession disputes; and
— administrative disputes that, according to mandatory laws, shall be settled by administrative organs.\textsuperscript{34}

4.3 Separability

4.3.1 The question of whether or not an arbitration clause contained in a contract is valid shall be considered separately from the question of whether or not the contract itself is valid. An arbitration agreement shall exist independently and shall not be affected by the amendment, rescission, termination or invalidity of the main contract.\textsuperscript{35}

\textsuperscript{30} Interpretations, art 3.
\textsuperscript{31} Ibid, art 4.
\textsuperscript{32} PRC Arbitration Law, art 2.
\textsuperscript{33} Ibid, art 1 and 2.
\textsuperscript{34} Ibid, art 3.
\textsuperscript{35} Ibid, art 19.
4.3.2 In international practice, the validity of an arbitration agreement is usually determined by the arbitral tribunal. However, under the PRC Arbitration Law, this question is reserved for determination by either the arbitral institution or the PRC People’s Court.\textsuperscript{36}

5. \textbf{Composition of the arbitral tribunal}

5.1 \textbf{Composition of the arbitral tribunal}

5.1.1 An arbitral tribunal may be comprised of one or three arbitrators, as agreed by the parties.\textsuperscript{37} The PRC Arbitration Law is silent as to what happens if the parties cannot come to an agreement on the number of arbitrators. This issue is resolved differently depending on which institutional arbitral rules are applicable.

5.1.2 If an arbitral tribunal is comprised of three arbitrators, each party shall select an arbitrator, or authorise the chair of the arbitral institution that is governing the arbitral proceedings to appoint an arbitrator on its behalf. A third arbitrator shall then be selected jointly by the parties or be nominated by the chair of the arbitral institution in accordance with the joint mandate of the parties. The third arbitrator shall be the presiding arbitrator.\textsuperscript{38}

5.1.3 If the parties agree to have a sole arbitrator, that arbitrator shall be selected jointly by the parties or shall be nominated by the chair of the arbitral institution in accordance with the joint mandate of the parties.\textsuperscript{39}

5.1.4 If the parties fail to agree on the method of formation of the arbitral tribunal or fail to select the arbitrators within the time limit specified in the applicable arbitral rules, the arbitrators shall be appointed by the chair of the arbitral institution that is governing the arbitral proceedings.\textsuperscript{40}

\textit{Composition of the arbitral tribunal under the CIETAC Arbitration Rules}

5.1.5 Under the CIETAC Arbitration Rules, the arbitral tribunal shall be composed of one or three arbitrators. Unless the parties agree otherwise, the default position under the CIETAC Arbitration Rules is that the arbitral tribunal shall be composed of three arbitrators.\textsuperscript{41}

\textsuperscript{36} Ibid, art 20. See also paragraphs 6.1.1 and 9.2.1 below.
\textsuperscript{37} PRC Arbitration Law, art 30.
\textsuperscript{38} Ibid, art 31.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid, art 32.
\textsuperscript{41} CIETAC Arbitration Rules, art 20.
5.1.6 The members of the arbitral tribunal are generally selected by the parties from a panel of CIETAC arbitrators. Currently, CIETAC’s panel of arbitrators consists of 998 arbitrators, including 218 non-PRC nationals from more than 30 different countries. In foreign-related disputes, non-PRC nationals can be appointed as arbitrators. As a result of the 2005 revision of the CIETAC Arbitration Rules, the parties are also entitled to appoint arbitrators who are not listed on CIETAC’s panel of arbitrators. However, any such appointment must be confirmed by the Chair of CIETAC.

5.1.7 In practice, the majority of the arbitrators, including the chair of the arbitral tribunal, are usually PRC nationals. This is due to the fact that CIETAC tends to appoint PRC nationals as arbitrators when called upon to appoint an arbitrator (e.g. if CIETAC is acting as the appointing authority or if the parties cannot agree upon the appointment of an arbitrator).

5.2 Procedure for challenging and substituting arbitrators

5.2.1 The parties shall have the right to challenge an arbitrator in one of the following circumstances:
- the arbitrator is a party in the case or a close relative of a party or an agent in the case;
- the arbitrator has a personal interest in the case;
- the arbitrator has another relationship with a party or an agent in the case which may affect the impartiality of arbitration; or
- the arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.

5.2.2 A party must submit its reasons for challenge of the arbitrator before the first hearing or, if it becomes aware of a reason for challenge of the arbitrator after the first hearing has taken place, it must submit its reasons as soon as possible but in any event before the conclusion of the final hearing of the arbitral tribunal. The decision to remove an arbitrator will be made by the chair of the arbitral institution or, if the chair of the arbitral institution is serving as an arbitrator, the decision will be taken by the arbitral institution collectively.

5.2.3 A substitute arbitrator shall be appointed on account of an arbitrator’s withdrawal.
5.2.4 Once a substitute arbitrator has been appointed, a party may request that the arbitral tribunal hears the dispute afresh. The arbitral tribunal will decide whether to continue the arbitral proceedings or to restart the arbitral proceedings.48

5.3 Request for arbitration

5.3.1 Article 23 of the PRC Arbitration Law sets out the requirements for the request for arbitration. The request for arbitration must contain details of:

— the parties concerned;
— the parties’ legal representatives;
— the parties’ registered addresses;
— the claimant’s arbitration claim and the facts and reasons on which that claim is based; and
— any evidence, sources of evidence, and the names and residences of witnesses, if any.

5.3.2 A copy of the arbitration agreement must be attached to the request for arbitration.49

5.4 Arbitration fees

5.4.1 In the course of enacting the PRC Arbitration Law, the State Council promulgated the Arbitration Fee Collection Measures of Arbitration Commission on 28 July 1995 (Measures). As a general principle, pursuant to the Measures, the arbitration fees shall be borne by the losing party.50 However, the arbitral rules of relevant foreign-related arbitral institutions contain differing fee schedules and these will apply.

5.5 Arbitrator immunity

5.5.1 If an arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent,51 and the circumstances are serious, or if the arbitrator has embezzled funds, accepted bribes or been involved in malpractice for personal benefits, or perverted the law in the course of the arbitration,52 he or she shall assume legal liability according to PRC law and the arbitral institution shall remove his or her name from the register of arbitrators.53

48 Ibid.
49 Ibid, art 22.
50 Measures, art 9; CIETAC Arbitration Rules, art 46.
51 PRC Arbitration Law, art 34(4).
52 Ibid, art 58(6).
53 Ibid, art 38.
6. Jurisdiction of the arbitral tribunal

6.1 Competence to rule on jurisdiction
6.1.1 The arbitral institution is not exclusively competent to decide upon the validity of an arbitration agreement. Each party can submit a request for a ruling on the validity of an arbitration agreement either to the arbitral institution or to a PRC People’s Court. If one party requests the arbitral institution to make a decision and the other party applies to the PRC People’s Court for a ruling, the decision of the PRC People’s Court shall prevail. However, where a party has failed to object to the validity of an arbitration agreement prior to the first oral hearing before the arbitral tribunal, or where an arbitral institution has made a decision on the validity of an arbitration agreement, the PRC People’s Court shall not accept an application for a ruling on the validity of the same arbitration agreement.

6.2 Power to order interim measures
6.2.1 Either party can apply for interim protective measures before an arbitral tribunal in the PRC. However, neither the arbitral tribunal, nor the arbitral institution governing the arbitral proceedings, have the power to order interim measures. Instead, it will forward the application to the competent PRC People’s Court which has sole jurisdiction to award interim measures. Available interim protective measures include orders preserving property and evidence. It is not possible under PRC law to apply for injunctions requiring specific performance of a party’s contractual obligations, or cease and desist injunctions.

7. Conduct of proceedings

7.1 Commencement of arbitration
7.1.1 Articles 24 and 25 of the PRC Arbitration Law contain certain procedural provisions on the commencement of the arbitral proceedings, specifically, those provisions that relate to the acceptance or refusal of the application for arbitration by the arbitral institution. After an arbitral institution accepts an application for arbitration it shall notify the claimant within five days. The arbitral institution must deliver a copy of the arbitral rules and details of the arbitral tribunal to the claimant. It must

---

54 Ibid, art 20.
55 PRC Arbitration Law, art 20; Interpretations, art 13.
56 PRC Arbitration Law, art 28(1).
57 Ibid, art 28(2).
58 Ibid, art 28, 46 and 68.
also deliver a copy of the request for arbitration and details of the arbitral rules and the arbitral tribunal on the respondent. After receiving a copy of the application for arbitration, the respondent shall submit a statement of defence and/or a counterclaim to the arbitral institution. The arbitral institution will then serve a copy of the statement of defence and/or a counterclaim on the claimant. Failure on the part of the respondent to submit a defence will not affect the progress of the arbitral proceedings.

7.1.2 Under the CIETAC Arbitration Rules, a party can appoint either a PRC or a non-PRC national to act as its representative in the arbitral proceedings.

7.2 Language of arbitration

7.2.1 Under the CIETAC Arbitration Rules, as a matter of principle, the arbitral proceedings shall be conducted in Chinese. However, the parties can agree to conduct the arbitral proceedings in a foreign language.

7.3 Multi-party issues

7.3.1 PRC law is silent on third-party participation in arbitration. Under PRC law, parties must agree to an arbitration agreement or arbitration clause for it to be effective and, therefore, only those parties that have expressly consented to refer their dispute to arbitration will be bound by it. There are a limited number of exceptions to this, which are set out in the Interpretations and include:

— where two or more legal entities merge, the merged entity will be bound by the arbitration agreements entered into by its predecessor(s);

— if claims or debts are transferred or assigned in whole or in part, the related arbitration agreement will be binding on the transferee or assignee, unless otherwise provided by the parties, or if the party is unaware of the existence of a separate arbitration agreement;

— if an individual who is party to an arbitration agreement dies, the arbitration agreement will bind the beneficiary who succeeds to the deceased’s rights and obligations in the arbitrable matters; and

— if a legal entity changes its legal form or name, the newly formed legal entity will be bound by the arbitration agreements entered into by the former entity.

---

60 Ibid, art 25(1).
61 Ibid, art 25(3).
62 CIETAC Arbitration Rules, art 16(2).
63 Ibid, art 67.
64 Interpretations, art 8.
66 Ibid, art 8.
7.3.2 There are no specific requirements in PRC law for a valid multi-party arbitration agreement and so parties should follow the rules of the applicable arbitral institution that has been designated to govern their arbitral proceedings.

7.4 Oral hearings and written procedures
7.4.1 The PRC Arbitration Law also contains several procedural provisions in relation to oral hearings and the procedure to render an award. Normally, the arbitral tribunal shall hold an oral hearing to hear the arbitration, but, if the parties agree, the arbitral tribunal may conduct the arbitration on the basis of written submissions only.

7.5 Default by one of the parties
7.5.1 If a claimant fails to appear before the arbitral tribunal without giving reasons, the arbitral tribunal may deem that the claimant has withdrawn the application for arbitration. Should a respondent fail to appear without giving reasons, the tribunal may make a default award. The same powers apply if either party leaves a hearing prior to its conclusion.

7.6 Confidentiality
7.6.1 The arbitral tribunal shall not conduct any oral hearings in public. If the parties agree to a public hearing, the arbitration may proceed in public, except in cases involving state secrets.

8. Making of the award and termination of proceedings
8.1 Choice of law
8.1.1 As the PRC Arbitration Law is a procedural law, it does not provide any guidance as to which substantive law should be applied to the dispute. This question is subject to the applicable laws and regulations of the substantive law.

Contractual disputes
8.1.2 Contractual disputes shall be governed by the law chosen by the parties, unless a choice of law is not permitted. According to Article 126 of the PRC Contract Law, if the contract involves a foreign element the parties are free to agree on the governing law unless mandatory PRC law shall apply. The PRC Contract Law does not contain a definition of a contract involving foreign elements. The definition of

---

67 PRC Arbitration Law, art 39.
68 Ibid.
69 Ibid, art 42.
70 Ibid, art 40.
is usually applied accordingly. In practice, this means that in most cases a foreigner or foreign entity must be a party to the contract in order to be permitted to choose a foreign law as governing law. Also in this respect, FIEs are not regarded as foreign parties so that a contract between a FIE and a PRC domestic entity or a contract between two FIEs shall be generally subject to PRC law.

8.1.3 Mandatory PRC law provides that certain contractual transactions (and subsequently, disputes arising out of such transactions) must be subject to the law of the PRC even if the contract involves a foreign element, e.g. even if a foreigner or foreign entity is a party to the contract. Such contractual transactions are:

- joint venture contracts on the establishment of a Sino-foreign equity joint venture company or Sino-foreign co-operative joint venture company;  
- contracts on the exploration and exploitation of natural resources to be performed on the territory of the PRC;  
- contracts on the transfer of equity interests in a Sino-foreign equity joint venture company, Sino-foreign co-operative joint venture company or wholly foreign-owned enterprise;  
- contracts on the operation by a foreign natural person, foreign legal person or any other foreign organisation of a Sino-foreign equity joint venture company or Sino-foreign co-operative joint venture company established in the PRC;  
- contracts on the purchase by a foreign natural person, foreign legal person or any other foreign organisation of equity interests held by a shareholder in a non-foreign-invested enterprise in the PRC;  
- contracts on the subscription by a foreign natural person, foreign legal person or any other foreign organisation of increased registered capital of a non-foreign-invested limited liability company or company limited by shares in the PRC;  
- contracts on the purchase by a foreign natural person, foreign legal person or any other foreign organisation of assets of a non-foreign-invested enterprise in the PRC; and

---

71 See paragraph 1.2.4 above.  
72 See paragraph 1.2.5 above.  
73 PRC Contract Law, art 126.  
74 Ibid.  
75 Rules of the Supreme People’s Court concerning the Application of Law in Civil and Commercial Disputes, 23 July 2007 (Rules), art 8, item 4.  
76 Ibid, art 8, item 5.  
77 Ibid, art 8, item 6.  
78 Ibid, art 8, item 7.  
79 Ibid, art 8, item 8.
— other contracts mandatorily governed by the law of the PRC as provided for in the laws or regulations of the PRC.\textsuperscript{80}

8.1.4 In the absence of an agreed choice of law, the arbitral tribunal will apply the rules on conflict of laws provided by PRC law. Under PRC law, the law governing foreign-related contracts in civil and commercial matters shall refer to the substantive law in the relevant country or region, excluding the conflicts of law analysis and procedural law.\textsuperscript{81} As a matter of principle, in the absence of an agreed governing law, the law of the country or region having the most significant relationship with the contract shall be the governing law.\textsuperscript{82} The PRC rules on conflict of laws contain detailed criteria defining the most significant relationship for different types of contracts.\textsuperscript{83}

\textit{Non-contractual disputes}

8.1.5 The law applicable to non-contractual disputes is stipulated in the PRC Law on the Application of Laws to Foreign-related Civil Relationships of 28 October 2010 (\textit{Application Law}). The Application Law also confirms the right of the parties to a dispute to choose the applicable law in a foreign-related civil relationship.\textsuperscript{84} However, the Application Law contains certain provisions on the mandatory application of a certain law, e.g. in cases of real estate property rights,\textsuperscript{85} negotiable instruments\textsuperscript{86} and pledges.\textsuperscript{87}

8.2 Timing, form, content and notification of award

8.2.1 An award shall specify:
— the arbitration claim;
— the facts of the dispute;
— the reasons for the decision;
— the results of the award;
— the allocation of arbitration fees; and
— the date of the award.\textsuperscript{88}

\textsuperscript{80} \textit{Ibid}, art 8, item 9.
\textsuperscript{81} \textit{Ibid}, art 1.
\textsuperscript{82} \textit{Ibid}, art 5, s 1.
\textsuperscript{83} \textit{Ibid}, art 5, s 2, items 1–17.
\textsuperscript{84} Application Law, art 3.
\textsuperscript{85} \textit{Ibid}, art 36.
\textsuperscript{86} \textit{Ibid}, art 39.
\textsuperscript{87} \textit{Ibid}, art 40.
\textsuperscript{88} PRC Arbitration Law, art 54.
8.2.2 If the parties agree that they do not wish for the facts of the dispute and the reasons for the decision to be specified in the award, the same may be omitted.\(^9\)

8.2.3 A unanimous vote of the arbitral tribunal is not required, but instead awards are made by the majority decision of the arbitral tribunal.\(^9\) Dissenting arbitrators may or may not sign the award.\(^9\)

8.2.4 Arbitral tribunals may grant interim awards during the arbitration on specific facts of the dispute which have become clear.\(^9\)

8.2.5 Under the CIETAC Arbitration Rules, in foreign-related disputes, the award shall be issued within six months from the date on which the arbitral tribunal is constituted. This time period can be extended by the Chair of CIETAC upon the request of the arbitral tribunal.\(^9\)

8.3 Settlement

8.3.1 The arbitral tribunal can recognise settlement agreements between the parties through an award reflecting the terms of the settlement or through a written conciliation statement.\(^9\)

8.4 Power to award interest and costs

8.4.1 In arbitral proceedings, the reasonable legal fees of the winning party shall generally be borne by the losing party.\(^9\) This is distinct from litigation in the PRC where, apart from certain disputes concerning the protection of intellectual property rights, a winning party shall generally bear its own legal fees. In exceptional cases, the arbitral tribunal may award additional and other reasonable expenses actually incurred.

8.4.2 Interest may be awarded. The interest rate will depend on the law applicable to the dispute. The arbitral tribunal has the discretion to decide whether or not to award interest on claims awarded to a party.

---

\(^9\) Ibid.
\(^9\) Ibid, art 53.
\(^9\) Ibid, art 54.
\(^9\) Ibid, art 55.
\(^9\) CIETAC Arbitration Rules, art 42.
\(^9\) PRC Arbitration Law, art 49 and 51.
\(^9\) See, for example, CIETAC Arbitration Rules, art 46.
8.5 Termination of the proceedings
8.5.1 In addition to termination by a final award, arbitral proceedings can be terminated by default or settlement.

8.6 Effect of the award
8.6.1 The award becomes effective and legally binding on the day that it is made.96

8.7 Correction, clarification and issue of a supplemental award
8.7.1 If there are typographical or mathematical errors in the award, or if the award omits certain matters which have been decided by the arbitral tribunal, the parties can apply for a correction within 30 days of receipt of the award.97 If entire claims have been omitted from the award, the parties can apply for a supplementary award.

9. Role of the courts

9.1 Jurisdiction of the courts
9.1.1 The PRC People’s Courts have a very limited role in arbitration except in relation to challenging and enforcing awards, as set out section 10 below.

9.2 Stay of court proceedings and rulings on jurisdiction
9.2.1 Where a party commences proceedings in the PRC People’s Court where it has concluded an arbitration agreement, the PRC People’s Court shall not accept the case, unless the arbitration agreement is void.98 In the event of a dispute over the validity of an arbitration, either the PRC People’s Court or the arbitral institution shall give a ruling and if one party requests the PRC People’s Court to rule and the other requests the arbitral institution, the PRC People’s Court shall give the ruling.99

9.3 Interim protective measures
9.3.1 Where a party seeks interim measures of protection of evidence in a foreign-related arbitration, the relevant arbitral institution is required to submit the application to the Intermediate People’s Court where the evidence is located.100

---

96 PRC Arbitration Law, art 57.
97 Ibid, art 56.
98 PRC Arbitration Law, art 5. See section 4.1 above on the requirements for a valid arbitration agreement.
99 PRC Arbitration Law, art 20. See also paragraph 6.1.1 above.
100 PRC Arbitration Law, art 68. See also paragraph 6.2.1 above.
10. Challenging and appealing an award through the courts

10.1 Appeals
10.1.1 As a matter of principle, it is not possible to appeal against an award before an arbitral tribunal or a PRC People’s Court.\(^{101}\)

10.2 Applications to set aside an award

10.2.1 Awards concerning domestic disputes

Whilst there is no right to appeal, there are certain circumstances in which awards rendered by an arbitral tribunal in the PRC that relate to domestic disputes can be set aside by a competent Intermediate People’s Court. The competent Intermediate People’s Court will be the court at the place in which the arbitral institution that governs the arbitral proceedings is located.\(^{102}\) If one party applies for the enforcement of an award and the other party applies to have the award set aside, the competent People’s Court shall rule to suspend the enforcement proceedings until a ruling has been made concerning the application for setting aside the award.\(^{103}\)

10.2.2 A party may apply to the Intermediate People’s Court to have a domestic award set aside within six months from the date of receipt of the award.\(^{104}\) When making an application to set aside a domestic award, that party must produce evidence to demonstrate that one of the following circumstances has arisen:

— there is no arbitration agreement;
— the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitral institution;
— the formation of the arbitral tribunal or the arbitration procedure was not in conformity with statutory procedure;
— the evidence on which the award is based was forged;
— the other party has withheld evidence sufficient to affect the impartiality of the arbitration; or
— while arbitrating the case, the arbitrators committed embezzlement, accepted bribes, or made an award that perverted the law.\(^{105}\)

---

\(^{101}\) PRC Arbitration Law, art 9. The corresponding provision in the CIETAC Arbitration Rules is Article 43(8).

\(^{102}\) PRC Arbitration Law, art 58(1).

\(^{103}\) Ibid, art 62.

\(^{104}\) Ibid, art 59.

\(^{105}\) Ibid, art 58.
10.2.3 In contrast to foreign-related awards, a domestic award can be set aside upon substantial review of the merits of the case. For example, this may occur if crucial evidence is found to be insufficient or if the application of the law is found to be erroneous.

Awards concerning foreign-related disputes

10.2.4 For foreign-related awards, either party may apply to the PRC People’s Court within six months from the date of receipt of the award. The grounds for setting aside are set out in Article 258 of the PRC Civil Procedure Law.

10.2.5 According to Article 258 of the PRC Civil Procedure Law, a foreign-related award will only be set aside if:
— the parties have neither included an arbitration clause in their contract, nor subsequently entered into a written arbitration agreement;
— the party applying to set aside the award was not requested to appoint an arbitrator or to take part in the arbitral proceedings, or the party was unable to state its opinions due to reasons for which it was not responsible;
— the formation of the arbitral tribunal or the arbitration procedure was not in accordance with the relevant arbitral rules; or
— the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitral institution.

10.2.6 The award may also be set aside if the PRC People’s Court determines that the execution of the award would be contrary to public policy.

10.2.7 In an application to set aside a foreign-related award, the Intermediate People’s Court will only review whether the relevant procedural requirements have been fulfilled and will not re-examine the merits of the dispute.

11. Recognition and enforcement of awards

11.1 Domestic awards and foreign-related awards rendered in the PRC
Procedural issues applicable to both domestic and foreign-related awards

11.1.1 The PRC Arbitration Law contains an express obligation upon the parties to perform the award. Where one party fails to do so, the other party may apply

---

106 Ibid, art 59.
107 Ibid, art 70.
108 PRC Civil Procedure Law, art 258, which provides that a court may refuse to enforce an award if it is against the “social and public interest” of PRC.
109 PRC Arbitration Law, art 62.
An application for the enforcement of both domestic and foreign-related awards must be filed with the Intermediate People’s Courts within two years from the last date upon which the losing party must comply with the terms of the award. In addition to filing the enforcement application, the party seeking enforcement must also provide the original or a certified copy of both the award and arbitration agreement and evidence to support its application.

11.1.3 In order to avoid the risk of contradictory decisions concerning the setting aside and non-enforcement of an award in the same case, where an application to set aside an award has been rejected by the competent court, the enforcing court cannot refuse to enforce such award on the same ground(s) on which the earlier court rejected the application to set aside the award.

11.1.4 As discussed in paragraphs 2.3.7 to 2.3.8 above, domestic arbitral institutions and foreign-related arbitral institutions are both permitted to render domestic and foreign-related awards, if agreed by the parties. As this distinction between the jurisdiction of domestic and foreign-related arbitral institutions has now been removed, the key consideration for the enforcement of an award in the PRC is the underlying nature of the dispute, rather than the identity of the arbitral institution governing the arbitral proceedings.

*Enforcement of a domestic award*

11.1.5 The enforcement of domestic awards can only be refused by the enforcing court in accordance with the provisions of Article 63 of the PRC Arbitration Law (in connection with Article 213 of the PRC Civil Procedure Law). The grounds for setting aside domestic awards are:

— the parties had not included an arbitration clause in their contract, or had not subsequently reached a written agreement on arbitration;

— the matters decided upon in the award exceed the scope of the arbitration agreement or the limits of authority of the arbitral institution governing the arbitration;

---

110 Interpretations, art 29, PRC Civil Procedure Law, art 215.
111 Interim Provision of the Supreme People’s Court on Certain Issues Concerning Enforcement by the People’s Court, 8 July 1998, art 20 and 21.
112 See section 10.2.2 above.
113 Interpretations, art 26.
114 For the definition of “domestic arbitration”, see paragraph 1.2.2 above.
— the formation of the arbitral tribunal or the procedure for arbitration is not in conformity with statutory procedure on arbitration;
— the main evidence for ascertaining the facts is insufficient;
— there are manifest errors in the application of the law; or
— the arbitrators committed acts of malpractice for personal benefits and perverted the law in the arbitration of the case.115

11.1.6 In addition, a PRC People’s Court can refuse to enforce a domestic award where it determines that the execution of the arbitration award would be contrary to the social and public interests of the PRC.116

Enforcement of foreign-related awards

11.1.7 The grounds for refusing enforcement of an award relating to foreign-related disputes that have been rendered by an arbitral tribunal in the PRC are identical to those for setting aside such an award (as set out in paragraph 10.2.5 above).117

11.1.8 If a party seeks to enforce a legally binding foreign-related award, and the party against whom the application is sought or that party’s property is not within the territory of the PRC, then the party seeking enforcement shall apply directly to a competent foreign court for the recognition and enforcement of the award.118

11.1.9 If the competent Intermediate People’s Court refuses to enforce the award, this shall be reported to the Higher People’s Court, which must seek the approval of the PRC Supreme People’s Court if it intends to declare the award to be unenforceable.119

11.2 Foreign awards

11.2.1 This section concerns the enforcement of awards that have been rendered outside of the PRC either by a foreign arbitral institution or an arbitral tribunal that was established on an ad hoc basis.

11.2.2 In the event that either of the parties does not voluntarily comply with the terms of a foreign award, a party seeking to enforce that award in the PRC will need to

115 PRC Civil Procedure Law, art 213.
116 Ibid, art 258.
117 PRC Arbitration Law, art 71, in connection with PRC Civil Procedure Law, art 258.
118 PRC Arbitration Law, art 72.
119 See the Circular on Relevant Issues on Handling Foreign-related Arbitral Awards and Foreign Arbitral Awards by People’s Courts issued by the PRC Supreme People’s Court on 28 August 1995 in connection with the PRC Supreme People’s Court’s Opinions on Certain Issues Concerning Setting Aside of Foreign-related Arbitral Awards by the People’s Courts, 23 April 1998.
apply to the competent PRC People’s Court for enforcement. The competent court for the enforcement of a foreign award is the Intermediate People’s Court at the place of the respondent’s domicile or where its property is located.120 The Intermediate People’s Court shall handle the matter pursuant to the terms of any international treaties concluded or acceded to by the PRC, or in accordance with the principle of reciprocity.121

11.2.3 An application for the enforcement of a foreign award must be accompanied by either the original or a certified copy of the award and arbitration agreement, with Chinese translations thereof that have been verified by a PRC embassy or consulate, or a notary public in the PRC.122

11.2.4 With effect from 22 April 1987, the PRC became a contracting state to the New York Convention.123 However, in its Declaration of Accession, the PRC made a reciprocity reservation. As a result, the PRC is only obligated to recognise and enforce awards made in the territory of another contracting state of the New York Convention. Awards rendered in the PRC are not eligible for enforcement inside the PRC pursuant to the New York Convention.124

11.2.5 According to the second reservation made by the PRC, the PRC will only apply the New York Convention to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under national PRC law. To date, this reservation has never been invoked in practice due to the broad interpretation of the term “commercial disputes” contained in the 1987 PRC Supreme Court Notice.

11.2.6 Apart from the above limitations on reciprocity and commerciality, the competent Intermediate People’s Court can only refuse the enforcement of a foreign award for the reasons provided in Article V of the New York Convention (e.g. for serious procedural deficiencies or violations of public policy (ordre public) in the PRC). According to the Circular on Relevant Issues on Handling Foreign-related Awards and Foreign Awards by People’s Courts issued by the PRC Supreme People’s Court on 28 August 1995 (Circular), if the competent Intermediate People’s Court

\[\text{Circular}\]

---

120 PRC Civil Procedure Law, art 267.
121 Ibid, art 267.
122 Interim Provision of the Supreme People’s Court on Certain Issues Concerning Enforcement by the People’s Court, 8 July 1998, art 21.
refuses to enforce a foreign award, this fact shall be reported to the Higher People’s Court. If the Higher People’s Court intends to also declare the award to be unenforceable, it must first seek the approval of the PRC Supreme People’s Court.

11.2.7 The Circular was issued to prevent local courts from refusing the enforcement of foreign awards in order to protect the local party. Before 1995, some PRC People’s Courts had refused to acknowledge and enforce foreign awards. The probability of enforcing a foreign award against a PRC individual or a PRC entity was estimated to be approximately 50% during the 1990s, but has since increased significantly. Between 2000 and 2007, a total of 12 foreign awards were not enforced by PRC People’s Courts: five of these awards had been issued despite the lack of an arbitration clause, in one case there were no assets available for enforcement in the PRC, two awards were refused due to procedural deficiencies and the remaining four were refused because the statute of limitations for application of enforcement had expired.

11.2.8 As discussed in section 2.1 above, the PRC Arbitration Law does not recognise agreements to ad hoc arbitration. However, the PRC Arbitration Law is silent on whether or not international arbitral proceedings (seated outside of the PRC) can be conducted on an ad hoc basis.

11.2.9 On 3 December 1999, the Beijing Higher Court issued an opinion stating that an ad hoc award is enforceable in the PRC under the New York Convention if the award has been issued in another contracting state to the New York Convention and the law of that state recognises ad hoc arbitration.

11.2.10 Article 16 of the Interpretations confirms that an ad hoc arbitration governed by foreign law and conducted outside of the PRC will be recognised and enforceable by the PRC People’s Courts. However, some courts in the PRC may still be reluctant to recognise and enforce foreign ad hoc awards.

11.2.11 A foreign award made in the PRC by a foreign arbitral institution was, in the past, very unlikely to be acknowledged and enforced in the PRC. However, on 22 April 2009, the Ningbo Intermediate People’s Court in Zhejiang Province upheld an ICC

---


127 PRC Arbitration Law, art 16 and 18.

award by labelling it as non-domestic, despite the fact that the award was made in Beijing (*Ningbo Case*). In the Ningbo Case, the court rejected the respondent’s challenge to the validity of an award that had been rendered in favour of a Swiss claimant by an ICC arbitral tribunal seated in Beijing. The main reason for the court reaching this decision was that the respondent had failed to object to the jurisdiction of the ICC arbitral tribunal prior to the first oral hearing in the arbitration. In effect, the PRC People’s Court upheld and enforced the award, despite the fact that it was issued by an ICC-administered arbitral tribunal seated within the PRC.

11.2.12 The court in the Ningbo Case reached its conclusion from a procedural point of view, i.e. due to the respondent’s failure to challenge jurisdiction at the appropriate stage of the arbitral proceedings, rather than providing substantive reasoning to confirm that an award rendered by a foreign arbitral tribunal within the PRC should be upheld and enforced by a competent PRC People’s Court.

11.2.13 It is still too early to conclude whether the decision in the Ningbo Case is the start of a change in the relevant jurisprudence in general and whether this decision has reduced the risk that an award that has been made by a foreign arbitral institution within the PRC could be acknowledged and enforced in the PRC. Thus, it is still advisable to stipulate in an arbitration agreement that arbitral proceedings that are to be administered by a foreign arbitral institution shall be held outside of the PRC.

*Enforcement of an award made under the Washington Convention (ICSID)*

11.2.14 The PRC has been a contracting state to the Washington Convention (ICSID) since 1993. According to the Washington Convention (ICSID), if an investor from a contracting state has made an investment in another contracting state, disputes relating to that investment can be submitted for arbitration to ICSID. However, the PRC has made a reservation to the Washington Convention (ICSID) and, as a result, ICSID arbitration is only a valid option against the PRC if the dispute relates to compensation for expropriation.

11.2.15 Any award rendered by an ICSID arbitral tribunal within the scope of the above limitation must, in theory, be enforced by a PRC People’s Court as though the award were a final judgment of a PRC People’s Court. The PRC People’s Courts are obligated to enforce an ICSID award immediately, without the necessity of following any recognition or enforcement procedure. However, it is currently unclear whether the PRC People’s Courts will enforce such awards in practice.

---

130 For the full text of the Washington Convention (ICSID), see CMS Guide to Arbitration, vol II, appendix 1.2.
131 Washington Convention (ICSID), art 54 (see CMS Guide to Arbitration, vol II, appendix 1.2).
12. Concluding thoughts and themes

12.1.1 Due to the difficulty in recognising and enforcing foreign judgements from ordinary courts of law in the PRC, arbitration is likely to remain the preferred option for the settlement of international commercial disputes with counterparties located in the PRC. Furthermore, with the PRC’s increasing role in international commerce, international arbitration in the PRC is likely to continue growing as a method of resolving PRC-related international commercial disputes. As such, it is likely that the PRC foreign-related arbitral institutions will maintain their prominence within the PRC.

13. Contacts

CMS, China
Unit 2801, Tower 2, Plaza 66
1266 Nanjing Road West
Shanghai 200040
China

Ulrike Glück
T +86 21 6289 6363
E ulrike.glueck@cmslegal.cn

Falk Lichtenstein
T +86 21 6289 6363
E falk.lichtenstein@cmslegal.cn
ARBITRATION IN CROATIA

By Hrvoje Bardek, CMS
# Table of Contents

1. **Overview of arbitration in Croatia** 241

2. **Scope of application and general provisions of the Croatian Arbitration Act** 242
   2.1 Scope of application 242
   2.2 The structure of the Croatian Arbitration Act 243
   2.3 General principles 243

3. **The arbitration agreement** 244
   3.1 Definitions 244
   3.2 Formal requirements 244
   3.3 Special tests and requirements of the jurisdiction 245
   3.4 Separability 245
   3.5 Legal consequences of a binding arbitration agreement 246

4. **Composition of the arbitral tribunal** 246
   4.1 The constitution of the arbitral tribunal 246
   4.2 Challenging the arbitrators 247
   4.3 Procedure for challenge 247
   4.4 Appointment of a substitute arbitrator 248
   4.5 Responsibility of the arbitrators 248
   4.6 Arbitration fees 248

5. **Jurisdiction of the arbitral tribunal** 249
   5.1 Competence to rule on jurisdiction 249
   5.2 Power to order interim measures 249

6. **Conduct of proceedings** 249
   6.1 Commencement of arbitration 249
   6.2 General procedural principles 250
   6.3 Seat, place of hearings and language of arbitration 250
   6.4 Oral hearings and written proceedings 250
   6.5 Default by one of the parties 251
   6.6 Evidence 251
   6.7 Appointment of experts 252
   6.8 Confidentiality 252
7. Making of the award and termination of proceedings 252
   7.1 Choice of law 252
   7.2 Form, content and notification of award 252
   7.3 Settlement 253
   7.4 Power to award interest and costs 253
   7.5 Termination of the proceedings 253
   7.6 Effect of the award 254
   7.7 Correction, clarification and issue of a supplemental award 254

8. Role of the courts 254
   8.1 Jurisdiction of the courts 254
   8.2 Stay of court proceedings 254
   8.3 Preliminary ruling on jurisdiction 255
   8.4 Interim protective measures 255
   8.5 Obtaining evidence and other court assistance 255

9. Challenging and appealing an award through the courts 256
   9.1 Jurisdiction of the courts 256
   9.2 Applications to set aside an award 256
   9.3 Causes of relative nullity 256
   9.4 Causes of absolute nullity 256

10. Recognition and enforcement of awards 257
    10.1 Domestic awards 257
    10.2 Foreign awards 258

11. Special provisions and considerations 259
    11.1 Consumers 259
    11.2 Employment law 259

12. Conclusion 260

13. Contacts 260
1. Overview of arbitration in Croatia

1.1.1 The need for a new arbitration regime in Croatia emerged after the fall of communism. The unrestricted entrance of international capital and a new way of doing business in Croatia meant that drastic changes were required to the system that had been in place. This resulted in a new arbitration law.

1.1.2 The law on arbitration in Croatia is contained in the Croatia Arbitration Act NN 88/2001 dated 19 October 2001 (Croatian Arbitration Act). The new law has replaced parts of the Croatian Civil Procedure Act, the Conflicts of Law Act and the Obligations Act, which had previously regulated arbitration matters. Therefore, the new law not only amended, but also unified, provisions on arbitration into one single act. Organising the provisions on arbitration into one act created a more structured and identifiable environment for arbitration and promoted a better understanding of this area of legal practice.

1.1.3 The Croatian Arbitration Act came into force on 19 October 2001. The main purpose of the Croatian Arbitration Act was to create a modern arbitration law that incorporated the principal features of the Model Law (1985)\(^1\) and the New York Convention.\(^2\)

1.1.4 Before the enactment of the Croatian Arbitration Act, ad hoc arbitration was not permitted in domestic disputes. The main institutional arbitration forum, the Permanent Arbitration Court, was established in 1966 within the Croatian Chamber of Economy. Prior to the Croatian Arbitration Act it dealt with conciliation as well, but a separate conciliation centre was established in 2002.

1.1.5 After the enactment of the Croatian Arbitration Act, new Rules of Arbitration of the Permanent Arbitration Court at the Croatian Chamber of Economy (Zagreb Rules) and Rules of Conciliation were adopted. They came into force in 2002 and are consistent with the Croatian Arbitration Act.

---

2. Scope of application and general provisions of the Croatian Arbitration Act

2.1 Scope of application

2.1.1 The provisions of Croatian Arbitration Act apply to domestic arbitration, the recognition and enforcement of awards and the competence and operation of the courts in regard to arbitration.

2.1.2 It is important to emphasise that domestic arbitration is defined as any arbitration located in the Republic of Croatia. This does not mean that such arbitration cannot be international (so-called “arbitration with international element”), as it is possible for one of the parties to the arbitral proceedings to be a person residing abroad or a legal entity incorporated under foreign law. Provided that the seat of the arbitration is the Republic of Croatia, the arbitration is considered to be domestic. Arbitrations under the Croatian Arbitration Act can therefore be in two forms: with or without an international element (depending on the parties).

2.1.3 International arbitration is understood as arbitration with a foreign seat and it falls outside the scope of the Croatian Arbitration Act. The Croatian Arbitration Act allows for such arbitration in disputes with an international element, unless there is a Croatian lex specialis provision which provides that the dispute can be resolved only before a Croatian court.

2.1.4 If the dispute is without an international element (i.e. between physical persons residing in Croatia or legal entities incorporated under Croatian law), only domestic arbitration can be agreed (i.e. with the seat of arbitration in Croatia). Therefore, an arbitration agreement between two Croatian companies can only provide for domestic arbitration (notwithstanding the fact that the ownership structure of those companies might be foreign).

2.1.5 As far as the ability to stipulate domestic arbitration for a certain dispute is concerned, the arbitrability of a dispute, the Croatian Arbitration Act considers any dispute in which parties can freely dispose of their rights to be arbitrable.

---

3 Croatian Arbitration Act, art 2(1)(2).
4 Ibid, art 3(2).
5 Ibid, art 3(1).
2.2 **The structure of the Croatian Arbitration Act**

2.2.1 The structure of the Croatian Arbitration Act follows the Model Law (1985). There are five parts, which in turn are divided into chapters as follows:

- the first part contains general provisions on the scope of application and definitions;
- the second part is divided into six chapters:
  - (i) the first chapter contains general provisions on arbitrability;
  - (ii) the second chapter regulates the arbitration agreement;
  - (iii) the third chapter deals with the formation of the arbitral tribunal, challenging of arbitrators and jurisdiction;
  - (iv) the fourth chapter contains provisions relating to the conduct of proceedings;
  - (v) the fifth chapter deals with the rendering of the award; and
  - (vi) the sixth chapter deals with the setting aside of an award;
- the third part sets out the rules relating to the enforcement of domestic awards and the recognition and enforcement of foreign awards;
- the fourth part regulates court proceedings relating to arbitration, with general provisions being set out in the first chapter and provisions relating to proceedings concerning the recognition and enforcement of awards set out in the second chapter; and
- the fifth part contains rules on interim and final provisions.

2.3 **General principles**

2.3.1 The Croatian Arbitration Act is based on several principles, among which are the following: party autonomy, non-intervention by the court and equality of the parties.

*Party autonomy*

2.3.2 Due to the fact that many provisions in the Croatian Arbitration Act give priority to the arbitration agreement and to what has been agreed by the parties therein (e.g. rules on the constitution of the arbitral tribunal and choice of law as described below), party autonomy may be considered as the fundamental principle of arbitration in Croatia. Placing such importance on the agreement of the parties is consistent with the general characteristics of arbitration.

*Non-intervention by the court*

2.3.3 With respect to court intervention in arbitral proceedings, the Croatian Arbitration Act provides that the courts shall not intervene except in specifically prescribed circumstances.\(^7\)

---


\(^7\) Croatian Arbitration Act, art 41(1).
2.3.4 When intervening in arbitral proceedings, the court must act in accordance with the limitations set out in the Croatian Arbitration Act and in accordance with the rules of procedure.

2.3.5 Proceedings regarding requests to set aside an award are governed by the Croatian Arbitration Act. All other court proceedings are governed by the rules on non-litigious proceedings (e.g. summarised proceedings with more investigatory powers of a judge such as proceedings for the deprivation of legal capacity).\(^8\)

Equality of the parties

2.3.6 The principle of “equality of the parties” is explicitly stated in Article 17 of the Croatian Arbitration Act. Pursuant to that principle, parties should be able to respond to the allegations and requests of the opposing parties.

2.3.7 In order to make provisions on equality effective, arbitrators shall endeavour to give the parties adequate explanations and discuss together with the parties all relevant issues in dispute.\(^9\)

3. The arbitration agreement

3.1 Definitions

3.1.1 An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise in the future between them in respect of a defined legal relationship of a contractual or non-contractual nature.\(^10\) An arbitration agreement must be set out in writing. It may be concluded by separate agreement or be included as an arbitration clause within a contract.

3.1.2 There must be a legal relationship as the basis for such an agreement. An arbitration agreement that purports to refer disputes arising from non-legal relationships to arbitration is null and void.

3.2 Formal requirements

3.2.1 The arbitration agreement can either be contained in a document that is signed by the parties to the agreement or set out in correspondence between the parties that provides a record of their agreement (i.e. letters, telex, fax, telegrams or any other means of telecommunication that provides a record of the agreement, whether signed by the parties or not).

---

\(^8\) Ibid, art 41(2).  
\(^9\) Ibid, art 17(3).  
\(^10\) Ibid, art 6.
3.2.2 There are a number of situations where the agreement is deemed to be concluded in writing. For example, an offer against which no timely objection was raised, written communication with reference to an arbitration agreement that has been concluded orally or the issuance of a bill of lading with an explicit reference to an arbitration clause in a charter party “Brodarski ugovor” will all create binding arbitration agreements.11

3.2.3 A reference in a contract to another document containing the arbitration clause amounts to a valid arbitration agreement if the clause is a part of the contract and provided that the general requirements of a contractual reference to a separate document are satisfied.

3.2.4 A formal defect in the arbitration agreement is cured if the respondent does not contest the jurisdiction of the arbitral tribunal prior to filing its statement of defence.

3.2.5 There are stricter rules on the formation of a valid arbitration agreement for consumer contract disputes. Such agreements must be contained in a separate document that has been signed by both parties. No other agreements may be contained in such a document, except if the document has been drawn up by a notary public.12

3.3 Special tests and requirements of the jurisdiction

3.3.1 Parties may agree on domestic arbitration for disputes involving rights of which they can freely dispose. In disputes with an international element, parties may agree on a seat of arbitration outside the Republic of Croatia, unless special laws provide that such disputes are to be settled exclusively by a Croatian court. It is possible to submit a dispute covered by the Croatian Arbitration Act to arbitration irrespective of whether or not it is administered by an arbitral institution.13

3.4 Separability

3.4.1 If the arbitration agreement is included in the main contract and the main contract is invalid, the arbitration agreement is severable. Therefore, the arbitration clause will survive the termination of the contract. The principle of separability between the contract and the arbitration clause in Croatia is in line with the provisions of the Model Law (1985).14

12 Ibid, art 6(6).
13 Ibid, art 3.
3.5 Legal consequences of a binding arbitration agreement

3.5.1 The parties may agree the law that applies to the validity of an arbitration agreement. If the parties have failed to agree on this point, the applicable law shall be the law applicable to the main contract or Croatian law (as lex fori – the law of the country where the award is rendered). In other words, the arbitration agreement shall be deemed valid if it is valid under one of those laws (i.e. law applicable to the main contract or the lex fori). Consequently, the possibility that the arbitration agreement will be found to be valid is high.\footnote{Croatian Arbitration Act, art 6(7).}

3.5.2 If a valid arbitration agreement exists and if the parties and matter in dispute are the same then the courts must declare that they lack jurisdiction, dismiss the law suit and refer the dispute to an arbitral tribunal.\footnote{Ibid, art 42(1).} However, this situation only arises where a valid objection is raised by the respondent.

4. Composition of the arbitral tribunal

4.1 The constitution of the arbitral tribunal

4.1.1 An arbitrator can be any natural person with full legal capacity (i.e. their ability to make binding amendments to their rights, duties and obligations is not limited in any way). The Croatian Arbitration Act explicitly states that citizenship may not be an obstacle for the performance of the arbitrator’s duty, although the Act does permit the parties to agree on or impose citizenship restrictions. Although the Croatian Arbitration Act explicitly mentions only citizenship, it can be concluded that other qualifications (e.g. that the arbitrator has to be qualified as a lawyer or a registered member of the bar) are not required, unless the parties agree otherwise. An active Croatian judge can be appointed only as chair of the arbitral tribunal or as a sole arbitrator.\footnote{Ibid, art 10(1–3).}

4.1.2 The parties may, in the arbitration agreement, determine the number and names of the arbitrators or they may simply determine the manner of appointment. If the manner of appointment is not agreed, each party will appoint one arbitrator and the two party-appointed arbitrators will then choose a third arbitrator to act as chair.

4.1.3 If a party fails to appoint one arbitrator within 30 days from the date of notice that the other party has appointed its arbitrator, or if the two arbitrators fail to appoint
the third arbitrator within 30 days from the appointment of the second arbitrator, the arbitrator shall be appointed by the national court at the request of one party. The same happens in arbitrations with a sole arbitrator – if the parties fail to agree on the arbitrator, the arbitrator is appointed by the national court at the request of one party.\(^{18}\)

4.1.4 The parties are free to determine the number of arbitrators, and can agree an even number. However, given the potential problems of having an even number of arbitrators, it is not likely that the parties will agree this very often. If the number of arbitrators cannot be agreed, three arbitrators shall be appointed.\(^{19}\)

4.2 Challenging the arbitrators

4.2.1 The arbitrators have a duty to disclose any reasons that might put in doubt their independence or impartiality.\(^ {20}\) This obligation applies both prior to their appointment and throughout the arbitral proceedings.

4.2.2 A party may challenge the arbitrator if they can show a justifiable doubt as to the arbitrator’s independence and impartiality, if the arbitrator does not possess the qualifications agreed upon by the parties or if the arbitrator fails to fulfil his/her duties as prescribed by law.\(^ {21}\)

4.3 Procedure for challenge

4.3.1 The parties are free to decide on the procedure for challenging the arbitrators. However, they cannot exclude the application of Article 12(7) of the Croatian Arbitration Act. This paragraph stipulates the procedure to be followed in the event a challenge is rejected. The party challenging the appointment of the arbitrator may, within 30 days from (i) the date the challenge is rejected; or (ii) the expiry of the 30 day period during which the arbitral tribunal failed to decide upon the challenge, request the national court to decide on the challenge. A pending request with the court does not prevent continuance of the arbitral proceedings and the rendering of the award.

4.3.2 If there is no agreement on the procedural rules for challenge, the statutory provisions apply. The party that intends to challenge the appointment of an arbitrator must send a written statement to the arbitral tribunal explaining the reasons for the challenge, within 15 days (i) of becoming aware of the appointment of a biased

\(^{18}\) Ibid, art 10(4).
\(^{19}\) Ibid, art 9.
\(^{20}\) Ibid, art 12(1).
\(^{21}\) Ibid, art 11.
arbitrator; or (ii) of becoming aware of circumstances that make the arbitrator biased. The arbitral tribunal should promptly decide on the challenge. The arbitrator who is being challenged is not excluded from the decision making process.

4.4 Appointment of a substitute arbitrator

4.4.1 Early termination of an arbitrator’s mandate is possible if the parties so agree or if the arbitrator withdraws from office.

4.4.2 If the mandate of an arbitrator is terminated for any reason whatsoever, a substitute arbitrator must be appointed in accordance with the applicable rules.

4.5 Responsibility of the arbitrators

4.5.1 An arbitrator cannot be appointed without his/her consent. The signature of the arbitration agreement by the arbitrator would satisfy this requirement. The Croatian Arbitration Act does not specify the consequences of the lack of written form (i.e. if the arbitrator accepts the appointment orally), but legal theory suggests that this cannot be a reason for setting aside the award. However, this might have an impact on the composition of an arbitral tribunal, i.e. according to the theory, the parties might challenge an arbitrator on those grounds.

4.5.2 An arbitrator must conduct the proceedings in a timely fashion in order to avoid any unnecessary delays. Unless otherwise agreed, parties can agree to replace any arbitrators who do not fulfil their duties and responsibilities.

4.6 Arbitration fees

4.6.1 An arbitrator is entitled to compensation for the work performed including expenses. Parties are jointly and severally responsible for the payment of the arbitrator’s fees and expenses.

4.6.2 Parties may challenge the amount of fees and expenses claimed by an arbitrator. In the event of a challenge, presidents of the County Court in Zagreb or of the Commercial Court in Zagreb, depending on the jurisdiction, shall decide on the fees and expenses.

---

22 Ibid, art 12(5).
23 Ibid, art 12(6).
24 Ibid, art 13(1).
26 Ibid, art 11(1).
27 Ibid, art 11(2)–(3).
28 Ibid, art 11(4).
29 Ibid, art 11(5).
5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The arbitral tribunal decides on the issue of its own jurisdiction (competence-competence). A respondent’s objection that the arbitral tribunal does not have jurisdiction must be filed before or simultaneously with entering into discussion on the merits of the case. The fact that a party has already appointed an arbitrator does not prevent it from filing such an objection.

5.1.2 The arbitral tribunal may decide on the objection as a preliminary question or as part of the final award. If the arbitral tribunal decides on the matter as a preliminary question, each party may request a ruling of the national court (in an emergency procedure) within 30 days from the delivery of the arbitral tribunal’s decision. The Croatian Arbitration Act does not explicitly say on what basis a decision of the arbitral tribunal may be overturned by the national court, but it may be presumed that the national court reviews the same issues as the arbitral tribunal when it decides on its own jurisdiction (e.g. whether the arbitration agreement exists, whether it is valid and whether the respective dispute is arbitrable).

5.2 Power to order interim measures

5.2.1 Unless otherwise agreed by the parties, an arbitral tribunal is entitled, upon request by one party, to order interim or protective measures that the arbitral tribunal considers necessary in respect of the subject matter of the proceedings. The party that has requested such measures may apply to the competent national court for the enforcement of such measures.

6. Conduct of proceedings

6.1 Commencement of arbitration

6.1.1 If not agreed differently by the parties, arbitral proceedings commence:

(i) where they are administered by an arbitral institution, from the day the institution receives the claim; and

(ii) in other cases (ad hoc arbitration), from the day the respondent receives a notice from the claimant appointing or suggesting an arbitrator and asking for a response on the arbitrators and the claim.

---

30 Ibid, art 15(1).
31 Ibid, art 16.
32 Ibid, art 20.
6.2 **General procedural principles**

6.2.1 Aside from the mandatory provisions of the Croatian Arbitration Act (comprising the rules for protection of Croatian procedural public policy), the parties are free to agree on the procedure to be followed in the arbitral proceedings. Therefore, the parties are free to refer to the rules of an arbitral institution. In the absence of such an agreement, the arbitrators are free to conduct the proceedings as they deem appropriate.

6.2.2 The parties shall be treated equally and shall have a right to respond to the statements and claims of their adversary.

6.3 **Seat, place of hearings and language of arbitration**

6.3.1 The parties are free to agree on the seat of the arbitration. This provision does not refer to the actual place of oral hearings but to the legal seat of the arbitration. The Croatian Arbitration Act is only applicable if the seat of the arbitration is in Croatia, unless otherwise agreed between the parties.

6.3.2 The actual oral hearings may be conducted at any place the arbitral tribunal considers to be appropriate. If there is no agreement between the parties on the actual seat of arbitration, the arbitral tribunal shall determine the seat, having in mind the convenience of the seat of arbitration for the parties. If the seat is not determined, the seat stipulated in the award shall be deemed to be the seat of arbitration.

6.3.3 In accordance with Article 22 of the Model Law (1985), the parties are free to choose the language of the arbitral proceedings. Failing such agreement, the language shall be determined by the arbitral tribunal.

6.4 **Oral hearings and written proceedings**

6.4.1 The parties may agree on whether proceedings shall be in writing only or whether there shall be an oral hearing. In the absence of an agreement to hold an oral hearing, the arbitral tribunal may order an oral hearing at an appropriate stage, if requested by a party. If no such request is submitted, the arbitral tribunal may at its own discretion hold an oral hearing or conduct proceedings in writing only.

---

33 See Articles 36 (1)(c), 12(4), 12(7), 30(7), 36, etc of the Croatian Arbitration Act.
34 Croatian Arbitration Act, art 18(1).
36 Ibid, art 19.
38 Croatian Arbitration Act, art 21.
whichever seems more appropriate. The proceedings will be conducted in private, unless the parties expressly request that the proceedings be public.\textsuperscript{39}

6.4.2 The parties are to be given sufficient notice concerning hearings and meetings of the arbitral tribunal for the taking of evidence. Furthermore, the parties have the right to receive submissions, documents or communications supplied to the arbitral tribunal by the other party and expert reports or other evidence upon which the arbitral tribunal may rely.\textsuperscript{40}

6.5 Default by one of the parties

6.5.1 Issues that may arise if there is a default of a party in the proceedings are also dealt with in the Croatian Arbitration Act. If the claimant fails to communicate a statement of claim, the proceedings shall be terminated by the arbitral tribunal. If the respondent fails to respond within the agreed or ordered time limit, this does not automatically mean that he shall be treated as admitting the claim. If this occurs, the arbitral tribunal may continue with the proceedings and decide on the basis of the evidence provided. The same applies if a party fails to attend or submit evidence at a hearing.\textsuperscript{41}

6.6 Evidence

6.6.1 The claimant has the duty to submit its claim, identify the issues in dispute and state the facts on which the claim is based. The respondent responds to the claim and submits its defence. During the proceedings, both parties may amend or supplement their claim or positions, unless the arbitral tribunal considers that such amendments would lead to undue delay. Parties are invited to accompany their statements with documents they consider to be important and other relevant evidence.

6.6.2 Witnesses are heard at the hearing but not under oath. This omission has no significant legal ramifications and it is rather of symbolic value, distinguishing arbitral proceedings from the (more formal) court proceedings (although, even in court proceedings the oath is more a matter of custom). It should be noted that if this provision is breached, i.e. the witness is asked to testify under oath, this could not affect the validity of the award. Witnesses may be heard outside the hearing if so agreed by the parties, or the arbitral tribunal may request the witnesses to deliver written answers to questions.\textsuperscript{42}

\textsuperscript{39} Ibid, art 23.
\textsuperscript{40} Ibid, art 23(4).
\textsuperscript{41} Ibid, art 24.
\textsuperscript{42} Ibid, art 25.
6.7 **Appointment of experts**

6.7.1 Unless otherwise agreed by the parties, the arbitral tribunal has the authority to appoint experts to provide reports on specific issues. Furthermore, the arbitral tribunal may require the parties to give the expert any relevant information or to produce and provide documents relevant to the proceedings. Unless otherwise agreed, the expert is obliged to participate in the hearing after submission of his/her report.

6.8 **Confidentiality**

6.8.1 Although the Croatian Arbitration Act is silent on this matter, confidentiality is one of the main advantages of arbitration when compared to court proceedings. For example, under the Zagreb Rules, hearings before the arbitral tribunal shall be closed to the public, unless otherwise agreed between the parties. Therefore, it may be presumed that, absent an agreement otherwise or through the incorporation of institutional rules, there is no obligation of confidentiality on the parties.

7. **Making of the award and termination of proceedings**

7.1 **Choice of law**

7.1.1 The arbitrators shall make their decision based on the applicable law as agreed by the parties. The parties are free to decide on the applicable law. Unless agreed otherwise, the relevant conflict of laws rules will not apply.

7.1.2 Failing any designation by the parties, the arbitral tribunal shall apply the law which has the closest connection with the dispute. The parties may also expressly authorise the arbitral tribunal to render a decision based on principles of equity. In any case, the arbitrators shall make their decision in accordance with provisions of the arbitration agreement and shall take applicable customs into consideration.

7.2 **Form, content and notification of award**

7.2.1 The award shall be made in writing and signed by all of the arbitrators. In cases where there is more than one arbitrator, and one arbitrator fails to sign the award, the majority of arbitrators (including the chair) shall sign the award and note the reason for the missing signature(s) on the award. Each party has the right to receive a copy of the award signed by the arbitrators.

---

43 *Ibid*, art 26(1).
45 *Ibid*, art 30(5).
46 *Ibid*, art 30(6).
7.2.2 The award shall state the reasons on which it is based, unless the parties have agreed that reasons are not required or if the award is given on the basis of a settlement.\(^{47}\) It should also contain the date of award and the seat of the arbitration.\(^{48}\)

7.3 Settlement

7.3.1 The parties may conclude a settlement during the arbitral proceedings and may choose between two options: they may request that the arbitral tribunal terminate the proceedings or render an award on agreed terms (which has the same effect as an award on the merits of the case). In the latter case, the arbitral tribunal must verify that the content of the settlement is in accordance with Croatian public policy.\(^{49}\)

7.4 Power to award interest and costs

7.4.1 The arbitrators may decide at their discretion upon the amount of costs to be paid and the allocation of the obligation to pay such costs between the parties. However, it is common practice that the losing party pays the total amount of the arbitrators’ fees and the costs of the arbitral proceedings, including the other party’s reasonable costs of legal representation. The decision on the obligation for reimbursement of costs and the determination of the amount of costs shall be made in the award or in a separate award.\(^{50}\)

7.5 Termination of the proceedings

7.5.1 Pursuant to the Croatian Arbitration Act, arbitral proceedings may be terminated either as a result of a final award on the merits or by an order of the arbitral tribunal in cases where:
- the claimant withdraws its claim, unless the respondent objects thereto and the arbitral tribunal recognises the respondent’s legitimate interest in obtaining a final award;
- the parties agree on the termination; or
- the proceeding’s continuation is unnecessary or impossible.\(^{51}\)

7.5.2 With the exception of some specific situations (e.g. the power to render an additional award) the termination of the arbitral proceedings terminates the mandate of the arbitral tribunal.\(^{52}\)

\(^{47}\) Ibid, art 30(3).
\(^{48}\) Ibid, art 30(4).
\(^{49}\) Ibid, art 29.
\(^{50}\) Ibid, art 35.
\(^{51}\) Ibid, art 32(1).
\(^{52}\) Ibid, art 32(2).
7.6 **Effect of the award**

7.6.1 The award has the effect of a legally binding and final judgment unless the parties have agreed that the award may be contested before an arbitral tribunal of higher instance.\(^5^3\) In general, the finality and enforceability of an award does not differ from that of a binding judgment of a Croatian court.

7.7 **Correction, clarification and issue of a supplemental award**

7.7.1 The arbitrators may correct clerical mistakes, computational, typographical or similar errors, either on their own initiative or at the request of any of the parties within 30 days of receipt of the award (unless otherwise agreed by the parties). The interpretation or corrections are considered to be part of the award itself.\(^5^4\)

7.7.2 Furthermore, if they so agree, each party can request an interpretation of the award (or specific parts of it) by the arbitrators within 30 days of receipt of the award. On the other hand, if the parties do not agree otherwise, each of them can request the issuance of an additional award within 30 days of receipt of the award, concerning asserted claims not yet decided by the award.\(^5^5\) In both cases, the second party must be notified of any such request by the first party.

8. **Role of the courts**

8.1 **Jurisdiction of the courts**

8.1.1 Generally, the competent court for judicial tasks in relation to arbitration matters is the Zagreb County Court. When the subject matter of the arbitral proceedings is within the jurisdiction of the commercial courts, the competent court is the Zagreb Commercial Court.\(^5^6\)

8.2 **Stay of court proceedings**

8.2.1 If the parties have agreed to resolve their dispute through arbitration, a court must dismiss any claim regarding a subject-matter that falls under an arbitration agreement. However, the court shall do so only upon the objection of the respondent, which must be raised before arguing on the merits of the case. However, the court shall not dismiss the claim in case of such an objection, if the arbitration agreement is found to be:

\(^{53}\) Ibid, art 31.

\(^{54}\) Ibid, art 34.

\(^{55}\) Ibid, art 33.

\(^{56}\) Ibid, art 43(1).
— null and void;
— inoperative; or
— incapable of being performed. 57

8.2.2 Even if the claim has been filed in the court, an arbitral proceeding may be initiated or continued and an award may even be rendered while the court proceedings are pending. 58

8.3 Preliminary ruling on jurisdiction
8.3.1 The court may be requested to rule on the jurisdiction of the arbitral tribunal if the tribunal decides on that matter as a preliminary question. Each party may request such ruling of the court within 30 days from the delivery of the arbitral tribunal’s decision. The court is supposed to decide such question in the expedited proceedings, i.e. by avoiding any unnecessary delays.

8.4 Interim protective measures
8.4.1 Croatian courts have jurisdiction to grant interim or protective measures even if a valid arbitration agreement exists. 59 The request for interim measures of protection to a state court does not constitute an infringement or waiver of the arbitration agreement.

8.5 Obtaining evidence and other court assistance
8.5.1 The court may be requested to provide legal assistance in obtaining evidence which cannot be obtained by the arbitral tribunal itself. Such a request may be filed either by the arbitral tribunal or by each party with the arbitral tribunal’s approval. 60 Arbitrators are authorised to participate in such proceedings before the court and to question persons that are being heard before the court. 61

57 Ibid, art 42(1–2).
58 Ibid, art 42(3).
59 Ibid, art 44.
60 Ibid, art 45(1).
61 Ibid, art 31.
9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts
9.1.1 An award cannot be appealed through the courts. However, it can be the subject of an application to set aside an award. Regarding the competent court see paragraph 8.1.1 above.

9.2 Applications to set aside an award
9.2.1 An application to set aside an award is the only legal remedy against the award provided under the Croatian Arbitration Act. Regarding the reasons for setting aside an award, the Croatian Arbitration Act distinguishes causes of relative nullity which must be proven by the party that files the application and causes of absolute nullity which the court has to take into consideration even if a party has not raised these grounds.

9.3 Causes of relative nullity
9.3.1 The award shall be set aside if a party proves that:
   — the arbitration agreement did not exist, or was invalid;
   — it was unable to conclude the arbitration agreement because of lack of capacity, or that it was not duly represented;
   — it was not given proper notice of the commencement of the proceedings or was otherwise illegally prevented from presenting its case;
   — the arbitral tribunal dealt with a dispute not covered by the arbitration agreement or, that the award contains decisions concerning matters beyond the scope of the arbitration agreement (note that only the part of the award going beyond the scope of the arbitration agreement shall be set aside);
   — the arbitral tribunal was not constituted or composed in accordance with the contractual or statutory provisions; or
   — the award does not contain reasons or it is not signed in accordance with law.

9.4 Causes of absolute nullity
9.4.1 Even if a party has not raised these grounds, the court shall set aside the award:
   — if the proceedings were conducted in a way that violates Croatian public policy; or
   — if the matter in dispute is not arbitrable under Croatian law.

---

63 Ibid, art 45(3).
64 Ibid, art 36(2).
9.4.2 Provided that this possibility is expressly agreed between the parties, i.e. prescribed by the arbitration agreement, an application to set aside an award may be filed in a case where either party finds out new facts or new evidence which would have resulted in a more favourable award for that party if those facts or evidence had been known and used before. However, this ground may be raised only if it was not the fault of the applying party that it could not use those facts or evidence in the arbitral proceeding.65

9.4.3 The application to set aside the award shall be filed within three months of receipt of the award or a subsequent additional award.66

9.4.4 The court may also, if appropriate or upon the request of a party, withhold the decision on setting aside the award, in order to give the arbitral tribunal time to rectify the fault that otherwise would lead to the setting aside of the award.67

9.4.5 However, the setting aside of the award does not automatically invalidate the underlying arbitration agreement. A valid agreement presents grounds for a new arbitration. The court may, if appropriate and upon the request of a party, return the case to the original arbitral tribunal so that it can remedy the difficulty and render a new award.68

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Unless the court finds that one of the causes of absolute nullity prescribed in the Croatian Arbitration Act for setting aside the award is applicable, a domestic award shall be executed. In making this evaluation, the court shall not take into consideration the reasons which were finally rejected in respect of the application to set aside an award.69 It should be noted that the court will never assess the causes of relative nullity at this stage. Due to the fact that the Croatian Arbitration Act clearly distinguishes the enforcement of the award from the procedure of setting aside an award, the parties may not raise the relative grounds within the enforcement procedure even if the deadline for filing the application to set aside an award has not expired yet.

65 Ibid, art 36(5).
66 Ibid, art 36(3).
67 Ibid, art 36(4).
68 Ibid, art 37.
69 Ibid, art 39(1) and 39(2).
10.1.2 The court may be requested to issue a decision stating that causes of absolute nullity for setting aside the award do not exist for any party having a legal interest in filing such a request.\(^\text{70}\)

10.2 **Foreign awards**

10.2.1 Croatia is a party to the New York Convention.\(^\text{71}\) It should be noted, however, that when ratifying the New York Convention\(^\text{72}\), the Croatian Government expressly declared that:

(a) Croatian courts will only recognise and enforce awards rendered in other States that are party to the New York Convention;\(^\text{73}\) and

(b) Croatian courts will only recognise and enforce awards relating to disputes that qualify as “commercial” under Croatian law. Pursuant to the Croatian Arbitration Act, the court may deny recognition and enforcement of foreign awards either at the request of the party or of its volition.

*Court acting at the request of either party*

10.2.2 The Croatian courts shall recognise and enforce a foreign award, unless:

— the opposing party is able to prove reasons prescribed in the Croatian Arbitration Act for setting aside the award;

— the award is still not binding on the parties; or

— the court at the seat of the arbitration has set aside the award or suspended the effectiveness of the award.\(^\text{74}\)

10.2.3 However, in order for the court to deny recognition and enforcement of a foreign award in these cases, the appropriate party must make an adequate request.

10.2.4 On its own volition, recognition and enforcement of foreign awards shall also be refused if the court finds that:

— the proceedings were conducted in a way that violates Croatian public policy; or

— the matter in dispute is not arbitrable under domestic law.\(^\text{75}\)

\(^{70}\) Ibid, art 39(4).

\(^{71}\) CMS Guide to Arbitration, vol II, appendix 1.1.

\(^{72}\) Ibid.

\(^{73}\) Ibid.

\(^{74}\) Croatian Arbitration Act, art 40(1).

\(^{75}\) Ibid, art 40(2).
11. Special provisions and considerations

11.1 Consumers
11.1.1 If the dispute arises or can arise from a consumer contract, the arbitration agreement must be concluded in a form of separate deed and signed by both contracting parties. Save when the agreement is drawn up by a notary public, it may not include any other provisions except those connected to the arbitral proceedings.\footnote{Ibid, art 6(6).}

11.2 Employment law
11.2.1 Pursuant to Croatian Labour Act NN 149/09, 61/11 (CLA), arbitration may be agreed with regard to individual and collective labour disputes, as well as in specific situations prescribed by the CLA.

Individual labour disputes
11.2.2 Contractual parties may agree to settle their labour dispute through arbitration and they may be represented in front of the arbitral tribunal by the trade union or association of which they are members.\footnote{CLA, art 230.} Composition of the arbitral tribunal, proceeding and other relevant arbitral issues may be prescribed by the collective agreement.\footnote{Ibid, art 132}

Collective labour disputes
11.2.3 If a collective labour dispute is submitted to arbitration, the composition of the arbitral tribunal and other procedural issues may be prescribed by the collective agreement or by the agreement concluded between the parties after the dispute has arisen.\footnote{Ibid, art 274.} An issue that is to be submitted to arbitration has to be specified in the arbitration agreement and the arbitral tribunal is authorised to decide only on that specific issue.\footnote{Ibid, art 275.}

11.2.4 If a collective labour dispute concerns the interpretation or application of an act, regulation or collective agreement, the arbitral tribunal shall base its decision on such law, regulation or collective agreement. If, on the other hand, the dispute is related to the execution, modification or renewal of a collective agreement, then the award shall be based on principles of equity. In the latter case the award has an effect of the collective agreement.\footnote{Ibid, art 276.}
Arbitration in specific situations

11.2.5 Certain provisions of the CLA provide for the possibility of arbitration for specific labour disputes (e.g. disputes between the employers and trade unions regarding work that cannot be ceased during strike action). In such a case, a dispute may be submitted to arbitration under the CLA itself (and an arbitration agreement is not necessary).

12. Conclusion

12.1.1 Although arbitration has many advantages (such as confidentiality, speed, neutrality and costs), compared to court proceedings, arbitration is still not very frequently used in Croatia. Nevertheless, Croatia has adopted the Croatian Arbitration Act which is relatively modern and follows the main principles of the Model Law (1985). In addition, a lot of effort has been put into promoting the use of mediation and arbitral proceedings. This highlights Croatia’s attempts to ensure that in future methods of alternative dispute resolution will be more frequently used.

13. Contacts

Bardek, Lisac, Mušec, Skoko, Šarolić d.o.o.
in cooperation with CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Illica 1
10000 Zagreb
Croatia

Hrvoje Bardek
Attorney-at-Law
T +385 1 4825 606
E hrvoje.bardek@bmslegal.hr

---

82 Ibid, art 278.
ARBITRATION IN THE CZECH REPUBLIC

By Tomáš Matějovský, CMS
# Table of Contents

1. **Historical background and overview** 265

2. **Scope of application and general provisions of the Czech Arbitration Act** 267  
   2.1 **Subject matter** 267  
   2.2 **Structure of the law** 268  
   2.3 **General principles** 268

3. **The arbitration agreement** 269  
   3.1 **Definitions** 269  
   3.2 **Formal requirements** 269  
   3.3 **Special tests and requirements of the jurisdiction** 270  
   3.4 **Legal consequences of a binding arbitration agreement** 270

4. **Composition of the arbitral tribunal** 271  
   4.1 **Constitution of the arbitral tribunal** 271  
   4.2 **Procedure for challenging and substituting arbitrators** 272  
   4.3 **Responsibilities of an arbitrator** 274  
   4.4 **Arbitration fees and expenses** 274  
   4.5 **Arbitrator immunity** 275

5. **Jurisdiction of the arbitral tribunal** 276  
   5.1 **Competence to rule on jurisdiction** 276  
   5.2 **Power to order interim measures** 276

6. **Conduct of proceedings** 277  
   6.1 **Commencing an arbitration** 277  
   6.2 **General procedural principles** 278  
   6.3 **Seat, place of hearings and language of arbitration** 278  
   6.4 **Multi-party issues** 279  
   6.5 **Oral hearings and written proceedings** 279  
   6.6 **Default by one of the parties** 280  
   6.7 **Taking of evidence** 280  
   6.8 **Appointment of experts** 280  
   6.9 **Confidentiality** 281  
   6.10 **Court assistance in taking evidence** 281
7. Making of the award and termination of proceedings
   7.1 Choice of law
   7.2 Timing, form, content and notification of award
   7.3 Settlement
   7.4 Power to award interest and costs
   7.5 Termination of the proceedings
   7.6 Effect of an award
   7.7 Correction, clarification and issuance of a supplemental award

8. Role of the courts
   8.1 Jurisdiction of the courts
   8.2 Stay of court proceedings
   8.3 Preliminary rulings on jurisdiction
   8.4 Interim protective measures
   8.5 Obtaining evidence and other court assistance

9. Challenging and appealing an award through the courts
   9.1 Jurisdiction of the courts
   9.2 Appeals
   9.3 Applications to set aside an award

10. Recognition and enforcement of awards
    10.1 Domestic awards
    10.2 Foreign awards

11. Special provisions and considerations
    11.1 Consumers
    11.2 Employment law

12. Concluding thoughts and themes

13. Contacts
1. Historical background and overview

1.1.1 The pre-communist Czechoslovak legal roots were strongly influenced by the Austro-Hungarian legal system and, prior to 1939, commercial arbitration was well established.

1.1.2 After the communist reforms of the Czechoslovak legal system, only foreign trade disputes between state trading organisations of the Member States of the Council for Mutual Economic Assistance (COMECON) could be referred to arbitration before the Permanent Court of Arbitration attached to the Czechoslovak Chamber of Commerce. Such arbitrations were governed by the relevant provisions of the 1972 Moscow Convention, the 1963 Czech Arbitration Act (1963 Czech Arbitration Act) and the 1963 Czech Civil Procedure Code (Czech Civil Procedure Code).

1.1.3 Following the velvet revolution of 1989, as part of an extensive program of legal reform, a legislative commission was formed with the task of producing a new arbitration law. It was hoped that modernisation of the arbitration law would help to secure inward foreign investment by providing an internationally acceptable and politically neutral system of commercial dispute resolution. There was also a concern that, in the post-communist era, an increasing number of foreign investment contracts were providing for arbitration abroad (e.g. in Vienna or London) rather than in the Czech Republic.

1.1.4 As a result, the new Act No. 216 / 1994 Coll. on Arbitral Proceedings and Enforcement of Awards (Czech Arbitration Act) was adopted. The Czech Arbitration Act is based on the 1963 Czech Arbitration Act and, in contrast with the new arbitration laws in many jurisdictions elsewhere in Central and Eastern Europe, it is not based on the Model Law (1985). However, many of the underlying concepts and procedural provisions are similar.

1.1.5 The Czech Arbitration Act brought about wide ranging changes to the Czech arbitration regime. A key change effected by the Czech Arbitration Act was to enable domestic as well as international disputes to be referred to arbitration. It

---

also widened the range of disputes that are capable of being arbitrated. These were significant changes from the old law which restricted the use of arbitration to disputes arising from international trade agreements between state trading organisations.  

1.1.6 Since the division of Czechoslovakia and the creation of the Czech Republic in 1993, the Permanent Court of Arbitration has operated under the name of the Czech Arbitration Court Attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic (Czech Arbitration Court). It is the only permanent Czech arbitration court in the Czech Republic with general jurisdiction. The Czech Arbitration Court organises and supervises individual arbitral proceedings under its rules but does not itself resolve disputes. This task is carried out by the arbitral tribunals appointed under the Czech Arbitration Court’s rules. The Czech Arbitration Court provides overall support and administration services to arbitral tribunals, including services providing for secretaries, reception and delivery of documents. The President of the Czech Arbitration Court (President) may appoint arbitrators, upon the request of the parties or if the arbitrators appointed by the parties cannot agree on the identity of a third arbitrator. The other two Czech permanent arbitration courts, the Arbitration Court attached to the Commodity Exchange and the Arbitration Court attached to the Stock Exchange, are concerned with disputes arising from the relevant exchanges.

1.1.7 Since 1994, the Czech Arbitration Court no longer has a monopoly in relation to institutional arbitration. Arbitrations under the rules of other international arbitral institutions, such as the LCIA6 or the ICC7 are also permitted and used with increasing frequency in the Czech Republic, as are ad hoc arbitrations, including arbitrations under the UNCITRAL Rules (1976)8 and UNCITRAL Rules (2010).9

1.1.8 The Czech Arbitration Court remains the premier permanent arbitral institution in the Czech Republic for the resolution of both domestic and international disputes. It adopted two new sets of rules in 1996: one concerning international arbitration (Czech International Arbitration Rules)10 and the other concerning domestic arbitration. The domestic and international arbitration rules differ on various issues.

---

5 See paragraph 1.1.2 above.
6 For the full text of the LCIA Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.12.
7 For the full text of the ICC Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.7.
8 For the full text of the UNCITRAL Rules (1976), see CMS Guide to Arbitration, vol II, appendix 3.1.
9 Ibid, appendix 3.2.
10 The Rules of the Czech Arbitration Court.
including procedure, the fees charged and the language and place where arbitral proceedings are heard. Both rules provide a comprehensive framework for commercial arbitration in the Czech Republic. Since April 2008, the Czech Arbitration Court has been entitled to handle disputes between businesses and consumers (Consumer Disputes). The Czech Arbitration Court is also the Alternative Dispute Resolution Centre for disputes regarding domain names in accordance with principles and rules set out by the European Commission.11

1.1.9 This chapter will focus on the statutory provisions that apply under the Czech Arbitration Act to the extent that the parties have not (validly) agreed on the application of institutional arbitral rules or otherwise determined the applicable procedural rules governing the arbitral proceedings. However, the Czech International Arbitration Rules are also mentioned where they contain provisions of particular interest.

2. Scope of application and general provisions of the Czech Arbitration Act

2.1 Subject matter

2.1.1 The Czech Arbitration Act is applicable to the resolution of proprietary disputes12 (i.e. claims of a financial or monetary nature) by independent and impartial arbitrators and also governs the enforcement of awards.

2.1.2 The Czech Arbitration Act governs all arbitral proceedings taking place under arbitration agreements made after 1 January 1995. Arbitrations arising from agreements made before 1 January 1995 will continue to be governed by the 1963 Czech Arbitration Act regardless of the date of commencement of the arbitral proceedings.13 This provision of the Czech Arbitration Act is mandatory. The 1963 Czech Arbitration Act will therefore continue to be used for some years to come.

2.1.3 On 20 December 2011, the Chamber of Deputies of the Parliament of the Czech Republic approved a new amendment to the Czech Arbitration Act which was subsequently signed by the President of the Czech Republic on 2 January 2012 (2011 Amendment to the Czech Arbitration Act). The 2011 Amendment to the Czech Arbitration Act will take effect from spring 2012.

12 See paragraph 3.3.1 below for detail on what constitutes a “proprietary” dispute.
13 Czech Arbitration Act, s 48.
2.1.4 The primary goal of the 2011 Amendment to the Czech Arbitration Act is to provide wider protection for consumers as required by the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, dated 5 April 1993 (UTCC Directive).14

2.1.5 The Czech Civil Procedure Code (as amended by the Czech Arbitration Act) also continues to apply to arbitral proceedings, subject to any expressly incorporated institutional rules, such as those of the Czech Arbitration Court or of the ICC. Where the arbitration involves foreign parties or elements, the 1963 Private International Law and Law of International Procedure Act,15 which deals with conflicts of law issues, applies.

2.2 Structure of the law
2.2.1 The Czech Arbitration Act is rather brief; it only contains 50 Sections. It is divided into the following eight parts:
   (i) Part One (Sections 1–3): subject matter and arbitration agreement;
   (ii) Part Two (Sections 4–13): arbitrators, appointment and exclusion of arbitrators and the permanent arbitration courts;
   (iii) Part Three (Sections 14–30): arbitral proceedings, awards and the use of the Czech Civil Procedure Code;
   (iv) Part Four (Sections 31–35): setting aside of an award by the court and interruption of enforcement proceedings;
   (v) Part Five (Sections 36–40): provisions regarding relations with foreign countries;
   (vi) Part Six (Sections 41–44): competence and jurisdiction of courts;
   (vii) Part Seven (Section 45): modification and amendment to the Czech Civil Procedure Code; and
   (viii) Part Eight (Sections 46–50): transitional and final provisions.

2.3 General principles
2.3.1 The general principles of the Czech Arbitration Act, and Czech arbitration law in general, include:
   — the equal treatment of the parties in the arbitral proceedings;
   — the rights of parties to be given the full opportunity to present their respective cases;
   — the freedom of parties to agree on the procedural rules to be followed in the arbitral proceedings;

---

14 See further at section 11.1 below for further detail on changes introduced by the 2011 Amendment to the Czech Arbitration Act.
— in international arbitrations, the freedom of parties to determine the law applicable to the substance of their dispute;
— the independence and impartiality of arbitrators;
— non-publicity of arbitral proceedings, including hearings; and
— the statutory duty of confidentiality of arbitrators.

3. The arbitration agreement

3.1 Definitions
3.1.1 There is no specific definition of an arbitration agreement contained in the Czech Arbitration Act, save for a general provision that parties may agree that any proprietary disputes arising from their relations, which would otherwise fall under the jurisdiction of the ordinary courts, will be decided by one or more arbitrators in ad hoc arbitration or institutional proceedings in a permanent arbitration court (i.e. one established by an Act of the Parliament of the Czech Republic, such as the Czech Arbitration Court).\(^\text{16}\)

3.2 Formal requirements
3.2.1 Pursuant to the Czech Arbitration Act, an arbitration agreement may be entered into either in relation to a specific pre-existing dispute, or in relation to future disputes arising out of a given legal relationship.\(^\text{17}\)

3.2.2 The Czech Arbitration Act requires arbitration agreements to be made in writing. An arbitration agreement made by telegram, telex, or other electronic means, enabling the contents of the agreement to be ascertained and the parties to the agreement to be determined, is deemed to have been made in writing.

3.2.3 If the arbitration agreement is contained in general terms and conditions governing the main contract to which the arbitration agreement applies then the arbitration agreement is validly concluded, provided that the offer of the main contract is accepted by the other party and there is no doubt that this acceptance extends to the arbitration agreement.

3.2.4 The arbitration agreement also binds the legal successors of the parties thereto, unless expressly agreed otherwise.

---

\(^{16}\) Czech Arbitration Act, s 2(1) and 13. See paragraph 3.3.1 below for detail on what constitutes a “proprietary” dispute.

\(^{17}\) Ibid, s 2(3).
3.2.5 In international arbitrations, the issue as to whether disputes can be arbitrated in the Czech Republic is determined according to Czech law. However, the arbitration agreement will be valid if its form complies either with Czech law or the law of the place where the arbitration agreement was made.

3.3 Special tests and requirements of the jurisdiction

3.3.1 Most disputes relating to “property” are able to be settled by arbitration. The precise ambit of this term is unclear, but it is generally accepted to include most claims of a financial or monetary nature. Generally, an arbitration agreement may be validly entered into if the parties could conclude a settlement in respect of the subject matter of the dispute referred to arbitration.  

3.3.2 Accordingly, the only disputes that cannot, in principle, be arbitrated are:
— those regarding personal status (e.g. divorce, annulment of marriage and paternity);
— those where court proceedings can be initiated in the absence of a motion (e.g. cases involving care of minors, legal capacity and guardianship, and inheritance); and
— those in which the substantive law does not permit an agreement between the parties which is contrary to mandatory statutory requirements (e.g. disputes relating to the enforcement of decisions and disputes arising out of insolvency proceedings or receivership).

3.4 Legal consequences of a binding arbitration agreement

3.4.1 A binding arbitration agreement effectively prevents the parties from submitting their dispute to an ordinary court, unless both parties expressly or tacitly agree that their dispute is to be resolved by an ordinary court.

3.4.2 If a person brings a claim before an ordinary court in respect of a dispute which is subject to an arbitration agreement, the respondent should raise its objection to such court proceedings at the time at which it is required to take its first step in the proceedings. If the court finds that the dispute is subject to a valid arbitration agreement between the parties, it is obliged to terminate the court proceedings, unless both parties expressly declare that they do not insist on the arbitration agreement.  

3.4.3 An ordinary court is also authorised to continue with court proceedings (despite the objection as to the existence of an arbitration agreement) if it finds that:

---

18 In particular, pursuant to Czech Civil Procedure Code, s 99.

19 Ibid, s 106(1).
Arbitration in the Czech Republic

— the matter in question is non-arbitrable under Czech law;
— the arbitration agreement is not valid or is non-existent;
— the resolution of the matter in question by the arbitral tribunal, or in arbitration, would exceed the powers given to the arbitral tribunal by the arbitration agreement; or
— the arbitral tribunal refused to discuss and resolve the matter in question. 

3.4.4 Where a court declines jurisdiction on the basis that the dispute is subject to a valid arbitration agreement, for the purposes of determining whether the claim was filed within the relevant statutory limitation period, the deemed date of filing will remain the date on which the court claim was originally filed, providing arbitral proceedings are commenced within 30 days of the court’s decision.

3.4.5 Where arbitral proceedings have already been commenced before the filing of a claim in an ordinary court relating to the same dispute, the court must stay its proceedings concerning whether the dispute is subject to a valid arbitration agreement until the arbitral tribunal has decided on its competence and/or on the merits of the claim.

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal
4.1.1 Both Czech and foreign citizens may act as arbitrators, provided that they are of adult age and enjoy capacity to act under the law of their country or under the law of the Czech Republic.

4.1.2 The parties are free to determine the number of arbitrators in the arbitration agreement. The arbitration agreement should set out the identity of the arbitrators or the procedure for determining the number of arbitrator(s) and procedure for their appointment. The arbitral tribunal must always be composed of an odd number of arbitrators.

4.1.3 If the parties have not made any provisions in relation to the number or appointment of arbitrator(s) in the arbitration agreement, each party shall be entitled to appoint one arbitrator. The arbitrators appointed by the parties shall then select the presiding arbitrator to act as the chair.

20 Ibid.
21 The 2011 Amendment to the Czech Arbitration Act now specifically provides that an arbitrator must have good integrity and be of unimpeachable character.
4.1.4 The Czech Arbitration Act sets out the procedure to be followed in the event that a party who fails to appoint an arbitrator within 30 days of receipt of an invitation by the other party to make the appointment or if the arbitrators appointed by the parties are unable to agree on the identity of the chair.\(^{22}\) In such circumstances – unless otherwise agreed by the parties in their arbitration agreement – the court shall appoint the respective arbitrator. The application to the court for such nomination can be made by any party to the arbitral proceedings or any of the arbitrators that have already been appointed.

4.1.5 The Czech International Arbitration Rules state that arbitral tribunals should consist of three arbitrators (or a sole arbitrator, if so agreed by the parties to the arbitral proceedings) and set out the appointment procedures to be followed, including a provision in relation to multi-party disputes.\(^{23}\) Generally, if the parties, or the arbitrators appointed by the parties, fail to make an appointment, the appointment will be made by the President.

4.2 Procedure for challenging and substituting arbitrators

4.2.1 The Czech Arbitration Act requires a proposed arbitrator to disclose to the parties or to the court forthwith all circumstances which are likely to give rise to serious doubts as to his or her impartiality and which would disqualify the arbitrator from acting as an arbitrator.\(^{24}\)

4.2.2 Under the 2011 Amendment to the Czech Arbitration Act, arbitrators in Consumer Disputes are obliged to inform parties whether they have been involved in a dispute regarding one of the parties in the last three years.

4.2.3 The 2011 Amendment to the Czech Arbitration Act also strictly provides that arbitrators are excluded from hearing and making a decision in the matter if there is a reason to doubt their impartiality based on their relationship with the parties or their representatives.

4.2.4 An arbitrator who has been named in the arbitration agreement, or appointed by the parties, shall be disqualified from hearing the dispute if circumstances giving rise to serious doubts as to his or her impartiality are disclosed at a later date. Such arbitrator is required to resign from his or her office in the event of such circumstances being disclosed.

\(^{22}\) Czech Arbitration Act, s 9.

\(^{23}\) Ibid, s 7.

\(^{24}\) Ibid, s 8.
4.2.5 Each party has a right to challenge any of the arbitrators, experts or interpreters employed in the arbitral proceedings on the grounds that, in its opinion, they are biased or if it may be presumed that they are directly or indirectly interested in the outcome of the arbitral proceedings.

4.2.6 The same conditions and rules also apply if a nominating party decides to challenge its own nominee.

Procedure for challenging an arbitrator

4.2.7 If an arbitrator fails to resign from his or her office, notwithstanding the existence of reasons for disqualification, the parties have the right to agree on further steps to be taken. In addition, either party has the right to apply to the court for a disqualification order. If the parties do not agree on the steps to be taken, and if the arbitration is subject to rules that do not resolve this issue, the Czech Arbitration Act does not provide a clear answer as to whether the arbitral tribunal may determine the issue. In this respect the matter is usually submitted to the ordinary court for a decision.

4.2.8 In arbitral proceedings subject to the Czech International Arbitration Rules, the challenge shall be taken prior to the commencement of the oral hearing. If it is taken at a later time, a challenge shall be granted only if the cause leading to such late challenge is held to be sufficiently serious. A decision on the challenge of an arbitrator shall be taken by the remaining arbitrators of the arbitral tribunal. If they are unable to agree, or if the challenge is against two arbitrators, the decision thereon shall be taken by the board of the Czech Arbitration Court. The board shall also decide on a challenge of a sole arbitrator. If the challenge of an arbitrator is sustained, a new arbitrator shall be elected or appointed in accordance with the Czech International Arbitration Rules. The new arbitrator shall be a member of the arbitral tribunal from the date on which he or she accepts his or her appointment.

Substitution of arbitrators

4.2.9 In the event that an arbitrator that has already been appointed by the parties resigns from their office, or is otherwise no longer in a position to exercise their function, the court shall appoint a new arbitrator upon the application of any party or of another arbitrator, unless otherwise agreed by the parties. When making the substitute appointment, the court is required to take into consideration circumstances guaranteeing the arbitrator’s independence and impartiality.

---

25 The Czech International Arbitration Rules, s 22.
4.2.10 If a substitute arbitrator is appointed and if the arbitration is subject to rules that do not resolve this issue, the Czech Arbitration Act does not provide a clear answer as to whether the hearings, which have already occurred, need to be repeated. In arbitral proceedings subject to the Czech International Arbitration Rules it would be at the discretion of the arbitral tribunal as to whether the questions already discussed at earlier hearings would be reopened. Since there is no unified legal practice in this respect, the need for repetition of hearings would depend on particular circumstances and is usually decided on case-by-case basis. However, to minimise the risk of later annulment of the award by an ordinary court, it is recommended to repeat the hearings to include the new arbitrator. This is, however, at the discretion of the arbitral tribunal.

4.3 Responsibilities of an arbitrator

4.3.1 The acceptance of the office of arbitrator must be made in writing.\(^26\)

4.3.2 No person is obliged to accept the role of an arbitrator. However, once accepted, the arbitrator is obliged to pursue the office in accordance with Czech law and other regulations and is obliged to keep strictly confidential any facts and issues that come to their attention during the term of their office.\(^27\)

4.3.3 Only the parties may relieve an arbitrator from the confidentiality obligations. However, if the parties refuse, the chair of an ordinary district court may decide on relieving an arbitrator from this obligation but only in a case where there are serious and grave reasons to do so.\(^28\)

4.3.4 Relieving an arbitrator from confidentiality obligations is always decided on a case-by-case basis. However, one of the reasons for which an arbitrator may be relieved from his or her confidentiality obligation might be the need to disclose certain facts known to an arbitrator in pending criminal proceedings.

4.4 Arbitration fees and expenses

4.4.1 The Czech Arbitration Act does not contain any express provisions in relation to the payment of fees and costs of the arbitral proceedings or their allocation as between the parties.

4.4.2 In ad hoc arbitral proceedings, the arbitral tribunal will, upon an application by a party, decide on the allocation and payment of the costs of the arbitral proceedings

---

\(^{26}\) Czech Arbitration Act, s 5(2).

\(^{27}\) Ibid, s 5.

\(^{28}\) Ibid, s 6.
between the parties including a party's reasonable costs of legal representation, if the arbitration agreement between the parties so provides. Arbitral tribunals often apply Decree No. 484/2000 Coll., *(2000 Decree)* which specifies the amount of costs that may be awarded to winning parties by the court (regardless of the actual amount of the costs). Typically, sums awarded under the 2000 Decree are lower than the actual costs incurred.\textsuperscript{29}

4.4.3 In institutional arbitral proceedings, the rules of the relevant arbitral institution will generally contain detailed costs provisions. The Annex to the Czech International Arbitration Rules (comprising 15 Sections) makes detailed provision on the costs of arbitral proceedings before the Czech Arbitration Court. The arbitration fees are calculated by reference to the value of the claim although other factors, such as the number of parties and arbitrators, are also taken into account. The arbitration fee is payable upon the filing of the statement of claim or counterclaim, as the case may be. A lump sum payment on account of administrative costs will also be requested from the claimant.

4.4.4 The Czech Arbitration Act does not contain any express provisions regarding the fees and expenses of the arbitral tribunal. In ad hoc arbitrations, the arbitral tribunal’s fees and expenses (including a payment schedule) will be determined by agreement between the parties and the arbitral tribunal.

4.4.5 In institutional arbitral proceedings before the Czech Arbitration Court, the arbitral tribunal’s fees and expenses will generally be determined in the course of the arbitral proceedings and will not be known to parties in advance.

4.4.6 The arbitral tribunal’s expenses might cover costs for: document production; translation; holding hearings outside the seat of the arbitration court; travelling costs and accommodation of arbitrators. These specific costs shall be paid in amounts actually incurred and cannot, therefore, be determined in advance.

4.5 **Arbitrator immunity**

4.5.1 The Czech Arbitration Act does not contain any express provisions in relation to the immunity of arbitrators, however, the issue has been considered by the judiciary but only in respect of institutional arbitral proceedings at the Czech Arbitration Court.

---

\textsuperscript{29} See section 8.5 below on the costs incurred in connection with applications by the arbitrators to the court for measures in support of the arbitration process.
4.5.2 An award made by arbitrators in proceedings brought under the auspices of the Czech Arbitration Court, is deemed to have been issued on behalf of the Czech Arbitration Court. Therefore, the Czech Arbitration Court is held to be directly liable rather than the individual arbitrators.

4.5.3 In respect of ad hoc arbitrators, the situation is less clear but the prevailing opinion is that questions as to the liability of an arbitrator should be dealt with in the contract concluded between the parties to the dispute and the arbitrator(s).

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The scope of the arbitral tribunal’s jurisdiction is determined in the first instance by the terms of the arbitration agreement between the parties. The Czech Arbitration Act provides that the arbitral tribunal has the power to rule on its own jurisdiction. If the arbitral tribunal comes to the conclusion that it lacks the necessary jurisdiction, it shall order the discontinuance of the arbitral proceedings. An objection by a party to the jurisdiction of the arbitral tribunal on the grounds of the non-existence, invalidity or termination of the arbitration agreement must be raised no later than when taking the first step in the arbitral proceedings relating to the merits of the case, unless the objection is based on an allegation that the subject matter of the dispute is not capable of arbitration. In that event, the objection can be raised at any stage of the arbitral proceedings. The right to object to the award may otherwise be lost.

5.1.2 In institutional arbitral proceedings, jurisdictional challenges are decided by the Czech Arbitration Court pursuant to a reference from the arbitral tribunal.

5.2 Power to order interim measures

5.2.1 The Czech Arbitration Act does not give arbitral tribunals the power to order interim measures such as injunctions. However, the ordinary courts have jurisdiction to grant such measures in support of the arbitral process.

30 Czech Arbitration Act, s 15(1).
31 Ibid, s 15(2).
6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 Arbitral proceedings shall commence on the date that the statement of claim is lodged with the arbitral tribunal.\textsuperscript{32} Lodging a statement of claim with an arbitral tribunal has the same legal consequences (e.g. with regard to limitation of claims) as if the same were lodged with a court.

6.1.2 In institutional arbitral proceedings, the statement of claim must be lodged with the Czech Arbitration Court. In ad hoc arbitral proceedings, the statement of claim must be lodged with the chair of the arbitral tribunal, provided that the chair has already been determined or appointed. If the chair of the arbitral tribunal has not yet been determined or appointed, then the statement of claim shall be lodged with any arbitrator already determined or appointed.\textsuperscript{33}

6.1.3 The Czech International Arbitration Rules contain parallel provisions for the commencement of institutional arbitral proceedings.\textsuperscript{34} However, they require the claimant to pre-pay the arbitration fees and a lump sum to cover the administrative costs of the Czech Arbitration Court upon filing the statement of claim.

6.1.4 The Czech Arbitration Act does not contain express provisions in relation to the format, content or timetable of the parties’ submissions to the arbitral tribunal. To the extent that the arbitration agreement between the parties does not set out the procedure to be followed, this will be determined by the arbitral tribunal or the chair. If none of the above procedures apply, the general provisions of the Czech Civil Procedure Code regarding the contents and form of statement of claim will apply as appropriate.

6.1.5 In contrast, the Czech International Arbitration Rules set out the mandatory minimum content necessary for the statement of claim in arbitral proceedings before the Czech Arbitration Court.\textsuperscript{35} Upon filing, the statement of claim will be reviewed by the secretary of the Czech Arbitration Court and, if necessary, the claimant will be invited to remedy any defects. The statement of claim will generally have to be answered by the respondent within 30 days of service. The respondent is entitled to bring a counterclaim. Detailed provisions on the service of documents are set out in the Czech International Arbitration Rules.\textsuperscript{36}

\textsuperscript{32} Ibid, s 14.
\textsuperscript{33} Ibid, s 14(2).
\textsuperscript{34} The Czech International Arbitration Rules, s 10.
\textsuperscript{35} Ibid, s 17.
\textsuperscript{36} Ibid, s 28.
6.1.6  With effect from 1 June 2004, the Czech Arbitration Court has introduced the concept of “online arbitration”. The parties to an arbitration dispute may, if they agree, initiate arbitration under the online rules.\(^{37}\)

6.2  **General procedural principles**

6.2.1  The parties have the freedom to agree on the procedural rules to be followed in the arbitration. Such agreement by the parties is binding on the arbitral tribunal. To the extent that the parties have not made provision for procedural issues in their arbitration agreement, the Czech Arbitration Act provides that procedural issues may be decided by the chair, provided that the parties or all of the other arbitrators authorise the chair to do so.\(^{38}\) If no such agreement has been made, the arbitral tribunal shall be free to conduct the arbitral proceedings in the manner that it deems fit. The Czech Arbitration Act expressly provides that, when doing so, the arbitral tribunal shall avoid all superfluous formalities, but shall give full opportunity to the parties to present their respective cases and shall make findings of fact on which the decision is to be based.\(^{39}\)

6.2.2  The arbitral tribunal shall apply the provisions of the Czech Civil Procedure Code to the arbitral proceedings before it in a reasonable manner, unless otherwise provided by the Czech Arbitration Act.\(^{40}\) The Czech Civil Procedure Code therefore provides a fallback position in the event that the Czech Arbitration Act or the arbitration agreement between the parties does not contain any provisions in relation to a given procedural issue arising in the arbitral proceedings.

6.2.3  The Czech International Arbitration Rules apply in institutional arbitral proceedings before the Czech Arbitration Court.

6.3  **Seat, place of hearings and language of arbitration**

6.3.1  The arbitral proceedings shall be conducted at the seat of arbitration that has been agreed on by the parties. If no such seat of arbitration has been agreed, then the arbitral proceedings shall be conducted at the seat of arbitration that has been determined by the arbitral tribunal. When determining the seat of arbitration, the arbitral tribunal shall take the legitimate interests of the parties into due consideration.

\(^{37}\) See the online arbitration facility [www.arbcourtonline.cz] (accessed 20 December 2011).

\(^{38}\) Czech Arbitration Act, s 19(1).

\(^{39}\) Ibid, s 19(2).

\(^{40}\) Ibid, s 30.
6.3.2 In institutional arbitral proceedings held under the Czech International Arbitration Rules, hearings are generally held at the Czech Arbitration Court in Prague. On the initiative of the arbitral tribunal or by agreement between the parties, hearings may also be held elsewhere in the Czech Republic or abroad.

6.3.3 The Czech Arbitration Act does not contain any express provisions in relation to the language of the arbitral proceedings. Generally, all hearings will be held and decisions made in the Czech (or Slovak) language, unless otherwise provided in the arbitration agreement, agreed upon by the parties or determined by the rules of the relevant arbitral institution. Similar provisions apply to arbitral proceedings before the Czech Arbitration Court.

6.4 Multi-party issues
6.4.1 The Czech Arbitration Act is silent on the issues of intervention and joinder. However, for institutional arbitral proceedings before the Czech Arbitration Court, the Czech International Arbitration Rules helpfully contain a number of provisions expressly addressing multi-party dispute situations which frequently pose procedural difficulties in ad hoc arbitral proceedings. In multi-party arbitrations it may, therefore, be advisable for parties to opt for institutional arbitral proceedings before the Czech Arbitration Court rather than ad hoc arbitral proceedings.

6.5 Oral hearings and written proceedings
6.5.1 The Czech Arbitration Act requires an oral hearing, unless otherwise agreed by the parties. The parties are, therefore, free to agree that all or part of the arbitral proceedings shall be conducted in writing or the parties can take the opportunity to use the online arbitration facility.

6.5.2 The Czech International Arbitration Rules make detailed provision for the conduct of hearings in arbitral proceedings before the Czech Arbitration Court and set out simplified procedures for “document only” arbitrations, as well as for arbitral proceedings that result in an award without any grounds (these types of arbitral proceedings are 20–30% cheaper than standard arbitration).

41 The Czech International Arbitration Rules, s 5.
42 Ibid, s 6–7.
43 Procedural difficulties frequently arise in relation to: the Czech International Arbitration Rules, s 13 (joinder of third parties with a legal interest in the outcome of the proceedings); and s 21 (appointment).
44 Czech Arbitration Act, s 19(3).
45 See paragraph 6.1.6 above.
46 The Czech International Arbitration Rules, s 27.
6.6  Default by one of the parties
6.6.1 The Czech Arbitration Act contains an express provision that a party which, through no fault of its own, has failed to take a step in the arbitral proceedings which was necessary in order for it to defend its rights or otherwise participate in the arbitral proceedings, should be allowed to remedy such failure. In such circumstances, an arbitral tribunal is obliged to permit such a party to later take whatever steps it ought previously to have taken, in order that it can defend its rights or otherwise continue to participate in the arbitral proceedings.47

6.6.2 However, if a party’s default is not sufficiently excused, the arbitral tribunal may exclude some or all of the defaulting party’s submissions. The Czech International Arbitration Rules contain a similar provision.48

6.7  Taking of evidence
6.7.1 The arbitral tribunal has the power to hear witnesses, experts and the parties, provided that they appear voluntarily and do not refuse to give evidence. The arbitral tribunal may also consider other evidence if it is given voluntarily. However, the arbitral tribunal does not have the power under the Czech Arbitration Act to compel witnesses, experts or the parties to appear or to give evidence before it. If necessary, the arbitral tribunal can apply to the court to take any steps in the arbitral proceedings which the arbitral tribunal itself is unable to take.49

6.7.2 Pursuant to the rules of evidence applicable to arbitral proceedings at the Czech Arbitration Court, the arbitral tribunal takes the evidence, assesses the evidence freely at its discretion and may request the parties to produce supplementary evidence.50

6.8  Appointment of experts
6.8.1 The arbitral tribunal does not have the power to appoint experts. However, the parties may agree on such an appointment and on the related costs.

6.8.2 If deemed necessary and where the parties fail to agree on an expert appointment the arbitral tribunal may request an ordinary court to make such an appointment.

47 Czech Arbitration Act, s 21.
49 See further at section 6.10 below on the courts’ powers in such circumstances.
50 The Czech International Arbitration Rules, s 31–32.
6.9 **Confidentiality**

6.9.1 The Czech Arbitration Act makes it clear that arbitral proceedings shall not be public.\(^{51}\) The confidentiality of arbitral proceedings is further protected by the Czech Arbitration Act, which imposes a statutory duty of confidentiality on the arbitral tribunal.\(^{52}\) The arbitral tribunal may be relieved of this duty only by the agreement of the parties or (for serious reasons) by an order of the court.\(^{53}\)

6.9.2 The arbitrators’ confidentiality obligation covers all information which comes to their attention during the term of their office in a particular case, including documents which become part of the arbitration file, notifications or witness testimonies.

6.9.3 Parties to a dispute are not obligated to keep the proceedings confidential but it is prevailing good practice to do so. Despite the fact that the parties are not bound by a specific confidentiality obligation regarding arbitral proceedings, they must keep confidential information or documents covered by business, trade and/or state secret or similar confidentiality obligations arising from other acts and laws. In this respect it is always recommended to identify a document or information covered by such trade, business or other secret obligation as such.

6.10 **Court assistance in taking evidence**

6.10.1 The Czech Arbitration Act provides that to the extent that the arbitral tribunal is unable to take steps in the arbitral proceedings (due to the limits on their procedural powers), the competent court has jurisdiction to take such steps upon an application by the arbitral tribunal.\(^{54}\) This relates primarily to the power to compel witnesses, experts and parties to give evidence to the court for use in the arbitral proceedings where such evidence is not voluntarily given to the arbitral tribunal directly. The courts usually provide assistance to requests made by the arbitral tribunals which have been constituted under the rules of the Czech Arbitration Court, ICC, LCIA or other similar well-established arbitration courts or institutions. There is no specific standard that the courts apply when deciding on such requests, however, such requests must be well reasoned and cannot be demonstrably illegal or discriminatory.

\(^{51}\) Czech Arbitration Act, s 19(3).

\(^{52}\) Ibid, s 6(1).

\(^{53}\) Ibid, s 6(2). See paragraph 4.3.4 above for an example of a serious reason.

\(^{54}\) Ibid, s 20(2).
7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 If the arbitral proceedings involve legal relations containing an international element, the arbitral tribunal shall take its decision under the applicable law as chosen by the parties. If the parties have not determined the applicable law in their contract, the arbitral tribunal shall apply the local conflict of law rules in determining the applicable law. A choice of law by the parties, or the determination of the applicable law by the arbitral tribunal under the conflict of law rules shall, unless otherwise agreed by the parties, be taken as a reference to the substantive law of the jurisdiction so chosen or determined, excluding that jurisdiction’s conflict of law rules.

7.1.2 In domestic arbitrations, the arbitral tribunal shall base its decision on the material law applicable to the case. The arbitral tribunal may also decide the case *ex aequo et bono*, provided that the parties expressly authorise it to do so.

7.1.3 In arbitral proceedings before the Czech Arbitration Court, the arbitral tribunal is additionally required to have regard to trade customs.\(^{55}\)

7.2 Timing, form, content and notification of award
7.2.1 There are no specific periods for the issuance of an award or on the length of the arbitral proceedings. However, the Czech International Arbitration Rules provide for the possibility of accelerated arbitral proceedings upon express agreement of the parties (with the award to be issued within four months or within one month of payment of arbitration fees).\(^{56}\)

7.2.2 An award shall be adopted by a majority of the arbitral tribunal. The same applies in arbitral proceedings under the Czech International Arbitration Rules, although they contain special voting rules in relation to the quantum of monetary awards.\(^{57}\)

7.2.3 After the voting procedure on an arbitral award is completed (meaning an award is approved by a majority of the arbitral tribunal), the award must be produced in writing and signed by at least a majority of the arbitral tribunal. The Czech Arbitration Act expressly requires the operative part of the award to be unambiguous.\(^{58}\)

\(^{55}\) The Czech International Arbitration Rules, s 8.
\(^{56}\) Ibid, s 27a.
\(^{57}\) Ibid, s 36.
\(^{58}\) Czech Arbitration Act, s 25.
7.2.4 An opinion setting out the arbitral tribunal’s reasons for the decision shall be attached to the award, unless the parties dispense with this requirement by agreement. This rule also applies to awards recording a settlement between the parties.

7.2.5 The written award must be served on the parties and delivered in person. The awards are usually delivered through a postal service provider or by court. If a party refuses to receive the award or does not collect the award within ten days following the date when the postal service provider or court clerk attempted to serve it upon the party, the award is deemed to have been delivered.59

7.2.6 In addition to being signed by at least two out of three arbitrators or the sole arbitrator, awards in institutional arbitral proceedings before the Czech Arbitration Court are also signed by the President and the Secretary of the Czech Arbitration Court. The award is either announced to the parties orally or served in writing.

7.3 Settlement
7.3.1 The arbitral tribunal is required to invite the parties to settle their disputes during the course of the arbitral proceedings. If the parties reach a settlement while the arbitral proceedings are pending, the settlement may, upon application by the parties, be incorporated into an award.60

7.4 Power to award interest and costs
7.4.1 In principle, the arbitration fees, the administrative costs of the arbitral proceedings and other specific costs incurred by the Czech Arbitration Court are generally borne by the party who loses the case, or are split between the parties in proportion to their relative success. In making its award on costs, the arbitral tribunal may take into account the parties’ conduct during the arbitral proceedings. However, each party will generally have to bear its own legal costs, although the arbitral tribunal may order a partial recovery of costs from the other party if good cause is shown for an order in such terms. In such cases the 2000 Decree usually applies.

7.4.2 Besides the above arbitration fees, the administrative costs and other costs, there is also default interest on the claimed principal amount which might be claimed by a party. Arbitral tribunals have the power to award contractual or statutory default interest if claimed by the claimant in its statement of claim. Default interest may be awarded either on a contractual basis (if expressly agreed in the main contract), or on the statutory basis.61

59 Czech Civil Procedure Code, s 49.
60 See also the Czech International Arbitration Rules, s 34(1).
61 The Act No. 64/1964 Coll., Civil Code, s 517(2).
### 7.5 Termination of the proceedings

7.5.1 The arbitral proceedings shall be terminated either by an award being issued, or by a decree of discontinuance in cases where no award will be issued (e.g. because the arbitral tribunal declines jurisdiction over the dispute submitted to it for decision). The decree of discontinuance must be adopted, signed, accompanied by an opinion and served on the parties in the same way as an award.\(^\text{62}\)

7.5.2 The Czech International Arbitration Rules contain a similar provision for the discontinuance of arbitral proceedings without an award if:
- the claimant withdraws the statement of claim;
- the parties conclude a settlement without incorporating it in an award; or
- the Czech Arbitration Court rules that it lacked jurisdiction.\(^\text{63}\)

7.5.3 The provisions on awards contained in the Czech International Arbitration Rules also apply to rulings and orders of discontinuance.

### 7.6 Effect of an award

7.6.1 An award which is not subject to appeal by a second tier arbitral tribunal, or in respect of which the time limit for lodging an application for revision has expired, acquires the force of *res judicata* upon service and thus becomes enforceable in the courts. An award made in institutional arbitral proceedings before the Czech Arbitration Court is final, binding and enforceable.

7.6.2 In arbitral proceedings before the Czech Arbitration Court, the arbitral tribunal may also make partial awards (final awards in relation to certain issues in dispute), interim awards (on liability before deciding on quantum), or awards recording a settlement reached between the parties.

7.6.3 Generally speaking, these sorts of awards can also be issued in ad hoc proceedings. These issues should always be a matter of agreement between the arbitrator(s) and the parties or agreed in the rules of the ad hoc arbitration.

### 7.7 Correction, clarification and issuance of a supplemental award

7.7.1 Clerical errors, errors of calculation and other obvious defects of a similar nature in the award may be corrected by the arbitral tribunal or, if applicable, by the Czech Arbitration Court, at any time upon an application by a party. Such corrections are made by way of a decree of correction which shall be adopted, signed and served on the parties by the arbitral tribunal in the same way as an award. This might apply also for non institutional arbitral proceedings if agreed in the particular rules.

---

\(^{62}\) See section 7.2. above.

\(^{63}\) The Czech International Arbitration Rules, s 40.
7.7.2 In addition to correcting typing, numerical or other obvious errors in the award, the Czech International Arbitration Rules also provide the arbitral tribunal the power, upon an application by a party that has been filed within 30 days of service of the award, to issue a supplemental award if it appears that the original award failed to deal with all of the claims put forward by the parties. However, this requires the parties to be summoned to a further hearing. This power may apply in ad hoc proceedings only if so agreed by the parties.

7.7.3 In addition, the parties are free to agree in their arbitration agreement that the arbitral tribunal’s award shall be subject to appeal to a second tier arbitral tribunal consisting of different arbitrators. However, unless the parties expressly make such an agreement, the arbitral tribunal’s award will be final and binding, subject only to the limited circumstances in which an award may be set aside by the court. If an appeal procedure has been agreed by the parties, the application for revision must be served on the other party within 30 days, unless otherwise agreed. The appeal process forms part of the arbitral proceedings and the provisions of the Czech Arbitration Act apply thereto.

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 The Czech Arbitration Act contains express provisions on the courts’ powers in relation to arbitration matters. In particular, the courts have jurisdiction to support the arbitral process in certain circumstances (e.g. by appointing arbitrators, taking evidence and granting conservatory or other interim measures). The courts also have jurisdiction in relation to the challenge and enforcement of awards.

8.2 Stay of court proceedings
8.2.1 The Czech Republic is a signatory to the New York Convention. When dealing with an action in respect of which the parties have made a written arbitration agreement, the Czech courts are, at the request of one of the parties, obliged to refer the dispute to arbitration unless the said agreement is found to be null and void, inoperative or incapable of being performed.

64 ibid, s 38.
65 See section 9 below.
66 Czech Arbitration Act, Part IV.
8.2.2 The Czech Arbitration Act does not contain any express provisions regarding the stay of court proceedings commenced by a party in relation to a subject matter that is covered by a valid and binding arbitration agreement. The stay of court proceedings in such circumstances is dealt with by the Czech Civil Procedure Code (as amended). As soon as a court becomes aware, through the respondent, that a case should properly be dealt with by arbitration, it must stay the court proceedings. The respondent must inform the court at the earliest opportunity, as soon as the first contact with the court is established. However, if the parties both declare that they do not wish the dispute to be resolved by arbitration, the court may hear the case.

8.2.3 The court can also hear the case if it establishes that:
— under Czech law, the case cannot be dealt with in arbitral proceedings;
— there is no valid and binding arbitration agreement;
— the claim falls outside of the jurisdiction of the arbitral tribunal; or
— the relevant arbitration body has refused to deal with the case.

8.2.4 Where court proceedings are stayed and arbitral proceedings are commenced within 30 days of service of the order staying the court proceedings, the legal effects of the initial action remain in force (e.g. for the purpose of calculating the applicable limitation period).

8.2.5 Where court proceedings are commenced after arbitral proceedings have been initiated, the court must suspend such proceedings if they relate to the existence, validity or termination of the agreement until the arbitral tribunal has made a decision either as to its competence and/or on the merits of the case.

8.3 Preliminary rulings on jurisdiction
8.3.1 The arbitral tribunal has the power to decide on its own jurisdiction. The courts therefore do not have jurisdiction to make preliminary rulings on the arbitral tribunal’s jurisdiction (other than indirectly in connection with applications for a stay of court proceedings). However, the parties may subsequently challenge the arbitral tribunal’s findings on its jurisdiction by applying to the courts for the award to be set aside for lack of jurisdiction.

---

68 Czech Arbitration Act, s 106.
69 Ibid, s 106(1).
70 Czech Civil Procedure Code, s 106.
71 Ibid, s 106(2).
72 See section 9.3 below.
8.4 **Interim protective measures**

8.4.1 As explained at paragraph 5.2.1 above, the arbitral tribunal does not have the power to order interim protective measures or to grant injunctions in support of the enforcement of awards. Thus the courts have jurisdiction upon the application of any party to order a preliminary measure or injunction if, during or prior to the commencement of arbitral proceedings, circumstances arise which are likely to jeopardise the enforcement of the award.

8.5 **Obtaining evidence and other court assistance**

8.5.1 To the extent that the arbitral tribunal is unable to take steps in the arbitral proceedings (due to the limits on its procedural powers), the competent court has jurisdiction to take such steps upon an application by the arbitral tribunal. This relates primarily to the power to compel witnesses, experts and parties to give evidence to the court for use in the arbitral proceedings where such evidence is not voluntarily given to the arbitral tribunal directly. The court will implement the application by the arbitral tribunal unless the requested steps are prohibited by law. When taking its decision, the court shall take all measures necessary to ensure the successful implementation of the application.

8.5.2 The costs incurred by the court in taking the steps applied for by the arbitral tribunal in support of the arbitral proceedings shall be covered by the Czech Arbitration Court or the arbitral tribunal, as the case may be. This provision may at first appear somewhat unusual, but the arbitral tribunal will generally only make such an application if the parties have advanced reasonable funds to the arbitral tribunal to cover the costs of the application. Also, any such costs incurred by the arbitral tribunal in making an application to the court will ordinarily be included in the arbitral tribunal’s award on costs.

9. **Challenging and appealing an award through the courts**

9.1 **Jurisdiction of the courts**

9.1.1 An application to the court to take steps to support the arbitral proceedings shall be made to the court within the jurisdiction in which the steps are to be taken. If such a step or measure is to be taken abroad, then the jurisdiction and venue to order such a step or measure shall be the district court within the jurisdiction in which the arbitral proceedings are taking place.

---

73 Czech Arbitration Act, s 20(3).
9.1.2 Jurisdiction to hear applications for a declaration that an arbitral agreement is null and void lies with the court that would have so-called “functional” jurisdiction under certain provisions of the Czech Civil Procedure Code or other enactments which would apply, but for the existence of the arbitration agreement (i.e. the level of court allocated to hear the specific case, depending on a variety of complex factors including, but not limited to, the subject matter and the amount claimed). If such an application is heard at first instance by a court that does not have proper jurisdiction, the application will be heard and then referred to a court which has jurisdiction. This process may be lengthy.

9.1.3 The venue for applications relating to arbitral proceedings under the provisions of the Czech Arbitration Act is the court seated in the local jurisdiction where the arbitral proceedings are taking place, or have taken place, provided that such places are in the Czech Republic. Otherwise, the court that would have had jurisdiction to hear and determine the dispute were it not for the arbitration agreement shall be the venue for hearing the application.

9.1.4 In addition to the general rules on venue, the venue for the conduct of proceedings relating to the appointment of arbitrators and challenge of arbitrators shall be vested in the court at the place or residence of the applicant or respondent, as the case may be, if no venue can otherwise be established in the Czech Republic.

9.1.5 When hearing arbitration applications under the Czech Arbitration Act, the courts shall apply the provisions of the Czech Civil Procedure Code.

9.2 Appeals

9.2.1 An award cannot be appealed to the court. However, as stated at paragraph 7.7.3 above, the parties are free to agree in their arbitration agreement that the arbitral tribunal’s award shall be subject to review by a second tier arbitral tribunal consisting of other arbitrators.

9.3 Applications to set aside an award

9.3.1 The circumstances in which an award may be set aside by the court upon application by a party include the:

- non-arbitrability of the subject matter of the dispute;
- arbitration agreement being void for other reasons, or having been otherwise terminated or failing to cover the subject matter of the dispute;
- involvement of an arbitrator who takes part in the decision and has not been named in the arbitration agreement or otherwise duly appointed to decide the dispute, or lacks the capacity to act as an arbitrator;

---

74 Ibid, s 43.
— award has not been adopted by a majority of the arbitral tribunal;
— parties have not been given the opportunity to present their case;
— award contains an order against the losing party for relief not claimed by the winning party or the performance of which is impossible or illegal;
— Czech Arbitration Court has decided, in respect of a Consumer Dispute, that it was in breach of consumer protection laws and regulations or was otherwise in breach of good manners or public order;\(^75\)
— arbitration agreement regarding Consumer Disputes does not contain information required by the Czech Arbitration Act or such information is, to a large extent incomplete, incorrect or false;\(^76\) or
— court is satisfied that there are grounds on which it would be possible to apply for a new trial in civil proceedings.\(^77\)

9.3.2 An application to set aside an award must be lodged with the court no later than three months following service of the award on the party seeking to set the same aside. The filing of an application to set aside an award does not have the effect of staying the enforceability of the award. However, the court may, upon an application of the losing party, stay the enforceability of the award if execution of the award would inflict serious harm on the losing party.\(^78\) In cases of Consumer Disputes the court will have a power to stay the enforceability even without the party (consumer) applying for such stay.\(^79\)

9.3.3 As discussed at paragraph 5.1.1 above, the right to object to the award on the basis of the invalidity of the arbitration agreement or the improper appointment of an arbitrator may be lost if the party applying for the award to be set aside on such grounds did not raise an objection to the jurisdiction of the arbitral tribunal before or when presenting its arguments on the merits of the case.

9.3.4 If the court has set aside an award on the grounds that the subject matter of the dispute was not arbitrable, or that the arbitration agreement was void for other reasons, had been terminated or did not cover the subject matter of the dispute, then the court shall upon an application by either party lodged after the judgment on the setting aside of the award, proceed with hearing the matter anew and render a decision.

\(^75\) This provision will take effect from the date the 2011 Amendment to the Czech Arbitration Act comes into force.
\(^76\) Ibid.
\(^77\) Czech Arbitration Act, s 31.
\(^78\) Ibid, s 32. Under the 2011 Amendment to the Czech Arbitration Act, the court may also, upon application of the losing party, stay the enforceability of the award if an application to set aside an award is reasonable.
\(^79\) This provision will take effect from the date the 2011 Amendment to the Czech Arbitration Act comes into force.
10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 An award, which is not subject to revision by a second tier arbitral tribunal, or in respect of which the term for lodging an application for revision has lapsed, acquires the force of *res judicata* when served on the parties and is enforceable in the courts in accordance with the provisions of the Czech Civil Procedure Code.\(^80\)

10.1.2 A party against whom the award is being enforced may in certain circumstances apply for a stay of enforcement, even if it failed to lodge an application with the court for the award to be set aside. In addition to certain grounds set out in the Czech Civil Procedure Code, the application may be based on the following grounds:

- the subject matter of the dispute was not arbitrable;
- the award was not adopted by a majority of the arbitral tribunal;
- the award contains an order against the losing party for relief not claimed by the winning party, or the performance of which is impossible or illegal;
- a party, who can act only through a statutory representative, is not represented in the arbitral proceedings and its acts and measures have not subsequently been ratified; or
- a representative, having taken part in the arbitral proceedings in the name and on behalf of a party, lacks the necessary authority and his or her steps or measures taken have not subsequently been ratified by that party.\(^81\)

10.1.3 If an application for a stay of enforcement is lodged with the court in charge of the enforcement, it shall stay the proceedings and order that the applicant shall lodge an application for the award to be set aside within 30 days. If no such application is lodged, the court shall proceed with the enforcement proceedings. If the award is set aside as a result of such an application, the parties are free to apply to the court to hear the matter anew and to decide the same after the judgment setting aside the award has acquired the force of *res judicata*.

10.2 Foreign awards

10.2.1 Czechoslovakia was one of the first countries to ratify the New York Convention and the Czech Republic has become a party to the New York Convention as a legal successor state. New York Convention awards are, therefore, enforceable in the Czech Republic in accordance with the terms of the New York Convention.

---

\(^80\) Czech Arbitration Act, s 28(2).

\(^81\) Ibid, s 35.
10.2.2 In relation to non-New York Convention awards (i.e. awards rendered in countries that are not member states of the New York Convention), the Czech Arbitration Act provides that such awards shall be recognised and executed in the same way as local awards if reciprocity of enforcement is granted by the country from which the award originates. Such reciprocity shall be deemed granted if the respective foreign country declares, in a general way, that awards are enforceable subject to reciprocity.\(^{82}\) The decision by the court decreeing execution of a foreign award must always set out reasons for its decision. Recognition and enforcement of a foreign award may be refused only if:

- the award has not become effective and enforceable under the law of the country where it has been made;
- the award suffers from one of the defects as set out in paragraph 9.3.1 above;\(^{83}\) or
- the award is contrary to Czech Republic’s public policy.

11. Special provisions and considerations

11.1 Consumers

11.1.1 Consumer Disputes may be submitted to arbitration. However, there are several limitations arising from specific relations regarding consumers, as specified in the UTCC Directive.

11.1.2 In recent years, the number of Consumer Disputes that have been resolved by arbitration has grown significantly. The majority of these have been ad hoc arbitrations and the respective arbitration agreements are usually imposed upon the consumers by the party with a stronger bargaining position. The latter often chooses a private, ad hoc arbitration (i.e. not through the Czech Arbitration Court).

11.1.3 The difference between the institutional Czech Arbitration Court and ad hoc arbitral proceedings (or even proceedings with other arbitral institutions) is that the Czech Arbitration Court is established by law and is empowered and obliged to issue its own rules (statutes and orders) that require mandatory publication in the Commercial Bulletin (i.e. a publicly accessible periodical for publishing notifications).\(^{84}\) By contrast, private arbitral institutions are not established by law to resolve arbitration disputes. Czech law does not allow private arbitral institutions to create their own rules or oblige them to publish such rules in the Commercial Bulletin.

---

\(^{82}\) Ibid, s 38.

\(^{83}\) Ibid, s 31.

\(^{84}\) Ibid, s 13.
11.1.4 As a reaction to the above practice, the Czech courts have issued several decisions which have affected the validity of arbitration agreements referring to ad hoc private arbitral institutions to a considerable extent. The courts held it impermissible for an arbitration agreement concerning Consumer Disputes to only refer to the rules of arbitral procedure or rules relating to the arbitral tribunal’s fees of such private arbitral institutions if such rules do not automatically, and in full, become a part of the arbitration agreement and thus binding on both parties.

11.1.5 According to these decisions, an arbitration clause for ad hoc arbitral proceedings in Consumer Disputes may be deemed invalid if it does not contain exact and full rules for the direct appointment of ad hoc arbitrator(s) or any other specific manner of appointment and selection of arbitrator(s), full rules of arbitral proceedings and rules regarding the determination of the costs of proceedings. The mere reference to the “rules” of private arbitral institutions could be, in such cases, construed as an ambiguous arrangement and therefore invalid.

11.1.6 The 2011 Amendment to the Czech Arbitration Act introduces several changes to arbitral proceedings dealing with Consumer Disputes. The primary aim is to provide wider protection to consumers as they are usually in a weaker position when concluding contracts.

11.1.7 According to the 2011 Amendment to the Czech Arbitration Act, an arbitration agreement must be concluded as a specific agreement separate from the actual consumer contract or business terms, otherwise it will be deemed invalid. The business/entrepreneur will be further obliged to explain in detail to the consumer what the consequences of entering into an arbitration agreement may be. This is introduced in response to the current practice when arbitration clauses are contained in small print sections on the back of business terms where consumers may not have a proper chance to be acquainted with the fact or the terms of arbitration or to negotiate the matter.

11.1.8 Under the 2011 Amendment to the Czech Arbitration Act, consumers will also be entitled to receive full information regarding the:
— arbitration agreement, which will have to include information on the arbitrator(s) or that the dispute will be resolved by Czech Arbitration Court;
— manner of commencement of and form of conducting an arbitration;
— arbitrators’ fees and expected expenses of arbitration and manner of their payment and adjudication;

---

85 See for example the decision of Superior Court in Prague No. 12, 28 May 2009 Cmo 469/2008; and decision of the Supreme Court of the Czech Republic No. 32, 21 January 2009 Cdo 2312/2007.
— place of arbitration;
— manner and form of delivery of arbitral award; and
— enforceability of the award.

11.1.9 The 2011 Amendment to the Czech Arbitration Act imposes restrictive requirements on arbitrators. Arbitrators deciding Consumer Disputes will be required to have a university degree and the respective arbitrators will have to be listed in the public list of arbitrators for Consumer Disputes to be maintained by the Ministry of Justice of the Czech Republic.

11.1.10 An arbitrator must inform the parties whether he or she has been involved in any dispute for any of the parties within past three years in order to avoid any suggestion or risk of arbitrator bias in a Consumer Dispute.

11.1.11 Arbitrators dealing with Consumer Disputes will not be allowed to decide a case *ex aequo et bono*.

11.2 Employment law

11.2.1 Although not expressly barred, disputes arising from employment relations are usually resolved before ordinary courts and it would be highly unusual to submit these to arbitration. There are also serious discussions as to whether such disputes would even be arbitrable. However, no firm conclusions have yet been reached on this issue.

11.2.2 Similar limitations and comments as those imposed on Consumer Disputes might arguably apply to the potential arbitrability of disputes arising from employment relations. Another limitation to this effect would be the fact that, under Czech law, only disputes relating to claims of a financial or monetary nature may be arbitrable.\(^6\) For example, a dispute as to whether or not an employment relationship had been validly terminated may not be able to be resolved through arbitration due to this limitation.

12. Concluding thoughts and themes

12.1.1 The introduction of the Czech Arbitration Act formed the basis for arbitration as a means of resolving commercial disputes in the Czech Republic. More recent developments especially the confirmation of the arbitrability of Consumer Disputes (despite its limitations), the introduction of online arbitration and a

---

\(^6\) See paragraph 3.3.1 above.
general acceptance of arbitration as an alternative to ordinary court proceedings for dispute resolution have contributed to the increasing use of arbitration and its growing popularity.

13. Contacts

CMS Cameron McKenna v.o.s.
Palladium
Na Poříčí 1079/3a
110 00 Prague 1
Czech Republic

Tomáš Matějovský
Partner, Advokát/Advocate
T +420 2 96798 852
E tomas.matejovsky@cms-cmck.com
ARBITRATION IN ENGLAND AND WALES

By Guy Pendell and David Bridge, CMS
Table of Contents

1. The Arbitration Act 1996 299

2. Historical background 299

3. Scope of application and general provisions of the English Arbitration Act 300
   3.1 Arbitrability 300
   3.2 Scope of application 301
   3.3 General principles 302

4. The arbitration agreement 303
   4.1 Formal requirements 303
   4.2 Separability 303
   4.3 Mandatory and non-mandatory provisions 304
   4.4 Choice of law 305

5. Composition of the arbitral tribunal 306
   5.1 Constitution of the arbitral tribunal 306
   5.2 Removal of arbitrator 307
   5.3 Appointment of substitute arbitrators 308
   5.4 Arbitrators’ fees, expenses and immunity 308

6. Jurisdiction of the arbitral tribunal 308
   6.1 Competence to rule on jurisdiction 308
   6.2 Power to order interim measures 309

7. Conduct of proceedings 309
   7.1 Common law tradition 309
   7.2 Commencing an arbitration 310
   7.3 General procedural principles 310
   7.4 Seat, place of hearings and language of arbitration 312
   7.5 Submissions 313
   7.6 Oral hearings and written proceedings 313
   7.7 Taking of Evidence 313
### 8. Making of the award and termination of proceedings

- **8.1 Remedies**
- **8.2 Interest**
- **8.3 Decision-making by the arbitral tribunal**
- **8.4 Form, content and effect of the award**
- **8.5 Settlement**
- **8.6 Costs**
- **8.7 Correction and interpretation of the award**

### 9. Role of the courts

- **9.1 Jurisdiction of the courts**
- **9.2 Stay of court proceedings**
- **9.3 Extension of time for commencement of arbitral proceedings**
- **9.4 Preliminary rulings on points of jurisdiction and law**
- **9.5 Interim protective measures**
- **9.6 Obtaining evidence and other court assistance**

### 10. Challenging and appealing the award through the courts

- **10.1 Loss of right to object to award**
- **10.2 Challenging the award**
- **10.3 Appeal on point of law**

### 11. Recognition and enforcement of awards

- **11.1 Domestic awards**
- **11.2 Foreign awards**

### 12. Court proceedings

### 13. Questions not addressed by the English Arbitration Act

### 14. Conclusion

### 15. Contacts
1. The Arbitration Act 1996

- consolidated and updated the existing legislation on arbitration;
- codified legal rules and principles established by case law;
- brought English law more into line with internationally recognised principles of arbitration law;
- sought to make arbitration in England more attractive both to domestic and to international users;
- is broadly based on the Model Law (1985),\(^1\) but applies equally to domestic and to international arbitration;
- goes beyond the scope of the Model Law (1985) and contains a near-comprehensive statement of the English law of arbitration;
- is intended to be user-friendly, has a logical structure and is written in plain English;
- states what the objective of arbitration is, although it does not attempt a definition;
- increases the scope of party autonomy;
- strengthens the powers of the arbitral tribunal; and
- limits judicial intervention in the arbitration process while preserving the courts’ powers to provide assistance where this is necessary to make arbitration a fair and efficient dispute resolution procedure.

2. Historical background

2.1 Before the English Arbitration Act came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979. This legislation applied to different aspects of arbitration and was complemented by, interpreted by and built on a large body of case law.

2.2 Historically, three broad criticisms were levelled at English arbitration:
- it was slow and expensive: “litigation without wigs”;
- the law was inaccessible to laypersons and to foreign users; and
- the courts were too ready to intervene in the arbitral process.

2.3 As a result, arbitration became increasingly unattractive as an option for dispute resolution and London lost out to other jurisdictions as a venue for international commercial arbitrations.

---

\(^1\) For the full text of the Model Law (1985), see CMS Guide to Arbitration, vol II, appendix 2.1.
2.1.4 In the 1980s, the Department of Trade and Industry established the Departmental Advisory Committee on Arbitration Law (DAC) under the Chairmanship of Lord Justice Mustill (as he then was). One of the key decisions for the DAC was whether to recommend the enactment of the Model Law (1985).

2.1.5 Whilst the DAC decided against adopting the Model Law (1985) wholesale, it did recommend that the new Arbitration Act should, so far as possible, adopt the structure and language of the Model Law (1985) and be clear and accessible. Despite these aspirations, the first draft bill in February 1994 did little more than consolidate the existing statutes of 1950, 1975 and 1979.

2.1.6 Under the new chairmanship of Lord Justice Saville (as he then was), the DAC produced an entirely new draft bill by December 1995. After extensive consultation, but with relatively few changes, this became the English Arbitration Act.

2.1.7 Many provisions of the English Arbitration Act appear familiar at first sight, but it nevertheless implemented a number of radical reforms. The DAC also published Reports on the Arbitration Bill in February 1996 and on the English Arbitration Act in January 1997. These do not form part of the English Arbitration Act, but are authoritative guides to its provisions, may be referred to in court and are frequently relied on by arbitrators.

2.1.8 The procedures for arbitration applications to the courts in England and Wales are now set out in Part 62 and the Practice Direction to Part 62 of the Civil Procedure Rules.² (The courts of Scotland and of Northern Ireland follow their own procedure.)

3. Scope of application and general provisions of the English Arbitration Act

3.1 Arbitrability

3.1.1 Most commercial disputes are capable of being arbitrated if the parties agree on that form of dispute resolution.³ Generally, the courts have not considered the circumstances in which disputes cannot be arbitrated. Where this issue is brought before the courts, however, only limited public policy considerations normally apply. As the DAC noted, “matters which are not arbitrable in England lie almost...

---

² Civil Procedure Rules 1998 (CPR).
³ English Arbitration Act, s 1(b).
wholly outside the commercial field”. There are a few exceptions to this rule, for example, where the courts are concerned that the arbitral process may breach one of the party’s statutory rights. Recently the courts have held that where an employee has statutory rights entitling them to have their case heard before an employment tribunal, it is not possible to submit the dispute to arbitration as the sole means of deciding the dispute.4

### 3.2 Scope of application

3.2.1 The English Arbitration Act applies to all arbitrations, the legal “seat” or “place” of which is in England and Wales or Northern Ireland. Scotland has its own separate legal system and arbitration law (see Arbitration in Scotland, sections 1 and 2). The English Arbitration Act applies to institutional as well as to ad hoc arbitrations.

3.2.2 Certain provisions of the English Arbitration Act apply even if the place of the arbitration is outside England, Wales and Northern Ireland, or if no place has been designated or determined5 in the arbitration agreement. These include provisions concerning the:

— stay of legal proceedings;6
— enforcement of awards;7
— securing of the attendance of witnesses;8 and
— court’s powers in support of arbitral proceedings.9

3.2.3 The provisions of Part I of the English Arbitration Act apply to all arbitrations conducted pursuant to an arbitration agreement. Part II of the English Arbitration Act deals with consumer arbitrations10 and arbitrations conducted on a statutory basis to which Part I of the English Arbitration Act does not apply. Part III deals with the recognition and enforcement of foreign awards and Part IV contains general provisions. This chapter will focus on the provisions of Part I and Part III of the English Arbitration Act.

---


5 A distinction is made between “designated” and “determined” in the English Arbitration Act, s 3. “Designated” refers to the express or implied agreement of the parties as to the seat, or the power of the arbitral institution or arbitrators to determine the seat. In the absence of any such agreement, the court may itself “determine” the seat by reference to other relevant circumstances.

6 English Arbitration Act, s 9–11.

7 Ibid, s 66.

8 Ibid, s 43.

9 Ibid, s 44.

10 An arbitration agreement is not binding on a consumer in relation to a claim for a pecuniary remedy of not more than GBP 5,000 (see Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167).
3.3 **General principles**

3.3.1 The English Arbitration Act is founded on and is to be construed in accordance with three guiding principles: fairness, party autonomy and non-intervention by the courts.\(^{11}\)

*Fairness*

3.3.2 The English Arbitration Act states that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.\(^{12}\) This is primarily a reflection of the rules of natural justice, but there is an additional emphasis on avoiding unnecessary costs and delay. The principle is also given effect in the general duties imposed on the arbitral tribunal by Section 33 and on the parties by Section 40 (discussed in paragraphs 7.3.2 and 7.3.4 below).

*Party autonomy*

3.3.3 The English Arbitration Act states that the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.\(^{13}\)

3.3.4 These “safeguards” are provided by the mandatory provisions of Part I of the English Arbitration Act, which apply regardless of any agreement by the parties to the contrary. The English Arbitration Act is structured in such a way as to complement the mandatory provisions with two types of additional provisions: first, those which apply only if the parties expressly agree (i.e. the parties have “contracted in”); and, secondly, further provisions which apply automatically unless the parties expressly agree otherwise (i.e. the parties have “contracted out”).

*Non-intervention by the courts*

3.3.5 The English Arbitration Act limits the scope for court intervention in the arbitral process and provides that the courts shall not intervene except as expressly provided by the English Arbitration Act.\(^{14}\) At the same time, the English Arbitration Act reduces the scope for obstructive parties to delay arbitral proceedings by making applications to the courts through the following provisions:

— mandatory stay of court proceedings in favour of arbitration;\(^{15}\)

— arbitral proceedings to continue and award may be made pending a decision of the court on the arbitral tribunal’s jurisdiction.\(^{16}\)

---

\(^{11}\) English Arbitration Act, s 1.

\(^{12}\) Ibid, s 1(a).

\(^{13}\) Ibid, s 1(b).

\(^{14}\) Ibid, s 1(c).

\(^{15}\) Ibid, s 9.

\(^{16}\) Ibid, s 32(4).
— the arbitral tribunal (not the court) can order security for costs;\textsuperscript{17}
— extension of an arbitral tribunal’s powers in case of party default;\textsuperscript{18} and
— the court may exercise such powers as it has only if the arbitral tribunal has no equivalent power.\textsuperscript{19}

4. The arbitration agreement

4.1 Formal requirements
4.1.1 Section 5 of the English Arbitration Act stipulates that the arbitration agreement must be made in writing. This requirement is construed broadly so that it can be satisfied not only if there is a written agreement as such, but also if the agreement is contained in an exchange of communications in writing, or if the agreement is merely evidenced in writing or is reached otherwise than in writing but by reference to terms which are in writing (e.g. general terms and conditions). The writing requirement is also satisfied if there is an exchange of submissions in arbitral or legal proceedings in which the existence of an arbitration agreement is alleged by one party and not denied by the other. The exchange of written submissions between the parties is then taken to constitute the written arbitration agreement. Finally, an agreement is considered to be in writing, even if it is recorded by any other means.\textsuperscript{20}

4.1.2 Section 6(2) of the English Arbitration Act clarifies that a reference in a main agreement to a separate written arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the main agreement. The incorporation of the arbitration agreement by reference does, however, require the use of clear and unambiguous wording.\textsuperscript{21}

4.2 Separability
4.2.1 Pursuant to Section 7 of the English Arbitration Act, the arbitration agreement is treated as separate from the main commercial agreement into which it has been incorporated and the arbitration clause therefore survives the invalidity, non-existence or ineffectiveness of the main agreement.\textsuperscript{22}

\textsuperscript{17} Ibid, s 38(3).
\textsuperscript{18} Ibid, s 41.
\textsuperscript{19} Ibid, s 44(5).
\textsuperscript{20} Ibid, s 5(4).
\textsuperscript{21} Aughton Ltd v MF Kent Services Ltd [1991] 57 B.L.R. 1.
\textsuperscript{22} The court has upheld the principle of separability in a series of cases, see Fiona Trust & Holding Corporation and ors v Privalov and ors [2007] UKHL 40 and El Nasharty v J Sainsbury PLC [2007] EWHC 2618 (Comm).
4.3  **Mandatory and non-mandatory provisions**

4.3.1  The mandatory provisions of Part I of the English Arbitration Act are listed in Schedule 1 to the English Arbitration Act. They deal with such matters as the:
— duty of the court to stay its proceedings;\(^ {23}\)
— power of the court to extend time limits;\(^ {24}\)
— power of the court to remove an arbitrator;\(^ {25}\)
— joint and several liability of parties to arbitrators for fees and expenses;\(^ {26}\)
— immunity of arbitrators;\(^ {27}\)
— objections to the arbitral tribunal’s jurisdiction;\(^ {28}\)
— general duties of the arbitral tribunal;\(^ {29}\)
— general duties of the parties;\(^ {30}\)
— enforcement of an award;\(^ {31}\)
— challenges to the award;\(^ {32}\) and
— immunity of arbitral institutions.\(^ {33}\)

4.3.2  All other provisions of Part I of the English Arbitration Act are non-mandatory and the parties are free to make their own arrangements. If the parties do not make any such arrangements, the non-mandatory provisions form a set of “model rules” which will apply in the absence of any express agreement on a point by the parties. The parties are free to deviate from such “model rules” and adopt the procedural rules laid down by an arbitral institution or other body.\(^ {34}\)

4.3.3  Where parties agree to incorporate institutional rules into their arbitration agreement, such as those published by the LCIA\(^ {35}\) or the ICC International Court of

---

\(^{23}\) English Arbitration Act, s 9.

\(^{24}\) English Arbitration Act, s 12, which applies where an arbitration agreement provides that a claim shall be barred, or the claimant’s right extinguished, unless the claimant takes within a time fixed by the agreement some step (a) to begin arbitral proceedings or (b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun.

\(^{25}\) English Arbitration Act, s 24.

\(^{26}\) *Ibid*, s 28.

\(^{27}\) *Ibid*, s 29.

\(^{28}\) *Ibid*, s 31.

\(^{29}\) *Ibid*, s 33.

\(^{30}\) *Ibid*, s 40.

\(^{31}\) *Ibid*, s 66.

\(^{32}\) *Ibid*, s 67–68.

\(^{33}\) *Ibid*, s 74.

\(^{34}\) *Ibid*, s 4(3).

\(^{35}\) For the full text of the LCIA Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.12.
Arbitration, the English Arbitration Act provides that this amounts to parties making their own arrangements and displaces non-mandatory provisions in circumstances where the arbitration rules are contrary to any such provisions.

4.4 Choice of law

4.4.1 Regarding the law applicable to the arbitral proceedings, the courts have confirmed their willingness to recognise and enforce choices of law in parties’ arbitration agreements. If the parties choose England as the seat of the arbitration, they will be taken to have agreed that the English courts shall have exclusive jurisdiction of the arbitration and the mandatory provisions of the English Arbitration Act will apply, including those relating to the parties’ ability to challenge the award under Sections 67 and 68 of the English Arbitration Act. Specifically, the courts have confirmed that if England is chosen as the seat of an arbitration, the lex arbitri of any court proceedings regarding the award given by an arbitral tribunal will be English law and the proper jurisdiction of such proceedings is the English courts, even if the underlying contract is governed by the laws of a different jurisdiction.

4.4.2 With respect to the law applicable to the substance of the dispute, Sections 46(1) and (3) of the English Arbitration Act provide that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or, if and to the extent that there is no such choice or agreement, it shall apply the law determined by the conflict of law rules which it considers applicable. The parties’ choice of law will be taken to exclude conflict of law rules and to refer to the substantive laws of that particular country only.

4.4.3 By the arbitration agreement (or on some other basis) the parties can also authorise the arbitral tribunal to decide the dispute on the basis of the lex mercatoria or ex aequo et bono (also referred to as amiable composition, where arbitrators dispense with the consideration of law and consider solely what would be a fair and equitable resolution to the dispute). However, these are very rarely agreed upon in practice, given the uncertainties as to the scope of the lex mercatoria and the principles to be applied in making a decision ex aequo et bono.

36 For the full text of the ICC Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.7.
37 English Arbitration Act, s 4(3).
38 C v D [2007] EWCA Civ 1282.
39 Ibid.
40 Naviera Amazonica Peruana SA v Compania Internacional de Seguros de Peru [1988] 1 Lloyd’s Rep. 116. This applies other than, of course, to enforcement proceedings.
4.4.4 Under English conflict of law rules, the applicable law of a contract (in the absence of an agreement by the parties) will in most cases be determined in accordance with the Regulation on the Law Applicable to Contractual Obligations adopted by the European Community on 17 June 2008 (Rome I), which came into force on 17 December 2009. In July 2007, the European Community also adopted a new Regulation on the Law Applicable to Non-Contractual Obligations (Rome II), which came into force on 11 January 2009. Rome II sets out new choice of law rules for non-contractual obligations, such as torts and equitable claims and it is anticipated that the English courts will determine non-contractual conflicts of laws issues in accordance with Rome II. Where the arbitration agreement is drafted widely to include disputes that arise from non-contractual obligations, then the determination of the applicable law may also include reference to Rome II.

5. Composition of the arbitral tribunal

5.1 Constitution of the arbitral tribunal

5.1.1 The parties are free to agree on the number of arbitrators and whether there is to be a chair or umpire. However, an agreement that determines the number of arbitrators as two or any other even number shall be understood as requiring the additional appointment of a chair, unless the parties agree otherwise. If there is no agreement as to the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. If the parties have agreed that there is to be a chair or umpire, they are free to agree on his or her functions. Where there is no agreement as to the function of the chair or umpire, Sections 20 and 21 of the English Arbitration Act contain default provisions. Those default provisions provide, in the case of a chair, that decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chair) and that the view of the chair shall prevail in relation to a decision, order or award, in respect of which there is neither unanimity nor a majority. For an umpire, the default position is that the umpire shall attend the arbitral proceedings and be supplied with the same documents and other materials as supplied to the other arbitrators, with decisions being made by the arbitrators unless and until they cannot agree, in which case the umpire shall replace the arbitral tribunal and make decisions, orders and awards as if he or she were sole arbitrator.

---

41 English Arbitration Act, s 15(1).
42 Ibid, s 20(3) and s 20(4).
43 Ibid, s 21(3) and s 21(4).
5.1.2 The procedure for the appointment of the arbitral tribunal is determined by the arbitration agreement between the parties. Where the parties have not agreed an appointment procedure, Section 16 of the English Arbitration Act makes detailed provision for the appointment of the arbitral tribunal.

5.1.3 In the event that each of the two parties to an arbitration agreement is to appoint an arbitrator but one party refuses or fails to do so within the time specified, the other party, having duly appointed its arbitrator, may give notice in writing to the party in default that it proposes to appoint its arbitrator to act as sole arbitrator. If the party in default does not make the required appointment and does not notify the other party that it has done so within seven days of that notice, the other party may appoint its arbitrator as sole arbitrator and the arbitrator so appointed may proceed to make an award which is binding on both parties.44

5.1.4 If the agreed appointment procedure fails to constitute an arbitral tribunal, the courts have specific powers to appoint, or assist with securing the constitution of, an arbitral tribunal upon application by one of the parties.45

5.2 Removal of arbitrator

5.2.1 Pursuant to Section 23 of the English Arbitration Act, the authority of an arbitrator can be revoked by the agreement of the parties in writing or by an arbitral or other institution or person vested by the parties with powers in that regard.

5.2.2 The court may order the removal of an arbitrator upon application by one of the parties on any of the following grounds:
   — circumstances exist which may give rise to justifiable doubts as to an arbitrator’s impartiality;
   — an arbitrator does not possess the agreed qualifications;
   — an arbitrator is physically or mentally incapable of conducting the arbitral proceedings or there are justifiable doubts as to his or her capacity to do so; or
   — an arbitrator fails to conduct the arbitral proceedings properly or with reasonable speed and substantial injustice has been or will be caused to the applicant.46

5.2.3 The arbitral tribunal may, however, continue the arbitral proceedings in the meantime and proceed to make an award while the application to the court is pending. The challenge procedure cannot, therefore, be abused to delay the arbitral proceedings for tactical reasons.

44 Ibid, s 17.
46 Ibid, s 24.
5.3 Appointment of substitute arbitrators
5.3.1 Where an arbitrator ceases to hold office (whether it is due to resignation, removal or death) and the parties have not agreed whether, and if so, how the vacancy is to be filled, Section 27 of the English Arbitration Act provides that Section 16 or Section 18 procedures (discussed at paragraphs 5.1.1–5.1.4 above) apply to the filling of the vacancy as in relation to the original appointment.

5.4 Arbitrators’ fees, expenses and immunity
5.4.1 Section 28 of the English Arbitration Act makes express provision for the parties’ liability to the arbitrators for fees and expenses. Section 29 provides that arbitrators enjoy immunity from claims unless they act in bad faith.

6. Jurisdiction of the arbitral tribunal

6.1 Competence to rule on jurisdiction
6.1.1 Section 30 of the English Arbitration Act gives the arbitral tribunal the power to rule on its own jurisdiction. It is up to the arbitral tribunal to decide which, if any, of the disputes referred to arbitration are within the scope of the arbitration agreement.

6.1.2 However, if agreed in writing by the parties or in certain circumstances with the permission of the arbitral tribunal, the courts may determine preliminary points of jurisdiction upon application by one of the parties.47 The arbitral tribunal’s decision on jurisdiction may also be subject to a full rehearing by the courts.48

6.1.3 Section 31 of the English Arbitration Act requires that any objection to the substantive jurisdiction of the arbitral tribunal that a party may have, must be raised at the earliest possible stage in the proceedings, i.e. before that party takes any steps in the proceedings to contest the merits of any matter in relation to which the arbitral tribunal may have jurisdiction.

6.1.4 The right to object to the arbitral tribunal’s lack of substantive jurisdiction (and to other irregularities affecting the arbitral tribunal or proceedings) may be lost if the objection is not made at the earliest opportunity.49

---

47 Ibid, s 32.
48 English Arbitration Act, s 67 and see below at paragraph 10.2.2.
49 English Arbitration Act, s 73.
6.2  **Power to order interim measures**

6.2.1 Under Section 38(1) of the English Arbitration Act, the parties are free to agree on the powers exercisable by the arbitral tribunal. It is therefore possible for the parties to confer on the arbitral tribunal the power to order interim measures, either by incorporating the institutional rules of a major arbitral institution such as the ICC into their arbitration agreement or by express provision in the arbitration agreement.

6.2.2 In the absence of any agreement by the parties on the issue of interim measures, Section 38(4) of the English Arbitration Act empowers the arbitral tribunal to give directions relating to property which is the subject of the arbitral proceedings and which is owned by or is in the possession of a party to the dispute. Additionally, the arbitral tribunal may “give directions to a party for the preservation for the purposes of the proceedings of any evidence in his or her custody or control”.

6.2.3 Unless otherwise agreed by the parties, the English Arbitration Act does not confer upon arbitrators the power to secure the sum in dispute by an order taking effect as an injunction, although it is possible to seek a freezing injunction from the High Court.

7. **Conduct of proceedings**

7.1  **Common law tradition**

7.1.1 England and Wales is a common law jurisdiction. The legal process has traditionally emphasised the importance of procedural issues and a number of English procedural concepts. Those concepts are not part of the continental European civil law tradition, although they are familiar in other common law jurisdictions such as the United States, Canada, Australia and most Commonwealth member states. These procedural elements include the disclosure and inspection of documents, the exchange of witness statements, cross-examination of witnesses and use of party-appointed expert witnesses.

7.1.2 There was intended to be a significant shift in approach under the CPR (which govern the conduct of cases in the English courts) towards more proactive case management by the courts. However, English legal proceedings in essence remain adversarial in approach (i.e. party-driven with the judge adopting the position of arbiter between the opposing parties) rather than inquisitorial (i.e. more reliant on

---

50 Ibid, s 38(6).
51 English Arbitration Act, s 44(2)(e) and see below at section 9.5.
the judge taking charge of progressing a case). One of the advantages of arbitration over litigation as a means of settling international commercial disputes is that, because of its flexibility, arbitration can transcend the confines of national legal systems and the parties can tailor a procedure to suit their particular needs. English arbitral proceedings under the English Arbitration Act are not tied to English court procedure. The English Arbitration Act enables arbitrators to use wide-ranging powers (which are much more akin to the case management techniques employed under the continental European procedural system) to ensure that the arbitration progresses efficiently, proportionately and in the interests of the parties.

7.2 **Commencing an arbitration**

7.2.1 Unless otherwise agreed by the parties, Section 14(4) of the English Arbitration Act provides that arbitral proceedings are commenced when one party serves on the other a written notice requiring it to appoint an arbitrator or to agree to the appointment of an arbitrator. The court will interpret this broadly and flexibly and an implied request to appoint an arbitrator has been found to be sufficient for the commencement of an arbitration.\(^{52}\) However, in order to avoid any uncertainty in this respect, the written notice of arbitration should expressly call upon the other party to appoint an arbitrator.

7.2.2 Section 14 does not deal with the matters in dispute that a party wishes to refer to arbitration. A written notice should clearly specify such matters but be drafted widely enough to ensure all potential matters in dispute are referred to arbitration.

7.3 **General procedural principles**

7.3.1 The English Arbitration Act expressly defines and imposes duties on the parties and the arbitrators.

*General duties of the arbitral tribunal*

7.3.2 Section 33(1) is one of the key provisions in the English Arbitration Act and provides that the arbitral tribunal shall act fairly and impartially, shall give each party the right to be heard and shall adopt procedures that are suitable for a particular case to avoid unnecessary delay or expense.

7.3.3 The express duty to avoid unnecessary delay and expense was first introduced by the English Arbitration Act and is an important provision. It is intended to encourage arbitrators to impose strict timetables to ensure that the arbitral proceedings are progressed with all due expedition.

---

General duties of the parties

7.3.4 Under Section 40 of the English Arbitration Act, the parties have a general duty to do everything necessary for the proper and expeditious conduct of the arbitral proceedings and, corresponding to the duties imposed on the arbitral tribunal by Section 33, a duty to comply with the arbitral tribunal’s directions without delay.

Procedural powers of the arbitral tribunal

7.3.5 Procedural and evidential matters are decided by the arbitral tribunal unless the parties agree otherwise. Section 34(2) of the English Arbitration Act sets out a non-exhaustive list of the procedural issues to be determined by the arbitral tribunal. Those powers give arbitrators the ability to impose expedited procedures in suitable cases and to dispense with, for example:

— written submissions;
— disclosure;
— interrogatories (i.e. questions put to and answered by the parties prior to trial);
— oral evidence; and
— oral hearings.

7.3.6 The arbitral tribunal may refer to Section 34 as a guideline and may dispense with procedures which are not appropriate in the circumstances of a particular case. Nevertheless, arbitrators have to exercise these powers with care so as not to deprive a party of a reasonable opportunity to put its own case or to respond to its opponent’s case. If the arbitral tribunal acts contrary to this obligation, the aggrieved party may be able to challenge any subsequent award in the courts on the grounds of “serious irregularity” under Section 68 of the English Arbitration Act. However, the courts have generally approached this issue in favour of arbitrators actively managing their arbitrations.

---

53 English Arbitration Act, s 34(1).
54 Ibid, s 34(2)(c).
55 Ibid, s 34(2)(d).
56 Ibid, s 34(2)(e).
57 Ibid, s 34(2)(f).
58 Ibid, s 34(2)(h).
59 One of the arbitral tribunal’s general duties under s 33(1)(a) of the English Arbitration Act.
60 See below at section 10.2.
61 Margulead Ltd v Exide Technologies [2004] EWHC 1019 (Comm).
7.3.7 The English Arbitration Act provides the arbitral tribunal with further express powers, including the power to:

— appoint its own expert(s);\(^{62}\)
— order the claimant to provide security for costs;\(^{63}\)
— direct that a party or witness shall be examined on oath and, for that purpose, to administer the necessary oath;\(^{64}\)
— order interim payments to be made or to make other provisional awards where the parties have agreed that the arbitral tribunal should have such powers;\(^{65}\)
— make an award dismissing a claim for want of prosecution where there has been an inordinate and inexcusable delay on the part of the claimant in pursuing the claim and where the delay prejudices the respondent;\(^{66}\)
— continue the proceedings in the absence of a party who fails to attend a hearing of which proper notice was given without showing sufficient cause;\(^{67}\)
— make a peremptory order where a party fails to comply with an order or direction of the arbitral tribunal, which order may be enforceable by the court pursuant to Section 42 of the English Arbitration Act;\(^{68}\)
— make awards on different issues at different times;\(^{69}\)
— award compound interest;\(^{70}\) and
— direct that the recoverable costs of the arbitration be limited to a specified amount.\(^{71}\)

7.3.8 Unless the parties specifically agree, the arbitral tribunal has no power to consolidate different arbitral proceedings or to order concurrent hearings.\(^{72}\)

7.4 Seat, place of hearings and language of arbitration

7.4.1 Pursuant to Section 3 of the English Arbitration Act, the term “seat” of the arbitration means only its “juridical” seat. The fact that the parties have agreed that the seat of the arbitration shall be, for example, London, does not prevent

\(^{62}\) English Arbitration Act, s 37.
\(^{63}\) Ibid, s 38(3).
\(^{64}\) Ibid, s 38(5).
\(^{65}\) Ibid, s 39.
\(^{66}\) Ibid, s 41(3).
\(^{67}\) Ibid, s 41(4).
\(^{68}\) Ibid, s 41(5).
\(^{69}\) Ibid, s 47.
\(^{70}\) Ibid, s 49.
\(^{71}\) Ibid, s 65.
\(^{72}\) Ibid, s 35(2).
the parties or the arbitrators from deciding to hold any part of the arbitral proceedings elsewhere if this is more convenient.73

7.4.2 The language or languages to be used in the arbitral proceedings and the question of whether translations of documents are to be supplied is equally a matter for the parties to decide or, in the absence of any agreement by the parties, for the arbitral tribunal to determine.74

7.5 Submissions
7.5.1 The format and timetable for submissions will be determined by the arbitral tribunal unless agreed by the parties.75 In English arbitral proceedings, the parties’ submissions frequently take the form of formal statements of case, similar but not identical to those used in court proceedings and limited to identifying the issues between the parties. They may, however, take the form of more complete submissions which also deal with the relevant facts, evidence and law, similar to continental European court submissions.

7.6 Oral hearings and written proceedings
7.6.1 Before the English Arbitration Act came into force, either party could effectively require that an oral hearing be held. Under the English Arbitration Act it is now for the arbitral tribunal to decide whether there should be an oral hearing including submissions and evidence, subject to the parties’ right to agree otherwise.76 In suitable cases the arbitral tribunal can, therefore, make an award on the basis of written proceedings alone. However, in practice it would be rare for the arbitral tribunal to proceed on this basis unless agreed by the parties.

7.7 Taking of Evidence
7.7.1 Evidential matters will be determined by the arbitral tribunal, subject to any agreement between the parties.77 These matters might include whether disclosure and inspection of documents should take place between the parties and, if so, whether the scope of disclosure should in any way be restricted to certain documents or classes of documents;78 whether there should be an exchange of witness statements or expert reports; and whether strict rules of evidence should be followed as to admissibility, or the relevance of, or weight to be given to, the

73 Ibid, s 34(2)(a).
74 Ibid, s 34(2)(b).
75 Ibid, s 34(2)(c).
76 Ibid, s 34(2)(h).
77 Ibid, s 34(1).
78 Ibid, s 34(2)(d).
evidence adduced by the parties.\footnote{Ibid, s 34(2)(f).} The English Arbitration Act expressly authorises the arbitral tribunal to appoint experts and advisers but the parties must be given an opportunity to comment on the opinion, information or advice provided by any arbitral tribunal-appointed expert.\footnote{Ibid, s 37.}

8. Making of the award and termination of proceedings

8.1 Remedies

8.1.1 Subject to any agreement by the parties as to the powers which the arbitral tribunal may exercise, Section 48 of the English Arbitration Act provides that the arbitral tribunal may:

— make a declaration as to any matter to be determined in the arbitral proceedings;\footnote{Ibid, s 48(3).} or

— order the payment of a sum of money in any currency.\footnote{Ibid, s 48(4).}

8.1.2 Furthermore, the arbitral tribunal has the same powers as the courts to:

— grant a permanent injunction;\footnote{English Arbitration Act, s 48(5)(a). Note that Section 48(5)(a) does not confer a power to grant an interim injunction in the form of an award, since an award must finally dispose of the issues with which it deals. The parties may, however, have agreed pursuant to Section 39 that the arbitral tribunal should have the power to make provisional awards, in which case the arbitral tribunal may issue an interim injunction in the form of a provisional award under that section.}

— order specific performance of a contract;\footnote{English Arbitration Act, s 48(5)(b).}

or

— order the rectification, cancellation or setting aside of a deed or other document.\footnote{Ibid, s 48(5)(c).}

8.1.3 The arbitral tribunal’s powers to grant interim measures are discussed in section 6.2 above.

8.2 Interest

8.2.1 In the absence of any agreement between the parties, the arbitral tribunal has a discretionary power to award simple or compound interest, from such dates and at such rates as it considers just, on the whole or part of:
— the amount awarded, in respect of any period up to the date of the award;\textsuperscript{86}
— any amount claimed in the arbitration and outstanding at the date of commencement of the arbitration but paid before the award was made, in respect of any period up to the date of payment;\textsuperscript{87} and/or
— the outstanding amount of any award from the date of the award until payment.\textsuperscript{88}

8.2.2 The fact that the arbitral tribunal has a discretionary power to award interest does not affect the parties' rights to claim contractual interest.

8.3 Decision-making by the arbitral tribunal
8.3.1 Where the parties have agreed that there is to be a chair, they are free to agree the functions of the chair in relation to the making of decisions, orders and awards.\textsuperscript{89} If, or to the extent that there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chair)\textsuperscript{90} and the view of the chair shall prevail where there is neither unanimity nor a majority.\textsuperscript{91}

8.3.2 If the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be and, in particular, whether he or she is to attend the arbitral proceedings and when the umpire is to replace the other arbitrators as the arbitral tribunal with power to make decisions, orders and awards.\textsuperscript{92}

8.3.3 Where the parties agree that there shall be two or more arbitrators with no chair or umpire, the default position (unless agreed between the parties) is that decisions, orders and awards shall be made by all or a majority of the arbitrators.\textsuperscript{93}

8.4 Form, content and effect of the award
8.4.1 Pursuant to Section 58 of the English Arbitration Act, an award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the

\textsuperscript{86} Ibid, s 49(3)(a).
\textsuperscript{87} Ibid, s 49(3)(b).
\textsuperscript{88} Ibid, s 49(4).
\textsuperscript{89} Ibid, s 20(1).
\textsuperscript{90} Ibid, s 20(3).
\textsuperscript{91} Ibid, s 20(4).
\textsuperscript{92} Ibid, s 21(1).
\textsuperscript{93} English Arbitration Act, s 22(2). For an explanation of the position where the parties have agreed on an even number of arbitrators, see paragraph 5.1.1. above.
parties to the arbitration, subject to the limited rights the English Arbitration Act provides for challenge or appeal to the courts.\(^{94}\)

8.4.2 Section 52 of the English Arbitration Act provides that, unless otherwise agreed by the parties, an award shall:
- be in writing;
- be signed by all the arbitrators or a majority of those arbitrators assenting to the award;
- contain reasons (unless it is an agreed award or the parties have agreed to dispense with reasons); and
- state the place of the arbitration and the date on which the award was made.

8.4.3 Once an award has been made, parties shall be notified without delay,\(^{95}\) but the arbitral tribunal has power to withhold the award until the arbitrators’ fees and expenses are paid in full.\(^{96}\)

8.5 Settlement
8.5.1 If the parties settle their dispute during the course of the arbitration, the arbitral tribunal shall terminate the substantive proceedings and shall record the settlement in the form of an agreed award if requested to do so by the parties.\(^{97}\)

8.6 Costs
8.6.1 Unlike the Model Law (1985), Sections 59–65 of the English Arbitration Act make express provision for the allocation of the costs of the arbitration as between the parties. The English Arbitration Act also provides that, unless the parties agree otherwise, the arbitral tribunal may make an award of costs. The costs of the arbitration include the:
- fees and expenses of the arbitrators;
- fees and expenses of any arbitral institution concerned; and
- legal or other costs of the parties.

8.6.2 Generally, an award of costs will “follow the event”,\(^{98}\) but the arbitral tribunal has discretion to take other relevant factors into account when making its award on costs. Only reasonably incurred costs of the arbitration and fees and expenses of

\(^{94}\) English Arbitration Act, s 67–69. See also sections 10.2 and 10.3 below.

\(^{95}\) English Arbitration Act, s 55(2).

\(^{96}\) Ibid, s 56.

\(^{97}\) Ibid, s 51(2).

\(^{98}\) This means that the losing party pays the reasonable costs of the arbitration. If a claimant is successful only in part, the costs of the arbitration may be allocated between the parties on a pro rata basis.
arbitrators are recoverable. Pursuant to Section 60 of the English Arbitration Act, an agreement between the parties that a party is to pay the whole or part of the costs of the arbitration is only valid if it has been made after the dispute has arisen. Section 60 is a mandatory provision, the purpose of which is to prevent a party who wishes to pursue its claim finding that it is unable to do so because, whatever the result, it has agreed to bear some or all of its own costs. Section 60 does, however, permit such an agreement to be made where the decision to go to arbitration is taken after the dispute has arisen, as it is assumed that in such a case the costs agreement can be at arm’s length.99

8.7 Correction and interpretation of the award
8.7.1 The English Arbitration Act makes provision in Section 57 for the arbitral tribunal to correct obvious errors, mistakes, omissions or ambiguities in the award, or to make an additional award in respect of claims which were presented to the arbitral tribunal but not dealt with in the award. These powers may be exercised by the arbitral tribunal either on its own initiative, or upon the application of a party, and after hearing representations from the other party.

9. Role of the courts

9.1 Jurisdiction of the courts
9.1.1 The extent to which the courts may interfere in the arbitration process is one of the most important issues for parties to international arbitral proceedings. The English Arbitration Act follows the scheme of the Model Law (1985) in this regard: the courts have no jurisdiction in matters relating to arbitration unless expressly provided by the English Arbitration Act. A distinction can be drawn between the role of the courts:
— before and during the arbitral proceedings; and
— after the award has been made.

9.1.2 The powers of the court in relation to arbitral proceedings are limited to those expressly conferred by the English Arbitration Act. Those powers include:
— the enforcement of peremptory orders made by the arbitral tribunal;100
— making preservation orders in relation to evidence and assets;101 and
— the determination of preliminary points of law.102

99 Virdee v Virdi [2003] EWCA (Civ) 41.
100 English Arbitration Act, s 42.
101 Ibid, s 44.
102 Ibid, s 45.
9.2 Stay of court proceedings

9.2.1 Section 9 of the English Arbitration Act provides that, upon application by a party to an arbitration agreement against whom court proceedings are brought in regard to the same matter, the court must grant a stay of the court proceedings unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The court has established two threshold requirements for granting a stay of court proceedings under Section 9:
— there must be a concluded arbitration agreement; and
— the issue in the court proceedings must be a matter that, under the arbitration agreement, is to be referred to arbitration.103

9.2.2 The court also has an inherent jurisdiction to order a stay of its proceedings in exceptional circumstances (i.e. where the court deems proceedings to be vexatious or oppressive).104 The absence of jurisdiction under Section 9 of the English Arbitration Act to order a stay does not preclude the court’s exercise of this inherent jurisdiction.

9.2.3 Although Section 9 of the English Arbitration Act is silent on the point, the court decision granting or refusing a stay of court proceedings can be appealed, provided permission to appeal is granted either by the High Court judge hearing the application for a stay or by the Court of Appeal.105

9.2.4 A significant number of cases on the stay of court proceedings under Section 9 have reached the courts since the English Arbitration Act came into force. The case law confirms that the courts’ general approach is to enforce arbitration agreements strictly, even in circumstances where the agreement containing the arbitration clause might have been procured by bribery.106 This is still the case under the new Bribery Act 2010.

9.3 Extension of time for commencement of arbitral proceedings

9.3.1 An arbitration agreement may provide that a claim shall be time barred, or that the claimant’s right shall be extinguished, unless the claimant begins, within the time fixed by the agreement, either arbitral proceedings or another dispute resolution procedure which must be exhausted before arbitral proceedings may be commenced. In such cases the court may extend the time for taking these steps pursuant to Section 12 of the English Arbitration Act.

103 Albon v Naza Motor Trading SDN BHD [2007] EWHC 665 (Ch).
106 Fiona Trust and Holding Corporation & Ors v Privalov & Ors [2007] EWCA Civ 20.
9.4 Preliminary rulings on points of jurisdiction and law

9.4.1 Under Section 32 of the English Arbitration Act, the courts have the power to determine preliminary points on the substantive jurisdiction of the arbitral tribunal upon the application of a party. Pursuant to Section 45 of the English Arbitration Act and unless the parties agree otherwise, the courts may also, on the application of a party to arbitral proceedings, determine any preliminary points of law arising in the course of the proceedings if satisfied that it substantially affects the rights of one or more of the parties. The court will only consider such applications if they are made either with the agreement of all other parties or with the permission of the arbitral tribunal, and if the court is satisfied that the determination of the question is likely to produce substantial cost savings and that the application was made without delay. In the case of applications under Section 32, there must also be a good reason why the matter should be decided by the court.

9.4.2 While Section 32 of the English Arbitration Act is a mandatory provision, the parties are free to exclude the courts’ jurisdiction under Section 45 of the English Arbitration Act by agreement. An agreement by the parties to dispense with the requirement that the arbitral tribunal give reasons in support of its award will be considered as an agreement also to exclude the courts’ jurisdiction under Section 45.

9.5 Interim protective measures

9.5.1 Unless otherwise agreed by the parties, the courts have the power under Section 44(2) of the English Arbitration Act to order certain defined interim measures in support of arbitral proceedings, including orders preserving evidence and interim injunctions. If the case is one of urgency, Section 44(3) of the English Arbitration Act also empowers the English court, on the application of a party or proposed party to the arbitral proceedings, to make such orders as it thinks necessary for the purpose of preserving evidence or assets. Section 44 of the English Arbitration Act is, however, a non-mandatory provision and the parties may agree that the courts shall have wider powers than those set out in Section 44. If the parties wish to agree that interim relief is to be granted free from the restrictions of Section 44, then a very clear contractual provision needs to be made to that effect.

---

107 The court has, for example, been asked to consider as a preliminary legal issue the construction of documents; see *Beegas Nominees v Decco Ltd* [2003] EWHC 1891 (Ch).

108 *English Arbitration Act*, s 45(1).

9.5.2 The interim measures which the court may order include freezing orders,\(^\text{110}\) search orders\(^\text{111}\) and anti-suit injunctions. Anti-suit injunctions restrain a person over whom the arbitral tribunal has jurisdiction from continuing with or commencing proceedings in a foreign court that are vexatious or oppressive or that are in breach of the arbitration agreement. Following a referral of a case by the House of Lords (as it then was), the ECJ considered whether it is consistent with Brussels I Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement. The ECJ determined that anti-suit injunctions are inconsistent with the Brussels I Regulation, thereby curtailing the courts’ ability to grant anti-suit injunctions to prevent parties from continuing with or commencing proceedings before the courts of EU Member States.\(^\text{112}\)

9.5.3 It is important to note that the courts only have the power to grant interim measures if, or to the extent that, the arbitral tribunal has no power or is unable at that time to act effectively. In practice, the court is most commonly called upon to exercise this power to order interim measures in circumstances where the arbitral tribunal has not yet been constituted. Section 44 of the English Arbitration Act applies to all arbitral proceedings regardless of whether the place of the arbitration is in England and Wales. The courts may, therefore, in appropriate circumstances grant interim measures in aid of foreign arbitral proceedings which would not otherwise fall within the scope of the English Arbitration Act if there is a good reason for the court to exercise its discretion and intervene.\(^\text{113}\)

9.6 Obtaining evidence and other court assistance

9.6.1 An arbitral tribunal has no power to compel witnesses to attend before it to give evidence. Section 43 of the English Arbitration Act therefore provides that a party

\(^{110}\) Freezing orders are interlocutory injunctions granted by the court (normally \textit{ex parte} and on the basis of affidavit evidence) restricting the respondent’s right to dispose of or deal with its assets, requiring the respondent to disclose the nature, value and location of such assets and to provide other information to the applicant. Freezing orders can not only be made in relation to assets located in England and Wales but, in appropriate circumstances, also on a worldwide basis.

\(^{111}\) Search orders are also interlocutory injunctions granted by the court (normally \textit{ex parte} and on the basis of affidavit evidence) entitling the applicant to ‘raid’ and search the respondent’s premises for certain evidence in relation to the subject matter of court proceedings. Search orders are of particular importance in cases of infringement of intellectual property rights but have a wider scope of application. Both freezing and search orders have been described as ‘nuclear weapons of the law’ and will only be granted in exceptional circumstances and upon various cross-undertakings by the applicant, including a cross-undertaking in damages. Service of an arbitration claim form seeking relief under Section 44 of the English Arbitration Act can be effected outside the jurisdiction and in relation to evidence outside of England and Wales, i.e. a party to an arbitration agreement which is subject to the English Arbitration Act may apply to an English court for an order assisting it with obtaining evidence which is located outside of England and Wales.

\(^{112}\) \textit{Allianz SpA v West Tankers Inc.} (Case C-185/07).

\(^{113}\) See, for example, \textit{Mobil Cerro Negro Ltd v Petroleos de Venezuela SA} [2008] EWHC 532 (Comm) (the court set aside a freezing injunction in relation to foreign proceedings, as, \textit{inter alia}, the applicant failed to demonstrate a sufficient connection to the English jurisdiction).
to arbitral proceedings can use the usual court procedures to secure the attendance of witnesses. Under English civil court procedure this means that the party may serve a witness summons on the witness to secure attendance before the arbitral tribunal, either for the purpose of giving oral evidence or for the purpose of producing documents or other evidence. Applications for the preservation of evidence or the taking of witness evidence may be made to the court under Section 44 of the English Arbitration Act.

10. Challenging and appealing the award through the courts

10.1 Loss of right to object to award
10.1.1 The right of a party to object to an award on any of the following grounds may be lost if the aggrieved party had not raised such objections at the earliest possible opportunity in the arbitral proceedings, namely that:
— the arbitral tribunal lacked substantive jurisdiction;
— the arbitral proceedings were improperly conducted;
— there was a failure to comply with the terms of the arbitration agreement; or
— there was any other irregularity affecting the arbitral tribunal or the arbitral proceedings.\(^\text{114}\)

10.2 Challenging the award
10.2.1 An award once made can only be challenged pursuant to:
— Section 67 of the English Arbitration Act, on the ground that the arbitral tribunal lacked substantive jurisdiction; or
— Section 68 of the English Arbitration Act, on the ground that there was a serious irregularity affecting the arbitral tribunal, the proceedings or the award.

10.2.2 On applications challenging the award on the grounds that the arbitral tribunal lacked jurisdiction under Section 67 of the English Arbitration Act, the court may either confirm the award, vary the award or set the award aside in whole or in part. Section 68(2) of the English Arbitration Act sets out an exhaustive list of the circumstances which constitute a serious irregularity if they cause substantial injustice to the applicant, namely:
— breach of Section 33 of the English Arbitration Act (general duties of the arbitral tribunal);

\(^{114}\) English Arbitration Act, s 73.
— the arbitral tribunal exceeding its powers;
— failure to conduct the arbitral proceedings in accordance with the arbitration agreement;
— failure by the arbitrators to resolve all matters in dispute referred to them;
— uncertainty or ambiguity of the award;
— the award being obtained by fraud or in a manner contrary to public policy;
— failure to comply with formal requirements relating to the award; or
— admitted irregularity in the arbitral proceedings or the award.

10.2.3 In recent years, there have been a number of challenges to awards on the grounds of bias, on the basis that it involves a breach of Section 33 of the English Arbitration Act (which requires the arbitral tribunal to, inter alia, act fairly and impartially between the parties). The court has held that actual or apparent bias of an arbitrator is a substantial injustice and can amount to a serious irregularity for the purposes of Section 68 of the English Arbitration Act.

10.2.4 If an award is successfully challenged on grounds of serious irregularity under Section 68 of the English Arbitration Act, the court may either remit the award (in whole or in part) to the arbitral tribunal for reconsideration, set the award aside or declare it to be of no effect.

10.3 Appeal on point of law
10.3.1 Awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court or by the agreement of the parties. The grounds on which such permission to appeal will be granted derive from the pre-English Arbitration Act common law guidelines. Leave to appeal shall be given only if the court is satisfied that:
— the determination of the question will substantially affect the rights of one or more of the parties;
— the question is one which the arbitral tribunal was asked to determine;
— on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong;
— on the basis of the findings of fact in the award, the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
— despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

115 See above at paragraph 7.3.2.
116 ASM Shipping Ltd v TTMI Ltd [2006] EWCA Civ 1341.
117 English Arbitration Act, s 69(3).
10.3.2 On an appeal under Section 69 of the English Arbitration Act, the court may either confirm the award, vary the award, remit the award to the arbitral tribunal for reconsideration in whole or in part or set the award aside in whole or in part. The court will generally remit the matters in question to the arbitral tribunal for reconsideration unless it is satisfied that this would be inappropriate under the circumstances.

10.3.3 Unlike challenges under Sections 67 and 68 of the English Arbitration Act, the parties’ right to appeal on points of law can be excluded by agreement between the parties, either in the arbitration agreement or at a later stage. Where the parties choose to arbitrate under the ICC Rules or the LCIA Rules, the parties’ right to appeal under Section 69 of the English Arbitration Act is waived automatically.\(^{118}\) Where the parties opt for ad hoc arbitration or institutional rules which do not contain waiver language akin to the ICC Rules and LCIA, the parties can exclude the application of Section 69 by stating so expressly in the arbitration agreement. Pursuant to Section 69(1) of the English Arbitration Act, the parties’ agreement to dispense with the requirement that the arbitral tribunal give reasons for its award will be considered an agreement to exclude the right of appeal.\(^{119}\) Sections 70–73 of the English Arbitration Act contain supplementary provisions and restrictions in relation to the challenge or appeal of awards.

11. **Recognition and enforcement of awards**

11.1 **Domestic awards**

11.1.1 Section 66 of the English Arbitration Act provides that domestic awards may be enforced with the permission of the court as if they were court judgments. Permission shall only be refused if the person against whom the award is to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award. It has recently been confirmed that this right of enforcement under Section 66 also applies to declaratory awards, where the victorious party’s objective in obtaining an order for enforcement is to establish the primacy of a declaratory award over an inconsistent judgment.\(^{120}\)

11.2 **Foreign awards**

11.2.1 The procedure for recognition and enforcement of foreign awards is covered in Part III of the English Arbitration Act.

\(^{118}\) See Article 28.6 of the ICC Rules and Article 26.9 of the LCIA Rules.

\(^{119}\) See paragraph 9.4.2 above on the effect of such an agreement on the courts’ jurisdiction under Section 45 of the English Arbitration Act.

11.2.2 Pursuant to Section 99 of the English Arbitration Act, the Arbitration Act 1950 continues to apply to the recognition and enforcement of awards under the 1927 Geneva Convention, which continues to apply in relation to certain awards which cannot be enforced under the New York Convention.

11.2.3 Most foreign awards are today enforced under the New York Convention.\(^{121}\) This requires the award to be a “New York Convention Award”, i.e. an award made pursuant to a written arbitration agreement in a state which is a signatory to the New York Convention.

11.2.4 The recognition and enforcement of New York Convention awards are governed by Sections 100–104 of the English Arbitration Act and may only be refused if the party against whom it is to be enforced proves one or more of the following:\(^{122}\)

— incapacity of a party to the arbitration agreement;
— invalidity of the arbitration agreement;
— lack of due notice or opportunity to present its case;
— lack of substantive jurisdiction of the arbitral tribunal;
— irregularity in the composition of the arbitral tribunal or conduct of the arbitral proceedings;
— award not binding on parties, set aside or suspended;
— the subject matter of the arbitration is not capable of settlement by arbitration; or
— recognition and enforcement of the award would be contrary to public policy.\(^{123}\)

11.2.5 It is rare for the English Courts to refuse to enforce a foreign award under the New York Convention. However, the Supreme Court has recently ruled that an award given against an entity which the Supreme Court found was not a party to an agreement under which the arbitration was brought (but which the arbitral tribunal concluded was bound by the arbitration agreement) is not enforceable under English law.\(^{124}\) The Supreme Court also determined that it was entitled to revisit the arbitral tribunal’s decision on jurisdiction for the purposes of considering enforcement under the New York Convention.

---

\(^{121}\) For the full text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.

\(^{122}\) English Arbitration Act, s 104.

\(^{123}\) For example, in cases where the underlying contract involved illegality. See *Soleimany v Soleimany* [1999] QB 785.

\(^{124}\) *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46.
12. Court proceedings

12.1.1 Arbitration applications are generally dealt with by the Commercial Court or, in relation to cases where the subject matter relates to technology or construction, the Technology and Construction Court (TCC), both forming part of the Queen’s Bench Division of the High Court of Justice. They are governed by Part 62 and the Practice Direction to Part 62 of the CPR. Appeals in arbitration matters from decisions of the Commercial Court or TCC are heard by the Court of Appeal, but permission to appeal will first be required from the first instance court i.e. either the Commercial Court or TCC. Appeals from the Court of Appeal will be made to the Supreme Court.\textsuperscript{125}

13. Questions not addressed by the English Arbitration Act

13.1.1 A number of questions have not been addressed by the English Arbitration Act and have instead been left open to developments in the jurisprudence. These include, in particular, the following issues.

13.1.2 Multi-party disputes and consolidation of separate arbitral proceedings give rise to a number of potentially complex issues and require careful consideration on a case-by-case basis at the contract drafting stage. Parties should ensure that adequate provision is made in relation to the appointment procedure for the arbitral tribunal, the arbitral tribunal’s jurisdiction and procedural matters. Some institutional arbitration rules, for example the new ICC Rules,\textsuperscript{126} have been drafted to accommodate multi-party disputes and the joinder of additional parties.

13.1.3 Privacy and confidentiality of the arbitral proceedings and of the subsequent award are traditionally perceived as typical advantages of arbitration over court litigation. The English Arbitration Act does not address confidentiality. This was deliberate as the DAC took the view that the task of setting out the scope of the confidentiality obligations, and exceptions to it, was both difficult and controversial and would be better suited to case-by-case development by the courts.\textsuperscript{127}

\textsuperscript{125} Permission of the “court” is required for any appeal from a decision of the court under either Sections 67(4) or 68(4) of the English Arbitration Act. At first sight, this appears to suggest that unless the judge at first instances gives leave to appeal there can be no appeal. However, two separate lines of decisions of the Court of Appeal have weakened the proposition that the first instance judge alone is competent to grant leave to appeal from his own decision: see Cetelem SA v Roust Holdings Ltd [2005] EWCA Civ 618 and Lesotho Highlands Development Authority v Impregilo SpA [2006] 1 A.C. 221.

\textsuperscript{126} Which are in force since January 2012. For the full text of the ICC Rules, see CMS Guide to Arbitration, vol II, appendix 3.7.

\textsuperscript{127} See para 17, February 1996 DAC Report.
13.1.4 Under English law, the confidentiality of arbitration is an implied term of every arbitration agreement,\(^{128}\) despite conflicting decisions in the Commonwealth.\(^{129}\) The court has held that the obligation includes any documents prepared for and used in the arbitration, or disclosed or produced in course of the arbitration or transcripts or notes of the evidence in the arbitration or the award.\(^{130}\) Notwithstanding the position taken by the English courts, it is advisable for the arbitration agreement expressly to stipulate confidentiality in relation to the arbitral proceedings and the award.

13.1.5 There are a number of exceptions to the duty of confidentiality, namely:
- by consent of the parties;
- by order or leave of the court;
- where the court considers that making an exception is reasonably necessary (to establish or protect a party's rights against a third party); or
- where the court considers that making an exception is in the interests of justice (e.g. prior inconsistent views expressed by an expert in arbitral proceedings).\(^{131}\)

14. Conclusion

14.1.1 The English Arbitration Act has contributed significantly to revitalising English arbitration and to ensuring that London remains one of the leading centres for international commercial arbitrations.

14.1.2 The English Arbitration Act has made arbitration a more attractive option for dispute resolution by increasing party autonomy, as well as reducing the scope for court interference in the arbitral process. Arbitrators have been given wider procedural powers which can contribute to making arbitration more efficient. The success of these provisions depends on arbitrators exercising their powers in practice fairly and imaginatively, distinguishing the parties' choice of arbitration as their preferred method of dispute resolution from more formal and rule-bound court proceedings.

---


\(^{129}\) See, for example, *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 183 CLR 10 (in which the Australian High Court held that confidentiality is not an essential attribute of private arbitration).

\(^{130}\) *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

\(^{131}\) In *London & Leeds Estate v Paribas Ltd* [1995] 2 EG 134 Mance J permitted disclosure of an expert's reports from earlier arbitrations which were said to be inconsistent with his evidence in the current rent review arbitration. Mance J took the view that the public interest in ensuring that the expert's inconsistent views were exposed outweighed the parties' rights to confidentiality.
15. Contacts

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD
United Kingdom

Guy Pendell
Head of the CMS Dispute Resolution Practice Area Group
T  +44 20 7367 2404
E  guy.pendell@cms-cmck.com

Rupert Choat
Construction
T  +44 20 7367 3573
E  rupert.choat@cms-cmck.com

Ben Holland
Energy Disputes
T  +44 20 7367 3682
E  ben.holland@cms-cmck.com

Stephen Netherway
Insurance/Reinsurance
T  +44 20 7367 3573
E  stephen.netherway@cms-cmck.com
ARBITRATION IN FRANCE

By Jean de la Hosseraye, Stéphanie de Giovanni and Juliette Huard-Bourgois, CMS
# Table of Contents

1. **Historical background and legislative framework** 333  
   1.1 Overview 333  
   1.2 Historical background 333  
   1.3 Legislative framework 335  

2. **Scope of application and general principles** 336  
   2.1 Distinction between domestic and international arbitration 336  
   2.2 French definition of international arbitration 337  

3. **The arbitration agreement** 338  
   3.1 Definition 338  
   3.2 Formal requirements 338  
   3.3 Special tests and requirements of the jurisdiction 339  
   3.4 Autonomy of the arbitration agreement 340  
   3.5 Legal consequences of a binding arbitration agreement 341  

4. **Composition of the arbitral tribunal** 341  
   4.1 Constitution of the arbitral tribunal 341  
   4.2 Procedure for challenging and substituting arbitrators 342  
   4.3 Duty of disclosure 343  
   4.4 Arbitrators’ fees 344  
   4.5 Liability and immunity of arbitrators 344  

5. **Jurisdiction of the arbitral tribunal** 345  
   5.1 Competence to rule on jurisdiction 345  
   5.2 Power to order interim measures 346  

6. **Conduct of proceedings** 346  
   6.1 Legal framework applicable to international arbitral proceedings 346  
   6.2 Arbitral tribunal’s discretion and its duty of fairness and diligence 347  
   6.3 General procedural principles 347  
   6.4 Commencement of arbitration 349  
   6.5 Seat, place of hearings and language of arbitration 349  
   6.6 Oral hearings and written proceedings 350  
   6.7 Default by one of the parties 350  
   6.8 Evidence generally 350
6.9 Court assistance in taking evidence 351
6.10 Confidentiality of arbitral proceedings 351

7. Making of the award and termination of proceedings 352
   7.1 Applicable law 352
   7.2 Timing 352
   7.3 Form, content and notification of the award 353
   7.4 Settlement 354
   7.5 Power to award interest and costs 354
   7.6 Effect of the award 354
   7.7 Correction, clarification and issue of a supplemental award 355

8. Role of the courts 355
   8.1 Jurisdiction of the courts 355
   8.2 The supporting role of the courts 356
   8.3 Interim protective measures 357

9. Challenging and appealing an award through the courts 357
   9.1 Jurisdiction of the courts 357
   9.2 Action to set aside an international award made in France 358
   9.3 Waiver of the right to challenge the award 359

10. Recognition and enforcement of awards 359
    10.1 Obtaining enforcement of international awards 359
    10.2 Resisting enforcement of an international award made in France 360
    10.3 Resisting enforcement of an international award made abroad 361

11. Special provisions and considerations 361
    11.1 Consumers 361
    11.2 Employment law 362

12. Contacts 362
1. Historical background and legislative framework

1.1 Overview
1.1.1 France – which has hosted the International Chamber of Commerce in Paris since the 1920s – is well known as a favourable venue for arbitration. It has helped provide international arbitration with the means to become a trusted dispute resolution mechanism and to establish itself as an independent legal order.

1.1.2 The autonomy of the arbitration agreement, policies facilitating the enforcement of international awards, very limited court interference and party autonomy are some of the classic features of French law on international arbitration, which has been supported by the French courts for decades.

1.1.3 France adopted a new arbitration law in 2011, modernising the rules applicable to both domestic and international arbitration. This new law codifies the principles developed in case law and aims to preserve the trust of international arbitration users in the French legal system.

1.1.4 The scope of this chapter is limited to provisions relevant to international arbitration, considering such provisions that either exclusively concern international arbitration or apply to both international and domestic arbitration.

1.2 Historical background

Napoleonic Codes
1.2.1 The Napoleonic Codes, in particular the Code de Procédure Civile adopted in 1806 and the Code de Commerce adopted in 1807, originally provided for the restricted use of arbitration. Only limited types of disputes, including disputes relating to maritime insurance or commercial companies, could be arbitrated. In the majority of cases, it was only possible to submit disputes that had already arisen to arbitration, by way of compromis d’arbitrage. Arbitration agreements relating to future disputes were prohibited.

1.2.2 Following France’s signing of the 1923 Geneva Protocol, France passed a law on 31 December 1925 establishing the validity of arbitration agreements in commercial relationships. Subsequent laws were then adopted from 1926 to 1975 concerning the application of arbitration in certain areas but these laws were passed without amending the procedural rules. The procedures for appeal and review of international awards were based on case law and a series of scattered legal texts and this frequently led to confusion and abuse of the procedures, which in turn undermined the efficiency of arbitration agreements and awards.
1.2.3 However, France was simultaneously participating in a movement to liberalise arbitration in the international sphere. France ratified numerous international treaties on arbitration during this period, including the New York Convention,¹ the 1961 European Convention and the Washington Convention (ICSID),² which were, in effect, still not reflected in French domestic legislation. Two major reforms then took place which shaped the present legal landscape in favour of the autonomy of international arbitration.

The 1980–81 reform

1.2.4 In 1980 and 1981, two revolutionary decrees were passed, introducing progressive arbitration provisions into the Nouveau Code de Procédure Civile, which was subsequently renamed the Code de Procédure Civile (CPC). Decree No 80-354 of 14 May 1980 related to domestic arbitration and Decree No 81-500 of 12 May 1981 related to international arbitration (1980-81 Decrees).

1.2.5 The main objectives of the 1980-81 Decrees were to confirm, by way of statute, the autonomy of the parties and to limit judicial interference in arbitral proceedings. The 1980-81 Decrees allowed the parties to set out in their arbitration agreement the procedural rules to be followed by the arbitrators, subject to certain general principles commonly applicable to court proceedings. The 1980-81 Decrees also allowed the arbitrators to rule on the validity of the arbitration agreement and on their own jurisdiction, including the extent of their mandate. Although these arbitration provisions pre-dated the Model Law (1985),³ they established one of the most modern and flexible legal frameworks for arbitration at that time.

1.2.6 Since the entry into force of the 1980–81 Decrees, French courts have developed case law which has been driven by a policy favouring the autonomy of international arbitration. For example, French courts stopped applying conflict of laws rules to international arbitration agreements and, instead, developed a number of “material rules” which aimed to ensure the efficiency of the arbitral process by asserting the validity and autonomy of international arbitration agreements.⁴

1.2.7 While major progress was made in French law on international arbitration, French law on domestic arbitration lagged slightly behind this liberalisation movement. EU law – especially the Unfair Contract Terms Directive⁵ – raised new doubts over

² Ibid, appendix 1.2.
³ Ibid, appendix 2.1.
⁴ See section 3.4 below.
⁵ Council Directive 93/13/EEC.
the validity of certain arbitration agreements concluded by non-commercial parties. In 2001, the French legislator amended the provisions of the Code Civil relating to arbitrability of domestic arbitration agreements. The amended provision of the Code Civil established the validity of arbitration agreements in contracts entered into for the purposes of a professional activity, thereby removing the previous restriction that only commercial matters were arbitrable.

The 2011 reform

Ten years later, another overhaul appeared necessary in order to maintain the attractiveness and efficiency of the French arbitration system. In order to offer a more accessible legal framework to international arbitration users in France, the French Government sought to codify the numerous principles developed by case law in recent years. This reform led to today's legislative framework, established through Decree No 2011-48 of 13 January 2011 (2011 Decree), which amended the arbitration provisions of the CPC.

The 2011 Decree provides for the following improvements:
— redefining the role of the courts in arbitration, explicitly establishing a judge acting in support of the arbitration process (the juge d'appui) and the universal jurisdiction of this judge to assist with any arbitral proceedings to ensure there is not a denial of justice;
— simplifying the procedures for obtaining judicial review of an award;
— abolishing the suspending effect which a challenge to an award triggers; and
— introducing the common law principle of loss of right to object, or “estoppel”, under which a party who knowingly and without a legitimate reason fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to object to this irregularity.

1.3 Legislative framework

The legislative provisions and legal principles governing arbitration are for the most part in Book IV of the CPC, emanating from the 2011 Decree. However, several other principles can be found in the Code Civil and case law.

---

7 See section 3.3 below.
8 E Gaillard and P de Lapasse, Le nouveau droit français de l'arbitrage interne et international, Recueil Dalloz, 20 January 2011, n 3, p 175.
9 CPC, art 1505(4); see section 8.2 below.
10 Ibid, art 1520.
11 Ibid, art 1523.
12 Ibid, art 1466.
1.3.2 The CPC provisions relating to arbitration are the main source of French law on international and domestic arbitration. They provide a full and detailed description of the legal regimes applicable to both forms of arbitration, from the validity of the arbitration agreement to the procedure to set aside an award.

1.3.3 A residual aspect of French arbitration law is to be found in Articles 2059, 2060 and 2061 of the Code Civil. These Articles apply to domestic arbitration and deal with matters of arbitrability that are explained in more detail at section 3.3 below.

1.3.4 The provisions of the 2011 Decree entered into force on 1 May 2011. However, some of its provisions will only be engaged on certain conditions:

— Articles 1442–1445, 1489, 1505(2) and 1505(3) of the CPC apply to arbitrations where the arbitration agreement was concluded after 1 May 2011;
— Articles 1456–1458, 1486, 1502, 1513 and 1522 of the CPC apply to arbitrations where the arbitral tribunal was constituted after 1 May 2011; and
— Article 1526 of the CPC applies to awards made after 1 May 2011.

2. Scope of application and general principles

2.1 Distinction between domestic and international arbitration

2.1.1 French law makes a fundamental distinction between domestic and international arbitration. This distinction pervades the entire legal framework for arbitration in France and allows international arbitration, even if the seat of the arbitration is in France, to be governed by more flexible and permissive principles than those applying to domestic arbitration.

2.1.2 Consequently, the CPC provisions on arbitration follow a binary structure and are divided in two parts. Title I addresses domestic arbitration and Title II addresses international arbitration.

2.1.3 Title I on Domestic Arbitration (Articles 1442–1503 of the CPC) is structured as follows:

— Chapter I: The arbitration agreement (arbitration clauses and submission agreements);
— Chapter II: The arbitral tribunal;

---

11 2011 Decree, art 3.
— Chapter III: The arbitral proceedings;
— Chapter IV: The arbitral award;
— Chapter V: Exequatur (enforcement orders); and
— Chapter VI: Recourse (actions against awards).

2.1.4 Title II on International Arbitration (Articles 1504–1527 of the CPC) is structured as follows:
— Chapter I: International arbitration agreements;
— Chapter II: Arbitral proceedings and awards;
— Chapter III: Recognition and enforcement of arbitral awards made abroad or in international arbitration; and
— Chapter IV: Recourse (actions against awards).

2.1.5 It is important to note that, notwithstanding this division, a significant number of the domestic arbitration provisions also apply to international arbitration. These provisions are listed in Article 1506 of the CPC.

2.2 French definition of international arbitration
2.2.1 Article 1504 of the CPC provides a definition of international arbitration in the following terms: “An arbitration is international when international trade interests are at stake”. In other words, an arbitration is international as long as it involves an economic transaction that is not limited to the borders of a single country. This legal definition, based on “international trade interests”, is a codification of the main test that was applied by the French courts over several decades in order to determine which arbitration regime should apply to a particular dispute.\(^\text{14}\)

2.2.2 An arbitration can, therefore, be “international” while having its seat in France, with or without French parties, if the dispute involves the flow of goods, services or currency over international borders. Furthermore, an award which results from international arbitration will be treated as an international award even if made in France.

2.2.3 This means that three types of award exist under French arbitration law: (i) domestic awards which were made in France and do not address international matters; (ii) international awards which were made in France and address international matters and (iii) international awards made abroad. A description of the enforcement rules applicable to these different types of awards is set out at section 10 below.

3. The arbitration agreement

3.1 Definition
3.1.1 Previously there was a traditional distinction in French domestic arbitration law between arbitration agreements to arbitrate future disputes (clause compromissoire or clause d’arbitrage) and arbitration agreements to submit existing disputes to arbitration (compromis d’arbitrage). Some matters could only be resolved by arbitration on the basis of an arbitration agreement which had been concluded after the dispute had arisen. The 2011 Decree abandons that distinction. As a result, the arbitrability of a matter no longer depends on whether the dispute has or has not already arisen between the parties.

3.1.2 Importantly, this traditional distinction has never existed in the context of international arbitration.

3.2 Formal requirements
3.2.1 In French arbitration law, an arbitration agreement is valid even if it is not in writing. Courts have found that an arbitration agreement may, for instance, result from the conduct of the parties at the time of negotiating and performing the contract, or from a party’s submission to the jurisdiction of an arbitral tribunal.

3.2.2 Since the entry into force of the 2011 Decree, the CPC contains an express provision that “an arbitration agreement shall not be subject to any requirements as to its form.” This new provision constitutes a codification of case law. The courts also recognised that an arbitration agreement could be incorporated by reference to another document – even if the latter was not signed by a party – if evidence of the true consent of that party could be adduced by other means.

3.2.3 An arbitration agreement should, nevertheless, exist in some tangible form, as a party seeking to enforce an award must produce an original or copy of both the award and the arbitration agreement. As to the proof of the arbitration agreement, it may be considered, in light of Article VII of the New York Convention, that the existence of an arbitration agreement may be established by any means admitted by French law.

16 CPC, art 1507.
3.3 Special tests and requirements of the jurisdiction

Scope of arbitrability in domestic arbitration

3.3.1 As a general rule set out in Article 2061 of the Code Civil, arbitration agreements in domestic arbitration are valid in contracts concluded “by reason of a professional activity”. In other words, regardless of the object of the contract (e.g. sale of goods, shareholders’ agreement or partnership, etc), parties are free to arbitrate as long as the contract containing the arbitration agreement is concluded in the course of the professional activity of the parties. This means that consumer contracts are not arbitrable. It also means that the scope of arbitrability is no longer limited to commercial contracts. Disputes relating to civil contracts, as long as entered into for professional purposes, can also be submitted to arbitration.

3.3.2 In addition to consumer contracts, the following matters cannot be submitted to arbitration:
- matters relating to the status and capacity of persons, divorce and judicial separation;
- disputes concerning public bodies (the state and local authorities, public entities and public institutions, except when relating to establishments authorised (by decree) to have a commercial activity); and
- matters involving public policy.

Scope of arbitrability in international arbitration

3.3.3 In accordance with well-established principles of case law, most of the restrictions on the scope of arbitrable matters in domestic arbitration do not apply in international arbitration. Unlike in domestic arbitrations, the requirement that contracts be concluded “by reason of a professional activity” does not apply to international arbitration. Therefore consumer disputes are generally arbitrable.

3.3.4 The following arbitration agreements can also be concluded in international arbitration:
- arbitration agreements involving the state or state-owned entities; and
- arbitration agreements which relate to matters involving public policy, except where the subject matter of the dispute itself involves a breach of French international public policy (e.g. bribery of civil servants, drug trafficking or terrorism).

---


20 Code Civil, art 2060.
3.4 Autonomy of the arbitration agreement

3.4.1 The principle of the autonomy of the arbitration clause from the main contract, which is equivalent to the principle of separability, has long been maintained by French courts.\(^{21}\) This principle is now expressly recognised by statute in Article 1447 of the CPC, which provides: “An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.”

3.4.2 The consequence of the autonomy of the arbitration clause is that arguments as to the nullity of the main contract containing the arbitration clause shall not affect the validity of the arbitration clause or the competence of the arbitral tribunal to rule on these arguments.\(^{22}\)

3.4.3 The French principle of autonomy of the arbitration agreement goes beyond the classic principle of separability. French law also recognises that an arbitration clause can be subject to a different applicable law than the law governing the main contract.\(^{23}\) Not only is the arbitration clause independent from the contract, it is also independent from the law governing that contract. Consequently, an arbitration agreement could survive despite provisions of the law governing the main contract that would arguably invalidate that contract.\(^{24}\)

3.4.4 Through a consistent line of case law, the Cour de cassation has based the validity of the arbitration agreement on a substantive rule of validity.\(^{25}\) This substantive rule or règle matérielle allows the French courts to bypass any conflict of laws rule that would identify the national law governing the validity of the arbitration agreement. As a result, arbitration agreements are governed by this règle matérielle of validity instead of a national law. In practice, an international arbitration agreement will be valid if the consent of the parties is established and if it does not purport to violate international public policy.\(^{26}\)

\(^{21}\) Cour de cassation, 7 May 1963, Gosset c/ Carapelli, Rev Arb, 1963, p 60.

\(^{22}\) Cour de cassation (Civ. 1ere), 11 July 2006, No 04-14.950, National Broadcasting c/ Bernadaux et autres, Rev Arb, 2006, p 870.

\(^{23}\) Cour de cassation (Civ. 1ere), 4 July 1972, Hecht c/ Buisman, Rev Arb, 1974, p 89.


3.5  **Legal consequences of a binding arbitration agreement**

3.5.1 Where there is a binding arbitration agreement, the parties are obliged to refer their dispute to an arbitral tribunal pursuant to the terms of their arbitration agreement and the courts must decline jurisdiction over that dispute. An arbitration agreement only creates obligations on the parties to it, and has no binding force on third parties who cannot rely on it.

4.  **Composition of the arbitral tribunal**

4.1  **Constitution of the arbitral tribunal**

4.1.1 In their arbitration clause, the parties are free to designate the arbitrator, or provide for a procedure for the appointment of an arbitrator, either directly or by reference to arbitral or procedural rules. If the parties fail to agree on the arbitrator(s), or on the procedure for their appointment, this omission does not affect the validity of the arbitration clause.

4.1.2 French law of international arbitration also allows the parties to agree on the number of arbitrators. Parties may appoint legal entities or individuals of any nationality to act as arbitrators. Legal provisions requiring the arbitrator to be a natural person and the arbitral tribunal to be composed of an uneven number of arbitrators only apply in domestic arbitration.

4.1.3 Where there are three arbitrators, each party shall appoint an arbitrator and the two party-appointed arbitrators shall appoint the third arbitrator.

4.1.4 Article 1452 of the CPC provides the procedure that must be followed when the parties do not agree upon the constitution of the arbitral tribunal.

4.1.5 Where there is to be a sole arbitrator and the parties fail to agree, the arbitrator shall be appointed by the person in charge of the administration of the arbitration (most often an arbitral institution) or, if there is no such a person, by the judge acting in support of the arbitration (the juge d’appui).

---

27 CPC, art 1448.
28 Ibid, art 1508.
30 Ibid, art 1452(2).
31 Ibid, art 1452. See below at section 8.2.
4.1.6 Where the arbitral tribunal is to be composed of three members, the same rule applies. If the parties fail to appoint the arbitrators within one month or where the two arbitrators fail to appoint the chair within one month,\[32\] the person in charge of the administration of the arbitration or the judge acting in support of the arbitration shall appoint the arbitrator(s).

4.1.7 Any other dispute relating to the constitution of the arbitral tribunal shall be resolved, if the parties fail to agree, either by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration.\[33\]

4.1.8 In case of multi-party proceedings, the well known decision of the Cour de cassation in the Dutco case,\[34\] inspired the rule now set out in Article 1453 of the CPC, applicable to both domestic and international arbitration. If there are more than two parties to the dispute and they fail to agree on the procedure for constituting the arbitral tribunal, the person in charge of the administration of the arbitration, or where there is no such person, the judge acting in support of the arbitration, shall appoint the arbitrator(s). It is important to note however that Article 1453 of the CPC can be excluded by the parties in international arbitration.

4.1.9 The judge acting in support of the arbitration can render his decision by way of summary judgment (référé), which cannot be appealed. This summary procedure may also be used to resolve any other type of obstacle in relation to the composition of the arbitral tribunal, including challenges of arbitrators and problems occurring in the course of arbitral proceedings. However, in the case of institutional arbitral proceedings, it is generally considered that this summary procedure may only be used where the applicable rules of the arbitral institution are silent on the point.

4.2 Procedure for challenging and substituting arbitrators

4.2.1 An arbitrator may only be removed with the unanimous consent of the parties.\[35\] If the parties cannot agree on the removal of an arbitrator, Article 1456(3) provides that the issue shall be resolved by the person/institution responsible for administering the arbitration. Article 1456(3) further provides that where there is no such person, the issue shall be resolved by the judge acting in support of the arbitration (the juge d'appui), provided an application is made within one month.

\[32\] Ibid, art 1452(2).
\[33\] Ibid, art 1454; see section 8.2 below relating to the judge acting in support of the arbitration.
\[34\] Cour de cassation, 7 January 1992, Societes BKMI et Siemens c/ societe Dutco, Rev.arb. 1992 p 470.
\[35\] CPC, art 1458.
of the disclosure or discovery of the reason for challenge. In international arbitrations with their seat in France, the judge acting in support of the arbitration shall be the President of the *Tribunal de Grande Instance* of Paris.\(^\text{36}\)

*The challenge of arbitrators*

4.2.2 The grounds for challenging an arbitrator have been identified by the courts and are not defined in the CPC. A challenge will be successful if the challenging party shows that the arbitrator lacks the qualities expected from any judge, including independence and impartiality.\(^\text{37}\) Arbitrators are also at risk of being challenged if they do not possess the qualities or skills required by the parties in their arbitration agreement.\(^\text{38}\)

*Replacement*

4.2.3 Arbitrators shall carry out their mandate until it is completed, unless they are legally incapacitated or there is a legitimate reason for them to resign. If there is a dispute as to the materiality of the reason invoked, Article 1457(2) of the CPC provides that the matter shall be resolved by the judge acting in support of the arbitration (the juge d'appui), provided an application is made within one month following such incapacity, refusal to act or resignation.

4.3 Duty of disclosure

4.3.1 Arbitrators are under the obligation to disclose to the parties any information which could create a potential cause of challenge, as well as any circumstances that may affect their independence or impartiality. This duty applies before and during the arbitration.

4.3.2 This principle is embodied in Article 1456 of the CPC, which applies to domestic and international arbitration and has codified the case law.\(^\text{39}\) A failure on the part of an arbitrator to disclose any relevant information could lead to the setting aside of the award.\(^\text{40}\)

\(^{36}\) Ibid, art 1505.


\(^{39}\) Cour d'appel de Paris, 28 November 2002, *Voith Turbo GmbH AG et Co c/ Société Nationale des Chemins de Fer Tunisiens (SNCFT)*, Rev Arb, 2003, p 445; Cour d'appel de Paris, 12 February 2009, No 07/22164, *SA J&P Avax SA c/ Tecnimont SPA*, Rev Arb, 2009, pp 237–238, where the court held: “the arbitrator must disclose to the parties any circumstances which could influence his/her judgment and could create, in the mind of the parties, a reasonable doubt as to his/her qualities of impartiality and independence, which are the essence of his/her arbitral function” (free translation).

### 4.4 Arbitrators’ fees

4.4.1 The arbitrators’ fees are set by reference to various factors, including:

- the diligence of the arbitrators;
- the amount of time spent to adjudicate the dispute and write the award;
- the speed of the proceedings; and
- the complexity of the claim.

4.4.2 Often, when the arbitration is institutional, fees may be determined on the basis of the amount of the claim.

4.4.3 It is up to the arbitrators to decide which of the parties shall have the final obligation to pay the arbitration fees. The decision that a particular party is to pay the arbitration fees in whole or in part is usually mentioned in the final part of the award.

### 4.5 Liability and immunity of arbitrators

4.5.1 As a general rule of French law, the liability of an arbitrator to the parties is contractual by nature, as the arbitrator is related to the parties by virtue of a contract.

4.5.2 French law allows civil claims to be brought against arbitrators on the grounds of contractual responsibility as set out in Article 1142 of the *Code Civil*. Such claims could arise if, for instance, the arbitrator does not implement the arbitral procedural rules, resigns without a good reason or breaches the duty to disclose any fact which might lead to his or her removal.

4.5.3 An arbitrator’s liability is limited by a certain immunity, based on the particular nature of the arbitral mandate. French law provides that an arbitrator is not liable for errors committed in the adjudication of the claim or the contents of the award. For this reason, where a party is not satisfied with an award, it should first seek to challenge the award itself and not claim against the arbitrator.

4.5.4 An arbitrator’s immunity is not absolute in French law and does not cover all acts and omissions included in the scope of the arbitrator’s mandate. In particular, the arbitrator remains liable for fraud, gross negligence and wilful misconduct.

---

4.5.5 Nevertheless, arbitrators and arbitral institutions are entitled to limit or to exclude their contractual liability when the default at issue is minor and does not result from any fraud, willful misconduct or a breach of an essential obligation under the contract.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 In principle, a party who wishes to contest the jurisdiction of an arbitral tribunal cannot seek a ruling from the French courts. In French law on international arbitration, jurisdiction is a matter for the arbitral tribunal to decide in the first instance. However, parties can turn to the courts before the arbitral tribunal has been constituted and where the arbitration agreement is “manifestly void” or “manifestly not applicable”, although this rarely occurs.\textsuperscript{42}

5.1.2 Article 1448 of the CPC, which is applicable both to international and domestic arbitration, provides:

“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”

Article 1448 of the CPC, which was introduced by the 2011 Decree, is mandatory and any agreement of the parties to exclude its application would be invalid.

5.1.3 As with the principle of autonomy of the arbitration agreement (separability), French courts have adopted a doctrine of competence-competence that goes beyond what is generally adopted in other legal systems. French courts have recognised a double effect of the doctrine of competence-competence, finding that not only can arbitrators rule on their jurisdiction (effet positif), but also that the courts cannot rule on this issue (effet négatif).

5.1.4 The dual effect of the doctrine of competence-competence is re-affirmed by Article 1465 of the CPC, which provides: “The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction” (emphasis added).

5.2 Power to order interim measures

5.2.1 The arbitral tribunal may order any conservatory or provisional measures that it deems appropriate, impose conditions for such measures and, if necessary, attach penalties to such an order.

5.2.2 Furthermore, pursuant to Article 1468 of the CPC, the arbitral tribunal has the power to amend or add to any provisional or conservative measures it has granted. This statutory provision was introduced by the 2011 Decree and means that, in arbitration, the arbitral tribunal is not required – as would normally be the case under ordinary rules of French civil procedure – to establish the existence of new circumstances in order to obtain an amendment to an interim measure or an additional interim measure. However, only courts may order attachments or judicial security as arbitrators lack the requisite powers.

6. Conduct of proceedings

6.1 Legal framework applicable to international arbitral proceedings

A statutory opt-out system for international arbitral proceedings

6.1.1 The French arbitration legal framework follows a binary structure. It differentiates the regime applicable to domestic arbitration from the regime applicable to international arbitration, even where international arbitration has its seat in France. As a result, the CPC contains: (i) some procedural rules which apply only to domestic arbitration; (ii) some which apply only to international arbitration; and (iii) some which apply both to domestic and international arbitral proceedings.

6.1.2 As regards the third type, the 2011 Decree has enhanced the transparency of the applicable regimes, by specifically identifying the domestic procedural rules applicable to international proceedings. These rules apply automatically to international arbitral proceedings if the parties have not expressly decided to exclude them or have not provided for a different solution. The 2011 Decree therefore implements an “opt-out” system of procedural rules.

---


44 CPC, art 1468(1).


46 Title I of the 2011 Decree, art 1442–1503 of the CPC.

47 Title II of the 2011 Decree, art 1504–1527 of the CPC.

48 See CPC, art 1506.

Party autonomy as to the procedure

6.1.3 In addition to this “opt-out” framework of procedural rules, under the French law on international arbitration parties enjoy wide autonomy when determining the procedural rules which will govern their arbitration. They are free to state these rules in their arbitration agreement either directly or by reference to a procedural law or existing arbitration rules. The principle of party autonomy in respect of procedural matters is expressly set out in Article 1509(1) of the CPC.

Arbitral tribunal's discretion and its duty of fairness and diligence

6.2.1 If the parties did not choose procedural rules for their arbitration, the arbitral tribunal has the discretion to establish or determine them. The arbitral tribunal will often formulate the procedural rules at the outset of the dispute as it is typically done under the ICC Arbitration Rules in the Terms of Reference. The discretion of the tribunal as regards procedural matters also includes the power to issue any provisional measure it deems necessary, with the exception of judicial securities (sûretés judiciaires) and conservatory attachments (saisies conservatoires).

6.2.2 While offering wide discretion to the arbitrators, French law imposes on them a duty to act promptly and fairly in the conduct of the proceedings. In line with this duty of fairness and diligence, arbitrators are under the obligation to respect the scope of their mandate, subject to their award being annulled or found unenforceable. The fact that an arbitral tribunal ruled without complying with its mandate is one of the grounds for annulment or refusal of recognition listed in Article 1520 of the CPC.

General procedural principles

6.3.1 The general principles governing the arbitral procedure are the equal treatment of the parties, due process and the principle of estoppel.

Equal treatment of the parties

6.3.2 Originally based on case law, the application of the principles of equal treatment of the parties and due process in international arbitration proceedings is now expressly stated in the 2011 Decree. Article 1510 of the CPC provides that,

---

50 CPC, art 1509(2).
53 CPC, art 1468.
54 Ibid, art 1464(3).
55 The principle of estoppel has only recently been introduced in French law and is an innovation brought about by the 2011 Decree.
irrespective of the adopted procedure, the arbitral tribunal must ensure that the parties are treated equally and that the principle of due process is complied with.

### 6.3.3 The principle of equal treatment of the parties forms part of international public policy and was established by the Cour de cassation in the famous Dutco decision.\(^{56}\) In this multi-party case, two respondents with divergent interests had been asked to appoint an arbitrator jointly. The Cour de cassation decided to set aside the award finding that, as equality of the parties in the designation of the arbitrators had not been respected, the award infringed on international public policy. This decision led to a change of the ICC Arbitration Rules\(^ {57}\) and to the introduction in the CPC of Article 1453.

**Due Process**

### 6.3.4 The French principle of due process (*principe de la contradiction*) is slightly different from other standards of due process. It goes beyond the mere opportunity that a party may have to present its case.\(^ {58}\) Adding to the arbitrators’ duty to ensure that each party will be heard on any point of law or facts, the arbitral tribunal also has the obligation to ensure that the parties have had the opportunity to consider and comment on each legal and factual issue considered in the award (i.e. that new arguments and evidence are not introduced in the award that were not considered in the proceedings or submissions).\(^ {59}\)

**Estoppel**

### 6.3.5 The 2011 Decree has introduced the principle of estoppel, inspired by common law, in French law on domestic and international arbitration. Under this principle a party may lose its right to object to an irregularity before the court, if it knowingly and without a legitimate reason, failed to object in a timely manner before the arbitral tribunal.\(^ {60}\) Also known as the “loss of right to object”, this French version

---

\(^{56}\) See paragraph 4.1.4 above.


\(^{58}\) See Fouchard Gaillard Goldman on International Commercial Arbitration, (Gaillard and Savage (ed.)) (1999) Kluwer International, p 947; see also Cour d’appel de Paris, 6 May 2003, Rev Arb, 2004, p 720: “The ‘equality of weapons’, which represents an important element of the fair trial principle protected by public policy, implies the possibility to offer to each party a reasonable possibility to present his case and evidence in conditions which do not put the party in a disadvantageous situation” (free translation).

\(^{59}\) Cour de cassation (Civ. 1ere), 29 June 2011, No 1023232, Overseas Mining Investments Ltd c/ Commercial Caribbean Niquel SA, The Cour de Cassation upheld the annulment of an UNCITRAL award, finding that the arbitrators’ failure “to invite the parties to express their views” on loss of chance violated due process; see also Cour d’appel de Paris, 6 April 1995, Thyssen Stahlunion c/ Meeaden, Rev Arb, 1995, p 448.

\(^{60}\) CPC, art 1466.
of estoppel has already been applied by the courts prior to the enactment of
the 2011 Decree.\(^{61}\)

### 6.4 Commencement of arbitration

6.4.1 Arbitral proceedings are usually commenced by the submission of an arbitration
request or notice by the claimant to the respondent or to the arbitral institution, as
provided in the Model Law (1985).\(^{62}\) In contrast, there is no legal provision or
requirement as to the date of the commencement of the arbitral proceedings
under French law. Neither is there a specific limitation period for filing the request
for arbitration.

6.4.2 The 2011 Decree instead places a significant emphasis on the date of the arbitral
tribunal’s constitution. Article 1459 of the CPC provides: “The constitution of an
arbitral tribunal shall be complete upon the arbitrators’ acceptance of their
mandate. As of that date the tribunal is seized of the dispute”. The date upon
which the arbitral tribunal is deemed to be constituted and seized is important
under French law as it determines when the courts can exercise the power to order
interim and protective measures\(^{63}\) or to rule on the validity of an arbitration agreement.\(^{64}\)

### 6.5 Seat, place of hearings and language of arbitration

6.5.1 The CPC does not contain any provisions on the determination of the seat and
language of arbitral proceedings. Like other procedural matters, the seat and
language of the arbitral proceedings shall be determined by the parties, for
example, by reference to a set of arbitral rules or, in the absence of an agreement
between the parties, by the arbitral tribunal itself.\(^{65}\)

6.5.2 French courts have held on many occasions that the seat of the arbitration was
purely a juridical concept.\(^{66}\) Nothing prevents the arbitrators from holding any part

---

\(^{61}\) Cour de cassation (Civ.1ere), 6 July 2005, Golshani c/ Gouv. Rep. Islamique d’Iran, Bull.civ. I, No 302; Cour de cassation
(Civ.1ere), 3 February 2010, Merial c/ Klocke Verpackungs-Service GmbH, Rev Arb, 2010, p 93. On this case see K Karadelis
“French court defines estoppel – but confusion remains”, in Global Arbitration Review 24 February 2010; E Kleiman, “Stop!


\(^{63}\) Cour de cassation, 6 December 2005, Rev Arb, 2005, p 1104.

\(^{64}\) CPC, art 1448.

\(^{65}\) Cour d’appel de Paris, 16 November 2006, No 04-24238, Empresa de Telecomunicaciones de Cuba c/ Telefonica Antillana
et SNC Banco Nacional de Commercio Exterior, Rev Arb, 2008, p 109. In this case, an award was set aside as the arbitrators
had imposed the same seat, Paris, for two connected disputes relating to different contracts that provided for two different
arbitral seats. The courts found that the arbitrators could not ignore the agreement of the parties to have two different
seats.

\(^{66}\) Cour d’appel de Paris, 3 December 1998, Société ITP Interpipe c/ Hunting Oilfield Services (HOS), Rev Arb, 1999, pp
of the proceedings in a place other than the seat of the arbitration if this is more appropriate.

6.6 **Oral hearings and written proceedings**

6.6.1 The format and timetable for written submissions or hearings is to be determined by the arbitral tribunal in such a manner as to enable each party to present its case and to address that of its opponent.

6.6.2 The parties will often submit written memoranda (mémoires) containing their arguments on the facts and the legal basis for their demands, supported by extensive documentation.

6.6.3 As with classic international arbitration practice, the parties will also attend hearings, during which the arbitrators will ask for any clarification that may be required. If necessary, the arbitral tribunal will ask for additional written submissions.

6.7 **Default by one of the parties**

6.7.1 The 2011 Decree does not contain any specific provisions relating to default proceedings. However, where default arbitrations take place, the following principles apply:

(i) the institution in charge of administering the arbitration, or the courts, will appoint the arbitral tribunal;\(^67\)

(ii) the default of one party cannot stop the arbitral proceedings, which shall continue despite the absence of the defaulting party; and

(iii) the French courts will be ready to enforce a default award if the defaulting party received the notification informing it of the commencement of the arbitral proceedings and it knowingly decided not to appear at the arbitral proceedings.\(^68\)

6.8 **Evidence generally**

6.8.1 Under Article 1467 of the CPC, applicable to both domestic and international arbitration, arbitrators shall take all necessary steps concerning evidentiary or procedural matters jointly, unless the parties authorise the arbitral tribunal to delegate these tasks to one of its members. The arbitrators’ general power to take and admit evidence derives also from the discretion afforded to them by Article 1509 of the CPC.


6.8.2 In particular, the arbitral tribunal has the power to join a party to produce evidence in its possession in a manner determined by the arbitral tribunal itself.\(^6^9\) If that party does not comply with the tribunal’s order, penalties may be granted as a consequence.\(^7^0\)

6.8.3 A broad range of evidence is admissible before an arbitral tribunal. Evidence may be obtained through the disclosure of documents, witness statements, expert reports or discovery, in the same way as in normal court proceedings. However, the arbitral tribunal is not required to follow all the rules applicable to court proceedings.

6.8.4 In particular, the arbitral tribunal has the power to call upon any person to provide testimony.\(^7^1\) Under Article 1467(2) of the CPC, witnesses appearing before an arbitral tribunal shall not be sworn in.

### Court assistance in taking evidence

6.9.1 Pursuant to Article 1469 of the CPC, court assistance in taking evidence can be sought in two situations, where third party evidence is required or where the production of a private deed to which the applicant is not a party is needed.

6.9.2 If one of the parties intends to rely on an official or private deed to which it was not a party, or on evidence held by a third party, it may, upon the authorisation of the arbitral tribunal, have that third party summoned before the President of the Tribunal de Grande Instance in order to obtain a copy or to have the deed or the item of evidence produced.\(^7^2\) Such claims shall be made, heard and decided through expedited proceedings (référés).\(^7^3\) If the judge acting in support of the arbitration (the juge d’appui) considers the party’s request to be well-established, they shall order the other party to produce the relevant piece of evidence, with a periodic penalty payment if necessary. Such an order is not immediately enforceable and may be appealed within 15 days following service.

### Confidentiality of arbitral proceedings

6.10.1 When enacting its new arbitration law, the French legislator introduced a statutory provision in the CPC dealing with confidentiality of arbitral proceedings which is

---

\(^{69}\) CPC, art 1467(2).


\(^{72}\) CPC, art 1469.

expressly limited to domestic arbitration.\textsuperscript{74} In contrast, the CPC remains silent as to the confidentiality of international arbitral proceedings. While this silence does not deny a presumption of confidentiality which is needed in certain cases, it does not impose an obligation of confidentiality. Therefore, the CPC indirectly allows for international arbitral proceedings that cannot be confidential, such as certain types of investment arbitrations, to be seated in France.

6.10.2 Further, in the absence of an express statutory provision imposing confidentiality upon international arbitral proceedings, it is highly recommended that parties who wish to protect the confidentiality of their proceedings incorporate such an obligation into their arbitration agreement or enter into a special confidentiality agreement at the outset of the proceedings.

7. Making of the award and termination of proceedings

7.1 Applicable law
7.1.1 The parties are free to choose the rules of law that shall be applicable to the dispute. In the absence of such a choice by the parties, the arbitrators shall apply the rules of law that they consider appropriate.\textsuperscript{75} In either case, the arbitral tribunal is compelled to take trade customs into consideration.\textsuperscript{76}

7.1.2 The use of the wording "rules of law" rather than "law" in the CPC is intended to give the parties and the arbitrators greater flexibility in the choice of law, allowing the application of private rules (such as the UNIDROIT principles) instead of the law of one specific country.

7.1.3 Arbitrators can act as \textit{amiable compositeur}, only if expressly empowered by the parties to do so.\textsuperscript{77} When acting as \textit{amiable compositeur}, arbitrators are seeking a fair resolution of the dispute without being bound by any specific system or general principles of law alone.

7.2 Timing
7.2.1 There are no specific provisions in French law on international arbitration governing the duration of the mandate of the arbitral tribunal.\textsuperscript{78} However, where parties have

\textsuperscript{74} CPC, art 1464.
\textsuperscript{75} Ibid, art 1511.
\textsuperscript{76} Ibid, art 1511(2).
\textsuperscript{77} Ibid, art 1512.
\textsuperscript{78} The six month limit for the duration of the arbitral tribunal's mandate that is set out in Article 1463 of the CPC only applies to domestic arbitration.
determined a time limit for the award to be made, the courts will hold the arbitrator personally liable towards the parties if he/she does not respect it.\textsuperscript{79}

7.2.2 In any event, the statutory or contractual duration of the arbitral tribunal’s mandate may be extended by agreement between the parties or, in the absence of such agreement, by the judge acting in support of the arbitration (the \textit{juge d’appui}).\textsuperscript{80}

7.3 \textbf{Form, content and notification of the award}

7.3.1 Usually, the award is in writing although there is no express requirement as to the form of an international award. A written award presents the advantage of being capable of execution and recognition. Furthermore, if a party wishes to exercise recourse to the courts in order to set aside the award, proving the existence of the award would be difficult if the award had been made orally.

7.3.2 Pursuant to Article 1482 of the CPC, the award must succinctly set out the respective claims and arguments of the parties. Most importantly, the award shall state the reasons upon which it is made.\textsuperscript{81}

7.3.3 The award must contain:

— the full names of the parties as well as their domicile or corporate headquarters;
— if applicable, the names of counsel or other persons who represented or assisted the parties;
— the names of arbitrators who made the award;
— the date on which the award was made; and
— the place where the award was made.\textsuperscript{82}

7.3.4 Parties are usually notified of the award by the arbitrator or the arbitral institution. There is no formal requirement as to the notification of an international award. The requirement that the award needs to be notified by service, unless otherwise agreed by the parties, is only applicable to domestic arbitration.\textsuperscript{83}

7.3.5 Finally, the award shall be made by a majority decision unless the parties agree otherwise and shall be signed by all the arbitrators.\textsuperscript{84} In circumstances where a majority is not reached, the chair of the arbitral tribunal is empowered to rule

\textsuperscript{79} Cour de cassation (Civ. 1ere), 6 December 2005, Rev Arb, 2006, p 127.
\textsuperscript{80} CPC, art 1463(2).
\textsuperscript{81} Ibid, art 1482.
\textsuperscript{82} Ibid, art 1481.
\textsuperscript{83} Ibid, art 1484(3).
\textsuperscript{84} Ibid, art 1513.
7.4 Settlement
7.4.1 Parties may resolve their dispute during the arbitral proceedings. In such a case, the parties may privately formalise an agreement containing their mutual commitments, providing for an amicable settlement of their dispute (and thereby ending the arbitral proceedings). Alternatively, the parties may ask the arbitral tribunal to make an award setting out the terms upon which the dispute is resolved amicably, which is called an agreement award. The benefit of an agreement award is that it provides the parties’ decision with the res judicata effect which is attached, in principle, to every award. Furthermore, it allows the parties to enforce the award should a party fail to perform it.

7.5 Power to award interest and costs
7.5.1 Absent an agreement of the parties as to costs, French law confers a wide autonomy on the arbitrators to determine issues of costs. There is no specific rule regarding the award of costs or interest in international arbitration. The award of interest is usually a matter governed by the law applicable to the substance of the dispute.

7.5.2 The costs of the arbitration also include the fees and expenses of any arbitral institution involved in the proceedings. Although the arbitrators have the right to determine their fees, these amounts will often be determined in accordance with the applicable arbitral rules.\(^\text{86}\)

7.6 Effect of the award
7.6.1 The 2011 Decree expressly states that the award is final and has a binding effect upon the parties as from its notification. As soon as the award is made, it is res judicata with regard to the claims adjudicated in that award.\(^\text{87}\) This means that national courts do not have the right to hear a case that has been settled through arbitration when that claim involves the same parties and the same issue. Furthermore, once the award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award.\(^\text{88}\)

\(^{85}\) Ibid, art 1513(3).


\(^{87}\) CPC, art 1484(1).

\(^{88}\) Ibid, art 1485(1).
7.7 Correction, clarification and issue of a supplemental award

7.7.1 On the application of a party, the arbitral tribunal may interpret the award, correct clerical errors and omissions or make an additional award where it has failed to rule on a claim. The arbitral tribunal shall rule on a party’s rectification claim having heard both parties, or after having given them the opportunity to be heard. The application must be filed within three months of the notification of the award. The decision amending the award or the provision of an additional award shall be made within three months of the application to the arbitral tribunal.

7.7.2 Thus, arbitrators may interpret their award at the request of either party and may render an interpretative award to this effect. Interpretation may be needed where there is disagreement between the parties or uncertainty as to the meaning of the award. Simple confusion in relation to the reasons for the award does not give rise to a right for a party to request that the arbitral tribunal interprets the award.

8. Role of the courts

8.1 Jurisdiction of the courts

The courts’ obligation to decline jurisdiction because of an arbitration agreement

8.1.1 Where a party attempts to bring proceedings in a French court despite the existence of an arbitration agreement, the French courts will not stay their proceedings (in contrast with other court systems, e.g. the English courts), but rather, will decline jurisdiction. In cases involving international arbitration where the arbitral tribunal has not yet been seized of the matter, the court will decline jurisdiction if the arbitration agreement is not manifestly null and void, or inapplicable to the dispute.

8.1.2 It is important to note however that the court may not decline jurisdiction of its own accord; this decision must be made upon the demand of a party. The court’s decision on jurisdiction may be appealed within 15 days under a special procedure designed to avoid costs and delay (contredit).

---

89 ibid, art 1485(2).
90 ibid, art 1486(1).
91 ibid, art 1486(2).
92 ibid, art 1448(1).
93 ibid, art 1448(2).
8.1.3 In France, there is no option of obtaining a preliminary court ruling on jurisdiction. Article 1465 of the CPC, which is applicable both to domestic and international arbitration, provides that “the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction”. It is a general principle of French international arbitration law that the validity of the arbitration agreement is decided by the arbitrators applying the *competence-competence* principle, unless the clause is manifestly null and void.94

*Claims relating to the constitution of the arbitral tribunal*

8.1.4 In disputes before the courts relating to the constitution of the arbitral tribunal, if the arbitration agreement is manifestly void or manifestly not applicable, the judge acting in support of the arbitration (the *juge d’appui*) shall declare that no appointment needs to be made.95

8.2 The supporting role of the courts

8.2.1 The 2011 Decree created a judge whose task is to support the arbitral proceedings: the judge acting in support of arbitration or *juge d’appui*. This judge helps to ensure the effectiveness of the arbitration process.

8.2.2 Article 1505 of the CPC provides that the judge acting in support of an international arbitration shall be the President of the *Tribunal de Grande Instance* of Paris where:

- the arbitration is taking place in France;
- the seat of the arbitration is in another country but the parties have agreed that French procedural law should apply to the proceedings;
- the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or
- one of the parties is exposed to a risk of denial of justice.96

*The supporting role of the French courts in case of risk of a denial of justice*

8.2.3 One of the most progressive innovations of the 2011 Decree is to confer on the courts the power to support any international arbitral proceedings – including arbitral proceedings which have their seat in a foreign country – if a party is at risk of a denial of justice.

8.2.4 The judge acting in support of the arbitration can be seized if it is shown that a party is at risk of a denial of justice.97 In these circumstances, the judge can be

---

94 Ibid, art 1448.
95 Ibid, art 1455.
96 Ibid, art 1505. See section 8.5 below for further detail.
97 Ibid, art 1505(4).
asked to: act as an appointing authority; extend the time limits for arbitration; or decide on the incapacity, removal or resignation of an arbitrator. There is no requirement to establish any connection with France to obtain this jurisdiction.  

8.2.5 This supporting role of the court is meant to reinforce the authority of the arbitral tribunal and enable the parties to conduct the arbitral proceedings in accordance with the principles of due process and equal treatment of the parties.

8.3 Interim protective measures
8.3.1 Pursuant to Article 1468 of the CPC, provisional and protective measures are in principle ordered by the arbitral tribunal itself. Conservatory attachment and judicial securities on the other hand must be ordered by the courts at the request of the arbitral tribunal or the parties.

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts
Awards made in France only
9.1.1 The French courts will not entertain any challenge or appeal against awards made abroad. Such awards can only be subject to an action attempting to resist enforcement, as discussed in Section 10 below. Only domestic awards and international awards made in France can be challenged before the French courts.

No possibility to appeal
9.1.2 Although they can be challenged, international awards made in France cannot be appealed before the courts. The only court action available to an unsatisfied party is an action to set aside the award (recours en annulation).

98 Before the 2011 Decree, the courts had required at least a minimal connection with France. See Cour de cassation (Civ. 1ere.), 1 February 2005, Etat d’Israel c/ Société NIOC, Rev Arb, 2005, pp 218–219. The requirement of a link with France was construed very widely. The Cour de cassation held that, where the claimant could not apply to another foreign court to obtain the judicial appointment of an arbitrator on behalf of the respondent, the Tribunal de Grande Instance of Paris has jurisdiction to make this judicial appointment.

99 As the scope of this chapter is limited to international arbitration, it does not describe the challenge procedures applicable to domestic awards.

100 Please refer to paragraph 2.1.1 above regarding the definition of “international arbitration”.

101 CPC, art 1518.
9.2 Action to set aside an international award made in France

9.2.1 An action to set aside an award must be brought before the Cour d’appel in the place where the award was made.\textsuperscript{102} The court seized of an action to set aside an award cannot re-hear the case or overturn the arbitral tribunal’s findings of fact or law. The court can only declare the award null and void on the limited grounds contained in Article 1520 of the CPC, which are listed below. If the judge decides to set aside the award, this decision does not affect the existence of the arbitration agreement. As a result, the parties can resubmit their dispute to the arbitral tribunal.

Limited grounds of challenge

9.2.2 Article 1520 of the CPC sets out the limited grounds upon which international awards made in France may be challenged by an application to set aside the award. These grounds are restrictive and enable the courts to ensure observance of certain minimum standards for the international enforceability of an award.\textsuperscript{103}

9.2.3 An international award made in France may be challenged on the following five limited grounds:
- where the arbitral tribunal wrongly upheld or denied jurisdiction;
- where the arbitral tribunal was not properly constituted;
- where the arbitral tribunal ruled without complying with the mandate conferred upon it;
- where due process was violated; or
- where recognition or the enforcement of the award is contrary to international public policy.\textsuperscript{104}

9.2.4 Under the 2011 Decree, the lack of a reasoned opinion is not a valid ground of challenge in an action to set aside an award.\textsuperscript{105} This is consistent with the minimum standards of review set out by the New York Convention.\textsuperscript{106}

9.2.5 An action to set aside an award must be initiated within one month of notification of the award and shall be effected by service, unless otherwise agreed by the parties.
One of the main goals of the 2011 Decree is the prompt and straightforward enforcement of international awards that have been made in France or abroad. Consequently, time limits to commence court actions challenging awards are short and such actions do not suspend the enforcement of awards.

Interim enforcement of international awards pending actions to set aside

This is a peculiarity of the 2011 Decree. Neither an application to set aside an award nor an appeal against an enforcement order (see section 10 below) shall suspend the enforcement of an award, unless the enforcement of the award severely prejudices the rights of one of the parties.108

Furthermore, a decision denying an application to set aside the award shall be deemed to be an enforcement order of the whole of the award or of the parts of the award that have not been overturned.109

Waiver of the right to challenge the award

The 2011 Decree introduced the option for the parties to waive, at any time, their right to seek annulment of the award.110 This right to renounce, by contract, the courts’ review can be executed by any party, whether foreign or not.

If the parties have waived their right to challenge the award, the CPC provides the alternative right for the parties to appeal the order granting recognition or enforcement of the award in France.111 This alternative right cannot be waived.112

Recognition and enforcement of awards

An international award, whether made in France or abroad, is recognised in France if its existence can be established by the production of the award and the arbitration agreement, and if its enforcement is not manifestly contrary to

107 CPC, art 1519(2)–(3).
108 Ibid, art 1526.
109 Ibid, art 1527(2).
110 Ibid, art 1522.
111 Ibid, art 1523(1).
112 Such an appeal is otherwise not available for awards made in France. It can only be brought where the parties had waived their right to apply for an annulment of the award, as described in Article 1522 of the CPC. In this case, a party can exceptionally appeal the enforcement order granting enforcement on the same grounds as those applicable to an action to set aside an award pursuant Article 1520 of the CPC.
international public policy. Provisions regarding the enforcement of foreign international awards are the same as those applicable to international awards made in France.

10.1.2 Since the 2011 Decree, it is no longer necessary to provide an original copy of an award to obtain an enforcement order. The existence of the award shall be proven either by producing originals of both the award and the arbitration agreement or by producing duly authenticated copies of such documents. If these documents are not in French, a translation must be provided to the court. If the arbitration agreement is not in writing, this will not prevent the recognition or enforcement of the award, as a written arbitration agreement is not required under French law.

10.1.3 The award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de Grande Instance of the place where the award was made. In the case of foreign international awards, this place will be the Tribunal de Grande Instance of Paris. Exequatur proceedings are not adversarial and the request for enforcement must be filed with the Court Registrar.

10.1.4 Orders denying the enforcement of an award can normally be appealed. Such appeal must be brought within one month of service of the enforcement order.

10.2 Resisting enforcement of an international award made in France

10.2.1 The only recourse available to parties wishing to resist enforcement in France of an international award made in France is an action to set aside the award. Therefore, if the enforcement order being appealed concerns an international award made in France, the Cour d'appel can, at the request of a party, directly rule on an action to set aside the award in question, unless the parties had waived the right to bring such action or the time limit to bring it has expired.
10.3 Resisting enforcement of an international award made abroad

10.3.1 As foreign international awards cannot be subject to an action to set aside, the only recourse available to parties who wish to resist enforcement of such awards is to appeal the order granting enforcement. Such an appeal must be brought before the Cour d’appel of Paris within one month of service of the enforcement order. In such cases, the Cour d’appel can only deny recognition on the same grounds as those listed in Article 1520 of the CPC, which are applicable to an action to set aside an international award made in France.

Enforcement of awards set aside in their country of origin

10.3.2 Contrary to the express provisions of the New York Convention, the fact that an award made abroad has been set aside in its country of origin is not a good ground under French law to resist enforcement of that award in France. Applying Article VII of the New York Convention – which allows contracting states to apply their law where it is more favourable to the award than the New York Convention – French courts have on many occasions refused to consider that the annulment of an award by foreign courts was a valid ground to refuse enforcement in France.

11. Special provisions and considerations

11.1 Consumers

11.1.1 With respect to domestic consumer contracts, the Unfair Contract Terms Directive provides that arbitration agreements in consumer contracts are presumed to be unfair. French law goes further and provides that they are invalid per se.

11.1.2 In contrast with this prohibition, where the consumer contract can be characterised as an international consumer contract, i.e. where international trade interests are at stake, the Cour de cassation has found that an arbitration agreement incorporated into these contracts can be valid.

---

122 CPC, art 1525(2).
123 ibid, art 1525(3).
125 ibid.
128 Code de la consommation, art L.132-1.
11.2 Employment law

11.2.1 Employment disputes give rise to a complex regime of arbitrability, depending on which party initiates the arbitration.

11.2.2 In French law, arbitration agreements provided for in international employment contracts cannot be the basis of a claim by the employer. Only the employee can initiate the arbitration. If the employee decides to start a claim before the employment courts, instead of exercising his right for arbitration, he/she is free to do so and a claim by the employer that the arbitration agreement should be enforced would fail.\textsuperscript{130}

12. Contacts

CMS Bureau Francis Lefebvre
1 – 3, villa Emile Bergerat
92522 Neuilly-sur-Seine Cedex
France

Jean de la Hosseraye
Partner
\textbf{T} +33 1 4738 5500
\textbf{E} jean.delahosseraye@cms-bfl.com

Stéphanie de Giovanni
Associate
\textbf{T} +33 1 4738 4341
\textbf{E} stephanie.degiovanni@cms-bfl.com

CMS Cameron McKenna LLP
Mitre House, 160 Aldersgate Street
London EC1A 4DD
United Kingdom

Jeremy Wilson
Partner
\textbf{T} +44 20 7367 2614
\textbf{E} jeremy.wilson@cms-cmck.com

ARBITRATION IN GERMANY

By Torsten Lörcher, CMS
# Table of Contents

1. **Historical background and legislative framework** 367

2. **Scope of application and general provisions of the ZPO** 367
   2.1 Structure of the law 367
   2.2 General principles 367

3. **The arbitration agreement** 368
   3.1 Definitions 368
   3.2 Formal requirements 369
   3.3 Special tests and requirements of the jurisdiction 369
   3.4 Separability 369
   3.5 Legal consequences of a binding arbitration agreement 369

4. **Composition of the arbitral tribunal** 370
   4.1 Constitution of the arbitral tribunal 370
   4.2 Procedure for challenging and substituting arbitrators 370
   4.3 Responsibilities of an arbitrator 371
   4.4 Arbitration fees and expenses 372
   4.5 Arbitrator immunity 372

5. **Jurisdiction of the arbitral tribunal** 372
   5.1 Competence to rule on jurisdiction 372
   5.2 Power to order interim measures 373

6. **Conduct of proceedings** 374
   6.1 Commencing an arbitration 374
   6.2 General procedural principles 375
   6.3 Seat, place of hearings and language of arbitration 377
   6.4 Multi-party issues 377
   6.5 Oral hearings and written proceedings 377
   6.6 Default by one of the parties 378
   6.7 Taking of evidence 378
   6.8 Appointment of experts 378
   6.9 Confidentiality 378
   6.10 Court assistance in taking evidence 379
7. **Making of the award and termination of proceedings** 379
   7.1 Choice of law 379
   7.2 Form, content and notification of award 380
   7.3 Settlement 381
   7.4 Power to award interest and costs 381
   7.5 Termination of the proceedings 382
   7.6 Effect of an award 382
   7.7 Correction, clarification and issuance of a supplemental award 382

8. **Role of the courts** 382
   8.1 Jurisdiction of the courts 382
   8.2 Competent courts 383

9. **Challenging and appealing an award through the courts** 383
   9.1 Jurisdiction of the courts 383
   9.2 Appeals 384
   9.3 Applications to set aside an award 384

10. **Recognition and enforcement of awards** 385
    10.1 Domestic awards 385
    10.2 Foreign awards 385

11. **Special provisions and considerations** 386
    11.1 Consumers 386
    11.2 Employment law 386

12. **Concluding thoughts** 386

13. **Contacts** 387
1. Historical background and legislative framework

1.1.1 Germany’s arbitration law in its current form entered into force on 1 January 1998. It largely follows the structure and the wording of the Model Law (1985) and is the result of a reform process that was initiated in the late 1980s and early 1990s. The main purpose of the reform was to modernise German arbitration law on the basis of the Model Law (1985) and to improve Germany’s position internationally as a suitable seat for arbitral proceedings.

1.1.2 German arbitration law is set out in the Tenth Book of the Code of Civil Procedure (Zivilprozessordnung (ZPO)). A comprehensive English commentary on the German law of arbitration was published in 2007.

2. Scope of application and general provisions of the ZPO

2.1 Structure of the law

2.1.1 Sections 1025-1066 of the ZPO apply to ad hoc arbitrations as well as to arbitrations administered by institutions such as the DIS, ICC, LCIA or ICDR.

2.2 General principles

2.2.1 The ZPO applies if the seat of arbitration is situated in Germany, regardless of whether the dispute is international or domestic in nature. Certain provisions even apply if the seat of arbitration is located outside of Germany or is yet to be determined.
2.2.2 The ZPO supports and promotes party autonomy in arbitration.\textsuperscript{9} The parties can agree on the procedure to be followed by individual agreement or by reference to the arbitration rules of an arbitral institution. The only limitation is that such agreements must not conflict with any of the small number of mandatory provisions as set out below:

- application of the German arbitration law to arbitral proceedings where the seat of arbitration is situated in Germany;\textsuperscript{10}
- determination of the validity of the arbitration agreement by state courts;\textsuperscript{11}
- right of recourse to the state courts if the arbitration agreement disadvantages one party regarding the constitution of the arbitral tribunal;\textsuperscript{12}
- right to request a state court’s decision on a challenge of an arbitrator if the arbitral tribunal has previously rejected the challenge;\textsuperscript{13}
- enforcement of interim protective measures;\textsuperscript{14}
- parties have to be treated equally and each party shall be given a full opportunity to present its case;\textsuperscript{15} and
- counsel may not be excluded from acting as an authorised representative.\textsuperscript{16}

Pursuant to this provision, an agreement by the parties that they may not be represented in arbitral proceedings by counsel admitted to the bar in Germany is invalid. It also applies to counsel admitted in other jurisdictions.\textsuperscript{17}

3. The arbitration agreement

3.1 Definitions

3.1.1 Section 1029 of the ZPO provides a statutory definition of “arbitration agreement” (\textit{Schiedsvereinbarung}), which is defined 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”.\textsuperscript{18} Such an agreement may be in the form of a separate agreement (\textit{Schiedsabrede}) or in the form of a clause in a contract (\textit{Schiedsklausel}).\textsuperscript{19}

\begin{enumerate}
\item \textsuperscript{9} \textit{Ibid}, s 1042(3).
\item \textsuperscript{10} \textit{Ibid}, s 1025.
\item \textsuperscript{11} \textit{Ibid}, s 1032.
\item \textsuperscript{12} \textit{Ibid}, s 1034(2).
\item \textsuperscript{13} \textit{Ibid}, s 1037(3).
\item \textsuperscript{14} \textit{Ibid}, s 1041(2) and (3).
\item \textsuperscript{15} \textit{Ibid}, s 1042(1).
\item \textsuperscript{16} \textit{Ibid}, s 1042(2).
\item \textsuperscript{17} See K Sachs/T Lörcher in Böckstiegel/Kröll/Nacimiento, \textit{Arbitration in Germany: The Model Law in Practice} (2007), s 1042, recitals 20-23.
\item \textsuperscript{18} ZPO, s 1029(1).
\item \textsuperscript{19} \textit{Ibid}, s 1029(2).
\end{enumerate}
3.2 **Formal requirements**

3.2.1 Arbitration agreements must satisfy relatively few formal requirements.\(^{20}\) Arbitration agreements are valid if they are contained in a document signed by the parties or in an exchange of written communications between the parties such as letters, telefaxes, telegrams, or other means of telecommunication or electronic communication (including emails) which provide a record of the arbitration agreement.\(^{21}\)

3.2.2 In addition, an arbitration agreement can be contained in a document signed by the parties which refers to an arbitration clause contained in another document.\(^{22}\) For example, an agreement or an exchange of correspondence can refer to one of the parties’ standard terms and conditions, which provide for arbitration. Depending on the circumstances of the case, this will constitute a valid incorporation of the arbitration agreement into the contract.

3.3 **Special tests and requirements of the jurisdiction**

3.3.1 In principle, any claim concerning an economic interest can be the subject of an arbitration agreement.\(^{23}\) Private disputes in competition law matters may also be referred to an arbitral tribunal including, for example, disputes arising out of an agreement regarding restrictive trade practices. The German Federal Supreme Court (BGH) ruled in 2009 that applications to set aside shareholders’ resolutions adopted at a general meeting of a limited liability company, (Gesellschaft mit beschränkter Haftung), may be subject to arbitration if certain formal and procedural requirements are observed.\(^{24}\) However, certain matters relating to issues such as family law (e.g. divorce) are not arbitrable.

3.4 **Separability**

3.4.1 German law follows the doctrine of separability. It provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.\(^{25}\)

3.5 **Legal consequences of a binding arbitration agreement**

3.5.1 A binding arbitration agreement establishes the arbitral tribunal’s jurisdiction\(^{26}\) and entitles each party to object pursuant to Section 1032(1) of the ZPO if a state court

\(^{20}\) See the requirements provided by ZPO, s 1031.

\(^{21}\) Ibid, s 1031(1).

\(^{22}\) Ibid, s 1031(3).

\(^{23}\) Ibid, s 1030(1).

\(^{24}\) BGH judgment of 6 April 2009, II ZR 255/08, Neue Juristische Wochenschrift 2009, at p 1962 et seq.

\(^{25}\) ZPO, s 1040(1).

is seized with the same subject matter.\textsuperscript{27} It is, however, the parties’ responsibility to raise that objection, since the court will not consider an arbitration agreement of its own motion.\textsuperscript{28}

3.5.2 Additionally, entering into an arbitration agreement establishes a “duty of loyalty”,\textsuperscript{29} whereby the parties are obliged to support the arbitral proceedings and to abstain from abusive litigation tactics.\textsuperscript{30}

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The parties are free to determine the number of arbitrators that will constitute the arbitral tribunal. In the absence of any agreement, the arbitral tribunal shall be composed of three arbitrators.\textsuperscript{31} The parties are also free to agree on a procedure regarding the appointment of the arbitrator(s).\textsuperscript{32} In an arbitration with three arbitrators each party typically appoints one arbitrator and the two party-appointed arbitrators then appoint the third arbitrator, who acts as chair of the arbitral tribunal.\textsuperscript{33} If a party fails to appoint an arbitrator or if the party-appointed arbitrators cannot agree on the third arbitrator, each party may request the Higher Regional Court (\textit{Oberlandesgericht (OLG)}), with local jurisdiction at the seat of arbitration to make the appointment.\textsuperscript{34} The same applies where the parties have agreed that the arbitral tribunal shall consist of a sole arbitrator but cannot reach an agreement on the appointment. In the event that the seat of arbitration has not yet been determined, the German courts will have jurisdiction if either party has its place of business or habitual residence in Germany,\textsuperscript{35} unless the parties have agreed otherwise.

4.2 Procedure for challenging and substituting arbitrators

4.2.1 An arbitrator may only be challenged if circumstances exist which give rise to justifiable doubts as to the impartiality or independence of the arbitrator or if the


\textsuperscript{28} See \textit{ibid}, s 1032, recital 1; and W Voit in Musielak, ZPO (8th Edition, 2011) s 1032, recital 7.


\textsuperscript{31} ZPO, s 1034(1).

\textsuperscript{32} \textit{Ibid}, s 1035(1).

\textsuperscript{33} \textit{Ibid}, s 1035(3).

\textsuperscript{34} \textit{Ibid}, s 1035(3) and 1062(1).

\textsuperscript{35} \textit{Ibid}, s 1025(3) and 1062(3).
arbitrator does not fulfill the requirements or does not have the qualifications agreed on by the parties.  

4.2.2 The parties may agree on their own procedure for challenging an arbitrator. Arbitral institutions usually have provisions in their rules dealing with the challenge of arbitrators. In ad hoc arbitrations under German arbitration law, the arbitral tribunal itself or, as the last resort, the state courts, decide on challenges made against an arbitrator.  

4.2.3 Pending the outcome of the challenge proceedings, the arbitral tribunal (including the arbitrator subject to the challenge) may continue the arbitral proceedings and may render an award but any such award may subsequently be set aside if the challenge is successful. Arbitrators' mandates can be terminated if they fail to act without undue delay.  

4.2.4 If an arbitrator's mandate is terminated (by challenge, resignation, dismissal or death), a substitute arbitrator shall be appointed. The rules that apply to the appointment of a substitute arbitrator are the same as those applicable to the appointment of the replaced arbitrator, unless the parties have agreed otherwise.  

4.3 Responsibilities of an arbitrator  

4.3.1 A person nominated to act as an arbitrator must disclose all circumstances that could give rise to justifiable doubts as to his or her impartiality or independence. The arbitrator must also immediately disclose any such circumstances if they arise after appointment and during the arbitral proceedings. The IBA Guidelines on Conflicts of Interest in International Arbitration (2004) provide useful advice on what circumstances may give rise to doubts of an arbitrator's impartiality. In practice, the parties will usually make appropriate enquiries about the arbitrators at the beginning of arbitral proceedings. For a challenge to be successful, it does not matter whether the arbitrator was actually impartial and independent. It must only be shown that a reasonable party could have justifiable doubts regarding the impartiality and/or independence of the arbitrator on the basis of the particular circumstances of the case.
4.4 Arbitration fees and expenses

4.4.1 German arbitration law distinguishes between the arbitration agreement by which the parties submit their dispute to the decision of an arbitral tribunal and the arbitrators’ agreement. The arbitrators’ agreement deals with the contractual relationship between the parties and the arbitrators. It is therefore concerned, in particular, with issues such as the payment of the arbitrators’ fees and the reimbursement of their expenses. The ZPO is silent on this issue. The arbitrators’ agreement is simply regarded as a contract for the supply of services under the general rules of the German Civil Code, (Bürgerliches Gesetzbuch (BGB)).

4.4.2 Under German law, there will be an implied separate arbitrators’ agreement if the arbitration is conducted ad hoc or for example pursuant to the DIS Arbitration Rules. Under the DIS Arbitration Rules, the DIS will appoint the arbitrators and conclude the implied arbitrators’ agreement with the arbitrators on behalf of the parties. The arbitrators’ fees in such cases are determined in accordance with the fee scales of the DIS Arbitration Rules. By contrast, if the arbitrators are appointed by the ICC, the implied arbitrators’ agreement is concluded between the ICC and the arbitrator(s).

4.5 Arbitrator immunity

4.5.1 In Germany, arbitrators are liable to the parties in the same way as court judges. The law does not contain any explicit provision to this effect, but it is an implied term of the arbitrators’ agreement unless there is an agreed term to the contrary. In particular, arbitrators are liable for the erroneous application of the law under the same conditions that apply to court judges (i.e. if the erroneous application constitutes a deliberate criminal offence). An arbitrator may also be liable for negligence under the general rules of the law of obligations (e.g. where he or she, in violation of Section 1036 of the ZPO, fails to disclose circumstances giving rise to doubts as to his or her impartiality or independence and if this causes additional cost or delay). In practice such claims are rare.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The arbitral tribunal may rule on its own jurisdiction (competence-competence) and on the existence and validity of the arbitration agreement. Objections to the jurisdiction of the arbitral tribunal must be made no later than upon submission of

---

43 Section 839(2) of the BGB; P Reinert in Bamberger/Roth, BeckOK BGB (20th Edition, 2011) s 839, recital 95.
44 ZPO, s 1040(1).
the statement of defence.\footnote{Ibid, s 1040(2).} Otherwise the right to object to the arbitral tribunal's jurisdiction may be precluded.\footnote{Ibid, s 1040(2) and 1027.}

5.1.2 If the arbitral tribunal rules that it has no jurisdiction, this decision is final. If, on the other hand, the arbitral tribunal considers that it has jurisdiction, each party can apply for a decision from the OLG with local jurisdiction where the seat of arbitration is located.\footnote{Ibid, s 1040(3).} If the arbitral tribunal has confirmed its jurisdiction, it can continue the arbitral proceedings regardless of whether or not a party has requested the OLG to decide on the arbitral tribunal’s jurisdiction. It can also make an award while the request is pending.\footnote{Ibid.} This rule is intended to prevent a party from delaying arbitral proceedings by applying to the court and corresponds to the rules applicable to the challenge of arbitrators. If the court subsequently finds that the arbitral tribunal did not have jurisdiction, any award made in the meantime may be set aside following an application by one of the parties.\footnote{ZPO, s 1059(2).}

5.2 Power to order interim measures

5.2.1 The arbitral tribunal may order protective interim measures.\footnote{Ibid, s 1041(1).} At the request of a party, it may repeal or amend such measures.\footnote{Ibid, s 1041(3).} If an interim measure proves to have been unjustified from the outset, the party who obtained that order is obliged to compensate the other party for any losses it suffered as a result of the order.\footnote{Ibid, s 1041(4).} A claim for damages may be included in the pending arbitral proceedings.\footnote{Ibid.}

5.2.2 An interim measure ordered by the arbitral tribunal will not be automatically enforceable but requires enforcement to be granted by the courts.\footnote{ZPO, s 1041(2).} Jurisdiction for enforcement applications lies with the OLG.\footnote{Ibid, s 1062(1).} Upon application by a party, the court can also set aside or modify an interim measure ordered by the arbitral tribunal.
5.2.3 Instead of requesting an interim measure from the arbitral tribunal, a party may also apply to the courts in accordance with the general provisions on protective interim measures\(^{56}\) and ask for an attachment order\(^{57}\) or an interim injunction.\(^{58}\) In deciding whether to apply for an interim measure to the courts or to the arbitral tribunal, it is important to note that, as mentioned above, the arbitral tribunal’s order can only be enforced after enforcement has been granted by the court.

6. **Conduct of proceedings**

6.1 **Commencing an arbitration**

6.1.1 Unless otherwise agreed by the parties, the arbitral proceedings commence on the date on which a request for arbitration is received by the respondent.\(^{59}\) The ZPO only requires the request to contain the names of the parties, the subject matter of the dispute and a reference to the arbitration agreement.\(^{60}\) However, the request may, and usually does, contain details of the facts, legal arguments and evidence in support of the claim. Service of the request for arbitration suspends the limitation period. The parties may deviate from this procedure by agreement. In particular, the rules of the various arbitral institutions regularly contain provisions on the commencement of arbitral proceedings that deviate from this position.

6.1.2 Within the period agreed by the parties or determined by the arbitral tribunal, the claimant must complete its statement of claim and the respondent must serve its statement of defence.\(^{61}\) Each party may change or amend its written submissions in the course of the proceedings.\(^{62}\) The same provisions also apply to counterclaims.\(^{63}\) If a counterclaim relates to subject matters which exceed the scope of the arbitration agreement, the other party may object to the arbitral tribunal’s jurisdiction. In addition, a party may claim a right to set-off against the other party’s right if such claim falls within the scope of the arbitration agreement.

---

\(^{56}\) Ibid, s 1033.
\(^{57}\) Ibid, s 916-934.
\(^{58}\) Ibid, s 935-945.
\(^{59}\) Ibid, s 1044.
\(^{60}\) Ibid, s 1044(1).
\(^{61}\) Ibid, s 1046(1).
\(^{62}\) Ibid, s 1046(2).
\(^{63}\) Ibid, s 1046(3).
6.2 General procedural principles

6.2.1 The ZPO contains a number of provisions governing the conduct of the arbitral proceedings, namely:
- general rules of procedure;\(^{64}\)
- seat and place of arbitration;\(^{65}\)
- commencement of arbitral proceedings;\(^{66}\)
- language of proceedings;\(^{67}\)
- statements of claim and defence;\(^{68}\)
- oral hearings and written submissions;\(^{69}\)
- default of a party;\(^{70}\)
- experts appointed by the arbitral tribunal;\(^{71}\) and
- court assistance in the taking of evidence and other judicial acts.\(^{72}\)

6.2.2 The parties may derogate from these provisions with the exception of the mandatory provisions in Sections 1042(1) and (2) of the ZPO.

6.2.3 The German arbitration law stipulates that the parties must raise any objection to procedural irregularities without undue delay or within the relevant period provided for by the ZPO.\(^{73}\) If they fail to do so, they may not raise that objection later. However, this rule does not apply if a party was not aware of the irregularity at that time.

6.2.4 Subject to the mandatory provisions of the law, the arbitral tribunal shall conduct the proceedings according to the rules determined by the parties.\(^{74}\) Failing such an agreement, the arbitral tribunal shall conduct the proceedings in such manner as it considers appropriate.\(^{75}\)

\(^{64}\) Ibid, s 1042.
\(^{65}\) Ibid, s 1043.
\(^{66}\) Ibid, s 1044.
\(^{67}\) Ibid, s 1045.
\(^{68}\) Ibid, s 1046.
\(^{69}\) Ibid, s 1047.
\(^{70}\) Ibid, s 1048.
\(^{71}\) Ibid, s 1049.
\(^{72}\) Ibid, s 1050.
\(^{73}\) Ibid, s 1027.
\(^{74}\) Ibid, s 1042(3).
\(^{75}\) Ibid, s 1042(4).
6.2.5 German arbitration law does not indicate a preference as to whether arbitral proceedings should be conducted pursuant to Continental European or Anglo-American procedural traditions. Instead, the law gives the parties significant autonomy to agree on the procedure best suited to resolve their dispute. In the absence of an agreement between the parties, and subject to the mandatory and optional provisions of German arbitration law, the arbitral tribunal may decide on the procedure to be followed. In practice, the way the proceedings will be conducted often depends on the background of the parties, counsel and the arbitrators involved.

6.2.6 The comprehensive disclosure requirements typical of common law discovery procedures are unlikely to feature in arbitral proceedings conducted by arbitrators with a German legal background in a dispute that only involves Continental European parties, unless specifically agreed upon by the parties. In proceedings following the German tradition, each party will normally submit only those documents on which it seeks to rely in support of its case. Disclosure proceedings, although rare, are not forbidden, even in proceedings before German state courts. Section 142 of the ZPO provides for limited disclosure in State court proceedings, stipulating that the court may order the production of documents that are in the possession of a party or a third-party, to which one of the parties has made reference. In addition, pursuant to the jurisprudence of the German Federal Court of Justice, a claim for information exists, if three prerequisites are met: there must be a specific connection between the parties; the entitled party must have a justifiable uncertainty about the existence or the scope of its right; and the obliged party must be able to provide the requested information without undue hardship. Finally, German substantive civil, commercial and intellectual property laws contain a number of specific provisions pursuant to which a party may be obliged to provide certain information to the other party.

6.2.7 While disclosure is limited in German state court proceedings, arbitral tribunals, particularly in international arbitral proceedings, will take into account the backgrounds and the expectations of the parties involved with respect to disclosure.

6.2.8 In arbitral proceedings that involve international parties and, in particular, parties with a common law background, it has become standard practice for arbitral...
Arbitration in Germany

tribunals to apply the International Bar Association’s Rules on the Taking of Evidence in International Commercial Arbitration (2010), which attempt to bridge the gap between civil law and common law approaches to evidentiary issues.

6.3 Seat, place of hearings and language of arbitration

6.3.1 The parties are free to agree on the seat of arbitration\(^{79}\) and on the language of the proceedings.\(^{80}\) Failing such agreement, the arbitral tribunal shall determine the seat of arbitration and the language of the proceedings.\(^{81}\)

6.3.2 The seat of arbitration is significant for the applicability of German arbitration law and to the question of whether an award will be regarded as a domestic or foreign award. Unless otherwise agreed upon by the parties, the seat of arbitration does not determine where the hearing will take place. Moreover, the arbitral tribunal may hold hearings and take evidence or other procedural steps at any place which it considers appropriate.\(^{82}\)

6.4 Multi-party issues

6.4.1 Difficulties arise regarding the appointment of arbitrators where multiple parties are involved in the arbitral proceedings as claimants or respondents. German law does not contain explicit provisions for multi-party arbitrations and it is therefore up to the parties to incorporate fair procedures for the appointment of a joint arbitrator for several participating parties to an arbitration agreement. The ICC Rules as well as the DIS Arbitration Rules contain provisions on the appointment of arbitrators in multi-party arbitrations, which are accepted by German courts.

6.5 Oral hearings and written proceedings

6.5.1 It is common practice to exchange comprehensive written submissions at the first stage of the proceedings. The parties will usually submit the evidence on which they intend to rely in the proceedings together with these submissions. Unless otherwise agreed by the parties, the arbitral tribunal decides whether such written submissions are to be followed by an oral hearing or whether the proceedings are to be conducted on the basis of written submissions only.\(^{83}\) At the request of one of the parties, the arbitral tribunal is obliged to hold an oral hearing, unless the parties have excluded oral hearings in the arbitration agreement.

---

\(^{79}\) ZPO, s 1043(1).

\(^{80}\) Ibid, s 1045(1).

\(^{81}\) Ibid, s 1043(1) and 1045(1).

\(^{82}\) Ibid, s 1043(2).

\(^{83}\) Ibid, s 1047(1).
6.6 Default by one of the parties

6.6.1 If a party does not appear at an oral hearing, the arbitral tribunal may continue the proceedings in the absence of that party.\(^{84}\) However, unlike in court proceedings, absence will not be deemed to be an admission of the factual submissions made by the other party.\(^{85}\) Rather, the arbitral tribunal must base its award on the evidence available at that time.\(^{86}\)

6.6.2 If a party has not made its submissions within the time period determined by the arbitral tribunal, the arbitral tribunal may disregard submissions after the expiration of such time period if the delay is deemed unjustified. The parties can determine other or supplementary rules in regard to default by one of the parties. These may be found in institutional arbitration rules incorporated into the arbitration agreement by reference or in the terms of reference agreed by the parties.

6.7 Taking of evidence

6.7.1 Unless otherwise agreed, and particularly in domestic proceedings, the arbitral tribunal will usually decide whether the taking of evidence is required to support a statement of fact. In domestic proceedings, the arbitral tribunal will play an active role in the taking of evidence, namely with respect to the questioning of witnesses and experts. The arbitral tribunal has discretion to assess such evidence freely.\(^{87}\) In international cases, the taking of evidence in arbitral proceedings may differ considerably as it will be conducted in a way that takes into account the backgrounds of the parties involved.

6.8 Appointment of experts

6.8.1 In addition to party-appointed experts, the arbitral tribunal can appoint experts to report on certain issues identified by the arbitral tribunal. The arbitral tribunal will usually formulate these questions after consultation with the parties. The arbitral tribunal can instruct a party to provide the tribunal-appointed expert with information or give access to documents and other relevant items for inspection.\(^{88}\)

6.9 Confidentiality

6.9.1 Generally, arbitral proceedings tend to be more private than state court litigation, as there are usually no oral hearings open to the public. Furthermore, awards are

---

\(^{84}\) Ibid, s 1048(3).
\(^{85}\) Ibid, s 1048(2).
\(^{86}\) Ibid, s 1048(3).
\(^{87}\) Ibid, s 1042(4).
\(^{88}\) Ibid, s 1049(1).
not usually published and the public is not informed of the conduct and content of the proceedings. The private nature of arbitration is usually considered as one of the key advantages of arbitral proceedings compared to proceedings in state courts. However, the confidentiality of such proceedings is less extensive than parties usually assume as German arbitration law does not expressly stipulate a confidentiality obligation on the parties.

6.9.2 Regarding any consultation during the decision-making process, the arbitrators are bound by the confidentiality of judicial deliberations.\textsuperscript{89}

6.10 Court assistance in taking evidence

6.10.1 The arbitral tribunal cannot compel witnesses to give evidence but it can request the assistance of the state courts.\textsuperscript{90} The court can compel witnesses that fall under the jurisdiction of that court to appear and provide testimony.\textsuperscript{91} In practice the parties and the arbitral tribunal will be present at such a hearing before the state court and will usually be granted the opportunity to ask questions.

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 The arbitral tribunal must render its award on the basis of the law chosen by the parties. In the absence of an express or implied choice of law, the arbitral tribunal has to apply the law of the jurisdiction with which the subject matter of the proceedings is most closely connected.\textsuperscript{92} This rule corresponds to the conflict of law rules applicable in many countries and, in particular, to the Regulation on the Law Applicable to Contractual Obligations adopted by the European Community on 17 June 2008.

7.1.2 The parties can also agree that the arbitral tribunal shall apply the rules of \textit{lex mercatoria}, which are primarily based on customary law but also on international conventions and international uniform model laws. The rules of \textit{lex mercatoria}, however, lack a precise definition, which makes it difficult for the parties to predict the outcome of a dispute on this basis.

7.1.3 Finally, the parties can grant the arbitral tribunal the authority to decide \textit{ex aequo et bono} or as \textit{amicable compositeur}, where an arbitral tribunal will decide a dispute

\textsuperscript{89} BGH, 23. 1. 1957, V ZR 132/55, Neue Juristische Wochenschrift 1957, at p 592.

\textsuperscript{90} ZPO, s 1050.

\textsuperscript{91} Ibid, s 380(2).

\textsuperscript{92} Ibid, s 1051(2).
on what it considers to be fair and equitable rather than applying a particular law. Such authority has to be granted explicitly and in practice it is rare that arbitral tribunals are authorised to decide *ex aequo et bono*.

### 7.2 Form, content and notification of award

#### 7.2.1 In arbitral proceedings with more than one arbitrator, all decisions must be made by a majority of the members of the arbitral tribunal. This applies not only to all awards but also to procedural decisions. The parties may agree otherwise, for example, by providing that the chair has a casting vote. It is also not uncommon for the parties or the other arbitrators to authorise the chair to decide on routine issues of procedure. Section 1052(2) of the ZPO contains provisions dealing with the situation where an arbitrator refuses to take part in the vote on a decision. In that case and in the absence of a contrary agreement between the parties, the remaining arbitrators can decide without the arbitrator in question.

#### 7.2.2 The award shall be made in writing and signed by the members of the arbitral tribunal. If an arbitrator is prevented from signing or refuses to sign the award, the signature of the majority of the members of the arbitral tribunal shall be sufficient provided that the reason why a signature is missing is stated in the award.

#### 7.2.3 The award must state the reasons upon which it is based unless the parties have agreed that no reasons are to be given. No reasons are required for an award on agreed terms.

#### 7.2.4 Within the scope of its jurisdiction, an arbitral tribunal can grant the same relief in its award as can be granted in a court judgment. In particular, the arbitral tribunal can order a party to make payment, deliver goods or make a declaration of will and can determine the existence or non-existence of a legal relationship.

#### 7.2.5 The award is final and binding unless the parties have agreed to an arbitral process of appeal (which usually only arises in relation to commodity arbitration). The award shall be delivered to the parties. No particular form of service (e.g. service by a bailiff or by registered mail) is required under German law.

---

93 *ibid*, s 1051(3).
94 *ibid*, s 1052(1).
95 *ibid*, s 1054(1).
96 *ibid*.
97 *ZPO*, s 1054(2).
98 *ibid*, s 1054(4).
7.3 Settlement
7.3.1 If the parties reach settlement during the course of the arbitration, the arbitral tribunal shall terminate the proceedings. At the request of the parties, the arbitral tribunal shall record the settlement in the form of an award on agreed terms. Such an award can be enforced as soon as it is declared enforceable by a state court. Awards on agreed terms can be declared enforceable not only by the courts but also, with the consent of the parties, by a notary public.

7.3.2 It should be noted that, independent of any arbitral proceedings, a settlement agreement is enforceable under German law if it was concluded by duly authorised lawyers and was declared enforceable by a court or (with the consent of the parties) by a notary public.

7.4 Power to award interest and costs
7.4.1 The arbitral tribunal can award interest if and to the extent that the applicable substantive law allows a claim for interest. The arbitral tribunal can only award discretionary interest if the parties have granted the arbitral tribunal the right to decide *ex aequo et bono*. The filing of an arbitration claim, as opposed to a court action, does not in itself give the claimant a right to statutory interest. However, the debtor will often be in default of a contractual obligation to make payment and may therefore be obliged to pay interest under the contract.

7.4.2 The costs of the arbitration are dealt with in accordance with the arbitration agreement or other agreements reached by the parties. Failing an agreement on costs, the arbitral tribunal has discretion to allocate the costs between the parties. In exercising its discretion, the arbitral tribunal has to take into consideration the circumstances of the individual case, in particular the outcome of the proceedings. This is in line with the general concept under German civil procedure rules that the parties generally bear the costs in proportion to their degree of success or failure (i.e. the costs follow the event). The costs of the arbitration include the necessary costs incurred by the parties for the proper pursuit of their claim or defence, including: legal fees; the costs of expert reports; and travel expenses.

---

99 Ibid, s 1053(1).
100 Ibid, s 1053.
101 Ibid, s 796(a).
102 Ibid, s 796(b) and s 796(c).
103 Ibid, s 1051(3).
104 Ibid, s 1057(1).
105 Ibid, s 91-98.
7.5 Termination of the proceedings
7.5.1 The claimant can withdraw its claim and thereby terminate the arbitral proceedings. In this event the arbitral tribunal has to make a decision declaring the arbitral proceedings terminated.\textsuperscript{106} Withdrawal does not result in loss of the legal right to the claim and the claimant is therefore free to institute new proceedings regarding the same subject matter. However, if the respondent objects to the withdrawal of the claim and the arbitral tribunal recognises a legitimate interest on the part of the respondent in obtaining a final determination of the dispute, the arbitral tribunal may make an award on the merits of the claim instead of making a decision which merely declares the termination of the arbitration.\textsuperscript{107}

7.6 Effect of an award
7.6.1 The award has the same effect as a final judgment by a state court.\textsuperscript{108} This means that an award is final and can only be set aside at the request of one of the parties on one of the grounds stipulated in Section 1059 of the ZPO.

7.7 Correction, clarification and issuance of a supplemental award
7.7.1 If the award contains errors in computation, typographical errors or similar obvious errors, the arbitral tribunal can correct these on its own initiative or at the request of one of the parties.\textsuperscript{109} At the request of one of the parties, the arbitral tribunal may also provide an interpretation of parts of its award and/or make an additional award in respect of any claim which was presented to the arbitral tribunal but omitted from the award.\textsuperscript{110}

8. Role of the courts
8.1 Jurisdiction of the courts
8.1.1 State courts may only intervene to the extent permitted by the ZPO.\textsuperscript{111} In keeping with the scheme of the Model Law (1985),\textsuperscript{112} Section 1062(1) of the ZPO enumerates those limited circumstances where state courts are authorised or obliged to intervene:\textsuperscript{113}

\textsuperscript{106} ibid, s 1056(2).
\textsuperscript{107} ibid, s 1056(2).
\textsuperscript{108} ibid, s 1055.
\textsuperscript{109} ibid, s 1058(1) and (4).
\textsuperscript{110} ibid, s 1058(1).
\textsuperscript{111} ibid, s 1026.
\textsuperscript{112} See CMS Guide to Arbitration, vol II, appendix 2.1.
\textsuperscript{113} ZPO, s 1026 and 1062.
— determine the admissibility of arbitration;\textsuperscript{114}
— appoint an arbitrator;\textsuperscript{115}
— decide on a challenge of an arbitrator;\textsuperscript{116}
— decide on the termination of an arbitrator’s mandate;\textsuperscript{117}
— decide on an arbitral tribunal’s decision confirming its competence in a
preliminary ruling;\textsuperscript{118}
— enforce, set aside or amend orders for protective interim measures issued by
the arbitral tribunal;\textsuperscript{119}
— assist in the taking of evidence and in any other judicial act;\textsuperscript{120} and
— set aside an award, declare an award enforceable or set aside a declaration of
enforceability.\textsuperscript{121}

8.2 Competent courts
8.2.1 With the exception of situations governed by Section 1050 of the ZPO, the
competent court is usually the OLG designated in the arbitration agreement, or
failing such agreement, the OLG in whose district the seat of arbitration is
situated.\textsuperscript{122}

8.2.2 As far as the assistance in the taking of evidence and other judicial acts pursuant
to Section 1050 of the ZPO are concerned, the Local Court, in whose district the
judicial act is to be carried out, has jurisdiction.\textsuperscript{123}

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts
9.1.1 As already stated, unless otherwise agreed by the parties, an award is final and can
only be set aside at the request of one of the parties and on one of the grounds

\textsuperscript{114} ibid, s 1032.
\textsuperscript{115} ibid, s 1034-1035.
\textsuperscript{116} ibid, s 1037(3).
\textsuperscript{117} ibid, s 1038.
\textsuperscript{118} ibid, s 1040.
\textsuperscript{119} ibid, s 1041.
\textsuperscript{120} ibid, s 1050.
\textsuperscript{121} ibid, s 1059-1061.
\textsuperscript{122} For details see ZPO, s 1062.
\textsuperscript{123} ZPO, s 1062(4).
listed in Section 1059 of the ZPO. These grounds are based on the grounds for refusing recognition and enforcement of a foreign award under the New York Convention.124

9.1.2 The jurisdiction to decide challenges to awards lies with the OLG designated in the arbitration agreement, or failing such agreement, the OLG in whose district the seat of arbitration is situated.125

9.1.3 The court can set aside the award or can, in appropriate circumstances, set aside the award and refer the case back to the arbitral tribunal.126 If the award is set aside and the matter is referred back to the arbitral tribunal, the proceedings will continue before the original arbitral tribunal. If the award is set aside without the matter being referred back to the arbitral tribunal, the arbitral proceedings must be repeated from the beginning. In such cases, a new arbitral tribunal must be constituted since the arbitration agreement remains in force (unless it was deemed invalid by the court or the parties have agreed otherwise).127

9.2 Appeals

9.2.1 Appeals against the decision of the OLG can be made to the Federal Supreme Court.128 Such an appeal is, however, limited to points of law regarding the admissibility of the arbitral proceedings, the jurisdiction of the arbitral tribunal as well as the setting aside or the recognition and enforcement of an award.129 Other decisions by the OLG are final and without appeal.130

9.3 Applications to set aside an award

9.3.1 An application for the award to be set aside can generally only be made within three months from the date on which the party making the application received notification of the award.

9.3.2 In line with the standards applicable under the New York Convention131 such an application can only be based on a limited number of reasons, namely:
— a party to the arbitration agreement was under some incapacity;

124 See paragraph 9.3.2 below.
125 ZPO, s 1062(1).
126 ibid, s 1059(4).
127 ibid, s 1059(5).
128 With respect to the question whether an appeal against an award is possible, see paragraph 7.2.5 above.
129 ZPO, s 1065(1) and 1062(1).
130 ibid, s 1065(1).
— 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 its case;
— the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
— the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Tenth Book of the ZPO or with an admissible agreement of the parties and this presumably affected the award;
— the subject-matter of the dispute is not capable of settlement by arbitration under German law;
— recognition or enforcement of the award leads to a result which is in conflict with public policy (ordre public); and
— the invalidity of the arbitration agreement.\textsuperscript{132}

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 An award can be enforced in Germany if it has been declared enforceable by the German courts.\textsuperscript{133} Jurisdiction lies with the OLG designated by the parties in the arbitration agreement or, should there be no such designation, with the court in whose district the seat of arbitration is situated.\textsuperscript{134} The court may only refuse to declare the award enforceable if there are grounds for setting aside the award under Section 1059(2) of the ZPO.\textsuperscript{135} In particular, the declaration of enforceability cannot be refused on the grounds that the arbitral tribunal has made an erroneous decision.

10.1.2 An award on agreed terms can, with the consent of the parties, also be declared enforceable by a German notary public, unless the award violates public policy.\textsuperscript{136}

10.2 Foreign awards

10.2.1 The enforcement of foreign awards in Germany is governed by the New York Convention.\textsuperscript{137} If an application for an order declaring a foreign award enforceable is refused, the court must also make a declaration that the award is not to be recognised in Germany.

\textsuperscript{132} ZPO, s 1059(2).
\textsuperscript{133} \textit{id.}, s 1060(1).
\textsuperscript{134} \textit{id.}, s 1062(1).
\textsuperscript{135} \textit{id.}, s 1060(2). See also paragraph 9.3.2 above.
\textsuperscript{136} \textit{id.}, s 1053(4).
\textsuperscript{137} \textit{id.}, s 1061(1).
11. Special provisions and considerations

11.1 Consumers
11.1.1 Arbitration agreements to which a consumer is a party must, unless the document is notarised before a German notary public, be contained in a document that has been personally signed by the parties and only contains provisions concerning the arbitration agreement.\(^{138}\)

11.2 Employment law
11.2.1 German employment law distinguishes between the relationships of the employer and trade unions on the one hand and between the single employee and his or her employer on the other. Arbitration agreements contained in labour agreements between employers and trade unions are valid. Arbitration in such cases is governed by Sections 101–110 of the German Labour Court Law (Arbeitsgerichtsgesetz (ArbGG)). These provisions supersede the aforementioned rules of the Tenth Book of the ZPO. While a number of provisions are similar to the provisions of the ZPO (e.g. pursuant to Section 102 of the ArbGG the arbitration agreement will not be considered by the court of its own motion, the respondent, therefore, has to raise an objection),\(^{139}\) the applicable provisions of the ArbGG take into consideration the specific characteristics of labour law related disputes. By way of example, Section 103 of the ArbGG provides that an arbitral tribunal must consist of an equal number of employees and employers, which excludes the possibility of appointing a sole arbitrator. Furthermore, issues dealing with the recognition and enforcement\(^{140}\) or with the setting aside\(^{141}\) of awards are to be brought before the competent labour court.

11.2.2 In contrast, an arbitration agreement between an employer and individual employees regarding the employment contract is invalid under German law.

12. Concluding thoughts

12.1.1 Germany has a long-standing tradition as an arbitration-friendly jurisdiction. The Tenth Book of the ZPO provides a modern and up-to-date framework for domestic and international arbitration. Further, German courts take a positive and pro-

\(^{138}\) Ibid, s 1031(5).

\(^{139}\) See paragraph 3.5.1 above.

\(^{140}\) ArbGG, s 109.

\(^{141}\) Ibid, s 110.
arbitration attitude. This makes arbitration in Germany an attractive option not only for domestic but also international parties who look for a reliable and neutral jurisdiction for their arbitral proceedings.

13. Contacts

CMS Hasche Sigle
Im Zollhafen 18
50678 Cologne
Germany

Torsten Lörcher
T  +49 221 7716 200
E  torsten.loercher@cms-hs.com

CMS Hasche Sigle
Schöttlestraße 8
70597 Stuttgart
Germany

Dorothee Ruckteschler
T  +49 711 9764 129
E  dorothee.ruckteschler@cms-hs.com

CMS Hasche Sigle
Nymphenburger Straße 12
80335 Munich
Germany

Klaus Sachs
T  +49 89 23807 109
E  klaus.sachs@cms-hs.com
ARBITRATION IN HUNGARY

By Zsolt Okányi and Péter Bibók, CMS
# Table of Contents

1. **Historical background**  
   393

2. **Scope of application and general provisions of the Hungarian Arbitration Act**  
   394  
   2.1 Scope of application  
   394  
   2.2 Parties  
   394  
   2.3 Subject matter  
   394  
   2.4 Structure of the law  
   394  
   2.5 General principles  
   395

3. **The arbitration agreement**  
   395  
   3.1 Definitions  
   395  
   3.2 Formal requirements  
   395  
   3.3 Special tests and requirements of the jurisdiction  
   396  
   3.4 Separability  
   396  
   3.5 Legal consequences of a binding arbitration agreement  
   396  
   3.6 Mandatory and non-mandatory provisions  
   396  
   3.7 Domestic and international arbitration  
   397

4. **Composition of the arbitral tribunal**  
   397  
   4.1 Constitution of the arbitral tribunal  
   397  
   4.2 Procedure for challenging and substituting arbitrators  
   400  
   4.3 Arbitration fees and expenses  
   401  
   4.4 Arbitrator immunity  
   401

5. **Jurisdiction of the arbitral tribunal**  
   401  
   5.1 Competence to rule on jurisdiction  
   401  
   5.2 Power to order interim measures  
   402  
   5.3 Permanent Court of Arbitration of the Money and Capital Markets  
   402

6. **Conduct of proceedings**  
   403  
   6.1 Commencing an arbitration  
   403  
   6.2 General procedural principles  
   404  
   6.3 Seat and language of arbitration  
   404  
   6.4 Multi-party issues  
   405
6.5 Submissions 405
6.6 Oral hearings and written proceedings 406
6.7 Default by one of the parties 406
6.8 Taking of evidence 407
6.9 Appointment of experts 407
6.10 Confidentiality 407
6.11 Court assistance in the taking of evidence 407

7. Making of the award and termination of proceedings 408
7.1 Choice of law 408
7.2 Timing, form, content and notification of award 408
7.3 Settlement 409
7.4 Power to award interest and costs 410
7.5 Termination of the proceedings 410
7.6 Effect of an award 410
7.7 Correction, clarification and issuance of a supplemental award 411

8. Role of the courts 411
8.1 Jurisdiction of the courts 411
8.2 Stay of court proceedings 412
8.3 Preliminary rulings on jurisdiction 412
8.4 Interim protective measures 412
8.5 Obtaining evidence and other court assistance 413

9. Challenging and appealing an award through the courts 413

10. Recognition and enforcement of awards 414
10.1 Domestic awards 414
10.2 Foreign awards 414

11. Special provisions and considerations 415
11.1 Consumers 415
11.2 Employment law 415

12. Concluding thoughts and themes 415

13. Contacts 416
1. Historical background

1.1.1 The Hungarian legal system was influenced by German and Austrian law and is still based on the 19th century German and Austrian civil and commercial law codes. It has, however, developed significantly from these origins in order to keep up with the demands of the modern commercial world.

1.1.2 In 1911, shortly after the Austrian Code of Civil Procedure was introduced in 1895, a commercial arbitration system was established in the Hungarian Code of Civil Procedure.

1.1.3 In 1952, the Hungarian Code of Civil Procedure was replaced by Act III of 1952 on the Civil Procedure Code and, in line with the communist legislative tendencies at the time, existing Hungarian arbitral tribunals were closed. Afterwards, only foreign trade disputes could be referred to arbitration. These were submitted to a newly-formed Court of Arbitration, which was attached to the Hungarian Economic Chamber (now the Hungarian Chamber of Commerce and Industry). Under the Moscow Convention of 1972 (Moscow Convention), all disputes between trading organisations in different Member States of the Council for Mutual Economic Assistance (COMECON) (including Hungary) had to be referred to the arbitral tribunal attached to the chamber of commerce in the country of the respondent. Alternatively, the parties could choose a third country’s arbitral tribunal, provided that the third country was also a member of COMECON.

1.1.4 In 1994, as a result of democratic changes to Hungary’s political system, the new Act LXXI of 1994 on Arbitration (Hungarian Arbitration Act) was introduced. The Hungarian Arbitration Act, which is based on the Model Law (1985), has removed both the restrictions on arbitration contained in the Moscow Convention and the previous laws governing arbitration in Hungary.

1.1.5 The Hungarian Arbitration Act is supplemented by Section 376 of Act CXX of 2001 on the Capital Market (Capital Markets Act), which came into force on 1 January 2002, providing the framework for the establishment of the Permanent Court of Arbitration of the Money and Capital Markets.

2. Scope of application and general provisions of the Hungarian Arbitration Act

2.1 Scope of application
2.1.1 The provisions of the Hungarian Arbitration Act apply to both ad hoc and institutional arbitral tribunals, provided that the seat of arbitration (or the seat of the stipulated institutional arbitration court) is in Hungary.²

2.2 Parties
2.2.1 The Hungarian Arbitration Act places restrictions on who may choose arbitration, instead of state court proceedings, as their dispute resolution mechanism and who may be a party to arbitral proceedings. Arbitration may only take place if at least one of the parties is a natural or legal person professionally engaged in business activities and where the legal dispute is related to such activity.³ This restriction, however, does not apply to the proceedings of the Permanent Court of Arbitration of the Money and Capital Markets.

2.3 Subject matter
2.3.1 Under Hungarian law, disputes are only arbitrable where the parties have free disposal over the subject matter of the dispute.⁴ As a result, family law issues, public and private guardianship issues, state administration and employment issues cannot be submitted to arbitration. Other than these particular exceptions, there are no other restrictions on the type of issue which may be resolved by arbitration.

2.4 Structure of the law
2.4.1 Chapter I of the Hungarian Arbitration Act contains the general rules governing arbitral proceedings. Chapter II deals with the formation of the arbitral tribunal. Chapter III governs the jurisdiction of the arbitral tribunal, while Chapter IV addresses the rules of procedure to be applied in arbitral proceedings. Chapter V deals with the making of awards and the termination of proceedings. Chapter VI sets out additional rules for international arbitrations. Chapter VII contains the rules regarding the proceedings and rights of ordinary courts in relation to arbitration. Finally, Chapter VIII contains the closing provisions of the Hungarian Arbitration Act.

² Hungarian Arbitration Act, s 1.
³ Ibid, s 3(1).
⁴ Ibid, s 3(1)(b).
2.5 **General principles**
2.5.1 The Hungarian Arbitration Act is based on and construed in accordance with three guiding principles:
— equality of the parties, meaning that the parties shall enjoy equal treatment during the course of the arbitral proceedings;\(^5\)
— party autonomy, meaning that the parties are free to determine the rules that will govern the proceedings;\(^6\) and
— due process, meaning that each party must be given a proper opportunity to present its case.\(^7\)

3. **The arbitration agreement**

3.1 **Definitions**
3.1.1 The Hungarian Arbitration Act defines an arbitration agreement as an agreement in which the parties agree to submit their disputes which have arisen or which may arise in the future in respect of their legal relationship, whether contractual or not, to arbitration.\(^8\)

3.2 **Formal requirements**
3.2.1 Sections 5(2)–(5) of the Hungarian Arbitration Act set out the formal requirements of an arbitration agreement. An arbitration agreement must be in writing. It can be a separate agreement or form part of a larger contract. An arbitration agreement is deemed to be in writing if it is concluded between the parties by way of an exchange of letters, facsimiles, telexes or by such other means of telecommunication which is capable of producing a permanent record of the agreement. It is also deemed to be in writing if the claimant asserts in its statement of claim that an arbitration agreement was entered into between the parties and the respondent does not deny this assertion in its statement of defence. Reference to a written contract containing an arbitration clause will also qualify as an agreement to arbitrate.

3.2.2 If the parties wish their arbitral proceedings to be conducted under specific institutional arbitration rules (e.g. the ICC Arbitration Rules), they should stipulate the applicable rules in their arbitration agreement in an unambiguous way.\(^9\) This

---

\(^5\) *Ibid*, s 27.
\(^6\) *Ibid*, s 28.
\(^7\) *Ibid*, s 27.
\(^8\) *Ibid*, s 5(1).
requirement also applies where the parties wish to stipulate the rules of procedure of an institutional arbitral tribunal e.g. the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (Court of Arbitration). The Court of Arbitration has its own detailed Rules of Proceedings (Court of Arbitration Rules), but also administers arbitral proceedings under the UNCITRAL Arbitration Rules. The parties may include other provisions in the arbitration agreement if they wish, such as provisions regarding the number and appointment of arbitrators and other procedural issues.

3.3 Special tests and requirements of the jurisdiction
3.3.1 Aside from the requirements described in paragraph 2.3.1 and section 3.2 above, there are no other restrictions on arbitrability in Hungary.

3.4 Separability
3.4.1 An arbitration clause that forms part of another agreement shall be treated as an independent arbitration agreement. Accordingly, if the more general agreement is found to be null and void, this will not necessarily affect the validity of the arbitration clause contained therein.

3.5 Legal consequences of a binding arbitration agreement
3.5.1 If a valid and binding arbitration agreement has been made by the parties, the ordinary courts are excluded from assuming jurisdiction over the subject matter specified in the arbitration agreement. The Hungarian Arbitration Act expressly provides that the courts shall not intervene in arbitral proceedings except where provided for by the Hungarian Arbitration Act.

3.6 Mandatory and non-mandatory provisions
3.6.1 The parties may only deviate from the provisions of the Hungarian Arbitration Act where the Hungarian Arbitration Act so provides.

3.6.2 By way of example, the parties may not agree that the award will be reviewed by a second-level arbitral body because, under the Hungarian Arbitration Act, an award issued by any permanent or ad hoc arbitral tribunal in Hungary is final and binding.

---


Hungarian Arbitration Act, s 24(1).

Hungarian Arbitration Act, s 24(2).

Hungarian Arbitration Act, s 7.

Hungarian Arbitration Act, s 61.

Hungarian Arbitration Act, s 58.
3.7 Domestic and international arbitration

3.7.1 The Hungarian Arbitration Act draws a distinction between domestic and international arbitration. Chapter VI of the Hungarian Arbitration Act contains specific provisions applicable to international arbitral proceedings. Additionally, the other provisions of the Hungarian Arbitration Act apply to international proceedings unless specifically modified by the provisions of Chapter VI.\(^\text{16}\)

3.7.2 An arbitration shall be deemed to be international if, at the time of conclusion of the arbitration agreement, the parties have their seat or place of business in different states, or one of the following places is situated outside the state in which the parties have their seat or place of business:
- the seat of arbitration as determined in the arbitration agreement;
- the place where performance of the obligations originating from the legal relationship of the parties takes place; or
- the place with which the subject matter of the arbitration is most closely connected.\(^\text{17}\)

3.7.3 The Hungarian Arbitration Act provides that in international cases heard by an arbitral institution, where the seat of the arbitration is in Hungary, the Court of Arbitration acts as an institutional arbitral tribunal.\(^\text{18}\) In international arbitrations, the parties are free to choose the language of the arbitration\(^\text{19}\) and the applicable substantive law.\(^\text{20}\)

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The following persons may not be arbitrators:
- persons under 24 years of age;
- persons who have been barred from public affairs by a final and binding court judgment;
- persons who have been placed under state curatorship by a court; or
- persons who have been sentenced to imprisonment, without the right of further appeal, until the conviction has been erased from their criminal record.\(^\text{21}\)

\(^{16}\) *Ibid*, s 46.

\(^{17}\) *Ibid*, s 47(1).

\(^{18}\) *Ibid*, s 46(3).

\(^{19}\) *Ibid*, s 48.

\(^{20}\) *Ibid*, s 49.

\(^{21}\) *Ibid*, s 12.
4.1.2 Court judges are also prohibited from accepting an appointment as an arbitrator during the tenure of their office. A similar requirement applies to high state officials, thus presidents of the Hungarian Republic,\textsuperscript{22} justices of the Constitutional Court,\textsuperscript{23} senior public officers,\textsuperscript{24} ombudsmen,\textsuperscript{25} presidents, vice-presidents, senior accountants and accountants of the State Audit Office,\textsuperscript{26} prosecutors,\textsuperscript{27} presidents and vice-presidents of the Hungarian National Bank\textsuperscript{28} and the speaker and vice-speaker of the Parliament\textsuperscript{29} may not become arbitrators for the duration of their time in office.

4.1.3 The parties are free to agree on the number of arbitrators, provided that they choose an uneven number of arbitrators.\textsuperscript{30} If the parties fail to agree on the number of arbitrators, the default position is that there shall be three arbitrators.\textsuperscript{31}

*Procedure if the parties fail to agree on the appointment procedure*

4.1.4 The parties are also free to agree on the appointment procedure.\textsuperscript{32} Failing such agreement, the following rules apply.\textsuperscript{33}

4.1.5 In arbitral proceedings with three arbitrators each party appoints one arbitrator and the two party-appointed arbitrators appoint the third arbitrator, who is the chair of the tribunal.\textsuperscript{34} Generally, the claimant appoints its arbitrator in its statement of claim. The respondent then has 30 days from receipt of the claimant’s statement of claim to appoint its arbitrator.\textsuperscript{35}

4.1.6 If any party fails to appoint its arbitrator within 30 days following receipt of the request of the other party to do so, or the two party-appointed arbitrators cannot

\textsuperscript{22} The Constitution of Hungary, s 12(2).
\textsuperscript{23} Act CLI of 2011 on the Constitutional Court, s 10(1).
\textsuperscript{24} Act XXIII of 1992 on the Legal Status of Public Officers, s 21(3).
\textsuperscript{25} Act CXI of 2011 on the Supervisor of Essential Rights, s 8(2).
\textsuperscript{26} Act LXVI of 2011 on the State Audit Office, s 18(3).
\textsuperscript{27} Act CLXIV of 2011 on the Legal Status of the Prosecutor General, Prosecutors, and Other Employers of the Prosecutor Service and Service of Prosecutors and the Carrier of the Prosecutors, s 45(1).
\textsuperscript{28} Act CCVIII of 2011 on the National Bank of Hungary, s 55(3).
\textsuperscript{29} Act LV of 1990 on the Legal Status of the Members of the Parliament, s 12(1).
\textsuperscript{30} Hungarian Arbitration Act, s 13(1).
\textsuperscript{31} Ibid, s 13(2).
\textsuperscript{32} Ibid, s 14(1).
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid, s 14(2).
\textsuperscript{35} Ibid.
agree on the third arbitrator within 30 days following their appointment, any party may request that the county court makes the appointment.\footnote{Ibid.}

4.1.7 In proceedings before the Court of Arbitration, the applicable provisions are set out in Article 18 of the Court of Arbitration Rules:
— if the claimant fails to appoint its arbitrator in its statement of claim and to request that the Court of Arbitration appoints the arbitrator, the Court of Arbitration will request the claimant to remedy such failure. If the claimant fails to comply with the request of the Court of Arbitration within the 60 day time limit set out in the Court of Arbitration Rules, the Court of Arbitration (i.e. the President of the Court of Arbitration\footnote{Hungarian Arbitration Act, s 18(5).}) will terminate the proceedings,\footnote{Ibid.}
— if the respondent fails to appoint an arbitrator, the Court of Arbitration will request that the respondent nominate its arbitrator. If the respondent fails to do so, the President of the Court of Arbitration will appoint the respondent’s arbitrator from the roll of arbitrators after a 15 day additional time limit granted by the President of the Court of Arbitration has expired.\footnote{Ibid., s 14(2).}

4.1.8 If, in an arbitration with a sole arbitrator, the parties are unable to agree on the person to be selected as the arbitrator, the arbitrator shall be appointed by the competent county court upon the request of either party.\footnote{Ibid., s 14(4).} The same procedure applies where, in the case of a panel consisting of three arbitrators, the two party-appointed arbitrators are unable to agree on the appointment of the chair.\footnote{Ibid.}

4.1.9 In proceedings before the Court of Arbitration, if the party-appointed arbitrators are unable to agree on the appointment of the chair within 15 days, the President of the Court of Arbitration will appoint the chair from the roll of arbitrators.\footnote{Court of Arbitration Rules, art 18(5).}

4.1.10 A proposed arbitrator shall disclose to the parties without delay any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality.\footnote{Hungarian Arbitration Act, s 17(1).} An arbitrator shall accept the appointment through a written declaration addressed to the parties. The arbitrator’s signature on the deed containing the appointment will be regarded as acceptance.\footnote{Ibid., s 17(2).}
4.2 Procedure for challenging and substituting arbitrators

4.2.1 The challenge procedures are set out in Sections 18–20 of the Hungarian Arbitration Act. A party may challenge an arbitrator, including the chair, if circumstances exist that give rise to justifiable doubts as to the arbitrator’s independence or impartiality or if the arbitrator does not possess the qualifications specified by the parties in their arbitration agreement.\(^{45}\) A party may challenge its appointed arbitrator only if the circumstances justifying such a challenge became known to the party after the appointment was made.\(^{46}\)

Procedure for challenging arbitrators

4.2.2 The parties are free to agree on the procedure to be followed to challenge an arbitrator’s appointment.\(^{47}\) Failing such agreement, the challenging party must send a written statement containing the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of the constitution of the arbitral tribunal, or within 15 days of becoming aware of the circumstances under which a challenge may take place.\(^{48}\)

4.2.3 If the challenged arbitrator does not voluntarily withdraw from office, or if the other party does not agree to the challenge, the other members of the arbitral tribunal will decide on the merits of the challenge.\(^{49}\) If the arbitrators cannot reach agreement, or if two arbitrators or the sole arbitrator have been challenged, the competent county court shall decide on the merits of the challenge upon the request of the challenging party.\(^{50}\) While such a request is pending before the court, the arbitral tribunal – including the challenged arbitrator(s) – may continue the arbitral proceedings and make an award.\(^{51}\)

4.2.4 In institutional arbitral proceedings before the Court of Arbitration, the Board of the Court of Arbitration will decide on the challenge if the arbitral tribunal cannot agree, or if two arbitrators or the sole arbitrator have been challenged.\(^{52}\)

\(^{45}\) Ibid, s 18(1).
\(^{46}\) Ibid, s 18(2).
\(^{47}\) Ibid, s 19(1).
\(^{48}\) Ibid, s 19(2).
\(^{49}\) Ibid, s 19(3).
\(^{50}\) Ibid, s 20.
\(^{51}\) Ibid.
\(^{52}\) Court of Arbitration Rules, art 19(4).
Appointment of a substitute arbitrator

4.2.5 If the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the same rules applicable to the appointment of the original arbitrator (see paragraphs 4.1.4–4.1.9 above).\(^{53}\)

Responsibility of arbitrators

4.2.6 The Hungarian Arbitration Act contains no provisions on the liability of arbitrators for breach of their duties. If the parties and the arbitrators want to introduce rules regarding the responsibility of the arbitrators, they must agree on what the consequences of a failure by the arbitrators to fulfil their mandate will be. In the case of proceedings before the Court of Arbitration, the Court of Arbitration Rules exclude any liability of the arbitrators, the Court of Arbitration and the employees of the Hungarian Chamber of Commerce and Industry.\(^{54}\)

Arbitration fees and expenses

4.3 The Hungarian Arbitration Act contains no provisions on the fees and expenses of the arbitrator(s). In institutional arbitral proceedings, the fees are typically set by the fee schedule of the arbitral institution. In ad hoc arbitral proceedings, the fees are determined based on the agreement between the parties and the arbitrators.

Arbitrator immunity

4.4 The Hungarian Arbitration Act does not contain any provisions relating to the immunity of arbitrators.

Jurisdiction of the arbitral tribunal

5.1 The jurisdiction of the arbitral tribunal is determined by the arbitration agreement made between the parties. The arbitral tribunal may rule on its own jurisdiction, including the existence or validity of the arbitration agreement.\(^{55}\) As described above at paragraph 3.4.1, an arbitration clause which is part of another agreement is treated as an independent (and severable) arbitration agreement.\(^{56}\)

---

\(^{53}\) Hungarian Arbitration Act, s 23.

\(^{54}\) Ibid., s 56.

\(^{55}\) Ibid., s 24(1).

\(^{56}\) Ibid.
5.1.2 A plea that the arbitral tribunal does not have jurisdiction should be raised no later than at the time of submission of the defence on the merits.\(^{57}\) A plea that the arbitral tribunal has exceeded its jurisdiction should be made without delay after the alleged excess of jurisdiction occurred.\(^{58}\) However, the arbitral tribunal may rule on a plea raised at a later stage if it considers that the delay was justified.\(^{59}\)

5.1.3 The arbitral tribunal may rule on a plea of lack of jurisdiction either when the plea is raised or in its award on the merits.\(^{60}\) If the arbitral tribunal rules that it has jurisdiction, any party may, within 30 days of receiving notice of such ruling, request the competent county court to rule on the jurisdiction of the arbitral tribunal.\(^{61}\) Regardless of such a request, the arbitral tribunal may continue the proceedings and make an award pending the decision of the county court on jurisdiction.\(^{62}\)

5.2 Power to order interim measures

5.2.1 Unless the parties agree otherwise, the arbitral tribunal may, upon request, order any party to comply with such interim measures as the arbitral tribunal considers appropriate in respect of the subject matter of the dispute.\(^{63}\) However, the decisions or orders on interim measures issued by the arbitral tribunal are not enforceable (only final and partial awards are enforceable). The parties may also turn to the competent court to request interim measures.\(^{64}\)

5.3 Permanent Court of Arbitration of the Money and Capital Markets

5.3.1 Section 376 of the Capital Markets Act permits the trade organisations of exchange markets, credit institutions and investment enterprises to jointly establish and operate the Permanent Court of Arbitration of the Money and Capital Markets. On this basis the Permanent Court of Arbitration of the Money and Capital Markets was established on 30 June 2002 with its seat in Budapest. The provisions of the Hungarian Arbitration Act apply to the competence and the procedure of the Permanent Court of Arbitration of the Money and Capital Markets, with certain exceptions set out below.

\(^{57}\) Ibid, s 24(3).
\(^{58}\) Ibid.
\(^{59}\) Ibid.
\(^{60}\) Ibid, s 25(1).
\(^{61}\) Ibid.
\(^{62}\) Ibid, s 25(2).
\(^{63}\) Ibid, s 26.
\(^{64}\) Ibid, s 37(1).
5.3.2 The Permanent Court of Arbitration of the Money and Capital Markets has jurisdiction in disputes:
   (i) in connection with the offering of securities, investment services, services auxiliary to investment services and commodity exchange services falling within the scope of the Capital Markets Act;
   (ii) between investors in connection with financial instruments;
   (iii) in connection with shareholders’ rights;
   (iv) in connection with exchange transactions;
   (v) regarding an investment firm’s or credit institution’s refusal to provide services to a client in connection with financial instruments;
   (vi) in connection with the stock exchange’s internal regulations;
   (vii) in connection with the bylaws, standard service agreements and internal regulations of clearing corporations;
   (viii) clearing corporation financial services and activities auxiliary to financial services; and
   (ix) in connection with other services provided by investment and financial service providers, provided such services do not violate any exclusive rights.

5.3.3 The jurisdiction of the Permanent Court of Arbitration of the Money and Capital Markets applies provided that the parties concerned have stipulated to resort to arbitration in an arbitration agreement and the parties are able to freely dispose of the subject-matter of the proceedings.65

5.3.4 In the cases defined in sub-paragraphs (i), (ii) and (iv)–(ix) in paragraph 5.3.2 above, the Permanent Court of Arbitration of the Money and Capital Markets will have exclusive jurisdiction for institutional arbitration proceedings seated in Hungary, including cases deemed “international” under Section 47 of the Hungarian Arbitration Act. However, the parties may choose the jurisdiction of another arbitral institution seated outside of Hungary or non-institutional proceedings.66

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 Unless otherwise agreed by the parties, ad hoc arbitral proceedings are commenced when the other party receives the request for arbitration.67

65 Capital Markets Act, s 376.
66 Ibid, s 376(5).
67 Hungarian Arbitration Act, s 32(1).
6.1.2 If the parties have agreed to the jurisdiction of an arbitral institution, the proceedings typically commence when the statement of claim is filed with the arbitral institution.\(^{68}\) In the case of the Court of Arbitration, proceedings are commenced when the statement of claim is filed with the Secretariat of the Court of Arbitration.\(^{69}\)

6.2 General procedural principles

6.2.1 Unless the parties agree otherwise and subject to the provisions of the Hungarian Arbitration Act, the arbitral tribunal may determine the rules of procedure at its own discretion.\(^{70}\) The chair of the arbitral tribunal shall decide questions of procedure if so authorised by the parties or by the other members of the arbitral tribunal.\(^{71}\)

6.2.2 In institutional arbitral proceedings before the Court of Arbitration, the arbitrators will apply the procedural provisions set out in the Court of Arbitration Rules. If the Court of Arbitration Rules do not cover a specific issue, and if the parties do not agree otherwise, the arbitrators are free to determine the applicable rules.\(^{72}\)

6.2.3 During the proceedings, due respect shall be paid to the principles of equal rights and treatment of the parties and to the right of each party to familiarise themselves with the documents of the arbitral proceedings, the documents filed and evidence submitted by other parties and the procedural actions taken by the arbitral tribunal. Each party shall have the right to set forth their standpoint orally or in writing in the course of the arbitral proceedings.\(^{73}\)

6.3 Seat and language of arbitration

6.3.1 The parties are free to agree on the seat of arbitration in both ad hoc and institutional arbitral proceedings.\(^{74}\) Failing such agreement, in an institutional arbitration, the proceedings shall take place at the seat of the relevant court of arbitration (which is Budapest in the case of the Court of Arbitration),\(^{75}\) while in the case of an ad hoc arbitration, the seat shall be determined by the arbitral tribunal, having regard to the circumstances of the case.\(^{76}\)

\(^{68}\) Ibid, s 32(2).

\(^{69}\) Court of Arbitration Rules, art 21(1).

\(^{70}\) Hungarian Arbitration Act, s 28.

\(^{71}\) Ibid, s 38(2).

\(^{72}\) Court of Arbitration Rules, art 17(1).

\(^{73}\) Ibid, art 17(2).

\(^{74}\) Hungarian Arbitration Act, s 31(1).

\(^{75}\) Ibid, s 7.

\(^{76}\) Ibid, s 31(1).
6.3.2 The Hungarian Arbitration Act allows the parties to determine the language of the proceedings at any time before the commencement of the arbitration.\textsuperscript{77} Failing such agreement, the proceedings shall either be conducted in the Hungarian language,\textsuperscript{78} or, in the case of an international arbitration, the language(s) shall be determined by the court of arbitration.\textsuperscript{79}

6.4 Multi-party issues

6.4.1 Neither the Hungarian Arbitration Act, nor the Court of Arbitration Rules provide for the possibility of intervention by a third party in arbitral proceedings. However, where there is a mutually agreed and proper arbitration agreement in place, it is possible to initiate arbitration against multiple respondents or to have multiple claimants in the proceedings. In such circumstances, multiple parties may appoint arbitrators jointly, e.g. in an arbitration with three arbitrators, multiple claimants can agree on one person as claimant-appointed arbitrator.

6.5 Submissions

6.5.1 In ad hoc arbitral proceedings, the Hungarian Arbitration Act provides that the claimant must state its claim, the facts supporting it, and the points in issue in its statement of claim.\textsuperscript{80} The parties may submit with their statements of claim and defence the documents which they consider to be relevant.

6.5.2 The Hungarian Arbitration Act contains no other provisions on the format, content or timetable for the parties' submissions, but requires the parties to name their arbitrator(s) in the statement of claim and the statement of defence. However, the Hungarian Arbitration Act requires that all submissions to the arbitral tribunal by one party must be communicated to the other party.\textsuperscript{81}

6.5.3 In ad hoc arbitral proceedings, the arbitral tribunal will give directions and set the timetable for the parties' submissions, unless otherwise agreed by the parties. In institutional arbitral proceedings, the arbitral tribunal will follow the procedural rules of the institution in relation to submissions.

6.5.4 In arbitral proceedings before the Court of Arbitration, the Court of Arbitration Rules are more specific. Article 22 requires the claimant to provide the following information in its statement of claim:

\textsuperscript{77} Ibid, s 30(1).
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid, s 48(1).
\textsuperscript{80} Ibid, s 33(1).
\textsuperscript{81} Ibid, s 34(3).
— the names and addresses of the parties;
— any record establishing the jurisdiction of the Court of Arbitration;
— the claim;
— the legal grounds of the claim;
— the facts on which the claim is based;
— reference to any documents and evidence;
— the amount in dispute;
— the claimant’s appointed arbitrator or a request for the Court of Arbitration to appoint the arbitrator; and
— a list of documents attached to the statement of claim.

6.5.5 Article 25 of the Court of Arbitration Rules contains provisions in relation to the statement of defence and extends the provisions applicable to the statement of claim to the contents of the statement of defence, where appropriate.

6.6 Oral hearings and written proceedings
6.6.1 Subject to any contrary agreement, the parties are given the opportunity to make oral submissions to the arbitral tribunal. The tribunal will also hear the evidence of witnesses and experts (if the experts are summoned to explain their written reports upon the request of the parties). The parties are to be given sufficient prior notice of any hearings or any procedural action of the arbitral tribunal which involves the inspection of property or documents. The arbitral tribunal will prepare minutes of the proceedings and provide copies of such minutes to the parties.

6.7 Default by one of the parties
6.7.1 Pursuant to the Hungarian Arbitration Act, unless the parties agree otherwise, the arbitral tribunal shall terminate the proceedings if the claimant fails to present its statement of claim without giving sufficient or satisfactory reasons for its failure. If the respondent fails to present its statement of defence, the arbitral tribunal shall continue the proceedings without considering such failure in itself as acceptance of the claimant’s allegations. If any of the parties fail to attend any of the hearings

---

82 Ibid, s 34(1).
83 Ibid.
84 Ibid, s 34(2).
85 Ibid, s 34(4).
86 Ibid, s 35(1).
87 Ibid, s 35(2).
before the arbitral tribunal, or fail to produce evidence, the arbitral tribunal may continue the proceedings and make an award on the basis of the evidence it has before it.\(^{88}\)

### 6.8 Taking of evidence

6.8.1 There is no specific provision in the Hungarian Arbitration Act dealing with the taking of evidence. The parties are free to prove their respective case by the usual means of documentary, witness or expert evidence. Section 34(1) of the Hungarian Arbitration Act clarifies that the arbitral tribunal has no power to compel witnesses to attend and give evidence before it.\(^{89}\) In arbitral proceedings before the Court of Arbitration, Article 35 of the Court of Arbitration Rules contains specific procedural rules in relation to the taking of evidence.

### 6.9 Appointment of experts

6.9.1 Unless otherwise agreed by the parties, the arbitral tribunal has the power to appoint one or more experts to report on specific issues.\(^{90}\) The arbitral tribunal may require any party to provide such expert(s) with relevant information or documents.\(^{91}\)

### 6.10 Confidentiality

6.10.1 The Hungarian Arbitration Act contains an express provision that arbitral proceedings (including any award) are private and not open to the public unless otherwise agreed by the parties.\(^{92}\)

6.10.2 In the case of proceedings to set aside an award, the anonymised decision of the ordinary court will be made public.

### 6.11 Court assistance in the taking of evidence

6.11.1 The arbitral tribunal may request the assistance of the local court (in Budapest, this would be the Central District Court of Pest) in relation to the production of evidence or the examination of witnesses, where the arbitral tribunal would encounter considerable difficulties or costs in doing so, or if the application of coercive means is necessary to obtain evidence.\(^{93}\)

---

88 Ibid, s 35(3).

89 However, in respect of court assistance in the taking of evidence see paragraph 6.11.1 below.

90 Hungarian Arbitration Act, s 36(1)(a).

91 Ibid, s 36(1)(b).

92 Ibid, s 29.

93 Ibid, s 37(3).
7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 In international arbitral proceedings, the parties are free to determine the applicable substantive law according to which the arbitral tribunal must make its award. If the parties fail to determine the applicable law, it shall be determined by the arbitral tribunal.

7.1.2 The parties may also authorise the arbitral tribunal to make its decision ex aequo et bono.

7.1.3 The arbitral tribunal shall decide the dispute in accordance with the terms of the contract. It will also take into account the trade practices applicable to the transaction in issue.

7.2 Timing, form, content and notification of award

Timing

7.2.1 The Hungarian Arbitration Act does not stipulate an express time limit within which the tribunal must render its decision, but the arbitral tribunal should make its decision as soon as possible. In arbitral proceedings before the Court of Arbitration, the award and the reasons on which it is based shall be delivered in writing to the parties within 30 days (or 60 days if the arbitral tribunal includes a foreign arbitrator) from the closing of the oral hearing.

7.2.2 If the arbitral tribunal consists of more than one arbitrator, it shall make its decision by a majority of votes, unless the parties agree otherwise. Failing a majority, the chair of the panel shall make the decision.

Form

7.2.3 The award must be in writing and be signed by all of the arbitrators. However, in arbitral proceedings with more than one arbitrator, it is sufficient that the award...
is signed by a majority of the arbitrators, provided that the award states the reason why the other signatures are missing.\textsuperscript{102} The award must also state the date on which it is made and the place of the arbitration.\textsuperscript{103}

\textit{Content}

7.2.4 The Hungarian Arbitration Act requires that the award must state the reasons on which it is based, unless it is an award on agreed terms.\textsuperscript{104}

7.2.5 In addition, the arbitral tribunal shall decide on the amount and the allocation of the procedural costs and such decision shall be included in the award.\textsuperscript{105}

7.2.6 Article 40 of the Court of Arbitration Rules contains similar provisions as to the form and content of an award in institutional proceedings before the Court of Arbitration.

\textit{Notification}

7.2.7 A signed copy of the award shall be served on each of the parties.\textsuperscript{106}

7.2.8 In the case of proceedings before the Court of Arbitration, the award shall be delivered in writing to the parties within 30 days (or 60 days if the arbitral tribunal includes a foreign arbitrator) from the closing of the oral hearing.\textsuperscript{107}

\textbf{7.3 Settlement}

7.3.1 If the parties settle their dispute, the proceedings will be terminated by an order for termination issued by the arbitral tribunal.\textsuperscript{108} The arbitral tribunal must record the settlement in the form of an award on agreed terms if so requested by the parties, provided that the arbitral tribunal considers that the settlement is in accordance with the law.\textsuperscript{109} An award on agreed terms has the same effect as any other award made by an arbitral tribunal.\textsuperscript{110}

\textsuperscript{102} ibid.
\textsuperscript{103} ibid, s 41(3).
\textsuperscript{104} ibid, s 41(2).
\textsuperscript{105} ibid, s 41(1).
\textsuperscript{106} ibid, s 41(4).
\textsuperscript{107} Court of Arbitration Rules, art 39(2).
\textsuperscript{108} Hungarian Arbitration Act, s 39(1).
\textsuperscript{109} ibid, s 39(2).
\textsuperscript{110} ibid, s 39(3).
7.4 **Power to award interest and costs**

7.4.1 Under Hungarian law, an arbitral tribunal is generally entitled to award default interest, calculated pursuant to the relevant provisions of the applicable substantive law. In its final award, the arbitral tribunal must render a decision on the costs of the proceedings, including the remuneration of the tribunal, and must state which party has to pay the costs.\textsuperscript{111} In practice, the losing party is usually ordered to pay the costs of the proceedings. However, if the winning party is successful only in part, the arbitral tribunal may require the parties to pay the costs in proportion to their relative success or failure.

7.5 **Termination of the proceedings**

7.5.1 The arbitration can be terminated by a final award on the merits or by an order for termination of the arbitration.\textsuperscript{112} The arbitral tribunal shall issue an order for termination if:

- the claimant fails to submit its statement of claim;
- the claimant withdraws its statement of claim, unless the respondent objects thereto and the arbitral tribunal accepts that the respondent has a legitimate interest in obtaining a final award;
- the parties agree to terminate the proceedings; or
- the arbitral tribunal finds that continuing the proceedings has become unnecessary or impossible for any other reason.

7.5.2 Article 44 of the Court of Arbitration Rules contains similar provisions on the termination of arbitral proceedings before the Court of Arbitration without a final award on the merits.

7.5.3 Save for the subsequent correction or interpretation of the award or the making of an additional award, the mandate of the arbitral tribunal comes to an end when the proceedings terminate.\textsuperscript{114}

7.6 **Effect of an award**

7.6.1 The award is final and binding and the parties cannot agree otherwise. The award has the same effect as a final and binding court judgment and can be enforced with the assistance of the courts.

\textsuperscript{111} Hungarian Arbitration Act, s 41(1) and Court of Arbitration Rules, art 40(1).

\textsuperscript{112} Hungarian Arbitration Act, s 42(1).

\textsuperscript{113} Ibid, s 42(2).

\textsuperscript{114} Ibid, s 42(3).
If the parties agree, or the applicable rules of proceedings make it possible, the arbitral tribunal may also render a partial award if it decides that there is no need for further hearings on a particular issue.\textsuperscript{115} A partial award has the same legal effect as a final award of the arbitral tribunal.

**7.7 Correction, clarification and issuance of a supplemental award**

7.7.1 The relevant rules are set out in Sections 43–45 of the Hungarian Arbitration Act. At the request of either party, or on the arbitral tribunal’s own initiative, the arbitral tribunal may correct any change or error in names, error in numbers or computation, spelling mistakes or any other typographical errors of a similar nature in the award.\textsuperscript{116}

7.7.2 At the request of either party, subject to the agreement of the other parties, the arbitral tribunal may interpret a specific part or point of the award.\textsuperscript{117}

7.7.3 Either party may request a supplemental award if the arbitral tribunal failed to make an award on any claim presented in the arbitral proceedings.\textsuperscript{118}

7.7.4 A request for correction or interpretation of the award, or for an additional award, must be submitted to the arbitral tribunal within 30 days of receipt of the award unless the parties agree otherwise. However, the arbitral tribunal may extend this deadline if it deems it to be necessary. Any such request must be notified to the other party.

8. **Role of the courts**

8.1 **Jurisdiction of the courts**

8.1.1 If a valid and binding arbitration agreement exists between the parties, the ordinary courts are excluded from assuming jurisdiction over the subject matter specified in the arbitration agreement. The Hungarian Arbitration Act expressly provides that the courts shall not intervene in arbitral proceedings except where so provided by the Hungarian Arbitration Act.\textsuperscript{119}

\textsuperscript{115} See, for example, Court of Arbitration Rules, art 38(3).

\textsuperscript{116} Hungarian Arbitration Act, s 43(1)(a).

\textsuperscript{117} Ibid, s 43(1)(b).

\textsuperscript{118} Ibid, s 44.

\textsuperscript{119} Ibid, s 7.
8.1.2 The Hungarian Arbitration Act gives the courts a limited jurisdiction in certain circumstances to provide legal assistance to the arbitral proceedings. In addition to the courts’ powers in relation to the appointment and challenge of arbitrators, the courts have further powers outlined below at sections 8.2, 8.4 and 8.5.

8.2 Stay of court proceedings
8.2.1 In the event a matter that falls under an arbitration agreement is brought before the court, the court must reject the claim without issuing a writ of summons or terminate the proceedings upon the request of a party, unless it finds the arbitration agreement to be null and void, inoperative or incapable of being performed. The objection to the jurisdiction of the court must be raised no later than in the respondent’s response on the merits.

8.2.2 Therefore, the court has jurisdiction to determine the validity of the arbitration agreement before dismissing the claim. The court also has jurisdiction to review the arbitral tribunal’s assumption of jurisdiction on the application of a party.

8.3 Preliminary rulings on jurisdiction
8.3.1 If the arbitral tribunal finds, pursuant to Section 24 of the Hungarian Arbitration Act, that it has jurisdiction, within 30 days of receiving notice of the ruling, any party may request that the competent county court decide on the jurisdiction of the arbitral tribunal.

8.3.2 Until such decision has been made by the competent county court, the arbitral tribunal may continue the arbitral proceedings.

8.4 Interim protective measures
8.4.1 As explained, an arbitral tribunal may issue non-binding interim protective measures. Additionally, any party may, at any stage during arbitral proceedings, apply to the competent county court for interim measures which, if ordered, are enforceable. The Hungarian Arbitration Act expressly provides that such applications are permitted despite the existence of an arbitration agreement.

120 Ibid, s 8(1).  
121 Ibid.  
122 Ibid, s 25(1).  
123 Ibid, s 25(2).  
124 See further explanation above at paragraph 5.2.1.  
125 Hungarian Arbitration Act, s 37(1).  
126 Ibid.
8.4.2 The court may order measures to safeguard the claim of one party (e.g. by freezing a bank account) in a case pending before an arbitral tribunal if the party requesting such measure provides sufficient grounds for the measure to be granted and the claim is supported by appropriate documentary evidence (i.e. authentic instruments or private documents with full probative force).\(^{127}\)

8.5 **Obtaining evidence and other court assistance**

8.5.1 The local courts have jurisdiction to assist the arbitral tribunal with obtaining evidence if the production of evidence before the arbitral tribunal is likely to entail considerable difficulties or disproportionately high additional costs or if means of coercion are required to obtain evidence.\(^{128}\)

9. **Challenging and appealing an award through the courts**

9.1.1 There is no appeal against an award. However, the Hungarian Arbitration Act provides specific circumstances in which a party can apply to the competent county court to set aside an award.\(^{129}\) The request of the party to set aside an award must be filed within 60 days from the delivery of the award.

9.1.2 A party may apply to the competent county court for the award to be set aside for the following reasons:

- the party which concluded the arbitration agreement did not have legal capacity;
- the arbitration agreement is not valid under the law which the parties have chosen, or failing any indication thereon, under Hungarian law;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award was made in relation to a dispute not contemplated by or outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions not submitted to arbitration may be set aside); or

---

\(^{127}\) *Ibid*, s 37(2).  
\(^{128}\) *Ibid*, s 37(3).  
\(^{129}\) *Ibid*, s 54.
— the constitution 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 mandatory provision of the Hungarian Arbitration Act, or, failing such agreement, the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the Hungarian Arbitration Act.130

9.1.3 The setting aside of the award may also be requested if:
— the subject matter of the dispute is not capable of settlement by arbitration under Hungarian law; or
— the award is in conflict with the rules of Hungarian public policy.131

9.1.4 The court may suspend the enforcement of the award during the proceedings to set aside.132 The Hungarian Arbitration Act requires that the judgment of the court be confined exclusively to the setting aside of the award of the arbitral tribunal.133

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 The effect of an award is the same as that of a final and binding non-appealable court judgment.134 The court which has jurisdiction for enforcement is the county court located where the respondent has its seat or place of business or where it has sellable assets, or in the case of foreign entities the seat of the Hungarian branch or commercial representation.135 The enforcement is governed by the local legal rules on enforcement. The court may only refuse enforcement of the award if the subject matter of the dispute is not arbitrable under Hungarian law, or if the award is contrary to the rules of Hungarian public policy.136

10.2 Foreign awards

10.2.1 Awards issued outside Hungary are enforceable in Hungary pursuant to the provisions of multilateral conventions or bilateral treaties ratified by Hungary. The most important arbitration convention to which Hungary is a party is the New York Convention.

130 Ibid, s 55(1).
131 Ibid, s 55(2).
132 Ibid, s 56(1).
133 Ibid, s 56(2).
134 Ibid, s 58.
135 Act LIII of 1994 on the Judicial Enforcement Proceedings (Enforcement Act), s 16(d).
136 Hungarian Arbitration Act, s 59.
10.2.2 If there is an international treaty under which the award may be enforced, the competent court for enforcement of the foreign award is the same as described above, i.e. the county court where the respondent has its seat or place of business or where it has sellable assets or in the case of foreign entities the seat of the Hungarian branch or commercial representation. The party applying for enforcement must supply the original award and the original arbitration agreement or certified copies of these documents, and upon the request of the court must attach a Hungarian translation of such documents if issued in a foreign language.

10.2.3 The rules of the treaty pursuant to which the foreign award is enforceable in Hungary shall be applied by the courts to the enforcement (or to the refusal of the enforcement) of the award. Any questions which are not handled by the applicable treaty shall be governed by the local law on enforcement.

11. Special provisions and considerations

11.1 Consumers
11.1.1 There are no special provisions regarding arbitral proceedings involving consumers. Nevertheless, it should be noted that an arbitration clause sought to be applied by the business party of a consumer contract, where the contract has not been individually negotiated but is incorporated into the general terms and conditions, may be null and void, if such clause is unfair. This is the case if it is contrary to the requirements of good faith, or if it causes significant and unjustifiable imbalance of the parties’ rights and obligations arising under the contract. Nullity may only be referred to for the benefit of the consumer.

11.2 Employment law
11.2.1 According to the Hungarian Arbitration Act, no arbitration may take place in relation to employment issues.

12. Concluding thoughts and themes

12.1.1 Arbitration has a long tradition in Hungary but until the change of regime in 1990 it was not a popular method of dispute resolution and had no comprehensive legal

---

137 Enforcement Act, s 16(d).
138 Act IV of 1959 on the Civil Code (Civil Code), s 209/A(2).
139 Civil Code, s 209(1).
140 Hungarian Arbitration Act, s 4.
framework. The previous legal system did not recognise ad hoc arbitration and only foreign trade disputes could be arbitrated in Hungary.

12.1.2 The Hungarian Arbitration Act, which is based on the Model Law (1985) now provides a modern framework for arbitration and ensures the autonomy of the parties and the arbitration process. In accordance with the Hungarian Arbitration Act, new permanent arbitral institutions have been established to deal with general and specific issues (e.g. e-commerce, stock and commodity exchange disputes). The most popular permanent arbitral institution in Hungary is the Court of Arbitration, which is used by both Hungarian and international companies.

13. Contacts

Ormai és Társai CMS Cameron McKenna LLP
YBL Palace
Károlyi Mihály utca 12
1053 Budapest
Hungary

Zsolt Okányi
T +36 1 48348 37
E zsolt.okanyi@cms-cmck.com

Péter Bibók
T +36 1 48348 14
E peter.bibok@cms-cmck.com
# Table of Contents

1. **Overview** 421

2. **Scope of application and general provisions of the Indian Arbitration Act** 422

3. **The arbitration agreement** 423  
   3.1 Definitions 423  
   3.2 Formal requirements 424  
   3.3 Special tests and requirements of the jurisdiction 425  
   3.4 Separability 426  
   3.5 Legal consequences of a binding arbitration agreement 426

4. **Composition of the arbitral tribunal** 427  
   4.1 Constitution of the arbitral tribunal 427  
   4.2 Challenge of arbitrators 428  
   4.3 Responsibilities of the arbitrators 430  
   4.4 Arbitrator fees 431

5. **Jurisdiction of the arbitral tribunal** 431  
   5.1 Competence to rule on jurisdiction 431  
   5.2 Power to order interim measures 432

6. **Conduct of proceedings** 433  
   6.1 Commencement of arbitral proceedings 433  
   6.2 General procedural principles 433  
   6.3 Seat and language of arbitration 434  
   6.4 Multi-party issues 435  
   6.5 Oral hearings and written proceedings 435  
   6.6 Default by one of the parties 437  
   6.7 Evidence generally 438  
   6.8 Appointment of experts 438  
   6.9 Confidentiality 439  
   6.10 Court assistance in taking evidence 439
### 7. Making of the award and termination of proceedings

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1</td>
<td>Choice of law</td>
<td>440</td>
</tr>
<tr>
<td>7.2</td>
<td>Timing, form, content and notification of the award</td>
<td>441</td>
</tr>
<tr>
<td>7.3</td>
<td>Settlement</td>
<td>443</td>
</tr>
<tr>
<td>7.4</td>
<td>Power to award interest and costs</td>
<td>445</td>
</tr>
<tr>
<td>7.5</td>
<td>Termination of the arbitral proceedings</td>
<td>445</td>
</tr>
<tr>
<td>7.6</td>
<td>Effect of the award</td>
<td>447</td>
</tr>
<tr>
<td>7.7</td>
<td>Correction, clarification and issue of a supplemental award</td>
<td>447</td>
</tr>
</tbody>
</table>

### 8. Role of the courts

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.1</td>
<td>Jurisdiction of the courts</td>
<td>449</td>
</tr>
<tr>
<td>8.2</td>
<td>The extent of court interference</td>
<td>449</td>
</tr>
</tbody>
</table>

### 9. Challenging and appealing an award through the courts

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1</td>
<td>Challenge to enforcement of domestic and foreign awards</td>
<td>450</td>
</tr>
<tr>
<td>9.2</td>
<td>Appeals</td>
<td>452</td>
</tr>
</tbody>
</table>

### 10. Recognition and enforcement of award

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.1</td>
<td>Domestic awards</td>
<td>453</td>
</tr>
<tr>
<td>10.2</td>
<td>Foreign awards</td>
<td>453</td>
</tr>
</tbody>
</table>

### 11. Special provisions and consideration

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>456</td>
</tr>
</tbody>
</table>

### 12. Contacts

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>457</td>
</tr>
</tbody>
</table>
1. Overview

1.1.1 The Arbitration and Conciliation Act 1996 (Indian Arbitration Act) came into force on 22 August 1996 and is deemed to have effect from 25 January 1996.\(^1\)

1.1.2 The Indian Arbitration Act is based on the Model Law (1985) and was the result of recommendations for reform, particularly concerning improving the efficiency of the arbitral process.\(^2\)

1.1.3 Until the Indian Arbitration Act, the law governing arbitration in India consisted of three statutes: the Arbitration (Protocol and Convention) Act 1937 (1937 Act); the Arbitration Act 1940 (1940 Act); and the Foreign Awards (Recognition and Enforcement) Act 1961 (1961 Act).

1.1.4 The provisions of the 1940 Act were comparable in their content to those of the English Arbitration Act 1934. The 1961 Act implemented the New York Convention and, along with the 1937 Act, was designed to enforce foreign awards.

1.1.5 Historically, the 1940 Act was heavily criticised due to the intervention of the Indian courts, which was required during the arbitral proceedings when an arbitral tribunal needed a time extension when drafting the award and during the enforcement stage.

1.1.6 In addition, national institutions criticised the operation of the 1940 Act, including the Public Accounts Committee of Lok Sabha\(^3\) and the highest court in India – the Indian Supreme Court (Supreme Court) – which observed that the law of arbitration must be “simple, less technical and more responsible to the actual reality of the situations … [and] … responsive to the canons of justice and fair play.”\(^4\)

1.1.7 As a result, the Indian Law Commission and the Indian Legislature considered revising the arbitration legislation. A proposal was mooted on 27 July 1977 by the Secretary of the Department of Legal Affairs stating that the Indian government sought to revise the 1940 Act with a view to preventing the enormous delay and disproportionate costs in arbitral proceedings. This resulted in the 76th Report by the Law Commission of India which, along with the Model Law (1985) and the

---

\(^1\) M/S Fuerst Day Lawson Ltd v Jindal Exports Ltd [2001] SCC(6) 356.


observations of the Supreme Court at paragraph 1.1.6 above, were the primary factors leading to the enactment of the Indian Arbitration Act.

1.1.8 The Indian Arbitration Act sought to achieve the following main objectives:
— to comprehensively cover international and domestic arbitration and conciliation;
— to make provision for an arbitral process which is fair, efficient and capable of meeting the needs of each arbitral proceeding;
— to ensure that the arbitral tribunal gives reasons for its award;
— to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
— to minimise the supervisory role of the Indian courts in the arbitral process;
— to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
— to provide that every final award is enforced in the same manner as if it were a decree of the court;
— to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an award rendered by an arbitral tribunal; and
— to provide that every award made in a country that is party to an international convention to which India is also a signatory will be enforceable as a foreign award.

1.1.9 The objectives listed in paragraph 1.1.8 above clearly indicate the legislative intent to make arbitral proceedings more efficient and result-oriented. To achieve those objectives, and to encourage the use of arbitration in all civil disputes at family, commercial, domestic and international law levels, Section 89 was inserted into the Civil Procedure Code 1908 (CCP) by the Civil Procedure Code (Amendment) Act 1999. Its aim is to promote alternative methods of dispute resolution by requiring the courts to consider the possibility of settlement through such methods at any stage of legal proceedings.

2. Scope of application and general provisions of the Indian Arbitration Act

2.1.1 The Indian Arbitration Act covers both domestic and international arbitrations (i.e. where at least one party is not an Indian national), as well as mediation and conciliation.
2.1.2 The Indian Arbitration Act comprises four parts and three schedules, as follows:
— Part I: general provisions on arbitration (General Provisions);
— Part II: enforcement of certain foreign awards (Chapter I of Part II of the Indian Arbitration Act deals with New York Convention awards and Chapter II covers awards under the 1927 Geneva Convention);
— Part III: conciliation;
— Part IV: supplementary provisions;
— First Schedule: New York Convention;\(^5\)
— Second Schedule: 1923 Geneva Convention;\(^6\) and
— Third Schedule: 1927 Geneva Convention.\(^7\)

2.1.3 Accordingly, the Indian Arbitration Act puts domestic awards and foreign awards in two different and distinct compartments, subject to certain overlapping provisions.

2.1.4 The General Provisions apply to all other parts and chapters of the Indian Arbitration Act, unless it is expressly stated otherwise. For example, Part II provides a separate definition of “arbitral award” and contains separate provisions for the enforcement of foreign awards. In addition, if the arbitral proceedings are seated outside of India, all or some of the General Provisions may be excluded by the express or implied agreement of the parties. However, if no such exclusion is agreed, the General Provisions will apply to the arbitration and it will not be open for the parties to argue that Part I of the Indian Arbitration Act is not applicable to the arbitration.\(^8\)

3. The arbitration agreement

3.1 Definitions
3.1.1 The Indian Arbitration Act defines “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 otherwise.\(^9\)

\(^5\) Indian Arbitration Act, s 44.
\(^6\) Ibid, s 53(a).
\(^7\) Ibid, s 53(b).
\(^9\) Indian Arbitration Act, s 7(1).
3.2 Formal requirements

3.2.1 The arbitration agreement must be in writing and may take the form of an arbitration clause in a contract or as a separate agreement. A document containing an arbitration clause may also be adopted by way of reference through a written agreement of the parties.

3.2.2 An arbitration agreement is deemed to be in writing if it is contained in:
— a document signed by the parties;
— an exchange of letters, telex, telegrams or other means of telecommunication providing a record of agreement; or
— an exchange of submissions in which the existence of the agreement is alleged by one party and not denied by the other.

3.2.3 The intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement in which it is contained. If the terms of the agreement clearly indicate the parties’ intention to refer disputes between them to an arbitral tribunal for adjudication and a willingness to be bound by the decision of that arbitral tribunal on such disputes, it shall constitute an arbitration agreement.

3.2.4 While there is no specific form for an arbitration agreement, the words used should express a determination and obligation for arbitration. A mere possibility of the parties agreeing to arbitrate in the future – rather than an obligation to refer future disputes to arbitration – will not constitute a valid and binding arbitration agreement.

3.2.5 Furthermore, even if the words “arbitration”, “arbitral tribunal” or “arbitrator” are not used in a clause relating to the settlement of disputes, it does not detract from that clause being construed as an arbitration agreement if it contains the following attributes:
— the agreement is in writing;
— the parties have agreed to refer any disputes (present or future) between them to the decision of a private tribunal;

---

10 Ibid, s 7(2) and 7(3).
11 Ibid, s 7(5).
12 Ibid, s 7(4).
— the arbitral tribunal is empowered to adjudicate upon disputes in an impartial manner, giving the parties the opportunity to put forward their respective cases before the arbitral tribunal; and
— the parties agree that the decision of the arbitral tribunal is binding.\textsuperscript{14}

3.2.6 However, where a clause relating to the settlement of disputes specifically excludes any of the attributes stated in paragraph 3.2.5 above, or contains anything that detracts from an arbitration agreement, it will not be considered to be an arbitration agreement. For example, a clause shall not be considered an arbitration agreement where it:
— permits an authority to decide a dispute without a hearing;
— requires the authority to act in the interests of only one of the parties;
— provides that the decision of the authority will not be final and binding on the parties; or
— provides that if either party is not satisfied with the decision of the authority they may file a civil suit seeking relief.\textsuperscript{15}

3.3 Special tests and requirements of the jurisdiction
3.3.1 The Indian Arbitration Act does not specifically exclude any category of dispute as being non-arbitrable. However, an award will be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws currently in force, or if the award conflicts with Indian public policy.\textsuperscript{16}

3.3.2 Where a dispute is non-arbitrable, the court where a suit is pending will refuse to refer the parties to arbitration, even if the parties have agreed upon arbitration as the forum for settlement of that dispute. Disputes that are non-arbitrable include:
— disputes relating to rights and liabilities which give rise to, or arise out of, criminal offences;
— matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;
— guardianship matters;
— insolvency and winding up matters;
— testamentary matters (grant of probate, letters of administration and succession certificate); and
— eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and where specified courts are conferred jurisdiction to grant an eviction or decide such matters.

\textsuperscript{14} Ibid.
\textsuperscript{15} Jindal Exports Ltd v Fuerst Day Lawson Ltd (2011) 8 SCC 333.
\textsuperscript{16} Indian Arbitration Act, s 34(2)(b) and 48(2).
3.3.3 The cases referred to in paragraph 3.3.2 above relate to actions in rem (i.e. actions that deal with a right exercisable against the world at large), as contrasted from a right in personam (which is an interest protected solely against specific individuals). Generally, all disputes relating to rights in personam are considered to be arbitrable and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals. They are therefore considered unsuitable for private arbitration. There are, however, exceptions to this rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

3.4 Separability
3.4.1 Under the Indian Arbitration Act, the arbitration clause is separable from other clauses of an agreement and constitutes an agreement by itself. The Supreme Court has also observed that an arbitration clause is part of a contract and that, being a collateral term, it will survive after the contract in which it is contained has come to an end. This concept of “separability” is now widely accepted.

3.4.2 Thus the decision by an arbitral tribunal that a contract is null and void shall not result in the invalidity of the arbitration clause contained within that contract, provided that such clause constitutes a valid arbitration agreement. An arbitration clause in a contract shall be treated as an independent agreement between the parties and will be enforced as such.

3.5 Legal consequences of a binding arbitration agreement
3.5.1 It is settled law that where, in consequence of an arbitration agreement between parties, any act is done to further the transaction or to abide by the terms of the arbitration agreement, the necessary inferences are that a dispute regarding such a matter must be referred to arbitration and that the party who has carried out the act in question cannot renge from the dispute being submitted to arbitral proceedings. Thus as far as the provision of Section 7 of the Indian Arbitration Act is concerned, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Furthermore, an arbitration agreement is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement. Alternatively, an arbitration agreement is considered in writing if the parties exchange a statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

---

17 Firm Ashok Traders and Another v Gurumukh Das Saluja and Others [2004] AIR SC 1433.
19 Dr. S.Z. Jafrey v Modern Industrial Enterprises, Indore, 2006 (3) Arb. LR 424 (MP).
3.5.2 It is an obligation of each judicial authority to refer the parties to arbitration if an action brought before it is covered by an arbitration agreement. However, this obligation is conditional upon a request being made by either of the parties for the court to refer the dispute to arbitration. Such a request must be made before the first statement of defence of that dispute has been submitted to the court.\footnote{Indian Arbitration Act, s 8(1).} Where a party fails to make a request within the specified time frame, they will be deemed to have waived their right to invoke the arbitration agreement. Whether and what the court considers to be a statement of defence by a party on the substance of a dispute that results in proper jurisdiction of the court is to be determined on the basis of the facts of each case.\footnote{Booz Allen and Hamilton Inc v SBI Home Finance Ltd and Ors [2011] SCC(5) 532 (where the filing of detailed affidavit opposing interim relief was not considered to be a submission to the jurisdiction of the court).}

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 Chapter III of Part I of the Indian Arbitration Act relates to the composition of the arbitral tribunal. The parties to an arbitration agreement are free to determine the number of arbitrators, provided that this does not result in an even number of arbitrators.\footnote{Indian Arbitration Act, s 10(1).} In the event that the parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of one arbitrator.\footnote{Ibid, s 10(2).}

4.1.2 A person of any nationality can be an arbitrator, unless the parties have made an agreement to the contrary.\footnote{Ibid, s 11(1).} The parties are also free to agree on a procedure for appointing an arbitrator, subject to the provisions set out in paragraphs 4.1.5 and 4.1.6 below.\footnote{Ibid, s 11(2).} In the absence of an agreement between the parties, the Indian Arbitration Act sets out the procedure to apply for appointing a sole arbitrator.\footnote{Ibid, s 11(3).} Where the arbitral tribunal is to consist of three arbitrators and the parties fail to agree on a procedure for their appointment, each party shall nominate one arbitrator. The two party-appointed arbitrators shall then appoint the third arbitrator, who will act as presiding arbitrator (and not as an umpire).\footnote{Ibid, s 11(5).}
4.1.3 In the event that one party fails to appoint an arbitrator within 30 days of a request to do so from the other party, or the two arbitrators fail to appoint the third arbitrator within 30 days from the date of their appointment or the arbitral institution fails to appoint an arbitrator under a function entrusted to it, a party can approach the chief justice of the High Court of the state which has the jurisdiction to entertain the petition (or any person or institution designated by that justice) or, in international commercial arbitrations, the Chief Justice of India (or any person or institution designated by the Chief Justice) to appoint an arbitrator.\(^\text{28}\)

4.1.4 If two arbitrators are appointed on two different dates, the 30 day period to appoint the third arbitrator runs from the date on which the latter was appointed.\(^\text{29}\) However, it should be noted that this does not prevent a party from appointing an arbitrator – or prevent two party-appointed arbitrators from appointing a third arbitrator – after the 30 day time limit has elapsed. It merely gives a right to the party to approach the Chief Justice of the relevant High Court in domestic arbitrations and the Chief Justice of India in case of international commercial arbitrations.

4.1.5 However, if an alternative method for appointment is provided for in an arbitration agreement, the parties must follow this method instead of approaching the concerned Chief Justice.\(^\text{30}\)

4.1.6 It is settled law that a court cannot interpose and interdict the appointment of an arbitrator that the parties have chosen under the terms of an agreement, unless the legal misconduct, fraud or disqualification of that arbitrator has been pleaded and proven.\(^\text{31}\) Consequently, an arbitrator that has been appointed by the parties cannot have its authority revoked by the parties acting of their own will without a just and sufficient cause for such revocation.\(^\text{32}\)

### 4.2 Challenge of arbitrators

4.2.1 A person that has been approached to be an arbitrator is under an obligation to disclose to the parties, in writing, any circumstances that may give rise to justifiable doubts as to independence or impartiality.\(^\text{33}\) This obligation applies when the

\(^{28}\) Ibid, s 11(4).

\(^{29}\) Ibid, s 11(4) to s 11(6).

\(^{30}\) Ibid, s 11(6).


\(^{32}\) Ibid.

\(^{33}\) Indian Arbitration Act, s 12(1).
arbitrator is appointed and throughout the arbitral proceedings.\textsuperscript{34} Appointment of an arbitrator can be challenged if there are justifiable doubts as to that arbitrator’s independence or impartiality, or if the arbitrator does not possess the qualifications agreed to by the parties.\textsuperscript{35} However, such a challenge can be made only for reasons which the party making the challenge becomes aware of after the appointment has been made.\textsuperscript{36}

4.2.2 The parties are free to agree on a procedure to challenge the arbitrator(s), provided that the reasons for the challenge are discovered after an arbitrator has been appointed.\textsuperscript{37} Failing any agreement, the party who makes a challenge must, within 15 days after becoming aware of the constitution of the arbitral tribunal, or of any of the circumstances mentioned in paragraph 4.2.1 above, send a written statement containing the reasons for the challenge to the arbitral tribunal.\textsuperscript{38} Unless the challenged arbitrator withdraws or the other party to the arbitration agrees to the challenge, the arbitral tribunal shall decide on the success of the challenge.\textsuperscript{39} If the challenge is not successful, the arbitral tribunal shall continue with the arbitral proceedings and make an award. The party who made the unsuccessful challenge can then seek to set aside that award under Section 34 of the Indian Arbitration Act.

4.2.3 Sections 14 and 15 of the Indian Arbitration Act enumerate the circumstances in which the mandate of an arbitrator shall be terminated. The mandate of an arbitrator shall terminate if the arbitrator becomes \textit{de jure} or \textit{de facto} unable to perform the required functions or, for other reasons, acts with undue delay and withdraws from the office, or the parties agree to terminate the arbitrator’s mandate.\textsuperscript{40} Unless the parties have agreed otherwise, they may also apply to the court for the termination of an arbitrator’s mandate if any controversy arises between them in relation to the aforementioned grounds.

4.2.4 If an arbitrator withdraws from the office,\textsuperscript{41} or the parties agree to the termination of the arbitrator’s mandate,\textsuperscript{42} it is not deemed to constitute grounds for challenging the validity of the arbitrator’s appointment.
4.2.5 Section 15 of the Indian Arbitration Act specifies additional circumstances in which the mandate of an arbitrator shall be terminated (which include: (a) where the arbitrator withdraws from office for any reason; or (b) by or pursuant to agreement of the parties) and also provides for the substitution of an arbitrator. A substitute arbitrator must be appointed in accordance with the same procedure used to appoint the original arbitrator.43

4.2.6 The Indian legislature has repeatedly emphasised the necessity of adhering to the terms of an agreement between the parties in relation to the appointment of arbitrators and the procedure to be followed for such appointments. As stated in paragraph 4.2.5 above, even a substitute arbitrator is required to be appointed in accordance with the procedure used to appoint the original arbitrator(s). Further, in Section 15 of the Indian Arbitration Act, the term “rules” is not confined to statutory rules or the rules framed by a competent authority in exercise of the power delegated to it by legislation, but also includes the terms of an agreement entered into between the parties.

4.3 Responsibilities of the arbitrators

4.3.1 The Indian Arbitration Act requires that the arbitrators perform their functions honestly and impartially and adhere to the principles of natural justice by providing the parties with an equal opportunity to present their case and giving the parties proper notice of hearings.44

4.3.2 Once an arbitrator has been appointed and arbitral proceedings have commenced, that arbitrator should not act with a particular interest towards the appointing party or act in a manner that could be construed as indicative of partiality or unfairness.

4.3.3 The arbitral tribunal must only base its conclusions upon the material submitted before it by the parties and must not act on personal knowledge. Evidence of unfairness and/or unreasonableness by the arbitrators will render any decision or award given by the arbitral tribunal questionable.45

4.3.4 In general, the arbitrators must act jointly and must all be present at every meeting. However, the parties can agree to dispense with the regular attendance of all the arbitrators at certain meetings, except where the arbitral tribunal is examining a party or witness. It would amount to misconduct for an arbitrator to examine a party or witness in the absence of the other arbitrators.46

43 Ibid, s 15(2).
44 Ibid, s 18.
45 Payyavula Vengamma v Payyavula Kesanna, AIR 1953 SC 21.
46 Ibid.
4.4 Arbitrator fees

4.4.1 There is no regulated fee structure for arbitrators in an ad hoc arbitration. In practice, the arbitrator’s fees are decided by the arbitrator, with the consent of the parties. The fee varies from approximately INR 1,000.00 to INR 50,000.00 per hearing for an arbitrator, depending upon the professional standing of the arbitrator and the size of the claim.⁴⁷ The number of hearings required and the cost of the arbitral venue also vary widely.

4.4.2 In contrast, most institutional arbitration bodies in India, such as the Indian Council of Arbitration (ICA) or the Construction Industry Arbitration Council (CIAC), have their own schedules of arbitrators’ fees and administrative fees, based on the amounts claimed. The ICA and CIAC also charge a nominal, non-refundable registration fee on the basis of the claim amount. For example, an ICA arbitrator’s fees vary from INR 30,000.00 to INR 315,000.00 for claim amounts up to INR 10,000,000.00, while administrative fees vary from INR 15,000.00 to INR 160,000.00 for claim amounts up to INR 10,000,000.00. For the CIAC, fees vary from INR 5,000.00 to INR 260,000.00 per arbitrator for claim amounts up to INR 100,000,000.00, and administrative fees vary from INR 2,750.00 to INR 62,000.00 for claim amounts up to INR 100,000,000.00.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 Under the Indian Arbitration Act an arbitral tribunal is competent to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreements.⁴⁸ A decision by the arbitral tribunal that a contract is null and void shall not result in the invalidity of the arbitration clause contained therein (see further section 3.4 above on separability).

5.1.2 A ruling concerning the arbitral tribunal’s jurisdiction may be appealed under a procedure set out in Section 37 of the Indian Arbitration Act. Regardless of such proceedings, if the arbitral tribunal holds that it has jurisdiction then it may carry on with the arbitral proceedings and make an award which could be subject to challenge only under the procedure set out in Section 34 of the Indian Arbitration Act.

---

⁴⁷ "Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution", October 2009, Center on Democracy, Development, and The Rule of Law Freeman Spogli Institute for International Studies.

⁴⁸ Indian Arbitration Act, s 16(1).
5.1.3 Whilst the arbitral tribunal has the power to decide whether there is a valid arbitration agreement between the parties and the power to rule on its own jurisdiction, the existence of these powers do not take away the right of the Indian courts to examine whether the arbitral agreement is fraudulent, or was entered into under undue influence, before a decision to refer it to an arbitral tribunal is made.\(^{49}\)

5.2 Power to order interim measures

5.2.1 The arbitral tribunal may order interim measures in arbitral proceedings, unless such power is excluded by an agreement between the parties.\(^{50}\) This power is only legislatively recognised in connection with interim measures and not otherwise.

5.2.2 The list of interim measures available is, by its very nature, non-exhaustive. Such measures include, for example, orders for preservation, custody, sale and protection of goods, protection of trade secrets, maintenance of machinery, works and continuation of certain works. A common characteristic of all interim measures is the restricted circumstances in which they may be granted (see paragraph 5.2.4 below).

5.2.3 A party to arbitral proceedings is able to appeal against an order granting or refusing an interim measure.\(^{51}\) However, the Indian Arbitration Act does not empower the arbitral tribunal to enforce orders granting interim measures, nor does it provide for judicial enforcement of such orders. Nevertheless, if a court upholds the order in an appeal, the judicial enforcement of that order will be ensured.\(^{52}\)

5.2.4 The interim measures that the arbitral tribunal can grant are slightly different from those which a court may grant under Section 9 of the Indian Arbitration Act, although there is some overlap. Nevertheless, the court’s power to grant an interim measure has far wider scope than that of an arbitral tribunal, which is restricted by both the subject matter of the dispute and the agreement of the parties.

5.2.5 The arbitral tribunal’s power to grant interim measures can only be exercised against a party to the arbitral proceedings and a third party whose rights may be affected by way of such interim measures cannot be included as a party to the proceedings. While exercising the power, the arbitral tribunal is not bound strictly

\(^{49}\) SBP and Co v Patel Engineering Ltd and Another (2005) SCC(8) 618.

\(^{50}\) Indian Arbitration Act, s 17(1).

\(^{51}\) Ibid, s 37(2).

\(^{52}\) Ibid.
by the CCP or the Indian Evidence Act 1872 (*IEA 1872*) and the arbitral tribunal enjoys flexibility to adopt those rules of procedure which may be most convenient or cost effective. However, the broad principles underlying these enactments are, nevertheless, kept in mind.

6. **Conduct of proceedings**

6.1 **Commencement of arbitral proceedings**

6.1.1 Where the arbitration agreement is silent about the date of commencement of the arbitral proceedings, the proceedings will be deemed to have commenced on the date that the respondent received the request for arbitration.\(^{53}\) The request should clearly indicate that the claimant seeks to submit the dispute to arbitration. A request is deemed to have been received if it has been delivered to the respondent personally, or at their place of business, habitual residence or mailing address or, alternatively, the respondent’s last known place of business, habitual residence or mailing address.\(^{54}\)

6.1.2 Section 21 of the Indian Arbitration Act gives freedom to the parties to agree on the date of commencement of arbitral proceedings. For instance, in the case of an arbitration administered by an arbitral institution, the parties may agree to abide by the rules of that arbitral institution for determining the point of time at which the arbitral proceedings can be deemed to have commenced.

6.1.3 In situations that involve a consideration of the limitation period for bringing arbitral proceedings, the relevant date for commencement of arbitral proceedings shall be the date that the request for arbitration is received by the proposed respondent.\(^{55}\)

6.2 **General procedural principles**

6.2.1 As arbitral autonomy is one of the important features of the Indian Arbitration Act, the parties are able, through agreement, to determine the manner of – and the procedure for – conducting the arbitral proceedings.\(^{56}\) This can be achieved in several ways, such as agreeing on a set of rules of procedure to use, or by using the standard rules of an arbitral institution, with or without modification.

---


\(^{54}\) *Ibid*, s 3(1).

\(^{55}\) *Ibid*, s 43(2).

\(^{56}\) *Ibid*, s 19(2).
6.2.2 If there is no agreement between the parties on the rules of procedure then the arbitral tribunal is authorised to conduct the proceedings in a manner it considers appropriate.\textsuperscript{57} This includes having the power to determine the admissibility, relevance, materiality and weight of any evidence.

6.2.3 In addition, the fact that the arbitral tribunal benefits from an express exemption from the provisions of the CCP and the IEA 1872 further demonstrates its autonomy to determine the procedure of the arbitration.\textsuperscript{58} The Supreme Court has observed that the provisions of the CCP must not be applied in arbitral proceedings where the procedure is likely to hinder the efficiency of the arbitral proceedings but, equally, the CCP is to be used where it can aid the delivery of justice in the arbitral proceedings.\textsuperscript{59}

6.2.4 Where the arbitration is administered by an arbitral institution, the arbitral proceedings are governed by the rules of that arbitral institution. As a result, those rules become a part of the arbitration clause by implication.\textsuperscript{60}

6.3 Seat and language of arbitration

6.3.1 The seat of arbitration can be fixed by the parties themselves.\textsuperscript{61} If there is no such agreement, the arbitral tribunal has the freedom to determine the seat of arbitration. However, this discretion is not absolute. The arbitral tribunal must keep in mind the circumstances of the particular dispute and the convenience of the parties.

6.3.2 Normally, the appropriate courts of the seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of the arbitration. However, the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement.\textsuperscript{62} Thus if the law governing the arbitration agreement is Indian, it follows that Indian courts would have jurisdiction in respect of any and all disputes arising out the arbitration agreement.

6.3.3 The parties are free to agree upon the language or languages to be used in the arbitral proceedings.\textsuperscript{63} In the absence of such an agreement, the arbitral tribunal

\begin{itemize}
\item \textsuperscript{57} Ibid, s 19(3).
\item \textsuperscript{58} Ibid, s 19(1).
\item \textsuperscript{59} Mcdill And Company Pvt. Ltd v Gouri Shankar Sarda And Others [1991] SCC(2) 548.
\item \textsuperscript{60} Indian Arbitration Act, s 2(8).
\item \textsuperscript{61} Ibid, s 20(1).
\item \textsuperscript{62} National Thermal Power Corporation v Singer Company and Ors [1992] SCC(3) 551.
\item \textsuperscript{63} Indian Arbitration Act, s 22(1).
\end{itemize}
will determine the language or languages to be used.\(^{64}\) The agreement of the parties or the determination by the arbitral tribunal on the language of the arbitral proceedings shall, unless otherwise specified, apply to a statement of claim, written statements, hearings, the award or decision and any other communications made by the arbitral tribunal.\(^{65}\)

6.3.4 The arbitral tribunal may also order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.\(^{66}\)

6.4 Multi-party issues
6.4.1 A person who is not a party to an arbitration agreement cannot claim any right before the arbitral tribunal and cannot be joined as a party.\(^ {67}\)

6.4.2 However, a party to the arbitration agreement may be joined to arbitral proceedings on the basis of the principles laid down in the CCP, which provides that only a necessary or proper party may be added.\(^ {68}\) A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made, but whose presence is necessary for a complete and final decision on the question involved in the arbitral proceedings. It will however depend strictly on the facts and circumstances of a particular case.

6.5 Oral hearings and written proceedings
6.5.1 The time frame for filing the statement of claim and defence can be agreed upon by the parties. Failing an agreement between the parties, the arbitral tribunal shall determine the deadline for these documents.\(^ {69}\) The parties are also free to agree on the required elements of such statements. In the event that the parties have not reached an agreement, a statement of claim is required to provide:

— all of the facts supporting the claimant’s claim;
— the points at issue; and
— the relief or remedy sought.\(^ {70}\)

\(^{64}\) Ibid, s 22(2).
\(^{65}\) Ibid, s 22(3).
\(^{66}\) Ibid, s 22(4).
\(^{68}\) CCP, Order I, Rule 10.
\(^{69}\) Indian Arbitration Act, s 23.
\(^{70}\) Ibid, s 23(1).
6.5.2 The respondent’s statement of defence is required to state the defence in respect of the particulars of claim and may include any counterclaim.\textsuperscript{71}

6.5.3 The Indian Arbitration Act only states the core elements of the statement of claim and the respondent’s defence that are required to establish the dispute on which the arbitral tribunal is to render its award. The parties are permitted – and are indeed expected – to submit relevant supporting documents with their statements, or refer to relevant supporting documents and/or other evidence that they propose to submit.\textsuperscript{72} The arbitral tribunal is also free to ask the parties to submit additional submissions. The Indian Arbitration Act does not specify that the statement of claim and the defence must be in writing, although in practice both would generally be in written form. The word “claim” also includes a “counterclaim” and likewise, the word “defence” includes “defence to a counterclaim”. Accordingly, Section 23 of the Indian Arbitration Act applies \textit{mutatis mutandis} to counterclaims and defence to counterclaims.

6.5.4 As regards to supplementing and/or amending the claim or defence, the arbitral tribunal can reject a belated amendment or supplement in cases where it is considered inappropriate.\textsuperscript{73} In addition, the amendment or supplement cannot go beyond the terms of the arbitration agreement, as the arbitral tribunal has no discretion to allow such amendments. If a party fails to raise any objection to an amendment or supplement which enlarges the scope of the arbitration agreement and proceeds with the arbitral proceedings, that party is deemed to have consented to the amendment or supplement in question.\textsuperscript{74}

6.5.5 Unless there is an agreement between the parties to the contrary, the arbitral tribunal decides the manner in which oral submissions and evidence are presented during the hearing.\textsuperscript{75} In this respect, the parties are free to determine the method of tendering evidence and/or oral arguments, and whether oral hearings are necessary. Such agreement is binding on the arbitral tribunal. Furthermore, the parties are free to change the agreement at any stage of the arbitral proceedings.

6.5.6 In the absence of an agreement between the parties, the arbitral tribunal has the discretion to decide whether oral hearings – either for the presentation of the evidence, for oral arguments, or both – should be permitted, or whether the

\textsuperscript{71} Ibid, s 23(1).
\textsuperscript{72} Ibid, s 2(2).
\textsuperscript{73} Ibid, s 23(3).
\textsuperscript{74} Ibid, s 4 and 16.
\textsuperscript{75} Ibid, s 24(1).
Arbitral proceedings should be conducted on the basis of documents and other materials only. Moreover, either party can make a request for oral hearings at an appropriate stage of the arbitral proceedings. In these circumstances, the arbitral tribunal is bound to grant such a request, unless there is a specific agreement between the parties not to have such hearings.  

6.5.7 The arbitral tribunal is required to provide the parties with sufficient notice of a hearing or meeting held for the purpose of inspecting documents, goods, or other property. The Indian Arbitration Act also requires that all statements, documents, other information supplied or applications made to the arbitral tribunal by one party to the arbitral proceedings shall be communicated to the other party. In addition, any expert report or document which the arbitral tribunal may rely on in making its award or decision must also be communicated to the parties.

6.6 Default by one of the parties
6.6.1 The Indian Arbitration Act addresses default by a party as follows:
— where the claimant fails, without sufficient cause, to submit a statement of claim in accordance with Section 23(1) of the Indian Arbitration Act, the proceedings will be terminated;
— where the respondent fails to communicate, without sufficient cause, a statement of defence, in accordance with Section 23(1) of the Indian Arbitration Act, the arbitral proceedings shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant; or
— where either of the parties fails to appear at an oral hearing or produce documentary evidence without sufficient cause, the arbitral tribunal has the discretion to continue the arbitral proceedings and make the award on the evidence before it.

6.6.2 The arbitral tribunal has the discretion to decide what constitutes a “sufficient cause”. In relation to the second bullet point of paragraph 6.6.1, a failure to communicate a statement of defence does not amount to an admission by the respondent of the claimant’s allegations. In addition, the provisions set out in

---

76 Ibid, s 24(2).
77 Ibid.
78 Ibid, s 24(3).
79 Ibid.
80 Ibid, s 25(a).
81 Ibid, s 25(b).
82 Ibid, s 25(c).
paragraph 6.6.1 above will not apply where the parties have agreed otherwise.\textsuperscript{83} Furthermore, a civil suit remedy against such an order is not available and the only available remedy may be to file a writ petition challenging the order made under Section 25 of the Indian Arbitration Act.\textsuperscript{84}

6.6.3 An arbitral tribunal may proceed \textit{ex parte} for good cause. There is no mandatory requirement under the Indian Arbitration Act to issue a pre-emptory notice to the parties before proceeding \textit{ex parte}. Where an arbitral tribunal provides notice of a hearing and issues an \textit{ex parte} award in the absence of a party, that party will be unable to set aside the award on the grounds that a specific second notice was not given before the \textit{ex parte} proceedings. It is also not necessary to state a warning in the first notice that the matter would proceed \textit{ex parte} on default in the absence of a party.

6.7 \textbf{Evidence generally}

6.7.1 Under the Indian Arbitration Act, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.\textsuperscript{85} The expression “presentation of the evidence” covers all types of evidence, whereas the expression “oral arguments” covers arguments on both the substance of the dispute and the procedural issues.

6.8 \textbf{Appointment of experts}

6.8.1 The arbitral tribunal is empowered, although not obligated, to appoint experts to report on specific issues.\textsuperscript{86} However, the parties can agree that the arbitral tribunal will not have the power to appoint experts.

6.8.2 The Indian Arbitration Act does not restrict or specify the areas in which the arbitral tribunal may seek the assistance of experts.\textsuperscript{87} Tribunal-appointed experts may only advise the arbitral tribunal on specific issues. The arbitral tribunal is authorised to ask the parties to provide a tribunal-appointed expert with relevant information, or to grant tribunal-appointed experts access to relevant documents, goods, or other property for the inspection of the arbitral tribunal.\textsuperscript{88} The tribunal-appointed expert’s fees and expenses form part of the arbitral tribunal’s award on costs.

\textsuperscript{83} \textit{Ibid}, s 25.
\textsuperscript{84} \textit{Dilnawaz Kohinoory And Ors v Boman Kohinoor And Ors} AIR 1999 Bom 219.
\textsuperscript{85} \textit{Indian Arbitration Act}, s 19(4).
\textsuperscript{86} \textit{Ibid}, s 26(1).
\textsuperscript{87} \textit{Ibid}, s 26(1)(a).
\textsuperscript{88} \textit{Ibid}, s 26(1)(b).
6.8.3 Unless otherwise agreed by the parties, a tribunal-appointed expert may, at either an arbitral tribunal or a party’s request, participate in an oral hearing. In such an oral hearing, the parties will have the opportunity to put questions to the tribunal-appointed expert and also produce their expert witnesses to testify on the points at issue.

6.8.4 Subject to an agreement stating otherwise, the parties may request to examine the documents, goods or other property relied upon by a tribunal-appointed expert in any report. This is based on the principle that an expert can only effectively arrive at a finding on the basis of material that has been disclosed to the parties.

6.8.5 The arbitral tribunal must reach its own decision and cannot delegate this responsibility to an expert, legal adviser or technical assessor which it has instructed.

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

6.9.2 In India, the IEA 1872 legislation governs issues of confidentiality. Under the IEA, no barrister, attorney or pleader shall be permitted to disclose any communication, advice or contents of a document made available in the course and for the purpose of employment, unless with the client’s express consent.

6.10 Court assistance in taking evidence
6.10.1 Section 27 of the Indian Arbitration Act contains a procedure for seeking court assistance in the taking of evidence (including the production of documents and the inspection of property). Assistance may be sought either by the arbitral tribunal itself, or by one of the parties with the prior approval of the arbitral tribunal.

6.10.2 The power to request the court to assist the arbitral tribunal in the taking of evidence is a discretionary one. The court may, exercising its discretion, execute the request for evidence by ordering a witness or expert to provide evidence to the arbitral tribunal directly. The court’s assistance in this regard may be necessary.

---

89 Ibid, s 26(2).
90 See generally Ibid, s 18.
91 Ibid, s 26(3).
92 IEA 1872, s 126.
93 Ibid.
94 Indian Arbitration Act, s 27(3).
because the arbitral tribunal does not have the power to summon a witness or an expert. However, Section 27 of the Indian Arbitration Act has no application where a party to the arbitration agreement must be summoned to appear before the arbitral tribunal in order to participate in the arbitral proceedings and state its defence.

6.10.3 An order by the arbitral tribunal rejecting the application of Section 27 of the Indian Arbitration Act is not an award, interim order or final order.

7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 For domestic arbitrations in India, the applicable law is the law of India. This is a mandatory requirement under the Indian Arbitration Act and cannot be contracted out of by the parties.95

7.1.2 For international arbitrations with a seat in India, the arbitral tribunal shall follow the laws the parties have agreed to apply to the substance of their dispute.96 The designated law or legal system applying to the substance of the dispute is to be construed, unless expressly agreed otherwise, as referring to the substantive law of that country and not its conflict of laws rules.97 In the absence of any agreement between the parties as to the applicable law, the arbitral tribunal shall apply the laws that it considers to be appropriate and relevant to the dispute.98

7.1.3 If the parties expressly agree, the arbitral tribunal may make a determination ex aequo et bono, deciding the dispute in light of general notions of fairness, equity and justice as opposed to the strict rule of law.99 Furthermore, the arbitral tribunal may decide the applicable law by using the terms of any contract between the parties, taking into account the usages and trade practices applicable to that contract.100 It is understood that such terms and usages are not in conflict with the mandate of the Indian Arbitration Act, India’s public policy and the law applicable to the substance of the dispute.

---

95 Ibid, s 28(1)(a).
96 Ibid, s 28(1)(b)(i).
97 Ibid, s 28(1)(b)(ii).
98 Ibid, s 28(1)(b)(iii).
99 Ibid, s 28(2).
100 Ibid, s 28(3).
7.1.4 Parties may choose, either expressly or by implication, the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, and in the absence of any contrary indication, there is a presumption that the parties have intended that the proper law of the contract, as well as the law governing the arbitration agreement, to be the same as the law of the seat in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, in the absence of an unmistakable intention to the contrary, such law must govern the arbitration agreement which, though collateral or ancillary inclusion into the main contract, is nevertheless a part of such contract.\textsuperscript{101}

7.1.5 As stated above, the substantive law governing the arbitration determines the validity, effect and interpretation of the arbitration agreement. In the absence of any agreement to the contrary, the arbitral proceedings are conducted in accordance with the law of the seat of the arbitration. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitral proceedings will be conducted in accordance with that law, provided that it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of the arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the seat of arbitration.\textsuperscript{102}

7.1.6 The overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement. The jurisdiction exercised by the courts of the seat of arbitration is merely concurrent, not exclusive, and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement.\textsuperscript{103}

7.2 Timing, form, content and notification of the award
7.2.1 The Indian Arbitration Act does not stipulate a time frame within which the arbitral tribunal is to render its award.

\textsuperscript{101} National Thermal Power Corporation v Singer Company and others (1992) 3 SCC 551.

\textsuperscript{102} Ibid.

\textsuperscript{103} Ibid.
7.2.2 An award must be in writing and signed by the members of the arbitral tribunal. Where the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of the arbitral tribunal will suffice, provided that valid reasons for the omitted signature(s) are made clear. Section 31(2) of the Indian Arbitration Act provides that valid reasons for such an omission may include, among others: the death of an arbitrator, the physical inability of an arbitrator to sign, and an arbitrator’s refusal to sign based on a dissenting position. Although the signatures of the majority of the arbitral tribunal afford finality to the award, non-signature is a formal curable defect.

7.2.3 Under the Indian Arbitration Act, the arbitral tribunal must provide a reasoned award, except where the parties have agreed otherwise or the award is on agreed terms. However, this provision is flexible; it seeks to provide transparency in the decision-making process and accommodate party autonomy. The reasons given by the arbitral tribunal are not required to be as detailed as in a court judgment but should at least indicate the arbitral tribunal’s thought process.

7.2.4 The award should state the location where the arbitration took place and the date on which the arbitral proceedings concluded. The award will be deemed signed at the seat of the arbitration, even if the arbitrators signed at different places and on different dates. The date stated in the award is considered to be the date of the award, even if it is a deemed date. The date of the award is relevant, among other things, in connection with the nature and payment of interest under Section 31(7) of the Indian Arbitration Act and the correction of any errors in the award under Section 33 of the Indian Arbitration Act.

7.2.5 Signed copies of the award should be delivered to each of the parties. The date of receipt of the award has relevance, inter alia, in connection with:
- the correction and interpretation of the award;
- making an additional award under Section 33 of the Indian Arbitration Act;

---

104 Indian Arbitration Act, s 31(1).
105 ibid, s 31(2).
106 ibid.
108 ibid.
109 Delhi Development Authority v Alkaram 1982 (3) DRJ 286.
110 Indian Arbitration Act, s 31(4).
111 ibid.
112 ibid, s 31(5).
— filing an application for setting aside the award under Section 34(2) of the Indian Arbitration Act; and
— enforcing the award under Section 36 of the Indian Arbitration Act.

7.2.6 An arbitral tribunal may make an interim award on any matter on which it can make a final award. An award is also deemed to include an interim award. By its very nature, an interim award does not constitute a final disposition of all matters submitted to the arbitral tribunal to consider. As a result, the interim award does not terminate the arbitral proceedings.

7.2.7 The Supreme Court of India has considered that whether or not an interim award is final will depend upon the form of the award. If the interim award is only intended to have effect until the final award is delivered, it will cease to have effect after the final award is made. If, on the other hand, the interim award is intended to finally determine the rights of the parties, it will have the force of a final award and will therefore be in force even after the final award is delivered.

7.2.8 The Supreme Court has taken a position in support of arbitration and, in regard to awards, has held the following:
— there is a presumption in favour of arbitration and an award;
— a court will presume that the award finally disposes of all the matters in dispute; and
— where an award is made “de praemissis” (that is, of and concerning all matters in dispute referred to the arbitrator), the presumption is that the arbitral tribunal intended to dispose finally of all of the matters in dispute and its award will be final.

7.3 Settlement
7.3.1 Section 30 of the Indian Arbitration Act provides for the means of settlement of arbitral proceedings. Even if the arbitration agreement does not expressly authorise the arbitral tribunal to do so, the arbitral tribunal is required to encourage the parties to settle the dispute and, if so authorised by the parties, to use alternative

113 Ibid, s 31(6).
114 Ibid, s 2(1)(c).
117 Fiza Developers & Inter-Trade (P) Ltd. V. AMCI (I) Pvt. Ltd. & Anr. 2009 (11) SCALE 371.
118 UOI v Jai Narain Misra AIR 1970 SC 753.
119 Ibid.
methods of dispute resolution during the arbitral proceedings, such as mediation and conciliation.\textsuperscript{120}

7.3.2 Upon settlement, the arbitral tribunal is required to terminate the arbitral proceedings.\textsuperscript{121} If requested by the parties, the arbitral tribunal is authorised to record the settlement in the form of an award on agreed terms.\textsuperscript{122}

7.3.3 The arbitral tribunal has the discretion of whether or not to record the settlement. Typically, the arbitral tribunal does record the settlement, but in certain circumstances, such as fraud, unfairness or violation of public policy, the arbitral tribunal may not agree to do so. Any settlement request to the arbitral tribunal must be made by both of the parties. While the parties do not have to make the request simultaneously, it is critical that there is a common will of the parties to settle before the arbitral tribunal.

7.3.4 An award containing terms agreed by the parties must be made in accordance with Section 31 of the Indian Arbitration Act.\textsuperscript{123} Awards on agreed terms or otherwise are no different to each other, except that the award on agreed terms need not be a reasoned one.\textsuperscript{124}

7.3.5 An award on agreed terms has the same status and effect as any other award.\textsuperscript{125} It should be noted that an agreed award it is not a settlement \textit{per se} which is executable, but an award made by a duly constituted arbitral tribunal based on a settlement which is executable.\textsuperscript{126} An award on agreed terms stops the parties from continuing with the arbitral proceedings.

7.3.6 A settlement that has been reached between the parties cannot be challenged on the ground that it was a mistake. If the dispute is settled only in part, the arbitral tribunal shall have the jurisdiction to decide the remaining dispute on merits and make an award in respect of matters not yet settled.\textsuperscript{127}

\textsuperscript{120} Indian Arbitration Act, s 30(1).
\textsuperscript{121} Ibid, s 30(2).
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid, s 30(3).
\textsuperscript{124} Ibid, s 31(3)(b).
\textsuperscript{125} Ibid, s 31(4).
\textsuperscript{126} Shri Ravi Aggarwal v Shri Anil Jagota [2009] MANU DE 4646.
\textsuperscript{127} See Kapila Textile Mills Ltd v Madhava & Co (1963) AIR HP 30.
7.4 **Power to award interest and costs**

7.4.1 In the absence of any agreement to the contrary, the arbitral tribunal maintains full discretion on matters connected with the award of interest. For example, the arbitral tribunal may include interest on the sum awarded by it, at such rate as it deems reasonable on the whole or part amount and for the whole period or any part thereof, between the dates on which the cause of action arose and the date of the award.\(^\text{128}\)

7.4.2 Unless otherwise specified in the award, the awarded sum shall carry interest at the rate of 18 per cent per annum from the date of the award until it is paid.\(^\text{129}\) This provision seeks to discourage litigants from employing delaying tactics in the matter of enforcement of the award.

7.4.3 The parties have a degree of autonomy in relation to costs. The word “costs”, as interpreted within the meaning of the Indian Arbitration Act, means reasonable costs relating to the fees and expenses of the arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the award.\(^\text{130}\) The arbitral tribunal is obligated to specify the elements of the costs payable by the parties.\(^\text{131}\)

7.5 **Termination of the arbitral proceedings**

7.5.1 Section 32 is a mandatory provision of the Indian Arbitration Act and provides for the termination of arbitral proceedings. Section 32 has several purposes, including determining the starting point of the limitation period for instituting court proceedings.

7.5.2 Arbitral proceedings are terminated by a final award or by way of an order of the arbitral tribunal.\(^\text{132}\) The situations in which the arbitral tribunal may order a termination of the arbitral proceedings include:
- withdrawal of the claim by the claimant;
- agreement by the parties to terminate the proceedings; and
- where the arbitral tribunal finds that, for any reason, the continuation of the proceedings becomes unnecessary or impossible.\(^\text{133}\)

\(^{128}\) Indian Arbitration Act, s 31(7)(a).

\(^{129}\) Ibid, s 31(7)(b).

\(^{130}\) Ibid, s 31(8).

\(^{131}\) Ibid, s 31(8)(b).

\(^{132}\) Ibid, s 32(1).

\(^{133}\) Ibid, s 32(2).
7.5.3 While the claimant cannot be forced to continue the arbitral proceedings once commenced, fairness demands that the claimant is not allowed to abuse the withdrawal facility in order to force the respondent to participate in other legal proceedings.

7.5.4 The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.\(^{134}\) This is subject to certain, non-exhaustive circumstances where the arbitral tribunal can resume proceedings, including where:

— the arbitral tribunal extends the arbitral proceedings for the purposes of correcting, interpreting or making an additional award in accordance with Section 33 of the Indian Arbitration Act; or

— in instances where a party has applied for setting aside of an award under Section 34(1), the court may in appropriate cases adjourn the proceedings and give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action which, in the view of the arbitral tribunal, will eliminate the grounds for setting aside the award.\(^{135}\)

7.5.5 Furthermore, the arbitral tribunal is also required to terminate the arbitral proceedings in the following situations:

— where the claimant fails to communicate its statement of claim in accordance with Section 23(1) of the Indian Arbitration Act;\(^ {136}\)

— where the parties settle the dispute and the arbitral tribunal records the settlement in the form of an award on agreed terms (if this is requested by the parties and the arbitral tribunal does not object);\(^ {137}\) and

— where a party does not pay its share of the arbitrators’ deposit in respect of a claim or counterclaim that is the subject of the arbitral proceedings.\(^ {138}\)

7.5.6 The terms “order” and “award” are distinct. An “order” signifies the termination of arbitral proceedings without deciding the merits of the dispute, whereas an “award” is a termination on the merits. In addition, a decision given under Section 25(a) of the Indian Arbitration Act is an order terminating the arbitral proceedings and does not amount to a final award.\(^ {139}\)

---

\(^{134}\) Ibid, s 32(3).

\(^{135}\) Ibid, s 34(4).

\(^{136}\) Ibid, s 25(a).

\(^{137}\) Ibid, s 30(2).

\(^{138}\) Ibid, s 38(2).

\(^{139}\) Ibid, s 25(a).
7.6 Effect of the award

7.6.1 Under the Indian Arbitration Act, an award – including a foreign award – has the status of a decree of an Indian court. Accordingly, the award can be enforced as such.

7.6.2 Section 35 of the Indian Arbitration Act deals with the finality of awards. Where the time for making an application under Section 34 of the Indian Arbitration Act has expired, or such an application has been refused, the award shall be enforced under the CCP in the same manner as if it were a decree of the court.140

7.6.3 Under Section 35 of the Indian Arbitration Act, if an award remains unchallenged during the time period stipulated in Section 34(3) of the Indian Arbitration Act, it then becomes final and binding on the parties. Where there is a Section 34(3) application, the court must either set aside the award or reject the application to challenge it. A court’s decision on the challenge under Section 34 is subject to appeal.141

7.6.4 After the award is pronounced as final and binding by the arbitral tribunal, it is not permissible to initiate an action on the basis of the original claim. All of the rights and liabilities of the parties in respect of the claims which are the subject matter of the arbitral proceedings can only be determined on the basis of the award.142 The award is final in the sense that there cannot either be a further award on the same subject in dispute or an appeal against the finality of the award.143

7.7 Correction, clarification and issue of a supplemental award

7.7.1 Under Section 33 of the Indian Arbitration Act, an arbitral tribunal may:
— correct any computation, clerical, typographical or similar error;
— provide its interpretation of a specific point or part of an award; and
— make an additional award as to claims omitted from the original award.144

7.7.2 All of the arbitral tribunal’s powers outlined in paragraph 7.7.1 above can also be exercised by the arbitral tribunal at the request of one or both of the parties.145

---

140 Ibid, s 36.
141 Ibid, s 37(b).
144 Indian Arbitration Act, s 33(1).
145 Ibid.
7.7.3 A request for the correction and interpretation of an award can be made to the arbitral tribunal, with notice being given to the other party, within a period of 30 days from the receipt of the award or any other period as agreed by the parties.\textsuperscript{146}

7.7.4 If the arbitral tribunal considers a request to correct or interpret an award to be justified, it is required to carry out the correction or give its interpretation within 30 days from the receipt of the request.\textsuperscript{147} In addition, an interpretation of an award by an arbitral tribunal subsequently forms part of that award.\textsuperscript{148}

7.7.5 In addition to a request made by one or both of the parties, an arbitral tribunal may, on its own initiative, correct errors in an award within 30 days of the date the award was issued.\textsuperscript{149} However the arbitral tribunal does not have the authority to correct errors of substance or content.\textsuperscript{150}

7.7.6 Unless otherwise agreed, either party can make a request for an additional award concerning claims presented in the arbitral proceedings but omitted from the final award.\textsuperscript{151} Such a request has to be made within 30 days from the receipt of the award. The party making the request must also give notice to the other parties.

7.7.7 If requested by one of the parties, the arbitral tribunal must make an additional award if it is satisfied that the request is justified.\textsuperscript{152} An additional award must be made by the arbitral tribunal within 60 days from the date that it is requested. A longer period is provided for the making of an additional award in order that the arbitral tribunal may hear the parties and take evidence on the omitted claims where necessary.

7.7.8 The arbitral tribunal is empowered, if necessary, to extend the time limit for making its correction, providing its interpretation or making an additional award.\textsuperscript{153} In addition, the provisions regarding the form and content of an award\textsuperscript{154} also apply when the arbitral tribunal corrects or interprets an award or an additional award.\textsuperscript{155}

\textsuperscript{146} Ibid, s 33(1).
\textsuperscript{147} Ibid, s 33(2).
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid, s 33(3).
\textsuperscript{150} Instrumentation Ltd v E. Kuttappan [1992] Arb. LR(1) 284 (Ker).
\textsuperscript{151} Indian Arbitration Act, s 33(4).
\textsuperscript{152} Ibid, s 33(5).
\textsuperscript{153} Ibid, s 33(6).
\textsuperscript{154} Ibid, s 31.
\textsuperscript{155} Ibid, s 33(7).
7.7.9 When an arbitral tribunal corrects or interprets an award, or makes an additional award, it is required to ensure that each party is given full opportunity to present their case in respect of the proposed correction or interpretation of the award or the proposed additional award.\(^{156}\)

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 Notwithstanding anything contained elsewhere in Part I of the Indian Arbitration Act, or in any other law currently in force, where an application with respect to an arbitration agreement under Part I has been made in a court, that court alone will have jurisdiction over the arbitral proceedings and all subsequent proceedings arising out of that agreement.\(^{157}\) Thus disputes arising out of an arbitration agreement cannot be subject to the territorial jurisdiction of more than one court. This provision is mandatory and not subject to the principles of party autonomy.\(^{158}\)

8.1.2 The phrase “with respect to an arbitration agreement” referred to in paragraph 8.1.1 above and stated in Section 42 of the Indian Arbitration Act, should be interpreted widely and should include an application for setting aside an award. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal under Section 32(2) of the Indian Arbitration Act.

8.2 The extent of court interference

8.2.1 It may be noted that it is open for parties to raise a preliminary objection to jurisdiction of a particular court, asserting that that court lacks the territorial jurisdiction on the ground that the respondent does not reside within its territorial jurisdiction and does not have any cause of action that has arisen within such jurisdiction. Rejection of arbitration proceedings on the ground of jurisdiction will only mean that the party would be at a liberty to move to the appropriate court within the prescribed time frames.

8.2.2 Section 5 of the Indian Arbitration Act prescribes the extent of judicial intervention. It states that the object of the Indian Arbitration Act is to encourage resolution of disputes expeditiously and cost-effectively and ensure the minimal intervention of the court where the parties to a dispute have an arbitration agreement in place.\(^{159}\)

\(^{156}\) See generally \textit{ibid}, s 18.

\(^{157}\) \textit{ibid}, s 42.


\(^{159}\) See \textit{P. Anand Gajapathi Raju v P.V.G. Raju} [2000] SCR(2) 684.
The extent of judicial intervention is limited by Section 5 of the Indian Arbitration Act,\textsuperscript{160} which provides that no judicial authority shall interfere in matters governed by Part I (Sections 7 to 43) of the Indian Arbitration Act, unless provided for within Part I itself.\textsuperscript{161} Where the Indian Arbitration Act does not address a particular situation, a court may not assume jurisdiction and interfere in the arbitration.\textsuperscript{162}

8.2.3 Part I of the Indian Arbitration Act provides for judicial interference in the following instances:

- making reference in a pending suit;\textsuperscript{163}
- passing interim orders;\textsuperscript{164}
- appointment of arbitrators;\textsuperscript{165}
- terminating the mandate of an arbitrator;\textsuperscript{166}
- court assistance in the taking of evidence;\textsuperscript{167}
- setting aside an award;\textsuperscript{168}
- enforcement of an award by way of decree;\textsuperscript{169}
- entertaining appeals against certain orders;\textsuperscript{170}
- directing the delivery of award subject to payment of cost;\textsuperscript{171} and
- reference of a dispute to arbitration in insolvency proceedings.\textsuperscript{172}

9. Challenging and appealing an award through the courts

9.1 Challenge to enforcement of domestic and foreign awards

9.1.1 Chapter VII of the Indian Arbitration Act provides the recourse available against awards. Most notably, an application may be made to the court to set aside an award.\textsuperscript{173} An award under the Indian Arbitration Act can be enforced under the CCP.

\textsuperscript{160} Krishna Kumar Mundhra v Narendra Kumar Anchalia [2003] MANU/WB 444.
\textsuperscript{162} See Bharat Heavy Electricals Ltd. v Indian Overseas Bank and Another [2000] Arb. LR(3) 674.
\textsuperscript{163} Indian Arbitration Act, s 8.
\textsuperscript{164} Ibid, s 9.
\textsuperscript{165} Ibid, s 11.
\textsuperscript{166} Ibid, s 14(2).
\textsuperscript{167} Ibid, s 27.
\textsuperscript{168} Ibid, s 34.
\textsuperscript{169} Ibid, s 36.
\textsuperscript{170} Ibid, s 37.
\textsuperscript{171} Ibid, s 39(1).
\textsuperscript{172} Ibid, s 41(2).
\textsuperscript{173} Ibid, s 34(2) and 34(3).
9.1.2 When an award is made, the process for challenging its validity requires an application under Section 34 of the Indian Arbitration Act to be filed. Only upon the expiry of the period specified in Section 34 to challenge an award, or when such objection is refused, will the award then become enforceable. Section 36 of the Indian Arbitration Act merely specifies how such an award can be enforced by stating that it can be enforced as if it were a court decree.\(^\text{174}\)

9.1.3 An application to challenge an award may not be made after three months have elapsed from the date on which the party making the application has received the award or, if requested under Section 33 of the Indian Arbitration Act, from the date on which that request had been disposed by the arbitral tribunal.\(^\text{175}\) A qualification to this is that the court, if satisfied of sufficient cause, has the power to entertain the application for setting aside the award within a further period of 30 days.

9.1.4 A domestic award may be set aside on the following grounds:
— a party was under some form of incapacity;
— the arbitration agreement is not valid under the law to which the parties have subjected it;
— the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case;
— the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration;
— the award contains decisions on matters beyond the scope of the submission to arbitration;
— the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the provisions of the Indian Arbitration Act
— the subject-matter of the dispute is not capable of settlement by arbitration under the law in force for the time being, or
— the award is in conflict with the public policy of India.\(^\text{176}\)


\(^{175}\) Indian Arbitration Act, s 34(3).

\(^{176}\) Ibid, s 34(2).
9.1.5 An award has been held to be contrary to public policy if its enforcement were contrary to the fundamental policy of Indian law, the interests of India, justice or morality, or that the award was patently illegal. As per the explanation to Section 34 (2) (b) (ii) an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

9.1.6 The aim of Section 34 of the Indian Arbitration Act is to limit judicial intervention in the arbitral proceedings. It is also a mandatory provision from which the parties cannot derogate.

9.1.7 In certain circumstances, foreign international awards can also be challenged under the procedure set out in Section 34 of the Indian Arbitration Act, provided that it is not expressly or impliedly excluded by agreement between the parties.

9.1.8 Generally, the courts have not favoured interference with awards that are incorrect due to an error of law or of fact, or on account of an error of law or of fact due to a misreading of materials. Instead, the courts have shown a definite inclination to preserve the award as far as possible in these instances.

9.2 Appeals

9.2.1 The following is an exhaustive list of the orders which are appealable under the Indian Arbitration Act:

— granting or refusing to grant any interim measure by the court;
— setting aside or refusing to set aside an award by the court;
— accepting the plea of lack of its jurisdiction by the arbitral tribunal;
— accepting the plea of excess scope of authority by the arbitral tribunal; and
— granting or refusing to grant an interim measure by the arbitral tribunal.

---

177 ONGC v SAW Pipes Ltd. [2003] AIR SC 2629.
179 See State of Rajasthan v Puri Construction Co. Ltd. [1994] SCC(6) 485 (where the court held that it does not sit in appeal over arbitral awards and review the reasons why the tribunal gave its award and can set aside the award only if it is apparent that there is no evidence to support the conclusions the tribunal reached or if the award is based upon legal propositions which are erroneous).
180 Indian Arbitration Act, s 37.
181 Ibid, s 9.
182 Ibid, s 34.
183 Ibid, s 16(2).
184 Ibid, s 16(3).
185 Ibid, s 17.
9.2.2 No second appeal can be made against an appellate order passed under Section 37 of the Indian Arbitration Act. However, there is no bar against the right to challenge the order passed under Section 37 by way of a “Special Leave Petition” under Article 136 of the Constitution of India.

10. Recognition and enforcement of award

10.1 Domestic awards
10.1.1 Under Section 36 of the Indian Arbitration Act, a domestic award (i.e. an award made under Part I) is enforceable under the CCP in the same manner as if it were a decree of an Indian court.

10.1.2 The procedure for the execution of a domestic award is laid down in Order XXI of the CCP and must be followed. Order XXI of the CCP also lays down the detailed procedure for enforcement of decrees.

10.1.3 All proceedings in execution are commenced by way of an “application for execution” in accordance with Rule 10 of the CCP. The execution of a decree against the property of the judgment debtor can be under two heads, namely:
— attachment of property; and
— sale of the property of the judgment debtor.

10.1.4 At the execution stage, there can be no challenge as to validity of the domestic award. Thus, once a party has failed to challenge an award under Section 34 of the Indian Arbitration Act, this possibility is no longer available in execution proceedings.

10.2 Foreign awards
10.2.1 A foreign award can be enforced in India under the multilateral international conventions to which India is a party, namely the 1927 Geneva Convention and the New York Convention. The award must have been made in a country that has ratified the 1927 Geneva Convention or the New York Convention. The 1927 Geneva Convention has ceased to apply to those awards to which the New York Convention now applies.

10.2.2 India made two reservations when it ratified the 1927 Geneva Convention and the New York Convention. The first was that India would apply both the 1927 Geneva Convention and the New York Convention to the recognition and enforcement of

---

186 Ibid, s 37(3).
an award only if it was made in the territory of another state that is bound by either convention. The second was that India would apply the 1927 Geneva Convention and the New York Convention only to differences arising out of legal relationships which are considered as “commercial” under the Indian laws. The concept of “commercial relationship” takes place within the ambit of all relationships which arise out of, or are ancillary or incidental to business dealings.187

10.2.3 In pursuance of those reservations, the 1937 Act and 1961 Act provided that the government of India would notify the names of the countries to which the 1927 Geneva Convention and the New York Convention would apply and also the countries which have made reciprocal provisions for the enforcement of Indian awards.

10.2.4 A foreign award can be enforced under Part II of the Indian Arbitration Act. The procedure for enforcement of awards is largely the same in the Indian Arbitration Act as under the 1937 Act and the 1961 Act. The New York Convention and the 1927 Geneva Convention provide a procedure for enforcement which has been given statutory recognition by way of enabling legislation, namely the 1937 Act and the 1967 Act. This continues under the Indian Arbitration Act (which has replaced the 1937 Act and the 1967 Act).

10.2.5 A person intending to enforce a New York Convention award should apply to the court and produce the following four documents:
— the original award, or copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
— the original arbitration agreement, or a duly certified copy;
— such evidence as may be necessary to prove that the award is a foreign award; and
— if necessary, the translated versions of the documents stated above.188

10.2.6 Similarly for a 1927 Geneva Convention award the party applying for the enforcement of award shall at the time of the application, produce before the court:
— the original award, or copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
— evidence that the award has become final;


188 Indian Arbitration Act, s 47(1).
— that the conditions for enforcement of award as stated in Section 57 (1) (a) and (c) of the Indian Arbitration Act are satisfied; and
— if necessary, the translated versions of the documents stated above. 189

10.2.7 Section 48 of the Indian Arbitration Act provides the grounds where the enforcement of a New York Convention award may be refused:
— where a party to an arbitration agreement was, under the law applicable to them, under some incapacity;
— where the arbitration agreement was invalid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
— where a party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
— where the award was given due to a jurisdictional defect;
— where the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement of the parties, or failing such agreement, with the law of the country where the arbitration took place;
— where the foreign award has not yet become binding for 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;
— where the foreign award is in respect of a matter which is not capable of settlement by arbitration under the laws of India; or
— where the enforcement of a foreign award would be contrary to the public policy of India.

10.2.8 Section 57 of the Indian Arbitration Act provides for the conditions to be fulfilled in order that a 1927 Geneva Convention award may be enforced. These conditions are:
— the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
— the subject-matter of the award is capable of settlement by arbitration under the laws of India;
— the 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;
— the award has become final in the country in which it has been made; and
— the enforcement of the award is not contrary to the public policy or the law of India.

189 Ibid, s 56.
10.2.9 However even if the conditions laid down in the preceding paragraph are fulfilled, enforcement of the 1927 Geneva Convention award shall be refused if the Court is satisfied that:

— the award has been annulled in the country in which it was made;
— the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or that, being under a legal incapacity, he was not properly represented;
— the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

10.2.10 The Indian Arbitration Act does not prescribe any time limit within which an application to enforce a foreign award must be made. However, a number of High Court cases have held that the period of limitation would be governed by the residual provisions under the Limitation Act 1963, i.e. the period would be 12 years from the date when the right to apply for enforcement accrues.\(^{190}\)

10.2.11 An appeal lies under Section 50 of the Indian Arbitration Act against an order refusing to enforce a foreign award under Section 48 in case of New York Convention awards and against an order refusing to enforce a foreign award under Section 57 in case of 1927 Geneva Convention awards. Furthermore a petition would lie against such order with the Supreme Court under Article 136 (Special Leave Petition) of the Indian Constitution. Such petitions are only entertained if the Supreme Court considers that they raise a question of fundamental importance or public interest.

10.2.12 Once the court determines that a foreign award is enforceable, it can be executed as a decree straightaway.\(^{191}\) Non-1927 Geneva Convention and non-New York Convention awards will be enforceable in India under the common law on grounds of justice, equity and good conscience.\(^{192}\)

11. Special provisions and consideration

11.1.1 The presence of an arbitration agreement in a contract will not be a bar to either party seeking a remedy under the Consumer Protection Act 1986 (CPA) in addition to, and not in derogation of, other provisions of Indian law currently in

---


\(^{191}\) *M / S Fuerst Day Lawson Ltd v Jindal Exports Ltd* [2001] SCC(6) 356.

force.\textsuperscript{193} If a complaint is made by a consumer in relation to a certain deficiency of service under an agreement, the existence of an arbitration clause in that agreement will not prevent the complaint from being brought before the Redressal Agency, constituted under the CPA. The remedy provided under the Indian Arbitration Act is in addition to the provisions of any other law currently in force.\textsuperscript{194}

12. Contacts

**Khaitan & Co**
One Indiabulls Centre, 13th Floor
841 Senapati Bapat Marg
Elphinstone Road
Mumbai 400 013
India

**Chakrapani Misra**
T +91 22 6636 5000
E chakrapani.misra@khaitanco.com

**Khaitan & Co**
Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001
India

**Sanjeev Kapoor**
T +91 11 4151 5454
E sanjeev.kapoor@khaitanco.com

\textsuperscript{193} Skypak Couriers Ltd v Tata Chemical [2008] AIR SC 2008.

\textsuperscript{194} Ibid.
ARBITRATION IN ITALY

By Maria Letizia Patania, CMS
# Table of Contents

1. **Legislative framework**  
   1.1 Code of Civil Procedure – Book IV, Title VIII, Articles 806–840 *(CPC)*  
   1.2 Historical background

2. **Scope of application and general provisions**
   2.1 Subject matter
   2.2 General principles

3. **The arbitration agreement**
   3.1 Definition
   3.2 Formal requirements
   3.3 Special tests and requirements of the jurisdiction
   3.4 Separability
   3.5 Effects of a binding arbitration agreement

4. **The arbitral tribunal**
   4.1 Constitution of the arbitral tribunal
   4.2 Challenge of arbitrators
   4.3 Responsibilities of the arbitrators
   4.4 Arbitration fees

5. **Jurisdiction of the arbitral tribunal**

6. **Conduct of arbitral proceedings**
   6.1 Commencement of arbitration
   6.2 General procedural principles
   6.3 Seat, place of hearings and language of arbitration
   6.4 Multi-party issues
   6.5 Oral hearings and written proceedings
   6.6 Default by one of the parties
   6.7 Evidence
   6.8 Appointment of experts
   6.9 Confidentiality
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Making of award and termination of proceedings</td>
<td>478</td>
</tr>
<tr>
<td>7.1 Choice of law</td>
<td>478</td>
</tr>
<tr>
<td>7.2 Timing, form, content and notification of award</td>
<td>478</td>
</tr>
<tr>
<td>7.3 Settlement</td>
<td>479</td>
</tr>
<tr>
<td>7.4 Power to award interest and costs</td>
<td>480</td>
</tr>
<tr>
<td>7.5 Stay of the proceedings</td>
<td>480</td>
</tr>
<tr>
<td>7.6 Termination of the proceedings</td>
<td>480</td>
</tr>
<tr>
<td>7.7 Correction and clarification</td>
<td>480</td>
</tr>
<tr>
<td>8. Role of the courts</td>
<td>481</td>
</tr>
<tr>
<td>8.1 Jurisdiction of the courts and stay of court proceedings</td>
<td>481</td>
</tr>
<tr>
<td>8.2 Interim protective measures</td>
<td>482</td>
</tr>
<tr>
<td>8.3 Obtaining evidence and other court assistance</td>
<td>482</td>
</tr>
<tr>
<td>9. Challenging and appealing an award through the courts</td>
<td>483</td>
</tr>
<tr>
<td>9.1 Jurisdiction of the courts</td>
<td>483</td>
</tr>
<tr>
<td>9.2 Appeal</td>
<td>483</td>
</tr>
<tr>
<td>9.3 Challenge</td>
<td>484</td>
</tr>
<tr>
<td>9.4 Revocation</td>
<td>485</td>
</tr>
<tr>
<td>9.5 Third party opposition</td>
<td>485</td>
</tr>
<tr>
<td>10. Recognition and enforcement of awards</td>
<td>485</td>
</tr>
<tr>
<td>10.1 Domestic awards</td>
<td>485</td>
</tr>
<tr>
<td>10.2 Foreign awards</td>
<td>486</td>
</tr>
<tr>
<td>11. Special provisions and considerations</td>
<td>487</td>
</tr>
<tr>
<td>11.1 Corporate arbitration</td>
<td>487</td>
</tr>
<tr>
<td>11.2 Consumers</td>
<td>489</td>
</tr>
<tr>
<td>11.3 Employment Law</td>
<td>490</td>
</tr>
<tr>
<td>12. Conclusion</td>
<td>491</td>
</tr>
<tr>
<td>12.1 Main features of arbitration in Italy</td>
<td>491</td>
</tr>
<tr>
<td>12.2 Main advantages</td>
<td>491</td>
</tr>
<tr>
<td>12.3 Disadvantages</td>
<td>492</td>
</tr>
<tr>
<td>13. Contacts</td>
<td>493</td>
</tr>
</tbody>
</table>
1. Legislative framework

1.1 Code of Civil Procedure – Book IV, Title VIII, Articles 806–840 (CPC)

1.1.1 Arbitration in Italy is governed by the CPC rules, which are structured as follows.

Chapter I

1.1.2 Articles 806–808 quinquies provide general rules on the arbitration agreement (i.e. formal requirements, arbitrability, effects and interpretation of the arbitration agreement) as well on the so called arbitrato irrituale or free arbitration.

Chapter II

1.1.3 Articles 809–815 concern the arbitrators (i.e. number, appointment, replacement, incapacity, acceptance, loss, liability, rights and challenge of the arbitrators).

Chapter III

1.1.4 Articles 816–819 ter give details on the arbitration procedure (i.e. seat of arbitration, procedural rules, evidence and stay of the proceedings).

Chapter IV

1.1.5 Articles 820–826 deal with the award (i.e. timing, content, effects and correction).

Chapter V

1.1.6 Articles 827–831 deal with challenging the award (i.e. grounds for setting aside, appeal, revocation and third party opposition).

Chapter VI

1.1.7 Articles 832–838 govern international arbitrations pursuant to pre-established arbitral rules (e.g. Associazione Italiana per l’Arbitrato Resulations, ICC Arbitration Rules, etc).

Chapter VII

1.1.8 Articles 839–840 govern the recognition and enforcement of foreign awards and the procedure for opposing such recognition and enforcement.

1.2 Historical background

1.2.1 In order to modernise the procedure and incorporate the terms of several international conventions ratified by Italy, the provisions of the CPC were amended by three important laws.

Law 9th February 1983, No. 28 (1983 Reforms)

1.2.2 The 1983 Reforms represented the first attempt to reduce the rigidity of the CPC by excluding Italian nationality as a basic requirement for appointment as an arbitrator.
1.2.3 The 1994 Reforms introduced new rules regarding international arbitration in compliance with international conventions and, in particular, with the New York Convention.

Legislative Decree 2nd February 2006, No. 40 (2006 Reforms)

1.2.4 The 2006 Reforms constituted re-drafting all of the previous CPC provisions on arbitral proceedings. The aim of the 2006 Reforms was to promote and improve recourse to arbitration as an attractive alternative to ordinary judicial proceedings.

2. Scope of application and general provisions

2.1 Subject matter

2.1.1 The CPC applies to all arbitral proceedings which take place in Italy, unless otherwise agreed by the parties. The CPC also contains provisions regarding the recognition and enforcement of awards rendered by arbitral tribunals seated outside Italy.

2.1.2 The CPC applies different rules depending on the type of arbitration.

Domestic arbitrations

2.1.3 The statutory rules governing domestic arbitrations apply in the event that the seat of the arbitration is in Italy and both parties are Italian.

International arbitrations

2.1.4 International arbitrations are governed by the provisions of applicable international regulations chosen by the parties, as no specific provision is provided by the CPC. However, when the seat of arbitration is outside Italy or the award is rendered outside Italy and the recognition and enforcement is required in Italy, certain provisions of the CPC can be invoked. In such case, the arbitration will be considered international even if one of the parties is Italian or Italian law has been chosen to govern the dispute between the parties.

2.1.5 In addition to the above, the Italian system distinguishes between arbitrato rituale and arbitrato irrituale. The 2006 Reforms expressly introduced the right for the parties to resort to arbitrato irrituale proceedings and established a right for parties to submit non-contractual disputes to arbitration, known as arbitrato extraccontrattuale.
Arbitration in Italy

Arbitrato rituale or ordinary arbitration

2.1.6 Arbitrato rituale is the ordinary type of arbitral proceedings governed by the CPC rules that is considered in more detail below.

Arbitrato irrituale or free arbitration

2.1.7 Arbitrato irrituale is an alternative arbitral procedure which does not result in an enforceable award. Rather, an arbitrato irrituale award is binding on the parties in the same way as a contract.

2.1.8 The parties must specify in writing if the arbitration is to be an arbitrato irrituale. If the arbitration agreement does not specify the nature of the arbitration (rituale or irrituale) the arbitration will be deemed to be arbitrato rituale.

2.1.9 The arbitration agreement can provide that the arbitral tribunal must make a decision based on either law or ex aequo et bono principles. The parties can decide the procedural rules to be followed by the arbitral tribunal. The procedural rules are usually simpler than in ordinary arbitration, but, due to the adversarial nature of the proceedings, both parties have the right to be heard and to submit documents and claims.

2.1.10 The award issued in an arbitrato irrituale can be challenged only on the following grounds:
- the arbitration agreement is void;
- the arbitral tribunal exceeded the scope of the arbitration agreement and this issue was raised as an objection during the arbitral proceedings;
- the arbitrators were not appointed in accordance with the provisions of the arbitration agreement;
- incapacity of the arbitrators;
- the arbitrators breached their duties; and
- violation of the rule audi alteram partem.1

2.1.11 Arbitrato irrituale awards can be challenged by applying to the competent court of first instance.

2.1.12 If a party does not comply with an arbitrato irrituale award the other party can commence an action before the competent court of first instance for breach of contract.

---

1 CPC, art 808 ter, para 2.
2.1.13 The 2006 Reforms of the CPC rules introduced the possibility of referring all future disputes to arbitration which may arise from one or more given relationships not provided for in a contract. Indeed, by way of this new rule, a third type of arbitration (other than ordinary and free arbitration) was introduced. The parties are entitled to refer the dispute to arbitrators regardless of whether they are bound to each other by a contract. Such cases could occur, for example, in disputes concerning real rights, such as boundary regulations, neighbourliness or joint ownership.

2.2 General principles

2.2.1 The CPC rules provide certain general principles, which only apply to arbitrato extracontrattuale or arbitration on matters not provided for in a contract.

Due process

2.2.2 The parties are entitled to equal treatment by the arbitral tribunal and must be given the opportunity to submit their requests and be heard under the same conditions. Infringement of this principle is a ground for annulment of the award. Moreover, the arbitral tribunal has a general obligation to be impartial.

Autonomy

2.2.3 The parties are free to agree on the subject matter of the dispute they wish to refer to arbitration, as well as on the choice of arbitrator(s), rules of procedure, seat of arbitration, applicable law, etc. The parties’ autonomy is limited by certain mandatory statutory rules and matters on which national courts have exclusive jurisdiction (i.e. disputes concerning matters which cannot be submitted to arbitration such as personal status, marital status, judicial separation, divorce as well as national insurance contributions).

Non-intervention by the courts

2.2.4 As a general principle, national courts cannot intervene in arbitral proceedings, except as expressly provided for in the CPC.
3. The arbitration agreement

3.1 Definition
3.1.1 The arbitration agreement is the agreement whereby two or more parties agree to submit the resolution of specific disputes to one or more arbitrators and provide for the principal rules that shall govern the arbitral proceedings (e.g. type of arbitration, appointment and constitution of the arbitral tribunal and the seat of arbitration).

3.2 Formal requirements
3.2.1 The arbitration agreement can be in the form of a clause within a contract or a stand-alone agreement. In either case, the arbitration agreement should be in writing and should clearly set out the subject-matter submitted to arbitration. In the absence of writing, the arbitration agreement will be null and void.

3.2.2 The CPC does not require that the agreement is embodied in a single document. Therefore, the agreement may arise out of an exchange of letters, telegrams, emails signed with an electronic signature, in a communication by tele-printer or by telefax.

3.2.3 In the event that the arbitration clause is embodied in a party’s general terms of business, it must be explicitly confirmed in writing by the parties. However, this requirement has been relaxed in international arbitration so that an arbitration clause contained in general conditions of business or in a standard form is considered valid even without any explicit confirmation in writing by the parties.

3.2.4 In addition, a written agreement which incorporates by reference an arbitration clause contained in the general conditions of business is considered valid if the parties were aware of the clause or should have known of its existence by exercising reasonable diligence.

3.3 Special tests and requirements of the jurisdiction
3.3.1 Disputes concerning inalienable rights (such as constitutional ones) or other matters such as issues concerning personal status and martial separation cannot be submitted to arbitration.

---

5 Ibid, art 807.
6 Ibid, art 807–808.
8 CPC, art 806.
3.3.2 Disputes regarding individual contracts of employment can only be submitted to arbitration if expressly provided for by law (see section 11.3 below).

3.3.3 Any award which is made in respect of a dispute that could not have been submitted to arbitration is subject to annulment.\(^9\) The Italian courts may also refuse to recognise and enforce international awards on matters which are excluded from arbitration under Italian law.\(^10\)

3.4 Separability
3.4.1 The validity of the arbitration clause is examined independently from the contract in which it is included in accordance with the recognised principles of separability. Therefore, the invalidity of the underlying contract does not necessarily render the arbitration clause invalid.\(^11\)

3.5 Effects of a binding arbitration agreement
3.5.1 An arbitration agreement duly agreed upon by the parties remains binding until the award ruling on the merits of the dispute is rendered by the arbitrators.\(^12\)

4. The arbitral tribunal

4.1 Constitution of the arbitral tribunal
4.1.1 As a general rule, the parties are free to determine the number of arbitrators and the procedure governing their appointment. The parties may appoint one or more arbitrators, provided that the tribunal consists of an odd number. In the event that the parties fix an even number of arbitrators, an additional arbitrator must be appointed by the President of the Italian court in the district in which the arbitration has its seat, unless otherwise agreed by the parties.\(^13\)

4.1.2 If no number has been fixed in the arbitration agreement and the parties have not reached an agreement on this matter, the number of arbitrators shall be three. If the parties are unable to appoint the arbitrators, the President of the Italian court in the district in which the arbitration has its seat shall proceed to make the appointments, unless the parties have provided for an alternative procedure.\(^14\)

---

\(^9\) Ibid, art 806 and 829.
\(^10\) Ibid, art 839, para 4.
\(^11\) Ibid, art 808, para 3.
\(^12\) Ibid, art 808 quinquies.
\(^13\) Ibid, art 809, para 3.
\(^14\) Ibid.
4.1.3 If, as is commonly the case, the parties do not deal with the appointment of the arbitrators in the arbitration clause, the party intending to commence arbitral proceedings – after having previously chosen its own arbitrator – shall serve a notice of appointment of its arbitrator on the other party and a request for the addressee to appoint its own arbitrator.

4.1.4 The respondent has 20 days to appoint its arbitrator from receipt of the request to do so. Failing such appointment, the party who has made the request may petition the President of the court in the district in which the arbitration has its seat to appoint an arbitrator. If the seat of the arbitration has not been agreed by the parties, the arbitrator shall be appointed by the President of the court in the district in which the arbitration clause was executed or, if it is abroad, by the President of the Court of Rome.\textsuperscript{15}

4.1.5 The President of the Italian court in the district in which the arbitration has its seat shall not proceed with the appointment if the arbitration clause is clearly invalid or if it clearly provides for arbitration in a country other than Italy.\textsuperscript{16} The court order by which the President appoints an arbitrator is not open to appeal.\textsuperscript{17}

Acceptance by the arbitrators

4.1.6 The arbitrators’ acceptance of appointment shall be given in writing by signing the arbitration agreement or shall be included in the minutes of the first arbitral hearing or shall be contained in a separate agreement in writing.\textsuperscript{18}

Capacity to act as an arbitrator

4.1.7 A person who lacks legal capacity, completely or partially, cannot be appointed as arbitrator by the parties.\textsuperscript{19}

4.1.8 By way of example, minors, persons subject to bankruptcy proceedings or those who are disqualified from holding public office cannot be appointed as arbitrators.

4.2 Challenge of arbitrators

4.2.1 Arbitrators may be challenged or replaced only in the circumstances expressly provided for under the CPC.\textsuperscript{20}

\textsuperscript{15} Ibid, art 810, para 2.
\textsuperscript{16} Ibid, art 810, para 3.
\textsuperscript{17} Corte di Cassazione Civile (CASS), Sezione I, 18 May 2007, no 11665.
\textsuperscript{18} CPC, art 813.
\textsuperscript{19} Ibid, art 812.
\textsuperscript{20} Ibid, art 811, 812 and 815.
Challenge of the arbitrators

4.2.2 A party may challenge the appointment of the other party’s chosen arbitrator or the chair by applying to the President of the court in the district in which the arbitration has its seat in the following circumstances:
— the arbitrator does not meet the requirements agreed upon by the parties;
— the arbitrator, or the company in which the arbitrator is a director, has an interest in the proceedings or in any related proceedings;
— the arbitrator or the arbitrator’s spouse has family ties up to the fourth degree of kinship, is living with or has a close friendship with one of the parties or one of their lawyers;
— the arbitrator or the arbitrator’s spouse is a party to proceedings pending against, or is a creditor or debtor of, one of the parties or one of their lawyers;
— there is serious hostility arising from personal affairs between the arbitrator and one of the parties or one of their lawyers;
— the arbitrator is a tutor, agent or employer of one of the parties;
— the arbitrator has given advice, has appeared as a witness or was involved as a judge or arbitrator in the same matter previously; and
— there are serious reasons of convenience which make it advisable not to act in the proceedings, such as cases where – for any reason – an arbitrator has given an opinion on the matter before being formally involved in the case, which may be deemed to jeopardise that arbitrator’s impartiality.21

4.2.3 The parties cannot challenge their own party-appointed arbitrators except on grounds that arise after the appointment of the arbitrator in question.22 In any case, the time limit for filing an application to challenge the appointment is ten days from the appointment of the arbitrator or from the date of knowledge of the ground for challenge.23 The decision of the President of the court cannot be challenged by the parties.

4.2.4 The application does not suspend the arbitral proceedings, unless otherwise agreed by the arbitrators. However, if the challenge is successful, the past activity of the challenged arbitrator will have no effect.

Replacing an arbitrator

4.2.5 An arbitrator may be replaced in case of:
— legal incapacity to act (e.g. incapacitated persons, persons declared bankrupt and some public officers);

21 Ibid, art 815, para 1.
22 Ibid, art 815, para 2.
23 Ibid, art 815, para 3.
— conflict of interest;
— failure to act properly or delaying the procedure (provided there is evidence that the parties have invited the arbitrator to remedy this and he has not done so);
— resignation by an arbitrator from office with good reason; and
— death.24

4.2.6 When, for the above reasons, one or more appointed arbitrators are no longer in office, replacement arbitrators must be appointed according to the procedure set out in the arbitration agreement or as set out in the CPC (see section 4.1 above).25

4.3 Responsibilities of the arbitrators

4.3.1 The 2006 Reforms provided complete and uniform regulations on the duties and liabilities owed by arbitrators to the parties.26

Duties of the arbitrators

4.3.2 The arbitrators must render their award within the time limit set by the parties or by law. If they fail to do so and the award is declared null and void due to their delay, they are responsible for any damage suffered by the parties.27

4.3.3 The arbitrators cannot withdraw from their office after having accepted it without good reason. In the absence of a good reason, they may be held liable in damages.28

4.3.4 Unless otherwise agreed, any arbitrator who fails to perform the relevant duties or fails to perform them in a timely manner can be replaced by agreement of the parties or by a third party appointed for this purpose under the terms of the arbitration agreement.29

4.3.5 Failing such replacement, within a period of 15 days after notice has been served on the defaulting arbitrator, either party may file an application with the competent court for the arbitrator’s removal.30

24 Ibid, art 811.
25 Ibid.
26 Ibid, art 813 ter.
27 Ibid.
28 Ibid.
29 Ibid, art 813 bis.
30 Ibid.
4.3.6 If the President of the court, having heard the parties, finds that the arbitrator did breach a duty, then the President of the court may remove the arbitrator from office. The court’s order cannot be appealed.\(^{31}\)

**Liability of the arbitrators**

4.3.7 Arbitrators may be held liable for any damages suffered by the parties in the event of:
- fraudulent or grossly negligent omission or delay in the procedure;
- resignation without a proper cause; or
- fraudulent or grossly negligent omission or delay in issuing the award.\(^{32}\)

4.3.8 Each arbitrator is only liable for his/her own actions.\(^{33}\) An action for damages can be brought during the arbitral proceedings on the occurrence of the first and second grounds described in paragraph 4.3.7 above.

4.3.9 In the absence of fraud, compensation for damages cannot exceed three times the arbitrators’ fees.\(^{34}\) Further, if an appointed arbitrator is held to be liable, the parties do not have to pay that arbitrator’s fees.\(^{35}\)

**Arbitrator immunity**

4.3.10 Except in the cases of liability outlined above, arbitrators have a similar immunity from liability in tort or gross negligence as judges (i.e. liability cannot arise from either the interpretation of the regulations or the evaluation of the facts or the evidence).\(^{36}\)

4.4 **Arbitration fees**

4.4.1 The CPC expressly recognises that the arbitrators are entitled to fees and to reimbursement of their expenses.\(^{37}\) Arbitrators should make reference to the schedule of fees set out in the Ministerial Decree issued by the Italian Ministry of Justice on 8 April 2004.

4.4.2 All parties to the arbitration are jointly and severally liable for the fees and expenses of the arbitral proceedings regardless of how the arbitrators apportion costs.

---

\(^{31}\) *Ibid*.

\(^{32}\) *Ibid*, art 813 ter.

\(^{33}\) *Ibid*, art 813 ter, para 7.

\(^{34}\) *Ibid*, art 813 ter, para 5.


\(^{37}\) CPC, art 814, para 1.
between them. If one party pays all of the fees and expenses due to the arbitrators, that party is allowed to recover the fees and expenses from the other party within the limits set out in the award.\(^{38}\)

4.4.3 It is commonly accepted that the role of the arbitrators includes determining their own fees in the award and allocating the responsibility for paying those fees between the parties. However, unless the parties approve the arbitrators’ determination of their fees, that determination will not be binding. Failing payment of their fees, the arbitrators may apply to the President of the court in the district in which the arbitration has its seat in order to determine their fees. The court order, although open to challenge by the parties, is immediately enforceable.\(^{39}\)

**Advanced payment**

4.4.4 In accordance with current common practice, arbitrators can refuse to take any steps to advance the arbitral process until they have received payment in advance of the estimated arbitration costs.\(^{40}\)

4.4.5 If the parties refuse to pay the advance costs within the timeframe stipulated by the arbitrators, the parties are no longer bound by the arbitration agreement with respect to the dispute.\(^{41}\)

5. **Jurisdiction of the arbitral tribunal**

5.1.1 The arbitral tribunal is competent to rule on the validity of the arbitration agreement, which includes an ability to assess the capacity of the parties, determine whether or not formal requirements have been met, determine the arbitrability of the dispute and address any issues relating to the appointment of the arbitrators. The decision rendered by the tribunal on its jurisdiction is, however, subject to judicial control upon request of one of the parties.\(^{42}\)

5.1.2 If a party has any jurisdictional objections they must be raised in its first submission on the merits of the dispute.\(^{43}\)

---

\(^{38}\) Ibid, art 814.

\(^{39}\) Ibid, art 814, para 3.

\(^{40}\) Ibid, art 816 septies.

\(^{41}\) Ibid.

\(^{42}\) Ibid, art 817.

\(^{43}\) Ibid.
5.1.3 The arbitrators’ jurisdiction is not excluded if the same dispute is pending before a national court, nor if it is connected to another dispute pending before a national court. However, in the court dispute, one of the parties must raise an objection concerning the lack of jurisdiction of that court in its first defence, otherwise the arbitrators will lose jurisdiction over the dispute.\textsuperscript{44}

5.1.4 Similarly, a party must raise an objection that the pleadings of the other party exceed the limits of the arbitration agreement during the arbitral proceedings or it will lose the right to file for annulment of the award on this ground.\textsuperscript{45}

5.1.5 Actions on the invalidity or ineffectiveness of the arbitration clause cannot be brought before the court while the arbitration is pending.\textsuperscript{46}

6. Conduct of arbitral proceedings

6.1 Commencement of arbitration

6.1.1 The arbitral proceedings are deemed to commence when a party serves a notice of appointment of an arbitrator on the other party along with a request that the other party appoint its arbitrator.\textsuperscript{47}

6.2 General procedural principles

6.2.1 The parties are free to determine the procedural rules governing the arbitration. These rules must be determined before the arbitrators accept their office. Upon acceptance, the parties may no longer modify the procedure.\textsuperscript{48} It is commonly accepted that the arbitrators will have good reason to withdraw from their office if the parties insist on amending the procedural rules during the course of the arbitration.

6.2.2 Where the parties have not agreed on the applicable procedure, the arbitrators shall apply the rules which they deem most suitable.\textsuperscript{49}

\textsuperscript{44} Ibid, art 819 ter.
\textsuperscript{45} Ibid, art 817.
\textsuperscript{46} Ibid, art 819 ter.
\textsuperscript{47} Ibid, art 810.
\textsuperscript{48} Ibid, art 816 bis.
\textsuperscript{49} Ibid, art 816, para 3.
6.2.3 The only mandatory rule that the arbitrators may not exclude is their obligation to fix the time by which the parties must submit their demands, documents and replies.\(^50\) This is considered to be the strict minimum to guarantee a fair process.

6.2.4 In the event that the arbitrators do not comply with the rules chosen by the parties, the courts may annul the award.\(^51\)

6.3 **Seat, place of hearings and language of arbitration**

6.3.1 The parties are free to determine the language of the arbitration.\(^52\)

6.3.2 The parties shall also determine the seat of arbitration. In the absence of any express choice, the seat shall be determined by the arbitrators.\(^53\) If neither the parties nor the arbitrators determine the seat of arbitration, it shall be the place at which the arbitration agreement was signed or, if it was signed abroad, the seat of arbitration will be Rome.

6.3.3 Unless otherwise agreed in the arbitration agreement, the arbitrators can carry out their functions (e.g. hold hearings) anywhere they please whether at the seat of arbitration or elsewhere.

6.4 **Multi-party issues**

6.4.1 If the arbitration agreement is concluded between more than two parties, any party can commence arbitral proceedings against all or some of the other parties.\(^54\)

6.4.2 In multi-party proceedings, the arbitrators must be appointed in one of the following ways:
- by a third party in accordance with the arbitration agreement;
- by agreement between all of the parties; or
- the claimant(s) jointly appoint their own arbitrator(s), the respondents jointly appoint their own arbitrator(s) or all parties jointly request a third party to make appointment on their behalf.\(^55\)

---

\(^{50}\) *Ibid*, art 816 bis, para 1.

\(^{51}\) *Ibid*, art 829.

\(^{52}\) *Ibid*, art 816 bis, para 1.

\(^{53}\) *Ibid*, art 816.

\(^{54}\) *Ibid*, art 816 quater.

\(^{55}\) *Ibid*, art 816 quater.
6.4.3 The intervention and involvement of a third party (i.e. a person or legal entity who is not party to the arbitration agreement) is only allowed with the consent of the third party, the parties and the arbitrators.\textsuperscript{56}

6.4.4 Any third party who has an interest in the dispute has the right to voluntarily intervene in existing proceedings in support of one of the party's defence or to join as a legally necessary co-party, without the consent of either the parties or of the arbitrators being required.\textsuperscript{57}

6.5 **Oral hearings and written proceedings**

6.5.1 The arbitration agreement or the arbitrators may provide specific time-limits within which the parties must file their formal statements and deposit relevant documents.\textsuperscript{58}

6.5.2 The content of the formal statements, as well as the choice of which documents to attach to such statements, is at the discretion of the parties.

6.5.3 The parties are not obliged to disclose relevant facts or documents that are harmful to their case and will usually only submit the facts and documents that they deem useful in order to establish their rights.

6.5.4 The parties are free to organise oral hearings or to conduct the proceedings on a documents only basis. It is common practice to exchange written submissions and then to hold a final oral hearing at which both parties have the opportunity to present their arguments.

6.6 **Default by one of the parties**

6.6.1 The term “default” is not expressly defined by law. Therefore, it is advisable to qualify it as the inactivity or lack of participation of one party during the arbitral proceedings.\textsuperscript{59}

6.6.2 The validity of the award or the arbitral proceedings is not affected by the inactivity of one of the parties, provided that the other party has duly served the notice of appointment of an arbitrator on the inactive party and a request that the inactive party appoints its arbitrator.\textsuperscript{60}

\textsuperscript{56} Ibid, art 816 quinquies, para 1.

\textsuperscript{57} Ibid, art 816 quinquies, para 2.

\textsuperscript{58} Ibid, art 816 bis.


\textsuperscript{60} M Curti, L’arbitrato le novità della riforma D.lgs. 2 febbraio 2006, n. 40, p 69.
6.7 Evidence

6.7.1 The parties are free to fix the rules specifying the types of evidence that will be admissible during the course of the arbitration. In the absence of any agreement between the parties, the arbitral tribunal will establish the most suitable framework for the production of evidence (often reflecting the Italian statutory rules).61

6.7.2 Parties and arbitrators may accept the admissibility of certain forms of evidence (e.g. email correspondence) or, on the other hand, may limit the admissible evidence (e.g. only permitting written documents).

6.7.3 The arbitral tribunal may delegate the decision as to whether or not certain evidence should be admissible to one of the arbitrators.62

6.7.4 The arbitrators may hear witnesses in a place of their choosing (e.g. at the seat of the arbitration or at the witnesses’ home or office) or require a written statement of a witness’s testimony.63 When a witness refuses to appear, the President of the court where the arbitration has its seat can oblige him/her to appear before the arbitrators (see paragraph 8.3.2 below).64

6.7.5 The arbitrators can request information from public bodies which they consider to be useful for the proceedings.65

Interlocutory awards

6.7.6 The arbitral tribunal may render interlocutory awards regarding all queries which arise during the arbitral proceedings (e.g. evidential issues or witnesses), as long as they fall within the scope of the arbitration agreement.66

6.8 Appointment of experts

6.8.1 In addition to the powers mentioned above, the arbitral tribunal may also appoint technical experts to help them resolve technical issues. Arbitrators are entitled to appoint either individuals or companies as technical experts.67

6.8.2 After the arbitral tribunal has appointed technical experts, the parties have the same rights provided for in the CPC as parties to ordinary proceedings before the

61 CPC, art 816 bis and 816 ter.
62 Ibid, art 816 ter.
63 Ibid.
64 Ibid, art 816 ter, para 3.
66 Ibid, art 819.
67 Ibid, art 816 ter.
courts. All parties are entitled to appoint their own experts who have the right to submit their own reports in response to the results put forward by the experts appointed by the arbitral tribunal.\textsuperscript{68}

6.9 Confidentiality
6.9.1 Although there are no compulsory provisions on confidentiality in the CPC, arbitral proceedings generally afford parties a high level of confidentiality.

6.9.2 While the decisions of the ordinary courts are generally available to third parties, awards are not, unless the parties agree otherwise.

7. Making of award and termination of proceedings

7.1 Choice of law
7.1.1 The parties are free to choose the governing law.\textsuperscript{69} In the absence of an express choice, the arbitrators shall select the law that they deem to be most appropriate.\textsuperscript{70} Unless the parties authorise them to do so, the arbitrators may neither decide the dispute \textit{ex aequo et bono} (equità) nor in accordance with the \textit{lex mercatoria}.\textsuperscript{71}

7.2 Timing, form, content and notification of award
7.2.1 In the absence of any contrary agreement, the arbitrators must render their decision within 240 days from the acceptance of their appointment as arbitrators.\textsuperscript{72} The time limit is suspended when a petition for challenge is filed or when it is necessary to replace one or more arbitrators. In the latter scenario, the remaining time, if shorter, will be extended to a minimum of 90 days from the date on which the suspension is lifted.\textsuperscript{73}

7.2.2 The CPC provides for different circumstances in which the above time limit can be extended with the written agreement of both parties or if so ordered by a national court, namely:\textsuperscript{74}


\textsuperscript{69} CPC, art 816 bis.

\textsuperscript{70} Ibid.

\textsuperscript{71} Ibid, art 822.

\textsuperscript{72} Ibid, art 820, para 2.

\textsuperscript{73} Ibid, art 820, para 4.

\textsuperscript{74} Ibid.
7.2.3 It is important to note, however, that an extension can only be granted once and for no longer than 180 days.

Form and contents of the award

7.2.4 The award must be rendered by a majority of the arbitrators (with the participation of all of the arbitrators), recorded in writing and must contain the following information:

— identity of the arbitrators;
— seat of the arbitration;
— identity of the parties;
— reference to the arbitration agreement and to the matters submitted to arbitration;
— a brief statement of the reasons for the decision;
— the decision; and
— the signatures of the arbitrators and the date of signature.\(^{75}\)

7.2.5 The signature of a majority of the arbitrators is sufficient provided that the decision was taken with the participation of all of the arbitrators and the award expressly mentions that one or more arbitrators refused or were unable to sign the award.

Effects and notification of the award

7.2.6 The award has the same effect as a judgment as soon as it is signed.\(^{76}\) The arbitrators shall issue the award in as many original copies as there are parties and notify each party by delivering an original copy of the award to each party by hand or by registered post within ten days of the date of the last signature.\(^{77}\)

7.3 Settlement

7.3.1 If the parties reach a settlement during the proceedings, it is common practice to inform the tribunal and withdraw from the arbitral proceedings. Alternatively, the parties can ask the arbitrators to issue an award which records the terms of the settlement.

\(^{75}\) Ibid, art 823, para 2.

\(^{76}\) Ibid, art 824 bis.

\(^{77}\) Ibid, art 824.
7.4 **Power to award interest and costs**

7.4.1 The arbitrators will take account of costs as well as their own fees in the award. They can also decide whether to award interest if requested to do so by the parties.

7.5 **Stay of the proceedings**

7.5.1 The arbitrators are required to stay the proceedings in the following circumstances:
- death, termination or loss of legal capacity of a party;
- if criminal proceedings are pending in relation to the same matter;
- if, during the proceedings, an issue arises which cannot be settled by arbitration and which must be resolved by means of a final court judgment; or
- if the arbitrators submit an issue to the Italian Constitutional Court.\(^{78}\)

7.5.2 If neither party files an express request to lift the stay on proceedings within the time limit imposed by the arbitrators, then the proceedings shall be terminated.\(^{79}\)

7.6 **Termination of the proceedings**

7.6.1 Arbitral proceedings terminate when the arbitrators render and sign their final award which has the same effect as a court judgment.

7.7 **Correction and clarification**

7.7.1 The parties may require the arbitrators who decided the case to rectify the award if it contains formal omissions, errors or miscalculations or when substantial formal requirements are missing.\(^{80}\)

7.7.2 The tribunal must make a decision regarding the corrections within a period of 60 days following the request by one or more parties to do so. The tribunal has an obligation to hear the parties within this period. If the arbitrators do not comply with this time limit, the parties can request that the correction is made by the competent national court.\(^{81}\)

7.7.3 If the award has already been filed with the competent national court for the purposes of enforcement or challenge, it shall be for that court to rule on possible rectification.\(^{82}\)

---

\(^{78}\) Ibid, art 829 bis, para 1.

\(^{79}\) Ibid, art 819 bis.

\(^{80}\) Ibid, art 826.

\(^{81}\) Ibid.

\(^{82}\) Ibid.
8. Role of the courts

8.1 Jurisdiction of the courts and stay of court proceedings

8.1.1 As a general rule, if the parties agree to submit their dispute to arbitration, the national courts must decline jurisdiction on the merits if the respondent raises an objection concerning the lack of jurisdiction of the court in its first defence. The court shall decide on its jurisdiction by judgment.\textsuperscript{83}

8.1.2 Should the respondent not raise an objection concerning the lack of jurisdiction in a timely manner, the arbitral tribunal will no longer have jurisdiction.\textsuperscript{84}

8.1.3 The 2006 Reforms set out the consequences of disputes concerning the validity of the arbitration clause arising, which depends on whether it materialises before or after the commencement of the arbitration. In the latter scenario (pending the arbitral proceedings), no claim concerning the validity of the clause can be raised in court proceedings.\textsuperscript{85} However, if the arbitral proceedings have not been commenced, the dispute shall be referred to court proceedings on the grounds that – at that stage – it only concerns the validity of an agreement (i.e. the arbitration clause). Regardless of the decision of the courts, the parties cannot enforce the CPC articles to stay or reinstate the proceedings after a decision on the competence has been taken.\textsuperscript{86} New proceedings shall be commenced by the parties before the competent authority (either the arbitral tribunal or the ordinary courts).\textsuperscript{87}

\textit{Award rendered before the termination of the court proceedings}

8.1.4 Although there are no specific provisions, if the arbitral tribunal renders an award on a preliminary question before the termination of the court proceedings, the court could be asked by the parties to align its judgment with the award.\textsuperscript{88} For instance, it could be the case that the court proceedings concern a payment of money that depends on the validity of an agreement between the parties. If the validity of the agreement was referred to arbitration on the grounds of an

\textsuperscript{83} Ibid, art 37, 819 ter.
\textsuperscript{84} Ibid, art 819 ter, para 1.
\textsuperscript{85} Ibid, art 819 ter, para 4.
\textsuperscript{86} Ibid, art 819 ter, para 3.
arbitration clause within the agreement and answered by the arbitral tribunal, the court could be asked by the parties to take note of this ruling.

**Award rendered after the termination of the court proceedings**

8.1.5 An arbitral decision on a preliminary question of an arbitration clause has the effect of a final judgment, while a court decision on the same matter has the effect of an interlocutory judgment. Consequently, a party interested in challenging the court’s judgment could start new proceedings on the grounds of the award. Making reference to the above example, if the courts have ordered payment in favour of one party, assuming – *incidenter tantum* – that the agreement was valid, but afterwards the validity of the agreement was denied by an arbitral tribunal, the party that had been ordered to pay would be entitled to start other court proceedings in order to recoup the monies already paid.

8.2 **Interim protective measures**

8.2.1 National courts have exclusive jurisdiction to grant interim protective measures and seizure orders, whereas arbitrators do not. However, applications to the national courts for interim measures do not suspend the arbitral proceedings.

8.3 **Obtaining evidence and other court assistance**

8.3.1 Although the CPC recognises the autonomy of the arbitral tribunal, in some cases the President of the court of the district where the arbitration has its seat has powers to provide assistance to arbitrators.

**Assistance in hearing witnesses**

8.3.2 When a witness refuses to appear upon the arbitrators’ request, the President of the court of the district where the arbitration takes place can oblige him to appear before them. If the arbitrators request assistance from the President, the term within which the arbitrators have to render the award is stayed until the date when the arbitrators hear the witness’s testimony.

**Other powers of the courts**

8.3.3 The President of the court has the power to settle conflicts which may arise during the arbitral proceedings, including the settlement of the number of arbitrators or the appointment, removal and replacement of arbitrators (see section 4 above).

---


90 CPC, art 818.


92 *Ibid*.
8.3.4 The arbitrators are also entitled to apply to the President of the court in the district in which the arbitration has its seat in the event that the parties fail to pay their fees in order to ask the President for a fee assessment. The court order, although open to challenge by the parties, is immediately enforceable.

8.3.5 The role of the court is also important whenever a query arises during the arbitral procedure that cannot be settled by arbitration under Italian law (see section 3.3).

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts
9.1.1 The parties have 90 days from being notified of the award to file an appeal with the Court of Appeal where the arbitration has its seat. Should no notification occur, the term to challenge is extended to one year from the last signature on the award.\(^93\)

9.2 Appeal
9.2.1 The CPC sets out the following grounds on which arbitral awards governed by Italian law can be challenged and declared null and void by the court:
  — lack of a valid arbitration agreement;
  — the arbitrators were not correctly appointed;
  — the award was rendered by an arbitrator who did not have capacity to act as arbitrator;
  — the award was beyond the jurisdiction of the arbitral tribunal or the tribunal did not render a decision on one or more issues or the award is contradictory;
  — non-compliance with formal requirements;
  — non-compliance with the time limits;
  — non-compliance with the statutory rules as determined by the parties;
  — the award is in conflict with a precedent final award or judgment between the parties, provided that the arbitrators were informed of the precedent in the course of the arbitral proceedings;
  — the award breached fair process rules;
  — the award was not determined on the merits of the dispute; and
  — non-compliance with law (unless the arbitrators were authorised by the parties to decide to the dispute \textit{ex aequo et bono}).\(^94\)

---

\(^{93}\) \textit{Ibid}, art 828.  
\(^{94}\) \textit{Ibid}, art 829.
9.2.2 In addition to the grounds set out above, the parties may agree on other situations in which the award can be challenged.

9.2.3 Challenge of the award for non-compliance with the law is always permitted, even when not provided for by law or agreed as a separate ground by the parties, in the following cases:95
— non-compliance with Italian public policy;
— disputes regarding employment issues; and
— disputes on issues which cannot be settled by arbitration (see section 3.3 above).

9.2.4 A petition to set the award aside does not automatically suspend the enforcement of the award. That said, upon the request of the parties, the Court of Appeal may suspend the enforceability of the award.96

9.3 Challenge
9.3.1 If the award is declared null and void, unless otherwise agreed by the parties, the Court of Appeal is also entitled to decide the dispute on the merits.97

9.3.2 The above power is granted to the Court of Appeal only if the award was declared null and void on one of the following grounds:
— formal requirements (e.g. reasons for the decision, order, seat or signature) were not respected in the award;
— non-compliance with the time limits;
— non-compliance with the statutory rules as determined by the parties;
— the award is in conflict with a precedent final award or judgment between the parties;
— the award breached fair process rules;
— the award does not decide one or more questions raised by the parties; or
— non-compliance with law.98

9.3.3 If a party has its residence or its registered office abroad, the Court of Appeal can decide the dispute on the merits only if expressly agreed by both parties.99

95 Ibid, art 829.
96 Ibid, art 830.
97 Ibid.
98 Ibid.
99 Ibid, art 830.
9.3.4 Should the award be declared null and void, but the Court of Appeal is not entitled to rule on the merits on the grounds of the above, the dispute must be re-submitted to arbitration for a ruling on the merits, provided that the invalidity of the arbitration agreement is not the reason for the award being declared void.\textsuperscript{100}

9.4 Revocation

9.4.1 The award may be revoked within 30 days of a party becoming aware of one of the following events:\textsuperscript{101}
— the award is the result of a fraud committed by a party;
— the award has been rendered on the basis of false evidence;
— subsequently, one or more relevant documents have been discovered, which were not disclosed due to the behaviour of one of the parties or due to force majeure; or
— the award is the result of a fraud committed by one of the arbitrators.

9.5 Third party opposition

9.5.1 A third party can challenge the award within 30 days from the date upon which he became aware of the award if:\textsuperscript{102}
(i) it affects that third-party's rights; or
(ii) it is the result of a fraud against that third-party, in order to prevent it from recovering its credit or from claiming for a purchased right.

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 The enforcement of domestic awards is subject to an application to the competent national court where the arbitration has its seat. Upon assessment of the formal requirements of the award, the court shall issue an execution order (exequatur).\textsuperscript{103}

10.1.2 The parties can file a complaint with the court if it denies enforcement of the domestic award. The court must decide on the merits of the complaint within 30 days from the date of notification of the court’s decision to the parties.\textsuperscript{104} The decision of the court is final and is not open to appeal.\textsuperscript{105}

\textsuperscript{100} Ibid.

\textsuperscript{101} Ibid, art 831, paras 1 and 2.

\textsuperscript{102} Ibid, art 831, para 3.

\textsuperscript{103} Ibid, art 825.

\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid.
10.2 Foreign awards

10.2.1 The 1994 Reforms introduced a recognition and enforcement regime which applies to all foreign awards unless more favourable provisions are available in an international treaty. The relevant Italian provisions on recognition and enforcement of foreign awards comply almost entirely with the provisions of the New York Convention.

10.2.2 In order to enforce a foreign award in Italy, a party must file an application with the President of the Court of Appeal where the other party has its residence, and if the other party is not resident in Italy, with the Court of Appeal of Rome.

10.2.3 The party must provide the President of the Court of Appeal with an original copy of the foreign award and the arbitration agreement, together with a certified Italian translation.

10.2.4 Upon assessment of the above formal requirements, the President of the Court of Appeal must declare the award enforceable in Italy, unless he establishes ex officio that:

(i) the subject-matter of the dispute cannot be settled by arbitration under Italian law; or

(ii) the award is contrary to public policy.

10.2.5 Italian courts will apply an international concept of public policy applied under the New York Convention, which is intended as a body of universal principles aimed at the protection of fundamental human rights, and is often embodied in international declarations or conventions.

10.2.6 A party may challenge the decision of the Court of Appeal if that party proves that:

— one of the parties to the arbitration agreement was under some incapacity, the agreement was not valid under the law chosen by the parties or under the law of the state in which the award was rendered;

— the applicant party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present its case;

107 CPC, art 839, para 1.
108 Ibid, art 839, paras 2 and 3.
109 Ibid, art 839.
— the award deals with a dispute not provided for or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;\textsuperscript{111}

— 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 law governing the arbitration; or

— the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.\textsuperscript{112}

11. Special provisions and considerations

11.1 Corporate arbitration

11.1.1 In 2003 the Italian Government introduced a new procedural law to be applied to company disputes\textsuperscript{113} concerning all corporate relations, including disputes arising out of or in connection with incorporation, modification, winding-up, liability actions against managing and auditing bodies of all kinds of companies and share transfers.\textsuperscript{114} The Decree came into force as of 1 January 2004.

Arbitration clause

11.1.2 The arbitration clause must provide for the number of arbitrators and set out the procedure for their appointment.\textsuperscript{115}

11.1.3 The power to appoint all the arbitrators must be conferred on a third party unconnected with the company, otherwise the clause is null and void. If the third party fails to fulfil its duty to appoint the arbitrators, then the President of the court of the district in which the company has its registered office has the authority to make the appointment and will proceed accordingly.\textsuperscript{116}

11.1.4 Appointment of arbitrators by third parties is the main difference between these arbitral proceedings and those governed by the provisions of the CPC and is aimed at promoting impartiality and fairness in the choice of arbitrators.

\textsuperscript{111} Note that where decisions on matters submitted to arbitration can be separated from those not so submitted, the part of the award containing decisions on matters submitted to arbitration may be enforced.

\textsuperscript{112} CPC, art 840.

\textsuperscript{113} With the exception of those companies operating in the venture capital market.

\textsuperscript{114} Legislative Decree 17 January no. 5/2003 on corporate, banking and finance proceedings (Decree).

\textsuperscript{115} Decree, art 35, para 2.

\textsuperscript{116} Ibid.
Arbitrability

11.1.5 The memorandum of association of a company may include clauses submitting disputes to arbitration which concern disposable rights relating to the by-laws of the company and which may arise:
(i) between shareholders; or
(ii) between the company and its shareholders.

11.1.6 The object of the clause may relate to disputes concerning the existence, the qualification or the regulation of the by-laws of the company or rights deriving from them.

11.1.7 The mere inclusion of an arbitration clause in the company’s memorandum renders such clause binding on the company and on all of its shareholders, including those who contest their status as such.\(^\text{117}\)

11.1.8 Each and every amendment to the memorandum that introduces or deletes an arbitration clause, needs to be approved by shareholders representing at least two thirds of the company’s capital. Those shareholders who do not vote or participate in the decision are entitled to withdraw from the company within 90 days following the decision.\(^\text{118}\)

11.1.9 If specifically provided for in the memorandum, the clause may also deal with those disputes initiated by or against directors, liquidators and auditors. Such a clause will automatically be binding on such persons upon acceptance of their post.\(^\text{119}\)

11.1.10 Disputes requiring the intervention of the Public Prosecutor may not be submitted to arbitration (e.g. disputes concerning the appointment and the removal of liquidators).\(^\text{120}\)

Arbitral proceedings

11.1.11 Procedural aspects which are not expressly provided for in the Decree are governed by the provisions of the CPC. The provisions of the Decree that differ from ordinary arbitral proceedings are as follows:

\(^{117}\) Decree, art 34, para 3.
\(^{118}\) Ibid, art 34, para 6.
\(^{119}\) Ibid, art 34, para 4.
\(^{120}\) Ibid, art 34, para 5.
Arbitration in Italy

— the arbitration application must be filed with the company’s registry and be made available to all of the company’s shareholders;\(^{121}\)
— third parties may intervene in company arbitral proceedings;\(^{122}\)
— \textit{ex parte} intervention (available for the benefit of third parties who are not shareholders)\(^{123}\) and intervention by virtue of court order (available for shareholders)\(^{124}\) are also permitted;
— arbitrators may admit new evidence and extend the period within which they are obliged to render their final award; and
— when the dispute concerns the validity of shareholder resolutions, the arbitrators may always suspend the effects of those resolutions as a preventive measure.\(^{125}\)

11.2 Consumers

11.2.1 The arbitrability of disputes concerning consumer protection claims has always been under debate in Italy.

\textit{Before the Consumers’ Code}\(^{126}\)

11.2.2 Legal commentators and case law were divided into those who totally excluded the arbitrability of consumers’ claims\(^{127}\) and those who conceded the possibility of the submitting consumer disputes to \textit{arbitrato rituale}, deeming that recourse to \textit{arbitrato irrituale} or free arbitration did not offer enough protection to consumers.\(^{128}\)

\textit{After the introduction of the Consumers’ Code}

11.2.3 The Consumers’ Code, in relation to the submission of a consumer claim to out-of-court dispute resolution in general (e.g. arbitration or alternative dispute resolution such as mediation), expressly states that consumers should always have the right to submit their claims to the courts, regardless of the results of the out-of-court decision.\(^{129}\)

---

\(^{121}\) \textit{Ibid}, art 35, para 1.
\(^{122}\) \textit{CPC}, art 105.
\(^{123}\) \textit{Ibid}, art 106.
\(^{124}\) \textit{Ibid}, art 107.
\(^{125}\) \textit{Ibid}, art 35, para 5.
\(^{126}\) Legislative Decree 6th September 2005, no. 206 (\textit{Consumers’ Code}).
\(^{129}\) Consumers’ Code, art 140, para 6.
11.2.4 Therefore, although the Consumers’ Code does not expressly rule on the relationship between consumer protection and arbitration, recourse to *arbitrato rituale* has now generally been admitted by legal commentators, but without prejudice to the right of consumers to submit their claims to the courts, regardless of the decision rendered by the arbitral tribunal.\(^\text{130}\)

11.2.5 The above interpretation seems to be in conflict with the principle introduced by the 2006 Reforms, whereby arbitral awards have the same binding effect as court judgments. This conflict has not yet been resolved.

11.3 Employment Law

11.3.1 The 2006 Reforms introduced recourse to *arbitrato irrituale* or free arbitration in relation to employment disputes, which was previously excluded by law and in collective labour contracts.

11.3.2 The matter has been reformed recently\(^\text{131}\) through general reform of the Italian employment law system, which aimed at promoting recourse to arbitration in order to lessen the burden on the labour courts.

11.3.3 The new regulation expressly introduces the following cases of *arbitrato irrituale* or free arbitration in relation to labour disputes:

- before making an application to the labour court, pending or following a genuine attempt of conciliation as required by law, the parties are entitled to refer the dispute to arbitration appointing the conciliation panel already involved in the matter as the arbitral tribunal;\(^\text{132}\)
- the arbitration must be conducted in compliance with the rules set forth by the collective labour contracts put forward by the major trade unions;\(^\text{133}\) and
- without prejudice of the right to recourse to the labour courts or to the conciliation panel, the parties are entitled to refer the dispute to a panel of three arbitrators, the first two appointed by the parties and the third one chosen by legal university professors or by lawyers who are qualified to appear before the High Courts.\(^\text{134}\)


\(^{131}\) Law no. 183 4th November 2010, art 31.

\(^{132}\) CPC, art 412.

\(^{133}\) *Ibid*, art 412 ter.

\(^{134}\) *Ibid*, art 412 quater.
12. Conclusion

12.1 Main features of arbitration in Italy

12.1.1 The number of disputes resolved out-of-court and by arbitration is exponentially increasing in Italy. In the past few years, the applications have more than tripled. Indeed, such proceedings are constantly becoming widespread among Italian people, acquiring more and more consideration as an effective option to safeguard their rights.

12.1.2 In the light of the above, it is useful to summarise the main advantages and disadvantages that recourse to arbitration can imply.

12.2 Main advantages

Neutrality and expertise of the arbitrators

12.2.1 The parties may choose to resolve a dispute which has arisen between them through a private third party or, more frequently, a panel of private arbitrators. Generally, each party selects their own arbitrator and, jointly, both arbitrators appoint a third one to act as chair of the panel.

12.2.2 The powers of the arbitrators are granted directly by the parties. The appointed arbitrators are generally private individuals with expertise on the specific subject matter of the dispute. The advantage of this is that they may assess not only the legal aspects of the case but also the general commercial framework of the dispute.

Brevity and less formality

12.2.3 Arbitration is a flexible means of resolving a dispute and is often procedurally simpler than ordinary civil proceedings, although it can differ depending on which type of arbitral proceedings the parties choose.

12.2.4 The rules concerning Italian arbitral proceedings are formal but they are not as strict as the procedural rules which govern ordinary litigation.

12.2.5 Arbitration is often a quicker method of dispute resolution because, generally, arbitral proceedings terminate at first instance. Proceedings can last longer in the event that the parties breach or refuse to enforce the binding award. In this case, a party must file an application to a competent court which, after assessing the formal requirements of the award, can issue an execution order (i.e. exequatur).
Confidentiality

12.2.6 Arbitration assures parties a high level of confidentiality. While the decisions of the ordinary court are generally accessible to third parties, the same does not apply to arbitral awards, unless the parties agree otherwise.

Possibility of ruling out the jurisdiction of the adverse party

12.2.7 In international agreements, the parties may expressly exclude certain jurisdictions by providing for this in the arbitration clause. Such a solution has practical advantages, such as avoiding the application of different local procedural rules which could prove time-consuming for multi-national companies.

12.3 Disadvantages

Costs of the proceedings

12.3.1 The main disadvantage of arbitration is the high costs involved, compared to the costs incurred in ordinary civil proceedings. This disadvantage is compensated in other areas, such as the lesser degree of formality, the confidentiality and the brevity mentioned above.

Interim protective measures

12.3.2 Arbitrators do not have powers to grant seizure orders nor grant other urgent preventive measures. In order to obtain such measures, the parties need to file the relevant application with the competent courts.

Challenge of the award before the court

12.3.3 As can be inferred from section 9.2 above, statutory rules on challenging arbitral awards are particularly restrictive and only permit a challenge when there has been a procedural error.
13. Contacts

CMS Adonnino Ascoli & Cavasola Scamoni
Via Agostino Depretis, 86
00184 Rome
Italy

Paola Ghezzi
T  +39 06 4781 51
E  paola.ghezzi@cms-aacs.com

Laura Opilio
T  +39 06 4781 51
E  laura.opilio@cms-aacs.com
ARBITRATION IN THE NETHERLANDS

By Mark Ziekman and Marlous de Groot, CMS
Table of Contents

1. Historical background 499
   1.1 Overview 499
   1.2 Review of the Netherlands Arbitration Act 500
   1.3 Arbitration experience in the Netherlands 500

2. Scope of application and general provisions of the Netherlands Arbitration Act 501
   2.1 Scope of application 501
   2.2 General principles 501

3. The arbitration agreement 502
   3.1 Formal requirements 502
   3.2 Arbitrability 502
   3.3 Separability 502
   3.4 Legal consequences of a binding arbitration agreement 503

4. Composition of the arbitral tribunal 503
   4.1 Composition of the arbitral tribunal 503
   4.2 Procedure for challenging and substituting arbitrators 504
   4.3 Arbitrators’ fees 504
   4.4 Arbitrator immunity 504

5. Jurisdiction of the arbitral tribunal 505
   5.1 Competence to rule on jurisdiction 505
   5.2 Power to order interim measures 505

6. Conduct of proceedings 505
   6.1 Commencing an arbitration 505
   6.2 General procedural principles 505
   6.3 Seat and language of arbitration 506
   6.4 Multi-party issues 506
   6.5 Oral hearings and written proceedings 507
   6.6 Default by one of the parties 508
   6.7 Taking of evidence 508
   6.8 Disclosure of documents 508
   6.9 Appointment of experts 508
   6.10 Confidentiality 508
7. Making of the award and procedural rulings
   7.1 Choice of law
   7.2 Form, content and notification of an award
   7.3 Settlement
   7.4 Power to award interest and costs
   7.5 Decision making by the arbitral tribunal
   7.6 Effect of an award
   7.7 Correction and interpretation of the award
   7.8 Submissions

8. Role of the courts
   8.1 Jurisdiction of the courts
   8.2 Preliminary rulings on jurisdiction
   8.3 Interim protective measures
   8.4 Obtaining evidence and other court assistance

9. Challenging and appealing an award through the courts
   9.1 Jurisdiction of the courts
   9.2 Appeals
   9.3 Applications to set aside an award

10. Recognition and enforcement of awards
    10.1 Domestic awards
    10.2 Foreign awards

11. Special provisions and considerations

12. Concluding thoughts and themes

13. Contacts
1. **Historical background**

1.1 **Overview**

1.1.1 On 1 October 1838, the legal basis for arbitration in the Netherlands was implemented in Book III of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). This remained more or less unchanged until the 1986 Arbitration Act was adopted and came into force on 1 December 1986. The 1986 Arbitration Act is set out in Book IV of the Code of Civil Procedure (*Netherlands Arbitration Act*).

1.1.2 The Netherlands Arbitration Act was designed to promote the Netherlands as a seat for international arbitration. The Model Law (1985)\(^1\) has clearly influenced the 1986 amendments in the Netherlands Arbitration Act in view of the emphasis placed on *inter alia* party autonomy. As a result, the Netherlands Arbitration Act contains a comprehensive set of rules for arbitration in the Netherlands and some articles regulating arbitration outside the Netherlands.

1.1.3 Please note that in this guide the term “the Netherlands” does not include the Caribbean islands within the Kingdom of the Netherlands. These islands adopted their own legislation with respect to arbitration, also based, to a large extent, upon the Model Law (1985).\(^2\)

1.1.4 Every arbitration that takes place in the Netherlands is subject to the Netherlands Arbitration Act, even when the parties involved are foreign. The regulations contained in the Netherlands Arbitration Act often apply subject to the agreement of the parties and there is considerable scope for the parties to formulate their own arbitral procedure (most commonly by adopting a standard set of arbitration rules promulgated by a domestic or international arbitral institution, as appropriate).

1.1.5 One peculiarity of the Netherlands Arbitration Act is that, in a number of cases, the President of the District Court may be called upon to assist with the conduct of the arbitration. One such instance is where the parties have failed to reach agreement on the number of arbitrators. In such a case, the President of the District Court may be petitioned by either party to make a ruling. There is further scope to make applications to the President of the District Court in other cases, such as for the appointment of an arbitrator, the removal of an arbitrator, the

---

2 On 10 October 2010 the island group of the Netherlands Antilles split up. Its islands Curaçao and St. Maarten now have the constitutional status of separate countries within the Kingdom of the Netherlands, a status that nearby Aruba obtained in 1986. The islands Bonaire, St. Eustatius and Saba are special municipalities of the Netherlands, with separate legislation on arbitration, very similar to that on Curaçao, St. Maarten and Aruba.
examination of an unwilling witness or the granting or refusal of an enforcement order. In many ways the President’s role is akin to that of an arbitral institution and in general any such interference is very limited.

1.2 Review of the Netherlands Arbitration Act

1.2.1 During the review of the Dutch Civil Procedural law in 2002, the Minister of Justice announced that the Netherlands Arbitration Act would also be reviewed. On 21 December 2006, a preliminary draft bill was presented to the Ministry of Justice by the chair of the Netherlands Arbitration Institute (NAI). It is not yet known when the legislative proposal of the Netherlands Arbitration Act will be submitted to the House of Representatives or whether the legislator will accept the preliminary draft bill.

1.2.2 There are two main reasons for reviewing the Netherlands Arbitration Act. First, after the implementation of the Netherlands Arbitration Act, the Model Law (1985) was adopted by at least 60 countries. The Netherlands is not one of those countries. Although the Model Law (1985) influenced Netherlands law on arbitration, the Netherlands Arbitration Act does not fully mirror its terms. Secondly, several important sets of institutional arbitration rules have been revised since the implementation of the Netherlands Arbitration Act, e.g. the ICC Rules, the LCIA Rules and the arbitration rules of the NAI (NAI Rules).

1.3 Arbitration experience in the Netherlands

1.3.1 The Netherlands has positive experience with arbitration. The leading arbitral institute is the NAI. In addition, there are permanent arbitration boards, for example De Raad van Arbitrage voor de Bouwbedrijven (construction) and numerous other trade-specific arbitration panels. Arbitration has even made some inroads into sport-related disputes, and the Royal Dutch Football Association arbitration board is well established. Arbitration is also widely used in IT, telecom and internet cases. ICT-Office (a Dutch trade association for 550 IT, telecom, internet and office companies) recommends that its members use general terms and conditions containing an arbitration clause based on the rules of Stichting Geschillenoplossing Automatisering. Finally, in 2000, the Dutch Centre of the ENDR, a network supported by the European Union for European arbitration, was founded.

1.3.2 While not as popular as institutional arbitration in the Netherlands, ad hoc arbitration is also available and the Netherlands Arbitration Act contains fall-back provisions that may assist in conducting ad hoc arbitrations.
1.3.3 The often cited advantages of arbitration over court proceedings, such as confidentiality, trade expertise of arbitrators, flexibility and expediency, apply with equal force to arbitration in the Netherlands.

1.3.4 Traditionally the cost of arbitral proceedings in the Netherlands has not varied significantly from court proceedings. Costs may increase if the award is challenged in the courts, though the Netherlands Arbitration Act has curtailed the grounds for challenge.

1.3.5 In addition to arbitration, there are binding ruling procedures in the Netherlands. A binding ruling (bindend advies) by an independent third party resembles arbitration, but there is one essential difference. A binding ruling can only be set aside and declared non-binding if it is in serious conflict with reasonableness and fairness and if it would be an abuse of law if the opposite party, on the basis of the binding ruling, should wish to hold the other party to it. In other words, the binding ruling is subject to limited review on the ground that the ruling is in serious conflict with reasonableness and fairness (marginale toetsing). Another difference between the binding ruling procedures and arbitration relates to the enforceability of the award/ruling. A binding ruling has the characteristics of an agreement and is deemed to have the force of an agreement. An arbitration award can be enforced simply on the basis of an enforcement order. In the case of a binding ruling, the ruling must be brought before the District Court to request enforcement.

2. **Scope of application and general provisions of the Netherlands Arbitration Act**

2.1 **Scope of application**

2.1.1 The Netherlands Arbitration Act is applicable if the seat of the arbitration is located in the Netherlands, whether the arbitration is ad hoc or institutional, and regardless of the nationality of the parties.³

2.2 **General principles**

2.2.1 Article 17 of the Dutch Constitution provides that no party may be prevented against his or her will from being heard by a court he or she is entitled to apply to by law. Therefore, arbitration must be based on the consent of all those involved. The principle of party autonomy is enshrined in the Netherlands Arbitration Act, …

³ Netherlands Arbitration Act, art 1073, see also paragraph 6.3.2 below.
together with the principle of equality of the parties and the right of each party to present its case and to be heard.\(^4\) Infringement of party autonomy may result in the annulment (vernietiging) of an award.\(^5\)

### 3. The arbitration agreement

#### 3.1 Formal requirements

3.1.1 An arbitration agreement must be evidenced in writing.\(^6\) The requirement is a statutory provision that coincides with arbitration legislation abroad and also with provisions in various treaties on arbitration.

3.1.2 Arbitrators do not have jurisdiction to hear a case in the absence of a valid arbitration agreement. Parties may agree to submit to arbitration, disputes which have arisen or which may arise between them out of a defined legal relationship (whether contractual or not).\(^7\)

#### 3.2 Arbitrability

3.2.1 The question as to whether a dispute is suitable for arbitration may arise in the arbitration itself if there is a challenge to the jurisdiction of the arbitrator pursuant to Article 1052 of the Netherlands Arbitration Act. The issue may also arise if the case comes before an ordinary court where a party invokes the arbitration agreement to stay the court proceedings. Some disputes are not suitable for arbitration, such as certain proceedings in family law (e.g. divorce or adoption), bankruptcy proceedings and certain aspects of corporate law (e.g. the status of a limited liability company or liquidation proceedings).

3.2.2 If arbitrators render an award on a matter not suitable for arbitration, such an award is in conflict with public policy and can therefore be set aside.

#### 3.3 Separability

3.3.1 The arbitration agreement shall be considered and decided upon as a separate agreement.\(^8\) The arbitral tribunal has the power to rule on the validity of the main agreement that contains the arbitration clause. Therefore, the possible invalidity of the main contract will not affect the validity of the arbitration clause that is

---

\(^4\) An elaboration of this principle is given in Netherlands Arbitration Act, art 1039, para 1.

\(^5\) Netherlands Arbitration Act, art 1065, paras 1(c) and 5.

\(^6\) *Ibid*, art 1021.

\(^7\) *Ibid*, art 1020.

\(^8\) *Ibid*, art 1053.
included within the main contract. However, it is still uncertain whether an arbitration clause will survive if the main contract is considered non-existent by the arbitral tribunal.

3.4 Legal consequences of a binding arbitration agreement

3.4.1 A binding arbitration agreement first and foremost settles the jurisdiction of the arbitral tribunal. If a dispute within the scope of the arbitration agreement is brought before any domestic court, it will rule that it lacks jurisdiction. However, the District Court does have jurisdiction in certain procedural matters as is further described in section 8.1 below and the President of the District Court has jurisdiction in summary proceedings.

3.4.2 Other obvious consequences of a binding arbitration agreement are the different procedural rules and, if this is agreed upon, the choice of law that is to settle the dispute.

4. Composition of the arbitral tribunal

4.1 Composition of the arbitral tribunal

4.1.1 The parties are free to agree on any uneven number of arbitrators. If the parties, however, agree upon an even number of arbitrators, these arbitrators must appoint an additional arbitrator as chair. In certain other countries an even number of arbitrators is permitted and the courts in the Netherlands are willing to enforce the awards of foreign arbitral tribunals in such circumstances. If the parties fail to determine the number of arbitrators or cannot reach agreement on the number of arbitrators, the President of the District Court will determine the number of arbitrators at the request of any of the parties.

4.1.2 The arbitral tribunal is appointed according to the procedure agreed between the parties. An appointment shall be made within a period of two months (three months if at least one of the parties is domiciled outside of the Netherlands) from the date the dispute is submitted to the arbitral tribunal, unless the arbitral tribunal had already been appointed.

4.1.3 Where a party fails to make an appointment within the two-month period, the non-defaulting party may request the President of the District Court to make the appointment.

4.2 **Procedure for challenging and substituting arbitrators**

4.2.1 An arbitrator must accept his or her appointment in writing. He or she may be relieved from the appointment upon his or her own request or by the joint decision of the parties. An arbitrator may be challenged if there is justifiable reason to doubt his or her impartiality or independence.

4.2.2 An arbitrator selected by one party can only be challenged by that same party for reasons that have become apparent after his or her appointment. A party cannot challenge an arbitrator appointed by a third party or by the President of the District Court if he or she has acquiesced in the appointment, unless a reason to challenge the arbitrator becomes known to him or her thereafter.

4.2.3 The general rule that an arbitrator may be challenged where there are justifiable reasons to doubt his or her impartiality or independence derives from Article 10 of the UNCITRAL Arbitration Rules (1976).

4.2.4 In the event that an arbitrator is incapable of performing his or her duties, he or she shall be removed upon the request of either party or, in default thereof, by the President of the District Court. Where an arbitrator is thus removed, he or she shall be replaced in accordance with the same procedure as per the original appointment.

4.2.5 The arbitration is suspended during the period for replacing an arbitrator unless otherwise agreed by the parties.

4.3 **Arbitrators’ fees**

4.3.1 The Netherlands Arbitration Act does not include stipulations regarding the arbitrators’ fees. In this regard, distinction should be made between institutional arbitration and ad hoc arbitration. In the former case, the arbitral institution will have a fee schedule, and in the latter case, the determination of fees is left to the arbitrators and the parties. It is normal practice that the arbitrators request a deposit before the start of the arbitral proceedings.

4.4 **Arbitrator immunity**

4.4.1 The liability of arbitrators in the Netherlands to a large extent mirrors the liability of judges, hence an arbitrator may only be held liable in exceptional cases. Where the arbitrator has ignored fundamental principles of law, this may constitute a

---

13 See among other judgments *ASB Greenworld v NAI*, Dutch Supreme Court, 4 December 2009, *JOR* 2010, 175.
violation of public policy which is in turn a ground for annulling the award or refusing its enforcement order. In exceptional circumstances, the arbitrator may be liable in damages to the parties for rendering an award that is contrary to public policy and is incapable of being enforced. Furthermore, the arbitrator may be held liable if an award is filed late, or if there has been excessive delay in the conduct of the proceedings.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The arbitral tribunal is competent to rule on its own jurisdiction in the first instance and will decide upon the existence or validity of the arbitration agreement. This decision is, however, subject to subsequent judicial control.\textsuperscript{14}

5.2 Power to order interim measures

5.2.1 The arbitral tribunal has the power to grant interim measures if the parties so agree.\textsuperscript{15} In the absence of such an agreement, an application must be made to the President of the relevant District Court.\textsuperscript{16}

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 In general, arbitral proceedings commence when a party to a dispute serves a written notice informing the other party that it is commencing arbitration and setting out the disputes submitted to arbitration. The parties may agree on a different procedure for initiating an arbitration.\textsuperscript{17}

6.2 General procedural principles

6.2.1 Dutch law includes a number of fundamental principles of procedural law. These principles include the equal treatment of parties and the right of each party to defend its own rights and to put forward arguments to that effect.\textsuperscript{18} The arbitral tribunal has the right to request oral submissions, to call witnesses or experts and

\textsuperscript{14} Netherlands Arbitration Act, art 1052.

\textsuperscript{15} Ibid, art 1051.

\textsuperscript{16} Ibid, art 1022, para 2.

\textsuperscript{17} Ibid, art 1036.

\textsuperscript{18} Ibid, art 1039.
to order the submission of documents.\textsuperscript{19} The arbitral tribunal is free to apply whatever rules of evidence it deems fit.\textsuperscript{20} The arbitrators may at their discretion determine the relevance and weight of evidence.

6.2.2 The Netherlands Arbitration Act provides that the arbitration is conducted in a manner agreed upon by the parties or, in the absence of such an agreement, according to the directions of the arbitral tribunal.\textsuperscript{21}

6.2.3 The way in which the arbitral proceedings are to be conducted is in most cases set out in the arbitration agreement. Where the parties have not agreed on the applicable procedure, the arbitrators determine the conduct of the proceedings (for example, directions on when submissions must be delivered). The chair of the arbitral tribunal plays an important role in such matters.

6.3 Seat and language of arbitration

6.3.1 The Netherlands Arbitration Act contains no provisions on the language of the proceedings and of documents to be submitted to the arbitral tribunal. The applicable language is therefore determined by the parties or, in the absence of an agreement, by the arbitral tribunal.\textsuperscript{22}

6.3.2 The seat of the arbitration is usually stipulated by the parties in their agreement, or, in absence of such agreement, it will be determined by the arbitral tribunal.\textsuperscript{23} The seat of arbitration is important, as this determines whether the Netherlands Arbitration Act is applicable. Furthermore, the arbitration award has to be filed at the office of the District Court at the seat of arbitration (when the seat of the arbitration is in the Netherlands), so that an authoritative copy of the text is available for possible judicial review.\textsuperscript{24}

6.4 Multi-party issues

6.4.1 The Netherlands Arbitration Act contains several provisions on multi-party issues. Any third party that claims to have an interest in the outcome of the proceedings can request to join a party to the proceedings in its claim against another party (\textit{voeging}) or file a claim against both parties (\textit{tussenkomst}).\textsuperscript{25} A party can also

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{19} Ibid, art 1039, paras 2–4, 1041, 1042 and 1043.
\item \textsuperscript{20} Ibid, art 1039.
\item \textsuperscript{21} Ibid, art 1036.
\item \textsuperscript{22} Ibid, art 1036.
\item \textsuperscript{23} Ibid, art 1037.
\item \textsuperscript{24} Ibid, art 1058, para 1(b).
\item \textsuperscript{25} Ibid, art 1045, para 1.
\end{itemize}
\end{footnotesize}
request that a third party is brought into the arbitration *(vrijwaring).* An important condition is that the new participant is willing to become party to the arbitration agreement. The arbitral tribunal, having heard all parties, has the final say in these matters.

6.4.2 It is also possible to consolidate two arbitrations on related subjects. The President of the District Court of Amsterdam has jurisdiction in these matters.

6.5 **Oral hearings and written proceedings**

6.5.1 The arbitral tribunal has discretion as to whether there should be an oral hearing and may request an oral hearing even if the parties have elected a “documents only” format for the arbitration. The arbitral tribunal may order the parties to appear in person for the purpose of providing information or attempting to arrive at a settlement at any stage of the proceedings.

6.5.2 The arbitral tribunal may regulate the manner in which witnesses are examined and it is entitled to examine witnesses under oath. The cross-examination of witnesses is unusual in the Netherlands; however, the parties are free to agree on a cross-examination procedure should they wish to. In the event that a witness fails to appear voluntarily, or refuses to make a statement, the arbitral tribunal may permit the requesting party, within a term to be determined by the arbitral tribunal, to apply to the President of the District Court requesting the appointment of a delegated judge *(Rechter-Commissaris)* before whom the witness will be examined. Arbitrators have the opportunity to be present at the examination of the witness.

6.5.3 Further procedural powers of the arbitral tribunal include:

— the selection of an expert to deliver an opinion;

— the termination of an arbitration reference if a claimant fails to take certain procedural steps;

— rendering an expedited award where the respondent defaults in presenting a defence without good reason;

— ordering parties to provide documents to the arbitral tribunal; and

---

— allowing third parties who have an interest in the arbitration to join as a party or be heard as an intervener.\(^{34}\)

6.6 **Default by one of the parties**

6.6.1 The arbitral tribunal can terminate arbitral proceedings if the claimant, without showing good cause, does not file or substantiate its claims in time.\(^{35}\) If the respondent, without showing good cause, fails to file or substantiate a defence in time, the arbitral tribunal is to award all claims unless a claim appears to be unjustified or unfounded. The arbitral tribunal can order the claimant to produce evidence of its claims before making this decision.\(^{36}\)

6.7 **Taking of evidence**

6.7.1 The arbitral tribunal shall, subject to any agreement between the parties, determine matters regarding evidence.\(^{37}\)

6.8 **Disclosure of documents**

6.8.1 The arbitral tribunal may order the disclosure of documents (often upon the request of the parties).\(^{38}\) There is no formal sanction for breach of this order, although the arbitral tribunal is at liberty to draw inferences from any non-compliance. Generally, it is a matter for the parties to determine which documents they disclose. In the event that documents are unreasonably withheld by a party, the resulting award may be revoked if the other party obtains such documents afterwards and can establish that they would have affected the decision of the arbitral tribunal.\(^{39}\)

6.9 **Appointment of experts**

6.9.1 The Netherlands Arbitration Act authorises the arbitral tribunal to appoint experts, and the parties will have an opportunity to pose questions to the expert, and comment on the expert’s opinion.\(^{40}\)

6.10 **Confidentiality**

6.10.1 The Netherlands Arbitration Act is silent on the confidentiality of the award. It has been the general practice in the Netherlands since 1919 to publish important

\(^{34}\) *Ibid*, art 1045.

\(^{35}\) *Ibid*, art 1040.

\(^{36}\) *Ibid*, art 1040, para 3.


\(^{39}\) *Ibid*, art 1068, para 1(c).

\(^{40}\) *Ibid*, art 1042, para 1.
arbitration in the Netherlands awards as this is perceived to be in the public interest. The widely used NAI rules of procedure state that the NAI may have awards published, provided that parties are not named and defining characteristics of the parties are left out. A party can nevertheless prevent publication by objecting to the NAI within a month after it has received the award. There has been some speculation about the possibility of a party to an award bringing a claim for damages against an institution that has published the award.

7. Making of the award and procedural rulings

7.1 Choice of law
7.1.1 Parties often agree on the applicable law in their arbitration agreement and the arbitral tribunal will uphold this choice. The parties are also at liberty to refer to the lex mercatoria, although this choice of substantive law has not enjoyed wide acceptance in the Netherlands.

7.1.2 Where parties have neither selected a national law nor opted for the lex mercatoria, the arbitral tribunal will generally select the law of the country most closely connected with the contract between the parties (generally the law of the jurisdiction in which the principal obligations are to be performed).

7.2 Form, content and notification of an award
7.2.1 Unless the parties have agreed otherwise, if the arbitral tribunal is composed of more than one arbitrator, it shall decide by a majority of votes. The award shall be in writing and signed by the arbitrator or arbitrators. If a minority of the arbitrators refuses to sign, the other arbitrators shall record this fact in the award. The requirement for an award to be made in writing is mandatory.

7.2.2 The arbitral tribunal has to ensure that an original copy of the award is filed with the Registry of the District Court within the district where the arbitration is seated.

7.2.3 Finally, an award must contain the reasons on which it is based; otherwise it is liable to be set aside. The extent and effect of this requirement is the subject of

41 NAI Rules, art 55.
42 Netherlands Arbitration Act, art 1057.
43 It is common in arbitrations in the construction industry for a verbal decision to be made, followed by a written award. This procedure often leads to delay in receiving the written award.
44 Netherlands Arbitration Act, art 1058, para 1(b).
much debate. In 2004 the Supreme Court ruled that annulment of the award due to the absence of reasons is only possible if the award is rendered without any reasons at all for the decision. Annulment is not possible when the reasons and explanations for the decision are deficient or inadequate, unless such deficiency in the reasoning is so obvious that it is considered to be on a par with no reasoning at all. 45

7.3 Settlement
7.3.1 Arbitrators may render an award to reflect a settlement reached by the parties. 46 Such recorded settlement is a valid award for the purposes of enforcement, and can only be set aside if it is contrary to public policy. The settlement award must be signed by both parties.

7.4 Power to award interest and costs
7.4.1 The Netherlands Arbitration Act does not contain rules on the costs of the arbitration. An arbitral tribunal is free to award costs and has wide discretion as to how the costs are to be allocated. It is usual practice for costs to follow the event (i.e. costs are awarded in favour of the successful party).

7.5 Decision making by the arbitral tribunal
7.5.1 The parties can agree on the procedural aspects of how the arbitral tribunal is to render its award. Unless otherwise agreed by the parties, the arbitral tribunal decides by a majority of votes (where there is more than one arbitrator). The appointment of a secretary (secretaris) to record the arbitral decision is quite popular in the Netherlands. The secretary ensures that the arbitral tribunal complies with certain agreed formalities.

7.6 Effect of an award
7.6.1 The final and conclusive award primarily settles the dispute between the parties. If it has become final and conclusive (kracht van gewijsde), domestic courts will recognise and enforce it, subject to the proceedings described in section 10.1 below. Parties to the arbitration agreement cannot challenge the facts as established in the award as they acquire the force of res judicata (gezag van gewijsde). 47 However, other parties are not bound by the facts as established in the award.

46 Netherlands Arbitration Act, art 1069.
7.7** Correction and interpretation of the award**

7.7.1 The correction of a final award is permitted under the Netherlands Arbitration Act.\textsuperscript{48} The correction of an interim award is not allowed, since the omission can be repaired in a subsequently rendered interim award or in the final award. The parties are at liberty to request the correction of typographical or computational errors within 30 days of the award being filed. Corrections of names, addresses, date of signing and place of the award are also permitted within the same period. Enforcement, however, is not suspended pending resolution of a request for corrections, unless the President of the District Court, who may be called upon for assistance, deems it necessary to suspend further proceedings for urgent reasons until there is a ruling on the request for corrections.

7.7.2 In a situation where the claimant has neglected to claim interest or costs of the proceedings, an arbitral tribunal will exceed its jurisdiction if it nonetheless orders the payment of interest or costs of the proceedings.\textsuperscript{49} If such a fundamental principle of procedural law is violated, an award can be set aside.\textsuperscript{50}

7.8** Submissions**

7.8.1 The arbitral tribunal shall also determine the timetable for submissions, unless the parties have already agreed a timetable.

8. **Role of the courts**

8.1** Jurisdiction of the courts**

8.1.1 If a dispute falls within the scope of an arbitration agreement, the appropriate domestic court will rule that it lacks jurisdiction.\textsuperscript{51} In a number of cases, however, the Netherlands Arbitration Act envisages that the District Court will assist in the conduct of the arbitration. For instance, the District Court may be called upon to:

- appoint an arbitrator;\textsuperscript{52}
- remove or replace an arbitrator;\textsuperscript{53}
- examine reluctant witnesses;\textsuperscript{54}

\textsuperscript{48} Ibid, art 1060.

\textsuperscript{49} Kuiken v Balkema, Amsterdam Court of Appeal 23 May 1958, NJ 1958, 465.

\textsuperscript{50} Netherlands Arbitration Act, art 1065, para 1.

\textsuperscript{51} Ibid, art 1022.

\textsuperscript{52} Ibid, art 1027, para 3.

\textsuperscript{53} Ibid, art 1029, para 4.

\textsuperscript{54} Ibid, art 1041, para 2.
— obtain information regarding foreign law;^^55
— fix a date for the hearing;^^56
— lift, suspend or mitigate a penalty (dwangsom);^^57 and
— grant or refuse enforcement of an award.^^58

8.1.2 Generally, it can be said that the role of the President of the District Court is important in a limited number of cases where the arbitration procedure, for whatever reason, falters. Such instances remain exceptional in Dutch arbitration practice.

8.2 Preliminary rulings on jurisdiction
8.2.1 Please note that a challenge of the jurisdiction of the domestic courts should be made before the formal defence on the merits is filed.^^59 It is advisable to explicitly request that any preliminary decision on jurisdiction is open for immediate appeal so the parties are not forced to complete an entire proceeding before the decision that the court has jurisdiction can be appealed.

8.3 Interim protective measures
8.3.1 An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection to preserve the status quo between the parties, such as to ensure that no assets will be moved out of the relevant jurisdiction.^^60 If time is of the essence, as is often the case in these matters, a party can apply to the President of the District Court for a decision in summary proceedings (kort geding).

8.4 Obtaining evidence and other court assistance
8.4.1 The arbitral tribunal has no power to compel a witness to give evidence to the arbitral tribunal but a delegated judge (Rechter-Commissaris) can be appointed to examine the witness.^^61 Attendance by the witness can be secured under Dutch Civil Procedure Law by way of a summons (dagvaarding).

^^59 Ibid, art 1022, para 1.
^^56 Ibid, art 1041, para 2.
^^57 Ibid, art 1056, para 3.
^^58 Ibid, art 1063.
^^55 Ibid, art 1044, para 1.
^^56 Ibid, art 1044, para 1.
^^57 Ibid, art 1056, para 3.
^^58 Ibid, art 1063.
^^59 Ibid, art 1022, para 1.
^^60 Ibid, art 1022, para 2.
^^61 Ibid, art 1041, para 2.
8.4.2 Applications for a witness to be examined before the commencement of the arbitral proceedings should be made to the District Court, as the Netherlands Arbitration Act does not make provision for a witness examination before the commencement of arbitral proceedings.

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts
9.1.1 The application to set aside (vernietigen) or revoke (herroepen) an award should be lodged with the District Court at the seat of arbitration. This has to be done within three months of the award being filed there or, if no award is filed, within three months of the award and judicial enforcement order (verlof tot tenuitvoerlegging) being served upon the other party.62

9.2 Appeals
9.2.1 An appeal against a decision of the President of the Court will generally be a matter for the Court of Appeal. An appeal against an award is not possible before the courts in the Netherlands, unless the parties have expressly provided for this in their arbitration agreement.

9.3 Applications to set aside an award
9.3.1 The grounds on which an award can be set aside (vernietigd) are as follows:
— there is no valid arbitration agreement;
— the arbitrator has not been correctly appointed;
— the arbitral tribunal lacks substantive jurisdiction;
— the award has not been signed and/or does not contain sufficient reasons;
— there have been serious irregularities affecting the proceedings; or
— the award is contrary to public policy.63

9.3.2 An award can be revoked (herroepen) by the District Court in specific cases of fraud, or if, after the award, a party obtains documents that would have affected the decision of the arbitral tribunal which were withheld by the other party.64

63 Ibid, art 1065.
64 Ibid, art 1068, para 1(c).
10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 The recognition and enforcement of an award in the Netherlands must be sought by way of an application to the President of the relevant District Court.  

10.1.2 The President will only grant enforcement of the award after the period for challenging the award has elapsed (i.e. after three months of receipt of the award from the parties).

10.1.3 In practice, enforcement of awards is nearly always granted in the Netherlands, subject only to exceptional cases on the grounds set out in the Netherlands Arbitration Act, namely:
— the content of the award is contrary to public policy or public morals;
— the manner of formation of the award is contrary to public policy or public morals; or
— a penalty (dwangsom) is unlawfully imposed.

10.1.4 If enforcement has been granted by the President, the only legal remedy available for a respondent is to apply for the annulment of the civil request, being a revocation of an award in the event of fraud, forgery or upon the emergence of new evidence. An application for revocation shall be brought before the Court of Appeal.

10.2 Foreign awards

10.2.1 The Netherlands is party to the New York Convention.

10.2.2 Articles 1075 and 1076 of the Netherlands Arbitration Act govern the enforcement of foreign awards rendered in New York Convention states and non-New York Convention states. An award may be challenged on several grounds, including if:
— the arbitral tribunal exceeded the terms of its reference in the award;
— there was no valid arbitration agreement between the parties; or
— the award is contrary to public policy.
10.2.3 The European Court of Justice\(^{69}\) and the Court of Appeal\(^{70}\) have ruled that an award rendered in violation of regulations governing European Union anti-trust law\(^{71}\) can constitute a violation of public policy.

10.2.4 An award may also be contrary to public policy if there is a violation of a fundamental principle of fair procedure, such as the denial of one party’s right to be heard by the arbitral tribunal.\(^{72}\)

10.2.5 It should be noted that the Dutch requirements for a valid arbitration agreement are less stringent than those prescribed in Article II of the New York Convention. Thus, in summary, a party seeking to enforce a New York Convention award in the Netherlands may, in appropriate circumstances, apply to the court either on the basis of Article 1076 of the Netherlands Arbitration Act or the New York Convention.

11. Special provisions and considerations

11.1.1 The Netherlands Arbitration Act does not address the possibility of rectifying errors in an interim award. The Netherlands Arbitration Act also does not address the issue of dissenting opinions. Dissenting opinions are extremely rare in domestic arbitrations in the Netherlands, although it would appear to be open to arbitrators in an international arbitration to render a dissenting opinion and attach this to the award.

12. Concluding thoughts and themes

12.1.1 The Netherlands is an arbitration friendly country. There are several industries in which arbitration is frequently used, such as construction, sports and IP/ICT. Also the NAI is constantly trying to make national arbitration and international arbitration as effective and client friendly as possible, offering a very good alternative for dispute resolution of pretty much any kind of dispute outside of court.

\(^{69}\) Eco Swiss China Time Ltd. v Bennetton International NV, Case 126/97 ECR [1999] I-3055.

\(^{70}\) Sesam v Betoncentrale Twente, Amsterdam Court of Appeal 12 October 2000, Tijschrift voor Arbitrage 2001, p 184.

\(^{71}\) EC Treaty, art 81.

13. Contacts

CMS Derks Star Busmann
Mondriaantoren
Amstelplein 8A
1096 BC Amsterdam
The Netherlands

Mark Ziekman
T  +31 20 3016 413
E  mark.ziekman@cms-dsb.com

Marlous de Groot
T  +31 20 3016 331
E  marlous.degroot@cms-dsb.com
ARBITRATION IN NEW YORK

By Jeremy Wilson and William Lowery, CMS
# Table of Contents

1. **Introduction: New York and federal law** 521

2. **The Federal Arbitration Act** 521
   2.1 Background and structure 521
   2.2 Scope of application 522
   2.3 General principles 525

3. **The arbitration agreement** 525
   3.1 Formal requirements 525
   3.2 Severability and defences to contract formation 526
   3.3 Choice of law 527

4. **Composition of the arbitral tribunal** 530
   4.1 Constitution of the arbitral tribunal 530
   4.2 Removal and substitution of arbitrators 531
   4.3 Arbitrator fees and expenses 532
   4.4 Arbitrator immunity 532

5. **Jurisdiction of the arbitral tribunal** 533
   5.1 Competence to rule on jurisdiction 533
   5.2 Scope of jurisdiction 534
   5.3 Power to order interim measures 535

6. **Conduct of arbitral proceedings** 536
   6.1 General procedural principles 536
   6.2 Commencement of arbitration 537
   6.3 Multi-party issues 537
   6.4 Submissions and oral hearings 539
   6.5 Default by one of the parties 539
   6.6 Evidence and discovery 540
   6.7 Confidentiality 541

7. **Making of the award and termination of proceedings** 541
   7.1 Remedies 541
   7.2 Interest 542
   7.3 Form, content and effect of the award 542
   7.4 Attorney’s fees 543
8. **Role of the courts** 543
  8.1 Jurisdiction of the courts 543
  8.2 Proper venue for filing Arbitration-Related Motions 545
  8.3 Initial court proceedings 546
  8.4 Preliminary rulings on points of jurisdiction and law 547
  8.5 Interim protective measures 547
  8.6 Obtaining evidence and other court assistance 548

9. **Challenging and appealing the award before the courts** 550
  9.1 Procedure 550
  9.2 Challenging (vacating) the award 551
  9.3 Correcting or modifying an award 554

10. **Confirmation and enforcement of awards** 554
    10.1 Domestic awards 554
    10.2 International awards 555

11. **Contacts** 558
1. Introduction: New York and federal law

1.1 Arbitration in New York is governed by both federal and state law. Unlike many other jurisdictions, arbitration in New York is not based on the UNCITRAL Model Law. New York has developed a significant body of state law on arbitration, both through the common law and statutory modifications. However, due to the United States’ federalist structure and the supremacy of federal law, the Federal Arbitration Act (FAA)\(^1\) has been broadly applied to international arbitrations in New York. This has limited the number of arbitration agreements and disputes that are subject solely to New York state law.\(^2\) As a result, this chapter primarily considers the reach and import of the FAA on international arbitration agreements and arbitral proceedings seated in New York. Where New York state law is of particular importance, either because it supplements the application of the FAA or because the rule it offers is of particular note, it is briefly discussed.

2. The Federal Arbitration Act

2.1 Background and structure

2.1.1 The FAA was initially introduced in 1925 in order to eliminate historic judicial hostility to arbitration agreements in the United States and to place arbitration agreements on the same footing as other contracts.\(^3\) In 1947 it was further amended, codified and restructured. More recently the FAA was updated to mandate the enforcement of the New York Convention\(^4\) and the Panama Convention, when these treaties were ratified. The FAA now consists of three chapters: (i) General Provisions (Chapter 1);\(^5\) (ii) Enforcement of the New York Convention (Chapter 2);\(^6\) and (iii) Enforcement of the Panama Convention (Chapter 3).\(^7\)

2.1.2 The scope and application of the FAA depends on the type of agreement, transaction or award at issue, as discussed below.

---

2 The FAA has been interpreted by the Supreme Court of the United States (Supreme Court) to represent a strong federal policy favouring commercial arbitration. Up until 1984, the FAA was considered to be largely a matter of procedural law (and therefore applicable only in federal courts). Today, however, the FAA is considered to be substantive federal law. The provisions of the FAA (and the interpretation of the FAA by federal courts) therefore pre-empt contrary New York state law.
6 Ibid, §§ 201–208.
7 Ibid, §§ 301–307.
2.2 Scope of application

2.2.1 The FAA applies to arbitral proceedings seated in the United States that relate to “foreign commerce” and “maritime transactions” (including general matters of admiralty jurisdiction and other common activities associated with maritime trade). Unlike the explicit and specified nature of the “maritime transactions”, the FAA defines “foreign commerce” broadly as “… commerce among the several states, other nations or the various territories…” Any activity that may impact interstate commerce, even if that transaction is not commercial in nature, may be considered “commerce” under this definition.

2.2.2 In light of this broad definition, almost all commercial arbitration agreements that involve transactions or proceedings connected with the United States – whether by the domicile of the parties, the nature of the transaction or the enforcement of the award – will be subject to the FAA. International arbitrations seated in New York and awards that parties seek to confirm or enforce in New York will be subject to the provisions of the FAA.

Application of Chapter 2 of the FAA: Enforcement of the New York Convention

2.2.3 The United States ratified the New York Convention in 1970 and codified it as Chapter 2 of the FAA. The provisions for the enforcement of the New York Convention in the United States are set out in this chapter. Chapter 2 can only be applied to arbitration agreements and awards that relate to commercial relationships (as defined by federal law).

2.2.4 Chapter 2 of the FAA applies when one of the parties to an arbitration agreement is not considered a “citizen” of the United States and/or the dispute relates to property located outside the United States, envisages enforcement or performance outside the United States or has some other relation to a foreign state. In relation to arbitration agreements, the Second Circuit Court of Appeals (Second Circuit) – the relevant federal court of appeal for federal cases in New York – has

---

8 Ibid, § 1.
9 Ibid, § 1.
10 Ibid, § 1.
11 See Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the growing of wheat in a singular state can be considered “interstate commerce” and regulated on the basis that growing wheat may impact the price of wheat among the several states); and United States v. Lopez, 514 U.S. 549, 460 (1995) (describing Wickard as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”).
13 As discussed below at paragraph 3.3.2, it is possible that parties may choose to have a different procedural law apply to arbitral hearings located in New York, although they would need to expressly agree to this.
Arbitration in New York

determined that Chapter 2 (i.e. the New York Convention) applies if the arbitration agreement:

(i) is in writing;
(ii) provides that the arbitration will be seated in a territory of a signatory to the New York Convention;
(iii) has a commercial subject matter; and
(iv) is not entirely domestic.16

2.2.5 The final aspect of this test, “not entirely domestic”, has been held to correspond to the New York Convention’s application to arbitration agreements and awards “not considered as domestic”.17

2.2.6 In most circumstances where the arbitration agreement or award is “not entirely domestic”, both Chapter 1 and Chapter 2 of the FAA may apply.18 Where the rules prescribed by Chapters 1 and 2 are not in conflict, the parties have a choice as to how they might enforce an arbitration agreement or award.19 Where both Chapters apply, and there is a conflict between the FAA and the New York Convention, the provisions of the New York Convention prevail.20 There are instances of clear conflict between the application of the FAA and the New York Convention and, where relevant, these are set out below.

Application of Chapter 3 of the FAA: Enforcement of the Panama Convention

2.2.7 The Panama Convention, which has been signed and ratified by numerous Central and South American countries,21 was ratified by the United States in 1990 and incorporated by reference into Chapter 3 of the FAA.22 The remainder of Chapter 3 serves to enforce the provisions of the Panama Convention and its relationship to the other provisions of the FAA.23

18 Lander Co. Inc. v. MMP Investments, Inc., 107 F.3d 476, 481 (7th Cir. 1997). There can be circumstances where the “not entirely domestic” test does apply, but the provisions of the New York Convention do not apply because of the reciprocity requirement. These awards are technically non-domestic, but for the purposes of the applicable law should be considered “domestic”.
19 FAA, 9 U.S.C. § 208 (“Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States”); see also, Spector v. Torenberg, 852 F.Supp. 201, 205 (S.D.N.Y. 1994); Oil Basins, Ltd. v. Broken Hill Proprietary Co. Ltd., 613 F.Supp. 483, 487 (S.D.N.Y. 1985).
20 Lander Co. Inc. v. MMP Investments, Inc., 107 F.3d 476, 481 (7th Cir. 1997).
21 The following countries have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela.
2.2.8 When originally ratified, the Panama Convention served to allow the enforcement of arbitration agreements and awards rendered in the United States in several foreign states that had not yet ratified or acceded to the New York Convention.

2.2.9 The same standards in the FAA that govern the application of the New York Convention also apply to the Panama Convention, as Chapter 3 incorporates the relevant jurisdictional considerations of Chapter 2. Accordingly, the Second Circuit’s four-part test (set out above at paragraph 2.2.4) is used to determine whether a commercial arbitration agreement or award applies to arbitration agreements and awards under the Panama Convention.

Which Convention Governs: The New York Convention or the Panama Convention?

2.2.10 There are a number of jurisdictions that have acceded to or ratified both the New York Convention and the Panama Convention. As a result, for the enforcement of arbitration agreements and awards rendered according to the laws of these foreign states, a conflict of laws analysis between the New York Convention and the Panama Convention may occur. In the United States, the enforcement of awards relating to these jurisdictions was anticipated and Chapter 3 resolves this issue by putting forward two clear possibilities:

(i) if the majority of parties to the arbitration agreement are member states of the Organization of American States (OAS) and those member states have ratified or acceded to the Panama Convention, then the Panama Convention will apply; or

(ii) the New York Convention will apply.

2.2.11 There are differences between the New York Convention and the Panama Convention, so the determination as to which convention applies may have an impact in certain cases. Situations of particular note are set out in the discussion below. In any case, the conventions are largely enforced through the same mechanism of applications made by the parties through the federal district courts. The law set out in Chapter 1 of the FAA serves to supplement both conventions in this regard.

---


25 In addition to the United States, these foreign states are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

26 FAA, 9 U.S.C. § 305. Note that parties may waive the application of the Panama Convention through agreement. See Reservations to the Panama Convention [http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp] (accessed: 16 January 2012). Unlike in other jurisdictions, the FAA does not have a rule whereby the convention with the most favourable enforcement terms applies.


2.3 General principles

2.3.1 While the FAA does not explicitly set out a purpose or guiding principle, the Supreme Court and the vast majority of commentators have agreed that the following fundamental principles guide the interpretation of arbitration law in the United States.

— **A policy favouring arbitration.** The FAA represents a federal public policy decision to favour arbitration and is now universally recognised to suprenede contrary state policies (where the parties can be considered to have agreed to arbitration).\(^{29}\)

— **A common intention to arbitrate.** The federal policy favouring arbitration is predicated on the agreement of the parties to submit their dispute to arbitration.\(^{30}\) United States courts therefore place significant importance on contract validity and scope of the arbitration agreement and seek to ensure that parties compelled to arbitrate their claims actually agreed to arbitration.

— **Freedom of contract.** Other than to show the existence of an agreement to arbitrate (e.g. a written agreement) there are few mandatory requirements for arbitration in the United States.\(^{31}\) Parties may waive the provisions of the FAA in favour of state law (by referring to the state law explicitly), agree to whatever procedure they may wish and freely limit or expand the scope of issues to be considered by arbitration.\(^{32}\)

3. The arbitration agreement

3.1 Formal requirements

3.1.1 Under the FAA there must be the existence of a valid, written agreement to arbitrate a dispute or claim. This agreement may be a separate agreement between the parties or a clause within a commercial contract (the terms “arbitration

---

\(^{29}\) See, for example, Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (holding that the FAA declares “a national policy favouring arbitration and that withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration”); and AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (holding that a state law is pre-empted by the FAA because it stands as an obstacle to the accomplishment and execution of the FAA’s objectives). The FAA does not pre-empt state law in all cases. The Supreme Court has constrained the effect of the FAA in the few cases where the application of other law might further the federal policy in favour of arbitration. For instance, the FAA has also been interpreted to yield to state legislation that is considered more favourable to arbitration than the FAA itself (where the parties can be considered to have agreed to state law). Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (yielding to California law because, in part, it furthered the federal policy in favour of arbitration).

\(^{30}\) See, for example, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

\(^{31}\) Such mandatory requirements include, for example, contracting to expand grounds for vacating an award. See Hall Street Associates L.L.C. v. Mattel, 128 S. Ct. 1396, 1408 (2008).

agreement” and “arbitration clause” are used interchangeably in this chapter).\(^{33}\) This is the only formal requirement under the FAA.

3.1.2 For international commercial arbitration agreements governed by the New York Convention, the Second Circuit interprets “written” to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.\(^{34}\) The Second Circuit has held that the New York Convention requires that an arbitration agreement (or clause) must either be signed by the parties or combined in a series of letters or telegrams in order to be effective.\(^{35}\)

3.1.3 Beyond these basic requirements, there may be larger questions concerning the validity of the arbitration agreement. For instance, disputes may arise concerning the existence or scope of the arbitration agreement. These two issues have been termed “gateway issues”\(^{36}\) and how they are resolved is fundamental to understanding both the procedure and process of enforcing arbitration agreements in New York. The Supreme Court has sought to resolve some of these issues through its jurisprudence on the issue of severability.

3.2 Severability and defences to contract formation

3.2.1 Federal law supports the concept of severability (also referred to as “separability”). First established under the Supreme Court case Prima Paint, an arbitration clause should be considered separately from the underlying contract (Container Agreement).\(^{37}\) Although there may be defences against the existence of the contract as a whole, e.g. fraudulent inducement (sometimes referred to in other jurisdictions as “deceit” and/or “fraudulent misrepresentation”), a court considering the objections of a party contesting the validity of the arbitration agreement may only consider defences that relate specifically to the formation of

\(^{34}\) New York Convention, art 2.2 (see CMS Guide to Arbitration, vol II, appendix 1.1).
\(^{35}\) Kahn Lucas Lancaster, Inc. v. Lark International Ltd., 186 F.3d 210, 214–215 (2d Cir. 1999). Note that Article 1 of the Panama Convention contains a similar requirement. However, the Second Circuit’s holding in Kahn Lucas does not extend, at present, beyond application to the New York Convention. Pursuant to New York’s Electronic Signatures and Records Act, it is probable that email correspondence meets this requirement as well.
\(^{37}\) Prima Paint Corp. v. Flood & Conklin Mtg. Co., 388 U.S. 395, 402–403 (1967) (finding that the doctrine of severability stems from the provisions of the FAA, 9 U.S.C. § 4). Unlike federal law, New York state law does not acknowledge the principle of severability. Defences against the formation of the Container Agreement are therefore considered valid defences against the formation of the intention to arbitrate for arbitrations where the law of New York is not pre-empted by federal law. For parties to international commercial arbitration agreements, this is of no concern because the FAA pre-empts this point. See Southland v. Keating 465 U.S. 1 (1984).
Arbitration in New York

the arbitration clause. All other defences concerning the Container Agreement (apart from issues concerning the validity of the arbitration agreement) are left to be considered by an arbitral tribunal.

3.2.2 The concept of severability is interconnected with the doctrine of arbitrability (addressed below at paragraph 5.1.1) and the authority of arbitrators to define their own jurisdiction.

3.2.3 However, the issue of whether an arbitral tribunal can consider defences to the formation of the arbitration clause (as opposed to the Container Agreement) is an open debate. There is varying case law on this point in United States circuit courts, particularly concerning the issue of fraudulent inducement, suggesting that this is still a developing area of the law.

3.3 Choice of law

3.3.1 The choice of New York as the seat for an international arbitration will, in almost all situations, mean that the provisions of the FAA apply. However, depending on the issue and the circumstances, the FAA may not be self-sufficient. Although the FAA constitutes federal substantive law, it sometimes requires the existence of supplemental law where there is no substantive law on point. For example, while the FAA requires that agreements to arbitrate be enforced, neither the FAA nor federal law defines what an “agreement” is (e.g. offer and acceptance, consideration, etc). As a result, the application of the FAA will depend on the applicable substantive law and, as demonstrated below, the applicable substantive law may be determined by the wording of the Container Agreement or arbitration clause, the stage in the proceedings and the issues considered.

Where there is a governing law clause

3.3.2 Where parties have explicitly included a valid governing law clause for the Container Agreement or a governing law clause specific to the arbitration clause, courts in New York will generally apply the law chosen by the parties to questions

---

39 See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (“a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator”).
40 For example cf. Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 667 (2d Cir. 1997) (requiring a substantial relationship between the inducement of fraud and the arbitration clause to consider non-enforcement of an arbitration agreement); and Rush v. Oppenheimer & Co. Inc., 681 F.Supp. 1045, 1053 (S.D.N.Y. 1988) (considering non-enforcement in the instance of fraud claims that pertained to the Container Agreement). Although only rulings of the Supreme Court and the Second Circuit have precedential value, where there is an open issue of law the reasoning of the circuit courts may be persuasive. For this reason, parties should take note of the varying approaches.
42 See, for example, Chelsea Square Textiles, Inc. v. Bombay Dyeing and Mfg. Co., Ltd., 189 F.3d 289, 295 (2d Cir. 1999).
concerning the existence, formation and validity of the arbitration agreement.\textsuperscript{43} However, there are two exceptions to this rule:

— when a party is seeking to apply an arbitration agreement against a non-signatory to the contract,\textsuperscript{44} or

— when there is basis for asserting the authority of federal law and the law chosen by the parties is adverse to arbitration, at least as compared to the federal policy embodied by the FAA.\textsuperscript{45}

3.3.3 If the courts in New York refuse to enforce the governing law clause for the reasons set out above, they may choose to apply only those provisions of law that are “non-offensive” to arbitration.\textsuperscript{46}

3.3.4 The second situation set out in paragraph 3.3.2 occurs mainly when the parties choose state law as the governing law. As noted earlier, the FAA is significantly more “pro-arbitration” than New York state law.\textsuperscript{47} When parties specify New York law in the Container Agreement’s governing law provision, courts in New York have applied substantive New York law to issues of general contractual interpretation while ignoring more restrictive statutes that are specific to arbitration.\textsuperscript{48}

3.3.5 If the parties have specified foreign law in the governing law clause (e.g. English law), they should be aware that certain mandatory statutory rights under United States law may still exist outside the scope of the arbitration agreement. Recent cases have suggested that where a forum selection clause and choice of law clause operate together as a prospective waiver of a United States citizen’s (both

\textsuperscript{43} See, for example, Telenor Mobile Communications AS v. Storm LLC, 584 F.3d 396, 411 n.11 (2d Cir. 2009).

\textsuperscript{44} See Sarhank Group v. Oracle Corp., 404 F.3d 657, 662 (2d Cir. 2005) (holding that general federal law is the applicable law to determine whether a non-signatory was properly bound by an arbitration agreement, where a contract specified Egypt as the seat of the arbitration and specified Egyptian law in the governing law clause); but cf. Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004) (applying Swiss law to the issue of whether a non-signatory to a contract could compel a signatory to the agreement to arbitration because the governing law clause specified Swiss law). Recent case law suggests that the difference in approach may depend on the stage of the proceedings the court is making its inquiry. Sarhank relates to an issue of enforcement while Motorola relates to an issue of compelling the parties to arbitrate. See FR 8 Singapore Pte v. Albacore Maritime Inc., 754 F.Supp.2d 628, 635 (S.D.N.Y. 2010).

\textsuperscript{45} See the discussion on this point at paragraph 2.3.1 and footnote 29 above.


\textsuperscript{47} For instance, New York law restricts the ability of arbitral tribunals to award punitive damages and determine issues concerning the validity of the Container Agreement. Federal law permits arbitral tribunals to determine the scope of their authority on these issues when granted by the parties. See discussion at section 7.1 below.

\textsuperscript{48} See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) (reading a governing law clause to include substantive New York law as regards general principles of contract formation and interpretation, but refusing to apply New York law to limitations on the power of the arbitrators). Parties may ensure that New York law – including its restrictions on the authority of the arbitral tribunal – is applicable to arbitration agreement by specifying that New York law should also govern “the enforcement” of the contract. See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (where the Supreme Court offered such guidance in relation to California law).
individuals and corporations) statutory rights, then that arbitration clause may be
deemed unenforceable with regard to those statutory claims. Parties seeking to
include the application of foreign law should be aware of this potential difficulty
and add language to their choice of law clause that explicitly waives statutory
ing rights under United States law.

Where the agreement does not provide for the governing law

3.3.6 In the rare instance that the parties have not specified a law governing the
arbitration agreement, then the courts of New York will apply a conflict of laws
analysis to determine the relevant substantive law that will be used to supplement,
when necessary, the applicable provisions of the FAA.

3.3.7 The New York approach to determining the applicable substantive law is an
“interest analysis”, which seeks to apply the law of the jurisdiction with the
greatest interest in the outcome of the dispute. This analysis will consider the
domicile of the parties, the place of execution and the place of performance of the
contract among other factors.

Construction of the New York Convention and Panama Convention

3.3.8 A further issue to consider in an international arbitration is how the relevant
conventions will be interpreted. This is an issue of statutory interpretation. As an
initial starting point, all authorities agree that the provisions of the relevant
convention will be applicable. However, when determining which law will be used
to supplement and interpret the New York Convention’s provision to “refer parties
to arbitration, unless [the court] finds that said agreement is null and void”,
various approaches have been used:

(i) the courts have sometimes applied principles of treaty construction as
employed by the courts of the United States (i.e. plain meaning based on
rules of grammatical construction and supplemented by the applicable
legislative history).

49 See Thomas v. Carnival Corp., 573 F.3d 1113 (11th Cir. 2009) (preserving rights of an employee under the Seaman’s Wage
Act where the parties specified Panamanian law for an arbitration to be seated in the Philippines); and Central national-
Gottlesman v. MV “Gertrude Oldendorff”, 204 F.Supp.2d 675 (S.D.N.Y. 2002) (preserving shipper’s right under Carriage
of Goods by Sea Act where a mandatory forum selection clause required all disputes to be decided in England under
English law).

50 See, for example, Progressive Casualty Insurance Co. C.A. v. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45–46
(2d Cir. 1993) (applying New York law and New York conflicts of law analysis).


53 New York Convention, art II(3) (see CMS Guide to Arbitration, vol II, appendix 1.1).

54 Kahn Lucas Lancaster, Inc. v. Lark International Ltd., 186 F.3d 210, 215–216 (2d Cir. 1999) (applying a “treaty” construction
approach and emphasising the plain meaning of the words).
the courts have also found that they must apply neutral international standards when interpreting this provision; only finding agreements to be “null and void” in obvious circumstances such as fraud, mistake, duress and waiver;\(^{55}\)

(iii) the courts have sometimes supplemented the provisions of the New York Convention with the provisions of forum law (e.g. the law of New York);\(^{56}\) and

(iv) additionally, the courts have also incorporated generally accepted principles of contract law; permitting parties access to contract defences available under federal common law.\(^{57}\)

3.3.9 Parties to non-domestic arbitration agreements can be assured that, at the very least, the provisions of the applicable convention will be enforced. However, there is not a uniform method as to how these provisions, and the “null and void” provision in particular, will be applied by New York courts.

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The FAA does not provide a formal method for the constitution of the arbitral tribunal. Rather, the FAA relies on the parties’ agreement, either within the arbitration agreement or separately, as to how the arbitral tribunal is to be constituted. This is done through the incorporation of institutional rules or on an ad hoc basis where the parties agree on their own arbitral procedures, including the constitution of the arbitral tribunal.

4.1.2 Where the parties disagree on the appointment process, e.g. where the arbitration clause is unclear on the appointment mechanism and the parties cannot subsequently agree to an alternative method of appointment, the issue may come before the courts, whereby the court will seek to determine the intention of the parties. Courts may unilaterally appoint arbitrator(s)\(^{58}\) or refer the parties to an appropriate arbitral institution in accordance with the intention of the parties.\(^{59}\)


\(^{58}\) Pursuant to powers under the FAA. See FAA, 9 U.S.C. § 5.

\(^{59}\) See HZI Research Center, Inc. v. Sun Instruments Japan Co., 1995 WL 562181 (S.D.N.Y. September 20, 1995) (finding that the AAA was the appropriate arbitral institution).
Arbitration in New York

In rare cases, the court may determine that the failure to incorporate proper institutional rules undermines the intention to arbitrate and refuse to enforce the arbitration agreement.  

4.1.3 In certain circumstances, the arbitration clause may clearly indicate the parties’ intention to arbitrate the dispute, but fail to specify any method for choosing arbitrators. In this case either party may apply to a federal district court to make an appointment. Courts in New York typically nominate sole-arbitrators where the agreement is completely silent as to the constitution of the arbitral tribunal. While the courts do receive occasional applications through this statute or by other means, they do not retain lists of arbitrator candidates and have no standing procedures for appointments.

4.2 Removal and substitution of arbitrators

4.2.1 The FAA does not provide explicitly for the removal of arbitrators during arbitral proceedings. New York courts have held that, except in very specific situations, courts will not entertain applications for the removal of arbitrators on the basis of alleged “inadequate qualifications or partiality”. Courts will consider these concerns only when an award has been rendered.

4.2.2 A New York court will remove or order the substitution of an arbitrator when it considers that the intention of the parties to conduct an impartial arbitration has been frustrated. For example, when it concludes that one party has deceived the other concerning the nature of its relationship with the arbitrator.

60 In re Saloman, Inc. Shareholders’ Derivative Litigation, 68 F.3d 554, 560–561 (2d Cir. 1995) (arbitration clause is null and void because the institution specified in the agreement was not available to the parties); and Lea Tai Textile Co., Ltd. v. Manning Fabrics, Inc., 411 F.Supp 1404, 1407 (S.D.N.Y 1975) (finding it impossible to determine the parties’ intention).

61 FAA, 9 U.S.C. § 5. New York law specifies a similar provision for parties that seek to appoint arbitrators through the state courts. See NY CPLR § 7504.


63 Aviall, Inc. v. Ryder System., Inc., 110 F.3d 892, 895 (2d Cir. 1997) (court “cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award”).

64 Masthead Mac Drilling Corp. v. Fleck, 549 F.Supp. 854, 856 (S.D.N.Y. 1982) (ordering the substitution of an arbitrator because one party had concealed the fact that the contractually-designated arbitrator was its business associate).

65 See Aviall, Inc. v. Ryder System., Inc., 110 F.3d 892 (2d Cir. 1997) (rejecting the application to remove an arbitrator on the basis of alleged partiality); and Fleming Companies, Inc. v. FS Kids, L.L.C., 2003 WL 21382895, at *4-5 (W.D.N.Y. 2003) (rejecting the application to remove an arbitrator on insufficient qualifications).
4.2.3 Where a court does intervene, or in other instances where an arbitrator needs to be replaced (e.g. on the death of an arbitrator), the method of appointment is at the discretion of the court. In some cases, a court has simply ordered the relevant party or parties to appoint a new arbitrator. A party may make an application under the FAA to request a court to appoint a replacement arbitrator, as discussed above at paragraph 4.1.3.

4.3 Arbitrator fees and expenses

4.3.1 The general rule in the United States is that each party pays its own costs (sometimes referred to as the “American Rule”) and parties are free to agree to split the arbitrator fees and expenses as they wish. The FAA does not require that parties split fees, and where the parties determine that fees should be borne unevenly, or even by one of the parties entirely, the courts will defer to the agreement of the parties.

4.3.2 Where the parties are silent as to how arbitrators’ fees and expenses should be split, the issue may be determined by the arbitral tribunal. The fact that the arbitration agreement is silent on this point does not render the arbitration agreement invalid.

4.3.3 The exception to the general rule that each party will pay its own costs is where the burden of fees makes it difficult for a party to arbitrate its statutory rights, such as employee-employer arbitration. However, even in this narrow area, there is no uniform standard as to what constitutes a burden on the vindication of statutory rights.

4.4 Arbitrator immunity

4.4.1 With regard to commercial disputes, the United States courts generally subscribe to the “jurisdictional theory” of judicial immunity whereby any party who undertakes a judicial function is entitled to absolute immunity. Within the Second

---


68 Reliastar Life Insurance Co. of New York v. EMC National Life Co., 564 F.3d 81, 86–88 (2d Cir. 2009) (administration of fees by an arbitral tribunal is an issue of the scope of the parties’ agreement).


71 Various approaches on this exception have been taken by several circuit courts, but none in relation to international commercial arbitration. See M. Lamm, Who Pays Arbitration Fees?: The Unanswered Question in Circuit City Stores, Inc. v. Adams, 24 Campbell L. (2001) (summarising the expansive and varying case law on the issue of arbitral tribunals’ fees and employment arbitration).

Circuit, arbitrators in commercial arbitrations are considered the functional equivalent of judges and therefore are entitled to absolute immunity.\(^{73}\) This immunity has also been held to apply to arbitral institutions that appoint arbitrators and supervise the arbitration.\(^{74}\)

4.4.2 An exception to absolute immunity arises where an arbitrator has clearly acted outside the scope of his or her jurisdiction.\(^{75}\) However, this exception is limited, particularly given the typically broad authority generally granted to arbitrators in arbitration agreements (e.g. the authority to resolve “any and all” disputes).

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 On the issue of the power of an arbitral tribunal to decide upon its own jurisdiction (competence-competence), the Supreme Court has held that the courts shall determine the jurisdiction of the arbitral tribunal, absent the agreement of the parties.\(^{76}\) Courts in New York will require clear and unmistakable evidence that the parties intended the arbitrators to determine their own jurisdiction.\(^{77}\) Where the requisite intent is demonstrated, a court will order the arbitral proceedings to commence and the arbitral tribunal will have the authority to determine the issues that are arbitrable under the clause. Courts in New York show considerable deference to the determinations of the arbitrator on jurisdiction.\(^{78}\)

5.1.2 The “clear and unmistakable evidence” standard required to determine jurisdiction ensures that arbitration remains consent based.\(^{79}\) The standard can, however, be easily satisfied. Where parties indicate that “any and all disputes” should be


\(^{74}\) As suggested by the Second Circuit, without extension to the relevant institution, immunity would be illusory. Austern v. Chicago Board Options Exchange, Inc., 898 F.2d 882, 886 (2d Cir. 1990).


\(^{76}\) See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942–943 (1995) (holding that the courts have the primary authority to determine the jurisdiction of the arbitral tribunal, absent the agreement of the parties). This differs to arbitration law in other areas of the world, which generally prevents courts from determining the jurisdiction of arbitrators under the principle of competence-competence.


\(^{78}\) See AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability and where a decision is reached, review of the arbitrator’s decision will not differ from other matters arbitrated); and FAA, 9 U.S.C. § 10 (setting out standards for review by the courts).

\(^{79}\) First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995) (“given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the “who should decide arbitrability” point as giving arbitrators that power”).
resolved by arbitration, New York courts will enforce that intention to the fullest and arbitrators will determine their own jurisdiction.\textsuperscript{80} Where the parties incorporate arbitral rules that confer the same authority or specifically grant arbitrators the power to determine their own jurisdiction, the courts will enforce those rules.\textsuperscript{81}

5.1.3 Where the “clear and unmistakable evidence” standard is met, both substantive and procedural issues will be submitted to the arbitral tribunal.

5.1.4 If a court does not find clear and unmistakable evidence that the parties intended the arbitral tribunal to determine its own jurisdiction, the court should determine the issues that may be addressed by an arbitral tribunal and compel arbitration on these issues alone.\textsuperscript{82} Procedural defences will normally be submitted to the arbitral tribunal (barring language in the agreement suggesting otherwise). This includes procedural defences predicated on issues such as the statute of limitations, contractual time limitations, the doctrine of \textit{laches}, etc.\textsuperscript{83}

5.2 Scope of jurisdiction

\textit{Merits-related issues}

5.2.1 As noted above, the default federal rule is that, unless the parties “clearly and unmistakably” specify the arbitral tribunal’s authority to determine its own jurisdiction, the courts will decide the jurisdiction of the arbitral tribunal. However, regardless of who actually determines the arbitral tribunal’s jurisdiction, the default presumption is that any ambiguity concerning the scope of the arbitral tribunal’s jurisdiction should be resolved in favour of arbitration.\textsuperscript{84} Where parties wish to


\textsuperscript{81} See Shaw Group, Inc. v. Triplefine International Corp., 322 F.3d 115, 122 (2d Cir. 2003) (permitting arbitrators to determine their own jurisdiction where the parties adopted an ICC standard clause, see CMS Guide to Arbitration, vol. II, appendix 5.2 for this standard clause).

\textsuperscript{82} See, for example, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 385 (11th Cir. 1995) (remanding to a federal district court for compliance with these instructions).

\textsuperscript{83} See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (holding that issue of contractual limitations was for an arbitrator to decide); and Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25 (1983) (defences of waiver and delay for an arbitrator to decide). Note that the New York rule is inapposite and procedural defences and preliminary issues are presumptively for the court to decide, see NY CPLR § 7502(b). Recall, however, that New York law will be displaced by provisions of the FAA unless the parties have specifically provided that New York law will govern the agreement and its enforcement. See matter of Diamond Waterproofing Sys., Inc. v. S.S Liberty Owners Corp., 4 N.Y.3d 247, 253 (C.A.N.Y. 2005).

\textsuperscript{84} First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944–945 (1995) (in respect to whether merits-related disputes are arbitrable, the presumption is that any doubts should be resolved in favour of arbitration); and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, n.13 (1985) (allowing arbitrators to consider the merits of a statutory rights claim under the Sherman Anti-Trust Act and instructing lower courts to compel arbitration).
limit the issues that an arbitral tribunal may consider, they must express that intention explicitly.\textsuperscript{85}

\textit{Formation-related issues}

5.2.2 Issues concerning the jurisdiction of the arbitral tribunal and the formation of the Container Agreement and the arbitration clause have been a topic of recent consideration by the Supreme Court.\textsuperscript{86} The Supreme Court has held that where the formation-related issue is concerned with the validity of the Container Agreement, it is an issue for the arbitral tribunal to consider.\textsuperscript{87} However, where the formation-related issue concerns the validity of the arbitration clause specifically, it is an issue for a court to resolve.\textsuperscript{88}

5.3 Power to order interim measures

5.3.1 Where parties provide the arbitral tribunal with a broad mandate to fashion remedies (e.g. “to resolve any and all disputes”), the arbitral tribunal has comprehensive authority to resolve the dispute and ensure a meaningful resolution, including the ability to grant interim relief. Courts will not undermine the authority of the arbitral tribunal in this regard as long as they have not exceeded the powers granted to them by the arbitration agreement.\textsuperscript{89} This power is expansive, even allowing arbitrators to fashion remedies (interim and otherwise) that courts in New York may not grant and that may include remedies of injunctive relief and specific performance.\textsuperscript{90}

5.3.2 Although an arbitral tribunal will typically have the power to grant these interim measures, such measures must be capable of being enforced. The process must abide by the due process requirements of United States courts.\textsuperscript{91} Additionally,

\textsuperscript{85} United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582–583 (1960) (“[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”).


\textsuperscript{87} See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–446 (2006); and Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010) (court held that state law unconscionability issue did not address the arbitration clause specifically and that the arbitrator should determine the issue).

\textsuperscript{88} The Supreme Court suggested in Buckeye that formation issues concerned with the capacity to contract or with the very existence of a purported Container Agreement (e.g. a fraudulent signature) may be considered under differing standards, leaving some outstanding questions. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

\textsuperscript{89} Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003).

\textsuperscript{90} Sperry International Trade, Inc., v. Govt. of Israel, 689 F.2d 301, 306 (2d Cir. 1982).

\textsuperscript{91} The key limitation is that the arbitral tribunal must ensure that minimum standards of “fundamental fairness” are met (e.g. each party has a right to present evidence and be heard). See Yonir Technologies, Inc. v. Duration Systems, Ltd., 244 F. Supp.2d 195, 208 (S.D.N.Y. 2002).
interim measures should conform to the requirements of an “arbitral award” where the dispute is subject to the New York Convention or the Panama Convention. This is not to suggest that interim measures are, in and of themselves, “awards” in the sense of being permanent and lasting. Rather, it means that the order of an arbitral tribunal communicating such interim measures must be reasoned and unappealable.

5.3.3 As a general rule, courts in the Second Circuit are reluctant to vacate interim awards aimed at ensuring a meaningful resolution of the dispute.

6. Conduct of arbitral proceedings

6.1 General procedural principles

6.1.1 Arbitral tribunals are permitted to conduct arbitral proceedings as they see fit, so long as the proceedings are in accord with the intention of the parties, as expressed in the arbitration agreement. Where the arbitration agreement is silent as to how the arbitration will proceed, the arbitral proceedings will generally be administered by the subsequent agreement of the parties or the decision of the arbitral tribunal (usually through the means of a procedural hearing). An exception to this principle arises when an arbitration agreement is governed by the Panama Convention, which expressly incorporates the rules and procedure of the 1988 Inter-American Commercial Arbitration Commission (Inter-American Commercial Arbitration Rules). In this situation, for arbitration agreements also subject to the FAA, the Inter-American Commercial Arbitration Rules will apply.

6.1.2 In addition to any agreement by the parties, the arbitral proceedings must meet minimum standards of fundamental fairness to avoid grounds for vacating the eventual award. This amounts, at the very least, to notice of the hearing and the opportunity for both parties to present evidence and be heard before an impartial arbitral tribunal.

---

92 Federal courts have required that “orders” be final and meet the substantive requirements of an award before being enforced. See Publicis Communication v. True North Communication, 206 F.3d 725, 729 (7th Cir. 2000). Both conventions require “reasoned” awards for arbitral tribunal orders to be enforced. See Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003). Note that in the instance of an arbitration agreement governed only by the FAA or New York law, these requirements do not apply.


94 Panama Convention, art 3.


6.2 Commencement of arbitration

6.2.1 Arbitration should be commenced in accordance with the terms of the arbitration agreement. Frequently, where the parties have incorporated private institutional rules, there will be institutional mechanisms and requirements that need to be fulfilled. If one of the parties refuses to participate in the process, they may be compelled by the courts to arbitrate (this is discussed below at section 8.3).

6.2.2 If the terms of the arbitration agreement are silent as to how the arbitration commences, but clearly indicate the parties' intention to arbitrate, then proceedings may be commenced through the courts to compel arbitration.97

6.3 Multi-party issues

Consolidation

6.3.1 Where there are multiple arbitrations involving the same facts or claims, consolidation may be an option to aid the efficiency of the process. Courts in New York consider consolidation to be a “procedural issue” that is presumptively for the arbitral tribunal to decide. An arbitral tribunal’s decision concerning consolidation will only be overturned by the courts if the arbitral tribunal has “exceeded its powers”98 (and a court will only have jurisdiction to overturn such decision if one of the parties submits a motion to vacate the award, as discussed below at paragraphs 9.1.2 and following).99

6.3.2 With regard to consolidation of arbitral proceedings by the courts, there are varying approaches among the several circuits. Consolidation is possible under the FAA, however, the Second Circuit considers that courts have no authority to consolidate arbitrations without party consent.100

Joinder and intervention of additional parties

6.3.3 Joinder or intervention of third parties in international arbitration is limited. Participation in arbitration is a matter of consent: the parties must consent to the addition of another party to the arbitration (either in the arbitration agreement, through rules incorporated in the agreement or after the arbitration has commenced through subsequent agreement by the parties).

100 See United Kingdom v. Boeing Company, 998 F.2d 68, 73–75 (2d Cir. 1993) (also holding that courts cannot consolidate arbitral proceedings without the consent of the parties); see also in re Allstate Insurance Co. v. Global Reinsurance Corp., 2006 WL 2289999, at *1 (S.D.N.Y. August 8, 2006) (refusing to order consolidation absent party consent).
6.3.4 There may be instances where the parties have already agreed to participate in an arbitration and, on this basis, are subject to joinder. Frequently, in joinder cases, these parties are non-signatories to the arbitration agreement. As presented by the Second Circuit, the primary basis for joinder of parties in this situation falls along the basis of agency and interrelated agreements. Within the Second Circuit there are a number of established theories for arbitration with a non-signatory to the agreement:

(i) **Incorporation by reference.** A party to an agreement that does not contain an arbitration clause explicitly incorporates an agreement that does. The signed contract need not specifically reference the arbitration clause.  

(ii) **Assumption by conduct.** Where a party indicates that it is assuming the obligation to arbitrate, it may be bound to the agreement.  

(iii) **Principles of agency.** Where an agent signs on behalf of a non-signatory principal with either actual or apparent authority to do so.  

(iv) **Piercing the corporate veil.** Where one legal entity dominates the other to the extent that it assumes the latter’s obligations; the test for piercing the corporate veil is borrowed from New York corporate law.  

(v) **Estoppel.** Courts have applied a theory of equitable estoppel whereby a party cannot purposefully take advantage of some of the benefits of a contract (e.g. the performance by the other party) without being subject to the obligations of the same contract (e.g. the arbitration clause).  

(vi) **Third-party beneficiaries.** An estoppel analysis might also apply when parties to the contract intend that a non-signatory third party may be able to rely or be bound by the terms of the agreement.  

6.3.5 When a non-signatory seeks to compel a signatory to arbitration, courts will generally find that the intention of the parties is a matter for the arbitrator to decide. However, when a signatory seeks to compel a non-signatory to arbitrate, an issue of the very existence of the agreement to arbitrate arises (e.g. a question concerning the validity of the arbitration agreement itself). As such, courts frequently assert jurisdiction in determining whether or not a non-signatory can be compelled to participate in arbitration by other parties.  

---

101 See Progressive Casualty Insurance Co. v. CA Reaseguradora Nacional de Venezuela, 991 F.2d 42, 46 (2d Cir. 1993).


6.4 **Submissions and oral hearings**

6.4.1 The expectation of “fundamental fairness” and considerations of due process require that the arbitral tribunal give the parties an opportunity to be heard and present evidence. Arbitral tribunals must allow the parties to present all evidence that “is pertinent and material to the controversy”, although an arbitral tribunal is afforded broad discretion regarding what is “pertinent and material”. The arbitral tribunal is not required to hear all of the evidence as long as each party has an adequate opportunity to present its case.\(^{108}\)

6.4.2 While the arbitral process may be informal, it commonly includes both written submissions and oral hearings; although, an arbitral tribunal has discretion in deciding whether to conduct an oral hearing.\(^{109}\) The minimum requirements of the “fundamental fairness” test are illustrated by what the courts have required in actions to vacate an award on the basis of “denial of the opportunity to present one’s case”. These are set out below at paragraphs 9.2.2 and 10.2.4 (ii).

6.5 **Default by one of the parties**

6.5.1 The majority of institutional rules provide for the event where one party fails or refuses to take part in the arbitral proceedings. These rules typically permit the arbitral tribunal to render an award, notwithstanding the failure of one of the parties (often the respondent) to participate in the proceedings. As the rules are agreed to by the parties, a federal court will enforce any resulting award so long as it meets the requirements for enforcement under the FAA and the relevant convention (see below at section 10).\(^{110}\)

6.5.2 If the incorporated rules do not specify a procedure for default by a party, a court may still confirm the award.\(^{111}\) Case law is scarce on this issue, but courts will look to whether or not the “fundamental fairness” standard is achieved by the proceedings.\(^{112}\) In difficult situations where the issue of default has not been considered by the arbitration agreement or where the arbitration agreement is to be enforced against a non-signatory, it may be preferable for the party seeking arbitration to seek the intervention of the courts and an order to compel the reluctant party to arbitration (see below at section 8.3).

---

\(^{108}\) See FAA, 9 U.S.C. § 10(a)3.


\(^{111}\) See Euromarket Designs, Inc. v. McGovern & Co. L.L.C., 2009 WL 2868725, at *4 (S.D.N.Y. September 3, 2009) (holding that a party that did not participate in arbitral proceedings that met the standards of “fundamental fairness” did not have grounds to vacate the award).

\(^{112}\) Ibid.
6.6 Evidence and discovery

6.6.1 Both the FAA and New York law recognise the right of the arbitral tribunal to compel witness testimony. The ability to compel witness testimony also applies to entities that are not party to the arbitral proceedings. 113

6.6.2 In addition, the Second Circuit has interpreted this grant of authority to extend to documents and pre-hearing discovery. 114 There has been some debate among the federal courts about the scope of this authority and whether or not an arbitral tribunal may order pre-hearing discovery against non-parties to the arbitral proceedings. 115 The Second Circuit has found that the arbitral tribunal may only compel pre-hearing discovery from parties that are engaged in the arbitral proceedings. 116 In addition, pre-hearing discovery may be further limited either by the agreement of the parties or the discretion of the arbitral tribunal (which may be impacted by other limits on its authority). 117

6.6.3 In the words of the Supreme Court, when a party agrees to arbitrate it “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”. 118 For this reason, unless agreed by the parties, the evidentiary rules of commercial litigation in the United States do not apply to international arbitrations in New York. As a result, discovery (and disclosure) is significantly more limited for arbitrations in New York, as compared to New York court-based proceedings.

6.6.4 However, where the parties have specified something contrary to this rule, for example, that the Federal Rules of Civil Procedure should apply, the courts will enforce this agreement. Where evidentiary rules of federal or state courts are explicitly incorporated into the agreement, the degree of discovery is likely to be broader than in other jurisdictions; incorporating depositions of witnesses, interrogatories and expansive requests for admissions.

113 See FAA, 9 U.S.C. § 7 (empowering the arbitral tribunal to issue a summons for any witness along with any material evidence). With regard to New York specific law, see Radin v. Kleinman, 299 A.D.2d 236 (App. Div. 2002) (stating that arbitrators have “inherent power to control the course of arbitral proceedings so as to permit a party to elicit the relevant information”).

114 Arbitration Between Brazell v. American Color Graphics, 2000 WL 364997, at *2-3 (S.D.N.Y. April 7, 2000) (stating that the FAA has been interpreted to permit the arbitral tribunal to subpoena documents of the parties where they are relevant to the proceedings, specifically as concerning pre-hearing discovery).

115 See discussion of the circuit split on this issue. Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210, 212 (2d Cir. 2008).


117 While judicial assistance is available to enforce the determinations of arbitral tribunals, this assistance does have limits. See, for example, National Broadcasting Co., Inc. v. Bear Stearns, 165 F.3d 184, 191 (1999) (affirming the decision of the federal district court to limit document discovery available in arbitration on the grounds of statutory limitation).

6.6.5 In certain situations, the arbitral tribunal or the parties may seek to rely on the courts to obtain evidence that the arbitral tribunal does not have the authority to compel. The most notable of such measures is motion under 28 U.S.C. § 1782. The current view of the Second Circuit on this issue is discussed in more detail at paragraph 8.6.1 below.

6.7 Confidentiality
6.7.1 While international arbitration is generally characterised as private and confidential, under both federal and state case law there is no duty of confidentiality absent party agreement. If the arbitration agreement does not contain a confidentiality clause or obligations of confidentiality via institutional rules, either party may disclose the details of the arbitration to any third party.\(^\text{119}\)

7. Making of the award and termination of proceedings

7.1 Remedies
7.1.1 The FAA does not provide guidance on the issue of remedies. Where the arbitration agreement is silent as to the issue of remedies, the arbitral tribunal has wide discretion on the range of remedies it may issue.\(^\text{120}\) In fact, an arbitral tribunal may issue relief that a court may not have permission to grant had the parties chosen to litigate the dispute.\(^\text{121}\) However, arbitral tribunals typically apply the substantive law, either of the forum or the law chosen by the parties, to the calculation of damages. Although there are numerous theories of damages that may apply under New York law, there are several common categories of damages that may apply:

— **Actual Damages.** As held by the Second Circuit and New York courts, the key limitation to actual damages is causation. An injured party must show that the other party’s conduct directly and proximately caused its loss.\(^\text{122}\) The amount of damages is limited to reasonable compensation for loss, although parties may be entitled to “lost profits” (subject to some limitations).\(^\text{123}\)

---


\(^\text{120}\) An arbitral tribunal may be restricted by the agreement of the parties as to the remedies it may consider. For instance, the parties may specify the nature of specific performance that can be ordered, a sum of liquidated damages or a prohibition of consequential damages. Where an agreement specifies such limits, courts will ensure that the arbitral tribunal does not reach beyond the limits of the agreed on powers while enforcing the award (see below at paragraph 10.2.4 (iii)).

\(^\text{121}\) “A court may not vacate an award because the [arbitral tribunal] has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than arbitrate the dispute.” Rochester City School District v. Rochester Teachers Association, 41 N.Y.2d 578, 582 (N.Y. 1977).

\(^\text{122}\) See National Market Share, Inc. v. Sterling National Bank, 392 F.3d 520, 525 (2d Cir. 2004).

— **Special (or consequential) damages.** New York law defines “special damages” as those which do not flow directly from a breach of contract. They are recoverable only in very limited circumstances. When parties specifically disclaim or include the possibility of special damages, the terms of the agreement will determine the matter (unless the terms are found to be unconscionable).\(^\text{124}\)

— **Punitive damages.** Arbitrators are not permitted to award punitive damages in arbitrations governed solely by New York state law. However, the FAA pre-empts state law in this regard. If the FAA is applicable to the agreement, the arbitral tribunal has the discretion to award punitive damages in accordance with the intention of the parties.\(^\text{125}\) For arbitration agreements that are subject to the FAA, parties may wish to specifically disclaim the application of punitive damages in the arbitration clause.

— **Specific performance.** The general rule in New York is that the use of specific performance as a remedy should be limited to situations where monetary damages are inadequate to redress the harm. This may occur if goods or services are especially unique and it is difficult to establish a market value for them.\(^\text{126}\) Where applicable, an arbitral tribunal may prescribe these remedies, although ultimate enforcement of the remedy will likely fall upon the courts.

### 7.2 Interest

7.2.1 Under the FAA there is no limit to an arbitral tribunal’s discretion with regard to interest. New York law does not regard pre-judgment or post-judgment interest as a penalty, but rather as the cost of using another’s money for a specified period. New York law provides that pre-judgment interest be awarded at a rate of 9% for all breach of contract actions (subject to waiver or agreement by the parties).\(^\text{127}\) Post-judgment interest at 9% is always applied by New York courts and will be enforced if awarded by the arbitral tribunal. Parties may vary the post-judgment rate up to the rate of usury (25%).\(^\text{128}\)

### 7.3 Form, content and effect of the award

7.3.1 The FAA does not provide explicit directions as to the form and content of the award. As interpreted by the federal courts, the FAA requires that an award be in

---


\(^{126}\) See New York Uniform Commercial Code at § 2-716(1)-(2).

\(^{127}\) See NY CPLR § 5001(a). Note that for actions in equity, pre-judgment interest is discretionary.

\(^{128}\) See NY CPLR § 5004 (specifying the post-judgment interest rule); and Marine Management, Inc. v. Seco Management, Inc., 574 N.Y.S.2d 207, 208 (2d Dep’t 1991) (stating that parties may vary the post-judgment rate up to the usury rate).
writing and represent a “final and binding” determination of the issues.\textsuperscript{129} The terminology ascribed to the award by the arbitral tribunal (i.e. terming it an “award”) will not be determinative; rather, courts look to the substantive effect of the award. If the written award resolves substantive issues before the arbitral tribunal in a final and binding manner, it can be considered enforceable by the courts.\textsuperscript{130} If the resolution reached by the arbitral tribunal is predicated on the future resolution of other issues in other proceedings, then the award will not meet the “final and binding” criteria and will not be enforced.

7.3.2 There is no requirement under the FAA that an award be a “reasoned award” unless required by the terms of the arbitration agreement or institutional rules incorporated by the parties.\textsuperscript{131}

7.4 Attorney’s fees
7.4.1 As discussed above at paragraph 4.3.1, the “American Rule” is that each party should bear its own costs in litigation. This is the standard set out by New York law. Absent an agreement of the parties otherwise, parties will bear their own costs in arbitration.

7.4.2 However, as construed by the Second Circuit, a broad arbitration clause may allow the arbitral tribunal to administer costs at its discretion.\textsuperscript{132} Parties may also specifically allow the arbitral tribunal to administer costs (either explicitly or through the incorporation of institutional rules). In such cases, arbitrators will have nearly unfettered discretion – including the discretion to determine whether or not the costs of ancillary litigation may be included.\textsuperscript{133}

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 The appropriate court in which to challenge an arbitration agreement, the enforcement (or confirmation) of an award or to make any other motion relating


\textsuperscript{130} See Publicis Communication v. True North Communications, 206 F.3d 725, 729 (7th Cir. 2000).


\textsuperscript{132} See Painewebber, Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996).

\textsuperscript{133} Shaw Group In. v. Triplefineline International Corp., 322 F.3d 115 (2d Cir. 2003).
Arbitration-Related Motions (collectively, *Arbitration-Related Motions*) will depend on both the court that maintains the appropriate jurisdiction and, in some cases, the preference of the parties.

8.1.2 Arbitration-Related Motions may only be brought before a federal district court if that court has a basis of jurisdiction. There are three applicable bases of jurisdiction: (i) subject matter jurisdiction; (ii) diversity jurisdiction; or (iii) admiralty. For arbitration agreements and awards that fall under the New York Convention or the Panama Convention, the FAA grants the federal courts subject matter jurisdiction. Arbitration-Related Motions in regard to an arbitration that addresses a controversy that “arises under” federal law can be brought before a federal district court. Proper federal jurisdiction may also be established under Chapter 1 of the FAA through diversity jurisdiction; so long as no party on one side of the dispute shares a state of citizenship with a party on the other side of the dispute (so-called “complete diversity”) and the amount in dispute is greater than USD 75,000. All disputes concerning admiralty law may be heard by federal district courts.

8.1.3 The vast majority of arbitrations, and all international commercial arbitrations, will have a basis in one of these areas of jurisdiction, and therefore a party will be able to bring an Arbitration-Related Motion before a federal court.

8.1.4 In addition to the requirements discussed above, courts must have personal jurisdiction over the party the motion is made against. This is largely a federal due process consideration. Personal jurisdiction may be obtained in a federal district court in one of three ways. First, if the party to the dispute consents to the jurisdiction (usually through a contract) then personal jurisdiction is established; the most common example is a forum selection clause. Secondly, personal jurisdiction may be established through statutory authorisation and exercise of jurisdiction comporting with minimum standards of federal due process. This requires showing either: (i) that the dispute could be properly brought in a New York court; or (ii) that there is a long-arm statute authorising service of process and that the appropriate “minimum contacts” within a jurisdiction make such service possible.

---

134 The FAA specifically contemplates motions, rather than other pleadings. Motions, as identified by the Federal Rules of Civil Procedure, are less expansive than other pleadings and are limited to a few contested issues that seek judicial action on some issue (e.g. vacating an award, confirming an award, compelling performance, etc). Each federal district court will specify standards for motions submitted by the parties. These are usually available on the relevant district court website.


139 See Bank Julius Baer & Co. Ltd., v. Waxfield, Ltd., 424 F.3d 278, 284 (2d Cir. 2005).
valid.\footnote{With regard to the test for either general jurisdiction or long-arm jurisdiction, see N.Y. CPLR 302(a) and Sole Resort S.A. de C.V. v. Allure Resorts Management, LLC, 450 F.3d 100, 103 (2d Cir. 2006). With regard to the “minimum contacts” necessary to satisfy federal due process, the inquiry concerns whether or not service would offend traditional notions of fair play and substantive justice. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).} Thirdly, personal jurisdiction may be obtained when property of the defendant exists in the jurisdiction, regardless of whether or not that property is the subject of the dispute.\footnote{See Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393, 398 (2d Cir. 2009) (affirming the view of Shaffer that personal jurisdiction exists over parties with assets in the relevant state).}

8.1.5 In all instances where the Arbitration-Related Motions relate to people, property or proceedings (held or to be held) in New York, the New York state supreme courts (so called because they are supreme in general jurisdiction) will have jurisdiction.\footnote{See NY CPLR § 302(a).} As a result, for all disputes seated in New York or for motions that impact property held in New York (e.g. bank accounts), the New York state supreme courts will have a jurisdictional basis.\footnote{However, the mere applicability of New York law to a dispute is not a sufficient basis for jurisdiction in New York; there must be more than a subject-matter basis for there to be proper jurisdiction.} If proper service of process can be made, a New York state supreme court would then have proper jurisdiction over the Arbitration-Related Motion as well.

8.2 Proper venue for filing Arbitration-Related Motions

\textit{In federal court}

8.2.1 The FAA provides that the appropriate venue for filing Arbitration-Related Motions is in any federal court, which, save for the arbitration agreement, is where the dispute could be brought.\footnote{See FAA, 9 U.S.C. § 204.} There are therefore two appropriate venues for a party to bring Arbitration-Related Motions. The first is in the court where the dispute would have been brought had the arbitration agreement not existed.\footnote{See FAA, 9 U.S.C. § 204 and 28 U.S.C. § 1391.} The second is in the federal district where the seat of the arbitration is located.\footnote{See American Construction Machinery and Equipment Co. v. Mechanised Construction of Pakistan, Ltd., 1986 WL 2973, at *4-5 (S.D.N.Y Mar 5, 1986).} If the arbitration is seated in New York City, this would be in the United States District Court for the Southern District of New York.

8.2.2 For motions to vacate an award, a separate venue provision applies. The FAA specifies that a motion to vacate an award should be made in the district where the award was made.\footnote{See FAA, 9 U.S.C. § 10.} The Supreme Court has interpreted this as a permissive
provision, so a motion to vacate can be made either where the award was made or before any other federal court that has proper jurisdiction.148

8.2.3 If a party brings Arbitration-Related Motions in the wrong federal district court, the opposing party may make a motion under the Federal Rules of Civil Procedure to dismiss the motion.149 Alternatively, a motion to transfer the proceedings to an appropriate venue may be made by either party under the Federal Rules of Civil Procedure.150

In state court

8.2.4 As mentioned above, Arbitration-Related Motions relating to international commercial arbitrations are rarely, if ever, brought before New York state courts. In the case that they were, it would likely result in the application of the FAA through procedural motions dictated by New York state law. These include motions to commence arbitration and the application of a one-year statute of limitation on the confirmation of an award.151 In the instance that a party brings a matter in a New York state supreme court, the opposing party may make a motion to remove the matter to the appropriate federal district court.152

8.3 Initial court proceedings

8.3.1 Application of the FAA prior to the arbitral hearing is centred around two motions: a motion to stay arbitral proceedings;153 and a motion to compel arbitral proceedings.154 Pursuant to a motion under either of these provisions, a court undertakes an analysis of: (i) the prima facie validity of the arbitration clause; (ii) a determination as to who decides issues of arbitrability (discussed above at paragraph 5.1.1) and, depending on the answer to “who decides”, the court may also consider (iii) the issues to be determined by an arbitral tribunal (discussed above at paragraph 5.1.4).

8.3.2 Applications under Section 3 and 4 of the FAA (primarily concerning stay of proceedings and orders to compel arbitration) are to be made as motions in accordance with the standards set out in FAA and the Federal Rules of Civil

149 See 28 U.S.C. § 12(b)3.
150 Ibid, § 1404(a). Note that such transfer can only be to an appropriate venue.
151 See NY CPLR §§ 7502, 7510 and 7511.
153 Ibid, § 3.
Procedure. In addition, individual federal district courts have discrete standards for the form and filing of motions and the majority of federal district courts now allow for the e-processing of applications and motions (though notice and service of process still must be made according to the rules of the relevant forum).

8.4 Preliminary rulings on points of jurisdiction and law
8.4.1 As a preliminary matter, courts may consider two questions:

(i) **The existence of the arbitration agreement.** If the court finds the arbitration agreement to be *prima facie* valid – that is, there is no allegation of fraud with regard to the arbitration clause specifically – then the arbitral tribunal will consider the issues referred to arbitration.

(ii) **The issues the arbitral tribunal may resolve.** Where the parties have “clearly and unmistakably” agreed to submit the scope of the arbitrator’s jurisdiction to the arbitral tribunal itself, the court will refer the issue of what the arbitral tribunal may consider to the arbitral tribunal. If, however, the parties have not indicated that the arbitral tribunal should resolve these issues, the court will determine the issues that the arbitrators may resolve.

8.5 Interim protective measures
8.5.1 Arbitral tribunals generally have broad authority to grant interim measures to protect the position of the parties. In some cases, the measures available to the arbitral tribunal may even exceed those available to courts in New York.

8.5.2 The effect of partial awards and interim measures is a matter of debate before United States courts. The Second Circuit has taken a favourable view of interim measures: allowing interim measures that reach a “final and binding” determination on issues to be enforceable as awards under the FAA and refusing to enforce or overrule interim measures that do not amount to a “final and binding” determination. This is not to suggest that interim measures are “final” in a permanent sense; rather, it means that the interim measure is not subject to appeal.

8.5.3 In addition, federal courts remain available to consider injunctions and other interim measures that will help to ensure the efficacy of any award. Parties may

---

155 Ibid, § 6. The specific rules of the relevant district court are generally available on the official webpage.


seek a motion by applying either state law or federal law standards for injunctive relief under the Federal Rules of Civil Procedure. The latter approach has been applied by federal courts in New York with more success, as state courts appear unwilling to grant preliminary injunctions and attachments where international commercial arbitration agreements are governed by the New York Convention.

8.6 Obtaining evidence and other court assistance

Court assistance for arbitral proceedings outside the United States

8.6.1 Under the FAA, arbitral tribunals may summon witnesses, along with appropriate supporting documents. The Second Circuit has interpreted Section 7 of the FAA to also allow arbitral tribunals to compel the parties to disclose documents through discovery where determined as an interim measure by the arbitral tribunal. However, the Second Circuit has explicitly prevented the application of this provision to pre-hearing discovery as applied to third parties who will not be called as witnesses at a hearing.

8.6.2 In rare instances, a New York state supreme court may be willing to aid an arbitral tribunal in obtaining evidence, particularly in ordering discovery, but this will only happen in exceptional circumstances where it is a matter of “necessity”.

8.6.3 As a practical matter, arbitral tribunals rarely rely on the courts to help obtain evidence during an arbitration. Rather, parties typically comply because an arbitral tribunal may draw adverse conclusions from a party’s failure to comply with its order.

160 See Cooper v. Ateliers de la Motobecane S.A., 57 N.Y.2d 408 (C.A.N.Y. 1982). The refusal to grant such interim measures stems from old case law. New York has specifically passed new legislation to explicitly grant state courts this authority but this new provision has yet to be tested and, absent a ruling by the New York Court of Appeals or the Second Circuit, the old case law has not been formally abrogated.
162 See Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210, 212 (2d Cir 2008) (“Section 7 of the FAA does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding.”).
164 See the IBA Rules (CMS Guide to Arbitration, Vol II, appendix 4.1) and ICDR Guidelines, which explicitly allow such negative inferences.
Court assistance for arbitral proceedings outside the United States

An ongoing issue of discussion within the arbitral community and federal courts are motions under 28 U.S.C. § 1782 (assistance to foreign and international tribunals and to litigants before such tribunals). In the Second Circuit, these motions have gained notoriety, in part, through the Lago Agrio litigation and Chevron’s dispute with Ecuador.165

A Section 1782 motion can only be made in relation to foreign proceedings, i.e. where the seat of the arbitration and place of the hearings is in a foreign country. Interested parties to these foreign proceedings may request the assistance of a federal court in procuring either testimony or the disclosure of documents from entities within that court’s jurisdiction. In order to do so, parties must at least demonstrate the following:

— that the party seeking the information is an “interested person”;
— that the documents are being obtained “for use in a foreign or international tribunal”;
— that such adjudicative proceedings are within “reasonable contemplation”; and
— that such materials are not privileged.166

It should be noted that a court is not required to grant a Section 1782 motion. Federal district courts have discretion to grant such motions and compliance is not mandatory.167 The Supreme Court has set out several factors that courts may consider in making such determinations:

— whether the individual from whom the information is sought is party to the proceedings or a third party;
— the nature of the tribunal, the character of the proceedings and the receptivity of the relevant government, court or agency to such assistance;
— whether the request seeks to circumvent proof-gathering limitations of the foreign country or the United States; and
— whether the request is unduly intrusive or burdensome.168

---

165 See, for example, Chevron Corp. v. Berlinge, 629 F.3d 297 (2d Cir. 2011).
8.6.7 The Second Circuit has since ruled on the application of these discretionary factors and has re-emphasised that the applying party does not need to show that the information would be discoverable in the foreign jurisdiction.\textsuperscript{169}

9. Challenging and appealing the award before the courts

9.1 Procedure
9.1.1 A party who opposes an award rendered by an arbitral tribunal may seek to have the award vacated when the award is rendered in the United States. Where a party seeks to vacate an award, a notice of a motion to vacate must be served on the opposing party within three months of the “date of the award” (as defined at paragraph 9.2.1 below).\textsuperscript{170} The circuit courts have interpreted this provision strictly and have denied a motion to vacate an award where a party filed its motion within three months but failed to serve the notice to the opposing party within three months.\textsuperscript{171} A party seeking to vacate an award cannot simply wait to raise the application during the other party’s application to confirm the award, and doing so may forfeit the ability to challenge the award.

9.1.2 Applications to challenge an award are made through motions to the court.\textsuperscript{172} The procedure and format of the motion will vary depending on the federal district court judge. Parties may submit affidavits, legal briefs and documentary evidence in support of the motion. One of the key requirements for an action that seeks to confirm, modify or correct an award is that the party attach the written award.\textsuperscript{173}

9.1.3 If a party files a petition\textsuperscript{174} before a New York state supreme court in accordance with state procedural law and the petition is removed to the appropriate federal district court, the pending petition will be treated by the federal district court as a motion. However, the procedural rules of the state court process will accompany

\textsuperscript{169} See Marubeni America Corp. v. LBA Y.K., 335 Fed.Appx. 95, 98 (2d Cir 2009).


\textsuperscript{171} See Webster v. A.T. Kearney, Inc., 507 F.3d 568, 571–572 (7th Cir. 2007).


\textsuperscript{173} ibid, § 13. This is also a requirement of the New York Convention art IV(1)(a) (see CMS Guide to Arbitration, vol. II, appendix 1.1). Some courts have held that the failure to submit the written award is fatal to an enforcement action. The Second Circuit, however, has held that while this is not fatal, it does impact the merits of a motion for enforcement. See Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 n.2 (2d Cir. 2005).

\textsuperscript{174} A petition is simply the state law equivalent of a motion and is used to commence a special proceeding in the New York state supreme courts. See NY CPLR § 304.
the removal to the federal district court; meaning any state law deadlines for filing a response will apply in this situation.\textsuperscript{175}

9.1.4 In the absence of the operation of state rules, the methods specified by the FAA for service of process of motions can be more complicated.\textsuperscript{176} With regard to parties that reside in the district where the award was made, the rule is simple: apply the rules for the relevant federal district court. For parties located outside the federal district court where the award was made, the FAA references a method of service of process (service by the U.S. Marshal) that has long been abolished.\textsuperscript{177} The present rule is that where the adverse party is not a resident of the district where the award was made then service of process should be made in accordance with Federal Rule of Civil Procedure 4, which sets out various options for service of process.\textsuperscript{178} This is implicitly also the rule for service of process on parties located outside the United States.

9.2 Challenging (vacating) the award

9.2.1 The substantive grounds for challenging an award, in particular, seeking to vacate an award, depend crucially on where and when the award was “made”. Awards made outside the United States cannot be vacated. An award is made at the time it is “originally decided by the arbitrators”.\textsuperscript{179} To avoid ambiguity on this point, some institutional rules require (and some parties set out that) the arbitral tribunal should specify the precise date and place where the arbitral tribunal made the award. If an award is made in a foreign country, the courts in New York do not have jurisdiction to vacate the award.\textsuperscript{180}

9.2.2 The provisions of the FAA specify the grounds on which an award made in the United States might be vacated.\textsuperscript{181} Courts have interpreted these grounds narrowly, consistent with the federal goal of enforcing agreements to arbitrate.\textsuperscript{182} Parties are limited to these grounds when moving to vacate an award and they cannot be

\begin{enumerate}
\item D.H. Blair & Co. Inc., v. Gottdiener, 462 F.3d 95, 108 (2d Cir. 2006) (holding that the federal rules concerning removal do not apply to petitions to confirm or vacate awards).
\item See FAA, 9 U.S.C. §§ 9 and 12.
\item Ibid.
\item See Gulf Petro Trading v. Nigerian National Petroleum Corp., 512 F.3d 742, 753 (5th Cir. 2008).
\item See FAA, 9 U.S.C. § 10.
\item See Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003).
\end{enumerate}
expanded on, even through the agreement of the parties.\textsuperscript{183} Each of these grounds is set out below and the standards applied by the Second Circuit are explained:

(i) \textbf{Where the award is procured by corruption, fraud or undue means.}\textsuperscript{184} Courts in New York require that the party seeking to vacate the award demonstrate the existence of the alleged fraud or corruption, show due diligence in attempting to discover the fraud or corruption prior to the award and show that the fraud or corruption was material to the decision of the arbitral tribunal. The standard of proof for demonstrating these elements varies among the cases in the Second Circuit, but a common standard is “clear and convincing” evidence. Each basis for vacating the award, “corruption, fraud or undue means” requires intentional misconduct.\textsuperscript{185}

(ii) \textbf{Where there was evident partiality or corruption in the arbitral tribunal.}\textsuperscript{186} Courts are reluctant to remove arbitrators on the mere allegation of partiality or corruption. However, where a party can show that “a reasonable person would have concluded that an arbitrator was partial to one party”, the resulting award may be vacated. While a demonstration of actual bias is not required, there must be something more than the mere appearance of bias.\textsuperscript{187} If a party has a relationship with an arbitrator, the other party has no reason to know of that relationship and that relationship is not disclosed, then the court may take non-disclosure as evidence of partiality and it may vacate the award.\textsuperscript{188}

(iii) \textbf{Where the arbitral tribunal is guilty of misconduct that prejudiced the rights of a party.}\textsuperscript{189} The misconduct that falls under this section may be characterised as the failure to postpone a hearing or a failure to entertain relevant and material evidence or other misbehaviour.\textsuperscript{190} With regard to the nature of the hearing and general conduct of the arbitral tribunal, courts in New York apply the “fundamental fairness” test discussed above at paragraph 6.4.1.\textsuperscript{191} Particularly when considering whether or not a hearing was properly adjourned, courts will provide wide latitude or discretion to the

\textsuperscript{184} See FAA, 9 U.S.C. § 10(a)i.
\textsuperscript{185} See, for example, Hakala v. Deutsche Bank AG, 2004 WL 1057788, at *2-3 (S.D.N.Y. May 11, 2004).
\textsuperscript{186} See FAA, 9 U.S.C. § 10(a)ii.
\textsuperscript{187} Morelite Construction Corp. v. N.Y. City District Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).
\textsuperscript{188} Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137–138 (2d Cir. 2007); and Lucent Technologies, Inc. v. Tatung Co., 379 F.3d 24, 28 (2d Cir. 2004).
\textsuperscript{189} See FAA, 9 U.S.C. § 10(a)iii.
\textsuperscript{190} Ibid, § 10(a)iii; see Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).
arbitral tribunal, upholding the decisions of the arbitral tribunal where there is a reasonable basis for doing so.\(^{192}\)

(iv) **Where the arbitral tribunal exceeded its powers or imperfectly executed them.**\(^{193}\) Courts will vacate an award when the arbitral tribunal exceeds its authority. To determine this, a court will look to the validity of the arbitration agreement and consider who determines the arbitral tribunal’s jurisdiction, as discussed above at section 5.1.

9.2.3 In addition to these provisions, there may also be the optional ground of “manifest disregard of the law”. Although the Supreme Court has called into question the merits of this ground,\(^{194}\) the Second Circuit continues to acknowledge its existence.\(^{195}\)

9.2.4 The application of “manifest disregard of the law” is severely limited. Mere factual error by the arbitral tribunal or misapplication of complex legal principles will not suffice. To successfully vacate an award under this standard, a party must show that the arbitral tribunal knew of the governing legal principle, that the governing legal principle was explicit, certain and clearly applicable to the instant facts, and that the arbitral tribunal refused to apply that governing principle.\(^{196}\)

9.2.5 A party seeking to vacate an award on these grounds must demonstrate these factors both subjectively and objectively. It must be shown that, subjectively, the arbitral tribunal actually knew the governing law and refused to apply it\(^{197}\) and in doing so must rely on actual statements by the arbitral tribunal (either in the transcript of the arbitral proceedings or in the award) as a party cannot depose the arbitral tribunal to provide a foundation for its motion.\(^{198}\) It also must be shown, objectively, that there is a clear, explicit and clearly applicable legal principle under the governing law.\(^{199}\) The more complex the factual situation, the less likely that the second criterion can be demonstrated.


\(^{194}\) See Wilko v. Swan, 346 U.S. 427, 440 (1953) (implying “manifest disregard” as a ground for vacating awards), but see Hall Street Associates, L.L.C. v. Mattel Inc., 128 S. Ct. 1396, 1404 (2008) (calling into question the validity of the ground while ruling that parties cannot contract to expand the scope of judicial review for awards).


\(^{197}\) See D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 111 (2d Cir. 2006).


9.2.6 Courts in New York have very rarely vacated on “manifest disregard” grounds and will only do so in the most obvious cases.\textsuperscript{200}

9.3 Correcting or modifying an award

9.3.1 The FAA expressly permits the correction and modification of awards by the courts in three circumstances: (i) where there is an evident miscalculation or mistaken reference; (ii) where the arbitral tribunal has produced a final and binding result on an issue that was not actually submitted to it (unless the resolution of this issue impacts the decision on the matter submitted); and (iii) when the award is imperfect as to its form in a way that does not effect the merits of the controversy (i.e. a date reference within the award is incorrect).\textsuperscript{201}

9.3.2 A party seeking a modification or a revision must submit a motion in the same way as it would a motion to vacate or confirm (as discussed in section 9.2 above). A party seeking such a correction should note that corrections and modifications are constrained by the actual intention of the arbitral tribunal and should indicate that this is the purpose of the motion.\textsuperscript{202}

10. Confirmation and enforcement of awards

10.1 Domestic awards

10.1.1 Pursuant to the FAA, enforcement of a domestic award (i.e. awards that are not subject to the provisions of the New York Convention or the Panama Convention) is sought through “confirmation”. For commercial awards governed solely by Chapter 1 of the FAA (primarily domestic awards), a party must apply to confirm the award within one year.\textsuperscript{203}

10.1.2 Under the FAA a court may confirm an award “if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.”\textsuperscript{204} Courts in New York have held that they have no jurisdiction to enforce awards without an indication that the parties intended the

\textsuperscript{200} See, for example, Porzig v. Dresdner, Kleinwort, Benson, North America L.L.C., 497 F.3d 133, 141–143 (2d Cir. 2007) (partially vacating an award on the grounds of “manifest disregard” where the arbitral tribunal failed to properly apply the rule concerning attorney’s fees that the federal district court had previously explained in a judicial order).


award to be enforced by court judgment.205 The use of the words “final or finally” will be sufficient to communicate this intent.206 The vast majority of standard arbitration clauses meet this minimal requirement. Where doubts remain, other facts outside the arbitration agreement may be used to demonstrate that the parties intended the award to be enforced by court judgment.207

10.1.3 On a motion to confirm, the only barrier to confirmation by the courts is a counterclaim by an adverse party to vacate, correct or modify the award.208

10.2 International awards

10.2.1 Awards subject to the New York Convention or the Panama Convention (also referred to as international awards) are exempt from the requirement that the parties demonstrate an intention to have the award confirmed by court order. This includes awards made in the United States but subject to the provisions of either Chapter 2 or Chapter 3 of the FAA because of their international characteristics.209

10.2.2 The FAA creates an extended period of three years in which parties may make a motion for the confirmation of a non-domestic award (see discussion above at paragraph 10.1.1). In addition, the FAA specifies simplified procedures for non-domestic awards. A party need only make a motion to the relevant court for confirmation, supported by a “duly certified copy of the award” (or the original), a “duly certified copy of the arbitration agreement” (or the original) and a certified translation of these documents if they are in a language other than English.

10.2.3 As referenced at paragraph 9.2.2 above, the Second Circuit does not have jurisdiction to vacate an award made outside of the United States. However, courts in New York do possess the authority to not recognise awards made outside the United States. While this does not prevent the recognition of the award in other foreign countries, a ruling by a federal district court to this effect would assure the non-recognition of the award throughout the United States (barring the decision of the court being overturned on appeal).

207 See P&P Industries, Inc. v. Sutter Corp., 179 F.3d 861 (10th Cir. 1999) (incorporation of rates that explicitly provide consent to entry of judgment are sufficient).
10.2.4 The New York Convention provides the grounds on which a jurisdiction may refuse to enforce an international award. The FAA and case law supplement the New York Convention to the extent they are not in conflict.\(^\text{210}\) As a result, courts in New York have severely restricted the scope of review in accordance with the federal policy favouring the enforcement of arbitration agreements.\(^\text{211}\) There are seven express grounds for non-recognition under the New York Convention; these and the standards applied by courts in New York are set out below.

(i) **Absence of a valid arbitration agreement.**\(^\text{212}\) Courts in New York will apply the FAA to determine whether or not the arbitration agreement is valid. As discussed above at section 3.2, the court will inquire as to whether or not the arbitration clause itself (as distinct from the Container Agreement) is valid. If the court finds that the arbitration clause is valid, then the court will inquire as to whether or not the arbitral tribunal had the jurisdiction to determine the validity of the Container Agreement. As discussed above at paragraph 5.1.2, the court will determine this on the basis of the “clear and unmistakable evidence” standard. If the parties intended for the arbitral tribunal to determine questions concerning the validity of the arbitration agreement then the court will defer to its decision.\(^\text{213}\) Notably, courts in the United States will apply this line of analysis even when the arbitration agreement is made outside the United States.\(^\text{214}\)

(ii) **Denial of an opportunity to present one’s case.**\(^\text{215}\) Courts in New York have interpreted this ground to imply the forum state’s standards of due process.\(^\text{216}\) As a result, courts in New York will ensure that the arbitral proceedings meet the “fundamental fairness” test set out above at paragraph 6.4.1.

(iii) **Exceeding authority.**\(^\text{217}\) The initial question courts in New York answer with regard to this ground is whether or not the parties intended for the arbitral tribunal to determine the issues to be arbitrated. Where this intention

\(^{210}\) See Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir.1983).


\(^{212}\) See New York Convention, art VI(1)(a) (CMS Guide to Arbitration, vol II, appendix 1.1).

\(^{213}\) See Telenor Mobile Communications AS v. Storm L.L.C., 584 F.3d 396, 406 (2d Cir 2009) (holding that the presumption that the court determines arbitrability applies to cases governed by the New York Convention).

\(^{214}\) See Sarhank Group, Inc. v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005) (applying FAA analysis on this issue to an arbitration proceeding seated in Egypt).

\(^{215}\) See New York Convention, art VI(1)(b) (CMS Guide to Arbitration, vol II, appendix 1.1).

\(^{216}\) Parsons & Whittemore Overseas Co. v. Societe Generale, 508 F.2d 969, 975–76 (2d Cir. 1974).

\(^{217}\) See New York Convention, art VI(1)(c) (CMS Guide to Arbitration, vol II, appendix 1.1).
is found, the court’s review of this issue will end. Even if this issue is left to the court to decide, courts in New York have interpreted this ground of non-recognition narrowly. A party seeking non-recognition of the award must overcome a “powerful presumption” that the arbitral tribunal acted within its authority.\(^{218}\)

(iv) **Violations of arbitral procedures or the law of the arbitral seat.**\(^{219}\) Courts in New York have established that the New York Convention prioritises the procedural choices of the parties, supplemented by the procedural requirements of the forum. A party seeking non-recognition of an award on this ground must demonstrate that the arbitral tribunal either ignored specific procedural guidelines agreed by the parties,\(^{220}\) or ignored arbitral procedures required by the seat. In either case, the party seeking non-recognition of the award on these grounds must show a “substantial prejudice” due to the failure to follow procedure.\(^{221}\)

(v) **Awards that are not binding or have been set aside.**\(^{222}\) Once an award is set aside by courts in the seat of arbitration, courts in other jurisdictions may refuse to recognise the award. Citing concerns regarding reciprocity and comity, New York courts generally do not confirm awards that have been set aside by foreign courts.

(vi) **Awards that address non-arbitrable issues.**\(^{223}\) A party seeking non-recognition on these grounds must demonstrate that the subject matter of the dispute is not an arbitrable issue in the United States. The Supreme Court has limited these exceptions to instances where Congress has explicitly recognised that an issue cannot be arbitrated.\(^{224}\) Courts in New York rarely find these grounds applicable.\(^{225}\)

\(^{218}\) See Parsons & Whittemore Overseas Co. v. Societe Generale, 508 F.2d 969, 976 (2d Cir. 1974).

\(^{219}\) See New York Convention, art VI(1)(d) (CMS Guide to Arbitration, vol II, appendix 1.1).

\(^{220}\) Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc., 403 F.3d 85, 90–91 (2d Cir. 2005) (finding that the premature appointment of a third arbitrator was grounds for non-recognition).

\(^{221}\) See P.T Reasuransi Umum Indonesia v Evanston Insurance Co., 1992 WL 400733, at *2 (S.D.N.Y. December 23, 1992) (an award should not be vacated based on a procedural irregularity because the complaining party was not “substantially prejudiced”).

\(^{222}\) See New York Convention, art VI(1)(e) (CMS Guide to Arbitration, vol II, appendix 1.1).

\(^{223}\) See New York Convention, art VI(2)(a) (CMS Guide to Arbitration, vol II, appendix 1.1).


\(^{225}\) The majority of cases where a court considers an issue to be non-arbitrable is where a claim is specifically limited to litigation in the courts. See, for example, Stephens v. American International Insurance Co., 66 F.3d 41, 45 (2d Cir. 1995).
(vii) **Awards that violate public policy of the forum state.**\(^{226}\) Given the ambiguous language of this provision, this is probably the most widely asserted basis for the non-recognition of an award in the United States; it is also the most likely to be refused. Courts in New York interpret this provision in an extremely narrow way. A court will refuse to recognise an award only in the instance that it violates “the forum state’s most basic notions of morality and justice.”\(^{227}\) The instances where the claims of a party approaches this standard are exceptionally rare and generally only occur when there is clear partiality exhibited by an arbitrator,\(^ {228}\) or where an award has been procured by obvious fraud and/or duress.\(^ {229}\)

10.2.5 Unless there are grounds for the deferral of recognition or enforcement as set out above, federal courts will enforce an award.\(^ {230}\)

11. **Contacts**

**CMS Cameron McKenna LLP**
Mitre House, 160 Aldersgate Street
London EC1A 4DD
United Kingdom

**Jeremy Wilson**
Partner
Member of the New York Bar
T +44 20 7367 2614
E jeremy.wilson@cms-cmck.com

**William Lowery**
Associate
Member of the New York Bar
T +44 20 7367 2656
E william.lowery@cms-cmck.com

---

227 Parsons & Whittemore Overseas Co. v. Societe Generale, 508 F.2d 969, 974 (2d Cir. 1974).
INTERNATIONAL ARBITRATION
– AN OVERVIEW
1. Arbitration defined

1.1.1 “Arbitration” has both contractual and judicial elements. It is a private and consensual form of adjudicative dispute resolution based on an agreement between parties. An arbitration agreement refers a current or future dispute between parties that arises from a defined legal relationship to an impartial third party (the arbitral tribunal), typically appointed by the parties. The arbitral tribunal is tasked with settling the parties’ dispute in a judicial manner after hearing both sides and the parties agree to be bound by the result.

1.1.2 Pursuant to the Model Law (1985)\(^1\) promulgated by UNCITRAL, an arbitration may be defined as an “international” arbitration if:
   — the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
   — one of the following places is situated outside the state in which the parties have their places of business:
     – the place of arbitration if determined in, or pursuant to, the arbitration agreement;
     – any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
     – the parties have agreed expressly that the subject matter of the arbitration agreement relates to more than one country.\(^2\)

2. Institutional and ad hoc arbitration

2.1 Institutional arbitration

2.1.1 An “institutional” arbitration is an arbitration conducted under the auspices and pursuant to the rules of an established arbitral institution. In institutional arbitrations, certain procedural steps, for example the appointment of the arbitral tribunal or service of documents, may involve or be administered by the president or secretariat of the arbitral institution (see further below).

2.1.2 In the area of international commercial arbitration, there are a number of leading international arbitral institutions, such as the International Chamber of Commerce

---


(ICC),\textsuperscript{3} the London Court of International Arbitration (LCIA),\textsuperscript{4} the Swiss Chambers of Commerce and Industry,\textsuperscript{5} the German Institution of Arbitration (DIS)\textsuperscript{6} and others.

2.1.3 In addition, most countries have their own commercial arbitral institutions which deal both with domestic and international arbitrations.

2.1.4 There are also a number of specialist trade associations which administer their own arbitration schemes, dealing with disputes concerning, for example, particular internationally traded commodities, or shipping. Leading examples of such specialist arbitration schemes are those set up by the Grain and Feed Trade Association (GAFTA),\textsuperscript{7} the Waren-Verein der Hamburger Börse e.V.,\textsuperscript{8} the London Metal Exchange (LME),\textsuperscript{9} the German Maritime Arbitration Association (GMAA)\textsuperscript{10} and the London Maritime Arbitrators Association (LMAA).\textsuperscript{11} Many countries also have arbitral institutions which deal primarily with disputes in the construction industry.\textsuperscript{12}

2.1.5 Most arbitral institutions have published their own arbitration rules, which parties may incorporate into their arbitration agreements by reference, using standard form arbitration clauses suggested by these arbitral institutions. Sample clauses recommended by selected leading arbitral institutions are set out in Volume II, Appendix 5 to this Guide and the arbitration rules of the main arbitral institutions in force on 31 January 2012 are set out in Volume II, Appendix 3.

2.1.6 If institutional arbitration rules are adopted by the parties in their arbitration agreement, these rules replace (to the extent permitted by the substantive law governing the arbitration agreement and the procedural law governing the arbitral

\begin{itemize}
  \item See: [http://www.dis-arb.de/] (accessed 23 January 2012).
  \item See: [http://www.gmaa.de/] (accessed 23 January 2012).
\end{itemize}
proceedings, and to the extent that the parties have not agreed otherwise) the
non-mandatory statutory arbitration procedure provided for by the national
arbitration laws of the country where the arbitration has its “seat”. Most arbitral
institutions also have a secretariat which, in return for payment of a fee, will assist
the parties with the administration of their arbitral proceedings and with
constituting an arbitral tribunal by appointing arbitrators where this cannot be
achieved by agreement between the parties.\textsuperscript{13}

2.1.7 Agreeing to the rules of an international arbitral institution, and thereby benefiting
from the services provided by that arbitral institution in relation to any arbitration
which arises, may provide the following advantages:
— the arbitration will take place within an internationally recognised and
established procedural framework;
— the arbitration will take place pursuant to comprehensive, clear and tested
arbitration rules;
— the arbitration will take place with the administrative assistance of an
experienced secretariat, which will be able to help the parties and the arbitral
tribunal on a large variety of procedural issues;
— the arbitral institution can assist the parties with respect to the appointment
of arbitrators and is well-suited to make a default appointment if a party fails
to appoint an arbitrator or if it is not possible to agree on an arbitrator;
— some arbitral institutions (in particular the ICC) carry out quality control over
the work of the arbitral tribunals appointed under their auspices (e.g. by
reviewing draft awards prior to their publication) and monitor the progress of
the proceedings;
— disputes between the parties about the application of statutory arbitration
procedures of the country where the arbitration has its seat can be avoided so
long as the provisions are not mandatory; and
— in international commercial arbitration, institutional arbitration is often
regarded as a “neutral choice”.

2.1.8 The disadvantages of institutional arbitration are that:
— additional costs are incurred by the parties in the form of fees for the
administrative services provided by the arbitral institution; taking into account
the overall costs of arbitral proceedings, however, these fees are modest in
most cases (a very low percentage of a party’s overall legal expenditure when
conducting arbitral proceedings); and
— the involvement of a secretariat may delay the arbitral proceedings.

2.2 Ad hoc arbitration

2.2.1 An “ad hoc” arbitration is an arbitration pursuant to an arbitration agreement between the parties which does not specify an arbitral institution to provide administrative services and/or the procedural rules pursuant to which an arbitration shall be conducted. When agreeing to an ad hoc arbitration, the parties can either design their own arbitral procedure to suit their particular requirements, refer to “non-institutional” arbitration rules such as the UNCITRAL Arbitration Rules (2010), or simply rely on the arbitration law of the country where the arbitration has its seat to provide the procedural framework for their arbitral proceedings.

2.2.2 In some circumstances, there may be advantages to opting for an ad hoc arbitration. Ad hoc arbitration offers increased flexibility by permitting the parties to agree the dispute resolution procedures themselves (although this process is likely to be easier if the procedure is agreed before a dispute arises). This added flexibility may be used, for example, to allow the parties to impose or control the speed with which the arbitration progresses to an award and the costs of the arbitration. In contrast, in an institutional arbitration, the parties may be subject to rules that impose longer deadlines or require lengthy, time-consuming procedures (e.g. English-style disclosure). Similarly, the arbitral institution will set the costs of the arbitration and apply its own administration costs for its work, whereas in an ad hoc arbitration, for example, the arbitrators and the parties may negotiate directly the arbitrators’ fees and avoid the arbitral institution’s administration fees (although it is noted that these costs savings may be diminished from having to incur the costs to agree the terms of the ad hoc arbitration rules between the parties).

2.2.3 There are advantages and disadvantages connected with both institutional and ad hoc arbitration. However, despite the advantages of ad hoc arbitration discussed above, as a general rule, parties are well-advised to agree on arbitration administered by one of the leading arbitral institutions. The main international arbitral institutions regularly revise and update their rules and they are generally keen to ensure that the parties, having chosen their arbitral institution, benefit from the advantages outlined above. For example, unlike in ad hoc arbitral proceedings, the arbitral institution may exercise some informal control over the speed at which the arbitrators deal with the matter and the fixing of the arbitrators’ fees.15

2.2.4 This Guide will explore the national arbitration laws applicable in a large variety of jurisdictions including some of the leading European and Asian arbitration centres, as well as Australia, China, South America and New York, and provides selected reference materials on international commercial arbitration.

2.3 The importance of national arbitration legislation

2.3.1 Even in an international context, national arbitration legislation remains relevant. First, it provides back-up procedures, which apply if the parties have not adopted a specific set of institutional arbitration rules in their arbitration agreement, or have not included in their arbitration agreement tailored rules dealing with the specific procedural issues which arise. Second, there are a number of important areas in which the application of national arbitration law is mandatory even where the parties have agreed upon an ad hoc procedural framework or to subject their arbitration to institutional arbitration rules.\(^{16}\)

2.3.2 In addition to the national arbitration laws of the country in which the arbitration has its seat, parties may also need to consider the national arbitration laws of countries where (parts of) the arbitral proceedings take place, where relevant evidence or assets are located, or where an award is to be enforced. In addition to the national arbitration laws of the seat, these other legal regimes may apply and may confer jurisdiction on national courts other than those where the arbitration has its seat.

2.3.3 National arbitration law continues to determine, in particular, issues such as:

— the validity and scope of the arbitration agreement;
— the arbitrability of disputes;
— mandatory rules of law;
— the remedies that the arbitral tribunal may grant;
— the right of the parties to invoke the jurisdiction of the courts in arbitration; and
— applications, including appeals and challenges to awards, before national courts.

2.3.4 Most of the European countries (and many non-European countries) covered in this Guide have in recent years reformed their national arbitration legislation to a greater or lesser extent on the basis of or by reference to the UNCITRAL Model Law on International Commercial Arbitration, which was first published by

UNCITRAL in 1985 (Model Law (1985)) and in an amended version in 2006 (Model Law (2006)).\textsuperscript{17} The Model Law (1985) (as amended by the Model Law (2006)) is increasingly accepted internationally as the model to which countries look when it comes to updating their arbitration legislation. As a result, the emerging similarity of approach makes arbitration laws increasingly more uniform and arbitration more attractive as a means of resolving international business disputes.\textsuperscript{18}

3. The arbitration process

3.1.1 Because arbitration is based on the consent of the parties to submit their dispute to arbitration instead of state courts, arbitration can be described as “privatised court proceedings”. Court and arbitral proceedings are essentially adjudicative processes and a number of key features of arbitral proceedings are similar to court procedures. Following the constitution of the arbitral tribunal, the parties file submissions. Thereafter, they produce evidence upon which they rely (which may be documentary, written or oral, or a combination of all three). There will usually be one or more hearings before the arbitral tribunal, providing the parties their “day in court”, although it is possible to have a “documents only” arbitration. Following the substantive hearing, the arbitral tribunal will deliver its award, which may then be enforced in the same way as a court judgment.

3.1.2 It is important that due process considerations are satisfied when parties set out to resolve their disputes by arbitration. Ensuring procedural fairness is an important concern of arbitration laws discussed in this Guide.\textsuperscript{19} However, in most cases and, in particular, in an international dispute, it would come as a surprise and prove unsatisfactory if the arbitral tribunal simply copied court procedures. Such an approach does not make use of the principal advantage of arbitration over court litigation: procedural flexibility. A party aware of the potential flexibility of arbitral proceedings may have an advantage over its opponent by seeking to agree or asking the arbitral tribunal to adopt procedures appropriate to the nature of the dispute in question.

3.1.3 One of the key features of the arbitration laws discussed in this Guide is that they provide the parties with a large degree of autonomy in the conduct of their arbitral

\textsuperscript{17} See Guide to Arbitration, vol II, appendix 2.1 and 2.2.
International Arbitration – An Overview

proceedings,\(^\text{20}\) and the arbitral tribunal with wide-ranging procedural powers, to ensure that the conduct of any arbitration is proportionate and appropriate to the issues in dispute, subject only to such safeguards as are necessary in the public interest.

4. **Arbitration distinguished**

4.1 **Arbitration/litigation**

4.1.1 Litigation seeks to resolve disputes between parties in public proceedings before a judge in a court of competent jurisdiction provided by the state; the judge obtains his or her authority to act in the proceedings between the parties from the state.

4.1.2 Arbitration, by contrast, is a private (and, at least in principle, confidential)\(^\text{21}\) form of dispute resolution based on an agreement between the parties to refer a current or future dispute between them to arbitration. Instead of a judge, the parties appoint an arbitral tribunal (usually consisting of one or three arbitrators) as an impartial third party to resolve their dispute in a judicial manner after hearing both sides. The parties agree to be bound by the result. The arbitral tribunal obtains its authority to act in the arbitration from the agreement of the parties to refer their dispute to arbitration. Unless otherwise agreed, the members of the arbitral tribunal usually need not be lawyers or legally qualified and may be selected for their specialist knowledge of particular fields in commerce, industry, science, etc.

4.2 **Arbitration/ADR**

4.2.1 The term Alternative Dispute Resolution (ADR) covers a wide range of dispute resolution techniques ranging from structured negotiation, through mediation and conciliation to adjudication, early neutral evaluation, expert determination, mini trial and many others.

4.2.2 The common characteristic of mediation and conciliation, in particular, is that they aim to produce an amicable settlement between the parties while avoiding formal proceedings, and thereby to create a “win/win” solution to the dispute from which both parties benefit without there necessarily being a winner and a loser. These methods seek to neutralise the adversarial nature of formal legal proceedings.


\(^{21}\) See section 5.6 below.
4.2.3 Although ADR can be a useful tool to deploy either before or during arbitral proceedings, the success of ADR is dependent on the continuing co-operation and goodwill of the parties: they need to be prepared to settle their dispute by agreement because no solution can be imposed upon them and ADR will not result in an enforceable and binding decision. However, once a substantial dispute has arisen between the parties, the scope for party co-operation may often already have been exhausted. In such circumstances, there must be a mechanism, as a last resort, by which one party can enforce its rights as against the other and obtain a binding and enforceable ruling from an impartial tribunal. Only litigation or arbitration can provide this protection of the rights of a party.

5. The comparative advantages and disadvantages of arbitration and litigation

5.1 The arbitral tribunal

5.1.1 In arbitration the parties are free to choose their own arbitral tribunal and can appoint an arbitrator with special technical or commercial qualifications, expertise and knowledge of the subject matter of their dispute, of the technical terminology and of the customs of their trade (while also having the relevant legal expertise as necessary). This can contribute to the overall efficiency, speed and cost-effectiveness of the dispute resolution process because an arbitrator chosen for his or her specialist knowledge or experience of a trade, industry, product or process does not need lengthy technical explanations of such matters, as a judge may do. Also, an arbitrator’s award may be better reasoned because of a more thorough understanding of the issues underlying the dispute.

5.1.2 Having said this, in addition to factual issues, the crucial issues in dispute between the parties may also raise difficult questions of law. In such a situation, it may be more prudent for the parties to appoint legally qualified arbitrators, who may also have the relevant expertise to assess the factual issues of the case. In many areas of law where specialist know-how is required in order to be able properly to determine the dispute (examples are international construction projects or post-M&A disputes), arbitration can offer advantages over state court proceedings, because the parties can ensure that the members of the arbitral tribunal are experienced in this area of law. A further advantage of arbitration in this respect is that there is continuity in the composition of the arbitral tribunal appointed to settle the dispute. This differs to court proceedings in many countries where a number of different judges may be involved in a case at its various stages. An arbitrator is, in principle, appointed to deal with a particular dispute from beginning
to end. This continuity enables the arbitrator to get to know the parties, their advisers and the case as it develops. Should the opportunity arise, he or she is therefore well placed to guide the parties in developing a suitable procedure for resolving their dispute (and perhaps in reaching a negotiated settlement in the course of the proceedings).

5.1.3 On the other hand, the powers which may be exercised by an arbitral tribunal are more limited than those conferred on a court of law. Should it become necessary for an arbitral tribunal to take enforcement steps (for example, in relation to interim protective measures, or compelling the attendance of witnesses to give evidence before it), such action can generally only be taken indirectly by the arbitral tribunal with the assistance of the courts.

5.2 **Representation**
5.2.1 In arbitration the parties can also decide whether they want to be represented in the proceedings by a lawyer, or by a technical expert, or by any other person of their choice, or whether they prefer to dispense with representation altogether. Generally in court proceedings, parties are required to be represented by advocates qualified in the jurisdiction of the relevant court.

5.3 **Flexibility and party autonomy**
5.3.1 A major advantage of arbitration is its flexibility. Arbitration does not need to follow narrow court rules and can, therefore, take better account of the fact that the resolution of different disputes may require different approaches.

5.3.2 The parties to an arbitration are given wide autonomy and are able to exercise greater control over the dispute resolution process than in court proceedings. They may design the arbitration process so that it is best suited and appropriate to dispose of the issues in dispute between them or in order to meet commercial or other requirements.

5.3.3 In particular, in international disputes with parties from different jurisdictions and legal cultures, this flexibility provides a major advantage of arbitration, as the parties and the arbitral tribunal are able (and in fact expected) to adapt the arbitral proceedings to the individual circumstances of the case, taking into account the different legal backgrounds of the parties.

---


23 For details see section 5.8 below.
5.3.4 A further advantage of the flexibility of international arbitration is that the parties may agree on measures to reduce costs and to speed up the arbitral proceedings.\textsuperscript{24} For example, they may do the following:

— adopt fast track procedures aimed at resolving the dispute as quickly as possible;
— limit the evidence which may be presented to the arbitral tribunal; and
— limit the extent of disclosure of documents (in jurisdictions which provide for disclosure of documents, such as England).

5.3.5 Often, by adopting the rules of arbitration of an international arbitral institution in their arbitration agreement, the parties will enable themselves to benefit in the above respects, as those rules will authorise the arbitral tribunal to adopt such measures if it considers them to be appropriate.

5.3.6 Furthermore, the parties may also agree to make the arbitration process more convenient by holding hearings in unconventional places (for example, on a construction site, on board a ship or indeed in cyberspace (i.e. so-called ‘online arbitration’),\textsuperscript{25} or at unconventional times (for example, by making use of video-link facilities while bridging different time zones), or by communicating by e-mail.

5.3.7 Finally, the parties may choose the substantive law to be applied by the arbitral tribunal, or they may agree that the arbitral tribunal does not have to make its decision based on the law but on other principles, such as trade usage, or even \textit{ex aequo et bono} (i.e. on the basis of equitable principles of fair dealing), or under the principles of the \textit{lex mercatoria} (i.e. internationally recognised principles of merchant law and trade customs).

5.4 Speed

5.4.1 Arbitral proceedings have the potential to be speedier than court proceedings, particularly in countries with over-burdened court systems. The parties can control the procedure applied to the arbitral proceedings, may agree a more or less strict timetable and have only limited bases for challenging awards of the arbitral tribunal.\textsuperscript{26} Nevertheless, there is no guarantee that arbitration will necessarily save time compared to litigation. Arbitration is, to a certain extent, consent-driven and the arbitral tribunal has less robust armoury in the face of a recalcitrant party than

\textsuperscript{24} On techniques for reducing time and costs of proceedings see CMS Guide to Arbitration, vol II, appendix 4.3.


\textsuperscript{26} See Model Law (1985), art 34 (see CMS Guide to Arbitration, vol II, appendix 2.1).
a court judge. An obstructive party can sometimes seek to delay the arbitral proceedings by invoking the supervisory jurisdiction of the courts at the seat of the arbitration.27

5.4.2 Quicker and cheaper proceedings, such as summary proceedings to enforce payment of liquidated debts, are sometimes available in the courts. In the early stages of any dispute the immediacy of arbitration may be less than that of court proceedings because it may take time for the arbitral tribunal to be constituted. However, some arbitral institutions (e.g. LCIA and ICC) offer the possibility of expedited arbitral proceedings or the appointment of an emergency arbitrator.28 Furthermore, in some jurisdictions the courts are so over-burdened that even this impediment may result in a significantly earlier award than any court judgment. This is particularly the case if the judgment rendered by a state court is subject to an appeal on facts and law as this may significantly extend the duration of the proceedings before a final judgment is rendered.

5.5 Costs
5.5.1 Arbitrating a dispute rather than taking it to court may result in a saving of costs, but arbitration is not necessarily a cheaper method of resolving disputes than litigation.29 In arbitral proceedings the fees and expenses of the arbitrators must be paid by the parties. It may also be necessary to pay the administrative fees and expenses of an arbitral institution. In particular, the fees and expenses of the arbitral tribunal can be considerable. Rooms for meetings and hearings and other services also have to be paid for by the parties to arbitral proceedings.

5.5.2 In litigation, the services of the judge and court officers, and the premises for hearings, are provided by the state and covered by the court fees (which tend to be lower but may be considerable as well).

5.6 Confidentiality
5.6.1 Arbitration is frequently a confidential process and hearings are normally conducted in private, while court hearings are generally held in public. In commercial arbitration the documents produced by the parties, and the arbitral tribunal’s award, generally remain confidential. It is, therefore, easier for the parties to avoid damaging publicity, to preserve trade secrets and to protect sensitive commercial

information. The confidentiality of arbitration may also help to maintain a valuable business relationship between the parties for the future.

5.6.2 Not all jurisdictions in which an arbitration may take place hold that arbitration is confidential as a matter of principle and not all institutional rules impose confidentiality on arbitrations administered pursuant to their rules. If there is any doubt, confidentiality provisions can (and often should) be built into the arbitration agreement or enshrined in a separate confidentiality agreement. Such provisions are usually upheld in most jurisdictions.30

5.7 Certainty
5.7.1 Arbitration may more quickly result in the rendering of a definitive decision than litigation proceedings. Under modern arbitration statutes, the award is normally final and binding, with only limited grounds for any challenge of the award. In certain jurisdictions, the right to appeal or challenge an award may be further restricted in the arbitration agreement. In a commercial environment, where all parties need to know where they stand as soon as possible, this can be a considerable advantage of arbitration over litigation where obstructive parties can delay the final outcome of a dispute for years by pursuing a protracted series of appeals. If necessary, an award can in most circumstances readily be enforced through the courts in the same way as a final court judgment.

5.8 International disputes
5.8.1 Arbitration has particular advantages in relation to disputes with an international element. When agreeing to arbitration, a claimant does not have to submit the dispute to the jurisdiction of a foreign court,31 which will frequently be a court in the respondent’s home country (e.g. under the rules of international civil procedure as established, for example, in the EU Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments (Regulation 44/2001) or the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention)).32


31 Arbitration is expressly excluded from the application of Regulation 44/2001 and the Lugano Convention. See Art. 1(2)(d) of Regulation 44/2001 and the Lugano Convention.

5.8.2 An international arbitral tribunal does not represent the home court of any party and a “neutral” country can be selected as the seat of, and venue for, the arbitration. This can be of particular relevance if a foreign state or foreign state entity is involved in the dispute as a party, and sovereignty considerations prevent submission under the jurisdiction of the courts of another country. The parties are also free to agree on the language (or languages) of the arbitration.

5.8.3 A total of 146 states – including most of the leading trading nations – have now ratified the New York Convention and other multilateral conventions or bilateral treaties providing for the recognition and enforcement of awards between signatory states. It is, therefore, generally possible to enforce an award in another jurisdiction more easily than a foreign court judgment. Enforcement of awards will be addressed in more detail in the country chapters. A list of the signatories to the New York Convention on 31 January 2012 is in Volume II, Appendix 1.3 to this Guide.

5.8.4 In international disputes arbitral tribunals can, within the (broad) limits provided for by the applicable procedural law of the seat, adopt procedures recognising that the parties may come from different legal systems. Those procedures can – and, in many cases, in fact do – represent a compromise reflecting a middle course between the parties’ legal systems or an entirely different approach to the parties’ national courts. As mentioned above, the flexibility of arbitration as a dispute resolution mechanism is a major advantage in this context.

5.9 Limitations on arbitration

5.9.1 Arbitration is a contract-based process, therefore the submission of disputes to arbitration is usually limited to disputes arising between the contracting parties and limited to the scope of the arbitration agreement. This principle of contractual privity can give rise to problems in multi-party situations where the rights of third parties may be affected by a dispute. However, such circumstances can often be anticipated and appropriate provision be made in the arbitration agreement at the


36 Which will, in many cases, be in France, Switzerland, the United Kingdom, the United States and Germany. See W L Craig, W W Park and J Paulsson, International Chamber of Commerce Arbitration (3rd Edition, 2000) s 1.07, p 11.

37 See section 5.3 above.

contract drafting stage. Some national arbitration laws and institutional arbitration
rules expressly address specific problems to which multi-party disputes may give rise.

5.9.2 Absent agreement between all parties involved, it may not be possible to
consolidate multi-party disputes before the same arbitral tribunal; whereas in
court litigation all relevant parties can usually be joined in one action and multiple
proceedings concerning the same parties or subject matter can be consolidated on
application so that they can be heard (and decided) at the same time. Moreover,
unless all the issues arising between the parties are within the scope of the
arbitration agreement, it may be necessary to resolve the outstanding issues in
separate but parallel court and/or arbitral proceedings, which may give rise to an
inherent risk of conflicting decisions in relation to the subject matter of the dispute.

5.9.3 Finally, certain civil and commercial disputes (e.g. disputes relating to personal
status and insolvency issues) are often regarded as not arbitrable as a matter of
national public policy. Such disputes may, therefore, have to be resolved in
litigation.

5.10 International investment arbitration

5.10.1 An important additional aspect of international arbitration is international
investment arbitration.\textsuperscript{39} International investment arbitrations are proceedings
brought by foreign investors against the state in which they invested (the host
state) to settle claims arising directly out of their investment pursuant to an
international investment treaty.\textsuperscript{40} There are now over 2,500 international
investment treaties and the growth in this form of dispute resolution in the last
two decades has been exponential. The most important arbitral institution for the
settlement of investment arbitration is the International Centre for the Settlement
of Investment Disputes,\textsuperscript{41} based on the Washington Convention (\textit{ICSID}),\textsuperscript{42}
and which provides comprehensive rules for the initiation and conduct of investment
arbitral proceedings.\textsuperscript{43} Because of the involvement of state parties, investment
arbitration differs from arbitration between private entities, which is often referred
to as commercial arbitration. The focus of the present Guide is on commercial
arbitration between private entities.

\textsuperscript{39} Cf for details R D Bishop, J Crawford et al, \textit{Foreign Investment Disputes} (2005); and R Dolzer and C Schreuer, \textit{Principles of

\textsuperscript{40} For details regarding international investment treaties see A Newcombe and L Paradell, \textit{Law and Practice of Investment
Treaties: Standards of Treatment} (2009).

\textsuperscript{41} On ICSID arbitration see L Reed, J Paulsson and N Blackaby, \textit{Guide to ICSID Arbitration} (2010).

\textsuperscript{42} See CMS Guide to Arbitration, vol II, appendix 1.2.

\textsuperscript{43} See \textit{ibid}, 3.9.
5.11 Common law and civil law traditions

An introduction

5.11.1 The common law and civil law systems are the two main streams of western legal tradition. They are historically defined primarily by reference to their sources of law. On the one hand, there is the common law system, with its judge made law and doctrines of judicial precedent (*stare decisis*); and on the other hand, there is the civil law, with its pronounced Roman law roots and the great codifications of the nineteenth century, such as the French *Code Civil* and the *Code de Procédure Civile*, and the German *Bürgerliches Gesetzbuch* and *Zivilprozessordnung*.

5.11.2 All this is familiar ground to legal historians, but how relevant is this distinction still today? What is left of the differences between common law and civil law in everyday legal practice in an age of global markets and how does it affect arbitration? Are there today more similarities than differences between the systems?

5.11.3 Perhaps one of the more surprising revelations of modern European comparative law is how the classical distinctions and differences between common law and civil law have become less and less clear. In the civil law countries the code-based law can today hardly be understood or applied in practice without recourse to an ever-increasing body of case law, which interprets the codes and adapts them in a continuing process to the ever changing requirements of modern society. In common law countries, on the other hand, most areas of the law are today either directly governed by statute law or are, at least indirectly, affected by primary or secondary legislation.

5.11.4 Whilst in practical terms the boundaries between both systems become more and more blurred and both systems are, in addition, increasingly suffused and harmonised by an increasing volume of supranational regulations (for example, those regulations and directions enacted in the EU over its Member States), differences nevertheless remain in two important areas: legal methodology (i.e. the way lawyers think and work) and the way in which court litigation is conducted. We shall look below in more detail at some of the main differences in the way court proceedings are conducted in civil law and common law jurisdictions and at the way in which this affects arbitration. Nevertheless, even in relation to court proceedings, the civil justice reforms in England and Wales in the late 1990s, and

---


the reforms to the Civil Procedure Rules that were introduced as a result, have adopted concepts into English procedural law that are clearly derived from continental European procedural practice.46

5.11.5 This Guide is concerned with arbitration rather than litigation in the state courts, but the legal system of a country and, in particular, its civil procedure, may colour the perceptions and expectations of the parties, their legal representatives and some arbitrators as to the way disputes should be resolved and their understanding of due process and procedural fairness. Understanding the differences between legal (and business) cultures helps parties to arbitral proceedings, and their legal representatives, to bridge this cultural gap, and to identify and agree cost and time-efficient procedures which, no matter what the outcome of the proceedings, provides an opportunity to put forward arguments, and have those arguments duly considered by the arbitral tribunal, ideally resulting in a fair and just award.

Codification and judicial precedent

5.11.6 In common law countries, the law consists of a mixture of common law and legislation. Judges can create new law by the decisions they make and lower courts are bound by the doctrine of precedent to follow the judgments of higher courts unless the case before them can be distinguished on the facts. Law text books are, save for a handful of exceptional treatises, not recognised as authoritative sources of the law in court proceedings. Legislation is generally passed by the legislature in a piecemeal fashion to deal with specific issues as and when they arise. Acts of the legislature are generally interpreted by the courts in a strict manner, having regard to the meaning of the words used rather than to the underlying purpose or spirit of the legislation (although recent years have seen a move away from this literal approach).47 In civil law countries, the law is traditionally found primarily in a series of codes. These are intended to be comprehensive and are normally written in broader and more conceptual language than common law statutes. The courts interpret the codes having


47 See the comparison of the EU Treaty with English legislation by Lord Denning, Court of Appeal (Civil Division): HP Bulmer Ltd v. J Bollinger SA (No.2) [1974] Ch. 401, p 425.
regard to the purpose of the law and seek to give effect to their underlying legislative intention.48 Decisions of higher courts are not necessarily binding on lower courts but they are persuasive, especially those of the supreme courts.49 Academics play a greater role in civil law countries than they do in common law countries and their views on the interpretation of statute law can sometimes have a similar influence as the judgments of higher courts.

“Inquisitorial” versus “adversarial” court procedure

5.11.7 In order to compare the differences between the civil law and the common law system, proceedings in the courts of civil law countries are sometimes described as “inquisitorial” rather than as “adversarial”, which is the description normally given to court procedure in common law countries. This can be explained by looking at the following procedural differences between the systems.

Statements of case

5.11.8 While the focus of civil law court procedure is on written proceedings in order to enable the judge to play a proactive role from the beginning of the case, common law proceedings place a much greater importance on the oral hearing. Therefore, in common law countries, statements of case remain formal written submissions served by the parties and pled at court setting out the facts of the case but not normally covering in detail the evidence or law on which the parties intend to rely, or the arguments which they intend to raise at the hearing.50

5.11.9 In civil law jurisdictions, the parties’ submissions tend to set out their respective cases much more fully and to contain submissions on the relevant facts, evidence and law. The documents on which the parties rely in support of their submissions are normally exhibited to the pleadings and in the submissions the witnesses will be named together with the facts on which they are able to provide testimony.

Disclosure

5.11.10 Under the common law system, the parties do not normally exhibit the documents which are relevant to the dispute to their statements of case. Instead, there is a procedure known in England as “disclosure” and in the United States as “discovery”, by which the parties must disclose to each other in the form of lists all relevant documents in their control – an obligation that is very widely defined and also includes documents which are detrimental to that party’s own case or

support the opposing party’s case. These lists may have to be verified under oath. The documents on the list can subsequently be inspected and copied by the other party. A party can ask the court to order further specific disclosure if it believes full disclosure of all relevant documents has so far not been made.

5.11.11 Documents which are detrimental to a party’s own case, or documents on which a party does not rely in support of its case, are not normally produced by that party in civil law proceedings unless the court makes a specific order for disclosure of individual, clearly identified documents. All other documents which the parties consider relevant to their respective cases will have already been exhibited to their submissions.\footnote{Cf W G O Morgan, “Discovery in Arbitration”, Journal of International Arbitration (1986) pp 9–26; and P R Griffin, “Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings”, Journal of International Arbitration (2000) pp 19–30.}

\textbf{Witnesses}


5.11.13 In civil law jurisdictions, written witness statements are not frequently used and there is no general procedure for the exchange of such statements before trial. Before civil law courts, parties cannot normally give evidence in their own cause.

5.11.14 In a common law trial, witnesses are examined orally although their written statement may stand as their evidence in chief. The witness is then cross-examined by the opposing parties’ lawyers. The judge will ask few (if any) questions, mainly to clarify the evidence which a witness has given, rather than to elicit further evidence. In a civil law trial, the judge plays a much more proactive role.\footnote{On the different role of the judge see F-J Semler, “Schnelligkeit und Wirtschaftlichkeit in Schiedsverfahren”, Zeitschrift für Schiedsverfahrensrecht/German Arbitration Journal (SchiedsVZ) (2009) pp 149 et seq; and N Blackaby, C Partasides, A Redfern and J M H Hunter, Redfern and Hunter on International Arbitration (5th Edition, 2009) s 6.85.} Based on the extensive written submissions, the judge will decide on which issues he or she will need to hear (witness) evidence in order to be able to decide the case. It is also the judge who will do the main questioning of the witnesses, with the parties’ lawyers asking additional questions thereafter, which does not usually amount to a cross-examination of witnesses in the common law sense.
**Court-appointed versus party-appointed experts**

5.11.15 In civil law proceedings, experts are typically appointed by – and report to – the court. Parties may appoint their own experts, but less weight is usually attributed to the evidence of party-appointed experts.\(^\text{54}\)

5.11.16 In contrast, in common law proceedings it is traditional for each party to appoint its own expert (witness); expert reports are exchanged between the parties before trial and agreed between the experts in so far as possible. However, in England and Wales, the new Civil Procedure Rules make provision for court appointed experts and clarify that the duty of experts (whether appointed by a party or by the court) is to the court.\(^\text{55}\)

**5.12 The hearing and the role of the judge**

5.12.1 In particular in common law proceedings, the trial, i.e. the oral hearing, is the main forum for the parties to present all of their evidence and arguments to the court.\(^\text{56}\) The judge appointed to preside over the trial will not necessarily be familiar with the case and will receive short written summaries of each party's case (“skeleton arguments”) and a reading list for the main statements of case and evidence (witness and documentary) only shortly before the hearing. The judge may have had no more than a brief review of the document bundles prior to the hearing.

5.12.2 The parties are fully in charge of preparing the case for trial (albeit subject to the court’s case management powers) and are also the main actors at trial. Judges in the common law system traditionally take the role of the passive umpire in a match between two opposing parties and declare the winner at the end. The judge is not concerned so much with taking an active part in ascertaining the truth but rather in deciding which of the parties’ cases he or she finds more convincing. Indeed, the judge’s active role only really starts after the parties have made their final closing submissions. However, common law proceedings can often involve a very thorough examination of the facts and background to a dispute if either party chooses to adopt that approach.

---

\(^\text{54}\) For further information on the use of party-appointed compared to court-appointed experts see M Kantor, “A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?”, *Arbitration International* (2010) pp 323 et seq.

\(^\text{55}\) Civil Procedure Rules, Part 35.3.

5.12.3 In civil law systems, the court plays a proactive role. It takes charge of the case when proceedings are first issued, and thereafter (normally the same judge) remains actively involved in the management of the case. The focus of civil law proceedings lies on the written submissions, where the parties have to set out their case in full. On the basis of these written submissions the judge, who will ultimately have to decide the dispute before him or her, determines on which issues he or she will need to take evidence in order to render a decision. As the judge also plays a proactive role with respect to the examination of witnesses and with respect to (court-) appointed experts, oral hearings in civil law proceedings are generally much shorter than in common law proceedings.

5.13 The impact of the differences between common law and civil law on arbitration

5.13.1 The background of the parties and their lawyers involved in international arbitral proceedings has an impact on the expectations of how arbitral proceedings should be conducted in the interest of justice and fairness.

5.13.2 Parties and lawyers from common law countries will normally expect there to be disclosure of documents, and that detailed witness statements will be prepared and exchanged between the parties, followed by cross-examination of witnesses at the main hearing. In such cases, the arbitral tribunal will, therefore, be confronted with a much larger volume of factual material than would be the case in arbitrations involving only parties and lawyers from civil law countries with more limited disclosure of documents. Equally, arbitrators from common law countries will often consider this the most appropriate procedure and will also put more weight on oral hearings than an arbitral tribunal composed of civil lawyers, who can normally be expected to rely to a greater extent on written submissions and to reduce the number and length of oral hearings. At the same time, arbitrators from civil law countries are more likely to take an active part in the management of the arbitral proceedings than their common law colleagues, including an involvement in settlement discussions between the parties.

5.14 Getting the best of both worlds

5.14.1 As stated above, the advantages of arbitration are flexibility and the possibility to adapt the procedure to the individual circumstances of the case. It is possible to have a “civil law arbitration” in a case involving a French and a German party.

---


58 See section 5.3 above.
while an arbitration between an English and an Austrian party is likely to be a compromise between civil law and common law proceedings. In a dispute between parties from England and the United States, the flexibility of arbitration allows the parties and the arbitral tribunal to tailor the proceedings as a compromise between English- and US-style arbitral proceedings. Thus arbitration allows the parties to combine procedural aspects from different legal systems and thereby tailor the arbitral procedure to the circumstances of the individual case.\(^{59}\)

5.14.2 In recent years, certain standards for the conduct of arbitral proceedings involving parties from common law and civil law countries have developed as a form of “best practice” for such proceedings.\(^{60}\) In such international arbitral proceedings, the parties will be expected to prepare comprehensive written submissions addressing the underlying facts, the relevant evidence (exhibiting to the submissions copies of any relevant documents) and the legal argument. In an early first hearing before the arbitral tribunal, procedural issues will be discussed and the parties will be encouraged to narrow down the substantive issues in dispute and to agree a procedural order and timetable for the further conduct of the proceedings.

5.14.3 With respect to the taking of evidence in such international arbitral proceedings, the IBA Rules on the Taking of Evidence which were adopted by the International Bar Association (IBA) in 1999, and which were adapted in a revised version in 2010, play an important role.\(^{61}\) Their intention is to bridge the gap between civil law and common law with respect to the taking of evidence and to strike a balance between the different approaches. For example, they encourage a limited approach to documentary disclosure (by reference to specific categories of documents) and require that the party requesting disclosure identify why such documents and material are relevant to the case and to its outcome.

5.14.4 In international proceedings, written witness statements will usually be prepared and exchanged and will then stand as evidence in chief at the hearing. While the arbitral tribunal will play a more proactive role in the preparation of the hearing and also during the hearing, the parties will usually have the opportunity to cross-examine witnesses, even though cross-examinations in international arbitrations are likely to be shorter than in pure common law proceedings.\(^{62}\)

---

\(^{59}\) See ibid, 5.8.


6. Drafting the arbitration agreement

6.1.1 Commercial disputes can only be referred to, and resolved by, arbitration if the parties enter into an arbitration agreement. An arbitration agreement can be made at any time – even after a dispute has arisen – although it may, by that stage, be more difficult to achieve a consensus between the parties. Normally, the arbitration agreement is concluded at the same time as the main commercial contract to which it relates and simply forms a clause in that main contract (albeit that the arbitration agreement remains technically a separate or severable contract).

6.1.2 The arbitration agreement sets out the terms on which the parties agree to refer defined disputes to arbitration. The main purpose of an arbitration agreement is to establish a practical, efficient and objectively fair method of dispute resolution and to ensure that the arbitral tribunal's decision can be widely enforced. An effective and well-considered arbitration agreement is essential for a successful arbitration. The arbitral institutions offer standard arbitration clauses. A number of selected arbitration clauses can be found in Volume II, Appendix 5 to this Guide. The advantage of these standard agreements is that they have been tested in practice and their adoption, therefore, reduces the risk of later disputes about the validity or the scope of the arbitration agreement.63

6.1.3 As a general rule, the parties should ensure that the arbitration agreement sets out:
— that the parties agree to submit specific disputes arising from a defined legal relationship to arbitration for final resolution;
— what disputes the arbitral tribunal has jurisdiction to decide;
— in most cases it is advisable to provide that all disputes arising out of or in connection with a specific contract fall under the arbitration agreement. However, should the parties only want to submit specific disputes to arbitration, while all other disputes are to be resolved by state courts, it is important to provide a precise and unambiguous definition of which disputes fall within the arbitration agreement;
— what rules of arbitration the arbitral tribunal should follow (if any);
— if the parties agree on institutional arbitration, it is essential to refer correctly and unambiguously to the administrating arbitral institution in order to avoid the risk of disputes in this respect and in particular the risk that the arbitration agreement is invalid;64

---


the number of arbitrators and how they are to be appointed;
— the seat of the arbitration;
— the language of the arbitral proceedings; and
— the law to be applied by the arbitral tribunal to the substance of the dispute.

6.1.4 Further aspects the parties may wish to take into consideration in order to tailor the arbitration agreement to the circumstances of the specific contract are:
— a multi-tier dispute resolution clause, i.e. a clause which provides for an escalating sequence of dispute resolution methods such as negotiations, which in case of failure are followed by mediation and subsequently arbitration;
— expedited proceedings;
— the exclusion or limitation of disclosure;
— any specific procedural powers granted to the arbitral tribunal;
— any specific remedies which the arbitral tribunal may award; and
— the extent to which parties may seek interim relief from the court.

6.1.5 The parties should be aware that an overly complicated arbitration agreement also increases the risk of later disputes regarding the meaning, scope and validity of the arbitration agreement.

6.1.6 It is, therefore, recommended that parties seek legal advice when drafting an arbitration agreement, particularly in complex transactions, in order to ensure that it is valid, that it reflects the intentions of the parties and that it limits the scope for future jurisdictional challenges.

7. Selecting your arbitrator

7.1.1 The selection and appointment of the arbitrator is crucial to the effectiveness of the arbitral proceedings. Selecting the right arbitrator is a complex and difficult task that involves a large variety of considerations and requires a profound knowledge of the underlying dispute and wide experience in the field of arbitration.

7.1.2 When selecting an arbitrator, the parties should be aware that all arbitrators, including the party-appointed arbitrators, should be independent and impartial. Contrary to a misconception on the part of some parties, the party-appointed arbitrator is not an advocate for the appointing party’s case within the arbitral tribunal, but under a duty to remain impartial (as is the chair or sole arbitrator).65

---

There is a significant risk that an obviously biased party-appointed arbitrator will be quickly identified by the other arbitrators and will lose credibility with the other members of the arbitral tribunal.

7.1.3 When approaching a potential (party-appointed) arbitrator, the following issues can and should be discussed, in particular:66

— the independence and impartiality of the arbitrator;
— knowledge in certain legal or technical areas (such questions, however, may only be asked in general terms; see paragraph 7.1.4 below): for example, in certain cases it may be helpful to appoint a person with a technical background rather than a lawyer as arbitrator;
— if the arbitration, or relevant evidence, is to be in more than one language, the language skills of the arbitrator play a role in the proceedings: it may, for example, be necessary or at least helpful if the arbitrators are able to read documents in a language other than the language of the proceedings as this may considerably reduce translation costs;
— cultural experience:67 if parties and counsel come from different legal backgrounds it is helpful to appoint arbitrators who are familiar with these different legal backgrounds or, at least, have some experience of similar inter-cultural issues. In a dispute between a party from a common law jurisdiction and one, for example, from a civil law jurisdiction, the arbitrator should be familiar with the different expectations of the parties regarding, for example, disclosure of documents; and
— availability: in practice, many arbitrators accept more appointments than they are able to handle since many will settle without the need for significant involvement by the arbitrator. Against this background, a potential arbitrator should confirm that he or she is available and will be able to devote sufficient time to the arbitral proceedings in question.

7.1.4 It is permissible to contact and to meet potential arbitrators in order to discuss the issues mentioned above – namely the questions of qualification, availability and independence and impartiality – prior to the appointment of the arbitrator. However, these topics may only be discussed in general terms. It is not permissible to discuss the individual circumstances of the dispute in question or the arbitrator’s views on specific issues that are likely to be relevant in this context. Parties should be aware that most arbitrators will, if appointed, make detailed disclosure regarding the contents of such an interview.68

---

67 See, in detail, ibid.
68 See ibid further details on interviews of arbitrators and in particular the limits of such interviews see above at footnote 66 and paragraph 7.1.4.
8. Conclusion

8.1.1 Arbitration can have clear advantages over litigation as a means of settling commercial disputes. It is important to appreciate that there may be a choice between litigation and arbitration and that the most appropriate dispute resolution mechanism should always be determined on a case-by-case basis, depending on the particular circumstances of each case. The nature of the dispute, the identities of the parties, the courts which might otherwise have jurisdiction and the location of assets are only some of the many factors that should be taken into account when deciding which form of dispute resolution to agree. In the absence of an express dispute resolution agreement, the only certainty is that any dispute will end up before a court somewhere. The risk is that this court, for a variety of reasons, may not have been the first choice of one or more of the parties to the resulting litigation.
ARBITRATION IN POLAND

By Joanna Młot and Katarzyna Kucharczyk, CMS
# Table of Contents

1. Legislative framework 563

2. Scope of application and general provisions of the CCP 563
   2.1 Scope of application 563
   2.2 General principles 563

3. Institutional arbitral tribunals in Poland 564

4. The arbitration agreement 565
   4.1 Formal requirements 565
   4.2 Arbitrability 566
   4.3 Separability 566
   4.4 Law applicable to an arbitration agreement 566
   4.5 Legal consequences of a binding arbitration agreement 567

5. Composition of the arbitral tribunal 568
   5.1 Composition of the arbitral tribunal 568
   5.2 Procedure for challenging and removing arbitrators 569
   5.3 Appointment of substitute arbitrators 570
   5.4 Arbitration fees and expenses 570
   5.5 Arbitrator immunity 570

6. Jurisdiction of the arbitral tribunal 571
   6.1 Competence to rule on its own jurisdiction 571
   6.2 Power to order interim measures 571

7. Conduct of proceedings 572
   7.1 Commencing an arbitration 572
   7.2 Applicable procedural rules 572
   7.3 Receipt of written communications 573
   7.4 Seat and language of arbitration 573
   7.5 Multi-party issues 574
   7.6 Oral hearings and written proceedings 574
   7.7 Default by one of the parties 574
   7.8 Evidence generally 574
   7.9 Appointment of experts 575
   7.10 Confidentiality 575
8. Making the award and closing the proceedings 575
   8.1 Choice of law 575
   8.2 Decision making by the arbitral tribunal 576
   8.3 Form, content and effect of the award 576
   8.4 Settlement 577
   8.5 Discontinuation of proceedings 577
   8.6 Costs 577
   8.7 Correction, interpretation and issuance of a supplemental award 578

9. Role of the courts 579
   9.1 Jurisdiction of the courts 579
   9.2 Preliminary rulings on jurisdiction 580
   9.3 Interim protective measures 580
   9.4 Obtaining evidence and other court assistance 580

10. Challenging and appealing an award through the courts 580
    10.1 Appeals 580
    10.2 Applications to set aside an award 581

11. Recognition and enforcement of awards 582

12. Special provisions and considerations 584
    12.1 Consumers 584
    12.2 Employment law 584

13. Conclusion 584

14. Contacts 585
1. Legislative framework

1.1 Domestic and international arbitration in Poland is regulated by the provisions of the Fifth Part of the Polish Code of Civil Procedure (CCP). The CCP came into force in 1964. However, the CCP provisions that are dedicated to arbitration were largely modified by an amendment dated 28 July 2005, which entered into force on 17 October 2005. This new arbitration legislation is based on the Model Law (1985). The recognition and enforcement of foreign awards is based either on the New York Convention or on the provisions of the CCP.

2. Scope of application and general provisions of the CCP

2.1 Scope of application

2.1.1 The provisions of the Fifth Part of the CCP apply to all arbitral proceedings where the seat of arbitration is within Poland and, in certain cases, to foreign arbitral proceedings. For example, a Polish court can reject a statement of claim due to the other party's objection based on a foreign arbitration agreement, or it can issue an interim injunction in a dispute that has been decided by a foreign arbitral tribunal. The law does not establish any major differences between institutional and ad hoc arbitration.

2.1.2 One of the main strengths of the CCP provisions on arbitration is that they allow a wide degree of party autonomy. In particular, the parties to the dispute are free to determine almost all issues concerning procedure and select the procedural rules, seat of arbitration and language of the arbitral proceedings (among other things).

2.2 General principles

2.2.1 The CCP contains only a few mandatory provisions regarding arbitral proceedings. On the basis of these provisions, the following general principles may be identified.

   Party autonomy

2.2.2 The parties are free to agree on the procedure to be applied to the resolution of their dispute, as long as the arbitral proceedings comply with the mandatory provisions of the CCP.2

---

2 CCP, art 1184(1).
**Fairness**

2.2.3 The principle of equal treatment of the parties is expressly stated in the CCP and is binding on the arbitral tribunal. Any provisions of an arbitration agreement that would impede this principle of equality, including provisions entitling only one party to file a statement of claim before an arbitral tribunal or a court, are prohibited. If a party is not granted the opportunity to defend its rights then the courts may set aside the award.

**Non-intervention by the courts**

2.2.4 The courts may only intervene in arbitral proceedings in the cases and to the extent expressly provided for by the CCP. For example, the courts have jurisdiction to take the following steps:

- appoint an arbitrator if the parties fail in making an appointment;
- rule on a challenge to an arbitrator, if the arbitrator has not been removed by the arbitral tribunal or by the parties, or has not resigned; or
- take other steps that cannot be carried out by the arbitral tribunal itself, including compelling the attendance of witnesses.

2.2.5 The assistance that the courts may rightly offer the parties to a dispute is discussed in more detail in section 9 below.

**3. Institutional arbitral tribunals in Poland**

3.1.1 Institutional arbitral tribunals have been established by a few Polish arbitral institutions for the settlement of international and domestic disputes. The most important arbitral institutions are the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan. The arbitral tribunals constituted under these rules are independent units within their respective arbitral institutions.

3.1.2 The rules for constituting such institutional arbitral tribunals, and the procedure applicable in institutional arbitral proceedings, are determined by the regulations issued by the respective arbitral institutions. In general, the rules governing institutional arbitral proceedings follow the rules set out in the Model Law (1985). The parties may choose party-appointed arbitrators freely, but a sole arbitrator

---

5 *Ibid*, art 1176(2)–(4).
6 *Ibid*, art 1192(1).
Arbitration in Poland

and the president of the arbitral panel must be chosen from the list of arbitrators provided by the arbitral institutions.\(^7\)

4. The arbitration agreement

4.1 Formal requirements

4.1.1 An arbitration agreement may be drafted as a separate, self-contained agreement, or may appear as an arbitration clause in the main contract. The CCP recognises arbitration agreements in either form, whether they are intended to govern future disputes between the parties (although the arbitration agreement needs to specify the legal relationship from which the future dispute may arise) or to submit existing disputes to arbitration.

4.1.2 The formal requirements for an arbitration agreement are set out in Article 1162(1) of the CCP, which specifies that it must be made in writing. This requirement is met if an arbitration agreement is included in letters or statements that are exchanged between the parties by means of a communication that preserves the content of the agreement (e.g. a fax).\(^8\) An arbitration clause may also be valid if it is included in a separate document that is referred to in a written contract between the parties, provided that the reference makes the arbitration clause an integral part of the contract. The CCP requires that the subject matter of the dispute, or the legal relationship from which the dispute arises or may arise, is specified in the arbitration agreement.\(^9\)

4.1.3 The parties are free to appoint the arbitrators in their arbitration agreement or indicate the number of arbitrators and the method of their appointment. As mentioned in paragraph 2.2.2 above, the parties are, to a large extent, also free to determine the procedure governing the arbitral proceedings.

4.1.4 An arbitration agreement may be incorporated into a company's articles of association regarding corporate disputes, i.e. disputes between the shareholders, between the shareholders and the company, or between the company and its statutory organs.\(^10\) Arbitration agreements may also be used in the statutes (articles of association) forming co-operatives and associations.

\(^7\) Rules of Court of Arbitration at the Polish Chamber of Commerce, para 22, and Rules of Court of Arbitration at the Polish Confederation of Private Employers Lewiatan, para 24.

\(^8\) CCP, art 1162(2).

\(^9\) Ibid, art 1161(1).

\(^10\) Ibid, art 1163(1).
4.1.5 Unless otherwise agreed, a power of attorney granted by a business entity in relation to a specific act also includes a power of attorney to conclude an arbitration agreement in relation to possible disputes concerning that act.\textsuperscript{11}

4.2 Arbitrability
4.2.1 The scope of arbitrability under Polish law was extended by the recent amendment to the CCP. The provisions of the CCP enable the parties to submit most disputes to domestic or foreign arbitration. With the exception of alimony disputes, all disputes that can be subject to settlement in court may be submitted to arbitration.\textsuperscript{12} The previous standard of arbitrability was premised on a distinction between financial and non-financial rights. The aim of this new provision is to put an end to problems regarding the determination of what constitutes a financial right.

4.2.2 While the previously relevant distinction between financial and non-financial rights has ceased to be relevant as far as arbitrability is concerned, some doubts still arise as to what disputes may be subject to settlement in court. This is due to the fact that Polish law lacks any explicit regulation on this issue.

4.2.3 The requirement that the arbitrability of a dispute depends on whether it can be subject to settlement in court also applies to corporate disputes, where an arbitration agreement is incorporated into the company’s articles of association. Disputes concerning whether resolutions of a company should be set aside or declared invalid may not be submitted to arbitration.

4.3 Separability
4.3.1 The CCP provides for the separability of arbitration clauses.\textsuperscript{13} The arbitration clause is a separate and independent part of the contract. As a consequence, the validity and existence of the arbitration clause is construed separately from the other terms of the contract. As described in more detail in section 6 below, the arbitral tribunal has the authority to determine the validity of the arbitration agreement.

4.4 Law applicable to an arbitration agreement
4.4.1 Under the new Conflicts of Laws Act of 4 February 2011 (Conflicts of Laws Act), an arbitration agreement is governed by the law chosen by the parties.\textsuperscript{14} If the

\textsuperscript{11} Ibid, art 1167.
\textsuperscript{12} Ibid, art 1157.
\textsuperscript{13} Ibid, art 1180(1).
\textsuperscript{14} Conflict of Laws Act, art 39(1).
governing law is not chosen by the parties, the law of the seat of the arbitration, as agreed by the parties, governs the arbitration agreement. If the seat of the arbitration has not been agreed by the parties then the arbitration agreement is governed by the law applicable to the legal relationship to which the dispute relates.\textsuperscript{15}

4.5 **Legal consequences of a binding arbitration agreement**

4.5.1 If an arbitration agreement is valid and binding with regard to the dispute between the parties, neither party may unilaterally demand that a court decide the dispute. For details of preliminary rulings on jurisdiction by the courts, please see section 9.2 below.

4.5.2 The parties may terminate the arbitration agreement by agreement and restore the jurisdiction of the courts. In addition, the CCP recognises the following three situations where an arbitration agreement may lose its validity and cease to be binding:

(i) where a person who was expressly designated in an arbitration agreement as an arbitrator and/or chair rejects or cannot otherwise fulfil his or her duties. In such a situation, the arbitration agreement becomes void, unless the parties have agreed otherwise;\textsuperscript{16}

(ii) where an arbitral tribunal which was expressly designated by the parties in an arbitration agreement refuses to hear the case or is unable to do so. In such a situation, the arbitration agreement again becomes void, unless the parties have agreed otherwise;\textsuperscript{17} and

(iii) where a majority of votes, or unanimity if required, cannot be reached by the arbitral tribunal when making the award with regard to all or a part of the claim. In such a situation, the arbitration agreement becomes void as regards the part on which a majority (or, if required, unanimity) of votes cannot be obtained.\textsuperscript{18}

4.5.3 Should any of these situations arise, the parties are free to commence proceedings in court.

\textsuperscript{15} Ibid, art 39(2).
\textsuperscript{16} CCP, art 1168(1).
\textsuperscript{17} Ibid, art 1168(2).
\textsuperscript{18} Ibid, art 1195(4).
5. Composition of the arbitral tribunal

5.1 Composition of the arbitral tribunal

5.1.1 Any individual with full legal capacity may be an arbitrator.\(^\text{19}\) However, active judges of the Polish courts cannot serve as arbitrators.\(^\text{20}\) It is unclear whether active judges of foreign state courts may serve as arbitrators. The law does not require arbitrators to be citizens of Poland and, as long as a foreign citizen has full legal capacity, that foreign citizen may be appointed to act as an arbitrator.

5.1.2 The person appointed as arbitrator should immediately inform both parties about any circumstances that could raise doubts as to his impartiality or independence.\(^\text{21}\) According to limited case law, an arbitrator may be removed by the court at a party’s request for the same reasons as court judges, such as if the arbitrator is a party to a dispute, the disputed case relates to the arbitrator’s spouse or relatives, or the arbitrator is or was an attorney at law for any party in the disputed case.

5.1.3 In their arbitration agreement, the parties are free to agree on the number of arbitrators and the method of their appointment. The parties may also agree on the number after a dispute has arisen, or may refer to the rules of an established arbitral institution. It is possible for the parties to either appoint the arbitrators in the arbitration agreement, or to select them as and when a dispute arises. It is also possible for the parties to only agree on an appointing authority, which will then choose the arbitrators when asked to do so by the parties.

5.1.4 If the parties fail to specify the number of arbitrators, or if the applicable procedural rules of the arbitral institution do not provide for the number of arbitrators, the arbitral tribunal will consist of three arbitrators.\(^\text{22}\)

5.1.5 The CCP provides for limited recourse to the courts when a party, or the appointing authority that is obliged to appoint an arbitrator, fails to do so (generally within one month of being requested to appoint an arbitrator). In such a case, the court shall appoint an arbitrator at the request of a party, pursuant to Articles 1171–1173 of the CCP. When appointing an arbitrator, the court shall consider the arbitrator’s qualifications specified by the parties in the arbitration agreement, as well as other circumstances ensuring the impartiality and independence of the arbitrator. When

\(^{19}\) Ibid, art 1170(1).

\(^{20}\) Ibid, art 1170(2).

\(^{21}\) Ibid, art 1174(1).

\(^{22}\) Ibid, art 1169(2).
appointing a sole arbitrator in a dispute between parties from different countries, the court shall consider appointing an arbitrator who is not linked to the relevant countries.

5.2 Procedure for challenging and removing arbitrators

5.2.1 An arbitrator may only be removed if there are justified doubts as to his or her impartiality or independence, or if he or she does not have the qualifications specified in the arbitration agreement.23 A party may only request the removal of an arbitrator who it appointed or in whose appointment it took part, if that party became aware of the grounds for removal after the appointment of the arbitrator.24

5.2.2 The procedure for challenging and removing arbitrators by the arbitral tribunal may be agreed between the parties.25 However, if an arbitrator who has been challenged is not removed by the arbitral tribunal within one month of the date on which the challenging party filed a corresponding motion with the arbitral tribunal, the challenging party may file a request for the removal of the arbitrator with the appropriate court within two weeks. The appropriate court is the court that would have been competent to decide the case if the parties had not entered into an arbitration agreement. Provisions in an arbitration agreement excluding such a motion are ineffective.26

5.2.3 If the parties have not agreed upon a procedure for challenging and removing arbitrators, the arbitral tribunal has no authority to decide on the removal of an arbitrator. In such a case, a party demanding the removal of the arbitrator must notify all of the arbitrators and the other party, in writing, within two weeks of the date of the demanding party learning of the appointment or about the reason for removing the arbitrator. If the arbitrator does not resign or is not removed by the mutual agreement of the parties within two weeks from the delivery of the notice to the arbitrator, the demanding party will be entitled to file a motion challenging the arbitrator with the court.27

5.2.4 The court is also entitled to remove any arbitrator upon a motion from a party, if it is obvious that the arbitrator will not perform his or her obligations within the specified time, or if the arbitrator delays the performance of his or her obligations without a significant reason.28

23 ibid, art 1174(2).
24 ibid, art 1174(2).
25 ibid, art 1176(1).
26 ibid, art 1176(2).
27 ibid, art 1176(3)–(4).
28 ibid, art 1177(2).
5.2.5 If the case is heard by an arbitrator who, based on the provisions of the CCP, should be removed, this also constitutes grounds for the award to be set aside, but only if the party filed an objection (to the arbitral tribunal or to the arbitrator and the other party, as the case may be) within the appropriate time (as set out in paragraphs 5.2.2 and 5.2.3 above).

5.3 Appointment of substitute arbitrators
5.3.1 If an arbitrator breaches his or her duties, or if the arbitrator’s appointment terminates for any other reason, the parties should appoint a substitute arbitrator. This should be done following the same procedure that is applicable to the appointment of the original arbitrators.29

5.3.2 If a party-appointed arbitrator resigns or is removed, and the replacement arbitrator that has been appointed by that party likewise resigns or is removed, then the other party may demand that the court, instead of the opposing party, appoints a substitute arbitrator. A substitute arbitrator may also be appointed before the expiry of the mandate of any arbitrator (e.g. in an arbitration agreement).30

5.4 Arbitration fees and expenses
5.4.1 The arbitrators are entitled to remuneration for the services rendered, and to reimbursement of expenses incurred by them in relation to the resolution of the dispute.31 The amount of the arbitrators’ fees and the method of their payment is a matter to be agreed between the parties and the individual arbitrator. If no agreement is reached between the parties and the arbitrators, the court shall determine the arbitrators’ remuneration and the expenses to be reimbursed.32 The parties are jointly liable for the payment of the arbitrators’ remuneration and for reimbursement of their expenses.

5.4.2 In an institutional arbitration, the rules of the relevant arbitral institution will provide for the amount, method and terms of payment of arbitrators’ fees and expenses. If the institutional rules do not provide for these, the statutory rules provided by the CCP shall apply.

5.5 Arbitrator immunity
5.5.1 An arbitrator is liable for any losses caused by his or her resignation, unless there are important reasons for such resignation.33 The CCP does not make any further

29 Ibid, art 1178(1).
30 Ibid, art 1171(3).
31 Ibid, art 1179(1).
32 Ibid, art 1179(2).
33 Ibid, art 1175.
Arbitration in Poland

provision for the liability of arbitrators, but established doctrine and practice characterise the relationship between the parties and arbitrators as similar to that between parties contracting for the performance of services. Therefore, should a negligent act or omission on the part of an arbitrator cause a loss to a party, that party may be entitled to damages. Even though the CCP does not provide for any specific rules on arbitrators’ liability, the rules of the main Polish arbitral institutions limit the arbitrators’ liability only to damage caused intentionally.

6. Jurisdiction of the arbitral tribunal

6.1 Competence to rule on its own jurisdiction

6.1.1 The arbitral tribunal can rule on its own jurisdiction, including the existence and validity of the arbitration agreement. A plea that the arbitral tribunal does not have jurisdiction must be raised no later than in the statement of defence, unless that party did not know and could not have known, even when acting with due diligence, of the grounds to question the arbitral tribunal’s competence, or if such grounds occurred after the filing of the defence. The parties may agree to extend the term for questioning the jurisdiction of the arbitral tribunal beyond the filing of the defence. The arbitral tribunal may, in any case, admit a later plea if it considers that the delay is justified. A party is not prevented from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator.

6.1.2 Each party may appeal against a decision of the arbitral tribunal on its jurisdiction to the state courts within two weeks from the date of delivery of such decision. The decision of the state courts may then be subject to a further appeal (zazalenie).

6.2 Power to order interim measures

6.2.1 The arbitral tribunal may issue orders imposing interim protective measures, but such measures are not directly enforceable. Issuing such orders may be made conditional upon the payment of appropriate security. If a protective measure was obviously unjustified then the party requesting it is responsible for any loss caused by such measure. The claim may be pursued before the arbitral tribunal who issued the order or before the court, see section 9.3 below.

34 Ibid, art 1180(1).
36 Ibid, art 1180(3).
37 Ibid, art 1181(1).
38 Ibid, art 1182.
7. Conduct of proceedings

7.1 Commencing an arbitration

7.1.1 Unless otherwise agreed by the parties, the proceedings before an arbitral tribunal commence on the date that a notice of arbitration is served on the respondent.39 Within a period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall make a statement of claim and the respondent may file a defence.40 The parties may submit all documents that they consider to be relevant when submitting their respective statements.41

7.1.2 The presentation of a statement of claim by the claimant is obligatory.42 As regards the consequences of a failure by either party to file their statement of claim or defence, see section below.

7.1.3 Unless otherwise agreed by the parties, either party may amend or supplement its statement of claim or defence in the course of the arbitral proceedings, except where the arbitral tribunal considers that the delay in seeking such an amendment renders it inappropriate.43

7.2 Applicable procedural rules

7.2.1 The parties are free to decide on the procedural rules governing the arbitration.44 Should the parties fail to determine the applicable procedural rules, the arbitral tribunal must apply the rules of procedure that it deems most appropriate.45 The provisions of civil procedure applicable to court proceedings are not binding on the arbitral tribunal.

7.2.2 If the parties have agreed in the arbitration agreement that the arbitration will be conducted under the auspices of an arbitral institution, the parties are bound by the rules of the relevant arbitral institution as they were on the date on which the parties concluded the arbitration agreement, unless otherwise agreed or unless the rules of the relevant arbitral institution state otherwise.46

39 Ibid, art 1186.
40 Ibid, art 1188(1).
41 Ibid, art 1188(2).
42 Ibid, art 1190(1).
43 Ibid, art 1188(2).
44 Ibid, art 1184(1).
46 Ibid, art 1161(3).
7.3  Receipt of written communications

7.3.1 Following the amendment of the CCP provisions on arbitration in 2005, the CCP now provides for special rules of service.\(^{47}\) This is due to the fact that many awards were challenged by losing parties on the basis of faults in service, which allegedly had deprived them of the possibility to present their case. Service of correspondence is now regulated in detail to avoid such problems.

7.3.2 Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at its place of business, habitual residence or mailing address.\(^{48}\) If the addressee is a business entity registered in the proper court or other public registry, a communication is deemed to have been received if it is delivered to the address specified in the registry.\(^{49}\)

7.3.3 If none of these places can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address. In these instances, the communication is deemed to be received on the last day that the communication could have been collected by the addressee.\(^{50}\)

7.4  Seat and language of arbitration

7.4.1 The parties are free to choose the seat of arbitration. In the absence of a choice by the parties, the arbitral tribunal shall determine the seat of arbitration, bearing in mind the subject matter of the dispute, the circumstances of the case and convenience for the parties.\(^{51}\) If the seat of arbitration was not agreed to by the parties or determined by the arbitral tribunal and the award was rendered in Poland then the seat of arbitration will be deemed to be Poland.\(^{52}\)

7.4.2 The parties are also free to choose the language of the arbitration.\(^{53}\) If the parties have not expressed a choice of language then the arbitral tribunal shall determine the language of the arbitration.

\(^{47}\) Ibid, art 1160.
\(^{48}\) Ibid, art 1160(1).
\(^{49}\) Ibid, art 1160(2).
\(^{50}\) Ibid, art 1160(3).
\(^{51}\) Ibid, art 1155(1).
\(^{52}\) Ibid, art 1155(2).
\(^{53}\) Ibid, art 1187(1).
7.5 Multi-party issues
7.5.1 Neither the CCP nor the rules of the Polish institutional arbitral tribunals contain any specific provisions dealing with multi-party proceedings. Generally, multi-party arbitration is allowed, provided that the parties so decided in the arbitration agreement. The arbitration rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw only provide for the procedure of appointing an arbitrator in case there is more than one person acting as a claimant or a respondent.

7.6 Oral hearings and written proceedings
7.6.1 Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold an oral hearing for the presentation of arguments and evidence, or to conduct the arbitral proceedings on the basis of documents and other materials only. If requested by a party and not agreed otherwise, the arbitral tribunal shall hold such hearings at an appropriate stage of the arbitral proceedings.

7.7 Default by one of the parties
7.7.1 As mentioned in paragraph 7.1.2 above, it is obligatory for the claimant to file a statement of claim. Where a claimant fails to file its statement of claim in accordance with the requirements of Article 1188 of the CCP, the arbitral tribunal shall terminate the arbitral proceedings without deciding on the merits of the dispute.

7.7.2 If the respondent defaults in submitting a reply to the statement of claim (i.e. it fails to file a statement of defence), this does not prevent the arbitral tribunal from continuing with the arbitral proceedings.

7.7.3 The default of any party to appear at a hearing or to submit documents that have been requested from it does not prevent the arbitral tribunal from continuing the arbitral proceedings and rendering an award based on gathered evidence.

7.8 Evidence generally
7.8.1 An arbitral tribunal may hear witnesses, and examine documents and other necessary evidence, but it may not compel the parties or third parties to provide evidence. In particular, an arbitral tribunal is not entitled to compel anyone to appear before it or fine anyone for failing to do so. However, the arbitral tribunal

---

54 Ibid, art 1189(1).
55 Ibid, art 1190(1).
56 Ibid, art 1190(2).
57 Ibid, art 1190(3).
58 Ibid, art 1191(1).
is entitled to ask the courts for assistance in obtaining evidence, as discussed in section 9.4 below.

7.9 **Appointment of experts**

7.9.1 Unless the parties have agreed otherwise, the arbitral tribunal can appoint an expert or experts in order to obtain their opinions. The arbitral tribunal may also request the parties to provide the expert with requested information and documents.\(^{59}\) Unless the parties have agreed otherwise, at a party’s request or if the arbitral tribunal considers it necessary, the expert, after providing an opinion, will attend a hearing where the parties can ask questions or request explanations.\(^{60}\)

7.10 **Confidentiality**

7.10.1 Although confidentiality is regarded as one of the main characteristics of arbitration, the CCP does not establish the confidentiality of arbitral proceedings. Therefore, for the avoidance of doubt, it is advisable that the parties provide for the confidentiality of arbitral proceedings in their arbitration agreement.

7.10.2 The arbitral rules of the Court of Arbitration at the Polish Chamber of Commerce establish the confidentiality of arbitral proceedings, while the rules of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan allow the President of the Court to publish the award, although on a no-names basis.

8. **Making the award and closing the proceedings**

8.1 **Choice of law**

8.1.1 The parties are free to choose the substantive law applicable to their contract that governs the disputes arising from it or in connection with it. The Conflicts of Laws Act refers in this respect to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.\(^{61}\)

8.1.2 Parties may also authorise the arbitral tribunal to resolve the dispute on the principles of equity or in accordance with general principles of law.\(^{62}\) However, this requires “explicit authorisation” by the parties, which can be granted either in the arbitration agreement or through some other express agreement.

---

\(^{59}\) *Ibid*, art 1191(2).

\(^{60}\) *Ibid*, art 1191(3).

\(^{61}\) Often referred to as the Rome I Regulation.

\(^{62}\) CCP, art 1194(1).
8.1.3 In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the specific nature of the trade applicable to the transaction.\textsuperscript{63}

8.2 Decision making by the arbitral tribunal

8.2.1 Unless a unanimous decision is required by the arbitration agreement, a majority of the arbitral tribunal is sufficient to make a valid award.\textsuperscript{64} However, the chair of the arbitral tribunal, if so authorised by the parties or all members of the arbitral tribunal, may determine questions regarding the procedure of the arbitral proceedings.

8.2.2 Any arbitrator who voted against the ruling may indicate, next to his or her signature on the award, that he or she presented a dissenting opinion and may prepare a statement of reasons within two weeks of drawing up the reasons for the award.\textsuperscript{65} However, in practice, this occurs quite rarely. Dissenting signatures are discretionary; the dissenting arbitrator has a right, but not an obligation, to indicate in the award that he or she expressed a dissenting opinion.\textsuperscript{66}

8.3 Form, content and effect of the award

8.3.1 An award must be made in writing and must include:\textsuperscript{67}

\begin{itemize}
  \item a reference to the arbitration agreement;
  \item the date of the award and the place where it was made;
  \item the names of the parties and the arbitrators;
  \item the decision on the claims of the parties;
  \item the reasons for the award; and
  \item the signatures of all the arbitrators (or a majority of the arbitrators if the case was judged by three or more arbitrators, with the reasons for the absence of other arbitrators’ signatures being stated in the award).
\end{itemize}

8.3.2 The arbitral tribunal shall serve a copy of the award on both parties.\textsuperscript{68} In ad hoc arbitral proceedings, the arbitral tribunal then files the records of the case and the original award (and proof that copies have been served) at the court. Such court documents are not publicly available. In institutional arbitral proceedings, these records are retained by the arbitral institution.\textsuperscript{69}

\textsuperscript{63} Ibid, art 1194(2).
\textsuperscript{64} Ibid, art 1195(1).
\textsuperscript{65} Ibid, art 1195(3).
\textsuperscript{66} Ibid, art 1195(2).
\textsuperscript{67} Ibid, art 1197(1)–(3).
\textsuperscript{68} Ibid, art 1197(4).
\textsuperscript{69} Ibid, art 1204.
8.4 Settlement
8.4.1 Based on the principle of party autonomy, it is open to the parties to settle their dispute in the course of the arbitral proceedings.\textsuperscript{70} The essential terms of a settlement must be included in a protocol and certified with the parties’ signatures. On request from the parties, the arbitral tribunal may provide an award by consent in accordance with the settlement. Awards issued in accordance with the settlement and settlements concluded before the arbitral tribunal have the same effect and force as awards.\textsuperscript{71} An award made on the basis of a settlement should conform to the requirements listed in paragraph 8.3.1 above and should contain a statement that it is an award.\textsuperscript{72}

8.5 Discontinuation of proceedings
8.5.1 The arbitral tribunal shall discontinue the arbitral proceedings if:

— the claimant fails to submit a statement of claim within the prescribed time agreed by the parties, or in absence of the parties’ agreement in that regard, within the time specified by the arbitral tribunal;\textsuperscript{73}

— the claimant withdraws the claim, unless the respondent opposes this withdrawal and the arbitral tribunal decides that the respondent has a justified interest in resolving the dispute;\textsuperscript{74} or

— the arbitral tribunal concludes that continuing with the arbitral proceedings is unnecessary or impossible for reasons other than the withdrawal of the statement of claim.\textsuperscript{75}

8.6 Costs
8.6.1 The parties are jointly and severally liable for the payment of the arbitrators’ remuneration and reimbursement of their expenses.\textsuperscript{76} Institutional arbitral rules usually contain specific provisions concerning the allocation of costs. In the case of ad hoc arbitration, the amount of the arbitrators’ remuneration and the allocation of costs between the parties may be specified in the arbitration agreement, although this occurs rarely in practice.

8.6.2 Usually, the costs of the arbitral proceedings (including arbitrators’ fees and expenses, discussed in section 5.4 above), the parties’ costs of legal representation and other expenses of the arbitral proceedings, such as the costs of expert

\textsuperscript{70} Ibid, art 1196(1).
\textsuperscript{71} Ibid, art 777(1)–(2).
\textsuperscript{72} Ibid, art 1196(2).
\textsuperscript{73} Ibid, art 1190(1).
\textsuperscript{74} Ibid, art 1198(1).
\textsuperscript{75} Ibid, art 1198(2).
\textsuperscript{76} Ibid, art 1179(1).
opinions, are dealt with in the award. The arbitral tribunal may apply to the relevant court for the arbitrators’ fees and expenses to be assessed in separate proceedings. The court will determine, in chambers, the amount of the arbitrators’ remuneration, taking into account the amount of time spent on the matter and reimbursable expenses. The court’s assessment and decision may be appealed.

8.6.3 The CCP does not address the allocation of the costs of the arbitration (including arbitrators’ fees and expenses and the parties’ costs of legal representation) between the winning and losing party. Under the general rules of civil procedure that are applicable to court proceedings, the parties bear the costs of the proceedings in accordance with the proportion of their success or failure, as stated in the judgment. Although the arbitral tribunal is not bound by these rules, they may be applied by analogy in arbitral proceedings.

8.7 Correction, interpretation and issuance of a supplemental award

8.7.1 Within two weeks of receipt of an award, unless another period of time has been agreed upon by the parties: a party, with notice to the other party, may request that the arbitral tribunal corrects any error in calculation, any clerical or typographical errors, or any errors of a similar nature in the award; and a party, with notice to the other party, may request that the arbitral tribunal provides an interpretation of a specific point or part of the award.

8.7.2 If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within two weeks of receiving the request. The interpretation shall form part of the award.

8.7.3 The arbitral tribunal may correct any clerical or typographical errors on its own initiative within a month of making the award. The arbitral tribunal shall inform the parties of any such corrections.

8.7.4 Unless otherwise agreed by the parties, within a month of receiving the award, one party, with notice to the other, may request that the arbitral tribunal makes a supplemental award on claims raised in the arbitral proceedings but omitted from

77 Ibid, art 98–110.
78 Ibid, art 1200.
79 Ibid, art 1200(1.1).
80 Ibid, art 1200(1.2).
81 Ibid, art 1201.
the award. If the arbitral tribunal considers the request to be justified, it shall make the supplemental award within two months of the date of the request.\textsuperscript{82}

8.7.5 If necessary, the arbitral tribunal may extend the period of time within which the parties may file a request for a correction, interpretation or supplemental award.\textsuperscript{83}

9. Role of the courts

9.1 Jurisdiction of the courts

9.1.1 In principle, a valid and binding arbitration agreement excludes the courts from the determination of disputes covered by such an agreement. As discussed in paragraph 9.2.1 below, if the respondent party properly objects to the court action, the court shall reject a statement of claim that has been submitted in relation to a dispute that is covered by an arbitration agreement.

9.1.2 However, in some cases it is necessary for the courts to act in order to ensure the effectiveness of arbitration as a dispute resolution mechanism. Such actions may even be taken before the arbitral proceedings commence. Usually, the courts will only intervene if the proper conduct of the arbitral proceedings is in some way jeopardised, or if a party refuses to satisfy an award voluntarily.

9.1.3 The CCP gives the courts jurisdiction to decide the following arbitration matters upon request of either party:

— the appointment of arbitrators or the chair of the arbitral tribunal, if the parties (or the arbitrators) fail to make such appointment themselves within the required period of time, or if an appointing authority does not make the appointment within the prescribed period or such period was not specified;\textsuperscript{84}

— an appeal against the decision of the arbitral tribunal in the case of a challenge to arbitrators under specified conditions;\textsuperscript{85}

— the determination of the arbitrators’ remuneration and of reimbursable expenses, if not determined by the parties;\textsuperscript{86}

— other judicial assistance, such as securing the appearance of a witness before the arbitral tribunal;\textsuperscript{87}

\textsuperscript{82} Ibid, art 1202.

\textsuperscript{83} Ibid, art 1203(1).

\textsuperscript{84} Ibid, art 1171(2) and art 1172.

\textsuperscript{85} Ibid, art 1176(2) and (4).

\textsuperscript{86} Ibid, art 1179(2).

\textsuperscript{87} Ibid, art 1192(1).
— the maintenance of ad hoc arbitration files following service of the final award on the parties;\(^{88}\) and
— the declaration of the enforceability of an award or a settlement.\(^{89}\)

9.2 Preliminary rulings on jurisdiction

9.2.1 If one of the parties brings a dispute before the court, and the other party properly objects, then the court will reject the dispute without any consideration of the merits. The objecting party must reference the arbitration agreement and object before it involves itself in the merits of the dispute.\(^{90}\)

9.2.2 If one party brings the dispute before the court and the other party either does not object or engages in a discussion concerning the merits of the dispute, then the dispute may be determined by the court.

9.3 Interim protective measures

9.3.1 Regardless of the existence of any pending arbitral proceedings, a party may apply to the courts and request interim measures. An injunction may be granted in accordance with the relevant general provisions of the CCP. Such applications may be allowed notwithstanding the existence of an arbitration agreement and may be made irrespective of whether arbitral proceedings are pending in Poland or abroad.

9.4 Obtaining evidence and other court assistance

9.4.1 The arbitral tribunal is entitled to ask the courts for assistance in summoning witnesses.\(^{91}\) Upon such a request, the court shall summon the witness or expert to appear before the arbitral tribunal and, should such a person fail to do so, the court may administer a fine and even ask the police to bring that person to the hearing. Recourse to the courts is extremely rare in practice.

10. Challenging and appealing an award through the courts

10.1 Appeals

10.1.1 The only judicial remedy against an award is an application to set aside an award. Where the parties have agreed to allow appeals or subsequent awards, an

\(^{88}\) Ibid, art 1204(1).
\(^{89}\) Ibid, art 1212.
\(^{90}\) Ibid, art 1165(1).
\(^{91}\) Ibid, art 1192(1).
aggrieved party may only apply to set aside the final award resolving the claims
between the parties.  

10.2 Applications to set aside an award

10.2.1 An action to set aside an award should be filed with the courts and meet all the
requirements prescribed for a statement of claim.  

10.2.2 An award may be set aside on the following grounds:
 — there was no arbitration agreement, or the arbitration agreement was invalid
 or became inoperative;
 — a party was not properly notified of the appointment of an arbitrator or of the
 arbitral proceedings, or was otherwise deprived of the possibility to defend its
 rights before the arbitral tribunal;
 — the award deals with a dispute not contemplated by or not falling within the
 terms of the submission to arbitration, or it contains decisions on matters
 beyond the scope of the submission to arbitration, provided that, if the
 decisions on matters submitted to arbitration can be separated from those not
 submitted, the part of the award which contains decisions on matters
 submitted to arbitration may be recognised and enforced;
 — the fundamental rules of procedure, as determined by the parties or by
 statutory provisions, in particular, by the provisions relating to the composition
 of the arbitral tribunal, were not observed. However, a party may not raise an
 objection on the grounds of a violation of the provisions of the CCP relating to
 procedure before the arbitral tribunal, and may not challenge the award on
 such grounds if that party failed to raise the objection immediately upon its
 notification or within such time as set by the parties;  
 — the award was issued as a result of a crime, or a document that formed the
 grounds for the award was falsified or forged; or
 — there is already a judgment with force of law in the case.  

10.2.3 Moreover, the court may also set aside an award if it finds that:
 — the subject matter of the dispute is not capable of settlement by arbitration;
 or
 — the award is contrary to the fundamental rules of Polish public policy.
10.2.4 An action to set aside an award should be filed with the court within three months of the date of service of the award (the rules concerning service are discussed in section 7.3 above). If the action is justified by the fact that the award was issued as a result of a crime, if a document that formed the basis of the award was falsified or forged, or there was already a judgment with force of law in that case, then the party may file an action to set aside an award within three months of the discovery of one of these facts, but not later than five years after delivery of the award.97

10.2.5 When asked to set aside an award the court may, where requested by a party, suspend court proceedings for a determined period of time to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action that may eliminate the grounds for setting the award aside.98

11. Recognition and enforcement of awards

11.1.1 For an award (and a settlement concluded by the parties before the arbitral tribunal) to have the same legal force as a judgment of the courts, the court must recognise the award and grant an *exequatur* declaring the award to be enforceable. If the award is not subject to enforcement (e.g. it confirms an existence of a right), the court determines whether the award shall be recognised. The provisions of Title Eight of the Fifth Part of the CCP relate to the same extent to awards rendered in Poland and abroad, unless the award was rendered in a country being a signatory of the New York Convention. In the latter case, the New York Convention prevails over the rules of the CCP.99

11.1.2 The court recognises or declares the enforceability of an award upon a motion from a party. The party must present the court with original or certified copies of the award and the arbitration agreement. In declaring the enforceability of the award or recognising the award, the court will not review the merits of the case, but will only check the records filed by the arbitral tribunal at court to see whether the subject matter of the dispute was capable of settlement by arbitration, and whether the recognition or enforcement of the award would be contrary to the fundamental rules of Polish public policy. The last condition is described as a ‘public order clause’ in Article 1214(3)(2) of the CCP. In the case of a foreign arbitration, the court makes the examination based on the documents provided by the requesting party, i.e. the arbitration agreement and the award.

97 *Ibid*, art 1208(2).
98 *Ibid*, art 1209(1).
11.1.3 A foreign award may be recognised or declared enforceable only after conducting a hearing before the court recognising/enforcing the award.\(^{100}\) Domestic awards may be recognised at a closed session, that is, without the parties present, or may be declared enforceable by granting *exequatur* through a simplified procedure described in and regulated by Articles 781–795 of the CCP. *Exequatur* is granted to the awards that are enforceable, while the awards that are not enforceable are only recognised (and thus they are not granted with *exequatur*).

11.1.4 Based on the CCP, the court will refuse to recognise or declare enforceable a foreign award in the situations described above and, upon a motion from a party, if it is shown that:
- there was no arbitration agreement, or the arbitration agreement was invalid or became inoperative;
- a party was not properly notified of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise deprived of the possibility to defend its rights before the arbitral tribunal;
- the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, the part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitration 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
- the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.\(^{101}\)

11.1.5 The above CCP rules of recognising and enforcing foreign awards apply only to awards from non-signatories to the New York Convention. Poland is a party to the 1961 European Convention and, more importantly, the New York Convention, both of which have binding force in Poland. The New York Convention is subject to the two reservations contained in Article I (3).\(^{102}\) New York Convention awards will be recognised and enforced through the Polish courts in accordance with Article V of the New York Convention.

\(^{100}\) *Ibid*, art 1215(1).

\(^{101}\) *Ibid*, art 1215(2).

12. Special provisions and considerations

12.1 Consumers
12.1.1 In general, arbitration agreements contained in contracts concluded with consumers are allowed under Polish law. However, if the arbitration agreement is contained in general conditions or in a contractual document that has not been individually negotiated with the consumer, it is deemed to be an abusive clause and as such has no legal effect.\textsuperscript{103}

12.1.2 In Poland, consumer disputes can be decided by the Permanent Consumer Arbitration Tribunals (Stałe Polubowne Sądy Konsumenckie) acting at the state Commercial Inspection (Inspekcja Handlowa). There are also arbitral tribunals acting in specific sectors, e.g. Banking Consumer Arbitration, that can decide on a dispute in which consumers are involved.

12.2 Employment law
12.2.1 Employment disputes may be subject to an arbitration agreement, provided that the agreement is explicit, made in writing and only concerns an existing dispute.\textsuperscript{104}

13. Conclusion

13.1.1 Arbitration continues to gain popularity in Poland as a method of resolving commercial disputes, particularly disputes arising from international commercial transactions. In comparison to proceedings before Polish courts, arbitral proceedings tend to be faster and cheaper, considering that appeals against awards are generally excluded.

13.1.2 Moreover, the new legislation largely incorporates the Model Law (1985) into the CCP. For foreign parties, it should also be of added benefit that arbitral proceedings may be conducted in a foreign language, which reduces the cost and delay caused by translations and facilitates resolution of the dispute.

13.1.3 Last but not least, awards are more readily enforceable (both Polish awards abroad and foreign awards in Poland) than court judgments, due to the fact that Poland is a signatory to the New York Convention. Taken together, these factors constitute strong grounds for preferring arbitration over court proceedings for the resolution of international commercial disputes in Poland.

\textsuperscript{103} Polish Code of Civil Procedure, art 385(3).
\textsuperscript{104} CCP, art 1164.
14. Contacts

CMS Cameron McKenna
Dariusz Greszta Spółka Komandytowa
Warsaw Financial Center
ul. Emili Plater 53
00-113 Warsaw
Poland

Joanna Młot
T +48 22 520 5588
E joanna.mlot@cms-cmck.com

Katarzyna Kucharczyk
T +48 22 520 5592
E katarzyna.kucharczyk@cms-cmck.com
# Table of Contents

1. **Historical background**  

2. **Scope of application and general provisions of the Portuguese Arbitration Act**  
   2.1 Subject matter  
   2.2 Structure of the law  
   2.3 General principles  

3. **The arbitration agreement**  
   3.1 Definitions  
   3.2 Formal requirements  
   3.3 Special tests and requirements of the jurisdiction  
   3.4 Separability  
   3.5 Legal consequences of a binding arbitration agreement  

4. **Composition of the arbitral tribunal**  
   4.1 The constitution of the arbitral tribunal  
   4.2 Procedure for challenging and substituting arbitrators  
   4.3 Arbitration fees  
   4.4 Arbitrator immunity  

5. **Jurisdiction of the arbitral tribunal**  
   5.1 Competence to rule on jurisdiction  
   5.2 Power to order interim measures  

6. **Conduct of proceedings**  
   6.1 Commencement of arbitration  
   6.2 General procedural principles  
   6.3 Seat, place of hearings and language of arbitration  
   6.4 Multi-party issues  
   6.5 Oral hearings and written proceedings  
   6.6 Default by one of the parties  
   6.7 Evidence generally  
   6.8 Appointment of experts  
   6.9 Confidentiality  
   6.10 Court assistance in taking evidence
7. Making of the award and termination of proceedings 605
   7.1 Choice of law 605
   7.2 Timing, form, content and notification of award 605
   7.3 Settlement 606
   7.4 Power to award interest and costs 606
   7.5 Termination of the proceedings 607
   7.6 Effect of the award 607
   7.7 Correction, clarification and issue of a supplemental award 607

8. Role of the courts 608
   8.1 Jurisdiction of the courts 608
   8.2 Stay of court proceedings 608
   8.3 Preliminary rulings on jurisdiction 608
   8.4 Interim protective measures 608
   8.5 Obtaining evidence and other court assistance 609

9. Challenging and appealing an award through the courts 609
   9.1 Jurisdiction of the courts 609
   9.2 Appeals 609
   9.3 Applications to set aside an award 610

10. Recognition and enforcement of awards 610
    10.1 Domestic awards 610
    10.2 Foreign awards 611

11. Special provisions and considerations 611

12. Concluding thoughts and themes 612

13. Contacts 612
1. Historical background


1.1.2 The much-awaited Portuguese Arbitration Act revoked the long-lived Voluntary Arbitration Act of 1986 (*1986 Act*). The approval of the new Portuguese Arbitration Act was a stipulation agreed between the Portuguese Government, the International Monetary Fund and the European Union’s institutions in order to modernise the alternative dispute resolution mechanisms available in Portugal and perfect them as an alternative to the slow paced Portuguese judicial system. This agreement was reached in the wider context of the structural reforms imposed on Portugal in order to repay its external debt. The reform also reflected the concern of harmonising the previous 1986 Act with the most common practices adopted internationally.

1.1.3 The Portuguese Arbitration Act:

— follows the Model Law (1985) and (2006), albeit with influences from other, more recent arbitration laws;
— contains a more detailed set of procedural rules to be applied within the arbitral proceedings, if the parties fail to agree on those rules between themselves;
— maintains the underlying idea that party autonomy constitutes the essential framework of arbitration; and
— regulates matters formerly absent from the 1986 Act, such as multi-party issues, interim measures and preliminary orders which may be applied by the arbitral tribunal (and their enforcement), and the recognition and enforcement of foreign awards.

---


2. **Scope of application and general provisions of the Portuguese Arbitration Act**

2.1 **Subject matter**

2.1.1 The Portuguese Arbitration Act governs all arbitrations held within Portugal.³ Any claim involving an economic interest will be arbitrable. The Portuguese state and public law entities are able to enter into arbitration agreements whenever duly authorised by law,⁴ or if the matters discussed refer only to private law. The Portuguese Arbitration Act constitutes a general law on the matter of arbitration and is, therefore, not applicable where there is a specific law concerning arbitration within a certain type of dispute (e.g. labour disputes and others set out at section 11 below).

2.2 **Structure of the law**

2.2.1 The Portuguese Arbitration Act is divided into twelve chapters, which are roughly organised according to the typical timeline of arbitral proceedings.

2.2.2 The first three chapters deal with aspects prior to the arbitral proceedings, namely the arbitration agreement, its mandatory content and its validity (Chapter I), the composition of the arbitral tribunal, the rules on the appointment of arbitrators and their substitution (Chapter II) and the competence of the arbitral tribunal (Chapter III).

2.2.3 The following two chapters deal with the essential procedural rules of arbitration, including interim measures and preliminary orders (Chapter IV) and the core of the arbitral procedure itself (Chapter V).

2.2.4 The subsequent chapters deal with aspects concerning the end of the arbitration, namely the issue of the award (Chapter VI), the terms to set aside an award (Chapter VII) and the enforcement of the award (Chapter VIII).

2.2.5 The final four chapters concern more specific matters, such as international arbitrations (Chapter IX), the recognition and enforcement of foreign awards (Chapter X), the competence of judicial courts as regards arbitration (Chapter XI) and final rules concerning the spatial scope of application of the Portuguese Arbitration Act and the creation of arbitral institutions (Chapter XII).

---

³ Portuguese Arbitration Act, art 61.

⁴ The Portuguese Administrative Courts Procedure Code, art 180, allows the entering into of arbitration agreements on matters regarding administrative contracts, civil liability and administrative acts.
2.3 General principles
2.3.1 One of the main principles of the Portuguese Arbitration Act is party autonomy. The resolution of disputes through arbitration depends upon an agreement between the disputing parties to exclude their dispute from the jurisdiction of the state courts.

2.3.2 The Portuguese Arbitration Act upholds the will of the parties in several areas, from the constitution of the arbitral tribunal to the procedural rules to be applied. The Portuguese Arbitration Act also recognises the principle of competence-competence, which is discussed in section 5.1 below.\(^5\)

2.3.3 Throughout the arbitration, there are also essential procedural principles which must be observed, such as the equality of the parties, due and fair process and the adversarial principle.

3. The arbitration agreement
3.1 Definitions
3.1.1 The Portuguese Arbitration Act defines the arbitration agreement as the means by which a dispute may be submitted to an arbitral tribunal (provided that the dispute does not concern inalienable rights or illegal transactions).\(^6\)

3.1.2 This broad definition is divided into two different types of arbitration agreements, according to the criteria of the object of the arbitration agreement.\(^7\) Hence, there are arbitration contracts which submit a present and specific dispute to arbitration, and arbitration clauses which define that certain future and potential types of disputes may be settled by arbitration.

3.1.3 This dual classification is relevant in defining the minimum content of the arbitration agreement required by law: the arbitration agreement must precisely determine the object of the dispute submitted to arbitration and must be sufficiently certain regarding the elements of the contract that can be settled by the arbitral tribunal.

3.1.4 It is also possible for the parties to agree to submit to arbitration other issues that may require the intervention of an impartial decision maker, for example, issues

---

\(^5\) Portuguese Arbitration Act, art 18(1), (8), (9) and (10).

\(^6\) Ibid, art 1(1) and (2); Civil Code, art 1249.

\(^7\) Portuguese Arbitration Act, art 1(3).
relating to the need to clarify, supplement and adapt long term contracts to new circumstances.\(^8\)

### 3.2 Formal requirements

3.2.1 The arbitration agreement must be in writing. This formal requirement is fulfilled whenever the agreement to arbitrate is inserted in a written document signed by both parties, or in an exchange of letters, telexes, telegrams or other means of communication of which there is a written record.\(^9\)

3.2.2 This requirement is also satisfied if a contract refers to a separate document that contains an arbitration clause, provided that the reference is such as to incorporate that clause as part of the contract.\(^10\)

3.2.3 The Portuguese Arbitration Act also considers this requirement to be fulfilled if there is an exchange of submissions in arbitral proceedings in which one of the parties alleges the existence of the arbitration agreement and this is not denied by the other party.\(^11\)

3.2.4 An arbitration agreement which does not comply with the formalities required by law will be null and void.\(^12\)

### 3.3 Special tests and requirements of the jurisdiction

3.3.1 Not every dispute may be submitted to arbitration. All disputes that do not concern economic interests or alienable rights,\(^13\) or which must be submitted legally to the state courts or mandatory arbitral tribunals are excluded from voluntary arbitration.

### 3.4 Separability

3.4.1 The nullification of a contract does not necessarily determine the invalidity of an arbitration clause contained within it. The invalidity of part or of a certain clause of a contract does not imply the invalidity of the whole of the contract.\(^14\) The only exception is where the contract would not have existed without the invalid part or clause. In every other case, the arbitration clause may be used to submit a dispute regarding the validity of the contract to arbitration.

---

\(^8\) Ibid, art 1(4).

\(^9\) Ibid, art 2(1) and (2).

\(^10\) Ibid, art 2(4).

\(^11\) Ibid, art 2(5).

\(^12\) Ibid, art 3.

\(^13\) Ibid, art 1(2).

\(^14\) Ibid, art 18(3); Civil Code, art 292.
3.5 **Legal consequences of a binding arbitration agreement**

3.5.1 A valid and effective arbitration agreement binds the parties to submit the disputes included in the agreement to arbitration and excludes those disputes from the jurisdiction of the state courts. Therefore, proceedings that are presented in the state courts concerning a dispute that the parties have agreed to submit to arbitration shall be, at the timely request of the respondent, declared void by the state courts on the grounds of lack of jurisdiction, except if the court determines that the arbitration agreement is patently *(manifestamente)* null, ineffective or unenforceable. However, if the respondent in such a claim does not object to the court’s jurisdiction while filing its statement of defence, the court will not undertake this action of its own volition and it will retain jurisdiction to adjudicate the claim.

4. **Composition of the arbitral tribunal**

4.1 **The constitution of the arbitral tribunal**

4.1.1 The arbitral tribunal may be composed of a sole arbitrator or several arbitrators, provided that the number of arbitrators is odd. Where the parties are silent on this matter, the arbitral tribunal shall be composed of three arbitrators.

4.1.2 The parties shall appoint the arbitrator or arbitrators of their choice. This can be done within the arbitration agreement itself, or in a subsequent written document. The parties may define alternative methods of appointing the arbitrators, should they wish to do so.

4.1.3 If the arbitral tribunal is composed of three (or more) arbitrators, each party shall appoint an equal number of arbitrators. The party-appointed arbitrators shall themselves appoint the final arbitrator, who will be the chair of the arbitral tribunal.

4.1.4 Either party may request that the court appoints the relevant arbitrator(s) where: the parties have not expressly stated the arbitrator(s) to be appointed or determined a method of appointment, and the parties subsequently fail to reach agreement on this issue;

---

15 Portuguese Arbitration Act, art 5(1).
16 *Ibid*, art 5(1); Portuguese Civil Procedure Code, art 494(j) and 495.
17 Portuguese Arbitration Act, art 8(1).
19 *Ibid*, art 10(1).
20 *Ibid*, art 10(3).
— one party does not appoint its arbitrator within 30 days of being requested to do so; or
— the party-appointed arbitrators fail to appoint the chair within 30 days of the latest party-appointed arbitrator being selected.21

4.1.5 Where the arbitral tribunal is to be composed of a sole arbitrator and the parties fail to agree upon the appointment of that arbitrator, either party may request that the court makes the appointment.22

4.1.6 There are some restrictions as to who may act as an arbitrator. An arbitrator must be a natural person, have full legal capacity and must be independent and impartial.23 Other restrictions may also arise from the internal regulations of the arbitral institutions or other legal instruments. For example, an arbitrator may be restricted from acting where there is incompatibility between his or her functions as an arbitrator and other legal obligations.

4.1.7 An arbitrator must accept his or her appointment in writing, unless otherwise agreed by the parties.24

4.2 Procedure for challenging and substituting arbitrators

4.2.1 The appointment of an arbitrator may be challenged if there are justifiable doubts as to the impartiality or independence of the arbitrator or if the arbitrator does not possess the qualifications agreed upon by the parties.25

4.2.2 An arbitrator has a duty to inform the parties (and the other arbitrators if that is the case) of any subsequent circumstances that arise or that have been brought to his or her attention after accepting the appointment that would constitute a justifiable reason to doubt that arbitrator’s impartiality or independence.

4.2.3 The parties may agree on the procedure for challenging an arbitrator.26 However, a party may not challenge its own appointed arbitrator other than for reasons of which it becomes aware following the appointment. This restriction is also applicable when an arbitrator is appointed by the mutual agreement of the parties.27

21 Ibid, art 10(4) and 59(1).
22 Ibid, art 10(2) and 59(4).
23 Ibid, art 9(1) and (3).
24 Ibid, art 12(2).
25 Ibid, art 13(3).
26 Ibid, art 14(1).
27 Ibid, art 13(3).


Procedure for challenging an arbitrator

4.2.4 The parties are at liberty to agree on the procedure for challenging an arbitrator. In the absence of a specific agreed procedure, a party that intends to challenge an arbitrator should submit a written statement to the arbitral tribunal setting out the grounds for the challenge. This request should be filed within 15 days from the date on which the challenging party became aware of the constitution of the arbitral tribunal or acquired knowledge of the grounds for the challenge. If the challenged arbitrator resists the challenge and remains in office, the full arbitral tribunal – including the challenged arbitrator – will decide on the challenge. If the challenge is not successful, the challenging party may present the request to the court within 15 days of receiving notice of the decision of the arbitral tribunal. The decision of the court on the challenge will be final.

Procedure for appointing a substitute arbitrator

4.2.5 Unless the parties have agreed to an alternative procedure, substitute arbitrators shall be appointed in the same manner as the arbitrator who was replaced. Taking into consideration the stage of the arbitral proceedings, the arbitral tribunal shall determine whether any additional procedural matters need to be addressed or repeated.

4.3 Arbitration fees

4.3.1 The Portuguese Arbitration Act establishes that if the parties have not previously agreed upon the arbitral tribunal’s fees, a written agreement between the parties and the arbitral tribunal shall be completed before the final arbitrator has accepted his or her appointment.

4.3.2 If the parties and the arbitral tribunal fail to agree on fees, the arbitral tribunal shall determine its fees and expenses by taking into account the complexity of the dispute, the amount of the claim and the time spent by the arbitral tribunal on the dispute. In this case, any dissatisfied party may request a reduction of the arbitral tribunal’s fees and/or expenses before the court.

28 Ibid, art 14(1).
29 Ibid, art 14(2).
30 Ibid, art 14(3).
31 Ibid, art 16.
32 Ibid, art 17(1).
33 Ibid, art 17(2).
34 Ibid, art 17(3).
4.3.3 There are not substantial differences in fee rates between arbitral institutions in Portugal. The tables below detail the fees determined by the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (ACL), the most representative Portuguese arbitral institution, including arbitrator’s fees and administrative expenses.\(^{35}\)

### Table 1 – Fees due to each arbitrator

<table>
<thead>
<tr>
<th>Value of the dispute</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower or equal to EUR 50.000,00</td>
<td>EUR 1.250,00</td>
</tr>
<tr>
<td>EUR 50.001,00 to EUR 100.000,00</td>
<td>EUR 1.250,00 + 3,00 % of what exceeds EUR 50.000,00</td>
</tr>
<tr>
<td>EUR 100.001,00 to EUR 250.000,00</td>
<td>EUR 2.750,00 + 2,00 % of what exceeds EUR 100.000,00</td>
</tr>
<tr>
<td>EUR 250.001,00 to EUR 500.000,00</td>
<td>EUR 5.750,00 + 1,00 % of what exceeds EUR 250.000,00</td>
</tr>
<tr>
<td>EUR 500.001,00 to EUR 1.000.000,00</td>
<td>EUR 8.250,00 + 0,60 % of what exceeds EUR 500.000,00</td>
</tr>
<tr>
<td>EUR 1.000.001,00 to EUR 2.500.000,00</td>
<td>EUR 11.250,00 + 0,55 % of what exceeds EUR 1.000.000,00</td>
</tr>
<tr>
<td>EUR 2.500.001,00 to EUR 5.000.000,00</td>
<td>EUR 19.500,00 + 0,45 % of what exceeds EUR 2.500.000,00</td>
</tr>
<tr>
<td>EUR 5.000.001,00 to EUR 10.000.000,00</td>
<td>EUR 30.750,00 + 0,30 % of what exceeds EUR 5.000.000,00</td>
</tr>
<tr>
<td>EUR 10.000.001,00 to EUR 20.000.000,00</td>
<td>EUR 45.750,00 + 0,15 % of what exceeds EUR 10.000.000,00</td>
</tr>
<tr>
<td>EUR 20.000.001,00 to EUR 40.000.000,00</td>
<td>EUR 60.750,00 + 0,12 % of what exceeds EUR 20.000.000,00</td>
</tr>
<tr>
<td>More than EUR 40.000.000,00</td>
<td>EUR 84.750,00 + 0,10 % of what exceeds EUR 40.000.000,00</td>
</tr>
</tbody>
</table>

Table 2 – Administrative expenses

<table>
<thead>
<tr>
<th>Value of the dispute</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower or equal to EUR 50.000,00</td>
<td>EUR 1.250,00</td>
</tr>
<tr>
<td>EUR 50.001,00 to EUR 100.000,00</td>
<td>EUR 1.250,00 + 2,00 % of what exceeds EUR 50.000,00</td>
</tr>
<tr>
<td>EUR 100.001,00 to EUR 250.000,00</td>
<td>EUR 2.250,00 + 1,80 % of what exceeds EUR 100.000,00</td>
</tr>
<tr>
<td>EUR 250.001,00 to EUR 500.000,00</td>
<td>EUR 4.950,00 + 0,50 % of what exceeds EUR 250.000,00</td>
</tr>
<tr>
<td>EUR 500.001,00 to EUR 1.000.000,00</td>
<td>EUR 6.200,00 + 0,25 % of what exceeds EUR 500.000,00</td>
</tr>
<tr>
<td>EUR 1.000.001,00 to EUR 2.500.000,00</td>
<td>EUR 7.450,00 + 0,10 % of what exceeds EUR 1.000.000,00</td>
</tr>
<tr>
<td>EUR 2.500.001,00 to EUR 5.000.000,00</td>
<td>EUR 8.950,00 + 0,09 % of what exceeds EUR 2.500.000,00</td>
</tr>
<tr>
<td>EUR 5.000.001,00 to EUR 10.000.000,00</td>
<td>EUR 11.200,00 + 0,08 % of what exceeds EUR 5.000.000,00</td>
</tr>
<tr>
<td>EUR 10.000.001,00 to EUR 20.000.000,00</td>
<td>EUR 15.200,00 + 0,07 % of what exceeds EUR 10.000.000,00</td>
</tr>
<tr>
<td>EUR 20.000.001,00 to EUR 40.000.000,00</td>
<td>EUR 22.200,00 + 0,06 % of what exceeds EUR 20.000.000,00</td>
</tr>
<tr>
<td>More than EUR 40.000.000,00</td>
<td>EUR 34.200,00 + 0,05 % of what exceeds EUR 40.000.000,00</td>
</tr>
</tbody>
</table>

4.4 Arbitrator immunity

4.4.1 Once an arbitrator has accepted his or her appointment, that arbitrator will not be held liable for any damage caused by decisions or judgments that they make, except in the same circumstances in which judges can be held liable.36 Judges and prosecutors are only liable for damage caused by their rulings if they acted intentionally or with gross negligence.37 In any case, an arbitrator can only be liable to the parties to the dispute.

---

36 Portuguese Arbitration Act, art 9(4).
4.4.2 Arbitrators are also liable for damage caused to the parties by an unjustified delay in deciding a dispute that has been submitted to the arbitral tribunal. The direct accountability of the arbitrator to the parties incentivises a swift outcome to the arbitration, which complements the duty to decide the dispute within the legal or agreed timeframe.\(^{38}\)

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The principle of competence-competence is adopted in the Portuguese Arbitration Act and states that the arbitral tribunal has the power to decide on its own jurisdiction, either as a preliminary question or in an award on the merits. In the event of an action to set aside a partial award concerning jurisdiction, the arbitral tribunal may continue the arbitral proceedings and issue a final award.\(^{39}\)

5.1.2 A respondent may argue that the arbitral tribunal lacks jurisdiction until the moment that the defence must be presented or within its defence.\(^{40}\)

5.1.3 The parties may object to the decision of the arbitral tribunal regarding its jurisdiction by means of appeal, if admissible, or may commence an action to set aside the award.\(^{41}\) In the event of an action to set aside or appeal a partial award concerning jurisdiction being made, the arbitral tribunal may continue the arbitral proceedings and issue a final award.\(^{42}\)

5.2 Power to order interim measures

5.2.1 Unless otherwise agreed by the parties, the Portuguese Arbitration Act gives the arbitral tribunal the power to grant such interim measures as the arbitral tribunal considers necessary, provided that the adversarial principle of the arbitral proceedings is assured.\(^{43}\) That is to say, arbitral tribunals are legally prevented from issuing *ex parte* injunctions.

\(^{38}\) Portuguese Arbitration, art 43(4).
\(^{39}\) Ibid, art 18(1), (8), (9) and (10).
\(^{40}\) Ibid, art 18(2).
\(^{41}\) Ibid, art 18(9).
\(^{42}\) Ibid, art 18(10).
\(^{43}\) Ibid, art 20(1).
5.2.2 The arbitral tribunal may modify, suspend or terminate an interim measure upon the application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal’s own initiative.\textsuperscript{44}

5.2.3 The decision to grant an interim measure binds the parties and, unless otherwise decided by the arbitral tribunal, it is subject to enforcement before the state courts.\textsuperscript{45}

5.2.4 In accordance with the Model Law (2006),\textsuperscript{46} and unless otherwise agreed by the parties, simultaneously with the request for an interim measure a party may, without notice to any other party, request the arbitral tribunal to make a preliminary order directing a party not to frustrate the purpose of the interim measure requested.\textsuperscript{47}

5.2.5 The preliminary order may be granted by the arbitral tribunal if it is considered that a prior disclosure of the request for the interim measure to the party against whom it is directed would risk frustrating the purpose of the measure requested. The arbitral tribunal may also require the party requesting a preliminary order to provide appropriate security, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.\textsuperscript{48}

5.2.6 After the arbitral tribunal has made a determination in respect of an application for a preliminary order, all parties shall be given notice of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications. In addition, any party against whom a preliminary order is directed shall be given the opportunity to present its case at the earliest practicable time.\textsuperscript{49}

5.2.7 The preliminary order is only valid for 20 days.\textsuperscript{50} Although the parties are bound by the determination made by the arbitral tribunal, the preliminary order cannot be enforced by the courts.\textsuperscript{51}

\textsuperscript{44} Ibid, art 24(1).
\textsuperscript{45} Ibid, art 27(1) and 59(4).
\textsuperscript{46} CMS Guide to Arbitration, vol II, appendix 2.1.
\textsuperscript{47} Portuguese Arbitration Act, art 22.
\textsuperscript{48} Ibid, art 24(2).
\textsuperscript{49} Ibid, art 23(3).
\textsuperscript{50} Ibid, art 23(4).
\textsuperscript{51} Ibid, art 23(5).
6. **Conduct of proceedings**

6.1 **Commencement of arbitration**
6.1.1 Unless otherwise agreed by the parties, the arbitral proceedings commence when a party receives the request of another party to submit the dispute to arbitration.\(^{52}\)

6.2 **General procedural principles**
6.2.1 The Portuguese Arbitration Act defines some fundamental principles to be observed throughout the arbitral procedure, which prevail over the will of the parties.

6.2.2 Both parties must be treated in conditions of absolute equality and opportunity, with a strict observance of an adversarial system, the right of the parties to present their case before the final award is given and the participation of the respondent in the arbitral proceedings.\(^{53}\)

6.3 **Seat, place of hearings and language of arbitration**
6.3.1 The parties are free to agree on the seat of arbitration\(^{54}\) and the language to be used in the arbitral proceedings.\(^{55}\) It is common for the parties to include a description of where the arbitration shall take place and the language to be adopted throughout the procedure in the arbitration agreement. If parties fail to agree on those issues, such decisions shall be made by the arbitral tribunal.\(^{56}\)

6.3.2 Regardless of the legal seat, the parties may agree to hold the hearings in any place they choose. If the parties have not agreed otherwise, the place of the hearings, evidence taking or decision making may be determined by the arbitral tribunal.\(^{56}\)

6.4 **Multi-party issues**
6.4.1 Unlike the 1986 Act, the Portuguese Arbitration Act contains provisions regarding multi-party issues.

6.4.2 Only third parties bound by the arbitration agreement are admitted to join the arbitral proceedings. If a third party subsequently adheres to the arbitration agreement after the constitution of the arbitral tribunal (adhesion is presumed in a

---

\(^{52}\) *Ibid*, art 33(1).

\(^{53}\) *Ibid*, art 30(1).

\(^{54}\) *Ibid*, art 31(1).

\(^{55}\) *Ibid*, art 32(1).

\(^{56}\) *Ibid*, art 31(2).
case where a third party intervenes with the consent of the other parties),\textsuperscript{57} it should make a declaration that it accepts the existing composition of the arbitral tribunal.

6.4.3 The arbitral tribunal should only permit the intervention or joinder of a third party if doing so would not unjustifiably hinder the arbitral proceedings and if there are relevant reasons to allow it, notably when there is an equivalence of interests with any of the parties regarding the object of the dispute (\textit{litisconsórcio voluntário ou necessário}), compatibility of identity of claims, the interest of the respondent to have third party co-creditors (\textit{solidariedade de credores}) bound by the award and the exercise of a right of recourse (\textit{direito de regresso}) arising to the respondent.\textsuperscript{58}

6.4.4 The intervention of third parties is only allowed in institutional arbitrations if the relevant rules of the arbitral institution ensure an equal participation of the parties in the appointment of the arbitrators.\textsuperscript{59} In ad hoc proceedings, the intervention of third parties is only permitted if the arbitration agreement covers such subject matter, either directly or by reference to a set of arbitral rules.\textsuperscript{60}

6.5 Oral hearings and written proceedings

6.5.1 Except if the parties agree otherwise, the arbitral tribunal has discretion as to whether there should be oral hearings or if the arbitral proceedings are to be conducted by reference to written documents and evidence only. However, the arbitral tribunal is required to conduct oral hearings for the examination of evidence whenever a party applies for such a hearing to take place, unless that party has previously waived this right.\textsuperscript{61}

6.6 Default by one of the parties

6.6.1 Unless otherwise agreed by the parties or defined in the relevant institutional rules, if the claimant does not file its statement of claim within the time limits set forth in the arbitration agreement or decided by the arbitral tribunal, the arbitral tribunal should terminate the arbitral proceedings.\textsuperscript{62} Conversely, if the respondent fails to submit its statement of defence within the designated time limit, the arbitral tribunal shall continue with the arbitral proceedings without viewing the respondent’s default as acceptance of the claimant’s allegations.\textsuperscript{63}

\textsuperscript{57} Ibid, art 36(2).
\textsuperscript{58} Ibid, art 36.
\textsuperscript{59} Ibid, art 36(6).
\textsuperscript{60} Ibid, art 36(7).
\textsuperscript{61} Ibid, art 34.
\textsuperscript{62} Ibid, art 33(2) and 35(1).
\textsuperscript{63} Ibid, art 35(2).
6.6.2 If one of the parties fails to appear in the hearings or to submit evidence within the designated time limit, the arbitral tribunal shall continue with the arbitral proceedings and make the award after taking into consideration the evidence presented before it.\textsuperscript{64}

6.6.3 The arbitral tribunal may, in any case, consider that the default of one of the parties is justifiable and allow the defaulting party to file the defaulted plea or evidence requested.\textsuperscript{65}

6.7 Evidence generally
6.7.1 Although the parties are free to determine the rules of evidence, there is a clear trend of parties using the same types of evidence as those used in judicial proceedings, such as documents, witnesses, experts, party evidence and so on. The parties also tend to soften the strict judicial procedural rules concerning evidence when producing the same types of evidence within the arbitral proceedings. The use of written statements is increasing.

6.8 Appointment of experts
6.8.1 As mentioned at paragraph 2.3.2 above, the parties are entitled to determine the applicable procedural rules for the arbitral proceedings. This is also the case for evidence generally and the appointment of experts specifically.

6.8.2 Therefore, unless otherwise agreed by the parties, the Portuguese Arbitration Act provides that the arbitral tribunal may appoint one or more experts, on its own initiative or upon request by the parties,\textsuperscript{66} and may require a party to give the expert any relevant information or to provide access to any relevant documents or goods for the expert’s inspection.\textsuperscript{67}

6.9 Confidentiality
6.9.1 The Portuguese Arbitration Act is silent on the matter of the confidentiality of the arbitral proceedings. In order to compensate for this, it is common for the parties to include a confidentiality provision in the arbitration agreement or to set it out as a rule of procedure.

6.9.2 Many arbitral institutions set out rules of confidentiality in their arbitral rules.\textsuperscript{68}

\textsuperscript{64} Ibid, art 35(3).
\textsuperscript{65} Ibid, art 35(4).
\textsuperscript{66} Ibid, art 37(1).
\textsuperscript{67} Ibid, art 37(2).
\textsuperscript{68} LCIA Arbitration Rules, art 30 (see CMS Guide to Arbitration, vol II, appendix 3.12).
6.10 Court assistance in taking evidence

6.10.1 If the disclosure of evidence is subject to the will of one of the parties, or of a third party who refuses to collaborate in providing it, the interested party may require the evidence to be produced before the relevant state court.\(^{69}\)

6.10.2 In order to apply for the court’s assistance, the interested party must first seek the authorisation of the arbitral tribunal. In addition, the evidence produced before the state court has to be communicated to the arbitral tribunal.

6.10.3 This requirement is also applicable to requests made to the relevant state court relating to arbitral proceedings that are located outside of Portugal.\(^{70}\)

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 The arbitral tribunal will commonly apply Portuguese substantive law, or any other substantive law chosen by the parties in the arbitration agreement.

7.1.2 However, the parties may authorise the arbitral tribunal to reach a decision based on equitable terms, instead of binding its decision within the limits of any substantive law.\(^{71}\)

7.1.3 In the case of an international arbitration, and if the parties have not agreed upon the applicable law, the arbitral tribunal shall apply the law with which the object of the dispute is most closely connected.\(^{72}\)

7.2 Timing, form, content and notification of award

7.2.1 Unless otherwise agreed by the parties, an award must be rendered within twelve months from the date on which the final arbitrator accepted his or her appointment.\(^{73}\)

7.2.2 The deadline may be extended one or more times, for successive periods of twelve months each, provided that either the parties agree or the arbitral tribunal so decides. In the latter case, the arbitral tribunal must justify its decision properly and the parties may oppose this decision by mutual agreement.\(^{74}\)

---

\(^{69}\) Portuguese Arbitration Act, art 38(1).

\(^{70}\) Ibid, art 38(2).

\(^{71}\) Ibid, art 39(1).

\(^{72}\) Ibid, art 52(2).

\(^{73}\) Ibid, art 43(1).

\(^{74}\) Ibid, art 43(2).
7.2.3 Failure to notify the parties of the final award within the time limit (or if the parties jointly oppose a decision of the arbitral tribunal to extend the time limit) will terminate the arbitral proceedings and the mandate of the arbitral tribunal.  

7.2.4 The award must be made in writing, signed by all or a majority of the arbitrators, mention the seat of the arbitration and contain the date of the award. In addition, the award must be sufficiently justified, unless the parties have agreed otherwise or the award results from a court settlement.

7.2.5 The award should also contain a determination on the amount and allocation of the costs of the arbitral proceedings, unless otherwise agreed by the parties.

7.2.6 After the award is rendered, a copy of the award that has been signed by all or a majority of the arbitral tribunal shall be delivered to each party.

7.3 Settlement

7.3.1 If, during the course of the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings. If requested by the parties and provided that the settlement does not violate any principles of public order, the arbitral tribunal shall record the settlement in the form of an award.

7.4 Power to award interest and costs

7.4.1 If interest is claimed by a party, the arbitral tribunal may order the other party to pay the requested sum in accordance with the contractual or legal interest rates applicable to the case.

7.4.2 As mentioned in paragraph 7.2.5 above, the award should contain details of the costs of the arbitral proceedings and the liability of each party for payment, unless otherwise agreed by the parties.

---

75 Ibid, art 43(3). The arbitration agreement will remain valid and a new arbitration may be commenced with a new arbitral tribunal.

76 Portuguese Arbitration Act, art 42(1).

77 Ibid, art 42(4).

78 Ibid, art 42(3). See further section 7.3 below.

79 Ibid, art 42(5).

80 Ibid, art 42(6).

81 Ibid, art 41(1).

82 Ibid, art 42(5).
7.5 **Termination of the proceedings**

7.5.1 There are several causes of termination of the arbitral proceedings, the most common being the issuance of the award. In addition, the arbitral proceedings may be terminated if:

— the parties enter into a settlement;
— the arbitration agreement is revoked by the parties, thereby reinstating their right to submit the dispute to the state courts;
— the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest for the respondent to obtain final settlement of the dispute;
— the parties agree on the termination of the arbitral proceedings;
— the arbitral tribunal finds that the continuation of the arbitral proceedings has for any other reason become unnecessary or impossible; or
— an award is not made before the end of the legal or agreed deadline.

7.6 **Effect of the award**

7.6.1 Following the expiry of the period in which a party may challenge the award, the award will have the same effect as a decision of the state courts of the lowest rank in the judicial hierarchy, and would therefore be directly enforceable.

7.7 **Correction, clarification and issue of a supplemental award**

7.7.1 Within 30 days of the award being rendered and received by the parties, the arbitral tribunal can correct any material or typographical errors, or any errors of a similar nature, on its own initiative or upon the application of a party.

7.7.2 Either party may also request the arbitral tribunal to clarify any obscurity or ambiguity in the award within this time frame.

7.7.3 Unless otherwise agreed by the parties, either party may request the arbitral tribunal to make an additional award within 30 days of receiving the rendered award as to claims presented in the arbitral proceedings but omitted therein.

---

83 *Ibid*, art 44(1) and (2).
84 Portuguese Arbitration Act, art 45(3); see paragraph 7.2.3 above.
85 On which see further sections 9.2 and 9.3 below.
86 Portuguese Arbitration Act, art 42(7).
87 *Ibid*, art 45(1) and (4).
88 *Ibid*, art 45(2).
89 *Ibid*, art 45(5).
8. **Role of the courts**

8.1 **Jurisdiction of the courts**

8.1.1 As discussed in paragraph 3.5.1 above, if an arbitration agreement is valid and effective, the parties are unable to submit a dispute that may arise under that agreement to the state courts. Where this occurs, the state court will order the end of the court proceedings, recognising that the matter is not within its jurisdiction.

8.2 **Stay of court proceedings**

8.2.1 The invocation of an arbitration agreement while proceedings are pending in a state court will not automatically cause those proceedings to be suspended. However, the Portuguese Civil Procedure Code allows for the suspension of court proceedings where there is a reasonable justification. Therefore, even if the facts in dispute are not identical, the state court may suspend the court proceedings based on the grounds of reasonable justification.

8.3 **Preliminary rulings on jurisdiction**

8.3.1 The preliminary rulings on jurisdictions are not prescribed by the Civil Procedure Code. However, the respondent must argue the lack of competence of the state court as part of its defence. A ruling will be delivered by the state court at the curative act or alternatively at the final judgment.

8.4 **Interim protective measures**

8.4.1 A court may, at any time, issue interim orders for the purposes of:

— maintaining or restoring the status quo;
— preventing or restraining a party from taking actions that are likely to cause harm or prejudice to the arbitral proceedings;
— providing means for preserving assets out of which a subsequent award may be satisfied; and
— preserving evidence that may be relevant and important to the resolution of the dispute.  

8.4.2 The conditions for granting interim measures are:

(i) the petitioner holds, with reasonable probability, the entitlement or right which the requested interim measure is intended to protect; and
(ii) the detriment resulting to the petitioner if relief is not granted could not be easily remedied.

---

90 Portuguese Civil Procedure Code, art 287(1).
91 Portuguese Arbitration Act, art 20(2).
92 Ibid, art 21(1).
8.5 **Obtaining evidence and other court assistance**

8.5.1 One of the few situations where the state courts may be involved in arbitral proceedings, without stepping into the arbitral tribunal’s sphere of jurisdiction, is when obtaining evidence from uncooperative parties or third parties to the arbitration.\(^93\)

8.5.2 This is not an intervention of the judicial courts in the arbitral procedure, but rather the provision of assistance by the judicial courts, which are empowered with *jus imperii* and may order unwilling parties to co-operate with the arbitral tribunal in providing evidence. The arbitral tribunals have no similar power, as their jurisdiction is limited to the terms of the arbitration agreement and its signatories.

9. **Challenging and appealing an award through the courts**

9.1 **Jurisdiction of the courts**

9.1.1 As mentioned above, the Portuguese Arbitration Act gives the same effect to an award as a state court decision at first instance. As described in detail below, the Portuguese courts will not entertain an appeal to an arbitral award unless explicitly agreed to by the parties. In this regard, the jurisdiction of the courts is therefore limited to applications to set aside, recognise and enforce awards.

9.2 **Appeals**

9.2.1 The award is final. However, parties may stipulate otherwise in their arbitration agreement.\(^94\)

9.2.2 However, where the parties authorise the arbitral tribunal to adjudicate the case on equitable terms, the award may not be appealed in any circumstances.\(^95\)

9.2.3 In an international arbitration, the parties are also unable to appeal an award, unless the parties have expressly agreed to the possibility of appeal to another arbitral tribunal and have regulated its terms and conditions.\(^96\)

9.2.4 The rules of most arbitral institutions in Portugal envisage the finality of the award.\(^97\)

---

\(^93\) Ibid, art 38(1).

\(^94\) Ibid, art 39(4) and 59(1)(e).

\(^95\) Ibid, art 39(4).

\(^96\) Ibid, art 53.

9.3 Applications to set aside an award

9.3.1 Apart from appealing against the award, the parties may bring a legal action for the annulment or setting aside of the award, provided that this is justified by one of the following situations:

— a party to the arbitration agreement was under some incapacity;
— the arbitration agreement is not valid under the law to which the parties have subjected it or, failing an indication thereon, under the Portuguese Arbitration Act;
— a mandatory principle of the procedure has been breached;
— the award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
— the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
— the subject matter of the dispute is not capable of settlement by arbitration under Portuguese law;
— the award is in conflict with the public policy of Portugal; or
— the award does not include the necessary signatures of the arbitral tribunal, or is insufficiently reasoned.98

9.3.2 The legal action of annulment must be filed within 60 days of the notice of the award to the parties or, if a request has been made to the arbitral tribunal to clarify any obscurity or ambiguity of the award, from the date on which the arbitral tribunal has decided on that request.99

9.3.3 The right to present a legal action for the annulment of the award is a mandatory provision of the Portuguese Arbitration Act that cannot be excluded by agreement between the parties and will prevail over any clause of the arbitration agreement that determines otherwise.100

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Awards made in domestic arbitrations are enforced on the same terms as the awards of the state courts. Therefore, the enforcement takes place within the state courts of first instance, without the need for any recognition or confirmation procedure.

---

98 Portuguese Arbitration Act, art 46(2).
99 Ibid, art 46(6).
100 Ibid, art 46(5).
10.2 **Foreign awards**

10.2.1 The recognition and enforcement of foreign awards follows the New York Convention\(^\text{101}\) rules if the country of origin is a signatory, resulting in fewer opportunities to refuse to recognise and enforce the award.

10.2.2 Where a country is not a signatory to the New York Convention,\(^\text{102}\) or any other treaties, conventions or European Union regulations that bind Portugal, these awards must undergo an internal procedure within the Portuguese state courts in order to be recognised and confirmed. Only after this procedure may such awards be enforced in Portugal.\(^\text{103}\) The grounds for refusal of recognition and confirmation are more ample but a review of the merits is not admissible in any case.

10.2.3 However, the recognition and enforcement of a foreign award must not lead to a result which is noticeably conflicting with international public policy.\(^\text{104}\)

11. **Special provisions and considerations**

11.1.1 Apart from the general scope of the Portuguese Arbitration Act, there are some specific arbitration regimes in different areas. These include mandatory and necessary arbitration in certain labour matters;\(^\text{105}\) matters concerning the consumers of essential public services;\(^\text{106}\) arbitration in tax matters;\(^\text{107}\) and arbitration in expropriation procedures, where the parties fail to reach agreement on the amount of the indemnity due to the expropriated party.\(^\text{108}\)

11.1.2 There are many arbitral institutions in Portugal, dealing with various issues. However, the largest and most relevant to international commercial arbitration remains the ACL. Its contacts details are as follows:

Rua das Portas de Santo Antão No. 89
1169-022 Lisboa, Portugal
www.port-chambers.com


\(^{102}\) Ibid.

\(^{103}\) Portuguese Arbitration Act, art 55; Civil Procedure Code, art 1094(1).

\(^{104}\) Portuguese Arbitration Act, art 54.


\(^{108}\) Expropriation Code, art 38 to 53.
12. **Concluding thoughts and themes**

12.1.1 The new Portuguese Arbitration Act has yet to show its true value, given that it only entered into force on 14 March 2012. However, since it embodies many of the long-awaited aspirations of the Portuguese arbitration experts, there is hope of its ultimate success.

12.1.2 The main advantage of the new regime is undoubtedly its approach to follow the Model Law (2006), thereby harmonising the Portuguese Arbitration Act with the arbitration legislation of more economically developed countries and erasing some traits of the past which are now regarded as having been surpassed by modern international practices.

13. **Contacts**

**CMS Rui Pena & Arnaut**  
Rua Sousa Martins, 10  
1050-218 Lisbon  
Portugal

**Joaquim Shearman de Macedo**  
**T** +351 210 958 100  
**F** +351 210 958 155  
**E** joaquim.macedo@cms-rpa.com

---

Table of Contents

1. Historical background 617

2. Scope of application and general provisions of the fourth book of the CPC 617
   2.1 Subject matter 617
   2.2 Structure of the law 618
   2.3 General principles 618

3. The arbitration agreement 619
   3.1 Definitions 619
   3.2 Formal requirements 619
   3.3 Special tests and requirements of the jurisdiction 621
   3.4 Separability 621
   3.5 Legal consequences of a binding arbitration agreement 621

4. Composition of the arbitral tribunal 622
   4.1 Constitution of the arbitral tribunal 622
   4.2 Procedure for challenging and substituting arbitrators 623
   4.3 Responsibilities of an arbitrator 625
   4.4 Arbitration fees 625
   4.5 Arbitrator immunity 626

5. Jurisdiction of the arbitral tribunal 626
   5.1 Competence to rule on jurisdiction 626
   5.2 Power to order interim measures 627

6. Conduct of proceedings 627
   6.1 Commencing an arbitration 627
   6.2 General procedural principles 627
   6.3 Seat, place of hearing and language of the arbitration 628
   6.4 Multi-party issues 628
   6.5 Oral hearings and written proceedings 629
   6.6 Default by one of the parties 631
   6.7 Taking of evidence 632
   6.8 Appointment of experts 632
   6.9 Confidentiality 633
   6.10 Court assistance in taking evidence 633
### 7. Making of the arbitral award and termination of proceedings 634
- **7.1 Choice of law** 634
- **7.2 Timing, form, content and notification of an award** 634
- **7.3 Settlement** 635
- **7.4 Power to award interest and costs** 635
- **7.5 Termination of the proceedings** 636
- **7.6 Effect of an award** 637
- **7.7 Correction, clarification and issuance of a supplemental award** 637

### 8. Role of the courts 638
- **8.1 Jurisdiction of the courts** 638
- **8.2 Rulings on jurisdiction** 639
- **8.3 Interim protective measures** 640
- **8.4 Obtaining evidence and other court assistance** 640

### 9. Challenging and appealing an award through the courts 640

### 10. Recognition and enforcement of awards 642
- **10.1 Domestic awards** 642
- **10.2 Foreign awards** 642

### 11. Special provisions and considerations 646
- **11.1 Consumers** 646
- **11.2 Employment law** 646

### 12. Concluding thoughts and themes 647

### 13. Contacts 647
1. **Historical background**

1.1.1 Arbitration in Romania has been regulated since 1865 by the provisions on arbitration contained in the fourth book of the Romanian Civil Procedure Code (*CPC*).\(^1\) Subject to various amendments, these provisions are still in force.

1.1.2 In 1953, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (*International Arbitration Court*) was established. During the communist era, the International Arbitration Court settled only international commercial disputes. In 1990, a new law establishing the International Arbitration Court was enacted, enabling this institution to also handle domestic commercial disputes. In 1993, the fourth book of the *CPC* was substantially amended. The Romanian legal provisions on arbitration now largely follow the principles and the structure of the Model Law (1985).\(^2\)

1.1.3 The recognition and enforcement of foreign awards is comprehensively regulated by the *CPC*,\(^3\) and by Law No 105/1992 on the Settlement of Private International Law Relations. Romania has also ratified the New York Convention and other relevant international conventions and bilateral treaties on arbitration.

2. **Scope of application and general provisions of the fourth book of the **CPC**

2.1 **Subject matter**

2.1.1 The provisions of the fourth book of the *CPC* constitute a basic framework for all forms of arbitration: they apply to ad hoc and institutional arbitration, to domestic and international arbitration as well as to arbitration at law and *ex aequo et bono*. The parties may choose to conduct their arbitrations on an ad hoc basis or may refer their dispute to a specialised arbitral institution, such as the International Arbitration Court.

2.1.2 Similar to the approach taken by the arbitration legislation of other Central European countries, the fourth book of the *CPC* draws a distinction between

---


3 See *CPC*, art 370 to 370\(^3\). (In Romanian practice, references to articles of the *CPC* which include a superscript number are to articles inserted into the *CPC* by way of amendment. Superscript numbers which appear in this chapter immediately after *CPC* article numbers and before any punctuation are references to superscript numbers in the *CPC*.)
domestic and international arbitration and contains specific provisions for international arbitration in Chapter X (Articles 369 to 369\textsuperscript{5}) of the CPC.

2.1.3 An arbitration taking place in Romania is considered international if it arises out of a private law relationship with a foreign element.\textsuperscript{4} An arbitration is considered international when at least one aspect of the matter in dispute is not related with the seat of arbitration.\textsuperscript{5} In general, it is considered that an international arbitration is one that concerns contracts that have a foreign element such that a conflict of laws could arise with respect to such contract.

2.2 Structure of the law

2.2.1 Chapters I to VII of the fourth book of the CPC deal with general provisions regarding arbitration (the arbitration agreement, composition and constitution of the arbitral tribunal, conduct of arbitral proceedings, costs of arbitration and the award). Chapter VIII deals with challenging the award, Chapter IX with its enforcement, Chapter X concerns special provisions applicable only to international arbitration and Chapter XI deals with the recognition and enforcement of foreign awards.

2.3 General principles

2.3.1 The CPC expressly stipulates three of the most important principles governing Romanian arbitration:

(i) Fairness: The parties must be treated equally by the arbitral tribunal and each party is entitled to a fair hearing.

(ii) Right to a defence: The parties must be given a full opportunity to present their cases and the arbitral tribunal must hear both sides.

(iii) The principle of hearing both sides. All parties must be properly served in order for the arbitral proceedings to take place. Each party must be given the opportunity to respond to all legal and factual aspects of the arbitration raised by the other party or by the arbitral tribunal before the arbitral proceedings close and an award is rendered.\textsuperscript{6}

2.3.2 Failure to comply with these principles may render the award null and void.

\textsuperscript{4} CPC, art 369.

\textsuperscript{5} E.g. the parties in dispute have different nationalities, the substantive applicable law is different than that of the \textit{lex fori}, the object of the dispute is in a different jurisdiction, or the place of performance of the contractual undertakings is different than \textit{lex fori}, etc.

\textsuperscript{6} CPC, art 358.
2.3.3 In addition, the CPC contains some further mandatory provisions which may also be regarded as general principles of arbitration in Romania, such as party autonomy, confidentiality and non-intervention by the courts.

— Party autonomy: The parties are free to agree on the procedure to be followed between them in their arbitration agreement, in a subsequent separate written agreement or by reference to arbitration rules, provided that there is no conflict with Romanian public policy and good morals.\(^7\)

— Confidentiality: The appointed arbitrators are liable for damages caused by the non-observance of their confidentiality obligation.\(^8\) This obligation to keep the arbitral proceedings confidential represents one of the main differences between arbitration and court litigation, which is governed by the principle of public hearings. However, there is no legal obligation for the parties to keep the arbitral proceedings confidential (except when confidentiality has been mutually agreed).

— Non-intervention by the courts: A valid arbitration agreement excludes the jurisdiction of the courts to settle the dispute to which the arbitration agreement relates.\(^9\) The court that would have been competent to determine the dispute if no arbitration agreement had been concluded retains, according to the CPC, jurisdiction in relation to certain matters, such as ordering interim measures, ruling on conflicts of jurisdiction and other matters (as detailed in sections 8 to 10 below).

3. The arbitration agreement

3.1 Definitions

3.1.1 An arbitration agreement is an agreement by which the parties agree that disputes arising out of or in connection with a contract are to be settled by arbitration. The arbitration agreement has to include the name of the arbitrators or the method of appointing the arbitral tribunal.\(^10\)

3.2 Formal requirements

3.2.1 The arbitration agreement may be in the form of an arbitration clause in a larger contract or in the form of a separate agreement (otherwise known as a submission agreement). An arbitration agreement must be in writing, otherwise it is null and
Any written document that confirms the will of the parties to arbitrate a dispute may be considered a valid arbitration agreement (e.g. letters, faxes, invoices, purchase orders and email correspondence).

3.2.2 In an arbitration clause, the parties agree to settle future disputes arising out of or in connection with the contract that contains the arbitration clause through arbitral proceedings. The arbitration clause shall specify the names of the arbitrators or the method of their appointment. However, failure to satisfy these requirements will not automatically render an arbitration clause invalid. If the parties have failed to establish the number of arbitrators, the dispute shall be arbitrated by three arbitrators, each party having the right to appoint one arbitrator, the chair being appointed by the other two arbitrators. In addition, the CPC contains default provisions for the appointment of the arbitrators where the parties have failed to nominate the arbitrators or to provide the method of appointment in an arbitration agreement (see for details paragraph 4.1.3 below).

3.2.3 In a submission agreement, the parties agree that a dispute that has already arisen between them shall be settled by arbitration. The requirements under the CPC in respect of submission agreements are the same as for arbitration agreements, i.e. a submission agreement shall specify the subject matter of the dispute and the names of the arbitrators or the method of their appointment. However, unlike the requirements for arbitration agreements, where a submission agreement fails to satisfy these requirements, it is null and void.

3.2.4 Subject to the rules of Romanian public policy, good morals and the mandatory provisions of the law, the parties may, by the arbitration agreement, by a subsequent written agreement or by reference to established arbitral rules, make provision for:
- the composition of the arbitral tribunal;
- the appointment, challenge and replacement of arbitrators;
- the time and place of the arbitral proceedings;
- the procedural norms to be followed by the arbitral tribunal (including a possible preliminary conciliation);

---

11 Ibid, art 343.
12 Ibid, art 343¹.
13 Ibid, art 345(2).
14 Ibid, art 347 and 348.
15 Ibid, art 343².
— payment of the costs of the arbitration as between the parties;
— the form and contents of the award; and
— any other details that are necessary for the proper conduct of the arbitral proceedings.  

3.2.5 In addition, the parties should also identify the language of the arbitration and the substantive law applicable to the merits of their dispute in their arbitration agreement (further information on this point is set out at paragraph 6.3.2 below).

3.3 Special tests and requirements of the jurisdiction
3.3.1 Persons with full legal capacity to exercise their rights may agree to settle patrimonial disputes by arbitration, except for disputes affecting rights which cannot by law be freely alienated. The term “patrimonial disputes” is commonly interpreted as referring to disputes involving a financial interest.

3.3.2 Under Romanian law, contracts may not resolve matters such as the civil status of persons, collective labour conflicts, certain shareholder disputes, annulment of intellectual property rights or bankruptcy proceedings. Accordingly, disputes concerning such legal relationships are not arbitrable.

3.4 Separability
3.4.1 The validity of the arbitration agreement is treated as independent from the validity of the main contract in which it has been incorporated. However, certain defects affecting the main contract, such as the legal incapacity of a contracting party, would also affect the validity of an arbitration agreement contained in the main contract.

3.5 Legal consequences of a binding arbitration agreement
3.5.1 The conclusion of an arbitration agreement excludes the jurisdiction of the courts to settle the dispute to which the arbitration agreement relates. If during proceedings before a State court a party invokes an arbitration agreement, then the court is obliged to verify if it has jurisdiction before it may resolve the dispute.

---

16 Ibid, art 341(2).
17 Ibid, art 340.
18 Disputes regarding the validity of the decisions taken by the General Meeting of Shareholders are not arbitrable.
19 CPC, art 343(2).
4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 In an international arbitration, any natural person of Romanian nationality and full legal capacity may be an arbitrator. However, in a domestic arbitration governed by Romanian law, the parties may only appoint Romanian nationals as arbitrators. Arguably, in an international arbitration subject to the 1961 European Convention, a Romanian party may appoint a foreign national as arbitrator (despite the law that only a foreign party may appoint a foreign citizen as arbitrator). Law number 59/2003 regarding international treaties stipulates that international treaties supersede national legislation and the 1961 European Convention expressly stipulates that foreign nationals may be arbitrators. In any event, under Romanian law, the parties may agree that the sole arbitrator or the chair of an arbitral tribunal consisting of several arbitrators shall be a citizen of a third state not connected with the dispute.

4.1.2 The CPC provides that arbitrators shall be appointed, dismissed or replaced in accordance with the terms of the arbitration agreement. In the case of international arbitration, the dispute shall be settled by an uneven number of arbitrators.

4.1.3 The CPC sets out a default procedure applicable in the event that the sole arbitrator or the arbitrators were not designated in the arbitration agreement and no provision was made for the method of their appointment. The claimant shall invite the other party in writing either to consent to the appointment of the proposed arbitrator in the case of a sole arbitrator, or to nominate its arbitrator in the case of an arbitral tribunal consisting of two or more arbitrators. The notice shall give full details of the proposed sole arbitrator or the arbitrator appointed by the claimant. The party so notified must respond within ten days of receipt of the notice with its comments on the appointment of the sole arbitrator or with the details of the arbitrator appointed by it, as the case may be.

4.1.4 In the absence of an agreement by the parties, the arbitral tribunal shall be composed of three arbitrators, one appointed by each party and the third (who shall be the chair of the arbitral tribunal) appointed by the two party-appointed arbitrators.

---

20 Ibid, art 344.
21 Ibid, art 347(1).
22 In domestic arbitration, the parties are free to agree whether the dispute shall be settled by a sole arbitrator or by two or more arbitrators; see CPC, art 345(1).
23 See CPC, art 347 and 348.
Arbitration in Romania

arbitrators.\textsuperscript{24} If there are several claimants and/or respondents, the parties with a common interest shall together appoint an arbitrator.\textsuperscript{25}

4.1.5 The International Arbitration Court has a list of 112 Romanian arbitrators and 42 foreign arbitrators.\textsuperscript{26} Parties conducting arbitral proceedings under the auspices of the International Arbitration Court must appoint their arbitrator(s) from that list.

4.1.6 The proposed arbitrators must accept (or decline) their appointment in writing and notify each party of their acceptance within ten days of receipt of the appointment proposal.\textsuperscript{27} In domestic arbitration, the acceptance term is five days from receipt of the appointment proposal. The two party-appointed arbitrators shall appoint the chair within twenty days from the date of the last acceptance.\textsuperscript{28} In domestic arbitration, the appointment term for the chair is ten days from the date of the last acceptance. The arbitral tribunal shall be regarded as constituted on the date on which the last arbitrator accepts his or her mandate.\textsuperscript{29}

4.1.7 Any clause in an arbitration agreement stipulating that one party may appoint an arbitrator instead of the other party or that one party may have more arbitrators than the other shall be null and void.\textsuperscript{30}

4.1.8 Either party may make a request to the competent court that it appoints an arbitrator in circumstances where the parties have agreed that the arbitral tribunal shall consist of a sole arbitrator but cannot reach an agreement on his or her appointment, a party fails to appoint its arbitrator, or the party-appointed arbitrators cannot agree on the appointment of the chair.\textsuperscript{31} The court shall summon the parties and make the appointment within ten days of the petition being submitted. The court’s decision cannot be appealed.

4.2 Procedure for challenging and substituting arbitrators

4.2.1 An arbitrator may be challenged on legal or contractual grounds in circumstances that give rise to justifiable doubts concerning his or her impartiality or independence. An arbitrator may also be challenged if he or she does not fulfil the requirements

\textsuperscript{24} Ibid, art 345(2).
\textsuperscript{25} Ibid, art 345(3).
\textsuperscript{26} This private arbitral institution is the most used in Romania.
\textsuperscript{27} CPC, art 349 and 369\textsuperscript{a}.
\textsuperscript{28} Ibid, art 350 and 369\textsuperscript{a}.
\textsuperscript{29} Ibid art 353\textsuperscript{a}.
\textsuperscript{30} Ibid, art 346.
\textsuperscript{31} Ibid, art 351(1).
or possess the qualifications agreed between the parties.\footnote{Ibid, art 351\textsuperscript{1} and 351\textsuperscript{4}.} The legal grounds for challenging a judge are also applicable for the challenging of arbitrators and are expressly set out in the CPC.\footnote{Ibid, art 27.} A party may not challenge an arbitrator it has appointed except on grounds that become apparent only after the appointment was made.\footnote{Ibid, art 351\textsuperscript{(2)}.}

4.2.2 A person who has been invited to act as an arbitrator must disclose all circumstances that could give rise to justifiable doubts as to his or her impartiality or independence and any other circumstances that may otherwise constitute a reason to challenge his or her appointment.\footnote{Ibid, art 351\textsuperscript{(3)}.} The arbitrator must also immediately disclose any such circumstances if they arise at any point between the date of his or her appointment and the conclusion of the arbitral proceedings. In such circumstances, the arbitrator cannot further participate in the decision making of the arbitral tribunal unless all parties have been appraised of the relevant circumstances and have informed the arbitrator or, as the case may be, the arbitral tribunal in writing that they do not intend to challenge the arbitrator in question.\footnote{Ibid, art 351\textsuperscript{(4)}.}

4.2.3 Any challenge to an arbitrator must be made within twenty days of the appointment of the arbitrator or of the occurrence of the circumstances giving rise to justifiable doubts as to the arbitrator’s impartiality or independence, as the case may be. In domestic arbitration, the time limit for a party to challenge an arbitrator is ten days from the appointment of the arbitrator or the occurrence of the circumstances giving rise to justifiable doubts as to the arbitrator’s impartiality or independence, as the case may be. In ad hoc arbitrations, such a challenge shall be determined by the court.\footnote{Ibid, art 351\textsuperscript{2} and 369\textsuperscript{3}.} In the case of institutional arbitrations, all the powers conferred to the court by Chapter III (Arbitrators, Constitution of the Arbitral Tribunal, Time and Place of the Arbitration) of the CPC shall be exercised by that institution according to its regulations unless they provide differently.\footnote{Ibid, art 353\textsuperscript{1}.} Non-compliance with the time limit may result in the right to challenge the arbitrator or the subsequent award being lost. The parties and the challenged arbitrator must be notified of the challenge. The court’s decision on the challenge is not subject to appeal.
4.2.4 If the appointment of an arbitrator is terminated (by challenge, resignation, dismissal, death or for any other reason), a substitute arbitrator shall be appointed in accordance with the same rules as those applicable to the original appointment of the arbitrator to be replaced, unless a substitute arbitrator has been named in the arbitration agreement.

4.3 Responsibilities of an arbitrator

4.3.1 One of the most important differences between a state court judge and an arbitrator is that the arbitrator may be liable for damages if he or she:
— resigns from the office without good reason after having accepted appointment as an arbitrator;
— fails without good reason to participate in the hearings and deliberations of the arbitral tribunal or to issue the award within the time frame established by the arbitration agreement or by law;
— does not observe his or her confidentiality obligation and discloses information obtained through his or her capacity as arbitrator without the approval of the parties; or
— is otherwise in material breach of an arbitrator's obligations.

4.4 Arbitration fees

4.4.1 The definition of arbitration expenses and the question of how these expenses shall be allocated between the parties in the award and paid is dealt with further in section 7.4 below.

4.4.2 The arbitral tribunal may make a provisional assessment of the amount of the arbitrators’ fees at the outset of the arbitration and order the parties to deposit that sum in equal amounts. The arbitral tribunal may also order such a deposit to be paid by the parties jointly and severally. Likewise, the arbitral tribunal may order the parties to pay other arbitral expenses in advance. If the respondent fails to pay the required deposit within the time limit established by the arbitral tribunal, the claimant shall pay the whole deposit and the arbitral tribunal shall subsequently establish in its award the amount of the fees due to each arbitrator, the amount of any other expenses and how these amounts are to be paid by the parties.

---

39 Ibid, art 352.
40 Ibid, art 353.
41 Ibid, art 359(1).
42 Ibid, art 359(1)(4).
43 Ibid, art 359(1)(3).
4.4.3 In any event, the arbitral tribunal shall not proceed with the arbitral proceedings until the deposits or advance payments requested have been made.\textsuperscript{44}

4.4.4 Either party may request the competent court to review the measures ordered by the arbitral tribunal, and to establish the amount of the arbitrators’ fees and of any deposits or advances requested.\textsuperscript{45}

4.4.5 The arbitrators’ fees shall be paid to the arbitrators after the award has been communicated to the parties. If arbitral proceedings are commenced but do not proceed to the making of an award, the arbitrators’ fees shall be reduced accordingly.\textsuperscript{46}

4.4.6 Where the arbitral tribunal has ordered payment of a deposit on account of arbitration expenses, the amount of such expenses (and any surplus or deficit) shall subsequently be regulated in the award and be paid before the award is communicated to the parties or deposited with the court.\textsuperscript{47}

4.4.7 In institutional arbitral proceedings the arbitrators’ fees and expenses shall be established and paid in accordance with the rules of the relevant arbitral institution (see paragraph 7.4.4 below).\textsuperscript{48}

4.5 \textbf{Arbitrator immunity}

4.5.1 The CPC does not provide any specific provisions with respect to the immunity of arbitrators. However, it is implied that an arbitrator may not be held liable for the award rendered except in case of fraud or other misconduct as detailed in paragraph 4.3.1 above.

5. \textbf{Jurisdiction of the arbitral tribunal}

5.1 \textbf{Competence to rule on jurisdiction}

5.1.1 The CPC gives the arbitral tribunal the power to rule on its own jurisdiction.\textsuperscript{49} At the outset of the arbitral proceedings, the arbitral tribunal examines whether it has jurisdiction to determine the dispute between the parties, even if no party has

\textsuperscript{44} Ibid, art 359\textsuperscript{2}.
\textsuperscript{45} Ibid, art 359\textsuperscript{3}.
\textsuperscript{46} Ibid, art 359\textsuperscript{4}.
\textsuperscript{47} Ibid, art 359\textsuperscript{5}.
\textsuperscript{48} Ibid, art 359\textsuperscript{6}.
\textsuperscript{49} Ibid, art 343\textsuperscript{(2)}. 
challenged the jurisdiction. It may issue an interim award on jurisdiction. Such an award may only be challenged before the courts, together with the final award of the arbitral tribunal.

5.2 Power to order interim measures
5.2.1 The arbitral tribunal has jurisdiction to order interim or protective measures during the arbitration. If the parties do not voluntarily comply with such measures, they may be enforced with the permission of the court. After the permission has been granted by the court, the enforcement shall be made via an enforcement officer. The courts also have parallel jurisdiction to order interim measures.

6. Conduct of proceedings

6.1 Commencing an arbitration
6.1.1 In the absence of agreement by the parties stating otherwise, the arbitral proceedings commence when the claimant serves on the respondent a copy of its written statement of claim together with copies of the relevant documents on which it relies as evidence in support of its claim. The claimant has to serve copies of the request for arbitration and related annexes to each of the arbitrators.

6.2 General procedural principles
6.2.1 The arbitral tribunal shall conduct the arbitral proceedings:
— on the basis of the rules set out in the arbitration agreement concluded between the parties (subject to mandatory provisions of public policy and good morals);
— if the parties have not agreed the procedure to be followed, at its procedural discretion; or
— if the arbitral tribunal does not establish any procedural norms, in accordance with the optional procedural rules for the conduct of arbitral proceedings in the provisions of the fourth book of the CPC (as to which see further below).

6.2.2 In practice, parties from Romania frequently provide in their arbitration agreement for their disputes to be resolved by arbitration before the International Arbitration

---

50 Ibid, art 358.
51 On which see paragraph 8.3.1 below.
52 CPC, art 355 and 356.
53 Ibid, art 341(1) and 341(2).
54 Ibid, art 341(3).
55 Ibid, art 341(4).
Court, in accordance with its sets of procedural rules. The CPC expressly provides that the parties may agree that the arbitration be administered by such a permanent arbitral institution.

6.3 **Seat, place of hearing and language of the arbitration**

6.3.1 The parties are free to agree the seat of the arbitration. Failing such an agreement, the arbitral tribunal determines the seat of the arbitration. In international arbitration, the parties may stipulate in their arbitration agreement that the arbitral proceedings shall take place in Romania or in another country.

6.3.2 Domestic arbitral proceedings shall be conducted in the Romanian language. In relation to international arbitral proceedings, the language of the arbitral proceedings shall be that chosen by the parties in their arbitration agreement or, absent a contractual choice or any subsequent agreement, in the language of the contract giving rise to the dispute, or in another international language chosen by the arbitral tribunal. The arbitral tribunal shall arrange for the services of a translator at the request of a party which is not familiar with the language of the arbitral proceedings and at that party’s expense. The parties are free to use their own translators for the purposes of the arbitral proceedings.

6.4 **Multi-party issues**

6.4.1 As with any other type of agreement, an arbitration agreement is only binding upon the parties to that arbitration agreement. Therefore, in principle, a non-party to the arbitral agreement may only join the arbitration if all of the parties to those arbitral proceedings agree.

6.4.2 In the case of multi-party agreements including an arbitration clause, any party to that agreement may intervene in the arbitral proceedings upon its own will, or may join the arbitration upon the request of one of the parties to the arbitration. The parties that have common interests may appoint a single arbitrator.

---


57 CPC, art 341.


6.5 Oral hearings and written proceedings

6.5.1 The requirements as to the contents of the written statement of claim are set out in the CPC. It has to contain:

— the name, domicile or residence of the parties or, in the case of legal persons, their name and seat, as well as their company registration number, telephone number and bank account details;
— the name and capacity of any representatives of the claimant (documentary evidence of such capacity should be attached to the statement of claim);
— reference to the arbitration agreement or the submission agreement (copies of the main agreement containing the arbitration agreement or of the submission agreement should also be attached to the statement of claim);
— the subject matter and value of the claim and of the calculation by which that value was determined;
— the factual and legal grounds and the evidence on which the claim is based;
— the names and places of residence of the members of the arbitral tribunal; and
— the signature of the claimant.63

6.5.2 Within 30 days of receipt of a copy of the statement of claim, the respondent must serve its defence.64 The defence must include:

— any objections with regard to the statement of claim;
— the factual and legal reply to the statement of claim and the evidence relied upon; and
— the content set out in paragraph 6.5.1 above as applicable to the statement of defence.

6.5.3 If the arbitral proceedings are delayed because of the respondent’s failure to submit its statement of defence on time, the respondent must pay the costs caused by such delay.65

6.5.4 After the defence has been filed, additional objections or defences may only be raised prior to the first hearing.66 If the respondent has counterclaims arising out of the same contractual relationship, it may submit them to the arbitral tribunal together with the defence, but no later than at the first hearing. The counterclaim must meet the same requirements as the statement of claim.67 Each party may

63 See ibid, art 355.
64 Ibid, art 356.1.
65 Ibid, art 356(3).
66 Ibid, art 356(2).
67 Ibid, art 357.
amend its written submissions in the course of the arbitral proceedings, but only prior to the first hearing before the arbitral tribunal.

6.5.5 All statements of case, written documents and other notifications that are submitted to the arbitral tribunal by one party must be copied to the other party. All communications between the parties and the arbitral tribunal shall be made by registered letter with receipt of delivery or confirmation of receipt. Information may also be transmitted by fax or by any other means of communication that provides evidence of the transmission and of the transmitted text. Documents may also be delivered directly to a party against signature of a receipt.

6.5.6 Immediately after the expiration of the time limit for the filing of the statement of defence, the arbitral tribunal shall examine whether the dispute is ready to be heard and, if necessary, order adequate measures for the completion of any outstanding matters. Afterwards, the arbitral tribunal must fix the time for the hearing and summon the parties once the case is ready to be heard and the submissions have to be filed. There must be an interval of at least 30 days between the date of receipt of the summons by the parties and the date of the hearing. In domestic arbitration, there must be an interval of at least 15 days between the date of receipt of the summons by the parties and the date of the hearing.

6.5.7 The parties may participate in the arbitral proceedings (and attend the hearing) personally or through any representative, though arbitral hearings are not open to the public. A party that attended or was represented at a hearing shall not be summoned again to every hearing in the course of the arbitral proceedings, but is deemed to have knowledge of the next hearing date by virtue of its attendance at the previous hearing. Hearing dates of which the parties have been informed or for which summonses have been served may only be changed for good reasons and if the parties are notified thereof.

6.5.8 The parties must raise any objections to the existence and validity of the arbitration agreement, the constitution of the arbitral tribunal, the scope of the arbitral tribunal’s jurisdiction and the conduct of the arbitral proceedings up to that point.

---

68 Ibid, art 358¹.
69 Ibid, art 358²(1).
70 Ibid, art 358²(2).
71 Ibid, art 358³ and 369³.
72 Ibid, art 358⁴.
6.5.9 The parties must also present their petitions and any documentary evidence no later than at the first hearing. Any evidence which has not been identified by the parties before the first hearing cannot be invoked in the arbitral proceedings, except in cases where the need for further evidence has resulted from the arbitral proceedings, or the additional evidence does not delay the resolution of the dispute.

6.5.10 The CPC requires that the arbitral proceedings shall be recorded in a minute (incheiere). Any decision of the arbitral tribunal and the grounds for that decision shall be recorded therein.

6.5.11 The minutes of each session of the arbitral tribunal shall contain:
— the composition of the arbitral tribunal;
— the date and place of the session;
— full details of the parties, their representatives and any other persons who participated in the arbitral proceedings;
— a brief description of the proceedings at that session;
— the requests and arguments of the parties;
— the reasons for any measures ordered;
— the order of the arbitral tribunal; and
— the signatures of the arbitrators.

6.5.12 The parties are entitled to review the contents of the minutes and the documents on the file. The arbitral tribunal may amend or complement the minutes of a session by other minutes upon the parties’ request or ex officio. A copy of the minutes of each session shall be served on the parties at their request.

6.6 Default by one of the parties
6.6.1 The failure by a party to attend a hearing, although duly summoned, shall not prevent the progress of the arbitral proceedings, unless the absent party submits, no later than on the day before the hearing, a request to the arbitral tribunal for

73 Ibid, art 358(1).
74 Ibid, art 358(2).
75 Ibid, art 358(2).
76 Ibid, art 358(3).
77 Ibid, art 358(3).
adjournment of the hearing on good grounds and notifies the other party thereof. 78 Only one adjournment may be granted.

6.6.2 Either party may request in writing that the dispute be settled in its absence on the basis of the documents filed. 79

6.6.3 In the event that both parties do not attend a hearing on the appointed date although duly summoned, the arbitral tribunal shall proceed with the determination of the dispute, except where the parties have requested an adjournment on good grounds. 80 Alternatively, the arbitral tribunal may also postpone the determination of the dispute and summon the parties where their presence at the hearing or the production of evidence is deemed necessary.

6.7 Taking of evidence
6.7.1 The rules on evidence are set out in Articles 358\textsuperscript{10} and 358\textsuperscript{11} of the CPC. However, in addition to these arbitration specific rules, arbitral tribunals also frequently apply the rules of the CPC that govern witness and expert evidence in court proceedings.

6.7.2 Each party has the burden of proof in relation to the facts on which it bases its claim or defence. In determining the dispute, the arbitral tribunal may request the parties to file written submissions on the claim and the facts of the dispute and may order the production of any evidence as provided by the law.

6.7.3 Evidence shall be produced during the sessions of the arbitral tribunal. Witnesses and experts shall be heard without taking an oath. The arbitral tribunal cannot compel witnesses or experts to give evidence but may request the assistance of the courts in taking the required measures. The courts may order witnesses to give evidence and make statements and may impose sanctions for failure to do so. Cross-examination is not normally part of the arbitration procedure in Romania but the parties under the control of the arbitral tribunal may put questions to the opponent’s witnesses.

6.8 Appointment of experts
6.8.1 The arbitral tribunal may order the use of an expert to clarify technical or accounting issues at the request of any of the parties or \textit{ex officio}. The tribunal-appointed expert may request that the parties produce documents or other information and must take the parties’ statements into account when preparing his or her report.

\textsuperscript{78} Ibid, art 358\textsuperscript{5}.

\textsuperscript{79} Ibid, art 358\textsuperscript{6}.

\textsuperscript{80} Ibid, art 358\textsuperscript{7}.
If a party acts in such a way as to hinder the production or completion of an expert report, for example, by failing to provide the expert with documentation he or she has requested, the arbitral tribunal may impose a fine on such party. A party may also apply to the arbitral tribunal for an order that another party produce documents that it holds. Failure to produce such documents entitles the arbitral tribunal to draw an adverse inference from a party’s failure to produce a requested document.

6.8.2 Experts normally summarise their findings in a written report, which is submitted to the arbitral tribunal and communicated by the arbitral tribunal to the parties. The parties may submit comments and questions on the report prior to the hearing. The expert may be questioned by the parties at the hearing under the control of the arbitral tribunal. The parties are entitled to appoint party-appointed experts which may render their own report in which they agree or disagree with the tribunal-appointed expert/experts.

6.9 Confidentiality
6.9.1 Confidentiality is one of the distinguishing factors of arbitration. Arbitrators may be held liable for damages in the event that they breach the confidentiality of the arbitration and disclose information relating to the arbitral proceedings without the prior approval of the parties.

6.9.2 The hearings are not public, however, if the parties did not previously agree to keep the arbitral proceedings confidential, they may disclose the details of the arbitral proceedings.

6.10 Court assistance in taking evidence
6.10.1 Any interested party may institute proceedings before the court in order to remove any impediments that might arise in the composition of the arbitral tribunal or conduct of the arbitration. Such proceedings should be brought before the court of first instance that, absent the arbitration agreement, would normally have jurisdiction over the dispute. The court shall settle such petitions summarily and as a matter of priority.

81 Ibid, art 108(1)(d).
82 Ibid, art 172 to 176.
83 Ibid, art 353(3).
84 Ibid, art 342(1).
85 Ibid, art 342(3).
7. Making of the arbitral award and termination of proceedings

7.1 Choice of law
7.1.1 The arbitral tribunal shall make its award on the basis of the provisions of the main contract and the applicable rules of law, taking into consideration the usage of the trade applicable to the dispute.\textsuperscript{86}

7.1.2 The law applicable to contractual obligations is to be determined in accordance with the regulations of the European Union.\textsuperscript{87}

7.1.3 The arbitral tribunal may only decide a dispute \textit{ex aequo et bono} if the parties have expressly authorised it to do so.\textsuperscript{88}

7.2 Timing, form, content and notification of an award
7.2.1 The award shall be drawn up in writing and shall include:

— the names of the members of the arbitral tribunal and the place and date of the making of the award;

— the parties and their addresses (domicile, residence or place of incorporation) as well as the full names of the parties’ representatives and of any other persons who participated in the arbitral proceedings;

— reference to the arbitration agreement on which the arbitral proceedings were based;

— the subject matter of the dispute and a summary of the parties’ cases;

— the \textit{de facto} and \textit{de jure} reasons for the award or, in case of an award made \textit{ex aequo et bono}, the grounds on which the decision is based;

— the decisions and orders of the arbitral tribunal; and

— the signatures of all arbitrators.\textsuperscript{89}

7.2.2 Unless otherwise agreed by the parties, the arbitral tribunal shall make its award within five months from the date on which the arbitral tribunal is constituted.\textsuperscript{90} The parties may agree to extend this term,\textsuperscript{91} and the term may also be extended by the arbitral tribunal by up to two months if there are good reasons for doing

\textsuperscript{86} Ibid, art 360(1).
\textsuperscript{87} (EC) Regulation 593/2008 (Rome I); Romanian Civil code, art 2.640.
\textsuperscript{88} CPC, art 360(2).
\textsuperscript{89} Ibid, art 361.
\textsuperscript{90} Ibid, art 353\textsuperscript{2}(1).
\textsuperscript{91} Ibid, art 353\textsuperscript{2}(3).
so. In addition, the CPC sets out circumstances in which the term of the arbitration is extended or suspended automatically as a matter of law, such as when an arbitrator is challenged or a court is seized with respect to a matter relating to the arbitration. If any of the parties, prior to the first hearing, notified the arbitral tribunal and the other party about the necessity of the arbitration to be terminated within the five month term, the arbitral proceedings may be terminated if not resolved within the applicable term.

7.2.3 The award must be notified to the parties within one month of being made and, at the request of a party, the arbitral tribunal shall issue a certificate of service. Within 20 days of communicating the final award to the parties, the arbitral tribunal shall deposit the file with the competent court, for archiving purposes, except if the arbitration was administered by a specialised arbitral institution, in which case that arbitral institution archives the file.

7.3 Settlement

7.3.1 The provisions of the CPC relating to arbitral proceedings are silent with respect to the possibility of entering into a settlement. However, based on the general rules of the CPC and of the Romanian Civil Code, parties are allowed to end an arbitrable dispute by a settlement agreement.

7.3.2 Once the parties agree on the terms of the settlement, they may request the arbitral tribunal to issue an award that includes the terms of the settlement. This award will have the same effect as any final award.

7.4 Power to award interest and costs

7.4.1 The arbitral tribunal is entitled to award interest. If the underlying agreement between the parties makes provision for payment of interest at a certain rate, the arbitral tribunal may award interest at the contractually agreed rate until the date of payment. If no contractual interest has been stipulated, and the Romanian substantive law is applicable to the arbitration, the arbitral tribunal may award legal interest (6% if the payment obligation was established in foreign currency) or at the official bank rate of the National Bank of Romania plus 4 points (if the payment obligation was established in Romanian currency).

---

92 Ibid, art 353(4).
93 Ibid, art 353(2) and (5).
94 Ibid, art 353(6).
95 Government Ordinance 13/2011.
7.4.2 The CPC contains detailed provisions in relation to expenses relating to arbitral proceedings, including expenses for the:

— administration and conduct of the arbitral proceedings;
— taking of evidence;
— cost of travel for parties, arbitrators, experts and witnesses; and
— arbitrators’ fees.

7.4.3 The CPC provides that such expenses shall be paid by the parties in accordance with their agreement. In the absence of any agreement, they shall be borne by the losing party or, if the claimant is only partially successful, by the parties in proportion to their respective success and failure. Unless the parties agree otherwise, the arbitration expenses payable by the losing party do not normally include the legal fees and other costs of representation of the successful party. 96

7.4.4 For institutional arbitral proceedings, the arbitration expenses, including the charges for organising the arbitration and the arbitrators’ fees, shall be established and paid in accordance with the rules of the relevant arbitral institution. 97 The International Arbitration Court, for example, has detailed provisions in relation to costs in its arbitration rules and has established a fee schedule. 98

7.4.5 For international arbitral proceedings, the fees of the arbitrators and their travel expenses shall be borne by the respective parties that appointed them, unless otherwise agreed. In the case of a sole arbitrator or chair, these expenses shall be shared equally between the parties. 99

7.5 Termination of the proceedings

7.5.1 Once all of the evidence has been submitted, the parties will be required to submit their final conclusions on the merits of the case during an oral hearing. Once this final hearing has taken place, the arbitral proceedings are closed and the arbitral tribunal will start the deliberation process.

7.5.2 The CPC requires that in all cases the arbitral tribunal must participate in private deliberations before issuing the final decision. Such participation must be recorded in the award. 100

---

96 CPC, art 359.
97 Ibid, art 359.
99 CPC, art 369.
100 Ibid, art 360(1).
7.5.3 Where the arbitral tribunal is composed of an uneven number of arbitrators, the award shall be made by a majority of votes. Any dissenting opinion must be recorded in writing and signed by the relevant arbitrator, stating the reasons on which it is based.\(^{101}\)

7.5.4 Where the arbitral tribunal is composed of an even number of arbitrators and no majority can be formed, an umpire shall be appointed in accordance with the terms of the parties’ arbitration agreement or, in the absence of an agreement, by the competent court.\(^{102}\) The appointed umpire shall either accept the decision proposed by one of the arbitrators, which he or she may amend, or render another decision. However, the umpire may not undertake either action until hearing both parties and following consultation with the other arbitrators.

7.6 **Effect of an award**

7.6.1 An award which has been served on the parties has the same effect as a judicial decision; it is final and binding and also enforceable (see further below at section 10).\(^{103}\)

7.7 **Correction, clarification and issuance of a supplemental award**

7.7.1 If the award contains any material errors in the text of the award (e.g. calculation or typographical errors or similar obvious errors), the arbitral tribunal may correct such errors by an award of correction on its own initiative or at the request of one of the parties made within twenty days of receipt of the award.\(^{104}\) In domestic arbitration, the term for submitting such request is ten days. All of the parties need to be notified of the application for correction and a new hearing shall be established to discuss the application.

7.7.2 Either of the parties may also request, within ten days of receiving the award, that the arbitral tribunal make an additional award in respect of any claim that was presented to the arbitral tribunal but not dealt with by the arbitral tribunal in its issued award. The arbitral tribunal may only agree to such an additional award after summoning the parties.\(^{105}\)

\(^{101}\) *Ibid*, art 360\(^2\).

\(^{102}\) *Ibid*, art 360\(^3\).

\(^{103}\) *Ibid*, art 363(3).

\(^{104}\) *Ibid*, art 362(1) and 369\(^3\).

\(^{105}\) *Ibid*, art 362(1).
7.7.3 The award of correction – as well as an additional award – forms an integral part of the award. However, the parties are not obliged to pay any additional costs in respect to such further awards.\textsuperscript{106}

7.7.4 The CPC does not contain provisions specifically dealing with the interpretation of awards by the arbitral tribunal, but arbitral tribunals may arguably respond to applications by a party for clarification of the award by applying the general rules of the CPC accordingly.

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 Jurisdiction for applications for court measures in support of the arbitral process generally lies with the court that would have had jurisdiction to determine the merits of the dispute in the absence of a valid and binding arbitration agreement.\textsuperscript{107} This includes applications:

— to remove any impediments that may arise in the administration or conduct of the arbitration;\textsuperscript{108}

— to appoint or replace arbitrators;\textsuperscript{109}

— for interim protective measures;\textsuperscript{110}

— for taking of evidence where the attendance of witnesses has to be compelled;\textsuperscript{111}

— to review arbitrators’ fees, deposits, advances or other payments required by the arbitral tribunal;\textsuperscript{112} and

— for leave for the enforcement of domestic awards.\textsuperscript{113}

8.1.2 The court immediately superior to that identified pursuant to Article 242 of the CPC has jurisdiction in respect of applications for:\textsuperscript{114}

\begin{itemize}
  \item[106] Ibid, art 362(4).
  \item[107] Ibid, art 342.
  \item[108] See ibid, art 342.
  \item[109] See ibid, art 351, 351(2) and 352.
  \item[110] See ibid, art 258(8).
  \item[111] See ibid, art 358\textsuperscript{111}.
  \item[112] See ibid, art 359\textsuperscript{3}.
  \item[113] See ibid, art 367(1).
  \item[114] See ibid, art 342.
\end{itemize}
— setting aside of awards;\textsuperscript{115} and
— settling any conflict of jurisdiction between the arbitral tribunal and the court identified pursuant to Article 242 of the CPC.\textsuperscript{116}

8.1.3 Jurisdiction for recognition and enforcement of foreign awards under the provisions of Law No 105/1992 lies with the county court in the district where the person refusing to fulfil the foreign award has its domicile or place of incorporation, or where the award is to be enforced.\textsuperscript{117}

8.2 \textbf{Rulings on jurisdiction}

8.2.1 As stated above at paragraph 5.1.1, the arbitral tribunal is the judge of its own jurisdiction (competence-competence). The arbitral tribunal’s decision on jurisdiction is subject to challenge only together with the final award (see further below).

8.2.2 Where a party commences court proceedings in relation to subject matter that is covered by an arbitration agreement concluded between the parties, and the other party invokes the arbitration agreement before the court, the court shall determine its jurisdiction.\textsuperscript{118}

8.2.3 The court retains jurisdiction to decide the dispute on its merits if it finds that:
— the arbitration agreement is null and void, inoperative or incapable of being performed;
— the respondent has already submitted its defence on the merits (and any counterclaims) without any jurisdictional reservation based on the arbitration agreement; or
— the arbitral tribunal cannot be constituted for reasons which fall within the sphere of responsibility of the respondent, for example if the respondent repeatedly appoints arbitrators that it knows will refuse such appointments with a view to causing excessive delay to the constitution of the arbitral tribunal.\textsuperscript{119}

8.2.4 Otherwise, the court shall declare at the request of one of the parties that it lacks jurisdiction and refer the parties to arbitration.\textsuperscript{120} In the case of a conflict of

\textsuperscript{115} \textit{See ibid}, art 365.

\textsuperscript{116} \textit{See ibid}, art 343\textsuperscript{4}.

\textsuperscript{117} \textit{International Relations Law}, art 170(1) and 173(1).

\textsuperscript{118} \textit{CPC}, 343\textsuperscript{4}(1).

\textsuperscript{119} \textit{CPC}, art 343\textsuperscript{4}(2).

\textsuperscript{120} \textit{CPC}, art 343\textsuperscript{4}(3).
jurisdiction between the arbitral tribunal and the court, the appropriate higher
court shall decide the issue.\textsuperscript{121}

8.3 Interim protective measures
8.3.1 Before or during the arbitral proceedings, any party may request that the court
grant interim injunctions or order other conservatory or protective measures
related to the subject matter of the arbitration,\textsuperscript{122} or establish relevant factual
circumstances (i.e. preserve evidence). A copy of the statement of claim and of the
arbitration agreement must be submitted to the court in support of the petition.\textsuperscript{123}
The party requesting such measures before the court shall immediately notify the
arbitral tribunal once they have been granted by the court.\textsuperscript{124}

8.4 Obtaining evidence and other court assistance
8.4.1 Any interested party may institute proceedings before the court which, in the
absence of the arbitration agreement, would have had jurisdiction to judge the
merits of the dispute at first instance in order to remove any impediments that
might arise in the administration or conduct of the arbitration. The court shall
settle such petitions summarily and as a matter of priority.\textsuperscript{125}

9. Challenging and appealing an award through
the courts
9.1.1 Parties may agree that an award shall be subject to appeal to a second tier arbitral
tribunal. However, there is no right to appeal an award to the courts.
9.1.2 The award may only be set aside following a petition for annulment for the
following limited reasons:
— the dispute was not arbitrable;
— the arbitral tribunal decided the dispute in the absence of an arbitration
agreement or on the basis of a void or inoperative arbitration agreement;
— the arbitral tribunal was not constituted in accordance with the requirements
of the arbitration agreement;

\textsuperscript{121} \textit{Ibid}, art 343\textsuperscript{4}(4).
\textsuperscript{122} \textit{Ibid}, art 358\textsuperscript{1}(1).
\textsuperscript{123} \textit{Ibid}, art 358\textsuperscript{2}(2).
\textsuperscript{124} \textit{Ibid}, art 358\textsuperscript{3}(3).
\textsuperscript{125} \textit{Ibid}, art 342(3).
— a party was not present when the arbitral proceedings took place and the legal requirements of the summoning procedure were not complied with;
— the award was rendered after expiry of the five month arbitration term provided under Article 353(1) of the CPC for making the award;
— the arbitral tribunal decided matters which were not the subject of the claim, has failed to decide upon a claim submitted for decision in the request for arbitration or has awarded more than requested;
— the award does not include the arbitral tribunal’s decision or does not give reasons, does not state the date and place where it was made or it is not signed by the arbitrators;
— the decision in the award includes provisions which cannot be implemented; or
— the award is contrary to public policy, good morals or mandatory provisions of the law.126

9.1.3 The parties cannot waive in advance the right to institute proceedings for the setting aside of the award. Such right may only be waived after the award is made.127 The waiver can be made by way of agreement or unilateral declaration of the party waiving such right.

9.1.4 The appropriate court for proceedings to set aside the award is the court immediately superior to the court which would have had jurisdiction to determine the dispute in the absence of the arbitration agreement.128 Proceedings to set aside the award may be instituted within one month from the date of communication of the award.129 Pending its substantive decision, the court may, after requiring security in an amount fixed by it, suspend the enforcement of the award against which setting aside proceedings have been instituted.130

9.1.5 The court will decide the request in accordance with the provisions of Article 366 of the CPC. If the court finds the request justified, it shall set the award aside and, if the dispute is ready to be determined, it shall make a decision on the merits within the limits of the arbitration agreement. If further evidence is needed before a decision on the merits can be made, the court will request the parties to submit that evidence and make its decision on the merits after that evidence has been submitted. Irrespective of the reasons for which the award was set aside, the court

126 See CPC, art 364.
127 CPC, art 364.1.
128 Ibid, art 365(1).
129 Ibid, art 365(2).
130 Ibid, art 365(3).
shall always render a judgment on the merits of the case in order to solve the dispute between the parties.

9.1.6 If the court proceeds to determine the dispute on the merits, the court’s judgment setting aside the award can only be challenged together with the judgment on the merits. The judgment of the court on the setting aside of the award is subject to a final appeal (recurs) before the superior court.

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 An award is binding and shall be complied with by the party against whom it was made immediately or within the time limit specified in the award.\(^{131}\) If necessary, the successful party may apply for leave to enforce the award (exequatur).\(^ {132}\)

10.1.2 Leave for enforcement shall be granted without a hearing unless there are doubts as to the regularity of the award, in which case the court will summon the parties to attend a hearing. Once leave for enforcement of the award has been granted, the award may be enforced in the same way as a court judgment.\(^ {133}\) The enforceable award represents a writ of execution based on which the party in whose favour it was made may commence the enforcement proceedings.

10.2 Foreign awards

Arbitral awards subject to international arbitration treaties

10.2.1 Romania ratified the New York Convention in 1961 and is also a party to the 1961 European Convention (as well as other international arbitration conventions and treaties). The vast majority of foreign awards will be subject to the provisions of one of these treaties.

10.2.2 When signing the New York Convention, Romania stated that it will apply the New York Convention only to the recognition and enforcement of awards made in the territory of another contracting state. Also, Romania will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law. With regard to awards made in the territory of non-contracting states, Romania will apply the New York Convention only to the extent to which those states grant reciprocal treatment.

\(^{131}\) Ibid, art 367.

\(^{132}\) Ibid, art 367.

\(^{133}\) Ibid, art 368.
10.2.3 If no multi- or bilateral treaty applies, the procedure for recognition and enforcement of foreign awards is set out in Romanian law.\(^\text{134}\) However, in practice, even if the award is subject to international treaties, the Romanian courts apply a mixture of the conditions set forth in the international convention and Law No 105/1992 (the Law on the Settlement of Private International Law Relations) \((\text{International Relations Law})\). In any case, as set forth below, the provisions regarding the recognition and enforcement of awards set forth in the International Relations Law represent, in general, a duplication of the conditions contained in the New York Convention.

10.2.4 An award is considered foreign if it was made in the territory of a foreign state.\(^\text{135}\) Foreign awards acquire the force of \textit{res judicata} in Romania if they are recognised pursuant to Articles 167 to 172 of the International Relations Law.\(^\text{136}\) A foreign award that is not complied with voluntarily by the party against which it was made may be enforced in Romania under the provisions of the International Relations Law.\(^\text{137}\)

10.2.5 Foreign awards may be recognised either directly pursuant to an application for recognition or indirectly if they are relied upon in different substantive proceedings pending in the Romanian courts.\(^\text{138}\) Foreign awards made by a competent arbitral tribunal have evidential force before the Romanian courts with regard to the facts which they establish, regardless of whether they are formally recognised.\(^\text{139}\)

10.2.6 Foreign awards granting interim measures of protection or awards which are only provisionally enforceable cannot be enforced in Romania.\(^\text{140}\)

\textit{Conditions for the recognition of a foreign award}

10.2.7 Pursuant to the International Relations Law, foreign awards may be recognised in Romania, provided that the following conditions are cumulatively met:

— the award is final under the national law of the state where it was issued. It therefore follows that the respondent has notice of the award, which would allow it to exercise any available right of appeal against the award;

\(^{134}\) See CPC, art 370\(^{3}\) and International Relations Law, s 4, art 167–177.

\(^{135}\) CPC, art 370.

\(^{136}\) The provisions of International Relations Law, s 4 relate primarily to the effect given to foreign court decisions in Romania. However, International Relations Law, art 181 clarifies that art 167–178 regarding the recognition and enforcement of foreign judicial decisions also apply to foreign awards.

\(^{137}\) CPC, art 370\(^{2}\) and International Relations Law, art 173–177.

\(^{138}\) Law No 105/1992, art 170(2).

\(^{139}\) CPC, art 370\(^{1}\) CPC, and International Relations Law, art 178.

\(^{140}\) Law No 105/1992, art 173(2).
— the arbitral tribunal that issued the award must have been competent to
determine the case under the national law of the state where the award was
issued;
— there is reciprocity regarding the recognition of foreign awards between
Romania and the state where the arbitral tribunal that issued the award had
its judicial seat;\textsuperscript{141} and
— in the case of an award made in the absence of the losing party, it is shown
that that party was properly notified of the claim, summoned to the arbitral
hearing and was given the opportunity to defend itself against the claim.\textsuperscript{142}

10.2.8 The recognition of a foreign award may be refused in any of the following
situations listed in the International Relations Law:
— the foreign award is the result of a fraud committed in the foreign proceedings;
— the foreign award violates the public policy of Romanian private international
law;\textsuperscript{143} or
— the dispute was resolved between the same parties by an earlier judgment
issued by a Romanian court or was in the process of being adjudicated by a
Romanian court on the date when the claim in the arbitral proceedings was
received by the arbitral tribunal.\textsuperscript{144}

10.2.9 The recognition of a foreign award may not be refused for the sole reason that the
arbitral tribunal applied a different substantive law to the merits of the case than
would have been applicable pursuant to the rules of Romanian private international
law. An exception to this rule applies if the proceedings concerned the legal status
or capacity of a Romanian citizen and application of the foreign law produced a
different result than would have been reached under Romanian law.\textsuperscript{145}

10.2.10 Quite importantly, but for limited exceptions, the Romanian courts may not re-
examine the merits of the foreign award or modify it.\textsuperscript{146}

\textsuperscript{141} It is not necessary to prove that formal legal or diplomatic reciprocity is granted as the law presumes that reciprocity is
granted unless the contrary is shown.

\textsuperscript{142} International Relations Law, art 167.

\textsuperscript{143} Romanian law does not define the concept of public policy, except in respect of certain grounds of exclusive jurisdiction
of the Romanian courts. Doctrine and jurisprudence have established that, for instance, the violation of the right to
defence falls under this concept.

\textsuperscript{144} International Relations Law, art 181.

\textsuperscript{145} Ibid, art 168.

\textsuperscript{146} See International Relations Law, art 169. The limited exceptions concern the review of the compliance of the foreign award
with the requirements of International Relations Law, on which see International Relations Law, art 167 and 168.
**Procedure for recognition of a foreign award**

10.2.11 The request for recognition of a foreign award must be drawn up in accordance with the requirements of Romanian procedural law and must be accompanied by the following documents:

- a copy of the foreign award;
- proof that it is a final award;
- a copy of the proof of notification of the summons and the statement of claim to a party which was not present before the foreign arbitral tribunal, as well as of the award; and
- proof that the foreign award meets all other conditions of Article 167 of the International Relations Law.\(^{147}\)

10.2.12 All documents need to be accompanied by authorised translations and authenticated by the competent authority in the state of the foreign arbitral tribunal, by the relevant Romanian consulate and by the Romanian Ministry of Foreign Affairs.\(^{148}\) Romania is a party to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

10.2.13 The request for recognition will be resolved in adversarial proceedings (i.e. the respondent will be summoned and will be allowed to state its defence) but limited strictly to the grounds in the International Relations Law upon which recognition of the foreign award may be resisted. The request for recognition may be determined without hearing the parties if it follows from the award that the respondent admitted the claim.\(^ {149}\) The court decision on recognition is subject to two tiers of appellate jurisdiction.

**Conditions for authorisation of enforcement of a foreign award**

10.2.14 In addition to the conditions for the recognition of a foreign award set out above, two further conditions must be met in order to obtain authorisation to enforce a foreign award:

- the award must be enforceable according to the national law of the state where the award was issued; and
- the right to request enforcement must not be time barred under Romanian law.\(^ {150}\)

\(^{147}\) International Relations Law, art 171.

\(^{148}\) Ibid, art 162.

\(^{149}\) Ibid, art 172.

\(^{150}\) Ibid, art 174. The time period is three years under Romanian law, however, if a shorter limitation period exists under the national law of the state where the award was issued, then enforcement should be sought within this shorter period in order to satisfy the first condition that the award must be enforceable according to the national law of the state where it was issued.
10.2.15 As with the recognition of a foreign award, when considering a request for enforcement, the court will not review the merits of the foreign award, save for compliance with the requirements of the International Relations Law.

Procedure for enforcement of foreign awards

10.2.16 The documents set out in paragraph 10.2.11 above, must also be attached to a request for enforcement. In addition, proof that the award is enforceable must be presented (e.g. in the form of a certificate from the arbitral tribunal confirming enforceability of the award). Usually, this follows from the final character of the award.151

10.2.17 Upon application for the enforcement of an award, the respondent will be summoned and allowed to state its defence, but again not on the merits of the case. For instance, the respondent may contend it has paid after the award was issued. The court decision on enforcement is subject to two tiers of appellate jurisdiction.152

10.2.18 Once enforcement of the foreign award in Romania has been authorised, such an award may be enforced in the same way as a domestic award.153

11. Special provisions and considerations

11.1 Consumers
11.1.1 There are no specific legal provisions with respect to arbitration of disputes relating to consumer rights. Therefore, the consumer is free to enter into an agreement to arbitrate a dispute relating to his or her consumer rights (prior to or after a dispute has arisen). However, due care has to be taken when entering an agreement including an arbitration clause, as the standard for assessing the abusive nature of contractual clauses in the case of a consumer is higher. If the contract is deemed non-negotiated, it may consequently be held that the arbitration clause is ineffective.

11.2 Employment law
11.2.1 Only collective labour disputes are arbitrable and not individual labour disputes. In accordance with the provisions of Article 179 of Law No 62/2011 of the social dialogue, if the parties agree, the disputes are subject to arbitration organised by

151 Ibid, art 175.
152 Ibid, art 176.
153 Ibid, art 177.
the Office for Mediation and Arbitration of Collective Labour Disputes attached to
the Ministry of Labour, Family and Social Protection. The awards rendered under
the auspices of this office are binding upon the parties, will amend the collective
labour agreement and are enforceable.

12. Concluding thoughts and themes

12.1.1 Arbitration is an increasingly popular method for resolution of commercial disputes
in Romania and Romanian arbitration law is in line with modern international
practice. Added attractions of arbitration include the wide international
enforceability of awards, the ability for parties to avoid the often substantial delays
encountered in the Romanian courts and the relative lack of judicial experience in
the field of complex commercial disputes.

13. Contacts

CMS Cameron McKenna SCA
11–15 Tipografilor Street
4th floor, B3–B4, S-Park
013714 Bucharest – District 1
Romania

Gabriel Zaharia Sidere
T +40 21 4073 800
E gabriel.sidere@cms-cmck.com
ARBITRATION IN RUSSIA

By Sergey Yuryev and Konstantin Kantyrev, CMS
Table of Contents

1. Historical background 653

2. Scope of application and general provisions of the Russian Arbitration Act 654
   2.1 Subject matter 654
   2.2 Structure of the law 655
   2.3 General principles 655

3. The arbitration agreement 656
   3.1 Definitions 656
   3.2 Formal requirements 656
   3.3 Special tests and requirements of the jurisdiction 657
   3.4 Separability 658
   3.5 Mandatory and non-mandatory provisions 658

4. Composition of the arbitral tribunal 659
   4.1 Constitution of the arbitral tribunal 659
   4.2 Procedure for challenging and substituting arbitrators 661
   4.3 Arbitration fees and expenses 663

5. Jurisdiction of the arbitral tribunal 664
   5.1 Competence to rule on jurisdiction 664
   5.2 Power to order interim measures 665

6. Conduct of proceedings 665
   6.1 Commencing an arbitration 665
   6.2 General procedural principles 666
   6.3 Seat, place of hearings and language of arbitration 666
   6.4 Multi-party issues 667
   6.5 Oral hearings and written proceedings 668
   6.6 Default by one of the parties 669
   6.7 Taking of evidence 669
   6.8 Appointment of experts 670
   6.9 Confidentiality 671
   6.10 Court assistance in taking evidence 671
7. **Making of the award and termination of proceedings**
   7.1 Choice of law
   7.2 Timing, form and content of award
   7.3 Settlement
   7.4 Power to award interest and costs
   7.5 Termination of the proceedings
   7.6 Correction, clarification and issuance of a supplemental award

8. **Role of the courts**
   8.1 Jurisdiction of the courts
   8.2 Stay of court proceedings
   8.3 Preliminary rulings on jurisdiction
   8.4 Interim protective measures
   8.5 Obtaining evidence and other court assistance

9. **Challenging and appealing an award through the courts**
   9.1 Jurisdiction of the courts
   9.2 Appeals
   9.3 Applications to set aside an award

10. **Recognition and enforcement of awards**

11. **Special provisions and considerations**
   11.1 Consumers
   11.2 Employment law
   11.3 Real estate rights

12. **Concluding thoughts and themes**

13. **Contacts**
1. **Historical background**

1.1.1 From September 1922 onwards, the newly created arbitration commissions settled commercial disputes between domestic parties and state enterprises.¹ These “arbitrazh” tribunals were neither courts, in the proper sense of the term, nor an independent arbitration system but rather quasi-judicial panels of adjudicators.² Foreign trade disputes were resolved by arbitration under two specialised permanent arbitration bodies: the Maritime Arbitration Commission (MAC) and the International Commercial Arbitration Court (ICAC),³ which dealt with all non-maritime international trade disputes. During the Soviet era, only special, state-controlled trading enterprises could engage in foreign trade. These enterprises alone had access to international arbitration.

1.1.2 In addition to this system for resolving trade disputes between Soviet foreign trade enterprises and parties from non-communist countries, the Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (Moscow Convention)⁴ introduced a compulsory international arbitration scheme for all disputes arising between state trading enterprises of the Member States of the Council for Mutual Economic Assistance (COMECON).

1.1.3 On 14 August 1993, the Law of the Russian Federation on International Commercial Arbitration (Russian Arbitration Act) came into force.⁵ The Russian Arbitration Act was introduced to make international commercial arbitration in Russia more acceptable to foreign parties, with particular regard to investment and foreign trade disputes. The Russian Arbitration Act is based on the internationally recognised standard of the Model Law (1985).⁶

---

¹ Statute on the procedure of resolution of proprietary disputes between state institutions and enterprises, published by the All-Russian Central Executive Committee and the Council of the People’s Commissars of the Russian Socialist Federated Soviet Republic, dated 21 September 1922. See Sobranie uzakoneniy i rasporyazheniy Rabochego i krestyanskogo Pravitelsva 1922, No 60, s 769.

² State arbitrazh was a process by which State-owned entities would solve their disputes. Each State arbitrazh commission was a three-member panel consisting of a lawyer, an executive member of the trade relevant to the dispute and a third-party neutral. State arbitrazh was based on the premise that all disputes should be resolved for the benefit of all State-owned enterprises.

³ ICAC has been in existence since 1932 when the Foreign Trade Arbitration Commission was set up. In 1987 it was renamed the Arbitration Court of the USSR Chamber of Trade and Commerce and in 1993 the entity became known as ICAC.


1.1.4 The Ministry of Economic Development of the Russian Federation has recently proposed changes to the Russian Arbitration Act. The changes are aimed at updating the Russian Arbitration Act to reflect the amendments made by the Model Law (2006).7

2. Scope of application and general provisions of the Russian Arbitration Act

2.1 Subject matter

2.1.1 The Russian Arbitration Act applies to international commercial arbitrations that are seated within the Russian Federation.8 However, the following provisions of the Russian Arbitration Act also apply to disputes where the seat of the arbitration is outside the Russian Federation:
— Article 8 (stay of court proceedings in favour of arbitration);
— Article 9 (court applications for interim protective measures in support of arbitral proceedings); and
— Articles 35 and 36 (recognition and enforcement of awards).9

2.1.2 It follows from the wide definition of “arbitration”10 in the Russian Arbitration Act that the provisions apply not only in relation to ICAC or MAC administered arbitrations, but may also be applied to ad hoc arbitrations and arbitrations organised under the rules of other permanent arbitral institutions (e.g. the ICC Court of Arbitration in Paris).

2.1.3 The Russian Arbitration Act does not apply to purely domestic arbitrations, which are presently governed by the Federal Law on Arbitration Courts in the Russian Federation (AC).11 This chapter on Arbitration in the Russian Federation will focus primarily on international commercial arbitration under the Russian Arbitration Act, as currently in force. It will also highlight some important provisions of the ICAC Rules.

---

8 Russian Arbitration Act, ch 1, art 1(1).
9 The Draft Amendments also propose that a new art 17.9 of the Russian Arbitration Act (concerning the enforcement of interim measures) be applicable to arbitrations outside of the Russian Federation.
10 Russian Arbitration Act, ch 1, art 2.
2.2 Structure of the law

2.2.1 The Russian Arbitration Act contains the following chapters:

(i) general provisions;
(ii) arbitration agreement;
(iii) composition of arbitral tribunal;
(iv) jurisdiction of the arbitral tribunal;
(v) conduct of proceedings;
(vi) making of the award and termination of proceedings;
(vii) challenging an award; and
(viii) recognition and enforcement of awards.

2.2.2 The Russian Arbitration Act also contains two appendices: the ICAC statute\textsuperscript{12} and the MAC statute\textsuperscript{13}.

2.3 General principles

2.3.1 The Russian Arbitration Act provides that:

— no court interference in the arbitral process may take place except as provided for by the Russian Arbitration Act (principle of non-intervention by the courts);\textsuperscript{14}

— prior to their appointment, and subsequently at any stage of the arbitration, arbitrators must disclose any information that may give rise to justifiable doubts as to their impartiality or independence and they may be challenged if such doubts exist (principle of impartiality and independence of the arbitral tribunal);\textsuperscript{15}

— the parties to a dispute may decide on particular issues relating to the arbitral procedure to be followed and thereby deviate from the provisions of the Russian Arbitration Act (where so permitted) (principle of party autonomy);\textsuperscript{16}

and

— the parties to a dispute must be treated equally and without preference and each party must be provided with an opportunity to present its case (principle of equality of the parties, fairness and due process).\textsuperscript{17}

\textsuperscript{12} Russian Arbitration Act, appendix I.

\textsuperscript{13} Ibid, appendix II.

\textsuperscript{14} Ibid, ch 1, art 5.

\textsuperscript{15} Ibid, ch 3, art 12.

\textsuperscript{16} Ibid, ch 5, art 19.

\textsuperscript{17} Ibid, ch 5, art 18.
3. The arbitration agreement

3.1 Definitions

3.1.1 The Russian Arbitration Act defines an arbitration agreement as:

“[A]n agreement by the parties to submit all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, to arbitration. An arbitration agreement may be in the form of a separate agreement or, more usually, will be incorporated as a clause in the main agreement between the parties to which it relates.”

3.2 Formal requirements

3.2.1 The arbitration agreement must be in writing. The following will satisfy the formal requirement for the agreement to be in writing:

- an agreement in the form of a document signed by the parties;
- an exchange of letters, telexes, or other means of telecommunication that provides a record of the parties’ agreement;
- an assertion by one party in its statement of claim or defence that there is an agreement between the parties to refer any dispute between them to arbitration that is not denied by the other party; and
- a reference in an agreement to a separate document containing an arbitration clause, provided that the agreement is executed in writing and that the reference to the arbitration clause in the separate document expressly makes that clause part of the underlying agreement.

3.2.2 As with international arbitration, an arbitration agreement executed in writing is required for parties to refer a domestic dispute to arbitration. Parties to a domestic dispute have a right to enter into an arbitration agreement up until the point when a court hands down a decision on the merits of the case.

3.2.3 Previously, the Russian courts were known to readily annul awards on the basis that a signatory to an arbitration agreement (frequently a natural person) lacked the necessary authority of the corporate entity on behalf of which the arbitration

---

18 Ibid, ch 2, art 7(1).
19 Ibid, ch 2, art 7(2).
20 The Draft Amendments envisage that an arbitration agreement may be capable of being concluded by electronic means of communication including email. Draft Amendments, s 3.
21 Russian Arbitration Act, ch 2, art 7(2).
22 AC, ch 1, art 5(4).
agreement was entered into. This practice has subsided. The Russian courts have
provided that certain corporate entities delegate certain implied authority to their
directors/managers.  

3.2.4 Russian courts have also held that an arbitral institution must be identified by the
parties at the time of execution of the arbitration agreement. The arbitrazh courts
established that an arbitration agreement that allows a party to nominate a
relevant institution at the time the dispute occurs will be deemed null and void. With this in mind, both parties must expressly designate an arbitral institution at the
time the arbitration agreement is executed to ensure its validity.

3.2.5 When designating an arbitral institution in the arbitration agreement, parties
must ensure that the correct name of the institution is used. For example, prior judgments of the arbitrazh courts suggest that a reference of a dispute to the “Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation” is insufficient and may lead to non-enforcement of the award.

3.3 Special tests and requirements of the jurisdiction

3.3.1 Under the Russian Arbitration Act the parties may refer the following disputes to
international commercial arbitration in their agreement:

— foreign trade disputes, resulting from contractual or other civil law relationships
  and disputes arising from other forms of international economic relationships,
  if the place of business of at least one of the parties is located outside of the
  Russian Federation; and

— disputes between Russian companies with foreign investments and disputes
  between participants in such companies, as well as disputes between such
  entities and other private or public Russian persons.

3.3.2 Notwithstanding the wide scope of disputes outlined above, the jurisdiction of the
Russian Arbitration Act is limited by the wider Russian legal framework. The
Russian Arbitration Act does not apply where a specific legal provision prevents the use of arbitration or imposes an alternative and compulsory dispute resolution method. Types of disputes that are generally seen as non-arbitrable are:
— bankruptcy (including claims against debtors after a bankruptcy is declared);
— subsoil disputes; and
— disputes in relation to state property.

3.4 Separability
3.4.1 The Russian Arbitration Act provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract for the purposes of determining the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement. The fact that the main contract may be null and void therefore does not invalidate the arbitration clause as a matter of law.\textsuperscript{29} This is an important precondition for the arbitral tribunal’s power to rule on its own jurisdiction.\textsuperscript{30}

3.5 Mandatory and non-mandatory provisions
3.5.1 The Russian Arbitration Act identifies non-mandatory provisions through wording such as “unless otherwise agreed by the parties” or “the parties are free to agree.” This language indicates that the parties to an arbitration agreement have the discretion to make their own arrangements on procedural matters. Express provisions in the arbitration agreement between the parties will take precedence over the non-mandatory provisions of the Russian Arbitration Act. However, where provisions are mandatory, the parties have no discretion to amend them or exclude their application by agreement.

3.5.2 Non-mandatory provisions include:
— the power of the arbitral tribunal to order interim protective measures;\textsuperscript{31}
— the seat, date of the commencement and language of proceedings;\textsuperscript{32}
— the number and the procedure for the appointment of arbitrators;\textsuperscript{33} and
— the procedure for the conduct of the arbitral proceedings.\textsuperscript{34}

3.5.3 In addition, the Russian Arbitration Act provides that where a provision of the Russian Arbitration Act (other than in respect of the law applicable to the substance

\textsuperscript{29} Ibid, ch 5, art 16(1).
\textsuperscript{30} See section 5.1 below.
\textsuperscript{31} Russian Arbitration Act, ch 4, art 17.
\textsuperscript{32} Ibid, ch 5, art 20–22.
\textsuperscript{33} Ibid, ch 5, art 19.
\textsuperscript{34} Ibid, ch 4, art 17.
of the dispute) affords the parties discretion to agree on a particular issue, they may authorise a third party to exercise that discretion.\textsuperscript{35} This relates, in particular, to institutional arbitration, where the parties may confer discretion on the arbitral institution (e.g. the right to appoint the arbitral tribunal on their behalf) by adopting the institutional rules in the arbitration agreement.\textsuperscript{36} The Russian Arbitration Act further clarifies that, where the parties are free to agree on a particular issue, they may do so by incorporating specific (institutional or ad hoc) arbitration rules into their agreement by reference, which are then regarded as containing the agreement of the parties.\textsuperscript{37}

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The Russian Arbitration Act provides that the parties to an arbitration agreement are free to determine the number of arbitrators. If the parties have not agreed to the number of arbitrators, three arbitrators shall be appointed.\textsuperscript{38} The Russian Arbitration Act also provides that, unless otherwise agreed by the parties, nationality cannot be used as grounds for disqualifying a potential arbitrator. It is therefore possible to appoint foreign nationals as arbitrators for the purpose of international arbitral proceedings in Russia.\textsuperscript{39}

4.1.2 The Russian Arbitration Act gives the parties freedom to agree on the procedure for appointing the arbitrators.\textsuperscript{40} If one of the parties fails to comply with the agreed procedure then the Russian Arbitration Act provisions regarding arbitral appointments shall apply.\textsuperscript{41}

4.1.3 The Russian Arbitration Act sets out the following appointment procedure to be followed in the absence of agreement by the parties. If the arbitral tribunal is comprised of three arbitrators, each party shall appoint one arbitrator and the two party-appointed arbitrators shall jointly appoint the third arbitrator. If a party fails to appoint its party-appointed arbitrator within 30 days of receipt of a request from the other party to do so, or if the two party-appointed arbitrators fail to

\begin{itemize}
\item \textsuperscript{35} Ibid, ch 1, art 2.
\item \textsuperscript{36} See ICAC Rules, ch 5, art 17.
\item \textsuperscript{37} Russian Arbitration Act, ch 1, art 2.
\item \textsuperscript{38} Ibid, ch 3, art 10.
\item \textsuperscript{39} Ibid, ch 3, art 11(1).
\item \textsuperscript{40} Ibid, ch 3, art 11(2).
\item \textsuperscript{41} Ibid, ch 3, art 11(4) and 11(5). See paragraphs 4.1.4–4.1.6 below.
\end{itemize}
agree on the appointment of the third arbitrator within 30 days of their appointment, then the President of the Russian Chamber of Commerce and Industry (RCCI President) will make the requisite appointment. The RCCI President will also make the appointment if the parties fail to agree on the appointment of a sole arbitrator.42

4.1.4 The Russian Arbitration Act provides for a number of situations where the parties may fail to follow the appointment procedure, including:
— where the parties have agreed an appointment procedure in their arbitration agreement but one of the parties does not comply with the agreed procedure;
— where the parties, or the two party-appointed arbitrators, fail to reach agreement on the identity of the third arbitrator; or
— where a third party (including an arbitral institution) does not fulfil the functions delegated to it in accordance with the agreed procedure.43

4.1.5 In these instances any party may request that the RCCI President takes the necessary measures to complete the appointment of the arbitrators, unless the arbitration agreement provides another mechanism for securing an appointment.44 Any measures taken by the RCCI President to complete the constitution of the arbitral tribunal are not subject to appeal.45

4.1.6 In appointing an arbitrator, the RCCI President will have regard to the qualifications required of the arbitrator by the agreement of the parties and to such other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Moreover, where the RCCI President is to appoint either the sole arbitrator or the chair, the Russian Arbitration Act obliges him to take into account whether it is advisable to appoint an arbitrator of a nationality other than those of the parties to the dispute.46

4.1.7 The ICAC Rules contain general provisions on arbitrators including the requirements as to their impartiality and independence and their specialist knowledge in settling disputes.47 ICAC maintains an approved list of arbitrators that is available on its website (in English and Russian)48 and may be requested in hardcopy. However,

42 Russian Arbitration Act, ch 3, art 11(3).
44 Ibid.
46 Ibid.
47 ICAC Rules, ch 2, art 3(1).
persons not included on that list may still be appointed to act as arbitrators in ICAC arbitral proceedings.\(^{49}\)

4.1.8 In ICAC arbitral proceedings the rules in relation to the formation of the arbitral tribunal are set out in chapter five of the ICAC Rules. Unless otherwise agreed by the parties,\(^{50}\) the ICAC Rules provide for an arbitral tribunal to consist of three arbitrators: one arbitrator appointed by each party and a chair appointed by the ICAC Presidium.\(^{51}\) The ICAC Presidium has exclusive authority to appoint a chair. In addition, the ICAC Rules provide for the nomination of a case reporter by the chair of the arbitral tribunal (or the sole arbitrator) and the appointment of the case reporter by the ICAC Presidium.\(^{52}\) The function of the case reporter is to keep a record of the proceedings, closed sessions of the arbitral tribunal and execute the orders of the ICAC President and the arbitral tribunal.

4.2 Procedure for challenging and substituting arbitrators

**Challenge of arbitrators**

4.2.1 Arbitrators are required to disclose any circumstances occurring prior to their appointment and throughout the arbitral proceedings that may give rise to reasonable doubts as to their impartiality or independence.\(^{53}\) Arbitrators are required to disclose circumstances such as participation in conferences sponsored by either party (or its counsel) to the arbitration.\(^{54}\)

4.2.2 Arbitrators may only be challenged if grounds exist that give rise to justifiable doubts as to their impartiality or independence or if the arbitrators do not have the qualifications required by the agreement of the parties.\(^{55}\) The parties are free to agree on additional grounds for challenge to those expressed in the Russian Arbitration Act.

4.2.3 A party is precluded from challenging its own party-appointed arbitrator if the circumstances giving rise to the challenge were known to the party at the time of appointment.\(^{56}\)

\(^{49}\) ICAC Rules, ch 2, art 3(4).

\(^{50}\) The ICAC Presidium also has discretion to determine whether a sole arbitrator is appropriate. To reach its decision the ICAC Presidium will consider the complexity of the case, amount of the claim and other circumstances.

\(^{51}\) ICAC Rules, ch 5, art 17.

\(^{52}\) Ibid, ch 2, art 7(1).

\(^{53}\) Russian Arbitration Act, ch 3, art 12(1).

\(^{54}\) See Yukos Capital S.a.r.l. v NK Rosneft, Case No KG-A40/6775-07, Federal Arbitrazh Court of the Moscow Region, 13 August 2007; the earlier decisions of the Moscow City Arbitrazh Court, Case Nos A40-4577/07-8-46 and A40-4582/07-8-47; and the subsequent decision in Case No BAC-14955/07, Supreme Arbitrazh Court, 10 December 2007.

\(^{55}\) Russian Arbitration Act, ch 3, art 12(2) and ICAC Rules ch 5, art 18(1).

\(^{56}\) Russian Arbitration Act, ch 3, art 12(2).
Procedure for challenging an arbitrator

4.2.4 The parties are free to agree on the procedure for the challenge of arbitrators.\(^{57}\) In the absence of an agreed procedure, the Russian Arbitration Act requires the challenging party to inform the arbitral tribunal of the reasons for the challenge in writing within 15 days of the constitution of the arbitral tribunal, or within 15 days of the date on which the challenging party learned of the circumstances giving rise to the right of challenge. If a challenged arbitrator does not step down voluntarily or if the other party to the arbitration objects to his/her removal, the challenge will be decided by the arbitral tribunal.\(^{58}\)

4.2.5 If an arbitrator is challenged in accordance with either the procedure agreed by the parties or that provided by the Russian Arbitration Act and such challenge is not successful, the Russian Arbitration Act provides that a party may, within 30 days of receiving notice of the decision rejecting the challenge, request the RCCI President to decide the challenge. The RCCI President’s decision is not subject to further appeal. Pending the RCCI President’s decision on the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the proceedings and make an award. However, should the challenge subsequently succeed, any such award may be set aside.\(^{59}\)

4.2.6 If an arbitrator can no longer perform his/her functions, or if for any other reason an arbitrator fails to fulfil his/her duties, the Russian Arbitration Act provides that the arbitrator’s mandate terminates upon resignation or if the parties agree to remove the arbitrator.\(^{60}\) If the parties fail to agree on the removal of the arbitrator and the situation remains unresolved in this regard, either party may request the RCCI President to intervene and decide on the termination of the arbitrator’s mandate.\(^{61}\)

4.2.7 The Russian Arbitration Act clarifies that an arbitrator may withdraw from office in the event of a challenge without such withdrawal being taken to imply acceptance by the arbitrator that the grounds for a challenge were valid.\(^{62}\)

\(^{57}\) Ibid, ch 3, art 13(1).
\(^{58}\) Ibid, ch 3, art 13(2).
\(^{59}\) Ibid, ch 3, art 13(3).
\(^{60}\) Ibid, ch 3, art 13(3).
\(^{61}\) Ibid, ch 3, art 14(1).
\(^{62}\) Ibid, ch 3, art 14(2).
4.2.8 Under the ICAC Rules a party may challenge an expert or interpreter on the basis of reasonable doubts to impartiality or independence. However, the ICAC Rules provide further grounds for the termination of arbitrators' appointments, such as removal by agreement of the parties or removal by the ICAC Presidium (upon an application of a party) for the failure to fulfil their duties.

Substitution of arbitrator(s)

4.2.9 In the event that an arbitrator's mandate is terminated, the Russian Arbitration Act requires that the appointment of a substitute arbitrator is made in accordance with the same procedure used to appoint the arbitrator being replaced.

4.2.10 For arbitrations under the ICAC Rules, an arbitrator whose mandate is terminated shall be replaced by the respective reserve arbitrator (if any). In the event that no reserve arbitrator is available, the replacement arbitrator will be appointed in accordance with the ICAC Rules. The ICAC Rules further provide that the ICAC Presidium has the discretion to carry on with the case with the remaining tribunal if the replacement is sought after the end of the hearings. The ICAC Presidium will take into account the circumstances of the case, the opinions of the arbitrators and the opinion of the parties prior to making its decision.

4.3 Arbitration fees and expenses

4.3.1 The Russian Arbitration Act does not address arbitrators' fees and expenses. In ad hoc arbitral proceedings, these are matters for agreement between the parties and the arbitrators. In institutional arbitral proceedings, the amount and procedure for payment of the arbitration fees will be set out in the rules and cost schedules of the relevant arbitral institution.

4.3.2 The ICAC Rules set out detailed provisions for fees in relation to: the amount of the registration and arbitration fees; the procedure for their payment; their allocation as between the parties; and the procedure for covering the other costs of the arbitral proceedings.

---

63 ICAC Rules, ch 5, art 18(4).
64 Ibid, ch 5, art 19.
65 Russian Arbitration Act, ch 3, art 15.
66 ICAC Rules, ch 5, art 20(1).
67 Ibid, ch 5, art 20(3).
68 Ibid, ch 5, art 14 and the Schedule of Arbitration Fees and Costs.
4.3.3 The registration fee in ICAC arbitral proceedings is currently a fixed fee of USD 1,000. The arbitration fees, which cover the general expenses of ICAC, the Secretariat and the arbitrators’ fees, are calculated on a sliding scale that depends primarily on the value of the claim and that of any counterclaim. The ICAC Rules provide for different fee amounts depending on the currency of the claim. Accordingly, any claim expressed in Russian Roubles will apply Rouble fees. However, if a claim is expressed in a currency other than Russian Roubles, the arbitration fee will be expressed in USD. By way of example, an arbitration fee of USD 2,600 shall be charged if the value of a claim does not exceed USD 10,000 whereas arbitration fees for claims in excess of USD 10,000,000 will be the sum of USD 74,600, plus 0.12% of the amount over USD 10,000,000.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 Under both the Russian Arbitration Act and the ICAC Rules, an arbitral tribunal has the power to rule on its own jurisdiction including any objections to the existence or the validity of the arbitration agreement. The Russian Arbitration Act requires that objections to the arbitral tribunal’s jurisdiction must be raised no later than the submission of the statement of defence regardless of whether the objecting party has appointed or participated in the appointment of an arbitrator.

5.1.2 Equally, any argument that the arbitral tribunal is exceeding the scope of its authority should be raised as soon as the arbitral tribunal exceeds the scope of its authority. An arbitral tribunal may, however, admit an objection later if it considers the delay in raising the objection justified. If a challenge to jurisdiction is not made during the course of the arbitral proceedings, an application to set aside a resulting award may be dismissed.

---

664

---

69 ICAC Rules, Schedule of Arbitration Fees and Costs, art 2.
70 Ibid, art 3(1).
71 Ibid, art 3(2).
72 Russian Arbitration Act, ch 4, art 16(1) and ICAC Rules, ch 1, art 2(4).
73 Russian Arbitration Act, ch 4, art 16(2).
74 Ibid.
75 Ibid.
76 See OOO Intercare v Berlin-Chemie/Minarini Pharma GmbH, Case No KG-A40/6468-08, Federal Arbitrazh Court of the Moscow Region, 31 July 2008; and the earlier decision in the proceedings Case No A40-4877/08-40-44, Moscow City Arbitrazh Court, 19 May 2008.
5.1.3 An arbitral tribunal may rule on the challenge to its jurisdiction either as a preliminary issue by an award on jurisdiction or in its final award on the merits.\textsuperscript{77} If the arbitral tribunal determines the issue of jurisdiction by an interim award, either party may, within 30 days of receipt of notice of the ruling, request the competent court to rule on jurisdiction. Such a court ruling is not subject to further appeal.\textsuperscript{78} Pending the outcome of the court proceedings, the arbitral tribunal may continue the arbitral proceedings and render an award.\textsuperscript{79} However, any such award is subject to being set aside if the court subsequently finds that the arbitral tribunal lacked or exceeded its jurisdiction.

5.2 Power to order interim measures

5.2.1 The Russian Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal may at the request of either party order interim measures of protection that it deems necessary for securing the claim concerning the subject matter of the proceedings. The arbitral tribunal may require any party to provide adequate security in connection with such measures.\textsuperscript{80}

5.2.2 The ICAC Rules contain similar provisions. In particular, at the request of either party, the arbitral tribunal may order such interim measures to secure the subject matter of the claim as it deems necessary.\textsuperscript{81} Such an order may take the form of an interim award.\textsuperscript{82} The arbitral tribunal may request a party to provide appropriate security in connection with such measures.\textsuperscript{83}

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 Subject to the agreement of the parties, arbitral proceedings in respect of a particular dispute are deemed to commence on the date on which the respondent receives the claimant’s request for arbitration.\textsuperscript{84} By comparison, under the ICAC

\textsuperscript{77} Russian Arbitration Act, ch 4, art 16(3).
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid, ch 4, art 17.
\textsuperscript{81} ICAC Rules, ch 6, art 36(1).
\textsuperscript{82} Ibid, ch 6, art 36(3).
\textsuperscript{83} ICAC Rules, ch 6, art 36(2). The Draft Amendments remove the current interim measures provisions of the Russian Arbitration Act and replace them with provisions which are very similar to art 17 of the Model Law (2006) (see CMS Guide to Arbitration, vol II, appendix 2.1). However, provisions relating to the recognition and enforcement of interim measures set out in the Model Law (2006) are not envisaged by the Draft Amendments. Draft Amendments, ss 4–5.
\textsuperscript{84} Russian Arbitration Act, ch 5, art 21.
Rules, an arbitration will commence at the time the claimant files its statement of claim. In ICAC arbitral proceedings, the actual date of commencement is either the date on which the statement of claim is delivered to ICAC or, if sent by post, the post date.

6.2 General procedural principles

6.2.1 The two key procedural principles under the Russian Arbitration Act are that:
(i) the parties shall be treated equally (without preference) and each party shall be given a full opportunity to present its case; and
(ii) subject to the mandatory provisions of the Russian Arbitration Act, the parties have autonomy to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. In the absence of such agreement, the arbitral tribunal may, subject to the mandatory provisions of the Russian Arbitration Act, conduct the proceedings in a manner it considers appropriate.

6.2.2 Under the ICAC Rules, the parties are free to agree on the procedure of the arbitration. However, if such agreement is not reached, the arbitral tribunal shall conduct the proceedings in such a manner as it considers appropriate, ensuring that the parties are treated with equality and that each party is given a fair opportunity to protect its interests.

6.3 Seat, place of hearings and language of arbitration

6.3.1 Under the Russian Arbitration Act, the parties are free to agree on the seat of the arbitration. Failing such agreement, the seat of the arbitration shall be determined by the arbitral tribunal, taking into account the circumstances of the case and the convenience of the parties.

6.3.2 The ICAC Rules provide that the seat of the arbitration shall be Moscow, although the parties or the arbitral tribunal may agree to hold hearings and other sessions in a place other than Moscow with the agreement of the Executive Secretary of the ICAC (if necessary).

---

85 ICAC Rules, ch 3, art 8(1).
86 Ibid, ch 3, art 8(2).
87 Russian Arbitration Act, ch 5, art 18.
88 Ibid, ch 5, art 19.
89 ICAC Rules, ch 6, art 26(2).
90 Russian Arbitration Act, ch 5, art 20(1).
91 ICAC Rules, ch 6, art 22(1).
**Language of arbitration**

6.3.3 Parties may agree on the language or languages to be used in the proceedings.\(^\text{92}\) In the absence of such agreement, the arbitral tribunal shall determine the language or languages to be used. Such agreement or determination shall, unless provided otherwise, apply to any written/oral submissions made by the parties, to any hearings and any awards, decisions or other communications by the arbitral tribunal.\(^\text{93}\)

6.3.4 The Russian Arbitration Act provides that the arbitral tribunal may in appropriate circumstances order that any documentary evidence submitted by the parties be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.\(^\text{94}\) The arbitral tribunal is not obliged to order the translation of documents into the language of the arbitration and the Constitutional Court of the Russian Federation has held that documents in a language other than the language of the arbitration do not prejudice any of the constitutional rights of a party, provided that the arbitral tribunal does not object to such documents.\(^\text{95}\)

6.3.5 Although Russian is the default language of proceedings under the ICAC Rules, the parties are free to agree on a different language.\(^\text{96}\) Furthermore, the ICAC Rules provide that documents (excluding written evidence) submitted by the parties in the arbitral proceedings shall be either in the language of: the arbitration; the contract; or the correspondence between the parties. Written evidence shall be submitted in the language of the original document.\(^\text{97}\) Like the Russian Arbitration Act, the ICAC Rules permit ICAC (whether of its own volition or at the request of a party) to request that documents submitted in a language other than the language of the arbitration are translated at the expense of the party submitting such documents.\(^\text{98}\)

### 6.4 Multi-party issues

6.4.1 The ICAC Rules contain an express provision for the joinder of third parties to the arbitral proceedings. Such joinder is possible only with the consent of the parties and the written consent of the third party proposed to be joined to the proceedings.

---

\(^{92}\) Russian Arbitration Act, ch 5, art 22(1).

\(^{93}\) Ibid.

\(^{94}\) Ibid, ch 2, art 22(2).

\(^{95}\) Ibid, ch 2, art 22(2).

\(^{96}\) See Claim of OOO Voshod, Case No 1310-O-O, Constitutional Court of the Russian Federation, 19 October 2010.

\(^{97}\) ICAC Rules, ch 6, art 23(1).

\(^{98}\) Ibid, ch 6, art 23(2).
The request for joinder of a third party must be made before the deadline for the submission of the respondent’s defence.  

6.4.2 The Russian Arbitration Act contains no express provision on the participation of third parties in the proceedings. It follows that joinder of third parties will only be possible if all parties agree to do so, whether in ad hoc or ICAC arbitral proceedings.

6.5 Oral hearings and written proceedings

6.5.1 The Russian Arbitration Act provides that, subject to any contrary provision in an arbitration agreement, the arbitral tribunal has the authority to decide whether to hold oral hearings for the presentation of evidence or oral argument or whether the proceedings should be conducted only on the basis of written submissions and other materials submitted by the parties. However, the arbitral tribunal shall hold an oral hearing at relevant stages of the arbitration upon the request of a party to the arbitration, subject only to contrary provisions of the arbitration agreement. The Russian Arbitration Act requires that the parties are given sufficient advance notice of any hearing (including procedural hearings) and of any meeting of the arbitral tribunal for the purpose of taking evidence.

6.5.2 Under the ICAC Rules, the default rule is that the arbitral tribunal shall hold a hearing to enable the parties to present and argue their case in the light of the evidence presented in the proceedings. The ICAC Rules also require that the parties are notified of the place and time of a hearing so as to afford them at least 30 days to prepare for and appear at the hearing. However, the parties may agree on shorter notice periods. The arbitral tribunal may hold further hearings if the circumstances so require. In ICAC arbitral proceedings the parties may, however, choose to waive their right to an oral hearing and conduct the arbitral proceedings solely on written submissions.

6.5.3 Although the Russian Arbitration Act does not require the arbitral tribunal to keep formal minutes of the arbitral proceedings, the ICAC Rules provide that minutes of

99 ICAC Rules, ch 6, art 28.
100 Russian Arbitration Act, ch 5, art 24(1).
101 Ibid.
102 Ibid, ch 5, art 24(2).
103 ICAC Rules, ch 6, art 32(1).
104 Ibid, ch 6, art 32(2).
105 Ibid, ch 6, art 32(3).
106 Ibid, ch 6, art 34.
arbitration hearings must be kept and that such minutes must contain a description of the proceedings at the hearing.\textsuperscript{107} Both parties have the right to review these minutes. At the request of either party, the arbitral tribunal may amend or change the minutes if it considers the request to be justified.\textsuperscript{108}

### 6.6 Default by one of the parties

6.6.1 Unless otherwise agreed by the parties, under the Russian Arbitration Act default by a party occurs in the following circumstances:

- where the claimant fails to submit its statement of claim within the time period agreed by the parties or determined by the arbitral tribunal, the arbitral tribunal must terminate the proceedings;
- where the respondent fails to submit its statement of defence within the time period agreed by the parties or determined by the arbitral tribunal, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission by the respondent of the claimant’s allegations; and
- where a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award on the basis of the evidence before it.\textsuperscript{109}

6.6.2 The ICAC Rules equally provide the arbitral tribunal discretion to continue the proceedings and make an award in the event that a party who has been duly notified of the hearing fails to appear.\textsuperscript{110} However, the ICAC Rules also permit a defaulting party to request in writing that the arbitral tribunal adjourns the proceedings for good reason.\textsuperscript{111}

### 6.7 Taking of evidence

6.7.1 The Russian Arbitration Act contains only limited provisions on the subject of evidence. Generally, each party is required to prove the facts on which it relies in support of its claim or defence by the usual means of evidence, which include: documents; real evidence (e.g. sample goods); witnesses; and expert opinions.

6.7.2 The Russian Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of the evidence submitted by the parties.\textsuperscript{112} Furthermore,

\textsuperscript{107} Ibid, ch 6, art 33(1).
\textsuperscript{108} Ibid, ch 6, art 33(2).
\textsuperscript{109} Russian Arbitration Act, ch 5, art 25.
\textsuperscript{110} ICAC Rules, ch 6, art 32(3).
\textsuperscript{111} Ibid, ch 6, art 32(4).
\textsuperscript{112} Russian Arbitration Act, ch 5, art 19(2).
any documents, statements or other information provided by one party to the arbitral tribunal must be communicated to the other party.\textsuperscript{113}

6.7.3 The ICAC Rules expressly require that each party prove the circumstances on which it relies in support of its pleaded case. The arbitral tribunal may request a party to submit additional evidence. The arbitral tribunal may, at its discretion, order the conduct of an expert examination, request the submission of evidence by third parties and summon and hear witnesses.\textsuperscript{114} In ICAC arbitrations, the arbitrators are free to evaluate the evidence at their discretion.\textsuperscript{115}

6.7.4 The ICAC Rules further state that all documents submitted to ICAC by one party to the arbitration should be sent by the ICAC Secretariat to all other parties. The parties shall also receive expert reports and other documentary evidence on which the award may be based.\textsuperscript{116}

6.8 Appointment of experts

6.8.1 The Russian Arbitration Act contains provisions specifically dealing with experts appointed by the arbitral tribunal.\textsuperscript{117} Unless otherwise agreed by the parties, an arbitral tribunal has the power to:
— appoint one or more experts to report to it on specific issues determined by the arbitral tribunal; and
— require that a party provide the tribunal-appointed expert with any relevant information or to produce (or provide access to) documents, goods or other property for inspection.\textsuperscript{118}

6.8.2 The Russian Arbitration Act also provides that, unless otherwise agreed by the parties, the expert shall after delivery of his report, at the request of a party or if the arbitral tribunal considers this necessary, participate in a hearing where the parties have the opportunity to put questions to the tribunal-appointed expert or to present their own expert witnesses to give evidence on the points in issue.\textsuperscript{119}

\textsuperscript{113} Ibid, ch 5, art 24(3).
\textsuperscript{114} ICAC Rules, ch 6, art 31(1).
\textsuperscript{115} Ibid, ch 6, art 31(4).
\textsuperscript{116} Ibid, ch 4, art 16(2).
\textsuperscript{117} Russian Arbitration Act, ch 5, art 26.
\textsuperscript{118} Ibid, ch 5, art 26(1).
\textsuperscript{119} Ibid, ch 5, art 26(2).
6.9 Confidentiality

6.9.1 The Russian Arbitration Act does not contain an express confidentiality provision. In ICAC proceedings, however, there is an obligation on the arbitrators, case reporter, experts and ICAC Secretariat to keep confidential any information that they become aware of by virtue of the arbitral proceedings. Importantly, this obligation of confidentiality does not expressly extend to the parties in dispute.

6.9.2 In addition, the ICAC Rules clarify that the arbitration hearings shall be conducted in private, unless the parties consent and direct the arbitral tribunal to allow the attendance of persons not participating in the proceedings.

6.10 Court assistance in taking evidence

6.10.1 The Russian Arbitration Act allows the arbitral tribunal or a party to an arbitration (with the approval of the arbitral tribunal) to request assistance from a competent court in the Russian Federation in taking evidence. The court may execute the request, in accordance with its rules on taking evidence.

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 In 2002, the third part of the Russian Civil Code containing rules on conflict of laws (Civil Code) was introduced. The Civil Code provides rules for defining the governing law where relations involve a “foreign element”. Under the Civil Code, the relevant existing legislation is used to establish the governing law by international commercial arbitrators (i.e. Russian international treaties and the Russian Arbitration Act). Furthermore, the Civil Code defines the procedure for construction of foreign law and sets out the principal conflict of laws rules.

7.1.2 The Russian Arbitration Act sets out how the arbitral tribunal is to determine the law applicable to the substance of the dispute. It requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable.

---

120 ICAC Rules, ch 6, art 25.
121 ICAC Rules, ch 6, art 32(1).
122 Russian Arbitration Act, ch 5, art 27.
123 The third part of the Civil Code was adopted by Federal Law No 146-FZ dated 26 November 2001 and came into force on 1 March 2002.
124 Civil Code, part 3, art 1186.
125 Ibid.
126 Russian Arbitration Act, ch 6, art 28.
to the substance of their dispute. Any reference to the law or legal system of a state shall be construed as directly referring to the substantive law of that state and not to its conflict of laws rules.  

7.1.3 In the absence of a choice of law by the parties, the arbitral tribunal shall apply the law determined by it in accordance with the conflict of laws rules which it considers applicable. The arbitral tribunal may decide to apply the conflict of laws rules from the Civil Code. Under the Civil Code, should the parties fail to choose the governing law, the law of the country where a main executor under a contract is located shall be applied.

7.1.4 This introduces an element of uncertainty for the parties, as their substantive rights and obligations may differ substantially depending on the applicable law. It is therefore always preferable for the parties to include an express choice of law provision in their agreement. Doing so will, to the greatest possible extent, also help the parties (or the appointing authority) identify and appoint arbitrators with the requisite legal knowledge from the outset of the proceedings.

7.1.5 The Russian Arbitration Act also requires the arbitral tribunal to decide the matter in accordance with the terms of the underlying agreement between the parties. The arbitral tribunal should take into account the trade customs applicable to the particular transaction in the arbitration.

7.1.6 Choice of law issues are also likely to be subject to the supervisory function of the Russian courts. The Supreme Arbitrazh Court held that a decision of the arbitral tribunal on the choice of law can be reviewed by the state courts. The court did not adopt the conventional approach to hold that the choice of law is a substantive issue and should be left to the arbitral tribunal.

7.2 Timing, form and content of award

7.2.1 The Russian Arbitration Act provides that an award shall be made in writing and shall be signed by the arbitrator(s). If the arbitral tribunal consists of more than one arbitrator the signatures of a majority of the arbitrators will suffice, provided that an explanation is provided for the omission of any signatures.

---

127 Ibid, ch 6, art 28(1).
128 Ibid, ch 6, art 28(2).
129 Civil Code, part 3, art 1211.
130 ICAC Rules, ch 6, art 26(1).
131 See OJSC Efirnoe v LLC Delta Villmar CIS, Case No BAC-11861/10, Supreme Arbitrazh Court, 13 January 2011.
132 Russian Arbitration Act, ch 6, art 31(1).
7.2.2 The award must state the reasons on which it is based, whether the claim is allowed or disallowed, the amount of the arbitration fees and costs, and their allocation between the parties.\textsuperscript{133} The Russian Arbitration Act further requires the award to be dated and to state the seat of arbitration as agreed by the parties or determined by the arbitral tribunal.\textsuperscript{134} The award will be deemed to have been made at that seat. The parties shall receive a signed copy of the award.\textsuperscript{135}

7.2.3 The ICAC Rules allow the arbitral tribunal to declare the proceedings closed and proceed to making an award when all the facts relating to the dispute have been sufficiently clarified. The award shall be made in a closed session of the arbitral tribunal and decided by a majority of votes. If a majority cannot be reached, the chair of the arbitral tribunal shall make the award.\textsuperscript{136} The ICAC Rules also provide for content of the award in detail.\textsuperscript{137}

7.3 Settlement

7.3.1 If the parties settle their dispute in the course of the arbitral proceedings, both the Russian Arbitration Act\textsuperscript{138} and the ICAC Rules\textsuperscript{139} require that the arbitral tribunal terminates the proceedings and, if requested by the parties (without the objection from the arbitral tribunal), records the settlement in the form of an award on agreed terms. The Russian Arbitration Act and the ICAC Rules provide further clarification that an award on agreed terms shall state that it is an award and comply with the requirements as to form and content of an award.\textsuperscript{140} An award on agreed terms has the same status and effect as an award on the merits of the case.

7.4 Power to award interest and costs

7.4.1 Under the Russian Arbitration Act the fees and costs of the arbitration must be assessed and allocated as between the parties in a costs order forming part of the award.\textsuperscript{141} Currently, there is no established practice in ad hoc arbitral proceedings pursuant to which the winning party may claim reimbursement of all or part of its legal costs and other expenses. However, arbitral tribunals will, in practice, exercise their discretion in relation to such claims upon an application of a party and may make an award for reimbursement of costs and expenses.

\textsuperscript{133} Ibid, ch 6, art 31(2).
\textsuperscript{134} Ibid.
\textsuperscript{135} Ibid, ch 6, art 31(4).
\textsuperscript{136} ICAC Rules, ch 7, art 38.
\textsuperscript{137} Ibid, ch 7, art 39.
\textsuperscript{138} Russian Arbitration Act, ch 6, art 30(1).
\textsuperscript{139} ICAC Rules, ch 7, art 41(1).
\textsuperscript{140} Russian Arbitration Act, ch 6, art 30(2) and ICAC Rules, ch 7, art 41(2).
\textsuperscript{141} Russian Arbitration Act, ch 6, art 31(2).
7.4.2 By contrast, in ICAC proceedings the arbitration fees and other additional costs (such as expert witness or translators’ fees, travelling expenses, etc) shall be borne by the losing party or apportioned between the parties pro rata depending upon their respective success or failure if a claim or counterclaim succeeds only in part. In addition, the winning party is entitled to reimbursement of its reasonable legal costs and expenses (including the cost of legal representation) from the losing party.

7.4.3 The ICAC Rules also require that the arbitral tribunal includes in its award the amount of the arbitration costs and fees in the case and the apportionment of such costs as between the parties.

7.5 Termination of the proceedings

7.5.1 Under the Russian Arbitration Act, the arbitral proceedings are terminated either by a final award or by an order of the arbitral tribunal. Furthermore, the arbitral tribunal is required to make an order terminating the arbitral proceedings when:

— the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises that the respondent has a legitimate interest in obtaining a final settlement of the dispute;
— the parties agree to terminate the proceedings; or
— the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

7.5.2 Although the arbitral tribunal’s mandate will be terminated, it will nevertheless have the authority to correct or interpret the award, make an additional award or resume proceedings where a matter is referred back by the Russian courts in setting aside proceedings.

7.5.3 The ICAC Rules similarly provide for the termination of the proceedings through the final award on the merits. Alternatively, the arbitral tribunal may issue an order for termination of the proceedings, although it must comply with the same requirements as a final award on the merits.

142 ICAC Rules, Schedule of Arbitration Fees and Costs, art 6(1).
143 Ibid, art 6(2).
144 Ibid, art 9.
145 ICAC Rules, ch 7, art 39.
146 Russian Arbitration Act, ch 6, art 32(1).
147 Ibid, ch 6, art 32(2).
148 Ibid, ch 6, art 32(3).
149 ICAC Rules, ch 7, art 37 and 44.
7.6 Correction, clarification and issuance of a supplemental award

7.6.1 Under the Russian Arbitration Act, each party may (within 30 days of receipt of the award)\(^{150}\) request that the arbitral tribunal corrects any errors in computation, any clerical or typographical errors, or any errors of a similar nature.\(^{151}\) If so agreed by the parties, the arbitral tribunal may also provide an interpretation on a specific point or part of the award. The request for correction or interpretation of the award must be made with notice to the other party. The Russian Arbitration Act also empowers the arbitral tribunal to correct an award on its own initiative within 30 days of the date of the award.\(^{152}\)

7.6.2 If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. Any such correction or interpretation shall form part of the original award.\(^{153}\) The Russian Arbitration Act gives the arbitral tribunal discretion to extend the time period within which to make the correction, interpretation or supplemental award, if necessary.\(^{154}\)

7.6.3 Unless otherwise agreed by the parties, each party also has the right (within 30 days of receipt of the award) to request that the arbitral tribunal makes a supplemental award on claims presented in the arbitral proceedings but omitted from the award.\(^{155}\) The request must be made with notice to the other party. If the arbitral tribunal considers the request to be justified, it shall render a supplemental award within 60 days.

7.6.4 The rules as to the form and content of the award also apply to the correction or interpretation of the original award or to a supplemental award.\(^{156}\)

7.6.5 The ICAC Rules provide for the correction, interpretation or making of a supplemental award in ICAC arbitral proceedings.\(^{157}\) These rules are similar to the provisions of the Russian Arbitration Act, with only minor differences on the timing.\(^{158}\)

---

\(^{150}\) A different time limit may be set by the parties.

\(^{151}\) Russian Arbitration Act, ch 6, art 33(1).

\(^{152}\) Ibid, ch 6, art 33(2).

\(^{153}\) Ibid, ch 6, art 33(1).

\(^{154}\) Ibid, ch 6, art 33(4).

\(^{155}\) Ibid, ch 6, art 33(3).

\(^{156}\) Ibid, ch 6, art 33(5).

\(^{157}\) ICAC Rules, ch 7, art 43.

\(^{158}\) Under the ICAC Rules, either party can apply for the correction of an award within a reasonable time rather than the 30 days prescribed by the Russian Arbitration Act.
8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 The Russian Arbitration Act highlights the important principle of non-intervention by the courts (i.e. that the courts shall not intervene in arbitral proceedings except where expressly permitted by the Russian Arbitration Act).\(^{159}\)

8.1.2 In addition, the Russian Arbitration Act confers authority for the exercise of most functions in support of the arbitral process to the RCCI President rather than to the courts. This reinforces the position of arbitration as essentially a private and autonomous dispute resolution process.\(^{160}\) Nevertheless, in certain clearly-defined circumstances, the availability of court assistance remains necessary to ensure the effectiveness of arbitration as a dispute resolution mechanism.

8.2 Stay of court proceedings

8.2.1 The Russian Arbitration Act requires a court to stay any court proceedings at the request of a party, if the subject matter of the court claim contains an arbitration clause. However, the court is not required to stay proceedings if it finds that the arbitration clause is null and void, inoperative or incapable of being performed. Any request by a party shall be made no later than when the relevant party submits its first statement to the court on the substance of the dispute.\(^{161}\) If a party fails to object to the jurisdiction of the court, the arbitration agreement will be deemed terminated and the court will assume the full jurisdiction to resolve the dispute.\(^{162}\)

8.2.2 The Russian Arbitration Act further provides that arbitral proceedings may be commenced or continued notwithstanding any court proceedings. An award may also be made prior to the decision of the court on jurisdiction.\(^{163}\)

8.3 Preliminary rulings on jurisdiction

8.3.1 If, contrary to a party’s plea, the arbitral tribunal makes a preliminary ruling that it has jurisdiction,\(^{164}\) the complaining party will have the right to request (within

---

\(^{159}\) Russian Arbitration Act, ch 1, art 5.

\(^{160}\) Ibid, ch 1, art 6(1).

\(^{161}\) Ibid, ch 2, art 8(1).

\(^{162}\) See OOO Ponate ARD v Hochtief Aktiengessellschaft, Case No KG-A40/3239-08, Federal Arbitrazh Court of the Moscow Region, 4 May 2008 (reversing the decision of the Moscow City Arbitrazh Court, Case No A40-68740/06-83-495, 13 January 2008).

\(^{163}\) Russian Arbitration Act, ch 2, art 8(2).

\(^{164}\) Ibid, ch 4, art 16.
30 days after having received notice of that ruling) a competent court to rule on the issue of jurisdiction.\textsuperscript{165}

8.3.2 Furthermore, the court will determine the issue of jurisdiction if court proceedings are commenced and the other party invokes an arbitration agreement regarding the subject matter of the court proceedings.\textsuperscript{166} The court may proceed with litigation only if the arbitration clause is null and void, inoperative or incapable of being performed.

8.4 Interim protective measures

8.4.1 Although the arbitral tribunal has the power to order interim measures (unless otherwise agreed by the parties),\textsuperscript{167} the Russian Arbitration Act clarifies that it is not prohibited for a party to request a court (at any stage of the proceedings) to order interim measures of protection or for a court to grant such measures.\textsuperscript{168} The court will decide in accordance with the general principles of Russian procedural law whether to grant interim protective measures in support of an arbitration claim. It is noted, however, that although the power to grant interim measures is available to the courts, the courts have been reluctant to enforce interim measures for security for costs.\textsuperscript{169}

8.4.2 In ICAC arbitral proceedings, the ICAC Rules provide that if a party has requested a competent court to order interim protective measures and the court has granted such measures, then that party shall immediately inform ICAC of such measures.\textsuperscript{170}

8.5 Obtaining evidence and other court assistance

8.5.1 An arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the competent court to provide assistance in obtaining evidence for use in the arbitral proceedings.\textsuperscript{171} The court may execute such request on the basis of the general Russian procedural rules on taking and securing evidence.

\textsuperscript{165} Ibid, ch 4, art 16(3).
\textsuperscript{166} Ibid, ch 2, art 8(1).
\textsuperscript{167} Ibid, ch 4, art 17.
\textsuperscript{168} Ibid, ch 2, art 9.
\textsuperscript{169} See OAO Maslodelno-Surodelniy Kombinat “Mihaylovskiy” v OOO Agropromishleniy Holding “Moloko”, Case No A12-12532/03-C47, Federal Arbitrazh Court of the Povolzhskiy Region, 9 December 2004; the earlier decision of the Volgogradsk Region Arbitrazh Court; ZAO Azovskaya Sudoremontnaya Kompaniya v OOO Union, Case No F08-4725/2004, Federal Arbitrazh Court of the North Caucasus Region, 20 October 2004; and the earlier decision in OOO Union v FGUP Eyskiy Sudoremontnii Zavod, OOO Status-S and ZAO Azovskaya Sudoremontnaya Kompaniya, Case No A32-21321/2004-31-385, Krasnodar Region Arbitrazh Court, 26 August 2004.

\textsuperscript{170} ICAC Rules, ch 6, art 36(4).
\textsuperscript{171} Russian Arbitration Act, ch 5, art 27.
9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

9.1.1 Russian procedural law provides that state courts have jurisdiction to consider applications to set aside awards made in Russia.

9.1.2 The procedures for challenging and enforcing awards were updated as the new procedural codes took effect. On 1 September 2002, the new Arbitrazh Procedural Code came into force, followed by the new Civil Procedural Code on 1 February 2003. The Arbitrazh Procedural Code governs proceedings at the arbitrazh courts, which generally hear business-related disputes whereas the Civil Procedural Code regulates proceedings in the common courts, typically relating to disputes concerning individuals. Common courts also have jurisdiction over certain economic disputes provided they do not fall within the jurisdiction of the arbitrazh courts.

9.1.3 The arbitrazh court decisions are typically made at the first level arbitrazh courts or third level (Federal) arbitrazh courts. However, it is not uncommon for a number of arbitration related decisions to reach the highest level (Supreme Arbitrazh) or the Constitutional courts for an ultimate ruling.

9.1.4 The new codes now contain detailed regulations for challenging and enforcing domestically rendered awards and recognition and enforcement of foreign awards.

9.1.5 Under article 232 of the Arbitrazh Procedural Code, a foreign award may be challenged on the grounds set out by an international treaty or the Russian Arbitration Act.

9.2 Appeals

9.2.1 Awards are not subject to appeal under the Russian Arbitration Act. Recourse to a court against an award may be made only through an application for setting the award aside in accordance with the provisions of the Russian Arbitration Act.


174 The reason for not including an intermediary level of appellate court is due to a procedural peculiarity. An initial arbitration-related claim (e.g. enforcement) should be filed with the first level courts but an appeal to any decision of a first level court should be filed directly with a federal level court.

175 Russian Arbitration Act, ch 7, art 34(1). This part of the Russian Arbitration Act is also subject to the Draft Amendments. See Draft Amendments, s 6.
9.3 Applications to set aside an award

9.3.1 An award may only be set aside if the party making the application establishes that:

— one of the parties to the arbitration agreement was under some legal incapacity, or the arbitration agreement was invalid under the law chosen by the parties as the governing law of the agreement or, in the absence of such choice, under the laws of the Russian Federation;

— a party was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was for some other reasons unable to present its case;

— the award was made with respect to a dispute which was not covered by the arbitration agreement, or does not fall within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

— the constitution of the arbitral tribunal or the arbitral procedure was inconsistent with the arbitration agreement between the parties, unless such agreement was in conflict with a mandatory provision of the Russian Arbitration Act, or in the absence of an agreement, was not in accordance with the provisions of the Russian Arbitration Act; or

if the court finds that:

— the subject matter of the dispute was not capable of settlement by arbitral proceedings under the laws of the Russian Federation; or

— the award is inconsistent with the public policy of the Russian Federation.

9.3.2 The Russian Arbitration Act provides that an application for setting aside an award must be made within three months of the date of receipt of the award by the party making the application. If a request for correction, interpretation or for a supplemental award has been made to the arbitral tribunal, the three-month time period commences from the date the request has been disposed of by the arbitral tribunal (by rejecting the request or by making the correction, interpretation or supplemental award).

9.3.3 Furthermore, the court has discretion to suspend the setting aside proceedings in appropriate circumstances at the request of a party for a specified period of time.

\[176\] Russian Arbitration Act, ch 7, art 34(2)(1).

\[177\] Ibid, ch 7, art 34(2)(2).

\[178\] Ibid, ch 7, art 34(3).
in order to provide the arbitral tribunal with an opportunity to resume the arbitral proceedings or to take such other steps as may remove the grounds for setting aside the award.\textsuperscript{179}

10. Recognition and enforcement of awards

10.1.1 The Russian Arbitration Act does not draw a distinction between the recognition and enforcement of domestic and foreign awards or the grounds on which they may be refused.

10.1.2 The Russian Arbitration Act provides that regardless of the country in which it was made, an award shall be recognised as binding and, upon application in writing to the competent court, shall be enforced in Russia.\textsuperscript{180} The Russian Arbitration Act requires the application to be supported by the authenticated original award and arbitration agreement or by certified copies thereof. If either of these documents is made in a foreign language, certified translations into Russian must also be provided.\textsuperscript{181}

10.1.3 Recognition and enforcement of an award may only be refused on the grounds which correspond to the grounds on which an award may be set aside, namely:
— one of the parties to the arbitration agreement was under some legal incapacity or the arbitration agreement was invalid under the law chosen by the parties as the governing law of the agreement or, in the absence of such choice, under the laws of the country where the award was made;
— the party against whom the award was made was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was for some other reason unable to present its case;
— the award was made with respect to a dispute which was not covered by the arbitration agreement or does not fall within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
 — the constitution of the arbitral tribunal or the arbitration procedure was inconsistent with the arbitration agreement between the parties or, in the

\textsuperscript{179} \textit{Ibid}, ch 7, art 34(4).
\textsuperscript{180} \textit{Ibid}, ch 7, art 35(1).
\textsuperscript{181} \textit{Ibid}, ch 7, art 35(2). The Draft Amendments suggest that the requirement for the provision of the arbitration agreement should not be mandatory under the Russian Arbitration Act. See Draft Amendments, s 7.
absence of an agreement, was not in accordance with the laws of the country where the arbitration took place; or
— the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which (or under the laws of which) that award was made; or

if the court finds that:
— the subject matter of the dispute was not capable of settlement by arbitral proceedings under the laws of the Russian Federation; or
— the award is inconsistent with the public policy of the Russian Federation.

The Arbitrazh Procedural Code contains a rule that foreign court decisions and awards are to be recognised and enforced in Russia if one of Russia’s international treaties or federal laws requires it. Russia is a signatory to the New York Convention and the 1961 European Convention. Therefore, recognition and enforcement of foreign awards in Russia is conducted in accordance with these conventions. It is more difficult to enforce or seek recognition of foreign commercial judgments (than awards) due to the fact that Russia has still not ratified or entered into bilateral treaties for enforcement of foreign commercial judgments with some leading economies (e.g. Great Britain, the USA, Canada, etc). This is yet another reason for referring disputes to international arbitration rather than to the courts of the relevant foreign state.

The Russian Arbitration Act provides that if a local court, in the country in which an award is granted, receives an application to set aside or suspend that award, then the court where recognition or enforcement is sought may, if it considers it appropriate, adjourn its decision until the challenge has been heard. Alternatively, it may also order the other party to provide security upon application by the party seeking recognition or enforcement of the award.

Recent cases have highlighted that a respondent may not object to the jurisdiction of the Russian courts in granting enforcement on the grounds of invalidity of the award, unless a previous application to set aside the award has been made.

---

182 Russian Arbitration Act, ch 7, art 36(1).
183 Ibid, ch 7, art 36(2).
185 Russian Arbitration Act, ch 7, art 36(2).
186 See Odffeil SE v. JSC PO Sevmash, Case No A05-10560/2010, Federal Commercial District Court for the North West, 10 March 2011; Living Consulting Group AB v. LLC Sokotel, Case No A56-22667/2010, Federal Commercial District Court for the North West, 29 April 2011; and Hipp GmbH & Co Export KG v. LLC SIVMA Detskoye Pitanie, and CJSC Sivma, Case No BAC-1787/11, Supreme Arbitrazh Court, 4 April 2011.
11. Special provisions and considerations

11.1 Consumers
11.1.1 Consumers in Russia may not use international arbitration to resolve consumer disputes.

11.2 Employment law
11.2.1 Russian legislation provides that employment disputes must be decided by an employment commission or a state court, not by arbitration.

11.3 Real estate rights
11.3.1 Previously, Russian courts held that disputes in relation to the extension of leases or rights in relation to immovable property in general were non-arbitrable. A number of cases established different grounds for this conclusion. These cases demonstrate that generally, the requirements for state registration of immovable rights should only be determined by state courts.\(^\text{187}\)

11.3.2 In May 2010, the Supreme Arbitrazh Court referred a case to the Constitutional Court of the Russian Federation relating to a domestic arbitration concerning mortgages of immovable property.\(^\text{188}\) The referral seeks to clarify certain sections of the Law “On Mortgages (collateral on property)”,\(^\text{189}\) which provide that disputes may be resolved by “courts”. Section 118 of the Russian Constitution\(^\text{190}\) (and its interpretation by the Constitutional Court)\(^\text{191}\) provides that “arbitration courts” are deemed to be an alternative method for the settlement of civil disputes and not part of the Russian judiciary. However, the Civil Code and the AC provide that civil disputes (in general) may be heard by either a “court” or an “arbitration court”.

---

\(^{187}\) See for example, ZAO Kalinka Stockmann v Smolensky Passazh and ZAO Mosstroekonombank, Ruling No BAC-17481/08, Supreme Arbitrazh Court, 19 May 2009. This ruling was given in relation to Case No A40-28757/08-25-228, originally decided by the Moscow City Arbitrazh Court and its appeal to the Federal Arbitrazh Court of the Moscow Region, Case No KG-A40/9294-08-1,2, 13 October 2008.

\(^{188}\) See two recent cases with similar facts: ООО Kommercheskiy Bank Ekonomicheskago Razvitiya “Bank Kazani” v ООО Torgoviy Aliance and ООО BulgarRegionSnab, Case No BAC-530/10, Supreme Arbitrazh Court 18 May 2010 (as well as the preceding decisions of the lower courts, Case Nos A65-9868/2009-SG5-52 and A65-9868/2009); and ООО Kommercheskiy Bank Ekonomicheskago Razvitiya “Bank Kazani” v ООО DataDot-Zakamye and ООО BulgarRegionSnab, Case No BAC-634/10, Supreme Arbitrazh Court, 18 May 2010 (as well as preceding actions in lower courts, Case Nos A65-9867/2009-SG5-52 and A65-9867/2009).


\(^{190}\) The Russian Constitution was adopted on 12 December 1993 and came into force on 25 December 1993. It was amended by the Laws on the amendment of the Constitution of the Russian Federation, Nos 6-FKZ and 7-FKZ dated 30 December 2008.

\(^{191}\) Decision of the Constitutional Court No 377-O-O, 4 June 2007.
11.3.3 To clarify this apparent conflict in legislation, the Supreme Arbitrazh Court requested that the Constitutional Court decide whether an “arbitration court” is capable to hear disputes in relation to mortgages of immovable property notwithstanding that an “arbitration court” is not deemed to be part of the Russian judiciary.

11.3.4 The Constitutional Court ruled that domestic arbitral tribunals may decide civil law disputes relevant to real estate (including mortgage foreclosure). However, this Constitutional Court ruling concerned domestic arbitral proceedings and it is not clear yet whether similar authority may be granted to international arbitral tribunals in deciding disputes concerning real estate in Russia.

12. Concluding thoughts and themes

12.1.1 There is a long tradition in Russia of resolving international commercial disputes by arbitration. In the form of the Russian Arbitration Act, Russia has adopted an appropriate framework for such arbitrations which follows the internationally recognised standard set by the Model Law (1985). Russia is also demonstrating acceptance of the development of the Model Law (2006) by promoting the Draft Amendments.

12.1.2 Today, most commercial disputes involving foreign parties or concerning foreign direct investment in Russia are dealt with by way of private arbitration rather than through the Russian court system. This may be an indication that arbitration in Russia is increasingly accepted as meeting the demands of the modern business world.

---

192 Decision of the Constitutional Court No 10-P, 26 May 2011.
194 Ibid.
13. Contacts

CMS, Russia
Gogolevsky Blvd., 11
119019 Moscow
Russia

Sergey Yuryev
Partner
T +7 495 786 4000
E sergey.yuryev@cmslegal.ru

Konstantin Kantyrev
Senior Associate
T +7 495 786 4056
E konstantin.kantyrev@cmslegal.ru

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD
United Kingdom

Slava Kiryushin
Associate
T +44 20 7367 3795
E slava.kiryushin@cms-cmck.com
ARBITRATION IN SCOTLAND

By Rob Wilson and Valerie Allan, CMS
Table of Contents

1. Historical background 689

2. Scope of application and general provisions of the Scottish Arbitration Act 690
   2.1 Subject matter 690
   2.2 Structure of the law 690
   2.3 General principles 692
   2.4 Limitation 693

3. The arbitration agreement 693
   3.1 Definitions 693
   3.2 Formal requirements 693
   3.3 Special tests and requirements of the jurisdiction 693
   3.4 Separability 694
   3.5 Legal consequences of a binding arbitration agreement 695

4. Composition of the arbitral tribunal 695
   4.1 Constitution of the arbitral tribunal 695
   4.2 Procedure for challenging and substituting arbitrators 696
   4.3 Responsibilities of an arbitrator 698
   4.4 Arbitration fees and expenses 698
   4.5 Arbitrator immunity 699

5. Jurisdiction of the arbitral tribunal 700
   5.1 Competence to rule on jurisdiction 700
   5.2 Power to order interim measures 701

6. Conduct of proceedings 701
   6.1 Commencing an arbitration 701
   6.2 General procedural principles 701
   6.3 Place and language of the arbitration 702
   6.4 Multi-party issues 702
   6.5 Oral hearings and written proceedings 702
   6.6 Default by one of the parties 703
   6.7 Taking of evidence 704
   6.8 Appointment of experts 704
7. Making of the award and termination of proceedings 706
   7.1 Choice of law 706
   7.2 Timing, form and notification of an award 706
   7.3 Settlement 706
   7.4 Power to award interest and costs 706
   7.5 Termination of the proceedings 707
   7.6 Effect of an award 708
   7.7 Correction, clarification and issue of a supplemental award 708

8. Role of the courts 708
   8.1 Jurisdiction of the courts 708
   8.2 Stay of court proceedings 709
   8.3 Interim protective measures 709

9. Challenging and appealing an award through the courts 711
   9.1 Jurisdiction of the courts 711
   9.2 Appeals 711
   9.3 Applications to set aside an award 712

10. Recognition and enforcement of awards 713
    10.1 Domestic awards 713
    10.2 Foreign awards 714

11. Conclusion 715

12. Contacts 716
1. Historical background

1.1.1 Private arbitration in Scotland can be traced back to the 12th century. However, despite this extensive history, Scotland did not have a clear and codified arbitration regime until the introduction of the Arbitration (Scotland) Act 2010 (Scottish Arbitration Act).

1.1.2 Prior to the introduction of the Scottish Arbitration Act, the Scots law of arbitration was governed by old case law, piecemeal legislation and out-dated rules, all of which led to the development of an uncertain and unclear regime. Reform was proposed by way of a draft Arbitration Bill during the 1990s which, despite being circulated in January 1997 by the Scottish Courts Administration (following recommendations made by the Dervaird Committee), was not progressed. In 1999 the Scottish Council for International Arbitration (SCIA) and the Chartered Institute of Arbitrators (Scottish Branch) (CIArb (SB)) produced the Scottish Arbitration Code (Code). The Code attempted to set out the general framework of arbitration and the rules under which arbitration in Scotland should be conducted. While the Code was widely welcomed, it was not mandatory and its adoption required the agreement of all parties to an arbitration.

1.1.3 A second draft of the proposed arbitration bill was produced in December 2002 by the Arbitration (Scotland) Bill Working Group, in association with the SCIA and CIArb (SB). The bill once again sought to provide a comprehensive statutory framework for arbitration with an emphasis on the expediency of arbitral proceedings. However, the bill was not progressed.

1.1.4 Following a shift in political climate, in May 2007 the new Scottish Government adopted a manifesto goal of encouraging arbitration in Scotland. As a result, the Scottish Government prepared a further draft bill, drawing on the Model Law 1985, the Arbitration Act 1996 (English Arbitration Act) and the earlier draft bill of 2002. The new draft bill was put out for consultation in June 2008 with its stated objectives being to:
   — clarify and consolidate Scottish arbitration law (filling in any gaps);
   — provide a statutory framework for arbitrations where none is agreed between the parties;
   — ensure fairness and impartiality in the arbitral process; and
   — minimise expense and ensure that the arbitral process is efficient.

1.1.5 This time the draft bill was progressed. The Scottish Arbitration Act received royal assent on 5 January 2010 and came into full force and effect as from 7 June 2010.
1.1.6 The Scottish Arbitration Act radically overhauls the Scots law of arbitration and provides the first complete statutory framework for arbitration in Scotland. That framework seeks to adopt “best practice” from around the world. The drafters’ approach was to create a comprehensive, uniformly drafted Act. Therefore, the decision was taken to repeal the Model Law 1985, which was introduced into Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Nevertheless, the principles that underpin the Model Law 1985 are still to be found in the Scottish Arbitration Act.¹

2. Scope of application and general provisions of the Scottish Arbitration Act

2.1 Subject matter
2.1.1 The Scottish Arbitration Act applies to all arbitrations that are “seated in Scotland”. An arbitration is defined as being “seated in Scotland” if:
— Scotland is designated as the juridical seat by the parties, by a third party with designated power to decide the juridical seat or by the arbitral tribunal (where parties fail to designate a third party); or
— in the absence of any such designation the court determines Scotland to be the juridical seat.²

2.1.2 However, if two Scottish parties arbitrate in Scotland but specifically choose a different jurisdiction as the juridical seat, the provisions of the Scottish Arbitration Act will generally not apply. Exceptions to this general rule include the following situations:
— the sisting of legal proceedings by a court (equivalent to a stay of proceedings in England) on the application by one of the parties where a valid arbitration agreement exists;³ and
— the enforcement of awards.⁴

2.2 Structure of the law
2.2.1 The Scottish Arbitration Act consists of 37 primary sections and two schedules. The first of these schedules contains the Scottish Arbitration Rules (SAR).⁵

² Scottish Arbitration Act, s 3.
³ Ibid, s 10.
⁴ Ibid, s 12.
⁵ Ibid, schedule 1.
second schedule lists the extent to which previous legislation has been repealed.\(^6\) In addition, explanatory notes (prepared by the Scottish Government) are annexed to the Scottish Arbitration Act.

2.2.2 The SAR provide an easy point of reference to the rules that govern arbitration seated in Scotland. The SAR are intended to be user friendly and are categorised into mandatory and default rules. The status of each rule is denoted in Schedule 1 to the Scottish Arbitration Act by the letter “M” for mandatory rules and the letter “D” for default rules.

**Mandatory rules**

2.2.3 The mandatory rules apply to all arbitrations seated in Scotland, irrespective of which law the parties may choose to apply. These rules cannot be modified or disapplied by agreement between the parties or by any other means.\(^7\) They are intended to establish minimum standards to ensure fairness and impartiality.

**Default rules**

2.2.4 The majority of the SAR consists of default rules which apply where the arbitration agreement is silent or the parties have not agreed to modify or disapply them (in whole or in part).\(^8\) The default rules set out in detail elements of the procedural framework. The intention is that they will enable the maximum autonomy and flexibility for the parties. The default rules provide a fall back or “ready made” position if the parties are unable to agree on specific rules.

2.2.5 In addition to any express agreement by the parties to modify or disapply the default rules, the parties will be treated as having agreed to modify or disapply a default rule if the:
- rule is inconsistent with or disapplied by the arbitration agreement;
- rule is inconsistent with or disapplied by any arbitration rules or other document (for example, the UNCITRAL Rules (2010) or institutional rules) which the parties agree are to govern the arbitration;
- rule is inconsistent with or disapplied by anything done with the agreement of the parties; or
- parties choose a law other than Scots law as the applicable law in respect of the rule’s subject matter.\(^9\)

---

\(^6\) *Ibid*, schedule 2.
\(^7\) *Ibid*, s 8.
\(^8\) *Ibid*, s 9.
2.3 General principles

2.3.1 The Scottish Arbitration Act is to be interpreted and applied in accordance with the three founding principles of fairness, autonomy of the parties and non intervention by the courts. The inspiration behind these principles is taken from the “general principles” of the English Arbitration Act.

Fairness

2.3.2 The object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense. The wording “without delay or expense” comes from the English Arbitration Act and it has been commented that this will hopefully give confidence to arbitral tribunals to deal with matters in an expeditious manner without fear of criticism by the parties for doing so. This principle also underpins all of the SAR.

Autonomy

2.3.3 Parties are free to agree how to resolve their disputes subject only to such safeguards as are thought to be necessary and in the public interest. Party autonomy is at the root of all modern arbitration law including the Model Law 1985. The principle of party autonomy is reinforced by the proportion of rules within the SAR that are default rules rather than mandatory and so may be varied or excluded by the parties. Parties are therefore encouraged to consider matters in advance and to exclude those rules that they do not wish to apply.

Limited court intervention

2.3.4 The court should not intervene in arbitration except as provided for by the Scottish Arbitration Act. This principle, as expressed in Article 5 of the Model Law 1985, was included in the Scottish Arbitration Act to assist in dissuading the courts from intervening in arbitral matters. It remains to be seen to what extent the courts decide to intervene notwithstanding this “principle” and the apparent absence of a binding rule in this regard, although the court appears to have accepted the limitation in an early decision under the Scottish Arbitration Act. Case law in England in relation to the English Arbitration Act has interpreted the use of the words “should not intervene” (as used in the English Arbitration Act rather than

10 Ibid, s 1.
11 Ibid, s 1(a).
13 Scottish Arbitration Act, s 1(b).
14 Ibid, s 1(c).
“shall” as used by Article 5 of the Model Law 1985) to mean that court intervention is not entirely precluded.16

2.4 Limitation
2.4.1 The Scottish Arbitration Act amends the Prescription and Limitation (Scotland) Act 1973 (1973 Act) to allow the 1973 Act to apply to arbitrations in Scotland.17

3. The arbitration agreement

3.1 Definitions
3.1.1 An “arbitration agreement” is defined as an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with provisions contained in a separate document).18

3.1.2 Anyone who has legal capacity to bind himself to a contract can enter into an arbitration agreement in Scotland. The purpose of an arbitration agreement is to exclude the courts from the resolution of the dispute.

3.2 Formal requirements
3.2.1 The Scottish Arbitration Act does not prescribe (unlike the English Arbitration Act or the Model Law 1985) that arbitration agreements must be in writing. Arguably, the Scottish Arbitration Act will therefore recognise agreements which are concluded orally.

3.2.2 The Scottish Arbitration Act makes clear that an arbitration agreement can relate to an ad hoc submission of an existing (present) dispute or an agreement between parties to submit all future disputes to arbitration (typically found in an arbitration clause within a wider contract).

3.2.3 The Requirements of Writing (Scotland) Act 1995 will continue to apply to the situations to which it refers including rights relating to land, where agreements, including arbitration agreements, must be in writing to be valid in Scotland.

3.3 Special tests and requirements of the jurisdiction
3.3.1 In principle, if a matter can be litigated before the civil courts, then it can also be arbitrated if the parties have so agreed.

16 Vale do Rio Doce Navegacacos SA v Shanghai Bao Steel Ocean Shipping Co Ltd [2000] 2 All E.R. (Comm) 70.

17 Scottish Arbitration Act, s 23.

18 Ibid, s 4.
3.3.2 Some arbitration laws identify a list of subjects which cannot be arbitrated. The Scottish Arbitration Act has not done so perhaps because at the heart of arbitrability in Scotland is the Scots common law of contract, the codification of which was not the intended purpose of the Scottish Arbitration Act. The Scottish Arbitration Act does not therefore of itself render any dispute capable of being arbitrated which would not have been otherwise capable of being arbitrated absent the Scottish Arbitration Act.¹⁹

3.3.3 Generally speaking, the following matters may not be arbitrated under Scots law:
— criminal matters;²⁰
— winding up of companies;
— creation of property rights (although the question of whether property rights have been infringed is in principle arbitrable);
— matters pertaining to public interest and status; and
— matters that are required to be determined according to specific regulatory regimes.

3.4 Separability
3.4.1 The principle of separability, which has long applied in Scotland, is expressly set out in the Scottish Arbitration Act. Section 5(1) provides that an arbitration agreement which forms (or which was intended to form) part of a contract is to be treated separately from the remainder of that contract.

3.4.2 If the contract is terminated, for example, by a material breach or frustration, the arbitration clause is likely to subsist unless the tribunal (or the court upon review of the tribunal’s decision) takes the view that the factors resulting in the termination of the contract should also nullify the arbitration clause.²¹

3.4.3 Where a dispute otherwise arises regarding the validity of a contract, the dispute can still be arbitrated²² in accordance with the arbitration clause or agreement notwithstanding the validity of the remainder of the contract, on the basis that the arbitration agreement can be severed from the remainder of the agreement which has its validity in dispute.

¹⁹ Ibid, s 30.
²¹ Scottish Arbitration Act, s 5(2).
²² Ibid, s 5(3).
3.5 Legal consequences of a binding arbitration agreement

3.5.1 The Scottish Arbitration Act states that an award will be final and binding.\textsuperscript{23} Although this was the situation prior to implementation of the Scottish Arbitration Act, it is hoped that the express statement will avoid any issues arising in this regard. It should also assist in facilitating the enforcement of awards outside Scotland given that the non-binding nature of an award is a ground for refusing enforcement under Art V(1)(e) of the New York Convention.\textsuperscript{24}

3.5.2 In addition, any provisional award dealing with a particular issue will be final and binding except to the extent specified in the award or until it is superseded by a subsequent award.\textsuperscript{25} This allows a degree of flexibility for the tribunal, permitting it to make interim awards or even a series of provisional awards on the same issue without such awards being final and binding.

3.5.3 It is a fundamental principle of arbitration that it can only bind the rights of the parties to the arbitration agreement. The Scottish Arbitration Act appears to go a stage further by stipulating\textsuperscript{26} that the award of a tribunal cannot bind any third party (acting in good faith) and that an award ordering the rectification or reduction of a deed or other document is not effective in so far as it would adversely affect the interest of any third party acting in good faith. It is currently unclear what effect this provision will have in practice as there is no comparable provision under the English Arbitration Act.

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 Part 1 of the SAR addresses the constitution of the arbitral tribunal. The parties are provided with a degree of flexibility due to the mandatory and default rules contained in the SAR. Rule 2 (a default rule) provides that an arbitration agreement need not address the appointment of the tribunal, but, if it does so, parties may specify who is to form the tribunal, require the parties (or any other person) to appoint the tribunal, or provide for the tribunal to be appointed in any other way.\textsuperscript{27}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{23} Ibid, s 11(1).
  \item \textsuperscript{24} For the full text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.
  \item \textsuperscript{25} Scottish Arbitration Act, s 11(4).
  \item \textsuperscript{26} Ibid, s 11(2).
  \item \textsuperscript{27} SAR, rule 2 (default rule).
\end{itemize}
\end{footnotesize}
4.1.2 The parties can agree to choose one or more arbitrators and, if they wish, they may also specify the identities of the arbitrators within the arbitration agreement. However, the arbitrator must be an individual (as opposed to, for example, a corporate body).\textsuperscript{28} The arbitrator must be over the age of 16 and must not be an incapable adult under the Adults with Incapacity (Scotland) Act 2000.\textsuperscript{29}

4.1.3 The default rules provide that if the parties fail to agree on the number of arbitrators the tribunal will consist of a sole arbitrator\textsuperscript{30} who should be jointly appointed by the parties.\textsuperscript{31} The appointment of a sole arbitrator has tended to be the usual position in domestic arbitrations (usually for reasons of cost) but parties are free to agree on an alternative number of arbitrators, such as three, which is the norm in international arbitrations. There is no requirement to choose an odd number of arbitrators.

4.1.4 If the parties fail to appoint an arbitrator, the appointment may be referred to an arbitral appointments referee.\textsuperscript{32} The arbitral appointments referee will make the appointment of the arbitrator (subject to certain procedural requirements). If parties seek to challenge this appointment, an application can be made to the court to make the final decision on appointment.

4.1.5 A judge is only entitled to act as an arbitrator where the dispute appears to be of a commercial character and the Lord President (the leading civil judge in Scotland) has authorised the judge to so act.\textsuperscript{33}

4.2 Procedure for challenging and substituting arbitrators

4.2.1 A party may object to the tribunal about the appointment of an arbitrator.\textsuperscript{34} This should be distinguished from a right to remove. An objection can only be made in relation to:
  — the impartiality or independence of the arbitrator;
  — fair treatment of the parties; or
  — the arbitrator not being qualified to the level agreed necessary by the parties.

\textsuperscript{28} Ibid, rule 3 (mandatory rule).
\textsuperscript{29} Ibid, rule 4 (mandatory rule).
\textsuperscript{30} Ibid, rule 5 (default rule).
\textsuperscript{31} Ibid, rule 6 (mandatory rule).
\textsuperscript{32} Ibid, rule 7(2) (mandatory rule).
\textsuperscript{33} Scottish Arbitration Act, s 25.
\textsuperscript{34} SAR, rule 10 (default rule).
4.2.2 This list is exhaustive and there are no other grounds for objection available. The default rule in the SAR provides that a party must make any objection to the tribunal within 14 days of becoming aware of the facts upon which the grounds for objection are based. This differs from the practice under the English Arbitration Act which provides for objections to be made to the court. This is a further example of the attempt to minimise the court’s involvement in arbitration matters.

**Procedure**

4.2.3 Any objection should be made directly to the tribunal. Notice must also be given by the party objecting to the other party to the arbitration. On receipt of a competent objection, the tribunal should decide to either confirm or revoke the appointment. If they fail to do so within 14 days of a competent objection being made then the appointment of the challenged arbitrator is automatically revoked.

4.2.4 The effect of the rule is that where there is only one arbitrator he/she is being asked to adjudicate on the challenge to their own appointment. However, there is an additional mandatory rule which allows any party to apply to the Outer House of the Court of Session in Edinburgh to remove the arbitrator if they are unsatisfied with the decision of the tribunal, subject to satisfying the criteria detailed in the rule. The grounds for such an application are the same as the three grounds for objecting to the tribunal (set out above at paragraph 4.2.1) with two additions:

— that the arbitrator is not capable of being an arbitrator;
— that a “substantial injustice” has been or will be caused if the arbitrator fails to conduct the arbitration in line with the arbitration agreement, the rules or any other agreement of the parties.

Use of the term “substantial injustice” would suggest that this will not extend to minor procedural breaches. This list is also exhaustive so any objection must be based on one of the five combined grounds.

**The appointment of substitute arbitrators**

4.2.5 It may be necessary to appoint a substitute arbitrator should an arbitrator decline the appointment or be unable to act. An arbitrator may only resign if:

---

35 Ibid, rule 10(2) (mandatory rule).
36 Ibid, rule 10(3) (default rule).
37 Ibid, rule 10(4) (default rule).
38 Ibid, rule 12 (mandatory rule).
39 Ibid, rule 12(c) (mandatory rule).
40 Ibid, rule 12(e) (mandatory rule).
41 Ibid, rule 15 (mandatory rule).
— the parties consent to the arbitrator’s resignation;
— the arbitrator has a contractual right to resign;
— a party has successfully challenged the arbitrator’s appointment;
— the parties choose to disapply Rule 34 (1) of the SRA, or
— a successful application has been made to the court.42

4.2.6 However, an arbitrator may also apply to resign, by way of petition to the Outer House of the Court of Session, irrespective of the parties’ position.43

4.2.7 The appointment of substitute arbitrators is an issue upon which the parties may agree. If they fail to do so, then such appointment will be dealt with under the rules discussed at section 4.1 above.

4.3 Responsibilities of an arbitrator
4.3.1 The Scottish Arbitration Act sets out the general duties that are incumbent upon the tribunal. These include that the tribunal must be impartial and independent, treat the parties fairly and conduct the arbitration without unnecessary delay or expense.44 These duties reflect the founding principles of the Scottish Arbitration Act and the laws of natural justice. They are mandatory duties and cannot be disapplied by the parties. The duty of treating the parties fairly is specifically extended to include giving each party a reasonable opportunity to put its case forward and address the other party’s case.45

4.3.2 The parties are also free to agree within the arbitration agreement or otherwise, any other duty or responsibility they wish to put upon the arbitrator or tribunal including, for example, the default rules on confidentiality.46

4.3.3 In contrast, the responsibilities or duties incumbent upon the parties are simply to conduct the arbitration without unnecessary delay or expense.47

4.4 Arbitration fees and expenses
4.4.1 Part 7 of the SAR concerns arbitration fees and expenses. The parties’ obligation to pay an arbitrator’s fee is “several” rather than “joint and several” (which was the previous position under the common law). This means that the arbitrator can

42 Ibid, rule 15(1)(a)–(e) (mandatory rule).
43 Ibid, rule 15(2) (mandatory rule).
44 Ibid, rule 24(1)(a)–(c) (mandatory rule).
46 Ibid, rule 26 (default rule).
Arbitration in Scotland

claim the fee from either one of the parties and the paying party has no right of relief against the other party until such time as an award is made in which the other party is made partly liable for the arbitrator’s fee. However, matters are made more complicated by a further rule (albeit a default rule, meaning it can be excluded by agreement) which states that the parties will each be liable for an equal share of the recoverable arbitral expenses until such time as an award is made, although it is stated that this should not affect the parties’ several liability.\(^{48}\)

4.4.2 The position is the same in relation to any expenses incurred by the arbitrator personally and any fees incurred by the tribunal (e.g. employing a clerk or experts). The arbitrator is entitled to a reasonable fee, which should ideally be stipulated by the arbitrator upon the acceptance of office.

4.4.3 Failing agreement between the parties and the arbitrators as to the amount of the arbitrators’ fees and expenses the matter will be remitted to the Auditor of the Court of Session who will decide the amount to be paid based on a reasonable commercial rate of charge.\(^{49}\) It should be noted that if the parties fail to agree, the Auditor of the Court of Session will also be responsible for determining the payment terms.

4.5 Arbitrator immunity

4.5.1 Part 9 of the SAR addresses arbitrator immunity. When drafting the Scottish Arbitration Act it was decided to retain the existing common law position. The SAR therefore provides that neither the tribunal nor any arbitrator will be liable for anything done or omitted to be done in the performance of its functions.\(^{50}\) This extends to any breach of either its express or implied terms or any delictual wrong committed in the course of the tribunal’s functions.

4.5.2 Immunity extends to all of the tribunal’s functions, covering not only those functions under the Scottish Arbitration Act but also any supplementary contractual provisions agreed between the parties. There are two exceptions to the operation of immunity:

— if the act or omission is shown to have been in bad faith, or
— any liability arising from an arbitrator’s resignation.

4.5.3 The purpose of the immunity is to ensure that capable arbitrators are not discouraged from taking up a position due to a risk that they may be sued for damages following a possible error or mistake.

\(^{48}\) Ibid, rule 62 (default rule).

\(^{49}\) Ibid, rule 60(4) (mandatory rule).

\(^{50}\) Ibid, rule 73 (mandatory rule).
4.5.4 Immunity also extends to any expert, witness or legal representative that may have participated in the arbitration. This mirrors the position in civil proceedings before the Scottish Courts.\(^{51}\)

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 An arbitral tribunal in Scotland has the power to rule on its own jurisdiction. This position is consistent with many modern arbitration systems. The tribunal can rule on questions relating to the validity of the arbitration agreement, whether the tribunal is properly constituted\(^{52}\) and whether a particular dispute falls within the terms of an arbitration agreement.\(^{53}\) As might be expected the relevant rule is mandatory and cannot be amended or disapplied.

5.1.2 A party may object to the tribunal’s jurisdiction on the grounds that it does not have jurisdiction in relation to a particular matter or that it has exceeded its jurisdiction. Any objection must be made before, or as soon as reasonably practicable after, the matter to which it relates is raised in the arbitration. The exception to this timing requirement is where the tribunal considers the circumstances to justify a later objection.\(^{54}\) However, any objection must be made prior to the tribunal making its final award.

5.1.3 If the tribunal upholds the objection then it must end the arbitration (in so far as it relates to matters over which it does not have jurisdiction) and set aside any relevant provisional or partial award that has been made previously.

5.1.4 The tribunal may either rule on the objection separately from the subject matter of the dispute or delay its ruling until it makes its award on the merits of the dispute. However, where the parties are in agreement as to which course of action should be taken, the tribunal should proceed accordingly.

5.1.5 If a party seeks to appeal a decision of the tribunal on an objection to jurisdiction, it can rely upon a further mandatory rule which allows parties the right to appeal to the Outer House of the Court of Session until 14 days after the decision. Pending

\(^{51}\) Ibid, rule 75 (mandatory rule).

\(^{52}\) Ibid, rule 19(a) and (b) (mandatory rule).

\(^{53}\) Ibid, rule 19(c) (mandatory rule).

\(^{54}\) Ibid, rule 20(2)(b) (mandatory rule).
such an appeal the tribunal may continue with the arbitration thereby avoiding any vexatious objections that might otherwise be designed to stall the process. 55

5.2 Power to order interim measures
5.2.1 The tribunal has limited powers under a default rule in relation to protecting property which is the subject of the arbitration. 56 In particular, the tribunal can direct a party to allow an expert or a third party to inspect, photograph, preserve or take custody of any property which that party either owns or possesses which is the subject of the arbitration. The tribunal can also direct a party to take samples, carry out experiments or preserve any document or other evidence which any party controls. These are similar to the powers available to the courts in civil proceedings.

5.2.2 The courts otherwise have the same power to order interim measures in relation to arbitration as they have in relation to civil court proceedings. However, the courts only have such powers if they are asked to take such action by a party to the arbitration either with the consent of the tribunal if the arbitration has begun or if the court is satisfied as to the urgency of the circumstances. 57

6. Conduct of proceedings

6.1 Commencing an arbitration
6.1.1 Arbitral proceedings begin when notice is given by one party to the other party (or parties) that they wish to submit the dispute to arbitration. 58 The Scottish Arbitration Act contains no formal requirement as to the content or form of the notice, although the arbitration agreement may contain formal requirements that must be observed to ensure that such a notice is valid.

6.2 General procedural principles
6.2.1 The tribunal may determine the procedure to be followed in the arbitration. 59 However, this rule can be disapplied by the agreement of the parties, reflecting the principle that the parties should be able to agree the form and method of resolution of their dispute.

55 Ibid, rule 21 (mandatory rule).
56 Ibid, rule 35 (default rule).
57 Ibid, rule 46 (default rule).
58 Ibid, rule 1 (default rule).
59 Ibid, rule 28 (default rule).
6.2.2 The tribunal may also give such directions to the parties as it consider appropriate for the conduct of the arbitration and the parties are required to comply with such directions within such period as the tribunal may specify.60

6.3 Place and language of the arbitration
6.3.1 Subject to any agreement between the parties to the contrary, the tribunal may conduct the arbitration in any location that it sees fit.61 This can be in Scotland or elsewhere.

6.3.2 There is no requirement under the SAR for the arbitration to be conducted in English. Instead, in terms of a default rule, the tribunal can determine the language in which the arbitration will be conducted.62

6.4 Multi-party issues
6.4.1 Parties may agree to consolidate their arbitration with other arbitral proceedings (involving the same or different parties) or to hold concurrent hearings. However, the tribunal cannot do this on its own initiative.63 There are special provisions regarding consolidation of statutory arbitral proceedings but these have not yet been brought into force.

6.5 Oral hearings and written proceedings
6.5.1 The Scottish Arbitration Act provides flexibility for a tribunal to approach the resolution of a dispute in whatever way is most suited to the particular circumstances of that dispute. The tribunal can determine whether and to what extent the arbitration will proceed by way of hearings and written or oral argument.65 It may make orders regarding the presentation, disclosure and submission of documents or other evidence.66

6.5.2 A party may be represented in arbitration by a lawyer or by any other person.67 No particular qualifications are required although notice of the party’s representative

---

60 Ibid, rule 31 (default rule).
61 Ibid, rule 29 (default rule).
62 Ibid, rule 28(g) (default rule).
63 Ibid, rule 40 (default rule).
64 Scottish Arbitration Act, s 16.
65 Although note that in Arbitration Application No 3 of 2011 [2011] CSOH 164 the court granted leave to make a legal error appeal in respect of a tribunal’s decision as to the legal onus or burden of proof between the parties, but refused to grant leave for a legal error appeal relating to the arbitrator’s decision as to the relevance of certain written pleadings.
66 SAR, rule 28 (default rule).
67 Ibid, rule 33 (default rule).
must be given to the tribunal and to the other party before representation begins. If the tribunal hears evidence, then it may direct that a party or witness is examined on oath or affirmation. 68

6.6 Default by one of the parties

Failure to submit a claim or defence in good time

6.6.1 Where a party fails to submit a claim or defence in a timely manner or there is an unnecessary delay without good reason, and the delay creates a substantial risk that the tribunal will not be able to resolve the issues fairly or the delay is likely to cause serious prejudice to the other party, the tribunal is required to end the arbitration in so far as it relates to the subject matter of the claim. The tribunal may also make any award it sees fit against the defaulting party, including an award of expenses. 69

Failure to attend a hearing or produce evidence

6.6.2 Where a party fails (without good reason) to attend a hearing which it was requested to attend on reasonable notice or fails to produce any document or other evidence requested by the tribunal, the tribunal can proceed with the arbitration and make an award on the basis of the evidence (if any) before it. 70

Failure to comply with a tribunal direction or arbitration agreement

6.6.3 A party will also be in default if it fails to comply with a tribunal direction or the arbitration agreement. As a consequence of this default, the tribunal can make an order requiring the party to comply with any directions or obligations arising from the tribunal or the arbitration agreement. 71 If a party continues to be in default by failing to comply with the tribunal’s order, the tribunal may:
— direct that the party is not entitled to rely on any allegation or material that is the subject matter of the order;
— draw adverse inferences from the party’s non-compliance;
— proceed with the arbitration and make its award; or
— make a provisional award (including an award on expenses) in consequence of the party’s non-compliance.

68 Ibid, rule 36 (default rule).
69 Ibid, rule 37 (default rule).
70 Ibid, rule 38 (default rule).
71 Ibid, rule 39 (default rule).
6.7 Taking of evidence

6.7.1 The tribunal will determine the admissibility, relevance, materiality and weight of any evidence. The tribunal will also determine the form in which evidence is to be given and whether or not it should be pro-active in determining the facts and law relative to the dispute. It may determine what documents and evidence should be disclosed to or by either party and how this should be done. Witness evidence may be heard on oath or affirmation.

6.8 Appointment of experts

6.8.1 The tribunal may instruct an expert to provide an opinion on areas outside the arbitrators’ knowledge. The expert’s role is to advise the tribunal and not to determine the issues personally. The cost of such instruction will be met by the parties, who must consent to any such instruction if significant expense is likely to be incurred. If such an appointment is made, the parties must be given a reasonable opportunity either to make representations about any written expert opinion or to hear any oral expert opinion and to question the expert.

6.8.2 Separately, parties are entitled to instruct their own experts to assist them in their case. It will be a question for the tribunal as to whether or not it is prepared to hear such an expert’s evidence or allow their report to be relied upon and, if so, what weight is given to that evidence.

6.8.3 Experts have the same immunity as they do under civil proceedings in Scotland. A recent Supreme Court decision has removed immunity from suit from English expert witnesses. It remains to be seen what approach is taken by the Scottish courts or the Scottish Parliament in response to that decision.

6.9 Confidentiality

6.9.1 “Confidential information” is defined as being any information that is not in the public domain relating to the dispute, arbitration, award or to any civil proceedings relating to the arbitration in respect of which an order has been made under section 15 of the Scottish Arbitration Act (which provides a mechanism for protecting the identity of a party to legal proceedings connected with an arbitration).

---

72 Ibid, rule 28 (default rule).
73 Ibid, rule 34 (default rule).
74 Ibid, rule 32 (default rule).
75 Ibid, rule 75 (mandatory rule).
77 SAR, rule 26(4) (default rule).
6.9.2 Any disclosure of confidential information by the arbitrator(s) or parties is actionable as a breach of an obligation of confidence. Disclosure is not expressly prohibited but instead the Scottish Arbitration Act relies on the possible sanctions which might be obtained by way of an action for breach of confidence such as damages or interdict. It does not specify who has the right to bring an action for breach of confidence. The parties and the tribunal are, however, required to take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the arbitration and the tribunal must inform the parties of these confidentiality obligations at the outset of the arbitration.

6.9.3 Disclosure is permitted without sanction in certain circumstances where it is:
— authorised expressly or impliedly by the parties;
— required by the tribunal, or made to assist or enable the tribunal to conduct the arbitration;
— required by a rule of law, for the proper function of the disclosing party's public functions or to enable any public body or office holder to perform their public functions properly;
— reasonably considered to be necessary to protect a party's lawful interests;
— in the public interest;
— necessary in the interests of justice; or
— made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.

6.10 Court assistance in taking evidence
6.10.1 On application by the tribunal or any party, the court may order any person to attend a hearing to give evidence or disclose documents or other evidence to the tribunal. The court cannot, however, order a person to give evidence which that person would be entitled not to give in civil court proceedings.
7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 Where the parties agree that the arbitration is to be seated in Scotland but do not specify which law is to govern it then Scots law will govern the arbitration agreement, unless the parties agree otherwise.\(^83\)

7.2 Timing, form and notification of an award
7.2.1 An award must be in writing and signed by all arbitrators or all of those assenting to the award.\(^84\) It must state the seat of arbitration, when the award is made and when it takes effect, the tribunal’s reasoning and whether any previous provisional or partial award has been made.\(^85\) An award is validly notified if it meets the criteria for formal notification or as otherwise agreed between the parties.\(^86\)

7.3 Settlement
7.3.1 Parties can end the arbitration by notifying the tribunal that they have settled the dispute.\(^87\) If the parties request it, the tribunal may make an award reflecting the terms of the settlement.\(^88\)

7.4 Power to award interest and costs

Interest
7.4.1 The tribunal has detailed powers to award interest on all or part of an award, if it chooses to do so.\(^89\) It is not open to the parties to remove by agreement the tribunal’s ability to award interest on all or part of the award, although the parties are permitted to agree the manner in which interest is to be calculated if it is awarded. Interest may be awarded by the tribunal on all or part of the amount of the award in respect of both the pre- and post- award periods. The tribunal may specify the interest rate and the period for which it is payable, and may make different determinations on interest in respect of different parts of the award.

\(^83\) Scottish Arbitration Act, s 6.
\(^84\) SAR, rule 51 (default rule).
\(^85\) Ibid, rule 51(2) (default rule).
\(^86\) Ibid, rule 83 (default rule).
\(^87\) Ibid, rule 57(3) (default rule).
\(^88\) Ibid, rule 57(4) (default rule).
\(^89\) Ibid, rule 50 (mandatory rule).
**Expenses and costs**

7.4.2 “Arbitration expenses” are defined as being the:
- arbitrator’s fees and expenses;
- expenses incurred by the tribunal in conducting the arbitration;
- parties’ legal and other expenses; and
- fees and expenses of any arbitral appointments referee and any third party to whom the parties gave powers in relation to the arbitration.\(^{90}\)

7.4.3 As mentioned at section 4.4 above, the parties are each separately liable for the arbitrator’s fees and expenses.\(^{91}\) The tribunal may make an award allocating liability between the parties for the recoverable expenses of the arbitration.\(^{92}\)

7.4.4 The parties are not permitted to agree between themselves the allocation of all or any arbitration costs before the dispute being arbitrated has arisen.\(^{93}\)

7.4.5 The tribunal is entitled to order either party to provide security for recoverable arbitral expenses as a condition of proceeding with that party’s claims.\(^{94}\) No conditions are laid down as to when such an order may be granted (although it may not be granted solely on the basis that the party in question is not a UK resident or company). It is likely that a similar test will be applied to that which must be met by a similar application in civil court proceedings.

### 7.5 Termination of the proceedings

7.5.1 Arbitral proceedings end when the last award in the arbitration is made and no claim is outstanding.\(^{95}\) The tribunal must, however, end the arbitration (or part of it) before then in two specific circumstances:
- (i) if the tribunal upholds an objection to its jurisdiction;\(^{96}\) or
- (ii) where a party delays without good reason in submitting or pursuing a claim and the tribunal is satisfied that the delay gives or is likely to give rise to unfairness in resolving those issues or has caused or may cause serious prejudice to the other party (subject to agreement between the parties to disapply this provision).\(^{97}\)

\(^{90}\) Ibid, rule 59 (default rule).

\(^{91}\) Ibid, rule 60 (mandatory rule).

\(^{92}\) Ibid, rule 62 (default rule).

\(^{93}\) Ibid, rule 63 (mandatory rule).

\(^{94}\) Ibid, rule 64 (default rule).

\(^{95}\) Ibid, rule 57(1) (default rule).

\(^{96}\) Ibid, rule 20(3) (mandatory rule).

\(^{97}\) Ibid, rule 37(1) (default rule).
7.6 **Effect of an award**

7.6.1 Section 11 of the Scottish Arbitration Act provides that an award is to be final and binding on the parties or any persons claiming under or through them, although it does not directly bind any third party. Parties can only challenge the award by any available arbitral process of appeal or review or by application to the court in the specific circumstances set out in Part 8 of the SAR. Provisional awards are not final or binding, only to the extent specified in the provisional award or until they are superseded by a subsequent award.

7.7 **Correction, clarification and issue of a supplemental award**

7.7.1 Arbitrators have authority to deal with accidental errors or omissions, or any ambiguity in any final award they make. This also applies to partial and provisional awards. The tribunal can make the correction on its own initiative or on the application of a party. Applications by a party must be intimated to the other party at the time the application is made, and must be made within 28 days of the award (unless that time limit is extended by application to court).

7.7.2 Before deciding whether to correct an award, the tribunal must give the other party or parties a reasonable opportunity to make representations about the proposed award. Corrections proposed by the tribunal must be made within 28 days of the award. Corrections proposed by a party must be made within 28 days of the application to correct the award being made.

7.7.3 If an award is corrected, it is treated as if it was made in the corrected form on the day it came into force. There is provision for the tribunal to make consequential corrections to other awards that are affected by any correction to a particular award.

8. **Role of the courts**

8.1 **Jurisdiction of the courts**

8.1.1 It has long been considered to be a strength of arbitration in Scotland that an arbitration agreement effectively and conclusively replaces the jurisdiction of the court. As mentioned above, non-intervention by the courts is one of the three founding principles of the Scottish Arbitration Act.

---

98 *ibid*, rule 53 (default rule).
99 Scottish Arbitration Act, s 11(4).
100 SAR, rule 58 (default rule).
101 *ibid*, rule 58(4) (default rule).
8.1.2 Therefore, court interventions are limited to the specific circumstances set out in the Scottish Arbitration Act, some of which may be disapplied by agreement between the parties. These are dealt with in more detail elsewhere in this chapter, but in summary the court has jurisdiction to:

— enforce an arbitral tribunal’s award;\textsuperscript{102}
— deal with questions regarding the validity of the arbitration agreement, the constitution of the tribunal or the matters submitted to the arbitration;\textsuperscript{103}
— determine a point of law on the application of any party;\textsuperscript{104} and
— vary any time limit relating to the arbitration which is imposed by the arbitration agreement or by any other agreement between the parties.\textsuperscript{105}

8.2 Stay of court proceedings

8.2.1 Section 10 of the Scottish Arbitration Act provides for a mandatory sist (stay) of court proceedings if the following criteria are met:

— there is an arbitration agreement which provides that a dispute on the matter with which the court proceedings are concerned is to be resolved by arbitration;
— the party seeking the sist is a party to the arbitration agreement, or is making its claim through or under a party to the arbitration agreement;
— notice of the application to sist the court proceedings has been given to the other parties in the court action;
— the person applying to sist the court proceedings has not taken any steps in the court proceedings to answer any substantive claim against him in that action or otherwise acted in a way which suggests a desire to have the dispute resolved in court rather than by way of arbitration; and
— there is nothing to indicate that the arbitration agreement is void, inoperative or incapable of being performed.

8.2.2 It is not necessary that the arbitration in question has its seat in Scotland. The obligation on the Scottish court is to sist proceedings (subject to the conditions listed above) to give effect to any valid arbitration agreement.

8.3 Interim protective measures

8.3.1 Arbitration is largely a private matter in Scotland. In recognition of this, Section 15 of the Scottish Arbitration Act provides for the court to prohibit the disclosure of the identity of a party to the arbitration in any reporting of civil proceedings related

\textsuperscript{102} Scottish Arbitration Act, s 12.
\textsuperscript{103} Ibid, s 14; see also Ibid, schedule 1, part 8 – Challenging Awards.
\textsuperscript{104} SAR, rule 41 (default rule).
\textsuperscript{105} Ibid, rule 43 (default rule).
to the arbitration.\textsuperscript{106} The court must grant such a request unless disclosure is in the public interest or necessary in the interests of justice, or is required to protect a party’s lawful interests or to enable the proper performance of public functions. As a result of this requirement, the court has confirmed that it will not identify on court lists or through access to court papers any parties to an application to court under the Scottish Arbitration Act until after the procedural stage by which an application for anonymity must be made, and will not usually publish decisions on the grant or refusal of leave to appeal on the judicial website unless they raise issues of law or practice.\textsuperscript{107}

8.3.2 Unless the parties agree otherwise, the court also has the power to make various other orders in the same way that it could in ordinary civil proceedings.\textsuperscript{108} These include:

- appointing a person to safeguard the interests of any party lacking capacity;
- ordering the sale of any property in dispute in the arbitration;
- making an order securing any amount in dispute in the arbitration;
- making an order for the inspection, photographing, preservation, custody or detention of documents or any other property (including land), which are relevant to the arbitral proceedings (in terms of Section 1 of the Administration of Justice (Scotland) Act 1972);
- granting warrant for arrestment or inhibition (these are freezing orders over respectively moveable property and real estate, to secure the sum claimed in the arbitration); or
- granting interdict or interim interdict (“interdict” is the Scottish equivalent of an injunction in England).

8.3.3 Applications in relation to the above matters can only be granted by the court on application by a party to the arbitration\textsuperscript{109} and (if the arbitration has commenced) only with the consent of the tribunal or where the court is satisfied that there is urgency. Applications may also be brought before arbitration has commenced, if the court is satisfied that a dispute has arisen or might arise and that, if it does arise, the dispute is one to which an arbitration agreement applies.

\textsuperscript{106} In terms of RC 100.5(5) this application must be made prior to the hearing of the motion for further procedure.


\textsuperscript{108} SAR, rule 46 (default rule).

\textsuperscript{109} For the procedure to be followed for such applications see RCS 100 of the Rules of the Court of Session.
9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts
9.1.1 Courts in Scotland have limited jurisdiction to review arbitral decisions. The tribunal’s award is not subject to review or appeal in any legal proceedings except as set out in Part 8 of the SAR (see below). Part 8 does not apply where parties have asked the tribunal to make an award reflecting the terms of a settlement between them.\textsuperscript{110}

9.2 Appeals
9.2.1 Under Part 8 of the SAR, only three types of appeal to the court are permissible:
(i) jurisdictional appeal, which is a complaint that the tribunal did not have jurisdiction to make the award;\textsuperscript{111}
(ii) serious irregularity appeal, which is a complaint that the tribunal failed to conduct the arbitration in accordance with the arbitration agreement, the Scottish Arbitration Act or the SAR or any other agreement between the parties concerning the conduct of the arbitration;\textsuperscript{112} and
(iii) legal error appeal, which is a complaint that the tribunal erred on a point of Scots law.

9.2.2 In each case, supplementary provisions regarding the process of making an appeal are contained in Rule 71, which is mandatory. Appeals against provisional awards are not permitted, although they are permitted against partial awards. If an appeal is brought against a partial award, the tribunal may continue with the arbitration in respect of the remaining matters while the appeal is being determined. Notice of an appeal must be given to the other party to the arbitration and to the tribunal. The court may order the tribunal to state its reasons for the award to enable the court to deal with the appeal properly and may make any order it sees fit in relation to any additional expenses arising from that order.

9.2.3 An appeal must be brought within 28 days of the date of the award or the date of determination of a correction process or a review or appeal process by the tribunal, whichever is later.\textsuperscript{114} A legal error appeal can only be brought with the agreement

\textsuperscript{110} (\textit{Ibid}, rule 57(4) (default rule)).
\textsuperscript{111} (\textit{Ibid}, rule 67 (mandatory rule)).
\textsuperscript{112} (\textit{Ibid}, rule 68 (mandatory rule)).
\textsuperscript{113} (\textit{Ibid}, rule 69 (default rule)).
\textsuperscript{114} (\textit{Ibid}, rule 71(4) (mandatory rule)).
of the parties or the leave of the court\(^{115}\) and so for the purpose of complying with this time limit, a legal error appeal is treated as having been made when leave is sought to make the appeal.

9.2.4 In each case, appeal is initially to the Outer House of the Court of Session.\(^{116}\) The Outer House’s decision may be appealed to the Inner House, but only with the leave of the Outer House. Leave may only be granted by the Outer House where it considers that the proposed appeal raises an important point of principle or practice or where there is another compelling reason for the Inner House to consider the appeal. An application for leave must be made within 28 days of the Outer House’s decision, and if leave is granted, the appeal must be brought within seven days of leave being granted.\(^{117}\) The Outer House’s decision on whether to grant leave, and the Inner House’s decision on such an appeal, are final. Appeal in each case is only competent where the appellant has exhausted any available arbitral process of appeal or review. This would include where appropriate the provisions in Rule 19, allowing an arbitrator to rule on his or her own jurisdiction, and Rule 58, which provides for the correction of an award.

9.2.5 The court may order an appellant, or a party applying for leave to appeal, to provide security for costs for the expenses of the appeal or the application and may dismiss the appeal or application if such security is not provided. It may not, however, make an order for security only on the grounds that the appellant is based outside the UK.\(^{118}\)

9.2.6 The court may also order that any sum which is due under an award being appealed (or any associated provisional award) is paid into court or otherwise secured pending a decision on the appeal. As with security for costs, if the order is not complied with then the court may dismiss the appeal.\(^{119}\)

9.3 Applications to set aside an award

9.3.1 Awards may be set aside on the basis of appeals brought under any of the three categories mentioned above if the court considers reconsideration of the award to

\(^{115}\) SAR, rule 70, which also sets out the criteria the court must apply in making this determination.

\(^{116}\) Ibid, rules 67(1) and 68(1) (mandatory rules); see also rule 69(1) (default rule). The procedure for making such an appeal is governed by RCS 100. See also Arbitration Application No 3 of 2011 [2011] CSOH 164, which sets out in detail how the procedure is intended to be applied in practice.

\(^{117}\) Ibid, rule 71(5) (mandatory rule).

\(^{118}\) Ibid, rule 71(10) and (11) (mandatory rule).

\(^{119}\) Ibid, rule 71(12) (mandatory rule).
be inappropriate.\textsuperscript{120} If the court orders that an award or part of an award is to be set aside, it may also order that any provision in the arbitration agreement which prevents the bringing of legal proceedings in relation to the subject-matter of the award is void.\textsuperscript{121}

9.3.2 If, in respect of a serious irregularity appeal or a legal error appeal, the court orders the tribunal to reconsider part of or the entire award, then the tribunal must make a new award (or confirm its original award) within three months of the Outer House or Inner House decision unless the court orders otherwise.\textsuperscript{122}

9.3.3 It is permissible to appeal against a new award and the rules apply equally in relation to such appeals as to appeals against the original award.\textsuperscript{123}

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Any party to an arbitration seated in Scotland may apply to the court for an order to enforce an arbitral tribunal’s award. The court has authority to make an order that the award may be enforced as if it were a final court award.\textsuperscript{124}

10.1.2 The court may not make such an order if the:

— award is currently under appeal, either to the court under Part 8 of the SAR, or under an arbitral process of appeal or review, or is subject to a process of correction under Rule 58 of the SAR;\textsuperscript{125} or

— court is satisfied that the tribunal did not have jurisdiction.\textsuperscript{126}

The onus of proof is on a party disputing a request for an enforcement order to show that the tribunal did not have jurisdiction, rather than on the applicant to prove that it did. The question of whether or not the tribunal had jurisdiction cannot be raised by a party if it has already lost the right to raise that objection under Rule 76 of the SAR. This may happen if the applicant has participated in the

\textsuperscript{120} Ibid, rules 67(2), 68(3) and 70(8) (all mandatory rules).
\textsuperscript{121} Ibid, rule 71(9) (mandatory rule).
\textsuperscript{122} Ibid, rule 72 (mandatory rule).
\textsuperscript{123} Ibid, rule 72(2) (mandatory rule).
\textsuperscript{124} Scottish Arbitration Act, s 12(1).
\textsuperscript{125} Ibid, s 12(2).
\textsuperscript{126} Ibid, s 12(3).
arbitration and not disputed the jurisdiction of the tribunal as soon as reasonably practicable. If the court is satisfied that the tribunal only had jurisdiction to make part of the award, the court may restrict the order accordingly.

10.1.3 If the court makes an order to enforce a tribunal's award, the award is registered in the court records in the same way as a court decree (judgment) is registered.127 Steps can then be taken to enforce the award in the same way as a court decree would be enforced.

10.1.4 As an alternative, where the arbitration agreement so provides, awards may also be registered for execution in the Books of Council and Session or Sheriff Court books, thus allowing such awards to be enforced directly without further application to the court. This is only possible if the arbitration agreement contains consent to registration for execution, and if the agreement is itself registered.

10.2 Foreign awards
10.2.1 Section 12(6) of the Scottish Arbitration Act provides that awards where the arbitration concerned was seated outside Scotland may be enforced in the same way as domestic awards, subject to the same requirements as set out above.

10.2.2 The Scottish Arbitration Act contains specific provisions in relation to awards made in pursuance of a written arbitration agreement in the territory of a party to the New York Convention.128 These are recognised as binding on the parties between whom they were made and can therefore be relied on by those parties in any legal proceedings in Scotland. The court may order the enforcement of such an award as if it were an award of the Scottish court. In order to enforce a New York Convention award, the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or a duly certified copy of it and, where these are not in English, a certified translation must be produced.129

10.2.3 The court may only refuse to make such an order in respect of a New York Convention award where:
   — a party to it was under some incapacity under the law applicable to the party;
   — the arbitration agreement was invalid under the law the parties agreed should govern it (or, failing agreement, the law of the country where the award was made);

127 Ibid, s 12(5).
128 Ibid, s 18–22.
129 Ibid, s 21.
Arbitration in Scotland — the applicant was not given proper notice of the arbitral process or of the appointment of the tribunal or was otherwise unable to present his or her case;
— the tribunal was constituted or the arbitration was conducted otherwise than in accordance with the parties’ agreement or the law of the country where the arbitration took place;
— if the party against whom the award is invoked proves that the award deals with a dispute not contemplated by or within the submission to the arbitration, goes beyond the scope of the submission to the arbitration, is not yet binding or has been set aside or suspended; or
— the award is contrary to public policy.130

10.2.4 If the award only partly exceeds the matters submitted to arbitration, then it can be enforced in respect of the competent part provided that the relevant decisions can be separated from those matters that should not have been included.131 There is also provision for the application to enforce to be sisted (stayed) or for security to be provided if an application to set aside or suspend the decision is made while the enforcement action is current.

11. Conclusion

11.1.1 The Scottish Arbitration Act provides Scotland with a firm foundation upon which it may continue to develop the law of arbitration in Scotland. It has radically overhauled the Scots law of arbitration and provides the first complete statutory framework for arbitration in Scotland. As that framework seeks to adopt “best practice” from around the globe it is hoped and expected that arbitration will once again become popular in Scotland as a means of dispute resolution. The Scottish Government’s aim is that in due course Scotland will become a jurisdiction of choice in relation to not only domestic but also international arbitration.

130 Ibid, s 20(2).
131 Ibid, s 20(5).
12. Contacts

CMS Cameron McKenna LLP
2nd Floor
7 Castle Street
Edinburgh EH2 3AH
Scotland

Rob Wilson
Head of the CMS Dispute Resolution Practice in Scotland
T +44 131 220 7672
E rob.wilson@cms-cmck.com

CMS Cameron McKenna LLP
6 Queens Road
Aberdeen AB15 4ZT
Scotland

Valerie Allan
T +44 1224 6220 02
E valerie.allan@cms-cmck.com
ARBITRATION IN SERBIA

By Daniela Karollus-Bruner and Nedeljko Velisavljević, CMS
Table of Contents

1. Overview of arbitration in Serbia 721

2. Scope of application and general provisions of the Serbian Arbitration Act 721
   2.1 Subject matter 721
   2.2 Structure of the Serbian Arbitration Act 722
   2.3 General principles 722

3. The arbitration agreement 723
   3.1 Definitions 723
   3.2 Formal requirements 723
   3.3 Arbitrability 723
   3.4 Separability 724
   3.5 Legal consequences of a binding arbitration agreement 724

4. Composition of the arbitral tribunal 724
   4.1 Constitution of the arbitral tribunal 724
   4.2 Procedure for challenging and substituting arbitrators 725
   4.3 Responsibilities of arbitrators 726
   4.4 Arbitration fees 727
   4.5 Arbitrator immunity 728

5. Jurisdiction of the arbitral tribunal 728
   5.1 Competence to rule on jurisdiction 728
   5.2 Power to order interim measures 728

6. Conduct of arbitral proceedings 728
   6.1 Commencement of arbitration 728
   6.2 General procedural principles 729
   6.3 Seat, place of hearings and language of arbitration 729
   6.4 Statements of case 730
   6.5 Multi-party issues 731
   6.6 Oral hearings and written proceedings 731
   6.7 Default by one of the parties 731
   6.8 Appointment of experts 732
   6.9 Confidentiality 732
   6.10 Court assistance in taking evidence 733
## Making of the award and termination of proceedings

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1 Choice of law</td>
<td>733</td>
</tr>
<tr>
<td>7.2 Decision making by the arbitrators</td>
<td>733</td>
</tr>
<tr>
<td>7.3 Timing, form, content and notification of the award</td>
<td>733</td>
</tr>
<tr>
<td>7.4 Settlement</td>
<td>734</td>
</tr>
<tr>
<td>7.5 Power to award interest and costs</td>
<td>734</td>
</tr>
<tr>
<td>7.6 Termination of the proceedings</td>
<td>735</td>
</tr>
<tr>
<td>7.7 Effect of the award</td>
<td>735</td>
</tr>
<tr>
<td>7.8 Correction, interpretation and issue of a supplemental award</td>
<td>736</td>
</tr>
</tbody>
</table>

## Role of the courts

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.1 Jurisdiction of the courts</td>
<td>736</td>
</tr>
<tr>
<td>8.2 Stay of court proceedings</td>
<td>737</td>
</tr>
<tr>
<td>8.3 Preliminary rulings on jurisdiction</td>
<td>737</td>
</tr>
<tr>
<td>8.4 Interim protective measures</td>
<td>737</td>
</tr>
</tbody>
</table>

## Challenging and appealing an award through the courts

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1 Jurisdiction of the courts</td>
<td>738</td>
</tr>
<tr>
<td>9.2 Applications to set aside an award</td>
<td>738</td>
</tr>
<tr>
<td>9.3 Appeals</td>
<td>739</td>
</tr>
</tbody>
</table>

## Recognition and enforcement of awards

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
</table>

## Contacts

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
</table>

742
1. Overview of arbitration in Serbia

1.1 In Serbia, the law on arbitration is contained in the Serbian Arbitration Act 2006 (*Serbian Arbitration Act*). It was adopted through a process of legal reform to promote arbitration as the common way of settling commercial disputes in Serbia. The Serbian Arbitration Act summarises the provisions relating to arbitral proceedings that were previously contained in the Law on Civil Procedure 1996 and the Serbian Act on Conflict of Laws 1982 (as amended in 1996 and 2006). It is based on the Model Law (1985).

1.2 The first arbitral institution in Serbia was the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce (*FCA*), which was established in 1947. It is an international arbitral institution that acts independently of the Serbian Chamber of Commerce.

1.3 The current rules of the FCA (*FCA Rules*)\(^1\) provide for both arbitration and conciliation as means of settling disputes before the FCA. The modern solutions contained in the FCA Rules are recommended by international arbitration experts and practitioners in Serbia.

2. Scope of application and general provisions of the Serbian Arbitration Act

2.1 Subject matter

2.1.1 The provisions of the Serbian Arbitration Act apply to both domestic and international arbitration, provided that the seat of arbitration is in the territory of the Republic of Serbia. However, parties to an international arbitration are free to agree otherwise if they wish.

2.1.2 International arbitration is defined in the Serbian Arbitration Act as being an arbitration relating to a dispute arising out of international business relations. In particular, the arbitration will be considered to be international if:
   — the parties have, at the time of conclusion of the arbitration agreement, their places of business in different states; or

---

\(^1\) Official Gazette of the Republic of Serbia 52/07, 8 June 2007.
the seat of arbitration, the place where a substantial part of the obligations of
the business relationship are to be performed or the place with which the
subject matter of the dispute is most closely connected, is situated outside the
state in which the parties have their places of business.²

2.1.3 Furthermore, arbitration is deemed to be international if the parties have expressly
agreed that the subject matter of the arbitration agreement relates to more than
one state.³

2.2 Structure of the Serbian Arbitration Act
2.2.1 The Serbian Arbitration Act is based on the Model Law (1985). The first chapter of
the Serbian Arbitration Act contains general provisions, such as the scope of
application of the act and provision for which disputes are eligible for arbitration
or international arbitration. The second chapter deals with the arbitration
agreement itself and the third chapter addresses the procedure for setting up the
arbitral tribunal. The fourth chapter contains provisions about arbitrators and the
fifth chapter concerns jurisdiction. The sixth and seventh chapters set out the
provisions relating to the conduct of arbitral proceedings and the rendering of the
award and the eighth chapter deals with setting aside an award. Finally, the ninth
chapter deals with the recognition and enforcement of foreign awards.

2.3 General principles
2.3.1 The underlying principles of the Serbian Arbitration Act are:
— equality, meaning that all parties must be treated fairly and equally;⁴
— party autonomy, meaning that the parties can decide upon the procedure of
the arbitration in many respects, although the mandatory provisions of the
Serbian Arbitration Act must be observed;⁵ and
— due process, meaning that all parties must have the opportunity to present
their case, evidence and position with respect to acts and proposals of the
opposing party.⁶

² Serbian Arbitration Act, art 3 following the definition in the Model Law (1985), art 1(3) (see CMS Guide to Arbitration, vol
II, appendix 2.1).
³ Serbian Arbitration Act, art 3.
⁴ Ibid, art 33.
⁵ Ibid, art 2.
⁶ Ibid, art 33.
3. The arbitration agreement

3.1 Definitions
3.1.1 The Serbian Arbitration Act does not contain a definition of an arbitration clause as set out, for example, in Article 7(1) of the Model Law (1985). However, it provides that an agreement to arbitrate may be contained in a contractual clause or in a separate contract. An arbitration agreement may be concluded after a dispute has arisen.

3.1.2 It is an accepted principle that the arbitration agreement binds only the parties to the agreement. However, an arbitration agreement will remain in force in the event of an assignment or subrogation.

3.2 Formal requirements
3.2.1 An arbitration agreement should be in writing and comply with the formal requirements under the Serbian Arbitration Act. The arbitration agreement must either be contained in a document signed by the parties, or concluded by an exchange of messages through a means of communication that provides a written record of the parties’ agreement, regardless of whether the messages were signed by the parties or not.

3.2.2 Furthermore, an arbitration agreement shall be deemed to exist when the claimant initiates arbitral proceedings in writing and the respondent either expressly accepts the arbitration in writing or by a statement which is recorded in the minutes of the arbitral proceedings, or fails to challenge the existence of the arbitration agreement or the jurisdiction of the arbitral tribunal before submissions on the subject matter of the dispute are submitted.

3.3 Arbitrability
3.3.1 The Serbian Arbitration Act defines arbitrable disputes as being pecuniary disputes concerning rights that the parties can freely dispose of and excluding disputes that are reserved to the exclusive jurisdiction of the Serbian courts. Furthermore, the Serbian Arbitration Act designates that any natural or legal person (including the

---

8 Serbian Arbitration Act, art 9.
9 Ibid, art 11.
11 Serbian Arbitration Act, art 12.
12 Ibid, art 5.
Serbian State), who has capacity to be a party in civil proceedings may be a party to an arbitration agreement. Under Serbian law, every natural and legal person may be a party to civil proceedings.\textsuperscript{13}

3.3.2 Certain pecuniary disputes are not arbitrable if they fall under the exclusive jurisdiction of the Serbian courts. For example, real estate matters relating to properties situated in Serbia, hereditary disputes (including cases where a foreign decedent owned real estate in Serbia) and disputes arising from family law relations are reserved to the Serbian courts.\textsuperscript{14}

3.4 Separability
3.4.1 The Serbian Arbitration Act accepts the doctrine of separability. An agreement to arbitrate concluded in the form of an arbitration clause within a larger agreement is considered to be independent and separable from the other terms of the contract.\textsuperscript{15}

3.5 Legal consequences of a binding arbitration agreement
3.5.1 The Serbian Arbitration Act, following the Model Law (1985), stipulates that a Serbian court, upon the motion of a party submitted prior to any submissions on the subject matter of the dispute, will dismiss an action for lack of jurisdiction if an action is brought in relation to a dispute that is the subject of an arbitration agreement.\textsuperscript{16} This is the position unless the court finds that the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.

4. Composition of the arbitral tribunal
4.1 Constitution of the arbitral tribunal
4.1.1 The parties are free to determine the number of arbitrators to conduct the arbitral proceedings, albeit that the number of arbitrators must be an odd number.\textsuperscript{17} An arbitral tribunal can be composed of one arbitrator (sole arbitrator), three arbitrators or any uneven number of arbitrators.\textsuperscript{18}

\textsuperscript{13} Civil Procedure Act 2004 (as amended in 2009), art 73.
\textsuperscript{14} See Serbian Act on Conflict of Laws 1982 (as amended in 1996 and 2006).
\textsuperscript{15} Serbian Arbitration Act, art 28.
\textsuperscript{16} Ibid, art 14.
\textsuperscript{17} Ibid, art 16.
\textsuperscript{18} Ibid.
4.1.2 If the parties fail to determine the number of arbitrators, their number shall be
determined by a person or arbitral institution designated by the parties’ agreement.
If no appointing authority is designated by the parties or the appointing authority
fails to act, the number of arbitrators shall be determined by the competent
Serbian court.\(^\text{19}\)

4.1.3 If the dispute is to be resolved by a sole arbitrator, the parties shall agree on the
appointment within 30 days of the date on which one party requests the other to
jointly appoint the arbitrator. Should the parties fail to reach an agreement, the
appointment shall be made by the appointing authority. If there is no appointing
authority, or the appointing authority fails to act, the appointment shall be made
by the competent Serbian court.\(^\text{20}\)

4.1.4 If the dispute is to be resolved by three arbitrators, each party shall appoint one
arbitrator within 30 days of the date on which the other party requests it to do
so.\(^\text{21}\) If the requested party fails to do so, the arbitrator shall be appointed by the
appointing authority designated by the parties. If there is no appointing
authority, or the appointing authority fails to act, the appointment shall be made
by the competent Serbian court.\(^\text{22}\)

4.1.5 The third arbitrator, who presides over the arbitral tribunal and is referred to as the
“President”, shall be elected by the two previously appointed arbitrators within 30
days of the date of their appointment.\(^\text{23}\) Should they fail to elect the President, the
appointment shall be made by the appointing authority. If there is no appointing
authority or the appointing authority fails to act, the appointment shall be made
by the competent Serbian court.\(^\text{24}\) The decision of the Serbian court on the
appointment of an arbitrator is not subject to appeal.\(^\text{25}\)

4.2 Procedure for challenging and substituting arbitrators

Grounds for challenge

4.2.1 The grounds for challenging arbitrators stipulated in the Serbian Arbitration Act
correspond to those in the Model Law (1985).\(^\text{26}\) An arbitrator may be challenged

---

\(^{19}\) Ibid.
\(^{20}\) Ibid, art 17.
\(^{21}\) Ibid.
\(^{22}\) Ibid.
\(^{23}\) Ibid.
\(^{24}\) Ibid.
\(^{25}\) Ibid.
only if circumstances exist that justifiably raise doubts as to the arbitrator’s impartiality or independence or if the arbitrator does not possess the qualities agreed upon by the parties.27

4.2.2 An arbitrator may be challenged only if grounds for challenge have arisen – or if the challenging party became aware of such grounds – after the arbitrator was appointed.28

Procedure for challenge

4.2.3 A party can submit a request in writing challenging an arbitrator within 15 days of becoming aware of the arbitrator’s appointment, or of the grounds for the challenge, unless otherwise agreed by the parties.29 Where the parties have entrusted the administration of the arbitral proceedings to an arbitral institution, the parties shall be deemed to have agreed that any challenge be resolved in accordance with that arbitral institution’s rules.30

4.2.4 Unless otherwise agreed by the parties, the competent Serbian court shall decide on the challenge of an arbitrator.31 However, the arbitral tribunal may continue the arbitral proceedings and make an award while the challenge procedure is pending.32

Appointment of substitute arbitrators

4.2.5 If the mandate of an arbitrator is terminated, a substitute arbitrator shall be appointed in accordance with the appointment provisions of the Serbian Arbitration Act.33

4.3 Responsibilities of arbitrators

4.3.1 The Serbian Arbitration Act does not contain a chapter specifically dedicated to the responsibilities of arbitrators. However, it prescribes that an arbitrator must have the qualities agreed upon by the parties and be impartial and independent in relation to the parties and the subject matter of the dispute.34 Furthermore, the proposed arbitrator has a duty to disclose any circumstances that may justifiably

27 Serbian Arbitration Act, art 23.
28 Ibid, art 24(2).
30 Ibid.
31 Ibid.
32 Ibid.
34 Ibid, art 19.
Arbitration in Serbia

raise doubts as to their impartiality or independence before accepting the appointment.  

35 If such circumstances occur after the appointment, the arbitrator shall without delay disclose the circumstances to the parties.  

36 The Serbian Arbitration Act also provides that an arbitrator shall perform all duties conscientiously and efficiently.

4.3.2 Additionally, there are various other legislative acts in Serbia setting out principles and responsibilities that should be followed by arbitrators in the same way as state court judges.

4.3.3 According to the Constitution of the Republic of Serbia, there is an obligation for judges, and arbitrators, to perform their duties in accordance with the Constitution and Laws of Serbia, and where stipulated, in accordance with generally accepted rules of international law and ratified international treaties.

4.3.4 Finally, the FCA Rules contain provisions regulating the conduct of the proceedings and the rulings that arbitrators can make in relation to procedural matters, such as deciding on whether a party should be required to deposit an advance to cover the costs of experts and witnesses, securing evidence, time limits, joining cases, and other rulings that are deemed to be necessary.  

39 Under the FCA Rules, arbitrators owe this duty of care regardless of how the dispute falls within the jurisdiction of the Court of Arbitration. The duty of care is owed throughout the proceedings.

4.4 Arbitration fees

Costs of arbitration

4.4.1 Pursuant to the Serbian Arbitration Act, the parties are to bear the costs of arbitration. The amount of, and responsibility for, costs shall be determined by the arbitral tribunal.  

41 The arbitral tribunal may request the parties to pay the costs in advance.  

42 Furthermore, the permanent arbitral institution shall independently establish the costs of arbitration and the scale of such costs.

---

36 Ibid.
37 Ibid, art 22.
38 Constitution of the Republic of Serbia, art 142.
39 FCA Rules, art 41.
40 Ibid, art 18.
41 Serbian Arbitration Act, art 18.
42 Ibid.
43 Ibid.
4.4.2 The FCA Rules provide that the fees of the arbitrators, as well as the fees of the Chair, Vice-Chairmen and members of the Board of the Court of Arbitration, shall be determined by a decision of the Managing Board of the Serbian Chamber of Commerce at the proposal of the Extended Board. After the award is made, or a settlement is reached or proceedings are terminated, the Chair of the Court of Arbitration shall fix the arbitrators’ fees, in accordance with the above mentioned decision. Additionally, the FCA Rules provide that foreign arbitrators are entitled to their fees in foreign currency.

4.5 Arbitrator immunity
4.5.1 The Serbian Constitution and the Serbian Arbitration Act do not contain any provisions regarding arbitrator immunity.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction
5.1.1 The Serbian Arbitration Act provides that the arbitral tribunal is competent to decide on its own jurisdiction (the principle of competence-competence). A decision by an arbitral tribunal that the contract containing an arbitration clause is null and void will not invalidate the effect of the arbitration clause.

5.2 Power to order interim measures
5.2.1 Unless otherwise agreed by the parties, the arbitral tribunal may order interim measures upon the request of a party. The requesting party may be required to provide security in appropriate circumstances.

6. Conduct of arbitral proceedings

6.1 Commencement of arbitration
6.1.1 Unlike the Model Law (1985), the Serbian Arbitration Act distinguishes between institutional and ad hoc arbitral proceedings when providing for the date of commencement of arbitral proceedings.

---

44 FCA Rules, art 62.
45 Ibid.
46 Ibid.
48 Serbian Arbitration Act, art 31.
6.1.2 In institutional arbitral proceedings, the arbitration shall commence on the day that the arbitral institution receives the request for arbitration or a statement of claim.\(^{49}\) However, in ad hoc arbitral proceedings the arbitration shall commence on the day that the respondent receives the request for arbitration or a statement of claim together with a notification that the claimant has appointed an arbitrator and the invitation to the opposing party to appoint its arbitrator or, alternatively, has proposed a sole arbitrator and requested that the opposing party state whether it agrees to the proposed sole arbitrator.\(^{50}\)

6.2 General procedural principles

6.2.1 Parties to an arbitration agreement are free to agree on the procedural rules to be followed by the arbitral tribunal.\(^{51}\) If the arbitration is international, the parties may agree that foreign law shall be applied to the arbitral proceedings in accordance with the provisions of the Serbian Arbitration Act. If the parties fail to agree on what procedural rules are to apply, the arbitral tribunal may conduct the arbitral proceedings in such a manner as it considers appropriate in accordance with the provisions of the Serbian Arbitration Act.\(^{52}\)

6.2.2 The Serbian Arbitration Act provides that the fundamental principles of the arbitral proceedings are the equal treatment of the parties, party autonomy and due process (see section 2.3 above).

6.2.3 Under the Serbian Arbitration Act, a party waives its right to object to a derogation of any requirement stipulated in the arbitration agreement where it is aware of the derogation and yet continues to participate in the arbitral proceedings without raising an objection.\(^{53}\)

6.3 Seat, place of hearings and language of arbitration

6.3.1 Parties are free to agree on the seat of arbitration. If the parties have entrusted the administration of their arbitral proceedings to an arbitral institution, the seat of arbitration shall be determined in accordance with its rules.\(^{54}\) If the parties fail to determine the seat of arbitration, the seat of arbitration should be determined by the arbitral tribunal.\(^{55}\)

---

\(^{49}\) Ibid, art 38.

\(^{50}\) Ibid.

\(^{51}\) Ibid, art 32.

\(^{52}\) Ibid.

\(^{53}\) Ibid, art 34.

\(^{54}\) Ibid.

\(^{55}\) Ibid.
6.3.2 Unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate, which need not be the seat of arbitration, for the deliberations of the arbitral tribunal, the hearing of witnesses, experts or the parties, as well as for the inspection of goods, other property or documents.56

6.3.3 Pursuant to the Serbian Arbitration Act, the parties may agree on the language of the arbitral proceedings. If the parties fail to agree on the language of the arbitration, the arbitral tribunal shall determine the appropriate language, taking into account the seat of arbitration and the language used by the parties in their legal relationship.57

6.3.4 Until the language of the arbitration is determined, the statement of claim, the statement of defence and any other written submissions may be submitted in the language of the contract, the language of the arbitration agreement or in the Serbian language.58

6.4 Statements of case
6.4.1 Article 36 of the Serbian Arbitration Act sets out the definitions of the statement of claim and the statement of defence. The Serbian Arbitration Act provides that, unless otherwise agreed by the parties, the claimant shall state in its statement of claim the facts supporting its claim, the issues in dispute and the relief or remedy sought.

6.4.2 The respondent shall, unless otherwise agreed by the parties and within the time limit agreed upon by the parties or as determined by the arbitral tribunal, state its defence to the claims, statements and evidence contained in the statement of claim.

6.4.3 The parties may, during the course of the arbitral proceedings, amend or supplement their statement of claim or statement of defence, unless they agree otherwise or unless the arbitral tribunal decides that to allow such amendments would jeopardise the efficiency of the arbitral proceedings.59

6.4.4 Unlike the Model Law (1985), the Serbian Arbitration Act contains specific provisions on counterclaims. A counterclaim may be submitted by the respondent with the statement of defence, unless the parties agree otherwise.60

---

56 Ibid.
57 Ibid, art 35.
58 Ibid.
59 Ibid, art 36.
60 Ibid, art 37.
6.5 Multi-party issues
6.5.1 In the event that the parties have submitted several statements of claim against each other arising out of different legal relationships, the Secretariat of the Court of Arbitration shall try to join the proceedings and have them decided by the same arbitral tribunal, for the purpose of economy of proceedings.\(^{61}\)

6.5.2 A person that has a legal interest to participate in the arbitral proceedings may join one of the parties, but only with the consent of both parties.\(^{62}\)

6.6 Oral hearings and written proceedings
6.6.1 Parties may choose to have oral hearings or arbitrations based on written submissions only.\(^{63}\) If the parties fail to agree, the arbitral tribunal shall decide whether to hold an oral hearing or whether to conduct the arbitral proceedings on the basis of documents and written materials only. If one of the parties requests a hearing, the arbitral tribunal shall hold such a hearing unless the parties have previously agreed otherwise.\(^{64}\)

6.6.2 The arbitral tribunal is required to notify the parties in a timely fashion of any hearings or meetings of the arbitral tribunal for the purposes of inspection of goods, other property or documents.\(^{65}\) All statements, documents and other evidence (including any expert reports) that are supplied to the arbitral tribunal by one party shall be communicated to the other party.\(^{66}\)

6.6.3 A witness can be examined through oral testimony in arbitral proceedings,\(^{67}\) at the request of a party or the tribunal.\(^{68}\)

6.7 Default by one of the parties
6.7.1 Article 42 of the Serbian Arbitration Act addresses issues that may arise if there is a default of a party with regard to the arbitral proceedings without a justified cause. If the claimant, after filing the request for arbitration, fails to communicate its statement of claim, the arbitral tribunal shall terminate the arbitral proceedings.\(^{69}\)

\(^{61}\) FCA Rules, art 33.
\(^{62}\) Ibid, art 42.
\(^{63}\) Ibid, art 35.
\(^{64}\) Serbian Arbitration Act, art 39.
\(^{65}\) Ibid, art 40.
\(^{66}\) Ibid.
\(^{67}\) Ibid, art 44.
\(^{68}\) FCA Rules, art 40.
\(^{69}\) Serbian Arbitration Act, art 42.
6.7.2 If the respondent fails to communicate its statement of defence, the arbitral tribunal shall continue the arbitral proceedings, without treating such default as an admission by the respondent of the allegations and claims contained in the statement of claim.  

6.7.3 If a party, although duly summoned, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and render an award based on the evidence that was produced.

6.7.4 The parties are free to agree on different consequences of a default.

6.8 Appointment of experts

6.8.1 Unless otherwise agreed by the parties, the arbitral tribunal may:

- appoint one or more experts to provide reports or opinions on the issues to be determined by the arbitral tribunal; or
- require that the parties provide the expert(s) with any necessary information or documents, or allow them access to documents, goods or other property.

6.8.2 Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal so determines, the tribunal-appointed expert(s) shall, after delivery of their written or verbal report and opinion, participate in an oral hearing. At such hearing, the parties may put questions to them or present other experts to discuss the issues in dispute with the appointed expert.

6.8.3 The provisions of the Serbian Arbitration Act regarding the challenge of arbitrators are similarly applied to the challenge of experts.

6.9 Confidentiality

6.9.1 Under the FCA Rules, arbitral proceedings are held in private, unless the parties have agreed otherwise.

6.9.2 The full text of the award may be published only with the consent of the parties. However, the Chair of the Court of Arbitration is permitted to authorise the publication of the award in professional periodicals without disclosing the names of the parties or any information that may be damaging to the interests of the parties.

---

70 Ibid.
71 Ibid.
72 Ibid, art 45.
73 Ibid.
74 FCA Rules, art 37.
75 Ibid, art 51.
6.10 Court assistance in taking evidence
6.10.1 If the arbitral tribunal considers that it requires assistance in taking evidence, or upon a request of a party, it is entitled to request such assistance from the Serbian courts in taking evidence. If it does so, the arbitral tribunal will consider any evidence heard before the Serbian court as evidence heard by itself.\(^76\)

7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 The parties are free to choose the law governing the dispute.\(^77\) The Serbian Arbitration Act provides that the designation of the law of a given state shall be construed, unless otherwise expressly agreed by the parties, as a direct reference to the substantive law of that state and not to its conflict of law rules.\(^78\) Should the parties fail to reach an agreement on the applicable law, the arbitral tribunal, in an international arbitration, shall determine the applicable law or body of rules on the basis of the conflict of law rules it deems appropriate.\(^79\) If the parties expressly agree, the arbitral tribunal may decide the dispute *ex aequo et bono*.\(^80\)

7.2 Decision making by the arbitrators
7.2.1 The Serbian Arbitration Act provides that an award can be rendered as a final award, an interim award or a partial award.\(^81\) Unless otherwise agreed by the parties, an award shall be made after deliberations in which all the arbitrators must participate.

7.2.2 Unlike the Model Law (1985), which neither requires nor prohibits dissenting opinions, the Serbian Arbitration Act provides that an arbitrator who disagrees with the award may write a dissenting opinion, which shall be communicated to the parties along with the award if the dissenting arbitrator so requests.\(^82\)

7.3 Timing, form, content and notification of the award
7.3.1 In order to be valid, an award shall be made in writing and signed by the majority of the arbitral tribunal.\(^83\) An award should comprise of an introduction, a decision

\(^76\) Serbian Arbitration Act, art 46.
\(^77\) Ibid, art 50.
\(^78\) Ibid.
\(^79\) Ibid.
\(^80\) Ibid, art 49.
\(^81\) Ibid, art 48.
\(^82\) Ibid, art 52.
\(^83\) Ibid, art 51.
on the subject matter of the dispute and on the costs of arbitration and a statement of reasons, unless the parties have agreed to exclude reasons. The award must state the date and place of its rendering.\textsuperscript{84}

7.3.2 The final award shall be made within 60 days of the date of the last hearing or the date on which the last meeting of the arbitral tribunal was held.\textsuperscript{85}

7.3.3 The arbitral institution that administers the arbitration shall notify the award to the parties in accordance with its rules. In ad hoc arbitration, the award shall be notified to the parties by the arbitral tribunal. In either case, the award may, on the joint request of the parties, be deposited with the court at the seat of arbitration.\textsuperscript{86}

7.3.4 At the request of a party, submitted no later than 30 days after the date of receipt of the award, the arbitral tribunal shall correct any language or technical errors in the award, provide specific interpretations of points contained in the award or make a supplementary award on any claims raised in the arbitral proceedings that were not decided in the award.\textsuperscript{87}

7.4 Settlement

7.4.1 If the parties settle the dispute during the arbitral proceedings, the arbitral tribunal shall, at the request of the parties, render the award on agreed terms, unless the effects of the settlement are contrary to public policy.\textsuperscript{88} An award on agreed terms has the same legal effect as any other award, except that it need not contain a statement of reasons.\textsuperscript{89}

7.5 Power to award interest and costs

7.5.1 The parties shall bear the costs of the arbitration in the amounts determined by the arbitral tribunal. If the arbitral tribunal so requests, the parties shall pay the costs in advance. When the arbitral proceedings are conducted by an arbitral institution, it shall independently establish the costs of the arbitration and the scale of such costs.\textsuperscript{90}

\begin{footnotes}
\item[84] Ibid, art 53.
\item[85] FCA Rules, art 49.
\item[86] Serbian Arbitration Act, art 55.
\item[87] Ibid, art 54.
\item[88] Ibid.
\item[89] Ibid.
\item[90] Ibid, art 18.
\end{footnotes}
7.5.2 Provisions relating to the award of interest can be found in the law applicable to the subject matter of the dispute. For example, according to the Law on Contracts and Torts, a debtor who is late in performing a pecuniary obligation shall owe default interest, in addition to the principal sum.\(^91\) Furthermore, a creditor is entitled to default interest regardless of whether he has sustained loss due to the debtor’s delay. In the event that the loss sustained by the creditor due to the debtor’s delay is higher than the amount payable by way of default interest, the creditor is entitled to the additional amount.\(^92\)

### 7.6 Termination of the proceedings

7.6.1 The arbitral proceedings shall be terminated by the rendering of the final award. The arbitral proceedings may also be terminated if:
- the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal finds that the respondent has a legitimate interest in obtaining a final award;
- the parties agree on the termination of the arbitral proceedings;
- the arbitral tribunal finds that the continuation of the arbitral proceedings has become impossible; or
- the arbitral proceedings have been suspended in accordance with the Serbian Arbitration Act.\(^93\)

### 7.7 Effect of the award

7.7.1 A domestic award has the same effect between the parties as a final judgment of the domestic court.\(^94\)

7.7.2 A foreign award has the same effect between the parties as a final judgment of the domestic court after being recognised by the competent Serbian court.\(^95\)

7.7.3 A foreign award is an award either made by an arbitral tribunal, the place of which is outside the Republic of Serbia, or an award made by an arbitral tribunal in the Republic of Serbia where a foreign law was applied to the arbitral proceedings.\(^96\)

---

\(^{91}\) Law on Contracts and Torts, 1 October 1978 (as amended), art 277.

\(^{92}\) Ibid, art 278.

\(^{93}\) Serbian Arbitration Act, art 47.

\(^{94}\) Ibid, art 64.

\(^{95}\) Ibid.

\(^{96}\) Ibid.
7.8  Correction, interpretation and issue of a supplemental award
7.8.1  At the request of any party, submitted no later than 30 days from the date of receipt of the award, the arbitral tribunal shall:
— correct the language and any technical errors in the award or provide specific interpretations of the award; or
— render a supplementary award as to claims presented in the arbitral proceedings but not decided in the award.\(^97\)

8.  Role of the courts
8.1  Jurisdiction of the courts
8.1.1  A state court only has jurisdiction over arbitration in matters expressly specified in the Serbian Arbitration Act.\(^98\) For example, each party may, before or during arbitral proceedings, request that the court grants interim measures.\(^99\)

8.1.2  The court also has a role in the appointment of arbitrators. If the parties fail to determine the number of arbitrators where there is no appointing authority, or the appointing authority also fails to make a determination, the number of arbitrators shall be determined by the competent court.\(^100\) Additionally, where the dispute is to be resolved by a sole arbitrator, and the parties fail to agree on the appointment within 30 days of the date that one party requests the other to jointly appoint the arbitrator and there is no appointing authority, or the appointing authority also fails to appoint the sole arbitrator, the appointment shall be made by the competent court.\(^101\)

8.1.3  In ad hoc arbitration, if a party considers that an arbitrator has become unable to perform the arbitrator’s functions or has failed to act without undue delay, that party may request the competent court to terminate the arbitrator’s mandate. The decision of the court on this subject matter is not subject to appeal.\(^102\)

---

\(^97\) ibid, art 56.
\(^98\) ibid, art 7.
\(^99\) ibid, art 15.
\(^100\) ibid, art 16.
\(^101\) ibid, art 17.
\(^102\) ibid, art 25.
8.1.4 If the arbitral tribunal rules on pleas with regards to its own jurisdiction, including any objection to the existence or validity of the arbitration agreement, any party may request, within 30 days after receiving the ruling, the competent court to decide on the matter.\textsuperscript{103}

8.1.5 The arbitral tribunal may also request the court’s assistance in taking evidence. If it does so, the arbitral tribunal shall assess the evidence taken before the court as evidence taken by the arbitral tribunal itself.\textsuperscript{104}

8.1.6 In making an application for setting aside an arbitral award, the court at the seat of arbitration has the territorial jurisdiction to decide upon the application.\textsuperscript{105} When considering the recognition and enforcement of a foreign award, the court determined by the statute shall make this decision. Territorial jurisdiction will belong to the court in whose territory the award should be enforced.\textsuperscript{106}

8.2 Stay of court proceedings

8.2.1 Under the Serbian Arbitration Act, a Serbian court, upon the motion of a party submitted prior to submissions on the subject matter of the dispute, will dismiss an action for lack of jurisdiction if the dispute is subject to an arbitration agreement.\textsuperscript{107} This is the position unless the court finds that the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.

8.3 Preliminary rulings on jurisdiction

8.3.1 The Serbian Arbitration Act provides the courts with no powers to make preliminary rulings on the jurisdiction of an arbitral tribunal.

8.4 Interim protective measures

8.4.1 The Serbian Arbitration Act provides that each party is entitled, before or during arbitral proceedings, to request interim measures from the Serbian courts.\textsuperscript{108} This provision also applies when the seat of the arbitration is in another state.

\textsuperscript{103} Ibid, art 30.
\textsuperscript{104} Ibid, art 46.
\textsuperscript{105} Ibid, art 57.
\textsuperscript{106} Ibid, art 65.
\textsuperscript{107} Ibid, art 14.
\textsuperscript{108} Ibid, art 15.
9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

9.1.1 An application to set aside an award may only be made in relation to a domestic award. A domestic award is defined as an award made in the Republic of Serbia in either domestic or international arbitration. The Serbian court at the seat of arbitration is the competent court to decide on the procedure for setting aside an award. The parties cannot waive the right to apply to set aside an award.\textsuperscript{109}

9.2 Applications to set aside an award

9.2.1 The deadline for making an application to set aside an award is three months after the award was received by the party making the application, or three months from the date on which the decision on the request for a correction, interpretation or supplemental award was communicated to the parties.

9.2.2 An award can only be set aside if the applicant proves that:

— the arbitration agreement is invalid under the law determined by the parties’ agreement or under Serbian law;

— the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;

— the award deals with a dispute not falling under the arbitration agreement or contains decisions on matters beyond the scope of that agreement (although, if it is found that the part of the award going beyond the scope of the arbitration agreement can be severed from the remaining part of the award, only the former part of the award will be set aside);

— the composition of the arbitral tribunal or the conduct of the arbitral proceedings was not in accordance with the arbitration agreement or the rules of the arbitral institution that was entrusted with administration of the arbitration, or if such agreement was in conflict with a mandatory provision of the Serbian Arbitration Act;

— no agreement regarding the composition of the arbitral tribunal was made, the composition of the arbitral tribunal or the conduct of the arbitral proceedings was not in accordance with the provisions of the Serbian Arbitration Act; or

\textsuperscript{109} Ibid, art 62.
— the award was based on the false testimony of a witness or expert or a forged document, or the award results from the criminal act of an arbitrator or a party, if these grounds are proven by a final judgment.110

9.2.3 The Serbian court shall also set aside the award if it finds that:
— the subject matter of the dispute is not eligible for settlement by arbitration under Serbian law; or
— the award is contrary to Serbian public policy.

9.2.4 The Serbian Arbitration Act, like the Model Law (1985), leaves it to the Serbian court before which the application to set aside was filed to decide whether or not to suspend the arbitral proceedings in order to provide the arbitral tribunal with an opportunity to take such actions which, in the arbitral tribunal’s opinion, will eliminate the grounds for setting aside.111

9.2.5 If the Serbian court sets aside the award on grounds not relating to the existence and/or validity of the arbitration agreement, that agreement shall continue to bind the parties and the dispute shall be re-submitted to arbitration, unless the parties agree otherwise.112

9.3 Appeals
9.3.1 The Serbian Arbitration Act does not contain provisions regulating appeals against an award. The only way to challenge the final award is to submit an application for setting aside the award.

10. Recognition and enforcement of awards

General provisions
10.1.1 The Serbian Arbitration Act regulates the issue of recognition and enforcement of foreign awards.113 The provisions are based on the New York Convention, to which Serbia is a signatory,114 and the Model Law (1985). However, it should be noted that when ratifying the New York Convention, the Serbian Government expressly declared that:

111 *Ibid*, art 60.
113 *Ibid*, art 64–68.
114 For the text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.
— the Serbian courts will only recognise and enforce awards rendered in other states that are party to the Convention; and
— the Serbian courts will only recognise and enforce awards relating to disputes that qualify as “commercial” under Serbian law.

10.1.2 The Serbian court may decide on the recognition of a foreign award as a preliminary matter in the enforcement proceedings.

Grounds for refusing recognition and enforcement

10.1.3 Recognition and enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, if that party proves that:
— the arbitration agreement is invalid under the law determined by the parties’ agreement or under the law of the country where the award was rendered;
— the party against whom the award had been rendered was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
— the award deals with a dispute not falling under the arbitration agreement or contains decisions on matters beyond the scope of that agreement (although, if it is found that the part of the award going beyond the scope of arbitration agreement can be severed from the remaining part of the award, partial refusal of the recognition and enforcement of that award will be possible);
— the composition of the arbitral tribunal or the conduct of the arbitral proceedings were not in accordance with the arbitration agreement or, in the absence of such an agreement, were not in accordance with the law of the country where the arbitration took place; or
— the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.\(^\text{115}\)

10.1.4 The competent Serbian court will also refuse recognition and enforcement of the award if it finds that:
— the subject matter of the dispute is not eligible for settlement by arbitration under Serbian law; or
— the award is contrary to Serbian public policy.

\(^{115}\) Serbian Arbitration Act, art 65 which reflects the grounds set out in the Model Law (1985), art 36(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).
Jurisdiction of the Serbian courts in the recognition and declaration of enforceability of a foreign award

10.1.5 The Serbian court with territorial jurisdiction to hear applications for the recognition and enforcement of foreign awards is the Serbian court in the territory in which enforcement of the award is sought.\footnote{Serbian Arbitration Act, art 65.}

10.1.6 The Law on Organisation of Courts designates the Serbian higher and commercial courts as the competent courts to decide on the recognition and enforcement of foreign awards.\footnote{Law on Organisation of Courts, 27 December 2008, art 23 and 25.}

Effects of an application in another country to set aside an award

10.1.7 The Serbian Arbitration Act includes provisions on the effects of an application to set aside an award, where the application has been initiated abroad. The Serbian court before which recognition and enforcement of a foreign award is sought may, if it considers it necessary, adjourn its decision if proceedings for setting aside an award or suspending enforcement of an award have been initiated in the state in which, or under the laws of which, the award was rendered.\footnote{Serbian Arbitration Act, art 67.} The same provisions apply regardless of whether the country in which the application to set aside is being made is a signatory to the New York Convention.

10.1.8 The Serbian court before which recognition and enforcement of a foreign award is sought may, at the request of a party, require that its decision regarding the recognition and enforcement proceedings be conditional upon provision of the appropriate security by the party opposing enforcement.
11. Contacts

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Ebendorferstraße 3
1010 Vienna
Austria

Daniela Karollus-Bruner
T +43 1 40443 2550
E daniela.karollus-bruner@cms-rrh.com

Nedeljko Velisavljević
T +381 11 320 8900
E nedeljko.velisavljevic@cms-rrh.com
ARBITRATION IN SINGAPORE

By Peter Wood, Phillip Greenham and Shlomit Raz, Minter Ellison
# Table of Contents

1. Legislative framework 747

2. **Scope of application and general provisions of the Singapore Arbitration Act and the International Arbitration Act** 748
   2.1 Subject matter 748
   2.2 General principles 749

3. **The arbitration agreement** 750
   3.1 Definitions 750
   3.2 Formal requirements 750
   3.3 Opting in and out 751
   3.4 Separability 751
   3.5 Special tests and requirements of the jurisdiction 752

4. **Composition of the arbitral tribunal** 752
   4.1 Constitution of the arbitral tribunal 752
   4.2 Procedure for challenging arbitrators 753
   4.3 Substitution of arbitrators 754
   4.4 Arbitration fees and expenses 754
   4.5 Arbitrator immunity 755

5. **Jurisdiction of the arbitral tribunal** 755
   5.1 Competence to rule on jurisdiction 755
   5.2 Power to order interim measures 756

6. **Conduct of proceedings** 757
   6.1 Common law tradition 757
   6.2 Commencing an arbitration 757
   6.3 General procedural principles 757
   6.4 Seat and language of the arbitration 758
   6.5 Submissions 758
   6.6 Oral hearings and written proceedings 759
   6.7 Default by one of the parties 759
   6.8 Evidence 759
   6.9 Appointment of experts 760
   6.10 Confidentiality 760
7. Making of the award and termination of proceedings 761
  7.1 Remedies 761
  7.2 Form, content, notification and effect of an award 762
  7.3 Settlement 762
  7.4 Power to award interest and costs 762
  7.5 Correction, clarification and issuance of a supplemental award 763
  7.6 Termination of the proceedings 763

8. Role of the courts 764
  8.1 Jurisdiction of the courts 764
  8.2 Stay of court proceedings 765
  8.3 Extension of time for commencement of arbitral proceedings 765
  8.4 Interim protective measures 766
  8.5 Obtaining evidence and other court assistance 767

9. Challenging and appealing an award through the courts 767
  9.1 Loss of the right to object to an award 767
  9.2 Challenging the award 768
  9.3 Appeal on a point of law 769
  9.4 Applications to set aside an award 769

10. Recognition and enforcement of awards 769
    10.1 Domestic awards 769
    10.2 Foreign awards 770

11. Conclusion 770

12. Contacts 771
1. Legislative framework

1.1.1 There are two separate legal regimes governing the arbitration process in Singapore:
— the domestic regime, which concerns arbitrations that are conducted pursuant to domestic arbitration agreements and is governed by the Arbitration Act 2001 (*Singapore Arbitration Act*);\(^1\) and
— the international regime, which concerns arbitrations that are conducted pursuant to international arbitration agreements and is governed by the International Arbitration Act.\(^2\)

1.1.2 The first domestic act governing arbitration was the Arbitration Ordinance which came into force in 1953. It was based on the United Kingdom’s Arbitration Act of 1950. The Arbitration Ordinance 1953 was amended from time to time, until its last edition, the Arbitration Act 1985 (*1985 Act*).\(^3\) The 1985 Act was repealed by the Singapore Arbitration Act, which came into force on 1 March 2002. The purpose of the Singapore Arbitration Act was to align the domestic arbitration law with the Model Law (1985).

1.1.3 The International Arbitration Act came into force in 1995 and has been amended several times, most recently by the International Arbitration (Amendment) Act 2009 (*International Arbitration Act Amendments*), which entered into effect from 1 January 2010. The International Arbitration Act gives effect to the Model Law (1985), with the exception of Chapter VIII, by setting it out in Schedule 1 to the International Arbitration Act.\(^4\)

1.1.4 However, the main body of the International Arbitration Act prevails over its Schedules and modifies the Model Law (1985) in certain respects, such as:
— immunity of arbitrators;
— court assistance in taking evidence;
— confidentiality of arbitral proceedings;
— appointment of a third arbitrator, in situations where three arbitrators are to be appointed; and
— grounds for setting aside an award.

---

2 *Ibid*, ch 143A.
4 International Arbitration Act, s 3(1).
1.1.5 The changes introduced by the International Arbitration Act Amendments were aimed at further modifying the International Arbitration Act to align it to the Model Law (2006). However, the changes were made to the main body of the International Arbitration Act only, and Schedule 1 remains unchanged.\(^5\)

1.1.6 Currently, the default provision of the International Arbitration Act is that, subject to the International Arbitration Act, the Model Law (1985), with the exception of Chapter VIII, shall have the force of law in Singapore.\(^6\)

1.1.7 The main changes introduced by the International Arbitration Act Amendments relate to:
— the power of the Singapore Court to make interim orders;\(^7\)
— the definition of an arbitration agreement;\(^8\) and
— the designation of authenticating persons.\(^9\)

1.1.8 As a result of the enactment of the International Arbitration Act, Singapore has become a preferred choice for international arbitration in Asia.

2. Scope of application and general provisions of the Singapore Arbitration Act and the International Arbitration Act

2.1 Subject matter

2.1.1 The International Arbitration Act applies to international arbitrations (as defined below), as well as to non-international arbitrations where the parties have a written agreement that Part II of the International Arbitration Act or the Model Law (1985) will apply.\(^10\)


\(^{6}\) International Arbitration Act, s 3(1).

\(^{7}\) *Ibid*, s 12A.

\(^{8}\) *Ibid*, s 2.

\(^{9}\) *Ibid*, s 19C.

\(^{10}\) *Ibid*, s 5(1).
2.1.2 An arbitration is considered “international” if:
— at least one of the parties has its place of business in any State\(^\text{11}\) other than Singapore at the time the arbitration agreement was concluded;
— the agreed seat of the arbitration is situated outside of the State in which the parties have their place of business;
— any place where a substantial part of the obligation of the commercial relationship is to be performed, or the place to which the subject matter of the dispute is most closely connected, is situated outside of the State in which the parties have their place of business; or
— the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.\(^\text{12}\)

2.1.3 In order to determine a party’s place of business, the International Arbitration Act provides that:
— if a party has more than one place of business, the place of business shall be the one which has the closest relationship to the agreement; and
— if a party does not have a place of business, a reference to “place of business” shall be construed as a reference to that party’s habitual residence.\(^\text{13}\)

2.1.4 The Singapore Arbitration Act applies to any arbitration where the seat of the arbitration is Singapore and where Part II of the International Arbitration Act does not apply.\(^\text{14}\) Therefore, the Singapore Arbitration Act operates where the International Arbitration Act does not.

2.2 General principles
2.2.1 Arbitration in Singapore can be administered by an arbitral institution, such as the Singapore International Arbitration Centre (SIAC), or it can be administered on an ad hoc basis.

2.2.2 The SIAC administers most of its cases under its own rules of arbitration, the Arbitration Rules of the SIAC (SIAC Rules).\(^\text{15}\)

2.2.3 The international regime, with its adoption of much of the Model Law (1985), favours greater party autonomy and reduces the degree of court intervention. In contrast, the domestic regime allows for closer court supervision.

\(^{11}\) As defined by International Arbitration Act, s 3(2), “State” means Singapore and any country other than Singapore.

\(^{12}\) International Arbitration Act, s 5(2).

\(^{13}\) Ibid, s 5(3).

\(^{14}\) Singapore Arbitration Act, s 3.

3. The arbitration agreement

3.1 Definitions

3.1.1 The Singapore Arbitration Act 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 whether contractual or not.”

3.1.2 The International Arbitration Act, on the other hand, defines an arbitration agreement as “an agreement in writing referred to in Article 7 of the Model Law (1985) and includes an agreement deemed or constituted under Subsection (3) or (4)”. This embraces electronic communications as provided for by Option 1 of Article 7 of the Model Law (1985), but does not include oral agreements.

3.2 Formal requirements

3.2.1 Both the Singapore Arbitration Act and the International Arbitration Act provide that an arbitration agreement is deemed to have been constituted in the following circumstances:

— where a party asserts the existence of an arbitration agreement in a pleading, statement of case or any document in circumstances in which the assertion calls for a reply but is not denied; or

— where a reference in a bill of lading to a charterparty or some other document containing an arbitration clause is such as to make that clause part of the bill of lading.

3.2.2 The requirements for a valid arbitration agreement to exist are set out in Section 4 of the Singapore Arbitration Act. An arbitration agreement can take the form of an arbitration clause in the contract or as a separate agreement.

3.2.3 The Singapore Arbitration Act states that the arbitration agreement must be in writing and must be contained in:

— a document signed by the parties; or

— an exchange of letters, telex, telefacsimile or other means of communication that provide a record of the agreement.

---

16 Singapore Arbitration Act, s 4(1).
17 Singapore Arbitration Act, s 4(4) and International Arbitration Act, s 2(3).
18 Singapore Arbitration Act, s 4(5) and International Arbitration Act, s 2(4).
19 Singapore Arbitration Act, s 4(2). Singapore Arbitration Act, s 4(1) and (2) correspond to the Model Law (1985), art 7(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).
20 Singapore Arbitration Act, s 4(3). This section is similar to the Model Law (1985), art 7(1) (see CMS Guide to Arbitration, vol II, appendix 2.1).
The International Arbitration Act

3.2.4 The International Arbitration Act adopts the formal requirements of Article 7 of the Model Law (1985), which also requires that the arbitration agreement must be in writing.\(^{21}\)

Model arbitration clause

3.2.5 There are no specific words or form which must be used to constitute an arbitration agreement. However, an intention to arbitrate must be clear and unequivocal.

3.3 Opting in and out

3.3.1 The operation of the dual-track arbitration regime in Singapore allows the parties to pre-select a particular regime. This allows parties to “opt-in” or “opt-out” of the relevant legislation. This is achieved by making reference, in the arbitration clause, to the International Arbitration Act or the Singapore Arbitration Act and “opting-in” or “opting-out” of the desired regime.

3.3.2 In the International Arbitration Act, this is enabled by Section 15(1) which provides as follows:
If the parties to an arbitration agreement have expressly agreed either:
\(a\) that the Model Law (1985) or this Part shall not apply to the arbitration; or
\(b\) that the Singapore Arbitration Act or the repealed Arbitration Act shall apply to the arbitration,
then, both the Model Law (1985) and this Part shall not apply to that arbitration but the Singapore Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

3.4 Separability

3.4.1 Separability is incorporated into the Singapore Arbitration Act and the International Arbitration Act. The doctrine of separability means that an arbitration clause is treated as a separate agreement independent of the other terms of the contract.\(^{22}\) Therefore, a decision that the contract is null and void does not entail, as a matter of law, that the arbitration clause is invalid.\(^{23}\)

3.4.2 The doctrine of separability supports the principle of *competence-competence* discussed at section 5.1 below.

---

\(^{21}\) International Arbitration Act, s 2.

\(^{22}\) Singapore Arbitration Act, s 21(2) and International Arbitration Act, sch 1, art 16(1).

\(^{23}\) *Ibid.*
3.5 Special tests and requirements of the jurisdiction

3.5.1 The Singapore Arbitration Act does not impose any special tests or requirements for jurisdiction, beyond the requirement that the International Arbitration Act does not apply to the arbitration.24

3.5.2 The basis for the application of the International Arbitration Act is discussed above at paragraphs 2.1.1 to 2.1.3. The International Arbitration Act permits all disputes agreed upon by the parties to be submitted to arbitration unless it is contrary to public policy to do so.25

3.5.3 The International Arbitration Act also provides that an arbitration shall not be held to lack jurisdiction on the basis that a written law confers jurisdiction on a court, but does not refer to the determination of the matter by arbitration.26

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 Under both the Singapore Arbitration Act and the International Arbitration Act, the parties are free to agree on the procedure for appointing arbitrators.27 Arbitrators can be of any nationality and do not require any formal legal training or qualifications,28 although standard practice is that many of the arbitrators in Singapore are lawyers.

4.1.2 The SIAC has a panel of arbitrators from which appointments are normally made. If the parties fail to agree on the procedure by which appointments are to be made, either party may apply to the appointing authority (now the Deputy Chair of the SIAC, unless otherwise agreed) to make an appointment.29

24 Singapore Arbitration Act, s 3.
25 International Arbitration Act, s 11(1).
26 Ibid, s 11(2).
27 Singapore Arbitration Act, s 13(2) and International Arbitration Act, sch 1, art 11, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
28 Singapore Arbitration Act, s 13(1) and International Arbitration Act, sch 1, art 11(1).
29 Singapore Arbitration Act, s 13(3)(b) and International Arbitration Act, sch 1, art 11(3)(b) cf the Model Law (1985), art 6 (see CMS Guide to Arbitration, vol II, appendix 2.1) and International Arbitration Act, s 8(2).
4.1.3 The parties are free to agree on the number of arbitrators. Where the parties do not reach an agreement, the default position is to appoint a sole arbitrator. This position diverges from the default position under the Model Law (1985), which is to have a three member arbitral tribunal.

4.1.4 Decisions shall be made by a majority of the arbitral tribunal. Where the parties agree to have an even number of arbitrators, and are therefore not assured of a majority decision, it is necessary that the parties also agree on the method by which deadlocks will be resolved. Alternatively, the presiding arbitrator has authority to determine matters of procedure, so may determine the procedure in the event of a deadlock.

4.2 Procedure for challenging arbitrators

4.2.1 Under both regimes, an arbitrator’s appointment may only be challenged if:
— circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence; or
— the arbitrator does not possess the qualifications agreed to by the parties.

4.2.2 The Singapore Arbitration Act provides that:
A party may request the High Court of Singapore to remove an arbitrator –
  a) who is physically or mentally incapable of conducting the arbitral proceedings or where there are justifiable doubts as to his capacity to do so; or
  b) who has refused or failed –
      (i) to properly conduct the arbitral proceedings; or
      (ii) to use all reasonable despatch in conducting the arbitral proceedings or making an award,
and where substantial injustice has been or will be caused to that party.

---

30 Singapore Arbitration Act, s 12(1) and International Arbitration Act, sch 1, art 10(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
31 Singapore Arbitration Act, s 12(2) and International Arbitration Act, s 9.
33 Singapore Arbitration Act, s 19 and International Arbitration Act, sch 1, art 29, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
34 Singapore Arbitration Act, s 19(2) and International Arbitration Act, sch 1, art 29, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
35 Singapore Arbitration Act, s14(3) and International Arbitration Act, sch 1, art 12(2), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
36 Singapore Arbitration Act, s 16(1).
4.2.3 Under the Singapore Arbitration Act, if the parties have vested the power to remove an arbitrator in a specified person or institution, the courts will not exercise their powers unless satisfied that the parties have first exhausted their recourse to that person or institution.\(^{37}\)

4.2.4 Under the International Arbitration Act, an arbitrator may be removed by the competent court if they are unable to perform their functions or are acting with undue delay.\(^{38}\) The parties may terminate an arbitrator’s mandate by agreement on the same grounds.\(^{39}\)

4.3 **Substitution of arbitrators**

4.3.1 Under the Singapore Arbitration Act, parties are free to decide procedures concerning the substitution of an arbitrator who has ceased to hold office.\(^{40}\) Parties may determine:

— whether and if so how the vacancy is to be filled;
— whether and if so to what extent the previous arbitral proceedings should stand; and
— what effect (if any) an arbitrator ceasing to hold office has on any appointment made by that arbitrator (alone or jointly).

4.3.2 In the event that the parties cannot agree on the substitution of an arbitrator in the manner above, ordinary provisions relating to the appointment of arbitrators shall apply.\(^{41}\)

4.3.3 Under the International Arbitration Act, a substitute arbitrator will be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.\(^{42}\)

4.4 **Arbitration fees and expenses**

4.4.1 Under the domestic regime, the parties are jointly and severally liable to pay the arbitral tribunal’s reasonable fees and expenses.\(^{43}\)

---

37 *Ibid*, s 16(2).


39 *Ibid*.

40 *Singapore Arbitration Act*, s 18(1).

41 *Ibid*, s 18(2).


43 *Singapore Arbitration Act*, s 40(1).
4.4.2 Under both regimes, unless the fees of the arbitral tribunal have been agreed to by the parties, any party may require that the fees be assessed either by the Registrar of the Supreme Court under the Singapore Arbitration Act or the Registrar of the SIAC under the International Arbitration Act.\textsuperscript{44}

4.4.3 If the arbitral tribunal is appointed by the SIAC, or the arbitration is being administered by the SIAC, it is usual for the fees of the arbitral tribunal to be agreed upon prior to the commencement of the arbitral proceedings.\textsuperscript{45}

4.5 Arbitrator immunity

4.5.1 The immunity conferred on arbitrators is the same under the domestic and international regimes. Arbitrators will not be liable for:
— negligence in respect of anything done or omitted to be done in the capacity of arbitrator; or
— any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an award.\textsuperscript{46}

4.5.2 Importantly, under the international regime, immunity extends to any appointing authorities and other bodies empowered to make appointments.\textsuperscript{47}

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 Under both the domestic and international regimes, an arbitral tribunal has the power to rule on its own jurisdiction (the principle of \textit{competence-competence}).\textsuperscript{48}

5.1.2 A challenge to the arbitral tribunal’s jurisdiction must be raised before the submission of the statement of defence.\textsuperscript{49} If, on a preliminary question, the arbitral tribunal rules that it has jurisdiction, a party may make an appeal within 30 days to the relevant court.\textsuperscript{50}

\textsuperscript{44} Singapore Arbitration Act, s 40(2) and International Arbitration Act, s 21(2).
\textsuperscript{45} SIAC Rules, art 30.1 (see CMS Guide to Arbitration, vol II, appendix 3.14).
\textsuperscript{46} Singapore Arbitration Act, s 20 and International Arbitration Act, s 25.
\textsuperscript{47} International Arbitration Act, s 25A(1).
\textsuperscript{48} Singapore Arbitration Act, s 21(1) and International Arbitration Act, sch 1, art 16(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{49} Singapore Arbitration Act, s 21(4) and International Arbitration Act, sch 1, art 16(2), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
\textsuperscript{50} Singapore Arbitration Act, s 21(9) and International Arbitration Act, s 10 and sch 1, art 16(3), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
5.2 Power to order interim measures

5.2.1 Under the domestic regime, the parties can agree on the powers which may be exercised by the arbitral tribunal.\(^51\) The Singapore Arbitration Act also expressly lists general powers that are exercisable by an arbitral tribunal.\(^52\) Those powers include some interim measures such as granting an order for security of costs, discovery of documents and interrogatories.\(^53\)

5.2.2 Under the international regime, the arbitral tribunal is granted powers to make orders or directions for:

- security for costs;
- discovery of documents and interrogatories;
- giving of evidence by affidavit;
- the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute;
- 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;
- the preservation and interim custody of any evidence for the purposes of the arbitral proceedings;
- securing the amount in dispute;
- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- an interim injunction or any other interim measure.\(^54\)

5.2.3 The International Arbitration Act currently incorporates the provisions of Article 17 of the Model Law (1985), which are supplemented by additional provisions introduced by the International Arbitration Act Amendments.\(^55\) The express powers conferred upon the arbitral tribunal to order interim measures enable it to deal with different issues in one forum, thereby reducing the possibility of excessive court intervention.

---

\(^{51}\) Singapore Arbitration Act, s 28(1).
\(^{52}\) Ibid, s 28.
\(^{53}\) Ibid, s 28(2).
\(^{54}\) International Arbitration Act, s 12(1).
\(^{55}\) See further section 8.4 below.
6. Conduct of proceedings

6.1 Common law tradition

6.1.1 Singapore is a common law jurisdiction. Common law systems involve complex procedural and evidentiary rules and are adversarial in nature. Generally, the parties to court proceedings conducted under such systems have little control over court processes. This can be contrasted with arbitral proceedings under the Singapore Arbitration Act or the International Arbitration Act where the parties have a greater degree of freedom to determine the procedures to be followed.

6.2 Commencing an arbitration

6.2.1 Under both the domestic and international regimes, unless it is otherwise agreed by the parties, the arbitral proceedings will commence on the date on which the respondent receives the request for the dispute to be referred to arbitration.\(^{56}\)

6.3 General procedural principles

6.3.1 If Singapore is the seat of the arbitration then the parties have the freedom to determine the procedures for conducting the arbitral proceedings.\(^{57}\)

6.3.2 Parties do not always conduct arbitration on an ad hoc basis and often choose to have the arbitration administered by an arbitral institution, such as the SIAC. If the parties adopt the SIAC Rules, the SIAC can administer the arbitral proceedings in accordance with those rules. Alternatively, the parties may choose to adopt the rules of another institution.

6.3.3 If the parties have not agreed on the procedure to be followed then the arbitral tribunal, subject to the provisions of the Singapore Arbitration Act or the International Arbitration Act, will be free to conduct the arbitration in the manner that it considers to be appropriate.\(^{58}\)

6.3.4 Under the domestic regime, the arbitral tribunal must act fairly and impartially and must give each party a reasonable chance of presenting its case.\(^{59}\) Similarly, under

---

\(^{56}\) Singapore Arbitration Act, s 9 and International Arbitration Act, sch 1, art 21, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{57}\) Singapore Arbitration Act, s 23(1) and International Arbitration Act, sch 1, art 19, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{58}\) Singapore Arbitration Act, s 23(2) and International Arbitration Act, sch 1, art 19.

\(^{59}\) Singapore Arbitration Act, s 22.
the international regime, the arbitral tribunal is required to treat the parties with equality and must give each party a full opportunity to present its case. There is no corresponding obligation in the International Arbitration Act to act impartially.

6.4 Seat and language of the arbitration

6.4.1 The parties may agree on the seat of the arbitration. Where the seat of the arbitration is Singapore, the Singapore Arbitration Act or the International Arbitration Act will generally govern the arbitral proceedings. The seat of the arbitration is fixed. In other words, the jurisdiction of the arbitration will be determined by the agreed “seat” of the arbitration, regardless of the actual location where the arbitration is conducted.

6.4.2 Under the international regime, the parties are free to agree on the language or languages to be used in the arbitration. Where there is no agreement, the arbitral tribunal will be free to make a determination as to what language or languages will be used in the arbitral proceedings. There is no corresponding provision of the Singapore Arbitration Act that governs languages.

6.5 Submissions

6.5.1 The parties have the right to agree on the format of submissions and the time frames in which they shall be made. Where the parties have made no agreement, the claimant shall state:
— the facts supporting its claim;
— the points at issue; and
— the relief or remedy sought.

6.5.2 The respondent shall state its defence in respect of those issues. Under both regimes, the parties may submit any documents that they consider to be relevant.

6.5.3 Under both regimes, unless otherwise agreed, the parties may amend or supplement their claim or defence during the course of the arbitral proceedings.

---

60 International Arbitration Act, sch 1, art 18, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

61 International Arbitration Act, sch 1, art 22(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

62 International Arbitration Act, sch 1, art 22(1).

63 Singapore Arbitration Act, s 24 and International Arbitration Act, sch 1, art 23, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

64 Singapore Arbitration Act, s 24(1) and International Arbitration Act, sch 1, art 23(1).

65 Ibid.

66 Singapore Arbitration Act, s 24(2) and International Arbitration Act, sch 1, art 23(1).
The arbitral tribunal has the power to reject those amendments if it considers those amendments inappropriate, having regard to the delay in making the amendment.67

6.6 Oral hearings and written proceedings
6.6.1 The parties have the power to agree on whether the arbitral proceedings will comprise a hearing or will be conducted only on the basis of documents and other materials. In the absence of an agreement between the parties, the arbitral tribunal can make a determination on this issue.68

6.7 Default by one of the parties
6.7.1 In the event that the claimant fails to properly communicate its statement of claim, the arbitral tribunal will terminate the arbitral proceedings.69

6.7.2 If the respondent fails to properly communicate its statement of defence, the arbitral tribunal will not treat the failure as an admission of the claimant’s allegations.70

6.7.3 Where a party fails to appear at a hearing or produce evidence, the arbitral tribunal will make an award on the evidence before it.71

6.7.4 The Singapore Arbitration Act provides that if the arbitral tribunal is satisfied that a delay caused by the claimant is inordinate and inexcusable, and that the delay has given rise to substantial risk that there will not be a fair resolution of the issues or is likely to cause serious prejudice to the respondent, then the arbitral tribunal may make an award dismissing the claim.72

6.8 Evidence
6.8.1 The rules of evidence that apply to all court proceedings in Singapore do not apply to arbitral proceedings.73

67 Singapore Arbitration Act, s 24(3) and International Arbitration Act, sch 1, art 23(2).
68 Singapore Arbitration Act, s 25(1) and International Arbitration Act, sch 1, art 24(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
69 Singapore Arbitration Act, s 29(1)(a) and International Arbitration Act, sch 1, art 25(a), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
70 Singapore Arbitration Act, s 29(1)(b) and International Arbitration Act, sch 1, art 25(b), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
71 Singapore Arbitration Act, s 29(1)(c) and International Arbitration Act, sch 1, art 25(c), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
72 Singapore Arbitration Act, s 29(3).
73 Evidence Act of Singapore (1893), s 2(1) excludes its own application (with the exception of pt IV, relating to bankers’ books) to arbitral proceedings.
6.8.2 Where the parties have not reached an agreement on the process to be followed by the arbitral tribunal, the arbitral tribunal has the power to conduct the arbitral proceedings in the manner that it considers to be appropriate.\(^{74}\) This power extends to determining the admissibility, relevance, materiality and weight of any evidence.\(^{75}\)

6.9 **Appointment of experts**

6.9.1 Powers with respect to experts lie with the arbitral tribunal. Unless otherwise agreed by the parties, the arbitral tribunal may appoint experts with respect to specific issues and require parties to provide relevant documents for the purposes of the expert’s determination.\(^{76}\)

6.9.2 Moreover, unless otherwise agreed by the parties, a party can request an expert to participate in a hearing (or the arbitral tribunal can require them to do so where necessary), in which case the parties can put questions to the expert and present their own expert witnesses to testify on the points in issue.\(^{77}\)

6.10 **Confidentiality**

6.10.1 The Singapore Arbitration Act requires that confidentiality be maintained in the event that an arbitrator acts as a mediator.\(^{78}\) The International Arbitration Act provides the same with respect to an arbitrator acting as conciliator.\(^{79}\)

6.10.2 Confidentiality must also be maintained, unless waived by the parties, where the proceedings are not heard in open court.\(^{80}\)

6.10.3 Under the SIAC Rules 2010, the parties and the arbitral tribunal shall at all times treat all matters relating to the arbitral proceedings and the award as confidential.\(^{81}\) Parties and the arbitral tribunal must not, without the written consent of all parties, disclose confidential matters to third parties, except:

\(^{74}\) Singapore Arbitration Act, s 23(2) and International Arbitration Act, sch 1, art 19, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{75}\) Singapore Arbitration Act, s 23(3) and International Arbitration Act, sch 1, art 19(2).

\(^{76}\) Singapore Arbitration Act, s 27(1) and International Arbitration Act, sch 1, art 26(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{77}\) Singapore Arbitration Act, s 27(2) and International Arbitration Act, sch 1, art 26(2), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{78}\) Singapore Arbitration Act, s 63(2).

\(^{79}\) Singapore Arbitration Act, s 57 and International Arbitration Act, s 17.

\(^{80}\) Singapore Arbitration Act, s 27(1) and International Arbitration Act, s 23.

— for the purpose of making a court application to enforce or challenge the award;
— pursuant to an order of, or a subpoena issued by, a court of competent jurisdiction;
— for the purpose of pursuing or enforcing a legal right or claim;
— in compliance with the provision of the laws of any State which are binding on the party making the disclosure;
— in compliance with the request or requirement of any regulatory body or other authority; or
— pursuant to an order by the arbitral tribunal on application by a party with proper notice to the other parties.  

82.6.10.4 Under the SIAC Rules, the arbitral tribunal has the power to take appropriate measures, including issuing an award for sanctions or costs, if a party breaches the above provisions.  

7. Making of the award and termination of proceedings

7.1 Remedies

7.1.1 Under the domestic regime, the parties may agree on the remedies that the arbitral tribunal may grant. Where there is no agreement between the parties, the arbitral tribunal may award any remedy that the court could award if the dispute had been the subject of civil proceedings in that court.  

84.7.1.2 Similarly, under the international regime, the arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute was the subject of civil proceedings in the High Court.  

85.7.1.3 This provision under the international regime is without prejudice to the application of Article 28 of the Model Law (1985), which allows the parties to choose the rules of law applicable to the substance of the dispute. Accordingly, where the parties choose to designate a particular legal system to govern the substantive issues of the dispute, that choice will impact upon any remedy that the arbitral tribunal is able to grant.

84 Singapore Arbitration Act, s 34.
85 International Arbitration Act, s 12(5)(a).
7.2 **Form, content, notification and effect of an award**

7.2.1 Awards must be in writing, signed and state:
- the reasons on which it is based, unless the parties have agreed otherwise, or that it is an award on agreed terms;
- the date of the award; and
- the seat of the arbitration.\(^86\)

7.2.2 After an award is made, signed copies should be delivered to the parties. Awards are final and binding on the parties and can only be varied, amended, corrected or reviewed in accordance with the procedures set out in under the Singapore Arbitration Act or the International Arbitration Act.\(^87\)

7.2.3 Any challenge to awards must be made in accordance with the provisions of the Singapore Arbitration Act or the International Arbitration Act, depending on whether the arbitration is domestic or international.\(^88\)

7.3 **Settlement**

7.3.1 Where the parties reach an agreement to settle their dispute, the arbitral tribunal must terminate the arbitral proceedings.\(^89\) The parties can request that the arbitral tribunal records the settlement in the form of an award on agreed terms.\(^90\) However, the arbitral tribunal has the power to refuse that request. With leave of the relevant court, an award on agreed terms can be enforced in the same manner as a judgment or order of the court.\(^91\)

7.4 **Power to award interest and costs**

7.4.1 Under both the domestic and international regimes, the arbitral tribunal has the power to award interest.\(^92\) Furthermore, if the award does not specify otherwise, the award shall carry interest from the date of the award as if it was a judgment debt.\(^93\)

\(^{86}\) Singapore Arbitration Act, s 38(1) and International Arbitration Act, sch 1, art 31(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{87}\) Singapore Arbitration Act, s 44(2) and International Arbitration Act, s 19B(2).

\(^{88}\) Singapore Arbitration Act, s 44(4) and International Arbitration Act, s 19B(4).

\(^{89}\) Singapore Arbitration Act, s 37(1) and International Arbitration Act, sch 1, art 30, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{90}\) Ibid.

\(^{91}\) Ibid.

\(^{92}\) Singapore Arbitration Act, s 37(3) and International Arbitration Act, s 18.

\(^{93}\) Singapore Arbitration Act, s 35(1) and International Arbitration Act, s 12(5)(b).
7.4.2 Under both regimes, the arbitral tribunal has the power to make orders regarding the costs of the arbitration.

7.5 Correction, clarification and issuance of a supplemental award
7.5.1 A party may, within 30 days of the receipt of the award, or within a period otherwise agreed upon, request the correction of any error in computation, any clerical or typographical error or errors of a similar nature. 94

7.5.2 Subject to the same time limitations, a party may, with the agreement of the other parties, request the arbitral tribunal to give an interpretation of a specific point or part of the award. 95

7.5.3 A party may, within 30 days of the receipt of the award, or within a period otherwise agreed upon, request the arbitral tribunal to make an additional award as to claims presented during the arbitral proceedings but omitted from the award. 96 The arbitral tribunal may make such an award if it considers the request justified. 97

7.6 Termination of the proceedings
7.6.1 The Singapore Arbitration Act makes no provision for termination of the arbitral proceedings.

7.6.2 Under the International Arbitration Act, arbitral proceedings are terminated where:
— a party withdraws its claim (unless the respondent objects to termination);
— the parties agree; or
— continuing the arbitral proceedings has become impossible or unnecessary. 98

---

94 Singapore Arbitration Act, s 43(1)(a) and International Arbitration Act, sch 1, art 33(1)(a), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
95 Singapore Arbitration Act, s 43(1)(b) and International Arbitration Act, sch 1, art 33(1)(b).
96 Singapore Arbitration Act, s 43(4) and International Arbitration Act, sch 1, art 33(3), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
97 Singapore Arbitration Act, s 43(5) and International Arbitration Act, sch 1, art 33(4), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
98 International Arbitration Act, sch 1, art 33(2), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
8. **Role of the courts**

8.1 **Jurisdiction of the courts**

8.1.1 Under the International Arbitration Act, no court shall intervene in arbitral proceedings unless there is an express provision in the International Arbitration Act permitting it to do so.\(^{99}\) Such express provisions include the right to:

— appoint arbitrators (failing agreement of the parties);\(^{100}\)
— decide on challenges to arbitrators;\(^{101}\)
— decide on the termination of an arbitrator’s mandate for a failure or impossibility to act;\(^{102}\)
— decide whether the arbitral tribunal has jurisdiction;\(^{103}\) and
— set aside an award on certain grounds.\(^ {104}\)

8.1.2 Under the Singapore Arbitration Act, the court does not have the power to review an award, except where the Singapore Arbitration Act expressly provides.\(^ {105}\) However, the courts have a greater degree of involvement in domestic arbitral proceedings compared to the international regime.

8.1.3 Under the domestic regime, the courts have certain powers for the purposes of – and in relation to – arbitral proceedings, which can be summarised as:

— the same powers that the arbitral tribunal is granted under Section 28 of the Singapore Arbitration Act;\(^ {106}\)
— the power to secure amounts in dispute;
— the power to prevent the dissipation of assets that would render any award ineffectual; and
— the power to award an interim injunction or any other interim measure.\(^ {107}\)

---

\(^{99}\) International Arbitration Act, sch 1, art 5, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{100}\) International Arbitration Act, sch 1, art 11(3), art 11(4), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{101}\) International Arbitration Act, sch 1, art 13(3), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{102}\) International Arbitration Act, sch 1, art 14(1), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{103}\) International Arbitration Act, sch 1, art 16(3), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{104}\) International Arbitration Act, sch 1, art 34, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1) and International Arbitration Act, s 24.

\(^{105}\) Singapore Arbitration Act, s 47.

\(^{106}\) On which see section 5.2 above.

\(^{107}\) Singapore Arbitration Act, s 31.
8.2 **Stay of court proceedings**

8.2.1 Where a party to an arbitration agreement has brought court proceedings in respect of any matter which is the subject of the agreement against any other party to that arbitration agreement, that other party may, after appearance and before delivering a pleading or taking any other step in the court proceedings, apply to that court to stay those proceedings, so far as they relate to that matter.\(^{108}\)

8.2.2 In the domestic context, the court may stay the proceedings, so far as they relate to the matter, if it is satisfied that:

— there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

— the applicant was, at the time when the court proceedings commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration.\(^{109}\)

8.2.3 In the international context, a stricter approach is taken, as the court will make an order staying the court proceedings, so far as they relate to the matter, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.\(^{110}\)

8.2.4 Under both regimes, after ordering a stay, the court may issue interim or supplementary orders in relation to property that is the subject matter of the dispute.\(^{111}\) The court may also elect to discontinue court proceedings where no party has taken any further steps in those proceedings for a period of two years following the stay.\(^{112}\)

8.3 **Extension of time for commencement of arbitral proceedings**

8.3.1 Under the domestic regime, if an arbitration agreement purports to bar a party from making a claim because they have not taken a step in the commencement of arbitral proceedings within the time specified by the agreement, the court has the power to grant an extension of that time period.\(^{113}\)

\(^{108}\) Singapore Arbitration Act, s 6(1) and International Arbitration Act, s 6(1).

\(^{109}\) Singapore Arbitration Act, s 6(1).

\(^{110}\) International Arbitration Act, s 6(2).

\(^{111}\) Singapore Arbitration Act, s 6(3) and International Arbitration Act, s 6(3).

\(^{112}\) Singapore Arbitration Act, s 6(4) and International Arbitration Act, s 6(4).

\(^{113}\) Singapore Arbitration Act, s 10(1).
8.3.2 The court will only exercise that power if it is satisfied that, in the circumstances of the case, undue hardship would otherwise be caused and that all arbitral avenues to gain an extension of time have been exhausted.

8.3.3 The courts have no equivalent power under the international regime.

8.4 Interim protective measures

8.4.1 Under the international regime, it is not incompatible with an arbitration agreement for a court to grant an interim measure.

8.4.2 The High Court, or a judge thereof, has express power to grant interim measures equivalent to those that the arbitral tribunal can make under Section 12(1) of the International Arbitration Act, save for the power to make orders or give directions in relation to security for costs, discovery of documents or interrogatories. However, those powers are subject to a number of restrictions to limit excessive court intervention. In particular, the High Court will not make an order where the arbitral tribunal or other nominated body has the power to act effectively.

8.4.3 Prior to the introduction of the recent International Arbitration Act Amendments, certain issues were raised in relation to interim measures in Singapore. One issue was whether it is appropriate for an arbitral tribunal to hear applications for interim measures, or whether the courts of Singapore ought to do so. The Court of Appeal initially clarified this position by expressing that the courts will not intervene in an arbitral tribunal’s jurisdiction unless it is necessary to do so. This issue has now been expressly confirmed by the International Arbitration Act Amendments.

8.4.4 Another issue that was resolved by the International Arbitration Act Amendments concerned the support of arbitral proceedings taking place outside of Singapore (i.e. freezing orders). Initially it was clarified by the Court of Appeal, but it is now codified by the International Arbitration Act Amendments that the High Court can make interim orders irrespective of whether the seat of the arbitration is in the

---

114 Ibid.
115 Singapore Arbitration Act, s 10(2)(a).
116 International Arbitration Act, sch 1, art 9, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
117 International Arbitration Act, s 12A(6).
118 NCC International AB v Alliance Concrete Singapore Pte Ltd. [2008] 2 SLR 565.
119 International Arbitration Act, s 12A(6).
Arbitration in Singapore
territory of Singapore. This change brought the International Arbitration Act closer in line with Article 17J of the Model Law (2006). However, following a consultation, other changes introduced by Model Law (2006) in respect of interim measures were not adopted.

8.4.5 Under the domestic regime, the court also has powers exercisable in support of arbitral proceedings, including the power to make an order for interim measures such as an interim injunction. The powers of the court under the Singapore Arbitration Act extend to making orders in relation to security for costs and discovery, which are excluded under the international regime.

8.4.6 Under both regimes, where the arbitral tribunal has made an order to which an order of the court relates, the order of the court ceases to have effect in whole or in part.

8.5 Obtaining evidence and other court assistance

8.5.1 Under both regimes, the courts can compel a witness to appear before the arbitral tribunal to give evidence or produce specified documents.

8.5.2 Under the international regime, the arbitral tribunal, or a party with its approval, may request assistance from a court in the taking of evidence.

8.5.3 Importantly, under both regimes, all orders of an arbitral tribunal will be enforceable in the same manner as if they were made by the court, if the leave of the relevant court is obtained by the arbitral tribunal.

9. Challenging and appealing an award through the courts

9.1 Loss of the right to object to an award

9.1.1 Under the Singapore Arbitration Act and the International Arbitration Act, an application to set aside an award may not be made after three months have passed.

121 International Arbitration Act, s 12A(1).
122 Singapore Arbitration Act, s 31(1)(d).
123 Singapore Arbitration Act, s 31(2) and International Arbitration Act, s 12A(7).
124 Singapore Arbitration Act, s 30 and International Arbitration Act, s 13.
125 International Arbitration Act, sch 1, art 27, which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).
126 Singapore Arbitration Act, s 28(4) and International Arbitration Act, s 12(6).
from the date that the party making the application received the award, or, if a claim has been made requesting an additional award or requesting the correction or interpretation of an award, after three months from the date on which that request had been disposed of by the arbitral tribunal.

9.2 **Challenging the award**

9.2.1 There are a number of grounds on which an award made under the International Arbitration Act may be judicially challenged. In summary, an award may be set aside where a party makes an application proving that:

- a party to the agreement was under some incapacity when the agreement was made;
- the arbitration agreement was not valid under the applicable law;
- the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;
- the applicant was unable to present its case;
- the award deals with matters not falling within the terms of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the award has not yet become binding or has been set aside by a competent court;
- the subject matter of the dispute is not capable of settlement by arbitration under the applicable law;
- the recognition or enforcement of the award would be contrary to public policy;
- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of natural justice occurred by which the rights of any party have been prejudiced.

9.2.2 It is important to note that the above provisions only apply if the seat of the arbitration was Singapore.

9.2.3 Under the domestic regime, the grounds for having an award set aside are contained in Section 48 of the Singapore Arbitration Act. Those grounds are, in substance, the same as those listed under the International Arbitration Act.

---

127 Singapore Arbitration Act, s 48(2) and International Arbitration Act, sch 1, art 34(3), which sets out the corresponding article of the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

128 International Arbitration Act, sch 1, art 34 and International Arbitration Act, s 24.

129 *PT Garuda v Birgen Air* [2002] 1 SLR 392.
9.3 Appeal on a point of law

9.3.1 In addition to challenging an award on the grounds listed above, an award made under the domestic regime can be challenged via an appeal to the court on a question of law.

9.3.2 An appeal on a question of law requires the agreement of all parties, or leave of the court. Any available arbitral process of appeal or review must first be exhausted.

9.3.3 Furthermore, unless otherwise agreed by the parties, the court may determine any question of law arising in the course of proceedings that the court is satisfied substantially affects the rights of one or more of the parties. The procedure under the Singapore Arbitration Act is subject to limitations, including the requirement that the application is made with the permission of the arbitral tribunal and the agreement of the parties.

9.4 Applications to set aside an award

9.4.1 The court must not exercise its power to set aside an award for a mistake of law unless it is satisfied that it would be inappropriate to remit the matter to the arbitral tribunal for reconsideration.

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Under the domestic regime, any award made by an arbitral tribunal may, with leave of the court, be enforced as if it were an order of that court. That principle applies irrespective of whether the seat of the arbitration is Singapore or elsewhere. The Singapore Arbitration Act makes no reference to the grounds on which an award will not be enforced. However, it is likely that the refusal would be limited to circumstances where an award could be set aside.

---

130 Singapore Arbitration Act, s 49(3).
131 Ibid, s 50(2)(a).
132 Ibid, s 45.
133 Ibid, s 45(2)(a).
134 Ibid, s 49(9).
135 Ibid, s 46(1).
136 Ibid, s 46(3).
10.2 **Foreign awards**

10.2.1 Under the international regime, an award may, by leave of the High Court, be enforced as if it were a judgment or order of the High Court. A foreign award may be enforced in the same manner and may be relied upon in any legal proceedings in Singapore. Given that there is no appeal on the merits under the International Arbitration Act, a refusal to enforce an award would only be made where the grounds for setting aside the award exist.

10.2.2 Section 31 of the International Arbitration Act sets out the grounds that an applicant must demonstrate in order for the High Court to refuse enforcement of a foreign award. Those grounds are, in substance, the same as those in Article 34 of the Model Law (1985), which deals with the grounds on which an award can be set aside.

10.2.3 Furthermore, by virtue of Part III of the International Arbitration Act, an award made in a Contracting State to the New York Convention can be enforced in the same way as if it was a judgment of a court in Singapore. To further ease the enforcement of Singaporean awards, the Singapore Arbitration Act and the International Arbitration Act provide that the Minister of Law of Singapore should appoint persons to authenticate and certify copies of Singaporean awards. Currently, the Minister of Law has designated the Chief Executive and the Deputy Chief Executive of Maxwell Chambers and the Registrar and Deputy Registrar of the SIAC to perform this task.

11. **Conclusion**

11.1.1 Singapore is increasingly being favoured as a venue for international arbitration. Organisations such as SIAC are seeing an increase in Singapore being nominated as the place for arbitration in contracts that otherwise do not have a strong nexus to Singapore.

11.1.2 That trend is in large part due to Singapore’s adoption of the Model Law (1985), which accords with the world view of international arbitration that focuses on party autonomy.

---

137 International Arbitration Act, s 19.

138 Ibid, s 29(2).

139 Singapore Arbitration Act, s 59A and International Arbitration Act, s 19C.
12. Contacts

Minter Ellison
Rialto Towers
525 Collins Street
Melbourne, Victoria, 3000
Australia

Peter Wood
Partner
T  +61 3 8608 2537
E  peter.wood@minterellison.com

Phillip Greenham
Partner
T  +61 3 8608 2540
E  phillip.greenham@minterellison.com

Shlomit Raz
Lawyer
T  +61 3 8608 2147
E  shlomit.raz@minterellison.com
Table of Contents

1. **Historical background and legislative framework**  

2. **Scope of application and general provisions of the Slovakian Arbitration Act**  
   2.1 Subject matter  
   2.2 Structure of the law  
   2.3 General principles

3. **The arbitration agreement**  
   3.1 Definitions  
   3.2 Formal requirements  
   3.3 Special tests and requirements of the jurisdiction  
   3.4 Separability  
   3.5 Legal consequences of a binding arbitration agreement

4. **Composition of the arbitral tribunal**  
   4.1 The constitution of the arbitral tribunal  
   4.2 The procedure for challenging and substituting arbitrators  
   4.3 Responsibility of the arbitrators  
   4.4 Arbitration fees  
   4.5 Arbitrator immunity

5. **Jurisdiction of the arbitral tribunal**  
   5.1 Competence to rule on jurisdiction  
   5.2 Power to order interim measures

6. **Conduct of proceedings**  
   6.1 Commencement of arbitration  
   6.2 General procedural principles  
   6.3 Seat, place of hearings and language of arbitration  
   6.4 Multi-party issues  
   6.5 Oral hearings and written proceedings  
   6.6 Default by one of the parties  
   6.7 Evidence generally  
   6.8 Appointment of experts  
   6.9 Confidentiality  
   6.10 Court assistance in taking evidence
7. Making of the award and termination of proceedings 788
   7.1 Choice of law 788
   7.2 Timing, form, content and notification of the award 788
   7.3 Settlement 789
   7.4 Power to award interest and costs 790
   7.5 Termination of the proceedings 790
   7.6 Effect of the award 790
   7.7 Correction, clarification and issue of a supplemental award 790

8. Role of the courts 791
   8.1 Jurisdiction of the courts 791
   8.2 Stay of court proceedings 791
   8.3 Preliminary rulings on jurisdiction 792
   8.4 Interim protective measures 792
   8.5 Obtaining evidence and other court assistance 793

9. Challenging and appealing an award through the courts 793
   9.1 Jurisdiction of the courts 793
   9.2 Appeals 793
   9.3 Applications to set aside an award 794

10. Recognition and enforcement of awards 794
    10.1 Domestic awards 794
    10.2 Foreign awards 795

11. Special provisions and considerations 796
    11.1 Consumers 796
    11.2 Employment law 796

12. Concluding thoughts and themes 797

13. Contacts 797
1. Historical background and legislative framework

1.1 The history of arbitration in the Slovak Republic dates back to the Austro-Hungarian monarchy in 1911. During this period, arbitration was regulated by the Civil Dispute Code, Act No.I/1911 (1911 Civil Dispute Code), which was in force until 1950. The advantage of the 1911 Civil Dispute Code was its broad scope of application, which enabled parties to refer *inter alia* both property and employment disputes to arbitration. Subsequently, at the end of Second World War and with the rise of socialism, a new regulation emerged in the form of the Civil Procedure Act no. 142/1950 Coll., which contained detailed provisions on arbitration.1

1.1.2 Until 1989, arbitration in former Czechoslovakia was divided into:
— arbitration regarding international disputes, which was regulated by Act No. 98/1963 Coll. (1963 Czechoslovakian Arbitration Act); and
— arbitration regarding the domestic affairs of state owned entities, which was regulated by Act No.121/1962 Coll. Domestic entities that were not state owned did not have recourse to arbitration for their domestic disputes from 1963 until 1994.

1.1.3 Following the establishment of the Slovak Republic on 1 January 1993, arbitral proceedings were still regulated by the 1963 Czechoslovakian Arbitration Act, which prohibited domestic arbitration for entities that were not state owned. The entry into force of Act No. 218/1996 Coll. on Arbitration (1996 Slovakian Arbitration Act) re-introduced the possibility for parties to resolve domestic disputes by way of arbitration. However, contrary to the legislators’ expectations, the 1996 Slovakian Arbitration Act did not cause a significant increase in the number of domestic arbitral proceedings.

1.1.4 The 1996 Slovakian Arbitration Act was replaced by Act No. 244/2002 Coll. on Arbitration, which entered into force on 1 July 2002 (Slovakian Arbitration Act). The Slovakian Arbitration Act has subsequently been amended twice.2

1.1.5 Arbitral proceedings in Slovakia can be conducted under the auspices of an arbitral institution, which administers the arbitration (i.e. the arbitral institution undertakes tasks such as transmitting correspondence between the parties and the arbitral tribunal, appointing arbitrators in cases where the parties are unable to agree upon such appointments and fixing arbitrators’ fees). Alternatively, arbitral proceedings may be conducted on an ad hoc basis, in which the parties administer the arbitral proceedings themselves.

---

1 Civil Procedure Act (No.142/1950 Coll.), s 648–654.
2. Scope of application and general provisions of the Slovakian Arbitration Act

2.1 Subject matter
2.1.1 The Slovakian Arbitration Act governs the resolution of proprietary disputes arising out of commercial or civil relationships, both at a domestic and international level, when the seat of arbitration is Slovakia. The term “proprietary dispute” means any dispute in which the subject matter is capable of evaluation in monetary terms.

2.2 Structure of the law
2.2.1 The Slovakian Arbitration Act reflects the course of the arbitral proceedings and is formed of nine parts, as follows:
   (i) Part One: basic provisions, including the subject matter and scope of the arbitral proceedings;
   (ii) Part Two: the arbitration agreement;
   (iii) Part Three: provisions relating to arbitrators and the arbitral tribunal, notably the conditions for performing the function of an arbitrator, the constitution of an arbitral tribunal, opposing the appointment of an arbitrator and termination of the function of an arbitrator;
   (iv) Part Four: the establishment of the permanent court of arbitration;
   (v) Part Five: the procedure for, and course of, the arbitral proceedings;
   (vi) Part Six: the content and effects of the arbitral tribunal’s decisions and awards;
   (vii) Part Seven: challenging and cancellation of awards;
   (viii) Part Eight: the recognition and enforcement of awards; and
   (ix) Part Nine: transitional and final provisions.

---

3 Slovakian Arbitration Act, s 1(1).
4 Ibid, s 1–2.
5 Ibid, s 3–5.
6 Ibid, s 6–11.
7 Ibid, s 12–15.
8 Ibid, s 16–30.
9 Ibid, s 31–39.
10 Ibid, s 40–43.
11 Ibid, s 44–50.
12 Ibid, s 51–56.
2.3 General principles
2.3.1 The Slovakian Arbitration Act is based on the Model Law (1985)\textsuperscript{13} and implements all of the principles contained therein, as well as the basic principles contained in the Code of Civil Procedure of the Slovak Republic\textsuperscript{14} (Slovakian CCP), the New York Convention\textsuperscript{15} and the 1961 European Convention.

3. The arbitration agreement

3.1 Definitions
3.1.1 The Slovakian Arbitration Act defines an arbitration agreement as an agreement between contracting parties that all or some disputes which have arisen or may arise between them in a specific contractual or legal relationship shall be resolved through arbitration.\textsuperscript{16}

3.2 Formal requirements
3.2.1 The Slovakian Arbitration Act stipulates that an arbitration agreement must be in writing in order to be valid.\textsuperscript{17}

3.2.2 The arbitration agreement shall be deemed to be in written form if it is:

— contained within a document that has been signed by the parties;
— contained in letters that have been exchanged by the parties; or
— agreed via fax or another telecommunication device that enables the content of the arbitration agreement and the identity of the person agreeing to it to be recorded.\textsuperscript{18}

3.2.3 An arbitration agreement may be contained in a stand alone agreement or in an arbitration clause in a contract.

3.2.4 If the agreement was not originally made in writing, the parties can remedy the situation before the commencement of the arbitral proceedings by drafting a written statement that records the agreement. This written statement must be in the form of minutes that have been signed in the presence of one of the arbitrators.

\textsuperscript{13} CMS Guide to Arbitration, vol II, appendix 2.1.
\textsuperscript{14} Act No. 99/1963 Coll.
\textsuperscript{15} CMS Guide to Arbitration, vol II, appendix 1.1.
\textsuperscript{16} Slovakian Arbitration Act, s 3(1).
\textsuperscript{17} Ibid, s 4(2).
\textsuperscript{18} Ibid.
who will be hearing the dispute.\textsuperscript{19} If there is no written arbitration agreement and one party commences arbitral proceedings, then unless the respondent expressly declares in presence of one of the arbitrators that it submits to the jurisdiction of the arbitral tribunal, the arbitral tribunal will not have jurisdiction. Failure by the respondent to object to the jurisdiction of the arbitral tribunal will not automatically confer jurisdiction on the arbitral tribunal. If the arbitral tribunal proceeds with the arbitration without the respondent’s declaration, the decision of the tribunal may be challenged. If a party commences arbitral proceedings even though there is no written arbitration agreement such proceedings shall be stayed due to the lack of jurisdiction of the arbitral tribunal.

3.2.5 A validly executed arbitration agreement is binding upon its signatories. It may be replaced or supplemented only in accordance with its provisions or by agreement between the parties. Any modification to the arbitration agreement must be made in writing.

3.2.6 Unless otherwise provided in the arbitration agreement, it will also be binding upon the legal successors of the parties.\textsuperscript{20}

3.3 Special tests and requirements of the jurisdiction

3.3.1 The parties are free to choose the law that governs the arbitration agreement. The parties can agree that the arbitration clause within a contract shall have a different applicable law to that which governs the contract as a whole.\textsuperscript{21}

3.3.2 Arbitration can only be used to resolve disputes that are capable of settlement. A dispute is capable of settlement where the substantive law does not dictate a particular way of settlement of rights and, therefore, allows the parties to settle the matter through agreement.

3.3.3 The following disputes cannot be resolved by arbitration:

\begin{itemize}
\item disputes regarding the creation, change and extinction of title and other rights to real property;
\item disputes regarding personal status;
\item disputes regarding the enforcement of decisions; and
\item disputes arising out of bankruptcy or a restructuring procedure.\textsuperscript{22}
\end{itemize}

\textsuperscript{19} Ibid, s 4(3).
\textsuperscript{20} Ibid, s 3(2).
\textsuperscript{21} Ibid, s 5(1).
\textsuperscript{22} Ibid, s 1(3).
3.4 Separability

3.4.1 In keeping with the principle of separability, an arbitration clause that is part of an otherwise invalid contract shall only be considered invalid itself if its validity is expressly pre-conditioned on the validity of the underlying contract.\(^\text{23}\)

3.4.2 Unless the parties agree otherwise, unilateral termination of an agreement containing an arbitration clause does not affect the validity or binding nature of the arbitration clause.\(^\text{24}\)

3.5 Legal consequences of a binding arbitration agreement

3.5.1 A binding arbitration agreement has the effect that the courts shall have no jurisdiction to decide the dispute unless such matter is determined otherwise by the arbitral tribunal.\(^\text{25}\)

3.5.2 An effective ruling from the arbitral tribunal that it lacks the jurisdiction to decide the dispute will establish the court’s jurisdiction to hear the dispute.

4. Composition of the arbitral tribunal

4.1 The constitution of the arbitral tribunal

4.1.1 The arbitral tribunal must be composed of an odd number of arbitrators.\(^\text{26}\) If the parties fail to agree upon the number of arbitrators, three arbitrators shall be appointed.\(^\text{27}\) If the parties agree upon an even number of arbitrators such agreement shall be invalid and it shall be deemed that the parties did not agree upon the number of arbitrators.

4.1.2 The parties may either agree upon the identity of the arbitrator(s) themselves, or request a court or arbitral institution to appoint the arbitrator(s).\(^\text{28}\) If the parties have agreed to appoint three arbitrators but cannot agree upon the identity of these arbitrators, each party shall appoint one arbitrator. The two arbitrators that have been appointed by the parties shall then appoint a third arbitrator, who will be the chair of the arbitral tribunal. If either party fails to appoint an arbitrator then, upon the request of either party, the arbitrator shall be appointed by the

---

\(^{23}\) Ibid, s 5(2).

\(^{24}\) Ibid, s 5(3).

\(^{25}\) Ibid, s 2(1).

\(^{26}\) Ibid, s 7(2).

\(^{27}\) Ibid, s 7(3).

\(^{28}\) Ibid, s 8(1).
relevant appointing authority or court upon the request of either party.29 There is no specific regulation affecting the appointment of the arbitral tribunal if there are more than two parties.

4.1.3 If the parties have agreed to appoint a sole arbitrator, but cannot agree upon the identity of such arbitrator, then the arbitrator will be appointed by the relevant appointing authority or court upon the request of either party.30

4.2 The procedure for challenging and substituting arbitrators

4.2.1 The Slovakian Arbitration Act requires all arbitrators to disclose (in their written letter accepting appointment as an arbitrator) all facts and circumstances that could, in the opinion of the parties, compromise the arbitrator’s independence or impartiality.31

4.2.2 If, upon consideration of the facts disclosed in the arbitrator’s letter of acceptance, the parties do not challenge an arbitrator’s appointment within 15 days, the grounds for challenging that arbitrator’s appointment in the future will be limited to facts revealed after the arbitrator’s appointment. An arbitrator is required to disclose to the parties any potentially compromising facts or circumstances that may arise during the arbitration.32

4.2.3 The parties may agree upon the procedure for challenging an arbitrator. In the absence of any such agreement, the arbitral tribunal is allowed, in the case of a challenge, to continue with the arbitral proceedings whilst considering the challenge. However, it must not issue an award during this period.33 Unless otherwise agreed, a challenge shall be decided by the arbitral tribunal or a third party that has been nominated by the parties. The ruling on a challenge cannot be appealed.34

4.2.4 When an arbitrator ceases to hold office (e.g. due to their resignation, removal or death), a replacement arbitrator is appointed in accordance with the procedure agreed by the parties. In the absence of any agreement between the parties on this issue, the parties must follow the same procedure as that adopted for the appointment of the original arbitrator(s), as set out in section 4.1 above.35

29 Ibid, s 8(2).
30 Ibid, s 8(2).
31 Ibid, s 9(1).
32 Ibid.
33 Ibid, s 9(3).
34 Ibid, s 9(5).
35 Ibid, s 11(2).
4.3 **Responsibility of the arbitrators**

4.3.1 The Slovakian Arbitration Act does not contain any express provisions regulating the legal liability of arbitrators. As a result, this issue is governed by the general principles of liability under Slovakian law, which are set out in section 4.5 below.

4.4 **Arbitration fees**

4.4.1 The Slovakian Arbitration Act neither regulates the fees for the arbitral procedure nor the entitlement of the arbitrators to fees.

4.4.2 The arbitration fees of each arbitral institution are regulated by its internal rules, which are typically binding upon the parties to institutional arbitral proceedings.

4.5 **Arbitrator immunity**

4.5.1 Arbitrators do not enjoy immunity under Slovakian law. Arbitrators can be liable for any damage caused by the exercise of their function as arbitrator. Arbitrators can also face criminal sanctions if they make a decision without the prior consent of any supervisory authority.

5. **Jurisdiction of the arbitral tribunal**

5.1 **Competence to rule on jurisdiction**

5.1.1 The arbitral tribunal is competent to rule upon its own jurisdiction, including challenges to the validity or existence of the arbitration agreement.\(^{36}\)

5.1.2 Should the arbitral tribunal conclude that it does not have jurisdiction to hear the dispute, it shall terminate the arbitral proceedings.\(^{37}\)

5.1.3 Any challenge to the arbitral tribunal’s jurisdiction must, at the latest, be raised by a party when taking the first step in the arbitral proceedings on the merits of the claim (usually when filing the statement of defence), unless the application is based on the dispute being non-arbitrable. In that case, the arbitral tribunal’s jurisdiction can be challenged at any stage of the arbitral proceedings.\(^{38}\)

5.2 **Power to order interim measures**

5.2.1 During the arbitral proceedings the parties must turn to the arbitral tribunal to order interim measures in relation to the dispute.

---

\(^{36}\) *Ibid*, s 21(1).

\(^{37}\) *Ibid*.

\(^{38}\) *Ibid*, s 23(2).
5.2.2 Once constituted, the arbitral tribunal can issue any interim measures that it deems to be necessary to protect the subject matter of the dispute and to preserve the integrity of the arbitral proceedings.\textsuperscript{39}

5.2.3 The arbitral tribunal may require that the party seeking interim measures provides security in exchange for any interim measures that are granted.

5.2.4 Prior to the constitution of the arbitral tribunal and after the termination of the arbitral proceedings, interim measures must be sought from the Slovakian courts. An application to the Slovakian courts may be required in order to enforce any interim measures granted by an arbitral tribunal.

6. Conduct of proceedings

6.1 Commencement of arbitration

6.1.1 The general principle regarding the commencement of arbitration is that the claim must be delivered to the designated person or authority.\textsuperscript{40} Institutional arbitral proceedings usually commence on the date on which the claim is filed with the competent arbitral institution. Ad hoc arbitral proceedings commence on the date on which the claim is received by the other party or filed with one of the arbitrators. Commencement of the arbitral proceedings by filing a claim with the arbitrator is possible if the parties have already identified the arbitrator(s).

6.1.2 Unless the parties agree otherwise, the arbitral tribunal is entitled to require that the claimant pays an advance towards the arbitrators’ estimated fees, failing which the arbitral tribunal will stay the arbitral proceedings.\textsuperscript{41} Unless otherwise agreed by the parties, the arbitral tribunal is entitled to claim an advance towards the arbitrators’ estimated fees from the claimant only.

6.2 General procedural principles

6.2.1 The provisions of the Slovakian Arbitration Act and the Slovakian CCP reflect the fundamental principles typically found in arbitration legislation across the world, including:

\textsuperscript{39} Ibid, s 22.
\textsuperscript{40} Ibid, s 16(1).
\textsuperscript{41} Ibid, s 18(6).
— equal treatment of the parties;\textsuperscript{42}
— party autonomy; and
— non-intervention by local courts.

6.3 Seat, place of hearings and language of arbitration

6.3.1 The seat of arbitration is usually selected by the parties. In the absence of agreement between the parties, the arbitral tribunal will determine the seat of arbitration, taking into account the nature of the dispute and the interests of the parties.\textsuperscript{43}

6.3.2 Unless otherwise agreed by the parties, the arbitral tribunal may organise hearings and perform its functions at a venue other than the seat of arbitration.

6.3.3 In the absence of an agreement between the parties, the language of the arbitration will be determined by the arbitral tribunal.\textsuperscript{44} There is no general rule that domestic arbitral proceedings must be conducted in Slovakia. The efficiency of the arbitral process is the most important consideration when deciding upon the language to be used. The chosen language will apply to all written statements of case, hearings, the award and all other documents issued by the arbitral tribunal. The arbitral tribunal may further rule that any document that is written in a different language must be accompanied by an official translation into the language of the arbitration. There is no statutory restriction for the arbitral tribunal to specify more than one official language to be used in conducting the proceedings.

6.4 Multi-party issues

6.4.1 The Slovakian Arbitration Act itself does not contain provisions on intervention and joinder in cases of multi-party issues. However, these issues are regulated by the Slovakian CCP, which is applied to arbitral proceedings by the Slovakian Arbitration Act.\textsuperscript{45} Third parties may intervene or join the proceedings as either claimant or respondent or through becoming a subsidiary party to one of the parties. A third party may only intervene as claimant or respondent upon the proposal of one of the parties or if it is a successor of one of the parties, and with the consent of the arbitral tribunal.\textsuperscript{46} The arbitral tribunal may join two or more

\textsuperscript{42} Ibid, s 17.
\textsuperscript{43} Ibid, s 23(1).
\textsuperscript{44} Ibid, s 24.
\textsuperscript{45} Ibid, s 51.
\textsuperscript{46} Slovakian CCP, s. 92, 93.
arbitral proceedings started before the same tribunal, involving the same parties or claims arising out of the same transaction or event.\textsuperscript{47}

6.5 **Oral hearings and written proceedings**

6.5.1 The parties are free to agree whether the proceedings should be conducted purely on the basis of documents (i.e. inviting the arbitral tribunal to render its award on the basis of written submissions only), or with the benefit of oral hearings before the arbitral tribunal.\textsuperscript{48} Unless the parties expressly agree to hold an oral hearing, there is no general rule that there will be one. However, in the absence of agreement between the parties, the arbitral tribunal shall decide upon whether an oral hearing is required. If the arbitral tribunal considers that an oral hearing is necessary, the general rule is that such a hearing will be held in private (unlike in national court proceedings), unless the parties agree otherwise.\textsuperscript{49}

6.5.2 The Slovakian Arbitration Act obliges the parties to assist the arbitral tribunal in resolving the dispute.\textsuperscript{50} In keeping with this obligation, parties are required to attend oral hearings either personally or through a representative. The parties are also required to file all written submissions and other documents on time, although the arbitral tribunal has the power to grant extensions of time in appropriate cases.

6.5.3 A formal notice of any oral hearing must be served on all parties in advance of such hearing. A party that is a not resident in Slovakia is entitled to a notice period of 30 days prior to any oral hearing.\textsuperscript{51}

6.6 **Default by one of the parties**

6.6.1 Should a party not participate in the arbitral proceedings, or fail to participate adequately, there are different consequences depending on the type of default.\textsuperscript{52}

6.6.2 If the claim fails to meet the basic statutory requirements and is not amended within a time period granted for this purpose, the arbitral tribunal shall stay the arbitral proceedings.

6.6.3 If any of the parties fail to attend the oral hearing or fail to produce evidence despite being duly informed about the date, time and place of the proceedings, the arbitral tribunal shall be entitled to issue an award based on the available evidence.

\textsuperscript{47} Ibid, s. 112.

\textsuperscript{48} Slovakian Arbitration Act, s 26(1).

\textsuperscript{49} Ibid, s 26(2).

\textsuperscript{50} Ibid, s 26(4).

\textsuperscript{51} Ibid, s 26(5).

\textsuperscript{52} Ibid, s 30.
6.6.4 If the respondent fails to file its written statement of defence within the stated time period, the continuance of the arbitral proceedings shall not be affected. Such a failure by the respondent shall not be deemed as an acknowledgment of the claimant’s statement of claim.53

6.7 Evidence generally

6.7.1 The arbitral tribunal can only use evidence that was presented by the parties as the basis for its decision.54 Such evidence can include oral evidence, documentary evidence and expert opinions. The arbitral tribunal determines for itself, in the exercise of its discretion, what weight to attach to the evidence submitted by the parties.

6.7.2 The parties usually attach the documents that they intend to rely upon as documentary evidence to their written submissions. Nevertheless, the arbitral tribunal has the power to order the parties either of its own motion or on the application of one of the parties to produce additional documentary evidence if it believes that such documents might assist in resolving the issues in dispute.

6.8 Appointment of experts

6.8.1 The arbitral tribunal may appoint experts in the arbitral proceedings to provide an opinion on issues that require certain expertise.55 The arbitral tribunal shall provide the expert with questions that it requires to be answered within the expert opinion.56 The arbitral tribunal can also invite the parties to provide their own questions to be posed to the expert(s).

6.8.2 The parties may be ordered by the arbitral tribunal to provide any information or documents that are necessary for the preparation of the expert opinion.57

6.9 Confidentiality

6.9.1 Arbitrators are bound by a duty of confidentiality, which survives the termination of the arbitral proceedings. An arbitrator may only be released from his or her confidentiality obligation with the consent of the parties or under certain statutory exceptions.58 The parties are not bound by such duty of confidentiality.

---

53 Ibid, s 30(2).
54 Ibid, s 27(1).
55 Ibid, s 28(1).
56 Ibid.
57 Ibid, s 28(2).
58 Ibid, s 8(4).
6.10 **Court assistance in taking evidence**

6.10.1 The arbitral tribunal is entitled to seek the assistance of the local courts to obtain evidence (e.g. to compel third parties to provide oral or documentary evidence).

6.10.2 The assistance of the local court in such cases may be sought if it is not possible for the arbitral tribunal to obtain evidence, or if obtaining the evidence by the arbitral tribunal would be more expensive or difficult than by involving the local court.\textsuperscript{59}

7. **Making of the award and termination of proceedings**

7.1 **Choice of law**

7.1.1 In the event that a dispute contains an international element, the arbitral tribunal must render its decision on the issues in dispute in accordance with the law agreed by the parties.\textsuperscript{60} Unless otherwise agreed, the parties’ agreement on the governing law refers only to the substantive law of the chosen state and not to its conflict of law rules. In the absence of an agreement between the parties on the governing law, the arbitral tribunal shall apply the law determined by the Slovakian conflict of law rules.\textsuperscript{61}

7.1.2 Slovakian law will always govern domestic arbitral proceedings.\textsuperscript{62} Domestic parties are not allowed to choose foreign law to govern their dispute. However, in all cases, the arbitral tribunal can take into account the relevant customs and trade usages.\textsuperscript{63}

7.1.3 If the parties agree, the arbitral tribunal can also decide a dispute *ex aequo et bono*.

7.2 **Timing, form, content and notification of the award**

7.2.1 The Slovakian Arbitration Act does not stipulate a time period for the rendering of an award.

7.2.2 An award must be made in writing and be signed by a majority of the arbitral tribunal.\textsuperscript{64} The award must also contain:

\textsuperscript{59} Ibid, s 27(3).
\textsuperscript{60} Ibid, s 5(1) and 31(1).
\textsuperscript{61} Ibid, s 31(1).
\textsuperscript{62} Ibid, s 31(2).
\textsuperscript{63} Ibid, s 31(3)–(4).
\textsuperscript{64} Ibid, s 34(1).
— the name of the arbitral institution (if any);
— the names of the arbitrators;
— the names of the parties and their representatives;
— the seat of arbitration;
— the date of the award;
— the decision of the arbitral tribunal on the issues in dispute;
— the reasons upon which the award is based (unless the parties have agreed that no grounds need to be included in the award or the award is based on a settlement agreement); and
— instructions to the parties on how to challenge the award.65

7.2.3 Any arbitrator may attach a dissenting opinion to the award which explains his or her reasons for disagreeing with the decision of the majority. In the event that a majority decision cannot be reached due to the absence of an arbitrator, the chair has a casting vote.

7.2.4 To avoid acting in excess of jurisdiction (and thereby potentially jeopardising the enforceability of the award), the arbitral tribunal must limit the scope of the award to the issues submitted to arbitration by the parties.

7.2.5 The award should contain a ruling on costs and should determine which party is obliged to pay such costs. Where the award imposes an obligation to perform an act, the arbitral tribunal shall specify a period for the performing of such act.66

7.2.6 The award must either be announced orally to the parties or it must be served on the parties.67

7.3 Settlement
7.3.1 During the arbitral proceedings the parties may settle the dispute by mutual agreement. The parties may request the court to record their settlement in the form of an award.

7.3.2 Upon settlement by the parties, the arbitral tribunal shall terminate the proceedings.68

65 Ibid, s 34(2).
66 Ibid, s 34(4).
67 Ibid, s 34(3).
68 Ibid, s 33(1). See further section 7.5 below.
7.4 **Power to award interest and costs**

7.4.1 There is no express provision in the Slovakian Arbitration Act concerning the issue of whether or not an arbitral tribunal can award interest or costs.

7.4.2 However, it is generally accepted that arbitral tribunals have the power to award interest, provided that such power is envisaged by the law governing the dispute. Default interest may be awarded either on a contractual basis (if so provided in the contract between the parties) or on a statutory basis. 69

7.4.3 It is also generally accepted that the arbitral tribunal shall have the power to award the costs of the arbitral proceedings. The cost of legal representation in the arbitral proceedings is statutorily regulated. 70 This also applies to international arbitral proceedings.

7.5 **Termination of the proceedings**

7.5.1 The arbitral proceedings shall be terminated either by the issuance of an award, or by an order on the discontinuance of the arbitral proceedings, in the event that no award is to be issued (e.g. if the arbitral tribunal declines jurisdiction over the dispute, or if the parties conclude a settlement). The provisions governing the contents of the award (as set out in paragraph 7.2.2 above) apply equally to any resolution on discontinuance. 71

7.6 **Effect of the award**

7.6.1 If the award is not subject to review, or if the time limit for lodging an application for the review of the award has expired, the award acquires the force of *res judicata*. Once an award has been properly served, it is binding on the parties in the same way as a national court decision. 72

7.7 **Correction, clarification and issue of a supplemental award**

7.7.1 The arbitral tribunal (of its own motion or upon the request of a party) may correct any clerical, typographical, computational or other similar errors in the award within 30 days of the date of the award. 73 The non-requesting party does not need to be made aware of such request. If a party has made the request and the arbitral tribunal considers the request to be justified, it shall issue a corrected award within 30 days of receipt of the party’s request.

---


70 Regulation of the Slovak Ministry of Justice No. 655/2004 Coll., s. 18(1), 19(3).

71 Slovakian Arbitration Act, s 38(2).

72 *Ibid*, s 35.

73 *Ibid*, s 36(1).
7.7.2 Each party may likewise request the arbitral tribunal to provide an interpretation of a specific point or part of the award within 30 days of receipt of the award.\textsuperscript{74} However, if the arbitral tribunal considers such a request to be justified, there is no set period for the arbitral tribunal to provide the interpretation of the award.

7.7.3 In addition, within 15 days of delivery of the award, each party may request an additional award on claims that had been submitted to the arbitral tribunal but omitted from the award.\textsuperscript{75} The arbitral tribunal may deny such a request if it considers that it is not justified. The non-requesting party does not need to be made aware of such request. The arbitral tribunal shall, however, issue a decision about such request (either by issuing a supplemental award or by issuing a resolution denying the request).

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 The Slovakian Arbitration Act specifies certain circumstances in which the Slovakian courts have the power to intervene in arbitral proceedings. In particular, the courts have jurisdiction to support the arbitral process by appointing arbitrators, granting interim measures\textsuperscript{76} and assisting with the gathering of evidence. In addition, the courts play a crucial role in hearing applications relating to challenging and enforcing awards.\textsuperscript{77}

8.2 Stay of court proceedings
8.2.1 A court is required to stay proceedings as soon as it becomes aware of the existence of a binding arbitration agreement. It can be made aware through an application by the respondent contesting the court’s jurisdiction, which must be made, at the latest, when the respondent first contests the merits of the claim.

8.2.2 If both parties declare that they do not wish for the dispute to be resolved by arbitration, the court may proceed to hear the case.\textsuperscript{78}

8.2.3 The court will also accept jurisdiction to hear a case if it establishes under Slovakian law that:

\textsuperscript{74} Ibid, s 36(2).
\textsuperscript{75} Slovakian CCP, s 166.
\textsuperscript{76} See section 8.4 below.
\textsuperscript{77} Slovakian Arbitration Act, parts seven and eight.
\textsuperscript{78} Ibid, s 2(1).
— the case is non-arbitrable;
— the arbitration agreement is invalid, inoperative or incapable of being performed;
— the claim falls outside of the jurisdiction of the arbitral tribunal; or
— the relevant arbitral institution has refused to deal with the case.79

8.2.4 Where arbitral proceedings are filed on the same issue within 30 days of an order staying the court proceedings, the legal effect of the original action shall remain unaffected (i.e. the claim is deemed to have been issued on the date of commencement of the court proceedings for the purposes of calculating the relevant limitation periods).80

8.2.5 If court proceedings are started after the commencement of arbitral proceedings and a challenge is raised as to the existence, validity or scope of the arbitration agreement, the court must stay such proceedings until the arbitral tribunal has ruled upon its own jurisdiction. If the arbitral tribunal decides that it has jurisdiction, the court must refuse jurisdiction.81 The parties may later challenge the arbitral tribunal’s assumption of jurisdiction by applying to the court to set aside the award for lack of jurisdiction.

8.3 Preliminary rulings on jurisdiction
8.3.1 The courts do not have the power to make preliminary rulings on jurisdiction. The challenge of the jurisdiction of the arbitral tribunal shall be made within the arbitral proceedings (see paragraph 8.2.5 above). If the arbitral tribunal wrongly decides that it does have jurisdiction to hear the dispute, this may be a basis for challenging the award.

8.4 Interim protective measures
8.4.1 In certain circumstances the Slovakian courts have jurisdiction to grant interim measures in support of arbitral proceedings. The local courts can grant interim measures, at the request of one of the parties, if the arbitral tribunal has not yet been constituted or, post-issuance of the award, to counter any threats to the enforcement of the award.

79 Slovakian CCP, s. 106(1).
80 Ibid, s. 106(2)
81 Ibid, s. 8, s. 104.
8.5 **Obtaining evidence and other court assistance**

8.5.1 As set out in section 6.10 above, the competent court has jurisdiction to obtain evidence upon the application of the arbitral tribunal. The arbitral tribunal may require that the party seeking evidence provides an advance to the competent court regarding any associated fees.

9. **Challenging and appealing an award through the courts**

9.1 **Jurisdiction of the courts**

9.1.1 The Slovakian Arbitration Act provides the parties with a statutory basis to challenge the award. The national courts have jurisdiction to decide on such a challenge.

9.1.2 The court’s power to set aside an award cannot be excluded by agreement between the parties (except with respect to grounds relating to the re-opening of the case).

9.1.3 If the court sets aside an award on the basis of the arbitral tribunal’s lack of jurisdiction or as a result of the invalidity of the arbitration agreement the court will assume jurisdiction and render a judgment on the subject matter of the dispute. In all other cases, the arbitration agreement remains valid and the dispute shall be submitted to a new arbitral tribunal.

9.2 **Appeals**

9.2.1 The Slovakian Arbitration Act contains the following grounds for challenging an award that has been rendered in Slovakia:

— the subject matter of the dispute was not arbitrable;

— the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement and the party challenging the award objected to this fact before the arbitral tribunal;

— the award addressed issues that had already been determined by a previous court or arbitral tribunal;

---

82 Slovakian Arbitration Act, s 27(3).

83 Ibid, part seven.

84 Ibid, s 43(2).
— the arbitration agreement is invalid;
— a party to the arbitration was unable to present its case (e.g. was not duly represented);
— the award was rendered by an arbitrator who had been removed for bias;
— the principle of equality of the parties was violated;
— there are compelling reasons for re-opening the case (e.g. new evidence has emerged which casts serious doubt upon the correctness of the arbitral tribunal’s decision); and
— the award was obtained by fraud or other criminal conduct.\textsuperscript{85}

9.3 Applications to set aside an award

9.3.1 A party seeking to challenge an award before the Slovakian courts must do so within 30 days of being served with the award.\textsuperscript{86} In the case of a challenge based on the alleged existence of compelling reasons for re-opening the case, a party has 30 days from the date upon which it became aware of the facts justifying such a challenge. However, there is a long stop of three years from the date upon which the award was rendered.\textsuperscript{87}

9.3.2 The filing of an application to set aside an award does not have the automatic effect of staying the enforcement of the award. However, the court may stay the enforcement of the award upon the application of a party if it considers that immediate enforcement of the award could cause serious prejudice to that party.

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 A domestic award (i.e. an award issued within the territory of the Slovak Republic) that is not subject to review acquires the force of res judicata when served on the parties. After the expiration of the voluntary performance period set out in the award, a domestic award is enforceable in accordance with the provisions of the Slovakian CCP and Act no. 233/1995 Coll. on Court Executors and Execution Activities (\textit{Slovakian Enforcement Act}). The enforcement of a domestic award is subject to the same conditions as court decisions.

10.1.2 The enforcement of a domestic award commences upon the filing of an execution application (together with the award) to the executor, as well as the depositing of

\textsuperscript{85} ibid, s 40(1).
\textsuperscript{86} ibid, s 41(1).
\textsuperscript{87} ibid, s 41(2).
an advance towards the cost of the execution procedure. The executor may start the execution process after having received court approval, subject to notifying both parties. The court shall issue such approval if upon inspection of the application and the award it finds that the award is enforceable.

10.1.3 Should the party against whom execution is sought fail to object to the execution within 14 days of the notification (e.g. for inadmissibility), or the court rejects that party’s challenge, the executor will issue an execution order. Based on the execution order, the executor can enforce the award against, for example, the debtor’s bank accounts, property and securities.

10.2 Foreign awards

10.2.1 Foreign awards rendered by states that are party to the New York Convention are, in principle, enforceable in Slovakia in the same way as domestic awards.

10.2.2 The Slovakian Arbitration Act sets out the conditions pursuant to which a non-New York Convention foreign award may be recognised and enforced. The party seeking the recognition and enforcement of a foreign award must file a written petition with the court making a request for the same, accompanied by the original foreign award and the original arbitration agreement (or a copy of either document that has been certified by a notary public). If the award or the arbitration agreement is in a foreign language, the party must also produce a translation that has been certified by an official or sworn translator, diplomat or consular agent.

10.2.3 Where a party has made an application to the courts of another country to set aside an award that is the subject of a Slovakian enforcement application, the Slovakian courts may stay the enforcement of that award. A foreign award is enforceable in the Slovak Republic in the same way as a domestic award.

10.2.4 The recognition and enforcement of a foreign award may only be refused if:

— one of the parties to the arbitration agreement was under some incapacity;
— the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

---

88 Ibid, s 29 and 36.
89 Slovakian Enforcement Act, part four.
91 Slovakian Arbitration Act, s 46 et seq.
92 Ibid, s 47(1).
93 Ibid, s 47(2).
94 Ibid, s 46.
— the party against whom the award was made was not given proper notice of the appointment of the arbitral tribunal or of the arbitral proceedings, or could not attend the hearing for some other serious reason;
— the award decided a dispute that had not been contemplated in the arbitration agreement, or which did not fall within the terms of the arbitration agreement;
— the subject matter of the dispute was non-arbitrable;
— the arbitral tribunal was not appointed or the arbitral proceedings were not conducted in the manner that had been agreed by the parties or, in the absence of agreement by the parties on these issues, the composition of the arbitral tribunal and the conduct of the arbitral proceedings were not in accordance with the law of the country in which the arbitral proceedings took place;
— the award has not yet become binding upon the parties or has been set aside or stayed by the court of the country where, or under the law of which, the award was made; or
— the recognition and enforcement of the award would be contrary to Slovakian public policy.  

10.2.5 Any decision refusing the recognition and enforcement of an award must be reasoned and can be appealed.  

11. Special provisions and considerations

11.1 Consumers
11.1.1 The Slovakian Arbitration Act does not contain any special provisions in relation to consumers. Disputes involving consumers are arbitrable. The arbitral tribunal shall consider the consumer protection regulations when issuing an award concerning a consumer dispute. Failing to meet this requirement may be a ground to challenge the award, causing it to be set aside. An express obligation on the arbitral tribunal in this respect was incorporated into the Slovakian Arbitration Act by the latest amendment thereto.  

11.2 Employment law
11.2.1 Employment matters are non-arbitrable under Slovakian law.

---

95 Ibid, s 50(1).
96 Ibid, s 50(3)–(4).
97 Act No. 71/2009 Coll.
12. Concluding thoughts and themes

12.1.1 One of the major and undoubtedly most essential advantages offered by arbitration is the promptness of arbitral proceedings. The resolution of disputes before national courts can be slow and unpredictable. Nevertheless, arbitration is still not accepted by the public as an equal and standard alternative to the court proceedings. However, there is an increasing tendency for parties to seek to resolve their disputes through arbitration.

12.1.2 The resolution of disputes by arbitration offers advantages for the parties to the arbitral proceedings, as well as for the state by relieving the national courts from having to administer additional cases. Increasing the awareness of the public about this form of dispute resolution would be beneficial for achieving the desired goal of providing the prompt protection of legal rights.

13. Contacts

Ružička Csekes s.r.o.
in association with members of CMS
Vysoká 2/8
811 06 Bratislava
Slovakia

Peter Zilizi
T +421 2 3233 3444
F +421 2 3233 3443
E peter.zilizi@rc-cms.sk
ARBITRATION IN SLOVENIA

By Lea Vatovec, CMS
Table of Contents

1. Historical background and overview 803

2. Scope of application and general provisions of the Slovenian Arbitration Act 803
   2.1 Scope of application 803
   2.2 Structure of the Slovenian Arbitration Act 804
   2.3 General principles 804

3. The arbitration agreement 804
   3.1 Definition 804
   3.2 Formal requirements 805
   3.3 Special tests and requirements of the jurisdiction 805
   3.4 Separability 805
   3.5 Legal consequences of a binding arbitration agreement 806

4. Composition of the arbitral tribunal 806
   4.1 The constitution of the arbitral tribunal 806
   4.2 The procedure for challenging and substituting arbitrators 807
   4.3 Responsibility of the arbitrators 808
   4.4 Arbitration fees 809
   4.5 Arbitrator immunity 809

5. Jurisdiction of the arbitral tribunal 809
   5.1 Competence to rule on jurisdiction 809
   5.2 Power to order interim measures 810

6. Conduct of proceedings 810
   6.1 Commencement of the arbitration 810
   6.2 General procedural principles 810
   6.3 Seat and language of the arbitration 811
   6.4 Multi-party issues 811
   6.5 Oral hearings and written proceedings 812
   6.6 Default by one of the parties 812
   6.7 Evidence generally 812
   6.8 Appointment of experts 813
   6.9 Confidentiality 813
   6.10 Court assistance in taking evidence 813
7. Making of the award and termination of proceedings 814
   7.1 Choice of law 814
   7.2 Timing, form, content and notification of the award 814
   7.3 Settlement 814
   7.4 Power to award interest and costs 814
   7.5 Termination of the proceedings 815
   7.6 Effect of the award 815
   7.7 Correction, clarification and issue of a supplemental award 815

8. Role of the courts 816
   8.1 Jurisdiction of the courts 816
   8.2 Stay of the court proceedings 816
   8.3 Preliminary rulings on jurisdiction 816
   8.4 Interim protective measures 817

9. Challenging and appealing an award through courts 817
   9.1 Jurisdiction of the courts 817
   9.2 Appeals 817
   9.3 Application to set aside an award 817

10. Recognition and enforcement of awards 818
    10.1 Domestic awards 818
    10.2 Foreign awards 818

11. Special provisions and considerations 819
    11.1 Consumers 819
    11.2 Employment law 819

12. Contacts 820
1. Historical background and overview


1.1.3 Slovenia also promotes institutional arbitration through the Chamber of Commerce and Industry of Slovenia (CCIS). The CCIS hosts an autonomous and independent permanent court of arbitration (CCIS Court) which seeks to resolve both domestic and international commercial disputes. Arbitral proceedings in the CCIS Court are conducted pursuant to its rules of arbitration (CCIS Rules).

2. Scope of application and general provisions of the Slovenian Arbitration Act

2.1 Scope of application

2.1.1 The provisions of the Slovenian Arbitration Act apply to all arbitrable disputes. Arbitrable disputes include all pecuniary claims capable of resolution by way of arbitral proceedings. Non-pecuniary claims, however, may also be subject to an arbitration agreement if the matter is capable of settlement. For consumer-related or employment-related matters, special provisions set out in Chapters IX and X of the Slovenian Arbitration Act apply.

---

1 In a letter dated 1 July 1992 sent to the Secretary-General of the United Nations by the Government of the Republic of Slovenia.
2 See Table of Ratifications, CMS Guide to Arbitration, vol II, appendix 1.3.
4 CCIS Rules were adopted by the CCIS on 20 April 2000 and published in the Official Gazette on 6 June 2000. On 22 April 2003, amendments referring to costs of arbitral proceedings were adopted and published in the Official Gazette on 7 July 2003.
5 Slovenian Arbitration Act, ch 1, art 4(1).
6 See section 11 below.
2.2  Structure of the Slovenian Arbitration Act

2.2.1 The structure of the Slovenian Arbitration Act follows the Model Law (1985). Chapter I of the Slovenian Arbitration Act contains general provisions on the scope of application of the law and the service of proceedings. Chapter II deals with the arbitration agreement itself. The composition of the arbitral tribunal and the challenge of arbitrators are set out in Chapter III. Jurisdiction of the arbitral tribunal is dealt with in Chapter IV. Chapters V and VI set out the provisions on the organisation and conduct of arbitral proceedings and the rendering of the award. Chapter VII deals with possible methods of recourse against an award. Chapter VIII deals with the recognition and enforcement of foreign awards. Chapters IX and X contain special provisions on consumer-related and employment-related issues.

2.3  General principles

2.3.1 The general principles underlying the Slovenian Arbitration Act are:
— equality and objectivity (i.e. all parties must be treated fairly);
— due process (i.e. all parties must have the opportunity to present their case);
— good faith and conscientiousness; and
— party autonomy.

3.  The arbitration agreement

3.1  Definition

3.1.1 The definition of an arbitration agreement is set out in the Slovenian Arbitration Act and closely follows the Model Law (2006).\(^7\) The arbitration agreement is an agreement by the parties to submit to arbitration all or specific disputes which have arisen or which may arise between the parties, whether contractual or not.\(^8\)

3.1.2 An arbitration agreement may either be concluded by way of a separate agreement or included as an arbitration clause in a contract. In either case, it needs to express clearly the intention of both parties to submit the dispute in question to arbitral proceedings.\(^9\)

---

\(^7\) The definition corresponds with the Model Law (2006), ch 2, art 7 (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^8\) Slovenian Arbitration Act, ch 2, art 10(1).

\(^9\) Ibid.
3.2 Formal requirements

3.2.1 The Slovenian Arbitration Act provides the formal requirements of an arbitration agreement. An arbitration agreement must be in writing. If the arbitration agreement is contained in correspondence between the contracting parties and the information contained therein is accessible so as to be useable for subsequent reference (i.e. letters, facsimiles, emails or other means of communication), it is deemed that the arbitration agreement is in writing.

3.2.2 A reference in a contract to any other document containing an arbitration clause constitutes a valid arbitration agreement, provided that the reference is sufficient to make that clause part of the contract.

3.2.3 An arbitration agreement may also be deemed to exist if the claimant submits a request for arbitration and the respondent fails to object to the competence of the arbitral tribunal in its statement of defence (or earlier).

3.3 Special tests and requirements of the jurisdiction

3.3.1 Generally, all pecuniary claims are arbitrable. However, disputes relating to non-pecuniary claims may also be arbitrable if the parties are able to conclude a settlement regarding the non-pecuniary dispute. As specified in Article 1053 of the Code of Obligations, disputes concerning the status of relations of natural and legal persons (e.g. questions regarding marriage, motherhood, fatherhood, adoption, paternal rights, etc) cannot be arbitrated.

3.4 Separability

3.4.1 The Slovenian Arbitration Act follows the provisions on the doctrine of separability set out in the Model Law (1985). An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A nullification of a contract containing an arbitration clause will not affect the validity of the arbitration clause.

---

10 The requirements correspond with the Model Law (2006), ch 2, art 7 (see CMS Guide to Arbitration, vol II, appendix 2.1).
11 Slovenian Arbitration Act, ch 2, art 10(2).
12 Ibid.
13 Ibid, ch 2, art 10(4).
14 Ibid, ch 2, art 10(6), reflected in CCIS Rules, ch 1, art 5(4).
15 Obligations Code, which was adopted by the National Assembly of the Republic of Slovenia at its session of 3 October 2001 (Code of Obligations).
17 Slovenian Arbitration Act, ch 4, art 19(1).
3.5 Legal consequences of a binding arbitration agreement

3.5.1 A claim brought before the courts will be dismissed on the grounds of lack of jurisdiction if it is subject to an arbitration agreement and a respondent objects to the court’s jurisdiction no later than when submitting its statement of defence. The court will only dismiss a claim if the respondent chooses to object and will not undertake this action ex officio. The courts may hear the claim if it is found that the arbitration agreement does not exist, is null and void, is inoperative or is incapable of being performed.\textsuperscript{18}

4. Composition of the arbitral tribunal

4.1 The constitution of the arbitral tribunal

4.1.1 There is no requirement that an arbitrator is qualified as a lawyer or is a registered member of the bar. Furthermore, nationality is not a reasonable ground for precluding someone from acting as an arbitrator, unless otherwise agreed by the parties.\textsuperscript{19} However, in arbitrations before the CCIS Court and under the CCIS Rules, an arbitrator should have special knowledge of and experience in law, economics or any other relevant field.\textsuperscript{20}

4.1.2 The parties are free to agree on the number of arbitrators. However, under the Slovenian Arbitration Act the default number of arbitrators is three.\textsuperscript{21} The parties are also free to agree on the procedure for appointing the arbitrator(s).\textsuperscript{22} The mandatory provisions of the Slovenian Arbitration Act will apply, however, in the following instances:

— if the parties fail to agree on a sole arbitrator, either party may request the court to make the appointment;

— where there are three arbitrators, each party appoints one arbitrator and the two party-appointed arbitrators shall appoint the third arbitrator to act as chair; and

— if the party-appointed arbitrators fail to agree on the identity of the chair within 30 days of receipt of a request to do so from the other party or within 30 days of their appointment, a party may request the court to make this appointment.\textsuperscript{23}

\textsuperscript{18} Ibid, ch 2, art 11(1), following the Model Law (2006), ch 2, art 8 (see CMS Guide to Arbitration, vol II, appendix 2.1).

\textsuperscript{19} Slovenian Arbitration Act, ch 3, art 14(1).

\textsuperscript{20} CCIS Rules, ch 2, art 14(1).

\textsuperscript{21} Slovenian Arbitration Act, ch 3, art 13.

\textsuperscript{22} Ibid, ch 3, art 14(2).

\textsuperscript{23} Ibid, ch 3, art 14(3).
4.1.3 The above mandatory provisions also apply if the parties agree on the appointment procedure but:
— a party fails to act as required under such procedure;
— the parties, or the party-appointed arbitrators, are unable to reach an agreement as envisaged under such procedure; or
— a third party, including an arbitral institution, fails to perform a function entrusted to it under such procedure.24

4.1.4 Any party may request the court to take necessary measures to appoint an arbitrator, unless the appointment procedure provides other means for securing the appointment(s).25 The court’s decision as to the appointment of an arbitrator is not subject to appeal.26

4.2 The procedure for challenging and substituting arbitrators

Challenge of arbitrators

4.2.1 The Slovenian Arbitration Act provides limited grounds for challenging an arbitrator.27 Arbitrators may be challenged only where circumstances give rise to justifiable doubts as to their impartiality or independence or if the arbitrator does not possess qualifications agreed to by the parties. Moreover, a party may challenge an arbitrator that it has appointed (or in whose appointment it has participated), only for reasons it becomes aware of subsequent to the appointment.28

Procedure for challenging an arbitrator

4.2.2 The procedure for challenging an arbitrator under the Slovenian Arbitration Act follows the Model Law (1985).29 Under the Slovenian Arbitration Act, the parties are free to agree on the procedure for challenging an arbitrator. If a specific procedure is not agreed upon, a party who intends to challenge an arbitrator should submit a written statement to the arbitral tribunal setting out the reasons for its challenge. Such a statement must be sent within 15 days of the party becoming aware of either the constitution of the arbitral tribunal or the circumstances set out in Article 15 of the Slovenian Arbitration Act.30 Unless the challenged arbitrator withdraws from his or her office or the other party agrees to

25 Ibid.
26 Ibid, ch 3, art 14(5).
27 Ibid, ch 3, art 15.
30 See above at paragraph 4.2.1.
the challenge, the challenge shall be decided by the full arbitral tribunal including the challenged arbitrator. If such a challenge is not successful, the challenging party may file a request to the court to decide on the challenge. A request of this nature must be made within 30 days of receiving notice of the arbitral tribunal’s decision rejecting the challenge. The court’s decision cannot be appealed. While a request is pending, the full arbitral tribunal may continue the proceedings and render an award.\textsuperscript{32}

4.2.3 In institutional arbitral proceedings concluded under the CCIS Rules, the President of the CCIS Court (\textit{CCIS President}) has the authority to decide on any challenge to an arbitrator. The decision of the CCIS President is final.\textsuperscript{33}

4.2.4 Should an arbitrator become unable to perform the duties of an arbitrator then the arbitrator’s mandate shall terminate if the parties so agree or if the arbitrator withdraws from the office. If no agreement is reached, or the arbitrator does not voluntarily withdraw, any party may request the court to rule on the issue. The court’s decision cannot be appealed.\textsuperscript{34}

\textit{Substitution of arbitrator(s)}

4.2.5 Where the mandate of an arbitrator terminates, a substitute arbitrator must be appointed according to the rules applicable to the appointment of the arbitrator being replaced.\textsuperscript{35}

4.3 \textbf{Responsibility of the arbitrators}

4.3.1 There are no specific statutory provisions relating to the responsibility of arbitrators. However, pursuant to the Code of Ethics for Arbitrators (\textit{Code of Ethics})\textsuperscript{36} the arbitrators are obliged to:

— act impartially;\textsuperscript{37}

— safeguard and keep all data acquired during the arbitral proceedings confidential.\textsuperscript{38}

\footnotesize{\textsuperscript{31} Slovenian Arbitration Act, ch 3, art 16 (3).}
\footnotesize{\textsuperscript{32} Ibid.}
\footnotesize{\textsuperscript{33} CCIS Rules, ch 2, art 21(5).}
\footnotesize{\textsuperscript{34} Slovenian Arbitration Act, ch 3, art 17(1).}
\footnotesize{\textsuperscript{35} Ibid, ch 3, art 17(2).}
\footnotesize{\textsuperscript{36} The Code of Ethics for Arbitrators is published by the CCIS and can be found at the Chamber of Commerce and Industry of Slovenia’s website [http://www.sloarbitration.org/english/rules/rules-arbitration-00.html] (accessed 3 December 2011).}
\footnotesize{\textsuperscript{37} Ibid, art 2.}
\footnotesize{\textsuperscript{38} Ibid, art 4.}
— conduct the arbitral proceedings pursuant to the CCIS Rules; and
— timely perform individual acts within the scope of the arbitral proceedings.

4.4 **Arbitration fees**

4.4.1 Unless otherwise agreed by the parties, the arbitral tribunal decides, at the request of the parties to the arbitral proceedings the extent to which either party shall be liable for the costs of the proceedings, including costs of representation and the arbitrators’ fees and expenses. The arbitral tribunal has discretion in making its decision and can take into account individual circumstances and the outcome of the proceedings.

4.4.2 In CCIS arbitral proceedings, when a claim is filed, the claimant must pay a registration fee amounting to EUR 250 in domestic disputes and EUR 500 in international disputes.

4.4.3 The arbitrator’s fee depends on the amount of the dispute, the number of arbitrators, the complexity of the case and whether the dispute is domestic or international.

4.5 **Arbitrator immunity**

4.5.1 There are no special provisions in relation to the immunity of arbitrators.

5. **Jurisdiction of the arbitral tribunal**

5.1 **Competence to rule on jurisdiction**

5.1.1 The arbitral tribunal has the power to rule on its own jurisdiction (the principle of competence-competence), which includes any objections with respect to the existence or validity of the arbitration agreement.

5.1.2 An arbitration clause forming 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 does not automatically invalidate the arbitration clause.

---

39 Ibid, art 3.
40 Ibid, art 7.
41 Slovenian Arbitration Act, ch 6, art 39(1).
42 CCIS Rules, ch 6, art 46 (setting out the table of fees for a sole arbitrator).
43 Ibid, ch 6, art 46(4) (providing that the fees of a whole panel of arbitrators are double the fees of a sole arbitrator).
45 Ibid.
5.2 **Power to order interim measures**

5.2.1 Upon hearing the submissions of both parties, the arbitral tribunal is entitled to order any interim measures it considers necessary to protect the subject matter of the proceedings. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security.\(^{46}\) Exceptionally, the arbitral tribunal may, if it considers it necessary, independently order interim measures absent a request by either party.\(^{47}\)

5.2.2 The arbitral tribunal may modify, suspend and/or terminate an interim measure upon the application of any party or, in exceptional circumstances, by its own motion without the application of either party.\(^{48}\) While an arbitral tribunal has the power to order an interim measure, only the court has the power to enforce interim measures in the event of a party’s non-compliance.\(^{49}\)

6. **Conduct of proceedings**

6.1 **Commencement of the arbitration**

6.1.1 Unless otherwise agreed by the parties, the Slovenian Arbitration Act provides that the arbitral proceedings in respect of a particular dispute commence on the date the request for arbitration is received by the respondent.\(^{50}\) However, under the CCIS Rules the arbitral proceedings commence on the day the statement of claim is received by the CCIS Court.\(^{51}\)

6.2 **General procedural principles**

6.2.1 The parties are free either to agree on the procedure to be followed in conducting the arbitral proceedings or to refer to the rules of an arbitral institution. If the parties do not agree upon a procedure to be followed or refer to institutional rules, then the arbitral tribunal shall conduct the arbitration in the manner it considers appropriate.\(^{52}\)

---

\(^{46}\) Slovenian Arbitration Act, ch 4, art 20(1).
\(^{47}\) Ibid, ch 4, art 20(2).
\(^{48}\) Ibid, ch 4, art 20(3).
\(^{49}\) Ibid, ch 4, art 20(4).
\(^{50}\) Ibid, ch 5, art 25.
\(^{51}\) CCIS Rules, ch 3, art 27.
\(^{52}\) Slovenian Arbitration Act, ch 5, art 23.
6.2.2 The parties should be treated equally and be given a full opportunity to present their case. The parties also have the right to be represented by a proxy, which may be any natural person with full capacity. A proxy is not required to be a Slovenian national. Furthermore, a foreign or national law firm may act as a proxy.

6.3 **Seat and language of the arbitration**

6.3.1 The parties are free to agree on the seat of arbitration and may also choose the language of the arbitral proceedings. If the parties fail to reach an agreement on the seat of arbitration or language of the arbitral proceedings, then the seat of jurisdiction or the language or languages to be used in the proceedings shall be determined by the arbitral tribunal. Prior to the determination of the language of the arbitral proceedings, the statement of claim and other submissions can be made either in the language of the arbitration agreement or in Slovenian.

6.4 **Multi-party issues**

6.4.1 The Slovenian Arbitration Act does not contain any specific provisions addressing multi-party issues. Therefore, multi-party issues are subject to the provisions of the arbitration agreement.

6.4.2 Under the CCIS Rules, where there are multiple parties to a dispute and they cannot agree among themselves on a joint arbitrator, the joint arbitrator shall be appointed by the appointing authority (i.e. *pooblaščenec za imenovanje*). The appointing authority is a person mutually appointed by the parties.

6.4.3 If multiple parties to an international dispute have not reached an agreement on the appointing authority within a reasonable time, or if the appointing authority refuses to accept this responsibility, then the CCIS President will act as the appointing authority.

---

56 *Ibid*.
58 Slovenian Arbitration Act, ch 5, art 26(3).
59 CCIS Rules, ch 2, art 19(2).
60 *Ibid*, ch 2, art 19(1).
6.5  **Oral hearings and written proceedings**

6.5.1  The parties are free to agree on whether proceedings shall be conducted orally or in writing. In the absence of an agreement between the parties, the arbitral tribunal shall decide whether to hold an oral hearing or whether the proceedings shall be conducted based on written submissions only. However, the default position under the Slovenian Arbitration Act is that an oral hearing is required if one of the parties requests it.

6.5.2  The arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. The parties are entitled to receive sufficient, advance notice of any hearing scheduled by the arbitral tribunal for the purposes of inspecting the evidence. Furthermore, the parties are entitled to receive submissions, documents or communications supplied to the arbitral tribunal by the other party, including expert reports or other documents on which the arbitral tribunal may rely in making its decision.

6.6  **Default by one of the parties**

6.6.1  The arbitral tribunal may continue with the proceedings and render an award even if one of the parties does not participate. The arbitral proceedings may be continued in the absence of a party if:

---

6.6.2  If the claimant fails to file a statement of claim in accordance with the agreement of the parties or the provisions of the Slovenian Arbitration Act, the arbitral tribunal should terminate the proceedings.

6.7  **Evidence generally**

6.7.1  Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall present the facts supporting its claim and the respondent shall present its defence in respect of those particulars. The parties

---

61 Slovenian Arbitration Act, ch 5, art 23(1).
62 Ibid, ch 5, art 28(1). Under the CCIS Rules, ch 3, art 26(2), the default position is that an oral hearing is required unless the parties have waived this requirement or the arbitral tribunal deems that a decision can be made without holding an oral hearing.
63 Slovenian Arbitration Act, ch 5, art 23(2).
64 Ibid, ch 5, art 28.
65 Ibid, ch 5, art 29(2) and (3).
66 Ibid, ch 5, art 29(1).
may agree as to the required elements of such statements. The parties may submit with their submissions all the documents that they consider to be relevant or may add a reference to the documents or other evidence they intend to submit.67 Any statement of case can be amended or supplemented by the parties unless it is agreed otherwise or the arbitral tribunal deems such amendment inappropriate, on the basis that it may cause delay.68

6.8  Appointment of experts
6.8.1 Unless the parties have agreed otherwise, the arbitral tribunal has the authority to appoint experts to produce a report on specific issues that are to be determined through the arbitral proceedings. Furthermore, the arbitral tribunal may require a party to give a tribunal-appointed expert any relevant information or to produce or provide access to any relevant documents, goods or other property for inspection.69

6.8.2 Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, in addition to written or oral report(s), a tribunal-appointed expert shall participate in the hearing where the parties have the opportunity to put questions to the tribunal-appointed expert and to present expert witnesses in order to testify on the points at issue.70

6.9  Confidentiality
6.9.1 There are no special provisions either in the Slovenian Arbitration Act or in the CCIS Rules in relation to confidentiality. Accordingly, the parties should bear this in mind when drafting their arbitration agreement.

6.10  Court assistance in taking evidence
6.10.1 The arbitral tribunal or a party (with the arbitral tribunal’s permission) may request court assistance in the taking of evidence or performance of any other acts for which the arbitral tribunal does not have authority. The court executes the request within its competence, jurisdiction and according to the relevant procedural rules. The arbitrators are entitled to participate in the taking of evidence before the court.71

67 Ibid, ch 5, art 27(1).
68 Ibid, ch 5, art 27(2), reflected in CCIS Rules, ch 3, art 32.
69 Slovenian Arbitration Act, ch 5, art 30(1).
70 Ibid, ch 5, art 30(2).
71 Ibid, ch 5, art 31(1).
7. Making of the award and termination of proceedings

7.1 Choice of law
7.1.1 The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties. Any designation of the law or legal system of a given state shall be interpreted as directly referring to the substantive law of that state rather than its conflict of laws rules.\(^72\) Failing any designation by the parties, the arbitral tribunal shall apply the rules of law which it considers appropriate.\(^73\)

7.1.2 The arbitral tribunal may also decide *ex aequo et bono* if the parties have expressly authorised it to do so.\(^74\) In all cases, the arbitral tribunal shall make its decision in accordance with the terms of the contract and the relevant trade customs.\(^75\)

7.2 Timing, form, content and notification of the award
7.2.1 The award shall be made in writing and shall be signed by the arbitrator(s). If there is more than one arbitrator, the signatures of the majority of the arbitral tribunal will suffice, provided that the reason for any omitted signature is stated. The award must provide reasons upon which it is based, the date of issue and the seat of arbitration. Each party has a right to receive a copy of the signed award.\(^76\)

7.3 Settlement
7.3.1 The parties may settle at any time during the arbitral proceedings. If the parties so request and the terms of a settlement are in accordance with Slovenian public policy,\(^77\) the settlement may be recorded in the form of an award.\(^78\) Such an award will have the same status and effect as an award on the merits of the case.\(^79\)

7.4 Power to award interest and costs
7.4.1 Unless otherwise agreed by the parties, the arbitral tribunal may decide, at its own discretion but upon the request of one of the parties, which party is obliged to reimburse:

\(^72\) *Ibid*, ch 6, art 32(1).
\(^73\) *Ibid*, ch 6, art 32(2).
\(^74\) *Ibid*, ch 6, art 32(3).
\(^75\) *Ibid*, ch 6, art 32(4).
\(^76\) *Ibid*, ch 6, art 35.
\(^77\) Slovenian public policy is an indefinite legal concept, which is defined by scientific literature, a number of decisions of foreign courts and arbitrations and the practice of Slovenian courts.
\(^78\) Slovenian Arbitration Act, ch 6, art 34.
\(^79\) *Ibid*, ch 6, art 34.
Arbitration in Slovenia

— the costs of the arbitral proceedings;
— the costs of arbitrator fees;
— the fees of any arbitral institution; and
— each party’s lawyers’ fees.

7.4.2 The arbitral tribunal’s decision on the amount and the allocation of costs between the parties can be recorded in either the award or in a separate order.\(^{80}\)

7.5 **Termination of the proceedings**

7.5.1 Arbitral proceedings usually terminate as a result of settlement or the rendering of a final award on the merits.\(^{81}\) The proceedings can also terminate as a result of the rendering of an order for the termination of the arbitral proceedings if:
— the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on the respondent’s part in obtaining a final award;
— the parties agree on the termination of the arbitral proceedings; or
— it is impossible or unnecessary for the arbitral proceedings to continue.\(^{82}\)

7.5.2 The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.\(^{83}\)

7.6 **Effect of the award**

7.6.1 The award has the same effect as a final judgment between the parties.\(^{84}\)

7.7 **Correction, clarification and issue of a supplemental award**

7.7.1 The Slovenian Arbitration Act follows the Model Law (2006) in relation to correction, clarification and supplemental awards.\(^{85}\) Accordingly, the arbitral tribunal may correct any errors in computation, any clerical or typographical errors or any errors of a similar nature within 30 days of receipt of the award by the parties. The arbitral tribunal may do so either at the request of one of the parties or on its own initiative.\(^{86}\)

---

\(^{80}\) Ibid, ch 6, art 39.

\(^{81}\) Ibid, ch 6, art 36(1).

\(^{82}\) Ibid, ch 6, art 36(2).

\(^{83}\) Ibid, ch 6, art 36(3).

\(^{84}\) Ibid, ch 6, art 38.

\(^{85}\) Ibid, ch 6, art 37, based on the Model Law (2006), ch 6, art 33 (see CMS Guide to Arbitration, vol II, appendix 2.1).

\(^{86}\) Ibid.
7.7.2 Furthermore, the parties can request that the arbitral tribunal give an interpretation of a specific point or part of the award. The parties can request the issuance of an additional award on claims presented in the arbitral proceedings but omitted from the award. Any interpretation or corrections are considered to be part of the award.\textsuperscript{87}

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 Under the Slovenian Arbitration Act the District Court in Ljubljana is the competent court for judicial tasks in relation to arbitration matters.

8.1.2 The District Court in Ljubljana decides on the:
— admissibility of arbitral proceedings;
— appointment, challenge and termination of an arbitrator’s mandate;
— competence of arbitral tribunals;
— setting aside of an award; and
— recognition of domestic/foreign awards.\textsuperscript{88}

8.2 Stay of the court proceedings
8.2.1 Generally speaking, applications in relation to the jurisdiction of the arbitral tribunal, the setting aside of an award and the admissibility of arbitral proceedings are governed by general provisions of Slovenian civil procedure.\textsuperscript{89} Other court proceedings in connection with arbitration (e.g. relating to the appointment, challenge and termination of the mandate of an arbitrator or the recognition of the award) are governed by the non-litigious rules of Slovenian civil procedure.\textsuperscript{90} The public can be excluded from court proceedings regarding arbitration matters upon the legitimate request of a party to the dispute.\textsuperscript{91}

8.3 Preliminary rulings on jurisdiction
8.3.1 There are no statutory provisions in relation to preliminary rulings on jurisdiction. The CCIS Rules provide that the jurisdiction of the CCIS Court will be established unless a court of law has exclusive jurisdiction over the dispute.\textsuperscript{92}

\textsuperscript{87} Ibid.
\textsuperscript{88} Slovenian Arbitration Act, ch 1, art 9.
\textsuperscript{89} See the Civil Procedure Act, which was published on 15 April 1999 in the Official Gazette no 26/1999 \textit{et al}.
\textsuperscript{90} See the Non-Litigious Civil Procedure Act, which was published on 28 July 1986 in the Official Gazette no 30/1986.
\textsuperscript{91} Slovenian Arbitration Act, ch 1, art 9(2).
\textsuperscript{92} CCIS Rules, ch 1, art 3.
8.4 **Interim protective measures**

8.4.1 The court may issue, if so requested by the parties, an interim measure in relation to the subject of the arbitral proceedings prior to or during the arbitral proceedings, irrespective of the existence of the arbitration agreement.\(^{93}\)

9. **Challenging and appealing an award through courts**

9.1 **Jurisdiction of the courts**

9.1.1 As referenced above, the District Court in Ljubljana has jurisdiction over arbitration matters and decides on whether or not awards issued in Slovenia should be set aside.\(^{94}\) A decision of the District Court may be appealed to the Supreme Court.\(^{95}\)

9.2 **Appeals**

9.2.1 The only judicial remedy against an award is an application to set aside the award.\(^{96}\)

9.3 **Application to set aside an award**

9.3.1 The award shall be set aside only if:

(i) the party making the application furnishes proof that:

   — a party to the arbitration agreement was under some incapacity;
   
   — the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any contrary indication, under Slovenian law;
   
   — the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
   
   — the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains a decision on matters beyond the scope of the submission to arbitration;
   
   — the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

(ii) the court finds that:

   — the subject matter is not capable of settlement by arbitration; or
   
   — the award itself violates public policy.\(^{97}\)

---

\(^{93}\) Slovenian Arbitration Act, ch 2, art 12.

\(^{94}\) Ibid, ch 1, art 9; see section 8.1 above.

\(^{95}\) Slovenian Arbitration Act, ch 1, art 9(3).

\(^{96}\) Ibid, ch 7, art 40(1).

\(^{97}\) Ibid, ch 7, art 40(2).
9.3.2 The parties cannot waive their right to apply to set aside an award. It should be noted that setting aside an award does not automatically invalidate the underlying arbitration agreement.

9.3.3 The court may, at its own discretion or if requested by a party to the dispute, suspend the proceedings to set aside the award for a period of time in order to provide the arbitral tribunal with an opportunity either to resume the arbitral proceedings or cure the grounds for setting the award aside.

10. Recognition and enforcement of awards

10.1 Domestic awards
10.1.1 A domestic award is executable when the District Court in Ljubljana declares it enforceable.

10.1.2 The court may reject an application for the enforcement of a domestic award if the court finds that the subject matter is not capable of settlement by arbitration or the award violates public policy.

10.2 Foreign awards
10.2.1 Slovenia is a signatory state to the New York Convention.

10.2.2 Foreign awards shall have binding effect when the District Court in Ljubljana recognises them. The party applying for enforcement of an award shall supply the original award or a copy of it. Additionally, a court may request that a party provide an original or a certified copy of the arbitration agreement.
10.2.3 The grounds for refusing the enforcement of an award set out in the Model Law (1985)\(^{106}\) have not been specifically included in the provisions of the Slovenian Arbitration Act.

11. Special provisions and considerations

11.1 Consumers

11.1.1 Due to the nature of consumer relations, provisions governing consumer disputes are governed by a separate chapter of the Slovenian Arbitration Act.\(^{107}\) Provisions regarding the arbitration agreement, language of the arbitration and recourse against an award are adjusted in order to ensure the protection of the party with less bargaining power (i.e. the consumer).

11.1.2 Pursuant to the Consumer Protection Act,\(^{108}\) a consumer is a natural person who acquires or uses goods and services for purposes other than in the course of his or her business.

11.1.3 Unlike the Model Law (1985), the Slovenian Arbitration Act offers protection for consumers who are involved in arbitration. The arbitration agreement must be written in a separate document directly signed by the consumer (and not be contained in the commercial enterprise’s general terms and conditions).\(^{109}\) Therefore, an arbitration agreement between a commercial enterprise and a consumer can only be effectively concluded after the dispute has arisen.\(^{110}\)

11.1.4 In addition to the general grounds for setting aside awards, the provisions relating to consumers include other grounds, such as violation of mandatory consumer protection provisions.\(^{111}\)

11.2 Employment law


\(^{107}\) Slovenian Arbitration Act, ch 9.


\(^{109}\) Slovenian Arbitration Act, ch 9, art 45(2).

\(^{110}\) Ibid, ch 9, art 45(1).

\(^{111}\) Ibid, ch 9, art 47.
11.2.2 If the subject of the arbitration is a labour dispute, the Labour Court is the competent body to decide on the questions relating to the jurisdiction of the arbitral tribunal, the setting aside of an award, the admissibility of arbitral proceedings, appointment, challenge and termination of the mandate of an arbitrator or recognition of the award.\(^{112}\)

12. Contacts

CMS Reich-Rohrwig Hainz
Bleiweisova 30
1000 Ljubljana
Slovenia

Aleš Lunder
Partner
T +386 1 62052 10
E ales.lunder@cms-rrh.com

Lea Vatovec
Associate
T +386 1 62052 10
E lea.vatovec@cms-rrh.com

\(^{112}\) As defined by the Law on labour court proceedings, Zakon o delovnih in socialnih sodiščih, Official Gazette of Republic of Slovenia No. 2/2004, [http://www.uradni-list.si/1/content?id=46630&part=&highlight=&Zak on+o+delovnih+in+soci alnih+sodi%C5%A1%C4%8Dih](http://www.uradni-list.si/1/content?id=46630&part=&highlight=&Zak on+o+delovnih+in+soci alnih+sodi%C5%A1%C4%8Dih) (accessed 3 December 2011).

\(^{113}\) Slovenian Arbitration Act, ch 10, art 48.
Table of Contents

1. The Spanish Arbitration Act 825
2. Historical background 825
3. Scope of application and general provisions of the Spanish Arbitration Act 826
4. The arbitration agreement 827
   4.1 Formal requirements 827
   4.2 Legal consequences of a binding arbitration agreement 828
5. Composition of the arbitral tribunal 828
   5.1 The constitution of the arbitral tribunal 828
   5.2 The procedure for challenging and substituting arbitrators 829
   5.3 The appointment of substitute arbitrators 830
   5.4 Responsibility of an arbitrator 830
   5.5 Provision of funds 830
6. Jurisdiction of the arbitral tribunal 831
   6.1 Competence to rule on jurisdiction 831
   6.2 Power to order interim measures 831
7. Conduct of proceedings 832
   7.1 Commencement of arbitration 832
   7.2 General procedural principles 832
   7.3 Seat, place of hearings and language of the arbitral proceedings 832
   7.4 Oral hearings and written proceedings 833
   7.5 Court assistance in taking evidence 833
   7.6 Specific rules 833
8. Making of the arbitral award and termination of proceedings 834
   8.1 Choice of law 834
   8.2 Timing, form, content and notification of the arbitral award 834
   8.3 Settlement 835
   8.4 Costs 835
8.5 Termination of the proceedings 835
8.6 Correction, clarification and issue of a supplemental arbitral award 836

9. Role of the courts 837
9.1 Jurisdiction of the courts 837
9.2 Judicial appointment of arbitrators 837
9.3 Interim measures 837
9.4 Obtaining evidence and other court assistance 838
9.5 Enforcement of the arbitral award 839

10. Challenging and appealing an arbitral award 839
10.1 Applications to set aside an arbitral award 839
10.2 Res judicata and the revision of final arbitral awards 840

11. Recognition and enforcement of arbitral awards 840
11.1 Domestic arbitral awards 840
11.2 Foreign arbitral awards 841

12. Concluding thoughts and themes 841

13. Contacts 841
1. **The Spanish Arbitration Act**

1.1.1 The new Spanish Arbitration Act 60/2003 (*Spanish Arbitration Act*) was officially published in the Official Gazette of the Spanish State\(^1\) on 26 December 2003 and came into force on 26 March 2004.

1.1.2 The changes brought about by the Spanish Arbitration Act responded to demands from international commercial parties who routinely choose arbitration to resolve disputes. There has been a notable expansion of domestic and international arbitration in Spain in recent years. Through the Spanish Arbitration Act, the Spanish legislator has made a firm commitment to fostering domestic arbitration and making Spain a centre for international arbitration, particularly for Spanish-speaking parties.

1.1.3 The Spanish Arbitration Act is based on the Model Law (1985)\(^2\) and contains the following key features:

- it opts for uniform regulation of domestic and international arbitration;
- it is governed by non-formalistic criteria;
- it provides for arbitration in law (as opposed to arbitration in equity) absent express agreement between the parties to the contrary; and
- it provides that the parties are free to decide the number of arbitrators, although there must be an uneven number.

2. **Historical background**

2.1.1 Before the Spanish Arbitration Act came into force, Spanish arbitration law was scattered between the Arbitration Acts 1953 and 1988.

2.1.2 On 7 December 1988, the Official State Gazette published Law 36/1988, of 5 December, concerning arbitration (*1988 Act*). This legislative text closed a long period of unsuccessful attempts to modify the Arbitration Act of 22 December 1953 (*1953 Act*).

2.1.3 The 1953 Act was based on political principles radically different from those of a democratic country. At that time, lawmakers viewed arbitration unfavourably, as it was the judicial monopoly of the state to resolve conflicts. From an economic standpoint, the 1953 Act was enacted during a period of autocracy and foreign

---

\(^1\) Boletín Oficial del Estado.

isolation, thus there was little or no activity within Spain with respect to international arbitration.

2.1.4 In 1975, Spain ratified the 1961 European Convention and in 1977 it ratified the New York Convention. At this time, as a result of the publication of these international treaties concerning international commercial arbitration, the idea began to take hold in Spanish legal doctrine that the international treaty provisions had become rules of domestic law, and they were therefore binding on international arbitrators in Spain alongside the provisions of the 1953 Act. Ratification of these conventions had introduced a dual and differentiated legal framework; one for domestic arbitration (in the 1953 Act) and the other for international arbitration (in the provisions contained in the international treaties ratified by Spain).

2.1.5 Changes in the business world, technical advances and new needs of the practice made the arbitration provisions of the 1988 Act insufficient. The Spanish Arbitration Act aims to provide for technical advances and meet the changing needs of arbitral practice, particularly with regard to requirements of the arbitration agreement and interim precautionary measures.


3. Scope of application and general provisions of the Spanish Arbitration Act

3.1.1 The Spanish Arbitration Act applies to any arbitration where the seat of the arbitration is in Spanish territory, whether domestic or international in nature.

3.1.2 Certain provisions of the Spanish Arbitration Act apply even if the seat of the arbitration is outside Spain. These include:
   — Article 8, Paragraphs 3, 4 and 6, which concern competent courts for assistance and supervision of arbitration;

---

4 Ibid.
— Article 9 (except Paragraph 2), which concerns the form and content of the arbitration agreement;
— Article 11, which concerns the arbitration agreement and its impact on substantive claims before a court;
— Article 23, which concerns the power of the arbitral tribunal to order interim measures;
— Title VIII, which concerns the enforcement of awards; and
— Title IX, which concerns the recognition of foreign awards.

3.1.3 The Spanish Arbitration Act is of supplementary application to any arbitral proceedings provided for in other legislation. The Spanish Arbitration Act is intended as a general law applicable to all arbitration: either providing rules for proceedings which have no special rules or providing additional rules to arbitrations which already have their own rules, except when the rules specified by the parties are contrary to the provisions of the Spanish Arbitration Act or any law expressly disapplies the Spanish Arbitration Act.

3.1.4 Employment arbitration is excluded from the scope of the Spanish Arbitration Act. Employment disputes should be resolved using the Spanish courts.

4. The arbitration agreement

4.1 Formal requirements

4.1.1 The arbitration agreement must be made in writing, in a document signed by the parties, in an exchange of correspondence or by any other means of telecommunication that provides a record of the agreement. This requirement is satisfied when the arbitration agreement appears and is accessible for subsequent consultation in any other format.

4.1.2 A valid arbitration agreement, which may be in the form of a clause in a contract or contained in a separate agreement, shall express the will of the parties to submit all or some disputes to arbitration that have arisen or which may arise between them in respect of a determined legal relationship, whether contractual or non-contractual. If the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to these types of contracts.

5 Spanish Arbitration Act, art 9.4.
7 Ibid, art 9.2.
4.1.3 An arbitration agreement from another document shall be deemed incorporated into a contract if it exists in any of the forms set out in paragraph 4.1.1 above and is expressly referenced in the agreement between the parties. An arbitration agreement is also deemed to exist when, in an exchange of statements of claim and defence, the existence of an arbitration agreement is alleged by one party and not denied by the other.

4.2 Legal consequences of a binding arbitration agreement
4.2.1 A valid arbitration agreement obliges the parties to comply with the agreement and prevents the courts from hearing disputes on matters relating to or submitted to arbitral proceedings, provided that an interested party does not raise an objection to jurisdiction.

5. Composition of the arbitral tribunal

5.1 The constitution of the arbitral tribunal
5.1.1 The parties are free to determine the number of arbitrators, provided that there is an uneven number. In the absence of any agreement between the parties, a sole arbitrator shall be appointed. The Spanish Arbitration Act provides that, unless agreed otherwise, a person appointed as sole arbitrator must be a jurist, except if the matter is to be decided ex aequo et bono. If a three-member tribunal is constituted, at least one of the three must be a jurist. The term jurist is used (as opposed to lawyer) to include academics and other legal professionals who are not practising lawyers.

5.1.2 Any natural person who has not been declared legally barred may act as an arbitrator, provided that they are not restricted by the legislation applicable to them in the exercise of their profession. Unless otherwise agreed by the parties, no person shall be prevented by reason of their nationality from acting as an arbitrator.

5.1.3 The parties may agree on the procedure for the appointment of the arbitrators, provided that there is no violation of the principle of equal treatment. If it is not

---

8 Ibid, art 9.2.
9 Ibid, art 9.5.
10 Ibid, art 12.
11 In accordance with the Organic Law of the Judicial Branch (1985), court clerks cannot be arbitrators. In addition, other individuals employed by public authorities cannot be arbitrators according to various prohibitions that exist in special laws.
12 Spanish Arbitration Act, art 13.
possible to appoint the arbitrators by the procedure agreed upon by the parties, any party to the arbitral proceedings may apply to the competent court for the nomination of the arbitrators or, if appropriate, the adoption of the necessary measures for this purpose. In this case, the court shall only refuse the request filed when it considers that the existence of an arbitration agreement is not established.\(^\text{13}\)

5.1.4 Unless the parties have otherwise agreed, each arbitrator shall, within 15 days from receiving the nomination, communicate acceptance of the nomination to the nominating party. If an acceptance is not communicated within the period established, the arbitrator is deemed not to have accepted his or her nomination.\(^\text{14}\) This time frame relates to all arbitral proceedings whether domestic or international.

5.2 The procedure for challenging and substituting arbitrators

5.2.1 The appointment of an arbitrator may be challenged only if circumstances give rise to justifiable doubts as to that arbitrator’s impartiality or independence or if the arbitrator does not possess the qualifications as required and agreed to by the parties. A party may only challenge its party-nominated or party-appointed arbitrator if it becomes aware of the reasons giving rise to the challenge after the appointment has been made.\(^\text{15}\)

5.2.2 The parties are free to agree on a procedure for challenging an arbitrator.\(^\text{16}\) If a party challenges the arbitrator in accordance with the agreed procedure, the challenging party may in due course rely upon the challenge in applying to set aside the award.\(^\text{17}\)

5.2.3 An arbitrator’s mandate terminates if the arbitrator is unable to perform the functions of an arbitrator, fails to act without undue delay, withdraws from the office or if the parties agree to the termination.\(^\text{18}\) If the parties fail to agree upon the termination of the mandate and there is no agreed procedure to overcome such disagreement, the following rules shall apply:
— the application for termination shall take the form of oral proceedings before the court in which the arbitral proceedings were taking place.\(^\text{19}\) This application

\(^{13}\) Ibid, art 15.
\(^{14}\) Ibid, art 16.
\(^{15}\) Ibid, art 17.3.
\(^{16}\) Ibid, art 18.1.
\(^{17}\) Ibid, art 18.3.
\(^{18}\) Ibid, art 19.
\(^{19}\) Sala de lo Civil y de lo Penal del Tribunal Superior de Justicia de la Comunidad Autónoma.
may be joined with the request for the nomination of a replacement arbitrator if the application for termination is granted;\textsuperscript{20} and

— in an arbitration with more than one arbitrator, the challenge of an arbitrator must first be decided by the remaining arbitrators. If they are unable to reach a decision, the application shall take the form of oral proceedings before the court in which the arbitral proceedings were taking place.\textsuperscript{21}

5.2.4 The withdrawal of an arbitrator or the agreement by a nominating or appointing party to terminate the mandate of an arbitrator does not imply acceptance as to the validity of the basis for the challenge.\textsuperscript{22}

5.3 The appointment of substitute arbitrators
5.3.1 Irrespective of the reason for the appointment, any new arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Once the substitute arbitrator is appointed, the arbitral tribunal, after hearing the parties, shall decide if it is appropriate to repeat any prior proceedings.\textsuperscript{23}

5.4 Responsibility of an arbitrator
5.4.1 The acceptance of a mandate obliges the arbitrators and, where applicable, the arbitral institution to comply faithfully with their responsibility. If they do not do so, by reason of bad faith, recklessness or fraud, they will be liable for the damage and losses they cause.\textsuperscript{24} Where the arbitration is entrusted to an arbitral institution, the injured party shall have a direct action against the institution, regardless of any actions for compensation available against the arbitrators.\textsuperscript{25} Arbitrators and arbitral institutions are obliged to subscribe for professional liability insurance or equivalent insurance in the amount established by regulation. Public entities and arbitration systems which are integrated or dependent on public administration are not required to take out insurance.

5.5 Provision of funds
5.5.1 Unless otherwise agreed, both the arbitral tribunal and the arbitral institution may require from the parties the provision of funds that they consider necessary to

\textsuperscript{20} See Spanish Arbitration Act, art 15.
\textsuperscript{21} Ibid, art 19.1.
\textsuperscript{22} Ibid, art 19.2.
\textsuperscript{23} Ibid, art 20.
\textsuperscript{24} Ibid, art 21.1.
\textsuperscript{25} Ibid, art 21.1.
meet the fees and expenses of the arbitral tribunal and those that may be incurred in the administration of the arbitration. Should the parties fail to provide the funds, the arbitral tribunal may suspend or terminate the arbitral proceedings. If one of the parties has not made its provision within the time fixed, the arbitral tribunal, before deciding whether to terminate or suspend the proceedings, shall inform the remaining parties so that they may provide the funds within a further period fixed by the arbitral tribunal, should they wish to do so.

6. Jurisdiction of the arbitral tribunal

6.1 Competence to rule on jurisdiction

6.1.1 The arbitral tribunal may determine its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any other objection, the acceptance of which would prevent the arbitral tribunal from entering into the merits of the dispute. For this purpose, an arbitration agreement which forms part of a contract shall be treated as severable from the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not invalidate the arbitration agreement.

6.1.2 Any objection referred to in the previous paragraph must be raised no later than the submission of the statement of defence. The fact that a party has appointed an arbitrator or participated in the appointment of the arbitral tribunal shall not preclude that party from raising such an objection. The objection that the arbitral tribunal is exceeding the scope of its jurisdiction shall be made as soon as the matter alleged to be beyond the scope of the arbitral tribunal’s jurisdiction is introduced to the arbitral proceedings.

6.2 Power to order interim measures

6.2.1 Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, order such interim measures as it considers necessary in respect of the subject of the dispute. The arbitral tribunal may require appropriate security from the applicant.

26 Ibid, art 21.2.
27 Ibid, art 21.2.
28 Ibid, art 22.1.
29 Ibid, art 22.2.
30 Ibid, art 22.2.
31 Ibid, art 23.1.
6.2.2 The provisions relating to the setting aside and enforcement of awards apply to the arbitral decisions in respect of interim measures, regardless of the form of those measures.  

7. Conduct of proceedings

7.1 Commencement of arbitration
7.1.1 Unless otherwise agreed by the parties, the arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

7.2 General procedural principles
7.2.1 The parties shall be treated with equality and each party shall be given the opportunity to present its case fully. Also, the arbitral tribunal, the parties and the arbitral institutions, if applicable, are obliged to keep any information coming into their knowledge during the course of the arbitral proceedings confidential.

7.2.2 The parties may freely agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of the Spanish Arbitration Act, 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 and usefulness of any evidence, the manner of taking evidence (including evidence obtained or introduced on the arbitral tribunal’s own motion) and the weight of such evidence.

7.3 Seat, place of hearings and language of the arbitral proceedings
7.3.1 The parties are free to agree on the seat of the arbitration. If there is no agreement, the seat of the arbitration shall be determined by the arbitral tribunal, having regard to the circumstances of the case and the convenience of the parties. The arbitral tribunal may, after consulting the parties, meet at any place it considers appropriate.

---

32 Spanish Arbitration Act, art 23.2.
33 Ibid, art 27.
34 Ibid, art 24.
36 Ibid, art 25.2.
for hearing witnesses, experts or the parties or to inspect objects, documents or persons. The arbitral tribunal may deliberate at any place it considers appropriate.\textsuperscript{37}

7.3.2 In respect of the language of the arbitration, the parties are free to agree on the language to be used in the arbitration. Failing such agreement, the arbitral tribunal shall determine the language, having regard to the circumstances of the case.\textsuperscript{38}

7.4 Oral hearings and written proceedings
7.4.1 Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of oral arguments, the taking of evidence and the submission of conclusions or whether the proceedings shall be conducted solely in writing. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.\textsuperscript{39}

7.5 Court assistance in taking evidence
7.5.1 The arbitral tribunal, or any party with their approval, may request assistance from the competent court in taking evidence, in accordance with the applicable Spanish rules on the taking of evidence. This assistance may comprise the taking of evidence before the competent court or the adoption by the competent court of specific measures necessary so that the evidence may be taken before the arbitral tribunal.\textsuperscript{40}

7.5.2 If requested, the court shall take evidence under its exclusive supervision. Otherwise, the court shall limit itself to ordering only those measures necessary. In either case, the court shall deliver to the applicant a certified copy of the proceedings to use in the arbitral proceedings.\textsuperscript{41}

7.6 Specific rules
7.6.1 The Act also provides for specific rules regarding arbitration of corporate disputes and for an arbitration mechanism for disputes between different bodies of the Spanish Public Administration.

\textsuperscript{37} Ibid, art 26.2.
\textsuperscript{38} Ibid, art 28.1.
\textsuperscript{39} Ibid, art 30.1.
\textsuperscript{40} Ibid, art 33.1.
\textsuperscript{41} Ibid, art 33.2.
8. Making of the arbitral award and termination of proceedings

8.1 Choice of law

8.1.1 The arbitral tribunal shall base its decision on equitable principles only if the parties have expressly authorised them to do so.\textsuperscript{42}

8.1.2 When the arbitration is international in nature, the arbitral tribunal must decide the dispute in accordance with the law chosen by the parties. Any designation of the law or legal system of a given state shall be construed, unless otherwise stated, as referring to the substantive law of that state and not to its conflict of law rules. If the parties fail to specify the applicable law then the arbitral tribunal shall apply the law that it considers appropriate.\textsuperscript{43}

8.1.3 In all cases, the arbitral tribunal shall decide the applicable law in accordance with the terms of the contract and shall take applicable usages and commercial customs into account.\textsuperscript{44}

8.2 Timing, form, content and notification of the arbitral award

8.2.1 Unless otherwise agreed by the parties, the arbitral tribunal shall decide the dispute in a single reasoned award or in as many partial awards as it deems necessary.\textsuperscript{45}

8.2.2 Unless otherwise agreed by the parties, the arbitral tribunal must decide the dispute within six months of the date of submission of the statement of defence or the expiry of the submission deadline. This period of time may be extended by the arbitral tribunal by means of a reasoned decision, for a period not to exceed two months; although this is also subject to an agreement by the parties to the contrary.\textsuperscript{46}

8.2.3 If a final award is not issued within the submission deadline, the arbitral proceedings and the mandate of the arbitral tribunal shall terminate. Unless otherwise agreed by the parties, the expiry of the period to issue the final award shall not affect the efficacy of the arbitration agreement or the validity of the award issued, without

\textsuperscript{42} Spanish Arbitration Act, art 34.1.

\textsuperscript{43} Ibid, art 34.2.

\textsuperscript{44} Ibid, art 34.3.

\textsuperscript{45} Ibid, art 37.1.

\textsuperscript{46} Ibid, art 37.2.
prejudice to any liability that the arbitrators may have incurred. Accordingly, if a party wished to pursue its claim further, it would be required to commence new arbitral proceedings.

8.2.4 The award shall be made in writing and shall be signed by the arbitrators, who may add any dissenting opinions. Where there is more than one arbitrator, the signatures of the majority of members of the arbitral tribunal, or, alternatively, the signature of the chair alone, shall make the award binding, provided that the reason for any omitted signature is stated.

8.2.5 The award shall state the reasons upon which it is based, unless the parties have agreed otherwise.

8.2.6 The arbitral tribunal shall provide the award to the parties in the form and time agreed by the parties. In the absence of any agreement, each party should receive a copy of the award signed in accordance with the requirements set out in paragraph 8.2.4 above.

8.3 Settlement

8.3.1 If, during arbitral proceedings, the parties wholly or partially settle the dispute, the arbitral tribunal shall terminate the proceedings in respect of the points agreed. If requested by both parties and not objected to by the arbitral tribunal, the settlement shall be recorded in the form of an award on agreed terms.

8.4 Costs

8.4.1 Subject to the agreement of the parties, the arbitral tribunal shall determine which party (if any) is liable for costs in the award. Such costs may include the fees and expenses of the arbitral tribunal, the cost of the services provided by the institution administering the arbitration, the fees and expenses of counsel or representatives of the parties (where applicable) and other expenses of the arbitral proceedings.

8.5 Termination of the proceedings

8.5.1 The arbitral proceedings and the mandate of the arbitral tribunal both terminate with the final award.

---

48 Ibid, art 37.3.
49 Ibid, art 37.4.
50 Ibid, art 37.7.
51 Ibid, art 36.1.
52 Ibid, art 37.6.
8.5.2 The arbitral tribunal shall also issue an order for the termination of the arbitral proceedings when:

— the claimant withdraws the claim, unless the respondent objects to the withdrawal and the arbitral tribunal recognises the respondent’s legitimate interest in obtaining a final settlement of the dispute;
— the parties agree to terminate the proceedings; or
— the arbitral tribunal finds that the continuation of the proceedings has for whatever reason become unnecessary or impossible.\(^\text{53}\)

8.6 Correction, clarification and issue of a supplemental arbitral award

8.6.1 Within one month of receipt of the award,\(^\text{54}\) unless another period of time has been agreed upon by the parties, any party, with notice to the other party, may request that the arbitral tribunal:

— corrects any errors in the issued award such as errors in computation, clerical or typographical errors or other errors of a similar nature;
— clarifies a point or a specific part of the award;
— supplements the award by taking into account other claims presented in the arbitral proceedings, but not resolved in the issued award; or
— corrects any excesses of jurisdiction.

8.6.2 In this sense, the Spanish Arbitration Act avoids the reference in Article 33 of the Model Law (1985) to an “additional award” to address omissions.\(^\text{55}\) The practical difference is that a successful application under Article 33(3) of the Model Law (1985) results in two separate awards (the original award and an additional award), while the procedure under the Spanish Arbitration Act results in a single (although supplemented) award.

8.6.3 After hearing the other party’s comments, the arbitral tribunal shall decide on applications for the correction of errors and for clarification within one month. The application for issuing a supplement to the issued award shall be decided within two months.\(^\text{56}\)

\(^{53}\) Ibid, art 38.2.

\(^{54}\) One month is the time frame that relates to “international” arbitral proceedings. For “domestic” arbitral proceedings, the applicable time frame is 10 days. See Spanish Arbitration Act, art 39.1. Factors that render arbitral proceedings “international” are: i) that, at the time of conclusion of the arbitration agreement, the parties have their addresses in different states; ii) that the seat of arbitration as determined in the arbitration agreement or the place of substantial performance of the obligations under the contract or the place most associated with the contract, is situated outside the state in which the parties have their address; or iii) that the legal relationship underlying the dispute affects international trade interests.


\(^{56}\) Spanish Arbitration Act, art 39.2.
8.6.4 Within one month of the date of the issued award, the arbitral tribunal may at its own instigation correct any computational, clerical or typographical errors or other errors of a similar nature.\(^5^7\)

9. Role of the courts

9.1 Jurisdiction of the courts
9.1.1 The Spanish Arbitration Act follows the Model Law (1985)\(^5^8\) in this regard and no court shall intervene except where provided by the Spanish Arbitration Act. The appropriate court of first instance will likely depend on the issue to be determined, as discussed below.

9.2 Judicial appointment of arbitrators
9.2.1 The court of first instance at the seat of the arbitration shall have jurisdiction in respect of the judicial appointment of arbitrators. If the seat of the arbitration has not yet been determined, then jurisdiction shall reside with the court of first instance at the domicile or habitual place of residence of any of the respondents. If none of the respondents have their domicile or habitual place of residence in Spain, the court of first instance of the domicile or habitual place of residence of the claimant shall have jurisdiction. If the claimant’s domicile or habitual place of residence is not in Spain, then the claimant is allowed to choose the court of first instance.\(^5^9\)

9.3 Interim measures
9.3.1 The court of first instance at the place where any award will be enforced shall have jurisdiction in respect of interim measures. In the absence of such a court, the court of first instance at the place where the measures must be implemented shall have jurisdiction.\(^6^0\)

9.3.2 The following interim measures may be ordered, among others:
— a pre-judgment schedule, aimed at ensuring the enforcement of judgments ordering the delivery of amounts of money or yields, rents and perishable goods that can be estimated in cash by applying fixed prices. In addition to these examples, a pre-judgment schedule would also be appropriate if it

\(^5^7\) Ibid, art 39.3. With regard to “domestic” arbitral proceedings, the time frame is 10 days.


\(^5^9\) Spanish Arbitration Act, art 8.1.

\(^6^0\) Ibid, art 8.3. With regard to courts where interim measures must be enforced, see Spanish Civil Procedure Act (2000), art 724.
would be the most suitable measure and could not be substituted by another measure that is equally or more efficient and less damaging for the respondent;

— the intervention or court-ordered receivership of profitable assets, when a judgment is sought ordering their delivery on the basis of legal, beneficial or any other title involving a legitimate interest in maintaining or improving profitability. Similarly, when guaranteeing profitability is deemed to be of paramount importance for the effectiveness of the final judgment court-ordered receivership may be a valid interim measure;

— the deposit of a moveable asset, when through the arbitration the claimant is seeking delivery of the said asset and the asset is in the possession of the respondent;

— the drawing up of inventories of assets in accordance with conditions to be specified by the court;

— the precautionary registration of the claim when the claim refers to assets or rights subject to recording in public registries;

— other registrations where publication in the relevant register may assist in ensuring effective enforcement;

— a court order to provisionally cease an activity. This may involve an order to temporarily abstain from certain conduct or an activity or an order prohibiting the suspension of specific conduct or an activity;

— the intervention and deposit of income obtained through an activity considered illicit and whose prohibition or cessation is requested in the claim, as well as the deposit of amounts claimed as compensation for breaches of intellectual property rights;

— the temporary deposit of works or objects allegedly produced in breach of rules on intellectual and industrial property, as well as the deposit of any material or devices used for their production;

— The suspension of a company resolution by the claimant or claimants who represent at least one or five per cent of the company’s capital, depending on whether or not the respondent company has issued securities that, at the time of the dispute, are listed on an official secondary market; and

— any other measures expressly established by law for the protection of certain rights or deemed necessary to ensure the effective enforcement of an award that may be granted at judgment.

9.4 Obtaining evidence and other court assistance

9.4.1 The court of first instance at the seat of the arbitration or that of the place where the assistance is required has jurisdiction in respect of judicial assistance in the obtaining of evidence.61

61 See Spanish Arbitration Act, art. 8.4.
9.5  **Enforcement of the arbitral award**
9.5.1 The court of first instance at the place where the award was issued shall have jurisdiction to enforce the award, in accordance with Article 545.2 of the Spanish Civil Procedure Act (2000) and, where applicable, Article 958 of the Spanish Civil Procedure Act of 1881.

10. **Challenging and appealing an arbitral award**

10.1  **Applications to set aside an arbitral award**
10.1.1 An award may be set aside only if the party making the application alleges and proves:
— that the arbitration agreement does not exist or is not valid;
— that the claimant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
— that the arbitral tribunal decided questions beyond its jurisdiction;
— that the appointment of the arbitrators or the arbitral procedure was not in accordance with the provisions of the Spanish Arbitration Act nor with the agreement of the parties, unless such agreement was in conflict with a provision of the Spanish Arbitration Act from which the parties cannot derogate;
— that the arbitral tribunal decided questions not capable of settlement by arbitration; or
— that the award is in conflict with public policy.  

10.1.2 The provincial court of appeal at the place where the award was made shall have jurisdiction in an application to set aside an award.  

10.1.3 An application for setting aside an award shall be made within two months of the date on which the party making that application received the award or, if a request for correction, clarification or a request to supplement the award is made, the date on which the party making that application received the decision on that request or the date on which the term for making a decision concerning that request expired.  

---

62 Ibid, art 40 and 41.
63 Ibid, art 8.5.
64 Ibid, art 41.4.
10.1.4 The application to set aside an award shall follow the procedure for oral proceedings as set out in the Spanish Arbitration Act.65

10.1.5 The statement of claim that seeks to set aside the award shall be accompanied by documentation evidencing the arbitral agreement and the award. If applicable, it shall also propose the evidence upon which the applicant intends to rely.66

10.1.6 There is no appeal from the judgment made by the provisional court of appeal on the application to set aside the award.67

10.1.7 The award is not sent back to the arbitral tribunal for amendment and the arbitral tribunal may not be reconstituted to address the dispute again. The judgment takes effect res judicata, and so a party cannot start the arbitration afresh and a new arbitral tribunal cannot be constituted to address the dispute anew.

10.2 Res judicata and the revision of final arbitral awards

10.2.1 The final award has res judicata effect and shall only be subject to an appeal in accordance with the procedure established in the Spanish Civil Procedure Act (2000) for final judgments.

11. Recognition and enforcement of arbitral awards

11.1 Domestic arbitral awards

11.1.1 An award is enforceable even though an application to set it aside has been made. However, the party against whom enforcement is sought may apply to the competent court for the suspension of enforcement, provided that this applicant offers security for the amount awarded, plus the damages and losses that may arise from the delay in the enforcement of the award.68

11.1.2 The suspension shall be lifted and the enforcement will continue when the court is satisfied that the application to set aside has been rejected, without prejudice to the rights of the party seeking enforcement to demand, if applicable, indemnification for the damages and losses caused by the delay in the enforcement.69

---

65 Spanish Arbitration Act, art 42.1.
66 Ibid, art 42.1.
67 Ibid, art 42.2.
68 Ibid, art 45.1.
69 Ibid, art 45.2.
11.1.3 If a court grants an application to set aside an award, any previous enforcement of the set aside award will be revoked.\textsuperscript{70}

11.2 Foreign arbitral awards
11.2.1 The recognition of foreign awards (i.e. any award which has been issued outside Spanish territory\textsuperscript{71}) is governed by the New York Convention\textsuperscript{72} (without prejudice to the provisions of other, more favourable, international conventions) and takes place in accordance with the procedure set out in the civil procedure rules for judgments issued by foreign courts.\textsuperscript{73}

12. Concluding thoughts and themes

12.1.1 In conclusion, the provisions of the Spanish Arbitration Act mark a progressive step forward in the Spanish regulation of arbitration, which undoubtedly encourages its greater use.

12.1.2 The Spanish Arbitration Act has made Spain an attractive place for arbitration. The quality of Spain's legal services and its traditional hospitality are now joined by modern legislation that both protects and promotes arbitration as a means of resolving civil and commercial disputes, at national and international levels.

13. Contacts

CMS Álbiñana & Suárez de Lezo, S.L.P.
Calle Génova, 27
28004 Madrid
Spain

Juan Ignacio Fernández Aguado
T +34 91 4519 291
F +34 91 4429 735
E uanignacio.fernandez@cms-asl.com

\textsuperscript{70} Ibid, art 45.3.
\textsuperscript{71} Ibid, art 46.1.
\textsuperscript{72} See CMS Guide to Arbitration, vol II, appendix 1.1.
\textsuperscript{73} See Spanish Arbitration Act, art 46.2.
ARBITRATION IN SWEDEN

By Harald Nordenson and Marie Öhrström, Setterwalls
# Table of Contents

1. **Introduction**
   1.1 The Swedish Arbitration Act 1999 847
   1.2 Historical background 847

2. **Scope of application and general provisions of the Swedish Arbitration Act**
   2.1 Sources of law 848
   2.2 Scope of application 848

3. **The arbitration agreement**
   3.1 Formal requirements 849
   3.2 Arbitrability 849
   3.3 Separability 850

4. **Composition of the arbitral tribunal**
   4.1 The constitution of the arbitral tribunal 850
   4.2 Qualifications of arbitrators 851
   4.3 Procedure for challenging arbitrators 852

5. **Jurisdiction of the arbitral tribunal**
   5.1 Competence to rule on jurisdiction 854
   5.2 Power to order interim measures 855

6. **Applicable law**
   6.1 Law governing the arbitration agreement 856
   6.2 Law governing the arbitral proceedings 856
   6.3 Law governing the merits 857
   6.4 Law governing the legal capacity of the parties 857

7. **Conduct of proceedings**
   7.1 Commencing an arbitration 858
   7.2 General procedural principles 859
   7.3 Seat, place of hearings and language of arbitration 859
   7.4 Multi-party and multi-contract issues 860
   7.5 Written submissions 861
   7.6 Oral hearings 862
7.7 Default
7.8 Amendments of claims
7.9 Evidence generally
7.10 Confidentiality

8. Making of the award and termination of proceedings
8.1 Decision making by the arbitral tribunal
8.2 Form, content and effect of the award
8.3 Power to award interest and costs
8.4 Correction, interpretation and issue of a supplemental award

9. Role of the courts
9.1 Interim protective measures
9.2 Obtaining evidence and other court assistance

10. Invalidity and challenging the award before the courts
10.1 Invalidity
10.2 Applications to set aside an award

11. Recognition and enforcement of awards
11.1 Domestic awards
11.2 Foreign awards

12. Conclusion

13. Contacts
1. **Introduction**

1.1 **The Swedish Arbitration Act 1999**

1.1.1 On 1 April 1999 the present Swedish Arbitration Act (*Swedish Arbitration Act*)\(^1\) came into force. Although Sweden did not formally adopt the Model Law (1985),\(^2\) it was an important source of inspiration when drafting the Swedish Arbitration Act. As a result, the Swedish Arbitration Act, to a great extent, contains identical or similar provisions to the Model Law (1985). Accordingly, the Swedish Arbitration Act should not present any major surprises. However, there are some features which deviate from the Model Law (1985).

1.2 **Historical background**

1.2.1 Arbitration in Sweden has a long tradition which goes back to the 14th century when it was established that disputes could be submitted to so-called “entrusted persons”. In the 1734 Statute Book, the Swedish Enforcement Code contained a provision on arbitration to the effect that if parties had referred a dispute to entrusted persons, and agreed to abide by their decision, such a decision was enforceable.

1.2.2 The first comprehensive arbitration act was adopted in 1887. Subsequently, a new arbitration act came into force in 1929. As a result of Sweden’s accession to the 1923 Geneva Protocol and the 1927 Geneva Convention, the Swedish legislature also enacted the Foreign Arbitration Agreements and Awards Act.\(^3\)

1.2.3 Consequently, it was not until the 1990s that the arbitration legislation was thoroughly revised. This revision resulted in the present Swedish Arbitration Act which came into force from 1999. One reason for the revision was the fact that, since the 1970s, Sweden had become a significant venue for cross border arbitration, primarily with parties from the USA on one side, and parties from the Soviet Union on the other. Sweden has since managed to maintain this “East-West” position. Today Sweden remains a popular choice as the seat of arbitration with many parties from Russia, Ukraine and the People’s Republic of China when negotiating the terms of an arbitration agreement with counterparties from the USA, Canada and Western Europe.

---


\(^3\) The Act Concerning Foreign Arbitration Agreements and Awards of 1929, SFS 1929:147.
2. Scope of application and general provisions of the Swedish Arbitration Act

2.1 Sources of law
2.1.1 Sweden is a civil law jurisdiction and as such, the primary sources of law are statutes. If the legislation does not provide a sufficient answer, preparatory works (travaux préparatoires) and scholarly writings are taken into consideration as secondary sources of law.

2.1.2 The preparatory works relevant when interpreting the Swedish Arbitration Act consist of the Committee Report, Statens offentliga utredningar,4 as well as the Government Bill.5 However, it should be noted that the importance of these preparatory works has gradually diminished in recent years.

2.1.3 In Sweden the decisions of higher courts are not, in the formal sense, binding on lower courts. However, in practice, the judgments and decisions made by the Swedish Supreme Court are followed. The most important decisions from the Supreme Court appear in a publication called “Nytt Juridiskt Arkiv”.

2.1.4 The revisions of the Model Law (1985) and the UNCITRAL Arbitration Rules (1976),6 and the development of the different sets of IBA Guidelines concerning arbitration, as well as the rules and policies of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and other major arbitral institutions, have all influenced the development of Swedish arbitration law. Such soft law sources have also been explicitly considered in case law when interpreting the Swedish Arbitration Act.7

2.2 Scope of application
2.2.1 The Swedish Arbitration Act applies to arbitral proceedings commenced after 1 April 1999. This includes arbitral proceedings commenced after 1 April 1999 where the parties entered into an arbitration agreement prior to this date.

---

7 Jilkén v Ericsson NJA 2007, p 841.
2.2.2 The Swedish Arbitration Act applies equally to domestic and international arbitration, provided that the seat of arbitration is Sweden. Moreover, certain provisions of the Swedish Arbitration Act apply even if the seat of arbitration is outside Sweden, for example, the provisions regarding the recognition and enforcement of foreign awards in Sweden.

3. The arbitration agreement

3.1 Formal requirements
3.1.1 Under Swedish law an arbitration agreement is, as a general rule, not considered any different from other agreements in respect of its validity. Thus, the arbitration agreement must not be tainted by duress, fraud, mistake or any other circumstances which may make it void under the ordinary rules of contract law.

3.1.2 No particular form is required as regards the arbitration agreement. This means that oral arbitration agreements are also legally binding and accepted. However, practically all arbitration agreements are in written form, either as a dispute resolution clause in a general business contract or, more rarely, entered into separately by the parties once a dispute has emerged.

3.1.3 The parties must have the legal capacity to conclude an arbitration agreement, i.e. if a party is a corporation, it must be properly constituted and validly represented.

3.1.4 There must not be any circumstances leading to the enforcement of the arbitration agreement being considered “unreasonable”. In exceptional cases, the arbitral tribunal or a court may set aside or amend an arbitration agreement if it is deemed unfair, this might be the case if one party is in a disproportionately strong negotiating position relative to a much weaker counterparty.

3.2 Arbitrability
3.2.1 The subject matter of the dispute must be “arbitrable”, i.e. it must be capable of settlement by arbitration under the laws of Sweden. Arbitrability is governed by Swedish law, even when foreign law is applied to the arbitration agreement or to the merits of the case. Certain disputes, for example, the registration and validity

---

8 Swedish Arbitration Act, s 46.
9 Ibid, s 52–60.
10 Swedish Contracts Act, s 36.
11 Swedish Arbitration Act, s 1(1).
12 Ibid, s 49(2).
of patents and trademarks, questions of punishment and forfeiture, as well as family and criminal law matters, are non-arbitrable under Swedish law.

3.3 Separability

3.3.1 The jurisdiction of an arbitral tribunal depends on the existence of a valid arbitration agreement. Such an agreement is often incorporated by the parties in their general business contracts. If the parties have done so, the question may arise as to what influence any alleged invalidity of the general business contract will have on the arbitration clause and the arbitral tribunal's powers. Under the doctrine of separability, where the validity of an arbitration agreement which constitutes part of another agreement must be determined, the arbitration agreement shall be deemed to constitute a separate agreement.¹³ Thus, even though the main agreement may be invalid, this does not automatically affect the validity of the arbitration clause. In practice this means that the arbitration clause is considered a separate agreement from the main contract. This safeguards the efficiency of the arbitral proceedings and allows the issue of the validity of a contract containing an arbitration clause to be submitted to arbitration.

4. Composition of the arbitral tribunal

4.1 The constitution of the arbitral tribunal

4.1.1 The statutory framework for appointing arbitrators is, to a large extent, non-mandatory. It can, therefore, be modified or replaced by the parties by, inter alia, express appointment provisions in the arbitration agreement, for example, by referring to the rules of any arbitral institution (e.g. the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules)¹⁴) or by designating an appointing authority.

4.1.2 The parties are free to appoint one or more arbitrators, and to determine the manner in which they are appointed.¹⁵ However, sole arbitrators are normally only appointed in minor and less complicated matters. For example, the SCC has developed a specific set of rules for expedited arbitrations, the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Expedited Rules).¹⁶ Pursuant to the SCC Expedited Rules, the arbitral

---

¹³ Ibid, s 3.


¹⁵ Swedish Arbitration Act, s 1(1) and 12(1).

¹⁶ For the full text of the SCC Expedited Rules, see [http://www.sccinstitute.com/forenklade-regler-2.aspx] (last accessed on 2 December 2011).
tribunal always consists of a sole arbitrator appointed either by the parties jointly or by the SCC.\textsuperscript{17}

4.1.3 Unless the parties have agreed otherwise, the arbitral tribunal shall consist of three arbitrators, of which each party shall appoint one and the party-appointed arbitrators shall appoint the third to be the chair of the arbitral tribunal.\textsuperscript{18}

4.1.4 The first party shall notify the opposing party of its choice of arbitrator in its request for arbitration.\textsuperscript{19} The receipt of such notice triggers an obligation for the opposing party to notify the first party of its choice of arbitrator in writing within 30 days.\textsuperscript{20} If the opposing party fails to appoint an arbitrator within this timeframe, the District Court shall appoint an arbitrator at the request of the first party. Another alternative for the first party is to abandon arbitration and bring the dispute before a state court.\textsuperscript{21} A valid arbitration agreement is normally a bar to the jurisdiction of the courts, but this does not apply when the other party has failed to properly appoint an arbitrator.

4.1.5 Should the party-appointed arbitrators fail to appoint the third arbitrator, i.e. the chair of the arbitral tribunal then, within 30 days from the date on which the last arbitrator was appointed, any party may apply to the District Court to make such an appointment.\textsuperscript{22}

4.2 Qualifications of arbitrators
4.2.1 Under Swedish law, any person who enjoys full age and capacity with regard to his or her actions and property may act as an arbitrator.\textsuperscript{23} Consequently, an arbitrator must be of full age and cannot have a trustee or be bankrupt.

4.2.2 Under the Swedish Arbitration Act, an arbitrator must be impartial.\textsuperscript{24} For proceedings under the SCC Rules a person acting as arbitrator must also be independent.\textsuperscript{25} Even though the Swedish Arbitration Act does not expressly refer to independence, this requirement is generally deemed to be implied in the impartiality obligation.

\textsuperscript{17} SCC Expedited Rules, art 12, 13(1) and 13(2).
\textsuperscript{18} Swedish Arbitration Act, s 13.
\textsuperscript{19} Ibid, s 19(2) and 19(3).
\textsuperscript{20} Ibid, s 14(1).
\textsuperscript{21} Ibid, s 5(2).
\textsuperscript{22} Ibid, s 15(1).
\textsuperscript{23} Ibid, s 7.
\textsuperscript{24} Ibid, s 8(1).
\textsuperscript{25} SCC Rules, art 14(1).
4.2.3 An arbitrator can be discharged at the request of one of the parties if there are circumstances which may diminish confidence in the arbitrator’s impartiality. Under the Swedish Arbitration Act, such circumstances include:

— where the arbitrator, or a person closely associated to the arbitrator, is a party to the dispute;
— where the arbitrator, or a person closely associated to the arbitrator, may expect to benefit or suffer detriment worth attention as a result of the outcome of the dispute;
— where the arbitrator, or a person closely associated to the arbitrator, is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect to benefit or suffer detriment worth attention as a result of the outcome of the dispute;
— where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of its case in the dispute; or
— where the arbitrator has received or demanded compensation in violation of Section 39(2) of the Swedish Arbitration Act.\(^{26}\)

4.2.4 There are also other situations when an arbitrator might be disqualified, as established under Swedish case law.\(^{27}\)

4.2.5 Both the Swedish Arbitration Act and the SCC Rules impose on arbitrators an express disclosure obligation to the parties in respect of any circumstances which, pursuant to Sections 7 or 8 of the Swedish Arbitration Act, may prevent him or her from serving as an arbitrator. This obligation starts when the arbitrator is approached with the assignment and lasts throughout the entire arbitral proceedings.\(^{28}\) In borderline cases, the failure to disclose relevant circumstances may be a factor to take into account when assessing whether an arbitrator is impartial or not.

### 4.3 Procedure for challenging arbitrators

#### 4.3.1 A challenge to an arbitrator must be presented to the arbitral tribunal (or the SCC for SCC proceedings) within 15 days of the date on which the party became aware

---

\(^{26}\) Swedish Arbitration Act, s 8(2).  
\(^{27}\) See Jilkén v Ericsson NJA 2007, p 841, where the Swedish Supreme Court (Supreme Court) addressed several questions concerning the impartiality of arbitrators, ultimately finding that there were justifiable doubts as to the arbitrator’s impartiality since he was a part-time consultant with a law firm which had Ericsson as one of its major clients. Further, see Korsnäs Aktiebolag v AB Fortum Värme samägt med Stockholms stad NJA 2010, p 317, where the Supreme Court held that an arbitrator appointed by the same law firm on repeated occasions did not cause sufficient doubts as to the arbitrator’s impartiality to be raised because, inter alia, the majority of his appointments came from other law firms.  
\(^{28}\) Swedish Arbitration Act, s 9.
both of the appointment of the arbitrator and of the existence of the circumstances forming the grounds for the challenge.\textsuperscript{29}

4.3.2 A challenge in an ad hoc arbitration is adjudicated by the arbitral tribunal, unless the parties have decided that it shall be determined by another party, for instance an arbitral institution such as the SCC.\textsuperscript{30}

4.3.3 If a challenge is sustained, the decision is not subject to appeal. However, a party that is dissatisfied with a decision not leading to the removal of an arbitrator may file an application with the District Court that the arbitrator should be released from his or her post. Such an application must be submitted within 30 days of the date on which the party receives the decision.\textsuperscript{31} The arbitral tribunal may continue with the arbitral proceedings pending the determination of the District Court.

4.3.4 In an SCC arbitration, any challenge to an arbitrator is decided by the SCC Board.\textsuperscript{32} Decisions of the SCC Board are final and not subject to appeal. The SCC normally does not publish the reasons for its decisions regarding challenges but does publish articles containing statistics and the outcome in anonymous challenge cases on a regular basis.

\textit{Replacement of arbitrators}

4.3.5 If an arbitrator resigns or is discharged, a new arbitrator will be appointed by the District Court at the request of one of the parties, unless they have agreed otherwise.\textsuperscript{33} Where the arbitrator cannot fulfil his or her duties due to circumstances which arise after his or her appointment, the person who was originally required to make the appointment shall do so according to the procedure set out in Sections 14 and 15 of the Swedish Arbitration Act, i.e. the same procedure as was applied when appointing the original arbitrator.

4.3.6 If an arbitrator is removed in an SCC arbitration, the SCC Board shall appoint a new arbitrator unless the arbitrator being replaced was a party-appointed arbitrator in which case, provided the SCC Board deems it appropriate, the appointing party shall appoint the new arbitrator.\textsuperscript{34}

\textsuperscript{29} Ibid, s 10(1) and SCC Rules, art 15(2).
\textsuperscript{30} Swedish Arbitration Act, s 11.
\textsuperscript{31} Ibid, s 10(3).
\textsuperscript{32} SCC Rules, art 15(4).
\textsuperscript{33} Swedish Arbitration Act, s 16.
\textsuperscript{34} SCC Rules, art 17(1).
4.3.7 Where an arbitrator has been replaced, the newly composed arbitral tribunal shall, after consultation with the parties, decide whether, and to what extent, the arbitral proceedings are to be repeated. In SCC cases there is the possibility to proceed with a “truncated tribunal” in order to avoid unnecessary loss of time and increased costs. Before the SCC Board makes its decision, the parties and the arbitral tribunal have the opportunity to submit comments to the SCC Board on whether to proceed with the arbitration.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 Swedish arbitration law recognises the well known principle of competence-competence whereby the arbitral tribunal has the authority to rule on its own jurisdiction. This rule empowers the arbitral tribunal to declare itself authorised to conduct the arbitral proceedings and to make an award in the dispute, or to rule that it lacks jurisdiction and to dismiss the dispute.

5.1.2 If the arbitral tribunal finds that it lacks jurisdiction, it shall dismiss the dispute through an award. A dissatisfied party may appeal such an award on its merits. However, should the arbitral tribunal determine that it has jurisdiction, this is formally a decision (i.e. not an award). A decision is, as a general rule, not binding on either the parties or the arbitral tribunal. Accordingly, the arbitral tribunal may change its decision if new circumstances occur in the course of the arbitral proceedings. Nonetheless, a decision on jurisdiction may become binding upon a party if that party is considered to have waived its right not to be bound by continuing to participate in the arbitral proceedings without properly objecting. A party also has a right to bring a court action for the purpose of obtaining a final and binding judgment as to whether the arbitration agreement is valid and applicable.

5.1.3 Thus, a state court can arrive at a different decision from the arbitral tribunal when it comes to the competence of the arbitral tribunal. The court’s determination of these matters is made in a judgment issued under the challenge procedure set out

---

36 Swedish Arbitration Act, s 2(1).
37 Ibid, s 27(1) and 36.
38 Ibid, s 27(1) and 27(3).
39 See Swedish Arbitration Act, s 34(2) and SCC Rules, art 31.
40 Swedish Arbitration Act, s 2(1).
in Section 34 of the Swedish Arbitration Act, or in litigation where one party requests a declaratory judgment resolving issues of arbitrability, validity or the applicability of the arbitration agreement.41

5.2 **Power to order interim measures**

5.2.1 According to Swedish law, an arbitration agreement does not constitute a procedural impediment against a state court granting interim relief, such as freezing orders and other security measures.42 In addition to the power of a state court to order interim measures,43 the arbitral tribunal may, at the request of a party, order interim measures in the course of arbitral proceedings, unless the parties have agreed otherwise.44 The arbitral tribunal may prescribe that the party requesting the interim measure must provide reasonable security for the damages the opposing party may incur as a result of such interim measure.45

5.2.2 A similar provision concerning the power to order interim measures is found in the SCC Rules.46 In addition, the SCC introduced new provisions in 2010 concerning a so-called “emergency arbitrator”.47 This is an arbitrator appointed solely to order interim measures, either before arbitral proceedings have been commenced, or before a case has been referred to the arbitral tribunal deciding the subject matter of the case. The SCC shall seek to appoint an emergency arbitrator within 24 hours of the receipt of an application for the appointment, and the emergency arbitrator appointed shall, as a general rule, make his or her decision on interim measures within five days of the date on which the application was referred to the emergency arbitrator.48

5.2.3 Interim measures ordered by an arbitral tribunal, cannot be enforced in Sweden. If parties want to be able to enforce interim measures they will, therefore, have to apply to the courts for such interim relief. In this respect, Swedish law deviates from the fairly new provisions in the Model Law (2006) on the enforceability of interim measures made by an arbitral tribunal.49

---

41 See RosInvest Co UK Ltd v The Russian Federation Case No Ö 2301-09, 12 November 2010, where the Supreme Court set out the criteria for when such a declaratory judgment is permitted.
42 Swedish Arbitration Act, s 4(3) and Swedish Code of Judicial Procedure (Procedural Code), ch 15, s 5.
43 On which see further section 9.1 below.
44 Swedish Arbitration Act, s 25(4).
45 *Ibid*.
46 SCC Rules, art 32.
47 *Ibid*, appendix II.
6. Applicable law

6.1 Law governing the arbitration agreement

6.1.1 As a consequence of the doctrine of separability, the arbitration clause, in theory, is an independent agreement and may, therefore, be governed by the laws of a jurisdiction different from that governing the main contract. Under Swedish law, an arbitration clause is not automatically included within the scope of a choice of law clause that may be in the main contract.

6.1.2 Any law chosen by the parties will apply to the arbitration agreement. Naturally it is very unusual for the parties to include a different choice of law to apply to the arbitration agreement. Where the parties have not agreed on the law to apply to the arbitration agreement, the arbitration agreement shall be governed by the law of the country which, the parties have chosen as the seat of arbitration. Consequently, if the parties have not selected any law to be applied to the arbitration agreement but have agreed on Stockholm as the seat of arbitration, then Swedish law will govern the arbitration clause, as well as issues regarding the validity and scope of the arbitration clause. If the parties have failed to agree upon the seat of arbitration, such decision will be made by the arbitral tribunal. If the arbitration takes place under the SCC Rules, the SCC Board will determine the seat, unless the parties agree otherwise.

6.2 Law governing the arbitral proceedings

6.2.1 Arbitral tribunals are subject to the national arbitration law in the territory in which the arbitral proceedings take place. This national law is the law of the seat of the arbitration (lex arbitri). Under Swedish law, the Swedish Arbitration Act governs arbitral proceedings which take place in Sweden, notwithstanding that the dispute that is the subject of those arbitral proceedings has an international connection.

6.2.2 However, it must be noted that the Swedish Arbitration Act contains very few mandatory provisions which govern the conduct of the arbitral proceedings. The principle of party autonomy leaves ample room for the parties to agree on the conduct of the arbitral proceedings, or to refer to institutional rules, such as the SCC Rules, to supplement the Swedish Arbitration Act.

---

50 Swedish Arbitration Act, s 48(1).
51 Ibid, s 22(1).
52 SCC Rules, art 9 and 20(1).
53 Swedish Arbitration Act, s 46.
6.3 Law governing the merits
6.3.1 Under Swedish arbitration law, and in light of the principle of party autonomy, the parties are free to select the law governing the merits of their dispute. Usually this is done by including a governing law clause in the contract (*lex contractus*). By way of contrast to the Model Law (1985), the Swedish Arbitration Act does not contain any rules explaining which law the arbitral tribunal shall apply when considering the substantive issues in dispute. However, for an arbitral tribunal sitting in Sweden, the Swedish conflict of law rules may serve as a starting point in the search for the applicable substantive law.

6.3.2 Where the parties have not made any choice of law and have chosen the SCC Rules, it is for the arbitral tribunal to determine the applicable law. In order to avoid having to identify and apply a specific conflict of laws system, the arbitral tribunal is permitted to decide which law to apply based on what it finds appropriate given the merits of the dispute.\(^{54}\) This straightforward approach enhances the flexibility and efficiency of the arbitral proceedings since the arbitral tribunal does not need to use a two step method, i.e. to first determine the conflict of law system which applies and then find the applicable law. For arbitrations under the SCC Rules, Article 22 applies, which follows the principles set out above. Further, the arbitral tribunal will decide the dispute *ex aequo et bono* or as *amiable compositeur* only if expressly authorised to do so by the parties.\(^{55}\)

6.4 Law governing the legal capacity of the parties
6.4.1 The important issue of legal capacity, i.e. whether the parties were appropriately authorised to conclude the agreement (for example, corporations must be properly constituted and validly represented), is decided by the local law of the entity in question (*lex corporationis*). This law is typically the law of the country where the entity has been registered, provided that registration is required for the creation and existence of a legal entity. If registration is not required, the law of the place of the legal entity is normally applied. This conflict of law rule under Swedish law is also found in many other jurisdictions.\(^{56}\)

\(^{54}\) SCC Rules, art 22(2).

\(^{55}\) Ibid, art 22(3).

7. Conduct of proceedings

7.1 Commencing an arbitration

7.1.1 A party wishing to initiate arbitral proceedings does so by sending the proposed respondent a written “request for arbitration”, containing the following:
— an express and unconditional request for arbitration;
— a statement of the issue covered by the arbitration agreement which is to be resolved by the arbitrators; and
— if applicable, a statement regarding the party’s choice of arbitrator.  

7.1.2 The request for arbitration need not set forth any claims or state any grounds. However, the description of the matter in dispute shall provide the respondent with a sufficient basis to decide on the appointment of its arbitrator. As previously stated at paragraph 4.1.4 above, the time limit by which the respondent is to appoint an arbitrator commences on the day it receives the request for arbitration.

7.1.3 An SCC arbitration (if chosen by the parties) is commenced on the date when the SCC Secretariat receives a request for arbitration from the proposed claimant. This request shall include:
— a summary of the dispute and contact details of the parties and their counsel;
— details of the preliminary relief sought by the claimant;
— a copy or description of the arbitration agreement;
— any comments on the number of arbitrators and the seat of arbitration; and
— if applicable, the contact details of the arbitrator appointed by the claimant.

7.1.4 In addition, the claimant shall, upon filing the request for arbitration, pay a registration fee to the SCC. Presently this fee is EUR 1,500.

Proof of notification

7.1.5 As a general rule, service of the request for arbitration and the award must be received personally, i.e. by actual receipt of the document by a person duly authorised to receive it on behalf of the recipient. The burden of proof in this respect lies with the sender. Proper notification is a key issue when it comes to the enforcement of awards.

57 Swedish Arbitration Act, s 19.
58 SCC Rules, art 2.
60 Swedish Arbitration Act, s 54(2). See also Lenmorniproekt OAO v Arne Larsson & Partner Leasing AB Case No Ö 13-09, 16 April 2010, where the Supreme Court refused to enforce a Russian award due to unsatisfactory notice.
7.1.6 In SCC arbitrations, the SCC assumes the responsibility for serving the request for arbitration on the respondent once the request for arbitration has been filed and accepted by the SCC. Usually the SCC delivers the request for arbitration to the respondent either by registered mail if the respondent is domiciled in Sweden, or by courier service with confirmation of receipt if the respondent is domiciled abroad.

7.2 General procedural principles
7.2.1 The arbitral tribunal shall handle the dispute that is subject to the arbitral proceedings in a fair, impartial, practical and speedy manner. Additionally, the arbitral tribunal shall act in accordance with the decisions of the parties insofar as there is no impediment from doing so. This ensures that the arbitration is guided by the principles of party autonomy, due process and equal treatment of the parties.

7.2.2 In Sweden it is considered of great importance that the arbitral procedure maintains its flexibility. The arbitral tribunal should always adapt the procedure to the circumstances of the individual case and aim to prevent a more detailed and formalised procedure than is regarded necessary in order to conduct a fair process.

7.2.3 Moreover, the role of the Swedish state courts is restricted to supporting the arbitral proceedings in those circumstances expressly provided for in the Swedish Arbitration Act, such as to assist in the composition of the arbitral tribunal or in the process of obtaining of evidence. This standpoint is often referred to as “the principle of non-intervention”.

7.3 Seat, place of hearings and language of arbitration
7.3.1 In an ad hoc arbitration taking place in Sweden, the arbitral tribunal determines the seat of arbitration if it has not been decided by the parties. Unless the parties have agreed otherwise, the arbitral tribunal may hold hearings and other meetings elsewhere in Sweden, or abroad. The legal significance of the seat of arbitration has also been confirmed by case law.

7.3.2 If the SCC Rules apply, the seat of arbitration is decided by the SCC Board, unless otherwise agreed by the parties. In the event that the parties have not made any agreement concerning the seat of arbitration, the SCC will usually choose

---

61 Swedish Arbitration Act, s 21 and 24. See also SCC Rules, art 19(2).
62 Swedish Arbitration Act, s 22(2).
63 RosInvest Co UK Ltd v The Russian Federation Case No Ö 2301-09, 12 November 2010.
64 SCC Rules, art 20(1).
Stockholm, unless another place is deemed more appropriate. Additionally, in SCC cases the arbitral tribunal may, after consultation with the parties, conduct hearings in a different location to the seat of arbitration.65

7.3.3 The language of the arbitral proceedings is decided by the arbitral tribunal, unless otherwise agreed by the parties. This applies to an ad hoc arbitration as well as an SCC arbitration.66 Although the Swedish Arbitration Act does not include any specific provisions dealing with the power of the arbitral tribunal to decide the language of the arbitral proceedings, it is deemed to be implied from the arbitral tribunal’s freedom to conduct the arbitral proceedings as it considers appropriate.67

7.3.4 In determining the language to use, the arbitral tribunal shall take into consideration all relevant circumstances, for example, the language that has been used by the parties in their business relationship and the language of the contract in dispute.

7.4 Multi-party and multi-contract issues

7.4.1 Multi-party and multi-contract issues are not addressed by the Swedish Arbitration Act. Such disputes primarily raise concerns when it comes to appointing arbitrators and the consolidation of cases.

7.4.2 Since the Swedish Arbitration Act does not contain any provisions concerning the appointment of arbitrators in multi-party arbitrations, the parties are recommended either to set out detailed provisions on how the arbitral tribunal shall be constituted in the arbitration agreement, or to refer to a set of institutional arbitral rules that provide the parties with a practical solution on how to establish the arbitral tribunal.

7.4.3 The SCC Rules provide that where there are multiple claimants or respondents and the arbitral tribunal is to consist of more than one arbitrator, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointments, the SCC Board shall appoint the entire arbitral tribunal.68 This rule exists to ensure that the parties are treated equally when the arbitral tribunal is established.69 If the SCC Board appoints all of the arbitrators, neither of the parties may argue that they were discriminated against in the appointment process.

65 Ibid, art 20(2).
66 Ibid, art 21(1).
67 Swedish Arbitration Act, s 21.
68 SCC Rules, art 13(4).
7.4.4 When it comes to consolidation, it is not considered possible under Swedish law to join arbitrations without the consent of all the parties involved. However, by referring to the SCC Rules, the chances of consolidation are somewhat improved. At the request of a party, the SCC Board may consolidate cases if the cases concern the same parties and the same legal relationship.\(^\text{70}\) To date the SCC Rules do not provide for consolidation of cases with different parties, or for a new party to join a pending arbitration. In order for this to occur the parties must be in agreement.

7.5 **Written submissions**

7.5.1 The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their cases in writing or orally.\(^\text{71}\) Further, a party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitral tribunal by the opposing party or another person.\(^\text{72}\)

7.5.2 As a general rule, the arbitral tribunal establishes a timetable for the arbitral proceedings at an initial stage of the proceedings. Within this timetable, the claimant shall state its claims in respect of the issues set out in its request for arbitration, as well as its evidence in support thereof. The respondent shall then state its position in relation to the claims and, likewise, its evidence in support.\(^\text{73}\)

7.5.3 A statement of claim typically includes the following parts:
- prayers for relief;
- the facts of the issue stated in the request for arbitration; and
- the legal grounds in support of the prayers for relief.

7.5.4 The respondent’s statement of defence typically includes:
- any objections concerning the jurisdiction of the arbitral tribunal;
- a statement whether, and to what extent, the claimant’s prayers for relief are denied or admitted;
- any counterclaim or set-off;
- the facts of the issue; and
- the legal grounds supporting any counterclaim or set-off.

7.5.5 Under Swedish law, the prayers for relief are expected to be very specific in order that there is no doubt as to the award requested. The parties are also expected to

---

\(^{70}\) SCC Rules, art 11.

\(^{71}\) Swedish Arbitration Act, s 24(1).

\(^{72}\) Ibid, s 24(2).

\(^{73}\) Ibid, s 23(1).
explain the legal grounds for each prayer for relief, i.e. referring to the legal notion and statutory provision on which they are based. The same applies to any counterclaim or set-off sought by the respondent.

7.5.6 Usually the documents and oral evidence on which the parties rely are submitted separately in a statement of evidence. Sometimes selected documents are already enclosed with the statements of claim and defence.

7.5.7 After the statements of claim and defence have been submitted they are usually followed by further submissions from both parties respectively (i.e. a reply to the statement of defence from the claimant and a rejoinder from the respondent). In some cases the parties also submit post-hearing briefs.

7.6 **Oral hearings**

7.6.1 An oral hearing shall be held at the request of a party prior to the determination of an issue referred to arbitration, even if the arbitral tribunal considers it unnecessary.\(^{74}\) This provision is non-mandatory and can be deviated from if the parties so wish, for example by referring to the SCC Expedited Rules, under which a hearing only takes place if the sole arbitrator considers it necessary.\(^{75}\)

7.6.2 At the main hearing, witnesses are heard and factual as well as legal arguments are presented. Naturally, the length of any hearing varies depending on the complexity of the case. When deemed appropriate, the arbitral tribunal may arrange a preliminary hearing or a telephone conference to clarify some issues in the parties’ submissions. Often this enhances the efficiency of the case management of arbitral proceedings.

7.7 **Default**

7.7.1 A party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by the opposing party or another person.\(^{76}\) This is a fundamental principle when conducting arbitration in Sweden.

7.7.2 Where one of the parties, without valid cause, fails to appear at a hearing or otherwise fails to comply with an order of the arbitrators, such failure shall not prevent a continuation of the proceedings and a resolution of the dispute on the

\(^{74}\) Ibid, s 24(1).

\(^{75}\) SCC Expedited Rules, art 27(1).

\(^{76}\) Swedish Arbitration Act, s 24(2).
basis of the existing materials. In the SCC Rules it is explicitly stated that a failure by the respondent to submit an Answer shall not prevent the arbitration from proceeding, providing of course that the respondent has been properly notified.

7.7.3 If a party has been afforded an opportunity to present its case but has failed to avail itself of this opportunity without valid reason, the arbitrators may, therefore, determine the dispute based on the material presented to them. However, where the arbitrators are of the opinion that a party had a valid reason, they should afford the party a new opportunity to present its case.

7.7.4 It may be noted that under the SCC Rules the arbitral tribunal may draw such inferences it deems appropriate if a party without good cause fails to comply with any provision of, or requirement under, the SCC Rules or any procedural order given by the arbitral tribunal.

7.7.5 The arbitrators are not entitled to issue awards in default. This means that they are obliged to try the dispute substantively notwithstanding that one of the parties has failed to enter an appearance. There are no difficulties enforcing such an award in Sweden provided that the party against whom the award is invoked was given proper notice of the arbitration proceedings. The same applies to recognition and enforcement of foreign arbitral awards.

7.8 Amendments of claims

7.8.1 The parties are entitled to file new claims, or to amend or supplement their respective claims. The presumption is that the arbitral tribunal should be generous in allowing new claims or amendments, as long as they fall within the scope of the arbitration agreement and, taking into consideration the time at which they are submitted to the arbitral tribunal, the arbitral tribunal does not consider it inappropriate to adjudicate such claims or amendments. It should be noted that, under the SCC Rules, the arbitral tribunal shall declare the arbitral proceedings closed when it is satisfied that the parties have had a reasonable chance to present their cases.

---

77 Ibid, s 24(3).
78 SCC Rules, art 5(3).
79 Ibid, art 30(2).
80 SCC Rules, art 30(3).
81 Swedish Arbitration Act, s 54(2).
82 Ibid, s 23(2).
83 SCC Rules, art 34.
7.9 **Evidence generally**

7.9.1 There are very few rules of evidence in Swedish arbitration law. Consequently, it is unusual for the arbitral tribunal to reject evidence on the grounds that it is inadmissible. The arbitral tribunal has the right and duty to freely evaluate all of the evidence presented by the parties. In general, the parties’ evidence is presented by means of the production of documents, hearing of witnesses, hearing of experts and inspection of the subject matter of the dispute. The arbitral tribunal may refuse to admit evidence which is manifestly irrelevant to the arbitral proceedings or where such refusal is justified having regard to the time at which the evidence is submitted.84

7.9.2 The arbitral tribunal may itself appoint experts, unless both parties oppose. The arbitral tribunal may not administer oaths or truth affirmations. Nor may it impose conditional fines or otherwise use compulsory measures in order to obtain evidence.85

7.9.3 In arbitral proceedings in Sweden, the parties are generally requested to submit a statement of evidence. This is a document indicating the evidence on which the respective parties intend to rely. This practice emanates from the rules of Swedish civil procedure. A statement of evidence includes the name of a witness or an identified document, and what the parties intend to prove with each item of evidence, i.e. the so-called “evidentiary theme”. The purpose of this statement is for the opposing party to be able to assess the need for cross-examination and rebuttal evidence.

7.9.4 Under Swedish arbitration law the arbitral tribunal may, at the request of a party, order the opposing party to produce documents in its possession. Although express provisions of the arbitral tribunal’s power in this regard are lacking in the Swedish Arbitration Act, guidance can be found in the Procedural Code and the SCC Rules (where applicable).86

7.9.5 When a party asks for documents which are in the other party’s possession, the document and its relevance must be properly identified and described. Hence, the Swedish approach is different from the discovery procedure practiced in common law jurisdictions. Although the arbitral tribunal’s decision on the production of documents cannot be enforced, if a party fails to comply with its decision the arbitral tribunal may attach negative evidentiary weight to such behaviour.

---

84 Swedish Arbitration Act, s 25(2).
85 Ibid, s 25(3).
86 Procedural Code, ch 38, s 2 and SCC Rules, art 26(3).
7.9.6 The IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) are applicable to arbitral proceedings in Sweden only if the parties have so agreed. However, even though not directly applicable, the IBA Rules often serve as a guide on how to conduct the taking of evidence in an efficient and reasonable manner.  

7.10 Confidentiality

7.10.1 The issue of confidentiality is not addressed by the Swedish Arbitration Act. In practice, arbitral proceedings are held in private and there is a general view that the arbitral tribunal must maintain confidentiality throughout the arbitral proceedings. However, case law suggests that a party to arbitral proceedings is not bound by confidentiality unless it has been explicitly agreed with the other party.

7.10.2 The SCC Rules stipulate that, unless otherwise agreed by the parties, the SCC and the arbitral tribunal shall maintain the confidentiality of the arbitration and the award. However, the SCC Rules do not prescribe any general confidentiality obligation for the parties.

8. Making of the award and termination of proceedings

8.1 Decision making by the arbitral tribunal

8.1.1 Unless the parties have decided otherwise, the opinion agreed upon by the majority of the arbitral tribunal shall prevail. If no majority is obtained, the opinion of the chair shall prevail. The chair’s casting vote differs from the corresponding provisions in the Model Law (1985), according to which majority voting is required for all types of decisions.

8.1.2 If an arbitrator fails, without valid cause, to participate in the deliberations or the determination of the dispute, such failure will not prevent the other arbitrators from ruling on the matter. Hence, it is permitted under Swedish law to have a “truncated tribunal” decide the dispute. This rule is important in order to prevent an arbitrator from sabotaging the proceedings. However, the application of this rule presupposes that the missing arbitrator has been afforded an opportunity to participate in the determination.

---

87 For the full text of the IBA Rules, see CMS Guide to Arbitration, vol II, appendix 4.1.
88 See the decision of the Swedish Supreme Court in Bulgarian Foreign Trade Bank Ltd (Bulbank) v A.I. Trade Finance Inc NJA 2000, p 538.
89 SCC Rules, art 46.
90 Swedish Arbitration Act, s 30(2) and SCC Rules, art 35(1).
91 Swedish Arbitration Act, s 30(1) and SCC Rules, art 36(5).
8.2 **Form, content and effect of the award**

8.2.1 The issues which have been referred to the arbitral tribunal shall be decided in an award. When rendered, an award is final and binding on the parties.

8.2.2 An award must be made in writing. It shall state the seat of arbitration and the date when it was made. Moreover, the award shall be signed by the arbitral tribunal. However, in exceptional cases it suffices that the award is signed by a majority of the arbitral tribunal or by the chair. In addition, the arbitral tribunal may decide a separate issue or part of the dispute in a separate award, unless opposed by both parties.

8.2.3 Where the arbitral tribunal terminates the arbitral proceedings without deciding on the issues referred to it, such termination shall also take place through an award, e.g. when the arbitral tribunal finds that it lacks jurisdiction, when the parties refuse to pay advance on the arbitrators’ compensation, or when the parties have entered into a settlement agreement. The arbitral tribunal may, upon the request of both parties, record the settlement in the form of a consent award.

8.2.4 Other determinations which are not embodied in an award, for example, where the arbitrators find that they possess jurisdiction to decide a dispute, are designated as decisions.

8.3 **Power to award interest and costs**

*Compensation of arbitrators*

8.3.1 The parties are jointly and severally liable to pay reasonable compensation to the arbitral tribunal for its work and expenses. However, where the arbitral tribunal has stated in the award that it lacks jurisdiction to determine a dispute, the party that did not request arbitration shall be liable to make payment only insofar as required in special circumstances. In a final award, the arbitral tribunal may order the parties to pay compensation to it, together with interest, calculated from the date occurring one month following the date of the award.

---

93 Swedish Arbitration Act, s 31(1).
94 Ibid, s 29(1).
95 Ibid, s 27(1)–(2).
96 Ibid, s 27(1)–(2) and SCC Rules, art 39(1).
97 Swedish Arbitration Act, s 27(3).
98 Ibid, s 37(1).
99 Ibid, s 37(2).
8.3.2 A party who is dissatisfied with the payment of compensation to the arbitral tribunal may bring an action in the District Court against the award. Such an action must be brought within three months from the date on which the party received the award. 99 The right to appeal the arbitral tribunal’s compensation applies to both ad hoc arbitrations and institutional arbitrations. 100

8.3.3 The arbitral tribunal may request advance payment for its compensation and may fix separate advances for individual claims. 101 However, as a rule, the parties are each asked to provide half of the advance. If a party fails to provide its part, the other party may provide the entire advance or may choose to commence court proceedings. 102 A party which fails to provide its share of the advance is considered to have waived any right it had to rely on the existence of the arbitration agreement as a bar to court proceedings. Where the requested advance on compensation is not provided, the arbitral tribunal may terminate the arbitral proceedings, in whole or in part. 103

8.3.4 The costs of the arbitration consist of the fees and expenses of the arbitral tribunal and, in the case of an SCC arbitration, the SCC’s administrative fee and expenses. 104 In an SCC arbitration, the SCC Board determines such costs in accordance with a schedule of costs included in the SCC Rules and based on the amount in dispute.

8.3.5 At the initial stage of the arbitral proceedings under the SCC Rules, the SCC establishes an advance on costs (for the arbitral tribunal’s and SCC’s compensation) to be provided by the parties, with each paying half of the costs. 105 If a party fails to pay its part of the advance on costs, the SCC gives the other party an opportunity to make such payment. 106 If the latter chooses to make such payment in order for the arbitration to continue, the arbitral tribunal may, at that party’s request, issue a separate award for reimbursement of the payment. 107

99 Ibid, s 41(1).
100 Soyak v W.M., K.H. and S.K. NJA 2008, p 1118, where the Supreme Court held that the arbitrators’ fees decided by the SCC could be appealed.
101 Swedish Arbitration Act, s 38(1).
102 Ibid, s 3(3).
103 Ibid, s 38(1).
104 SCC Rules, art 43(1).
105 Ibid, art 45(1).
106 Ibid, art 45(4).
107 Swedish Special Supplier AB v Sky Park AB NJA 2000, p 773, where the Supreme Court held that such repayment required the express agreement of the parties. Therefore, such provision was included in the 2007 SCC Rules.
Cost allocation

8.3.6 The arbitral tribunal’s fees and expenses, as ultimately decided by the arbitral tribunal or any arbitral institution, are established in the final award. The compensation payable to each arbitrator shall be stated separately.\(^\text{108}\)

8.3.7 The liability of each party in respect of the arbitral tribunal’s fees and expenses and the interest payable on those fees and expenses are dealt with above at paragraph 8.3.1.

8.3.8 Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order the opposing party to pay compensation in respect of the requesting party’s legal costs. The arbitral tribunal may, under the same conditions, determine the manner in which the compensation to the arbitral tribunal shall be finally apportioned between the parties, having regard to the outcome of the dispute and other relevant circumstances.\(^\text{109}\)

8.4 Correction, interpretation and issue of a supplemental award

8.4.1 If the arbitral tribunal commits an obvious irregularity, it is allowed to correct the mistake without any involvement of the Swedish courts. Under the Swedish Arbitration Act, the arbitral tribunal is able to correct, supplement or interpret an award.\(^\text{110}\) Similar provisions are also to be found in the SCC Rules.\(^\text{111}\)

8.4.2 The power of correction is limited to irregularities which are obvious oversights (i.e. clerical, typographical or computational errors), and does not include inaccuracies which can be traced back to errors in the application of the law or incorrect reasoning. A party can obtain interpretation of a specific point or part of the award if this is considered unclear.

8.4.3 The arbitral tribunal has the authority to make supplementary decisions in respect of matters that the arbitral tribunal, due to an oversight, has failed to determine.

8.4.4 A party seeking interpretation or correction of an award must make a request to the arbitral tribunal within 30 days. Subsequently, the arbitral tribunal must correct or interpret the award within 30 days of receiving the party’s request. If the request is for a supplemental award, the time limit is 60 days.\(^\text{112}\) Moreover, the arbitral

---

\(^{108}\) Swedish Arbitration Act, s 37(2).

\(^{109}\) Ibid, s 42 and SCC Rules, art 43(5) and 44.

\(^{110}\) Swedish Arbitration Act, s 32(1).

\(^{111}\) SCC Rules, art 41 and 42.

\(^{112}\) Swedish Arbitration Act, s 32(2).
tribunal may, of its own motion, correct or supplement an award, but it must do so within 30 days of the award being delivered. Before any decision is made the parties should be afforded an opportunity to express their views with respect to the measure in question.

9. Role of the courts

9.1 Interim protective measures
9.1.1 According to Swedish law, an arbitration agreement does not constitute a procedural impediment against a state court granting interim relief, such as freezing orders and other security measures.\(^{113}\) A prerequisite for an interim measure from a state court is the applicant showing probable cause to believe that it has a claim against another party which is, or can be made, the basis of judicial proceedings or another similar procedure (i.e. arbitration). As set out in paragraph 5.2.3 above, only interim measures decided by a court are enforceable under Swedish law.

9.2 Obtaining evidence and other court assistance
9.2.1 One of the main tasks of the courts in a pending arbitration is to support the taking of evidence. A party that requires a witness or an expert to testify under oath, another party to be examined under oath affirmation or another party or other person to produce a document or an object as evidence, must obtain the consent of the arbitral tribunal. If the arbitral tribunal considers that the measure is justified, having regard to the evidence in the case, it will approve the request, upon which the party must then submit an application to the District Court. The District Court shall grant the application if the evidence sought can be obtained lawfully.\(^{114}\)

10. Invalidity and challenging the award before the courts

10.1 Invalidity
10.1.1 Under Swedish law, a distinction has been made between circumstances which are of such a serious nature that they result in an award automatically becoming invalid, and circumstances as a consequence of which the award may be set aside by a court upon an action brought by a party.

\(^{113}\) Ibid, s 4(3) and Procedural Code, ch 15, s 5.

\(^{114}\) Swedish Arbitration Act, s 26(1).
10.1.2 The provisions governing invalidity are not based on the Model Law (1985) but on a consideration of public interest and the interest of third parties. Thus, an award rendered in Sweden is invalid if:

(i) it includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal;
(ii) the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system; or
(iii) the award does not fulfil the requirements with regard to its written form and signature in accordance with Section 31(1) of the Swedish Arbitration Act.\(^{115}\)

10.1.3 The circumstances set forth above are exhaustive and cannot be waived. Due to the serious nature of the invalidity grounds they are exceptionally rare. It is worth noting that invalidity may apply only to a certain part of the award.\(^{116}\)

10.2 Applications to set aside an award

10.2.1 It is a basic principle of Swedish law that an award cannot be amended or set aside in the event of the incorrect application of the law or the incorrect evaluation of evidence. However, a court can set aside the award if the arbitrators have committed a severe procedural error.

10.2.2 An award may be wholly or partially set aside, upon the motion of a party, on the following grounds:

(i) the award is not covered by a valid arbitration agreement between the parties;
(ii) the arbitral tribunal has made the award after the expiration of the period decided on by the parties;
(iii) the arbitral tribunal has exceeded its mandate;
(iv) the arbitral proceedings should not have taken place in Sweden;
(v) an arbitrator has been appointed contrary to the agreement between the parties or the Swedish Arbitration Act;
(vi) an arbitrator did not have legal capacity or was not properly impartial; or
(vii) without the fault of the party, an irregularity has otherwise occurred in the course of the arbitral proceedings which probably influenced the outcome of the arbitral proceedings.\(^{117}\)

10.2.3 In Sweden, only a very limited number of challenges lead to awards being set aside. The grounds most frequently invoked by the applicants are sub-paragraphs (iii) and (vii) above.

\(^{115}\) Ibid, s 33.
\(^{116}\) Ibid, s 33(2).
\(^{117}\) Ibid, s 34(1).
10.2.4 Notably, a party is not entitled to rely upon a ground which it may be deemed to have waived by participating in the arbitral proceedings without objection. In certain cases a party may be required to expressly reserve the right to challenge the award or otherwise express its protest, failing which the party will be deemed to have waived the right to plead the error. Such a protest may, for example, relate to the future proceedings after the arbitral tribunal has ruled that it possess jurisdiction to try the dispute.

10.2.5 A challenge must be brought within three months from the date upon which the party received the award. The action shall be considered by the Court of Appeal, whose determination cannot be appealed.118 However, the Court of Appeal may grant a party leave to appeal the determination to the Supreme Court in circumstances where it is of importance as a matter of precedent.119

10.2.6 Foreign parties, i.e. those which are neither domiciled nor have a place of business in Sweden, may agree to exclude or limit the application of the grounds for setting aside an award in challenge proceedings through a binding “exclusion agreement”. An award that is subject to such an exclusion or limitation agreement shall be recognised and enforced in Sweden in accordance with the rules applicable to foreign awards (see section 11.2 below).120

11. Recognition and enforcement of awards

11.1 Domestic awards

11.1.1 The Swedish Arbitration Act does not include any provisions on the recognition and enforcement of Swedish awards in Sweden. Such provisions are found in the Swedish Enforcement Code. Swedish awards are enforced based on an application for execution filed with the Swedish Enforcement Authority (SEA).

11.1.2 The SEA may refuse the execution of an award only in situations where the award does not meet the requirements of written form and signature, or if the arbitration agreement includes a right to appeal the award on the merits.

118 There are six courts of appeal in Sweden, whose jurisdiction is determined by geographical area: Svea Court of Appeal in Stockholm; Göta Court of Appeal in Jönköping; the Scania and Blekinge Court of Appeal in Malmö; the Court of Appeal for Western Sweden in Gothenburg; the Court of Appeal for Southern Norrland in Sundsvall; and the Court of Appeal for Northern Norrland in Umeå.

119 Swedish Arbitration Act, s 43(2).

120 Ibid, s 51.
11.1.3 Furthermore, if the SEA believes that an award may be invalid because the issue decided is non-arbitrable, or because the award is against public policy, the SEA shall direct the party seeking enforcement to initiate court proceedings concerning the validity of the award (if this has not already been done by the opposing party).

11.2 Foreign awards

11.2.1 Foreign awards are, as a general rule, recognised and enforced in Sweden.\(^{121}\) An application for enforcement must be lodged with the Svea Court of Appeal in Stockholm and undergo *exequatur* proceedings. The application is communicated to the opposing party, thereby providing it with an opportunity to express its opinion on that application.

11.2.2 The grounds for refusal of enforcement are based on the New York Convention\(^{122}\) and laid down in the Swedish Arbitration Act. Accordingly, foreign awards are not enforced if the party against whom the award is invoked proves that:

- pursuant to the law applicable to them, the parties to the arbitration agreement lacked capacity to enter into the agreement or were not properly represented;
- the arbitration agreement was not valid, either under the law to which the parties subjected it or, failing any indication thereof, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or was otherwise unable to present their case;\(^{123}\)
- the award deals with a dispute not falling within the arbitral tribunal’s mandate (i.e. it deals with disputes not falling within or contemplated by the terms of the request for arbitration or contains a decision on matters beyond the scope of the arbitration agreement), provided that where those parts of the dispute that fall outside of the arbitral tribunal’s mandate can be separated, that part of the award which contains decisions on matters falling within the mandate may be recognised and enforced;
- 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 arbitral proceedings took place; or

\(^{121}\) *Ibid*, s 53.

\(^{122}\) See CMS Guide to Arbitration, vol II, appendix 1, section 1.1.

\(^{123}\) *Lenmorniproekt OAO v Arne Larsson & Partner Leasing AB* Case No Ö 13-09, 16 April 2010, where the Supreme Court refused to enforce a Russian award due to the unsatisfactory notice given to the other party.
Arbitration in Sweden

— the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, the award was made.124

11.2.3 Enforcement of a foreign award shall also be refused where a court finds that:
— the award includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal; or
— it would be clearly incompatible with the basic principles of the Swedish legal system to recognise and enforce that award.125

12. Conclusion

12.1.1 Swedish arbitration legislation and case law are well developed and, to a great extent, correspond with the Model Law (1985). The SCC Rules and its case management are in line with best practice established at other major arbitral institutions. Consequently, it is our belief that Sweden will continue to be an attractive venue for cross border arbitration.

13. Contacts

Setterwalls
Arsenalsgatan 6
Box 1050
SE-101 39 Stockholm
Sweden

Harald Nordenson
T  +46 8 59889 007
E  harald.nordenson@setterwalls.se

Marie Öhrström
T  +46 8 59889 115
E  marie.ohrstrom@setterwalls.se

124 Swedish Arbitration Act, s 54.
125 Swedish Arbitration Act, s 55.
ARBITRATION IN SWITZERLAND

By Philipp Dickenmann, CMS
Table of Contents

1. **The legal framework** 879  
   1.1 The Swiss Code on Private International Law 879  
   1.2 The Swiss Rules as institutional rules 879

2. **The scope of application and general provisions of the Swiss CPIL** 880  
   2.1 The scope of application 880  
   2.2 General principles 881  
   2.3 Transitional provisions 881

3. **The arbitration agreement** 882  
   3.1 Formal requirements 882  
   3.2 Arbitrability 882  
   3.3 Separability 882  
   3.4 Substantive validity 883

4. **Composition of the arbitral tribunal** 883  
   4.1 Constitution of the arbitral tribunal 883  
   4.2 Constitution of the arbitral tribunal in multi-party proceedings 884  
   4.3 Challenge of arbitrators 885  
   4.4 Responsibility of arbitrators 886  
   4.5 Arbitration fees 887  
   4.6 Immunity of arbitrators 887

5. **Jurisdiction of the arbitral tribunal** 888  
   5.1 Competence to rule on jurisdiction 888  
   5.2 Power to order interim measures 888

6. **Conduct of arbitral proceedings** 889  
   6.1 Commencement of arbitration 889  
   6.2 General procedural principles 889  
   6.3 Seat, place of hearings and language of arbitration 890  
   6.4 Multi-party issues (intervention and joinder) 890  
   6.5 Oral hearings and written proceedings 891  
   6.6 Default by one of the parties 892  
   6.7 Evidence 892
6.8 Appointment of experts 892
6.9 Confidentiality 893

7. Making of the award and termination of proceedings 893
7.1 Choice of law 893
7.2 Timing, form, content and notification of award 894
7.3 Settlement 894
7.4 Power to award interest and costs 894
7.5 Termination of proceedings 895
7.6 Effect of the award 895
7.7 Correction, clarification and issue of a supplemental award 895

8. Role of the courts 895
8.1 Jurisdiction of the courts 895
8.2 Stay of court proceedings 896
8.3 Preliminary rulings on points of jurisdiction 896
8.4 Interim protective measures 897
8.5 Obtaining evidence and other court assistance 897

9. Challenging the arbitral award before the courts 898
9.1 Overview 898
9.2 Jurisdiction 898
9.3 The appeal 898
9.4 Exclusion of appeal 899

10. Recognition and enforcement of awards 900
10.1 Domestic awards 900
10.2 Foreign awards 901

11. Conclusion 901

12. Contacts 902
1. **The legal framework**

1.1 **The Swiss Code on Private International Law**

1.1.1 Switzerland has codified its rules on international arbitration in Articles 176–194 (*Chapter 12*) of its Federal Code on Private International Law of 1987 (*Swiss CPIL*).

1.1.2 Until 2010, purely domestic arbitration continued to be subject to the cantonal laws and the Inter-cantonal Arbitration Convention. Since 1 January 2011, domestic arbitration is governed by Articles 353–399 of the Federal Civil Procedure Code (*CPC*), unless the parties agree to submit their dispute to Chapter 12 of the Swiss CPIL.¹

1.1.3 This overview will address the rules of Chapter 12 of the Swiss CPIL as the source of rules governing international arbitration.

1.1.4 Chapter 12 is tailored to the needs of the international business community and affirms Switzerland’s longstanding tradition as a leading location for international commercial arbitration.

1.1.5 The law emphasises party autonomy by allowing the parties to determine the applicable procedural rules. The parties may create their own procedural rules or contractually refer to the procedural rules of a chosen arbitral institution, for example the Swiss Rules,² the ICC Arbitration Rules³ or the UNCITRAL Arbitration Rules (1976).⁴

1.2 **The Swiss Rules as institutional rules**

1.2.1 The Swiss Rules of International Arbitration (*Swiss Rules*),⁵ being the applicable procedural rules if referred to by the parties, are the result of harmonisation efforts undertaken by the Chambers of Commerce of Zurich, Geneva, Basle, Berne, Lausanne and Lugano. As of 1 January 2004, the Swiss Rules replaced the arbitration rules of each Chamber, among them the previous International Arbitration Rules of the Zurich Chamber of Commerce. Since 2008, the Swiss Rules also govern disputes under the auspices of the Chamber of Commerce of Neuchâtel.

---

¹ CPC, art 353.
⁵ *Ibid*, appendix 3.15.
1.2.2 The Swiss Rules are based on the UNCITRAL Arbitration Rules (1976), to which changes and additions have been made. In particular, certain modifications were necessary to adapt the UNCITRAL Arbitration Rules (1976) to institutional arbitration.

1.2.3 The Swiss Rules came into force on 1 January 2004. Unless agreed otherwise by the parties, the Swiss Rules apply to all arbitral proceedings initiated on or after 1 January 2004 if the parties referred to the procedural rules of one of the participating Chambers of Commerce in their arbitration agreement.

1.2.4 The Swiss Rules were well received by the users of international arbitration. They have grown to be well-established rules and several hundred arbitral proceedings have already been conducted efficiently and successfully under the Swiss Rules.

1.2.5 A revised version of the Swiss Rules will be introduced during the course of 2012 (2012 Swiss Rules) which will reflect the developments in international arbitration over the last eight years. Besides a number of smaller changes and amendments, a procedure for emergency relief will be introduced. The 2012 Swiss Rules will apply to all arbitral proceedings in which the notice of arbitration is submitted on or after the date on which the 2012 Swiss Rules enter into force.

2. The scope of application and general provisions of the Swiss CPIL

2.1 The scope of application

2.1.1 The scope of application of Chapter 12 is broad. Articles 176–194 of the Swiss CPIL apply to all arbitral proceedings with the seat of arbitration in Switzerland if, at the time the arbitration agreement was concluded, at least one of the parties was domiciled or had its ordinary residence outside of Switzerland.

2.1.2 In purely domestic disputes, Articles 353–399 of the CPC apply unless the parties expressly agree that, instead of the CPC, Chapter 12 of the Swiss CPIL shall govern.

---

6 Ibid.
7 The complete text of the 2012 Swiss Rules will be published as part of the online version of the CMS Guide to Arbitration at www.cms-arbitration.com as soon as they become available.
8 Swiss CPIL, art 176(1).
their dispute. Conversely, in international cases, the parties can explicitly agree that Articles 353–399 of the CPC are to apply instead of Articles 176–194 of the Swiss CPIL.

2.3 Transitional provisions

2.3.1 The Swiss CPIL does not state to what extent it applies to arbitration agreements concluded before the enactment of the Swiss CPIL on 1 January 1989. The Swiss Federal Supreme Court has ruled that the validity of an arbitration agreement which was concluded before the entry into force of the Swiss CPIL on 1 January 1989 must conform to the requirements of the formerly applicable law on international arbitration (the Inter-cantonal Convention). However, where such arbitration agreement meets the requirements under the Inter-cantonal Convention, the conduct of any arbitral proceedings arising out of that agreement and commenced after 1 January 1989 will be governed by Chapter 12 of the Swiss CPIL.
3. The arbitration agreement

3.1 Formal requirements

3.1.1 In relation to the formal requirements of an arbitration agreement, Swiss law avoids any reference to domestic or foreign legislation and, instead, establishes an independent substantive rule. Under Article 178(1) of the Swiss CPIL, which is inspired by the Model Law (1985), an arbitration agreement, in order to be formally valid, must be made in writing, by telegram, telex, fax or any other means of communication by which the agreement is evidenced in writing. Nowadays, an email printout should also suffice. In other words, a document actually signed by both parties is no longer necessary and an exchange of documents is not a prerequisite for a valid arbitration agreement, regardless of Article II(2) of the New York Convention.

3.2 Arbitrability

3.2.1 Pursuant to Article 177(1) of the Swiss CPIL, a dispute relating to any economic interest can be the subject matter of arbitral proceedings, regardless of whether the substantive law governing the underlying contractual relationship relies on a narrower definition of “objective arbitrability”. The arbitral tribunal does not have to inquire into the substance of the applicable substantive law in order to determine whether a claim is arbitrable. In this context, Chapter 12 of the Swiss CPIL introduced a provision regarding objections raised by states and state-controlled organisations against the arbitrability of disputes. Article 177 of the Swiss CPIL dictates that if a state or a state-controlled organisation or enterprise is a party to an arbitration agreement, it cannot invoke its own national law in order to contest either its capacity to be a party to arbitral proceedings or the arbitrability of a dispute covered by the arbitration agreement.

3.3 Separability

3.3.1 The validity of an arbitration agreement cannot be contested on the ground that the main contract is not valid or that the arbitration agreement concerns a dispute which has not yet arisen. The validity of the arbitration clause has to be determined separately.

---

15 Swiss Federal Supreme Court, 23 June 1992, BGE 118 II 356.
16 Swiss Federal Supreme Court, 23 June 1992, BGE 118 II 355.
17 Swiss CPIL, art 177(2).
18 Swiss CPIL, art 178(3), as confirmed by Swiss Federal Supreme Court, 2 September 1993, BGE 119 II 384.
3.4 **Substantive validity**

3.4.1 Apart from the requirement that the arbitration agreement must be in writing, the prerequisites of a valid arbitration agreement are governed by Article 178(2) of the Swiss CPIL. This provision gives preference to the validity of the arbitration agreement by providing that the agreement is valid if it conforms either to:

(i) the law chosen by the parties;

(ii) the law governing the subject matter of the dispute, in particular, the law governing the main contract; or

(iii) Swiss law.

3.4.2 With respect to the question whether there was a consensus between the parties to submit their dispute to arbitration, the Swiss Federal Supreme Court tends to be rather restrictive. If in doubt, it often decides in favour of state court proceedings. This restrictive approach does not apply in sport matters where the Swiss Federal Supreme Court is (sometimes overly) liberal in endorsing arbitration clauses, even where such clauses can only be found in the regulations of an association to which the contract makes just a general reference.

3.4.3 Once the Swiss Federal Supreme Court confirms that there is a valid arbitration agreement, it generally favours a broad scope of application.

4. **Composition of the arbitral tribunal**

4.1 **Constitution of the arbitral tribunal**

4.1.1 Pursuant to Article 179(1) of the Swiss CPIL, arbitrators will be appointed, removed or replaced in accordance with the agreement of the parties. The parties may also refer to the procedural rules of an agreed arbitral institution, such as the Swiss Rules.

4.1.2 If there is no agreement between the parties, or if the rules of the selected arbitral institution are silent, the parties may request the assistance of the state court at the seat of arbitration, which will then act in accordance with the relevant provisions of the CPC. Where the parties have agreed that a state court shall appoint the arbitrator, the judge must make the appointment, unless a summary assessment shows that there is no valid arbitration agreement between the parties.

---

19 Swiss CPIL, art 178(1). See discussion at paragraph 3.1.1 above.


22 Swiss Federal Supreme Court, 8 July 2003, BGE 129 III 675.

23 Swiss CPIL, art 179, para 2 and 3; Swiss Federal Supreme Court, 27 February 1992, BGE 118 Ia 26.
4.1.3 If the state court refuses to appoint an arbitrator, the ruling can be brought before the Swiss Federal Supreme Court by way of an appeal. In contrast, no appeal is available against the appointment of the arbitrator by a state court; only a preliminary or final award issued later by the arbitral tribunal may be challenged in the event that there was an improper appointment of the sole arbitrator or the arbitral tribunal.

4.2 Constitution of the arbitral tribunal in multi-party proceedings

4.2.1 The principle that the arbitral tribunal shall be constituted in accordance with the agreement of the parties also applies in cases where there are more than two parties involved. However, party autonomy is subject to the requirement of equal treatment, which prevents the claimant(s) or the respondent(s) from having an unequal influence on the constitution of the arbitral tribunal. The right to parity cannot be waived, as this would violate the mandatory provision of Article 182(3) of the Swiss CPIL, which ensures the parties' rights to equal treatment.

4.2.2 Typically, multiple parties agree on a three-member arbitral tribunal and allow each side, the claimant(s) and the respondent(s), to nominate one co-arbitrator. Providing that both (groups of) parties are able to agree on their co-arbitrator, this does not pose a problem.

4.2.3 However, where a plurality of claimants or respondents is unable to agree on a co-arbitrator, concerns may arise as to whether the claimants and the respondents have an equal influence on the constitution of the arbitral tribunal. Arguably, there is inequality in influence where one party can freely designate its co-arbitrator, while the multiple parties on the other side are unable to do so. This argument is more powerful where the inability of the multiple claimants or respondents to agree on the identity of their co-arbitrator is due to different interests within the group.

4.2.4 According to Swiss case law, this situation does not amount to an unequal treatment of the parties as long as the arbitrators fulfil the requirement of impartiality and independence. The French Cour de Cassation took the opposite position in the well known Dutco case. It is possible that state courts of other jurisdictions will follow the French approach, in particular where multiple parties

---

25 Swiss CPIL, art 190(2)(a); Swiss Federal Supreme Court, 11 September 1989, BGE 115 II 296.
26 Swiss Federal Supreme Court, 11 November 1981, BGE 107 Ia 155 c 2b and 4.
convincingly state that they are unable to agree on a co-arbitrator due to their differing interests and/or different claims being raised against two or more respondents (as it was the case in Dutco). For that reason, where a plurality of claimants or respondents is unable to jointly appoint a co-arbitrator and the parties can plausibly explain that this is the result of their dissimilar positions and/or separate claims, Swiss courts and arbitral institutions should generally adhere to the Dutco decision by directly appointing all arbitrators. In the case of direct appointment of the whole arbitral tribunal, none of the parties has (preponderant) influence on the composition of the arbitral tribunal.

4.2.5 Where the parties have agreed on the application of institutional rules, such rules will govern the question of whether, and to what extent, the arbitral institution has the power to name all arbitrators. For example, the Swiss Rules empowers the institution to appoint all arbitrators where a group of parties fails to designate its co-arbitrator.

4.2.6 Where the parties have not agreed on a procedure for appointing the arbitrators without the involvement of a state court, the judge at the seat of arbitration may be requested to take action if a plurality of claimants or respondents is unable to agree on its co-arbitrator. The judge will act in accordance with the relevant provisions of the CPC. Article 362(2) of the CPC provides that, in the case of a multi-party arbitration, the judge may appoint all arbitrators.

4.3 Challenge of arbitrators

4.3.1 Pursuant to Article 180(1) of the Swiss CPIL, there are three grounds for challenging an arbitrator:

(i) if the arbitrator does not meet the qualifications agreed upon by the parties;

(ii) if there is a ground for challenge under the rules of arbitration agreed upon by the parties; or

(iii) if the circumstances give rise to reasonable doubts as to the arbitrator’s independence or impartiality.

4.3.2 Any arbitrator must be fully independent and impartial; the same strict standard applies to a sole arbitrator, a chair and any co-arbitrator.  

---

30 Swiss CPIL, art 179(2).
31 Swiss Federal Supreme Court, 29 October 2010, 136 III 605.
4.3.3 A party may challenge its own arbitrator based only on reasons that the party became aware of after the appointment was made. The party must notify the arbitral tribunal and the other party of the grounds for the challenge without delay.\(^\text{32}\)

4.3.4 Where the parties have not agreed on the procedure for challenging an arbitrator, the state court at the seat of arbitration will decide on the challenge. The decision of the state court is final and it cannot be appealed to the Swiss Federal Supreme Court.\(^\text{33}\)

4.3.5 If the parties have agreed on a procedure for challenging the arbitrator without the involvement of a state court, the decision of the private institution cannot be the subject of a separate appeal to the Swiss Federal Supreme Court.\(^\text{34}\) However, it is possible to submit the reasons for challenging the arbitrator which were not accepted by the private institution to the Swiss Federal Supreme Court for review when filing an appeal against a preliminary or final award by the arbitral tribunal. Such review is based on Article 190(2)(a) of the Swiss CPIL, which allows an appeal in the case of improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal, including the lack of independence of an arbitrator.\(^\text{35}\)

4.3.6 In the event of a successful challenge or replacement of an arbitrator, the appointment of the substitute arbitrator is subject to the same rules as the appointment of the original arbitrators, unless the parties have agreed otherwise.

4.4 Responsibility of arbitrators

4.4.1 The arbitrators’ duties and rights towards the parties arise from:
— the contract between the arbitrators and the parties (the arbitrator’s contract or receptum arbitrii), which is a contract sui generis, with elements of both a service contract and a mandate, entering into force with the appointment of the arbitrators;
— the provisions of Chapter 12 of the Swiss CPIL; and
— the parties’ own procedural rules or the institutional rules to which the parties refer in their arbitration agreement and to which the arbitrators have agreed when accepting their nomination.

4.4.2 The arbitrators must ensure equal treatment of the parties and respect the right of both parties to be heard in adversarial proceedings.\(^\text{36}\)

---

\(^\text{32}\) Swiss CPIL, art 180(2).
\(^\text{34}\) Swiss Federal Supreme Court, 18 August 1992, BGE 118 II 361.
\(^\text{36}\) Swiss CPIL, art 182(3). See also paragraph 6.2.2 below.
4.4.3 The core duty of the arbitrators is the execution of their function as arbitrators. This duty lasts until the conclusion of the arbitral proceedings, unless a situation occurs which entails an early termination of the *receptum arbitrii*. An arbitrator may only resign for valid reasons. However, in the event an arbitrator is unwilling to continue to execute his/her function, there are no effective means to force him/her to do so. Additionally, the parties must not be left with a truncated arbitral tribunal. Accordingly, and unless the parties have agreed to the contrary, an arbitrator declaring his/her resignation has to be replaced through the application of the provisions in Article 179(2) of the Swiss CPIL and Article 371 of the CPC, whether or not one considers the unilateral resignation to be valid. By contrast, the Swiss Federal Supreme Court does not require the replacement of an arbitrator who does not participate in the deliberations without terminating his/her mandate.

4.5 Arbitration fees

4.5.1 Chapter 12 of the Swiss CPIL does not address the arbitrators’ fees and expenses. The advance and final allocation of fees and expenses is, therefore, subject to the parties’ discretion in the context of their arbitration agreement. If the arbitration is conducted under the rules of an arbitral institution, such rules will generally make detailed provision in relation to the arbitrators’ (and the institution’s) fees and expenses.

4.5.2 The Swiss Federal Supreme Court held in a recent decision that the power of the arbitral tribunal to issue an authoritative award does not extend to the arbitrators’ fees and other issues arising out of the contract between the arbitrators and the parties (*receptum arbitri*). The agreement to arbitrate does encompass the *receptum arbitri* and the arbitrators cannot authoritatively decide in their own favour. Accordingly, any arbitrators’ fees stated in the award are not authoritative, but are merely an invoice which the arbitrators issue based on the *receptum arbitri*. Where a party disagrees with the calculation of such fees, this issue has to be submitted to the competent state court.

4.5.3 Parties and the arbitrators may submit their *receptum arbitri* to arbitration; i.e. to agree that any dispute between them arising out of the *receptum arbitri* shall be decided by a different arbitral tribunal.

4.6 Immunity of arbitrators

4.6.1 There is no provision in Chapter 12 of the Swiss CPIL which would exempt arbitrators from liability claims by the parties. Therefore, an arbitrator’s liability for

---

37 Swiss Federal Supreme Court, 30 April 1991, BGE 117 Ia 166 c 6.
38 Swiss Federal Supreme Court, 1 February 2002, BGE 128 III 234 c 3.
39 Swiss Federal Supreme Court, 10 November 2010, BGE 136 III 597.
wrongful performance of his/her duties must be determined in accordance with the general legal rules governing liability under Swiss law. Article 97 of the Swiss Code of Obligations stipulates the principle that a party to a contract owes damage compensation if he/she does not duly perform the duties under the contract unless he/she can prove that no fault is attributable to him/her.

4.6.2 Institutional rules do however often limit arbitrators’ liability. Such limitations are valid, with the exception of limitations relating to liability for gross negligence or unlawful intent. In these cases liability cannot be validly excluded.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 Article 186(1) of the Swiss CPIL provides that the arbitral tribunal is authorised to decide whether it has jurisdiction over the matters brought before it. The arbitral tribunal will decide on its jurisdiction even if there are pending proceedings in existence on the same matter before a state court or another arbitral tribunal, unless there is a strong reason to stay the arbitral proceedings.\textsuperscript{40} For example, an arbitral tribunal might be inclined to stay the arbitral proceedings in the event that in the already pending procedure, the respondent did not contest the jurisdiction of the court.

5.1.2 A party’s objection to lack of jurisdiction must be raised prior to any defence on the merits.\textsuperscript{41} A party may concurrently contest jurisdiction and, subject to those objections, present its first defence on the merits. Generally, the arbitral tribunal will render its decision on jurisdiction in the form of a preliminary award.\textsuperscript{42}

5.2 Power to order interim measures

5.2.1 Unless the parties have agreed otherwise, upon the request of a party, the arbitral tribunal is empowered to order interim or protective measures.\textsuperscript{43}

5.2.2 The arbitral tribunal is not entitled to impose sanctions in the event that any interim or protective measures are not complied with. For this reason, if the party concerned does not comply voluntarily with the preliminary or protective measure

\textsuperscript{40} Swiss CPIL, art 186 (1 bis).

\textsuperscript{41} Ibid, art 186(2).

\textsuperscript{42} Ibid, art 186(3).

\textsuperscript{43} Ibid, art 183(1).
ordered, the arbitral tribunal may request the assistance of the judge at the place where the interim measure shall be enforced. The judge will apply his/her own law in order to enforce such measures.\textsuperscript{44}

5.2.3 Both the arbitral tribunal and the judge may grant interim or protective measures conditional upon the provision of appropriate security.\textsuperscript{45}

6. Conduct of arbitral proceedings

6.1 Commencement of arbitration

6.1.1 Arbitral proceedings are pending as soon as one party submits its claim to the arbitral tribunal designated in the arbitration agreement or, if the arbitration agreement does not designate a particular arbitrator, as soon as one party initiates the procedure to appoint the arbitral tribunal.\textsuperscript{46}

6.2 General procedural principles

6.2.1 Under Swiss law, parties have significant autonomy to choose and determine the arbitral procedure and to tailor the procedural rules to their specific needs. Accordingly, Chapter 12 of the Swiss CPIL does not contain specific or detailed (default) rules regarding arbitral procedures. Article 182(1) of the Swiss CPIL states that the parties may:

— create their own arbitral procedure;
— refer to existing institutional rules of arbitration such as the Swiss Rules,\textsuperscript{47} the ICC Arbitration Rules\textsuperscript{48} or the UNCITRAL Arbitration Rules (1976),\textsuperscript{49} or
— select a pre-existing body of procedural law, for example the CPC.

6.2.2 Despite the extensive autonomy of the parties with regard to procedural issues, the minimum requirements of Article 182(3) of the Swiss CIPL have to be observed.\textsuperscript{50} The arbitral tribunal must therefore:

— ensure equal treatment of the parties; and
— respect the rights of both parties to be heard in adversarial proceedings.

\textsuperscript{44} Ibid, art 183(2).
\textsuperscript{45} Ibid, art 183(3).
\textsuperscript{46} Ibid, art 181.
\textsuperscript{47} CMS Guide to Arbitration, vol II, appendix 3.15.
\textsuperscript{48} Ibid, appendix 3.7.
\textsuperscript{49} Ibid, appendix 3.1.
\textsuperscript{50} Swiss Federal Supreme Court, 7 September 1993, BGE 119 II 388.
6.2.3 If these minimum requirements are not met, the final award may be challenged before the Swiss Federal Supreme Court.\textsuperscript{51}

6.2.4 Where the parties have failed to set forth the applicable arbitral procedure, the arbitral tribunal is free to determine the procedure, either directly or by reference to a body of law or existing arbitration rules.\textsuperscript{52}

6.2.5 The arbitral tribunal will often consult with the parties at a very early stage of the arbitral proceedings in order to agree on the procedural framework of the arbitral proceedings.

6.3 \textbf{Seat, place of hearings and language of arbitration}

6.3.1 In order to become subject to Swiss law,\textsuperscript{53} the arbitral tribunal must have its official seat of arbitration in Switzerland.\textsuperscript{54} This does not prevent the parties from actually holding any part of the arbitral proceedings elsewhere.

6.3.2 In their arbitration agreement, the parties can choose the language of the arbitration. If the parties have not agreed upon the language, the arbitral tribunal will decide which language to apply to the proceedings.

6.4 \textbf{Multi-party issues (intervention and joinder)}

6.4.1 Where a third party is caused, either by the claimant or the respondent, to participate in the arbitration through a third-party notice, where a third party actively brings an intervention claim, or where arbitral proceedings between (partially) different parties are consolidated, the two-party arbitration converts into multi-party arbitration.

\emph{Third-party notice and third-party intervention}

6.4.2 Unlike Chapter 12 of the Swiss CPIL, some institutional rules address the issues of third-party notice and third-party intervention. For example, the Swiss Rules\textsuperscript{55} provide that where one or more third persons request to participate in arbitral proceedings already pending under the Swiss Rules, or where a party to arbitral proceedings under the Swiss Rules requests to cause one or more third persons to

\textsuperscript{51} Swiss CPIL, art 190(2) (d).

\textsuperscript{52} \textit{Ibid}, art 182(2).

\textsuperscript{53} \textit{Ibid}, arts 176–194.

\textsuperscript{54} \textit{Ibid}, art 176(1).

participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, including the person or persons to be joined, taking into account all relevant circumstances.

6.4.3 In the event of a third-party notice, the notified party cannot be forced to participate in the arbitration unless it is provided with the same rights regarding the appointment of the arbitral tribunal as the original parties to that arbitration.

6.4.4 Where a third party actively brings an intervention claim, as a general rule, such intervention should only be admitted by the arbitral tribunal if, in addition to any other requirements, the intervening party is willing to accept the co-arbitrator already appointed by the supported party as their jointly designated co-arbitrator.

Consolidation of two arbitral proceedings

6.4.5 Chapter 12 of the Swiss CPIL is silent on the consolidation of two arbitral proceedings. The Swiss Rules provide that if another arbitration is already pending under the Swiss Rules, the institution may decide that the new case shall be consolidated into the pending arbitral proceedings even if the parties to the new procedure are not (fully) identical to the parties of the existing arbitral proceedings. In this case, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the institution may revoke the appointment and confirmation of arbitrators and apply the provisions of the Swiss Rules regarding the composition of the arbitral tribunal. While, prior to its decision, the institution shall consult with the parties and any arbitrator already confirmed, their consent is not required. The institution shall take into account all relevant circumstances, including the links between the two cases and the progress already made in the pending arbitral proceedings.

6.5 Oral hearings and written proceedings

6.5.1 As discussed at paragraph 6.2.1 above, Swiss law grants the parties autonomy to choose and determine the arbitral procedure according to their specific needs. Hence, Chapter 12 of the Swiss CPIL does not contain detailed (default) rules regarding the arbitral procedure. It is for the parties, and subsequently for the arbitrators, to decide whether the arbitral procedure should encompass an oral hearing and/or to what extent the procedure should be in writing. However, the procedure still has to comply with the minimum requirements of Article 182(3) of the Swiss CIPL (i.e. the arbitral tribunal must ensure the equal treatment of the parties and respect the rights of both parties to be heard in adversarial proceedings).

6.6 Default by one of the parties

6.6.1 In the event that the respondent does not participate in the appointment of a sole arbitrator, or if it does not nominate its co-arbitrator, the agreement of the parties and/or the institutional rules to which the parties refer will govern the arbitral procedure. Institutional rules such as the Swiss Rules provide that the institution will appoint the sole arbitrator or the co-arbitrator that has not been nominated by respondent. If the parties’ agreement to arbitrate does not provide any guidance, the claimant can seek the assistance of the state court at the seat of arbitration. The judge will then appoint the sole arbitrator or the co-arbitrator that the respondent failed to nominate.57

6.6.2 Unless agreed otherwise by the parties, the arbitral tribunal, once constituted, will move ahead with the arbitration irrespective of the default of a party during the arbitral proceedings. It will depend on the agreement between the parties and subsequently on the decision of the arbitral tribunal whether the default of a party has certain consequences, e.g. whether a default by the claimant results in the termination of the procedure and/or whether the facts presented by one party are deemed to be true if the other side defaults. In order to prevent an assertion that the right to be heard was not respected, it is crucial that the arbitral tribunal keeps the defaulting party updated on subsequent steps in the arbitration.

6.7 Evidence

6.7.1 Article 184 of the Swiss CPIL gives the arbitral tribunal power to take its own evidence. Subject to rules set forth or referred to by the parties in the arbitration agreement, the arbitral tribunal will determine the evidentiary procedure.

6.7.2 Where legal assistance by a state court is necessary (for example, if a witness refuses to appear voluntarily before the arbitral tribunal), the arbitral tribunal may request the assistance of the judge at the seat of arbitration. The judge will then apply Swiss law.

6.8 Appointment of experts

6.8.1 On the request of a party or on its own motion, the arbitral tribunal may appoint its own tribunal-appointed expert. In arbitral proceedings, parties often present their own experts. In the event of contradicting expert opinions of the parties, the arbitral tribunal might decide to appoint a tribunal-appointed expert.

57 Swiss CPIL, art 179, para 2 and CPC, art 362(1).
6.9 Confidentiality

6.9.1 Privacy and confidentiality of the arbitral proceedings and of the subsequent award is often a decisive factor for parties to agree on arbitration.

6.9.2 However, Chapter 12 of the Swiss CPIL does not provide for a duty of confidentiality. Hence, it will be for the parties to agree on the desired level of confidentiality. Such agreement can be implicit or explicit. In order to avoid uncertainty at a later stage, the parties should expressly agree that the arbitral proceedings and the award shall be confidential, either by including a provision in their arbitration agreement or by referring to institutional rules which include a confidentiality provision, e.g. the Swiss Rules.

6.9.3 The Swiss Rules state that, subject to a written agreement to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the arbitral proceedings, unless a disclosure is necessary:

(i) due to the legal duties of a party;
(ii) in order to protect or pursue a legal right; or
(iii) in order to enforce or challenge an award in legal proceedings before a judicial authority.\(^{58}\)

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 The substantive law to be applied by the arbitral tribunal when assessing the merits of the case may be freely determined by the parties. In the absence of a choice of law by the parties, the arbitral tribunal will apply the law most closely connected with the subject matter of the dispute.\(^{59}\) The arbitral tribunal does not have to apply a specific set of conflict of laws rules, but it may apply an independent “closest connection” test in order to determine the applicable law. Yet in practice, the (abstract) applicable law as such is often less important than the provisions and the interpretation of the contract between the parties.

7.1.2 The parties may authorise the arbitral tribunal to base its decision purely on equitable considerations, i.e. to decide *ex aequo et bono*.\(^{60}\)

---

\(^{58}\) Swiss Rules, art 44. See CMS Guide to Arbitration, vol II, appendix 3.15.

\(^{59}\) Swiss CPIL, art 187(1).

\(^{60}\) Ibid, art 187(2).
7.2 **Timing, form, content and notification of award**

7.2.1 The award has to be rendered in conformity with the rules of procedure agreed upon by the parties.\(^61\) This provision again reflects the overriding importance of party autonomy provided for by Chapter 12 of the Swiss CPIL. In the absence of an agreement between the parties, the award will be made by a majority of the arbitrators or, in default of a majority, by the chair alone.\(^62\)

7.2.2 The parties may freely determine the form of the award. Unless agreed otherwise, the award must be in writing, accompanied by reasons for the decision, dated and signed. The signature of the chair of the arbitral tribunal is sufficient.\(^63\) The award must be notified to the parties.\(^64\)

7.2.3 Unless agreed otherwise between the parties, the arbitral tribunal may also render partial awards.\(^65\)

7.3 **Settlement**

7.3.1 The parties may settle their dispute at any time. Upon their request, the arbitral tribunal may record the settlement in the form of a consent award.

7.4 **Power to award interest and costs**

7.4.1 To the extent sought by the claimant, the arbitral tribunal has the power to award contractual and/or default interest on the claimed amounts.

7.4.2 Chapter 12 of the Swiss CPIL does not contain any provisions as to the award and allocation of the costs arising from the arbitration between the parties. It is left to the parties to determine compensation and allocation of costs in their arbitration agreement, or to refer to institutional rules containing such provisions.

7.4.3 Where an arbitration agreement does not deal with the award and/or allocation of the costs of the arbitration, the arbitrators will decide on these issues. However, their decision must not be contrary to the outcome of the arbitration. In a recent case, the Swiss Federal Supreme Court voided an award in which the claimant had been unsuccessful for the most part of its claim, but despite this, the respondent was ordered to bear all costs of the arbitration and to fully compensate the claimant.\(^66\)

---

\(^61\) Ibid, art 189(1).
\(^62\) Ibid, art 189(2).
\(^63\) Ibid, art 189.
\(^64\) Ibid, art 190(1).
\(^65\) Ibid, art 188.
7.4.4 As to the costs of the arbitral tribunal, the Swiss Federal Supreme Court has held in a recent decision that the arbitrators can only issue an authoritative award on the allocation of the costs among the parties, but not as to the amount of the fees owed to the arbitrators.\textsuperscript{67}

7.5 Termination of proceedings
7.5.1 Proceedings terminate upon notification of the final award to the parties.\textsuperscript{68}

7.6 Effect of the award
7.6.1 Upon its due notification to the parties, the award becomes final.\textsuperscript{69} An action for annulment of the award before the Swiss Federal Supreme Court does not affect the enforceability of the award, unless the Swiss Federal Supreme Court grants a motion to suspend enforcement of the award, which is fairly rare.

7.7 Correction, clarification and issue of a supplemental award
7.7.1 While Chapter 12 of the Swiss CPIL is silent on this issue, the Swiss Federal Supreme Court has affirmed that the correction or clarification of an award, as well as the issue of a supplemental award, is admissible in appropriate circumstances as a matter of general legal principle and established doctrine.\textsuperscript{70}

7.7.2 The Swiss Federal Supreme Court has also acknowledged the availability of the remedy of “revision” of an award if a party discovers important facts which could have been brought before the arbitral tribunal, but were not known to such party, despite all due diligence at the time. The revision proceedings must be initiated before the Swiss Federal Supreme Court within 30 days of discovering the facts. The Swiss Federal Supreme Court will examine whether the new facts would have led to a different decision of the arbitral tribunal and, if so, refer the case back to the arbitral tribunal to reconsider the award.\textsuperscript{71}

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 Pursuant to Article 7 of the Swiss CPIL, a Swiss court will refuse to exercise jurisdiction over a particular dispute if the subject matter of the dispute is arbitrable and if the parties have concluded an arbitration agreement, unless:

\textsuperscript{67} Swiss Federal Supreme Court, 10 November 2010, BGE 136 III 597; see paragraph 4.5.2 above.
\textsuperscript{68} Swiss CPIL, art 190(1).
\textsuperscript{69} Ibid, art 190(1).
\textsuperscript{70} Swiss Federal Supreme Court, 2 November 2000, BGE 126 III 527 and 7 January 2011, BGE 137 III 85.
\textsuperscript{71} Swiss Federal Supreme Court, 14 March 2008, 134 III 286; 1 November 1996, BGE 122 III 492 and 11 March 1992, BGE 118 II 204.
— the respondent has implicitly accepted the jurisdiction of the court by participating in the court proceedings without raising any objection;
— the court determines that the arbitration agreement is *prima facie* null and void, inoperative or incapable of being performed; or
— the arbitral tribunal cannot be constituted for reasons which are obviously attributable to the respondent’s behaviour in the arbitral proceedings.

### 8.2 Stay of court proceedings

8.2.1 According to the doctrine, in cases where arbitral proceedings have been initiated prior to court proceedings, the court should stay its proceedings until the arbitral tribunal has decided on its jurisdiction. Once the arbitral tribunal has confirmed its jurisdiction, the court should dismiss the claim.

### 8.3 Preliminary rulings on points of jurisdiction

8.3.1 Lack of jurisdiction must be asserted at the very beginning of the proceedings. The arbitral tribunal is competent to decide for itself whether it has jurisdiction over the matters brought before it (*competence-competence*). In general, the arbitral tribunal will render its decision on jurisdiction in the form of a preliminary award. The arbitral tribunal will decide on its jurisdiction notwithstanding any existing pending proceedings on the same matter before a state court or another arbitral tribunal, unless there is a strong reason to stay the arbitral proceedings.

8.3.2 The arbitral tribunal’s preliminary award on jurisdiction can be challenged directly before the Swiss Federal Supreme Court, which will review *de novo* whether the arbitral tribunal has properly accepted or declined jurisdiction over the matters in dispute. In case the arbitral tribunal decides on its jurisdiction by interim award, only such interim award on jurisdiction, and not the final decision, may be challenged on the ground that the arbitral tribunal lacks jurisdiction.

8.3.3 According to the Swiss Federal Supreme Court, even if the arbitral tribunal issues an interim or partial award without specifically addressing the question of jurisdiction, a party that has made a timely challenge to the arbitral tribunal’s jurisdiction is requested to file its challenge against such first preliminary ruling and

---

72 Swiss Federal Supreme Court, 29 April 1996, BGE 122 III 143.
74 Swiss CPIL, art 186(1) and (3).
75 *Ibid*, art 186 (1 bis).
76 *Ibid*, art 190(2) (b).
77 Swiss Federal Supreme Court, 23 June 1992, BGE 118 II 355 and 18 September 2003, BGE 130 III 76.
must not wait for the final award. The Swiss Federal Supreme Court has found that by filing a preliminary or partial decision, the arbitral tribunal implicitly affirms its jurisdiction.78

8.4 Interim protective measures
8.4.1 As long as the arbitral tribunal is not constituted, an application for interim measures may be filed with the state court. There is no unanimous opinion as to whether there is still alternative jurisdiction of the competent state court after constitution of the arbitral tribunal. According to one opinion supported by certain Swiss scholars, the state courts and arbitral tribunal have alternative jurisdiction, unless the parties have explicitly agreed to the contrary.79

8.4.2 Where the arbitral tribunal orders injunctive relief, but the party concerned does not voluntarily comply with such an interim measure, the arbitral tribunal may request the assistance of the competent state court, which will apply its own procedural law.80

8.4.3 Both the arbitral tribunal and the state court may make the granting of interim or protective measures conditional upon provision of appropriate security.81

8.5 Obtaining evidence and other court assistance
8.5.1 If court assistance is necessary with respect to the taking of evidence in connection with arbitral proceedings, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may ask the state court at the place of the arbitration for assistance. The state court will apply its own procedural law.82 The arbitral tribunal may also ask the state court to issue letters of request to the judicial authorities of other countries according to international conventions, in particular the Hague Convention on Taking Evidence Abroad of 1970.

8.5.2 The judge at the seat of arbitration also has jurisdiction when further assistance from judicial or administrative bodies is necessary.83

80 Swiss CPI, art 183(2).
81 Ibid, art 183(3).
82 Ibid, art 184.
83 Ibid, art 185.
9. Challenging the arbitral award before the courts

9.1 Overview
9.1.1 The rules of Chapter 12 of the Swiss CPIL on challenging awards are precisely tailored to the requirements of the international business community:

— the Swiss Federal Supreme Court is designated as the only judicial authority competent to hear actions for the annulment of awards.\textsuperscript{84} The procedure before the Swiss Federal Supreme Court has proven to be very quick. In most cases, the final decision of the Swiss Federal Supreme Court is issued no later than three to six months after the filing of the appeal;

— the grounds for annulment are very restrictive.\textsuperscript{85} Even with regard to these limited grounds for annulment, case law shows that the Swiss Federal Supreme Court is extremely reluctant to quash awards and the rate of success of appeals filed with the Swiss Federal Supreme Court is low;\textsuperscript{86} and

— if all of the parties are not resident in Switzerland, it is possible to waive the right to bring any action for annulment of the award with the Swiss Federal Supreme Court.\textsuperscript{87}

9.2 Jurisdiction
9.2.1 The action for annulment of an award has to be brought before the Swiss Federal Supreme Court in the form of an appeal.\textsuperscript{88} The appeal must be presented to the Federal Supreme Court within 30 days after service of the award.\textsuperscript{89}

9.3 The appeal
9.3.1 Chapter 12 of the Swiss CPIL contains significant limitations on the possibility of challenging an award before the Swiss Federal Supreme Court. Article 190(2)(a)–(e) of the Swiss CPIL provides that an award can only be challenged based on the following five grounds:

(i) improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal (including the appointment of an arbitrator who is not independent).\textsuperscript{90}

\textsuperscript{84} Ibid, art 191.
\textsuperscript{85} Swiss CPIL, art 190(2).
\textsuperscript{87} Swiss CPIL, art 192.
\textsuperscript{88} Swiss CPIL, art 190 in connection with the Swiss Federal Statute on the Swiss Federal Supreme Court (\textit{BGG}), art 77.
\textsuperscript{89} BGG, art 100(1).
\textsuperscript{90} Swiss Federal Supreme Court, 18 August 1992, BGE 118 II 361.
(ii) erroneous acceptance or denial of jurisdiction by the arbitral tribunal;
(iii) failure to decide all claims brought by the parties or decisions on matters beyond the claims submitted to the arbitral tribunal;
(iv) violation of the principle of equal treatment of the parties or the right to be heard; or
(v) non-compliance of the award with substantive or procedural public policy.  

9.3.2 The fact that the award may be arbitrary does not qualify as a reason for annulment under Article 190 of the Swiss CPIL.  

9.3.3 With regard to the grounds mentioned in Article 190(2)(a) and (b) of the Swiss CPIL (i.e. constitution and jurisdiction of the arbitral tribunal), an interim or partial award can be submitted to the Swiss Federal Supreme Court. As explained above, the parties must not await the final decision before filing their appeal. In contrast, with regard to the grounds mentioned in Article 190(2)(c), (d) and (e) of Swiss CPIL, only the final award can be challenged. This is even the case where an interim or partial decision causes a disadvantageous and not easily reparable situation for a party to the arbitral proceedings.  

9.3.4 If the challenge is well-founded, the Swiss Federal Supreme Court may issue a new decision replacing the award, but only if the arbitral tribunal erroneously denied or affirmed jurisdiction. In all other cases, the Swiss Federal Supreme Court will remit the matters in question to the arbitral tribunal for reconsideration.  

9.4 Exclusion of appeal  
9.4.1 According to Article 192 of Swiss CPIL, the parties may either waive the right to have the award set aside, or they may limit this right to one or several of the five aforementioned grounds for annulment, provided that two requirements are met: (i) none of the parties has its domicile, habitual residence or business establishment in Switzerland; and

---

91 Swiss Federal Supreme Court, 13 April 2010, 136 III 345. This is the only case in which the Swiss Federal Supreme Court affirmed a violation of public order. The arbitral tribunal had ignored that the case at hand had been decided before and thereby violated the fundamental principle of res judicata.
92 Swiss Federal Supreme Court, 25 April 1995, BGE 121 III 333.
93 Swiss CPIL, art 190(3).
94 Swiss Federal Supreme Court, 23 June 1992, BGE 118 II 355 and 18 September 2003, 130 III 76.
95 Swiss Federal Supreme Court, 18 September 2003, BGE 130 III 76.
96 Swiss CPIL, art 190(2) (b).
97 Swiss Federal Supreme Court, 9 April 1991, BGE 117 II 94.
(ii) the waiver is expressly mentioned in the arbitration agreement or is contained in a subsequent written agreement. Due to the requirement for an “express term”, the mere reference to a set of procedural rules excluding the right of appeal would probably not be sufficient. However, an explicit reference to Article 192 of the Swiss CPIL is not necessary. The Swiss Federal Supreme Court has held that the right to challenge was validly waived by an arbitration agreement in which the parties referred to the UNCITRAL Arbitration Rules (1976)\(^98\) and added that the decision of the arbitral tribunal “shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made.”\(^99\)

9.4.2 While, under the conditions mentioned above, the parties can exclude all grounds for annulment in Switzerland as the state of origin of the award, such award remains subject to judicial review according to Articles IV and V of the New York Convention\(^100\) in the countries in which the award is being enforced. In the event that the parties validly exclude an appeal and later seek enforcement of the award in Switzerland, such enforcement procedure is also governed by the New York Convention.\(^101\) This ensures that, irrespective of the country, there will be a review by the court enforcing the award in accordance with Articles IV and V of the New York Convention.\(^102\)

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Each party may, at its own expense, deposit a copy of the award with the state court at the seat of arbitration. Upon request by a party, the state court will issue a declaration as to its enforceability. Alternatively, at the request of a party, the arbitral tribunal will certify that the award was made in accordance with the provisions of Chapter 12 of the Swiss CPIL. Such a certificate has the same effect as depositing the award with the state court.\(^103\)

---

99 Swiss Federal Supreme Court, 4 February 2005, BGE 131 III 173.
103 Swiss CPIL, art 193.
10.1.2 Subject to the aforementioned Article 192(2) of the Swiss CPIL, any award issued by an arbitral tribunal having its seat of arbitration in Switzerland will be enforceable anywhere in Switzerland.\(^\text{104}\)

10.2 Foreign awards

10.2.1 Pursuant to Article 194 of the Swiss CPIL, the New York Convention\(^\text{105}\) governs the recognition and enforcement of all foreign awards in Switzerland. By including an express reference to the New York Convention in Article 194 of the Swiss CPIL, the Swiss legislature broadened the applicability of the New York Convention unilaterally, in that it now applies regardless of whether the country of origin of the award is a signatory of the New York Convention. Any and all foreign awards will therefore be recognised and enforced in Switzerland pursuant to the provisions of the New York Convention.

10.2.2 If a foreign state court exercises jurisdiction over a particular dispute despite the existence of a valid arbitration agreement in accordance with Article II of the New York Convention, the foreign state court’s decision will not be recognised in Switzerland.\(^\text{106}\)

11. Conclusion

11.1.1 With Chapter 12 of the Swiss CPIL and with the Swiss Rules as modern institutional rules, Switzerland affirms its position as a leading location for international commercial arbitration.

11.1.2 Switzerland’s arbitration law, combined with its neutrality, political stability, geographical position, arbitral institutions and the expertise of its legal profession make the country uniquely suitable for resolving international arbitration disputes.

---

\(^{104}\) Swiss Constitution, art 122(3).


\(^{106}\) Swiss CPIL, art 25(a); Swiss Federal Supreme Court, 19 December 1997, BGE 124 III 83.
12. Contacts

CMS von Erlach Henrici Ltd
Dreikönigstrasse 7
8022 Zurich
Switzerland

Damiano Brusa
T +41 44 2851 111
F +41 44 2851 122
E damiano.brusa@cms-veh.com

Philipp Dickenmann
T +41 44 2851 111
F +41 44 2851 122
E philipp.dickenmann@cms-veh.com

Jodok Wicki
T +41 44 2851 111
F +41 44 2851 122
E jodok.wicki@cms-veh.com
ARBITRATION IN TURKEY

By Ümit Hergüner, İpek Bozkurt, Hande Yayla and Noyan Göksu, Hergüner Bilgen Özeke Attorney Partnership
## Table of Contents

1. **Historical background and legislative framework** 907
   1.1 Introduction 907
   1.2 Domestic arbitration 907
   1.3 Foreign arbitration 907

2. **Scope of application and general provisions of the Turkish Arbitration Law** 908
   2.1 Subject matter 908
   2.2 Structure of the law 908
   2.3 General principles 909

3. **The arbitration agreement** 909
   3.1 Definitions 909
   3.2 Formal requirements 910
   3.3 Special tests and requirements of the jurisdiction 910
   3.4 Separability 910
   3.5 Legal consequences of a binding arbitration agreement 910

4. **Composition of the arbitral tribunal** 911
   4.1 The constitution of the arbitral tribunal 911
   4.2 The procedure for challenging and substituting arbitrators 912
   4.3 Responsibility of arbitrators 913
   4.4 Arbitration fees 913
   4.5 Arbitrator immunity 914

5. **Jurisdiction of the arbitral tribunal** 914
   5.1 Competence to rule on jurisdiction 914
   5.2 Power to order interim measures 914

6. **Conduct of proceedings** 915
   6.1 Commencement of arbitration 915
   6.2 General procedural principles 916
   6.3 Seat, place of hearings and language of arbitration 916
   6.4 Oral hearings and written proceedings 917
   6.5 Default by one of the parties 917
   6.6 Appointment of experts 918
6.7 Confidentiality 918
6.8 Court assistance in taking evidence 919

7. Making of the award and termination of proceedings 919
   7.1 Choice of law 919
   7.2 Timing, form, content and notification of award 919
   7.3 Settlement 920
   7.4 Power to award interest and cost 920
   7.5 Termination of the proceedings 920
   7.6 Effect of the award 921
   7.7 Correction, clarification and issue of supplemental award 921

8. Role of the courts 922
   8.1 Jurisdiction of the courts 922
   8.2 Stay of court proceedings 922
   8.3 Preliminary rulings on jurisdiction 922
   8.4 Interim protective measures 922
   8.5 Obtaining evidence and other court assistance 923

9. Challenging and appealing an award through the courts 923
   9.1 Jurisdiction of the courts 923
   9.2 Applications to set aside an award 923
   9.3 Appeals 924

10. Recognition and enforcement of awards 925
    10.1 Awards 925
    10.2 Domestic awards 925
    10.3 Foreign awards 925

11. Special provisions and considerations 927
    11.1 Non-arbitrable subject matter 927
    11.2 Consumers 927
    11.3 Employment law 927

12. Concluding thoughts and themes 928

13. Contacts 929
1. **Historical background and legislative framework**

1.1 **Introduction**

1.1.1 The main piece of legislation governing international arbitration in Turkey is the International Arbitration Law No 4686 (*Turkish Arbitration Law*). The Turkish Arbitration Law entered into force in 2001 and was modeled on the Model Law (1985)¹ and the international arbitration section of the Swiss Federal Private International Law of 1987. The Turkish Arbitration Law governs arbitrations that are seated in Turkey and involve a foreign element. Even if the seat of arbitration is not Turkey, the parties can contractually subject the arbitration to the Turkish Arbitration Law, provided the dispute has a foreign element.²

1.2 **Domestic arbitration**

1.2.1 The Turkish Code of Civil Procedural Law No 6100 (*CPL No 6100*) which came into effect on 1 October 2011, deals with domestic arbitrations between local parties where no foreign elements are involved. The arbitration section of CPL No 6100 resolved long-standing conflicts between the Turkish Arbitration Law and the arbitration section of the now-defunct Civil Procedure Law of 1927. CPL No 6100 aligned itself with both the Turkish Arbitration Law and the Model Law (1985).³ The arbitration section regulates domestic arbitral proceedings and the enforcement of domestic awards with a view to encouraging domestic arbitration in Turkey.

1.3 **Foreign arbitration**

1.3.1 In addition to the foregoing legislation, the recognition and enforcement of foreign awards is regulated separately under the Law on International Private Law and Procedure (*Law No 5718*). Law No 5718 entered into force in 2007 and replaced the International Private Law and Procedure No 2675 which had been in force since 1982.

1.3.2 The main difficulty associated with arbitration in Turkey is that international and domestic arbitration and the enforcement of awards are all addressed under separate conflicting legal frameworks. This problem has recently been addressed by the legislature through the drafting of domestic arbitral procedures and enforcement mechanisms which are compatible with the provisions of the Turkish Arbitration Law and Law No 5718.

---

² See section 2.1 below.
2. Scope of application and general provisions of the Turkish Arbitration Law

2.1 Subject matter

2.1.1 The Turkish Arbitration Law is applicable to disputes that have a foreign element where the seat of arbitration is in Turkey or where the parties mutually agree or the arbitrators decide to apply Turkish Arbitration Law. The following circumstances will constitute a foreign element under the Turkish Arbitration Law:

— if the usual residence, domicile or place of business of any party to the arbitration agreement is located outside Turkey;

— if the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country other than the seat of the arbitration designated in the arbitration agreement or determined on the basis of this agreement;

— if the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country other than the place where the majority of the obligations under the main agreement will be performed or the place where the subject of the dispute is primarily related to;

— if at least one of the shareholders of a company that is a party to the main agreement containing the arbitration clause has injected foreign capital into the company under applicable foreign investment legislation or when a loan or a guarantee agreement is executed in order to bring foreign investment to Turkey for performance of the relevant agreement; and

— the main agreement or legal relationship constituting the basis of the arbitration agreement permits the flow of capital or goods from one country to another.\(^4\)

2.2 Structure of the law

2.2.1 The Turkish Arbitration Law consists of seven chapters:

— Chapter I: general provisions;
— Chapter II: the arbitration agreement;
— Chapter III: the establishment, liability, challenge and authorities of arbitral tribunals;
— Chapter IV: the arbitral proceedings;
— Chapter V: legal remedies against awards;
— Chapter VI: arbitration costs; and
— Chapter VII: final provisions.

\(^4\) Turkish Arbitration Law, art 2.
2.3 General principles

2.3.1 The Turkish Arbitration Law is based on the Model Law (1985). Consequently, the general principles enshrined in the Model Law (1985) constitute the general principles of arbitration in Turkey under the Turkish Arbitration Law.

Equality of parties

2.3.2 Parties have equal rights and competence in arbitral proceedings and both parties must be given the opportunity to submit their claims and defences in full. An award may be set aside if the arbitrator or the arbitral tribunal does not respect this principle.

Party autonomy

2.3.3 Turkish law encourages the autonomy of the parties. In the spirit of this principle, many of the provisions of the Turkish Arbitration Law are caveated by the sentence “unless otherwise agreed between the parties”.

Non-intervention by courts

2.3.4 Courts may only intervene in the arbitral proceedings if they are entitled to do so in accordance with the Turkish Arbitration Law which limits the intervention of the courts in arbitral proceedings to specific circumstances.

Impartiality and independence of the arbitrators

2.3.5 The parties, or in circumstances where the parties fail to agree on arbitrators, a court, must pay due regard to the need to appoint independent and impartial arbitrators. Justifiable doubts on the impartiality or independence of an arbitrator may constitute legal grounds for challenging his/her appointment.

3. The arbitration agreement

3.1 Definitions

3.1.1 The Turkish Arbitration Law defines the arbitration agreement as an agreement executed by the parties to settle all or any, present or future disputes arising...
The arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.\(^{13}\) If the main agreement makes reference to a different document that includes an arbitration agreement, such reference will be acknowledged as a valid arbitration agreement by incorporation.\(^{14}\)

### 3.2 Formal requirements

3.2.1 The arbitration agreement must be made in writing\(^ {15}\) and must either be signed by the parties or included in an exchange of letters, telegrams or any other means of telecommunication that provides a record of the agreement. Alternatively, this requirement is also satisfied when a party refers to an arbitration agreement in court (i.e. challenges the court’s jurisdiction due to an arbitration agreement) and the respondent does not object.

### 3.3 Special tests and requirements of the jurisdiction

3.3.1 The Turkish Arbitration Law is not applicable to disputes regarding ownership or property rights over real property located in Turkey or to disputes that are not subject to discretionary settlement between the parties such as disputes arising from family or competition law.\(^ {16}\)

### 3.4 Separability

3.4.1 Under Turkish Arbitration Law the arbitration clause will be effective even if it is alleged that the main agreement is null and void or that the arbitration agreement relates to a dispute that has not arisen yet.\(^ {17}\)

### 3.5 Legal consequences of a binding arbitration agreement

3.5.1 Upon commencement of proceedings before a court a respondent is entitled to raise an objection that the dispute is to be resolved by arbitration.\(^ {18}\) Settlement of a dispute regarding the validity of an arbitration agreement will depend on whether a court case has been filed despite the arbitration clause or whether a request for arbitration has been filed.

\(^{12}\) Ibid, art 4.

\(^{13}\) Ibid.

\(^{14}\) Ibid.

\(^{15}\) Ibid.

\(^{16}\) Ibid, art 1.

\(^{17}\) Ibid, art 4.

\(^{18}\) Ibid, art 5.
3.5.2 Once the request for arbitration has been filed the arbitrators are entitled to
determine their own jurisdiction by deciding on the validity of the agreement to
arbitrate.

3.5.3 In the absence of a pending arbitration, and where a court case is filed instead, the
respondent may invoke the agreement to arbitrate and the claimant, in turn, may
argue that the agreement to arbitrate is invalid. In this case, the resolution of the
dispute is subject to the provisions of the CPL No 6100 which regulates preliminary
objections.\textsuperscript{19} The court would decide on the validity of the agreement to arbitrate.
Where the agreement to arbitrate is found to be invalid or unenforceable, the case
will be heard by the court on the merits. Where the agreement to arbitrate is
found to be valid, the court would uphold the objection and dismiss the lawsuit on
procedural grounds. The court will not specifically order that the dispute be
resolved through arbitration as it is up to the parties to decide whether to arbitrate.
However, the court’s dismissal would mean that the dispute may only be resolved
through arbitration, unless the parties agree otherwise.

4. Composition of the arbitral tribunal

4.1 The constitution of the arbitral tribunal

4.1.1 The parties are free to determine the number of arbitrators. However, the number
of arbitrators must be an odd number.\textsuperscript{20} Failing such determination, the number
of arbitrators will be three.\textsuperscript{21}

4.1.2 Only natural persons may be appointed as arbitrators.\textsuperscript{22} If the parties are unable to
agree on the appointment of a sole arbitrator, he or she will be appointed, upon
the request of a party, by the competent court of first instance.\textsuperscript{23} In an arbitration
consisting of three arbitrators, unless otherwise agreed by the parties, each party
will appoint one arbitrator, and those two arbitrators will appoint a third who will
act as the chair. If a party fails to appoint its arbitrator within the 30 days of receipt
of a request to do so from the other party, or if the two arbitrators fail to agree on
a third arbitrator within 30 days of their appointment, the appointment will be

\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid, art 7.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
made, upon the request of a party, by the competent court of first instance.\textsuperscript{24} The court will appoint a chair who has expertise in the subject-matter of the dispute.\textsuperscript{25}

4.1.3 Where, under an appointment procedure agreed upon by the parties:
— a party fails to act as required under such procedure;
— the parties, or two arbitrators, are unable to reach an agreement; or
— a third party, including an institution, fails to perform any function entrusted to it under such procedure,
the competent court of first instance will appoint the arbitrator or the arbitral tribunal. The decision rendered by the court will be final and binding.\textsuperscript{26}

4.2 The procedure for challenging and substituting arbitrators
4.2.1 The parties may determine the procedure for challenging arbitrators. The default position is that the challenging party is required to submit its challenge in writing within 30 days of the appointment of the arbitrator or the arbitral tribunal or within 30 days of becoming aware of a reason for challenging an arbitrator. If the challenging party’s request is rejected by the arbitral tribunal, that party may file a supplementary objection at the competent court of first instance. The decision of the court is final and binding.\textsuperscript{27}

4.2.2 The acceptable grounds for challenging an arbitrator are that the arbitrator lacks the features that were agreed on by the parties or that reasonable suspicions exist as to the arbitrator’s impartiality.\textsuperscript{28}

4.2.3 A new arbitrator must be appointed to replace the challenged arbitrator. The term of the arbitral proceedings, if limited, will not be extended where a replacement has taken place.\textsuperscript{29} The appointment of the replacement arbitrator will be subject to the same procedure as that used for the appointment of the original arbitrators.\textsuperscript{30}

\textsuperscript{24} Ibid.
\textsuperscript{26} Turkish Arbitration Law, art 7.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
4.3 **Responsibility of arbitrators**

4.3.1 Once an arbitrator accepts his/her appointment, he/she cannot refrain from duly performing his/her duties without a justifiable cause. If the arbitrator so refrains, he/she will be obliged to compensate the parties for any damages they incur.\(^{31}\)

4.4 **Arbitration fees**

4.4.1 The parties may determine the fee of the arbitrator or arbitral tribunal by making reference to established international rules or institutional arbitral rules on arbitral fees. If not agreed by the parties, the fees of the arbitrators will be determined by the arbitrators and the parties, taking into consideration the amount in dispute, the nature of the dispute and the duration of the arbitration.\(^{32}\)

4.4.2 In the absence of an agreement between the parties and the arbitrators, or a provision in the arbitration agreement dealing with fees, the fees will be fixed as per the fee tariff prepared by the Chamber of the Turkish Union of Arbitrators and Experts approved by the Ministry of Justice.\(^{33}\) According to the Regulation of Fee Tariffs of International Arbitration dated 9 March 2011, the fee to be paid to the arbitrator(s) is calculated in accordance with the amount in dispute and the number of arbitrators as follows:\(^{34}\)

<table>
<thead>
<tr>
<th>Value Dispute (in Turkish Lira)</th>
<th>Arbitrator Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Sole Arbitrator</td>
</tr>
<tr>
<td>0 to 500,000</td>
<td>5%</td>
</tr>
<tr>
<td>500,000.01–1,000,000</td>
<td>4%</td>
</tr>
<tr>
<td>1,000,000.01–2,000,000</td>
<td>3%</td>
</tr>
<tr>
<td>2,000,000.01–5,000,000</td>
<td>2%</td>
</tr>
<tr>
<td>5,000,000.01 and over</td>
<td>1%</td>
</tr>
</tbody>
</table>

4.4.3 Expenses incurred by the arbitrators during the arbitral proceedings, such as travel and accommodation costs, shall be claimed separately from the arbitrator fees.\(^{35}\) At its sole discretion, the arbitral tribunal may request that the claimant deposit an

---

31 Ibid.

32 Ibid, art 16.

33 Turkish Arbitration Law, art 16 and Regulation of Fee Tariffs of International Arbitration, art 1.

34 Regulation of Fee Tariffs of International Arbitration, art 11.

35 Turkish Arbitration Law, art 16.
advance payment at the beginning of the proceedings to cover such expenses, should its claim be unsuccessful. The losing party normally bears all of the arbitral costs including the fees of the arbitrator. If both parties are partially successful in their claims and defences, the arbitrators may hold them liable to each pay a proportion of the costs.\footnote{\textit{Ibid.}}

4.4.4 Unless the parties agree otherwise, the fee payable to the chair will be ten percent more than those payable to co-arbitrators.\footnote{\textit{Ibid.}}

4.4.5 No additional fees will be payable to the arbitrators for the correction, interpretation or completion of an award.\footnote{\textit{Ibid.}}

4.5 Arbitrator immunity
4.5.1 There is no provision in the Turkish Arbitration Law relating to the immunity of arbitrators.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction
5.1.1 The arbitral tribunal may rule on its own jurisdiction, including any objections raised regarding the existence or validity of the arbitration agreement.\footnote{\textit{Ibid.}, art 7.}

5.1.2 A plea that the arbitral tribunal does not have jurisdiction must be raised in, or prior to, the submission of the statement of defence.\footnote{\textit{Ibid.}} A party is not precluded from raising such plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. The arbitral tribunal will rule on the above-mentioned plea as a preliminary question and, if it should decide that it has jurisdiction, it will resume the arbitral proceedings.\footnote{\textit{Ibid.}} Such a decision by the arbitral tribunal cannot be appealed to the courts.

5.2 Power to order interim measures
5.2.1 Upon request by one of the parties, the arbitral tribunal may issue a preliminary injunction or attachment during the arbitral proceedings. Since it is possible that the other party might incur damages as a result of a preliminary injunction or

attachment the Turkish Arbitration Law permits the arbitral tribunal to demand an appropriate guarantee or security from the requesting party prior to rendering a preliminary injunction or attachment.\(^{42}\)

5.2.2 The Turkish Arbitration Law limits the arbitral tribunal’s authority to order a preliminary injunction or attachment by prohibiting it from issuing preliminary injunctions or attachments that are solely enforceable by governmental authorities. For example, real property owned by the respondent may not be seized based on a preliminary attachment ordered by an arbitral tribunal because the seizure of real property requires the involvement of execution officers. Similarly, the arbitral tribunal may not order the customs authority to prevent the respondent from taking its assets out of the country.

5.2.3 The arbitral tribunal is prohibited from issuing preliminary injunctions or attachments which are binding on third parties. This is because a third party may not have participated in the arbitral proceedings and therefore could not have properly objected to the decision rendered by the arbitral tribunal.\(^ {43}\)

5.2.4 If one of the parties refuses to comply with a preliminary injunction or attachment rendered by the arbitral tribunal, the other party may request the assistance of the competent court which may enforce the arbitral tribunal's decision by issuing a preliminary injunction or attachment. If necessary, the competent court may authorise another court to issue the injunction or attachment as rogatory should geographical concerns warrant this.\(^ {44}\)

6. Conduct of proceedings

6.1 Commencement of arbitration

6.1.1 Unless otherwise agreed by the parties, the arbitral proceedings will commence on the date on which:
— the application is made to the court of first instance or to the relevant person or institution which is entitled to appoint the arbitrator as per the arbitration agreement;
— the claimant appoints its arbitrator and requests that the other party appoints an arbitrator (when the arbitrators are to be appointed mutually by the parties); or

\(^{42}\) Ibid, art 6.
\(^{43}\) Ibid.
\(^{44}\) Ibid.
— where the identity of the arbitrator(s) is already set out in the arbitration agreement, the request to resolve the dispute via arbitration is received by one of the parties.\(^{45}\)

6.1.2 If a party has obtained a preliminary injunction or attachment from a domestic court with respect to a subject matter that falls under an arbitration agreement, the respective party must initiate arbitral proceedings within 30 days of obtaining such a preliminary injunction or attachment, or the preliminary injunction or attachment will be automatically null and void.\(^{46}\)

6.2 General procedural principles
6.2.1 The arbitral tribunal will render its award pursuant to the provisions of the arbitration agreement executed between the parties and the applicable law chosen by the parties to govern the proceedings.\(^{47}\)

6.3 Seat, place of hearings and language of arbitration
6.3.1 The seat of arbitration will be determined by the parties or, in the absence of agreement, by an arbitral institution agreed upon by the parties.\(^{48}\) If the parties cannot agree, the arbitral tribunal will determine the seat of arbitration, having regard to the circumstances of the case.\(^{49}\)

6.3.2 The arbitrator or arbitral tribunal is entitled to convene or to hold a hearing at a place other than the seat of arbitration. In such a case, the arbitrator or the arbitral tribunal must notify the parties in advance of such place.\(^{50}\)

6.3.3 The parties are free to agree on the language in which the arbitral proceedings will be conducted, provided that this language is a language spoken in any of the foreign countries recognised by the Republic of Turkey.\(^{51}\) If the parties have not agreed on the language, the arbitrators will determine the language(s) of arbitration.\(^{52}\) Unless otherwise expressed in the agreement of the parties or in a relevant interim decision rendered by the arbitrators, the language(s) of the arbitral proceedings will be used in:

\(^{45}\) Ibid, art 10.
\(^{46}\) Ibid.
\(^{47}\) Ibid, art 8.
\(^{48}\) Ibid, art 9.
\(^{49}\) Ibid.
\(^{50}\) Ibid.
\(^{51}\) Ibid, art 10.
\(^{52}\) Ibid.
— the written submissions and statements of the parties;
— hearings;
— any interim awards issued by the arbitrator or arbitral tribunal;
— the final award; and
— all written documents and correspondence brought before the arbitrator or the arbitral tribunal.\textsuperscript{53}

6.3.4 The arbitral tribunal may request that the documents on which the parties’ claims are based should be submitted and presented together with their translations in the language(s) of arbitration.\textsuperscript{54}

6.4 **Oral hearings and written proceedings**

6.4.1 The arbitral tribunal will decide whether the arbitral proceedings should be conducted solely on the basis of the documentation provided or include oral hearings.\textsuperscript{55} However, unless the parties have agreed not to hold a hearing, the arbitrator or arbitral tribunal is obliged to hold a hearing at an appropriate stage of the proceedings upon the request of any of the parties.

6.4.2 The parties must receive sufficient advance notice in relation to any expert review or any other meeting or hearing to be conducted by the arbitral tribunal and must be informed of the consequences of failing to attend to such hearings.\textsuperscript{56}

6.4.3 Petitions, information and other documents submitted to the arbitral tribunal should be communicated to each of the parties.\textsuperscript{57}

6.5 **Default by one of the parties**

6.5.1 If any of the parties to the arbitral proceedings loses its capacity as a party to the arbitration, e.g. by the death of a party, the arbitrators will postpone the arbitral proceedings and serve a notice to that party’s successors to resume the process, if they so wish.

6.5.2 If a notice is not served within six months or if any of the absent parties that have been served fail to explicitly notify the other party or the arbitral tribunal that it will continue the arbitral proceedings, then the proceedings will be terminated.\textsuperscript{58}

\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid, art 11.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid, art 11B.
6.5.3 The following will occur if any of the parties fails to participate in the arbitral proceedings:

— if the claimant fails to communicate his statement of claim to the respondent within the timeframe stipulated by the arbitrators (or as agreed by the parties) without justification, the arbitral tribunal will terminate the proceedings;
— if the statement of claim does not meet the procedural requirements such as the inclusion of the names of the parties, the name of counsel for the parties, the arbitration agreement/clause, the legal relationship/agreement out of which the dispute arises, the facts upon which the claims are based, or the subject-matter of the dispute, and such omissions are not remedied within the timeframe stipulated by the arbitrator or arbitral tribunal, the proceedings will be terminated;
— if the respondent fails to communicate his statement of defence, the proceedings will continue without treating such failure in itself as an admission of the claimant’s allegations; and
— if any party fails to attend a hearing or produce documentary evidence, the arbitrator or the arbitral tribunal may continue the proceedings and make any award based on the evidence before it. 59

6.6 Appointment of experts

6.6.1 The arbitrators may:

— appoint one or more experts to report to it on specific issues to be determined by the arbitrator or the arbitral tribunal;
— require a party to give any relevant information to the expert or to produce or provide access to any relevant documents, goods or other property for his/her inspection; and
— decide to conduct a site visit where they deem necessary. 60

6.6.2 Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert will, after the delivery of his/her written or oral report, participate in a hearing. 61 At this hearing, the parties are entitled to question the expert and to present their own expert witnesses to testify on the points at issue.

6.7 Confidentiality

6.7.1 Although there is no explicit provision in the Turkish Arbitration Law regarding confidentiality, the principle of confidentiality is recognised in arbitral proceedings. Therefore, as a general principle of Turkish law arbitration is confidential.

59 Ibid, art 11.
60 Ibid, art 12.
61 Ibid.
6.8 **Court assistance in taking evidence**

6.8.1 The arbitral tribunal may seek assistance of the competent Turkish court of first instance for the collection of evidence, regardless of whether it is a domestic or international arbitration, to the extent that such international arbitration is subject to the Turkish Arbitration Law. In these cases, the relevant court shall apply the provisions of CPL No 6100 in conducting its fact and evidence gathering function.

7. **Making of the award and termination of proceedings**

7.1 **Choice of law**

7.1.1 The arbitrator or arbitral tribunal will decide on the merits of the dispute in accordance with the applicable law chosen by the parties as relevant to the substance of the dispute. In interpreting and completing the contractual provision in dispute, commercial practices and usages of trade will be taken into account. Any designation of law or legal system of a given state will be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of law rules.

7.1.2 If the parties have not agreed on the applicable law then the arbitral tribunal will determine the applicable law by reference to the law of the country that has the closest connection to the dispute in the arbitral tribunal’s view.\(^{62}\)

7.2 **Timing, form, content and notification of award**

7.2.1 Unless otherwise agreed between the parties, the arbitrators shall render the award on the substance of the dispute within one year from the date on which the sole arbitrator was appointed; or in cases where an arbitral tribunal is constituted, from the date on which the minutes of the first meeting of the arbitral tribunal were issued.\(^{63}\) The term of the arbitral proceedings may be extended by the mutual agreement of the parties, or, if the parties fail to agree, by a competent court of first instance upon the application of either party. If the court does not grant the extension, the arbitral proceedings will be terminated upon the expiration of the statutory arbitration term. The decision rendered by the court of first instance is final and binding.\(^{64}\)

7.2.2 The parties may agree that the decision of the arbitral tribunal must be unanimous.\(^{65}\)


\(^{63}\) *Ibid*, art 10.

\(^{64}\) *Ibid.*

7.2.3 The arbitral tribunal may render a partial award unless otherwise agreed by the parties.

7.2.4 Awards must include the following information:
- names, surnames, titles and addresses of the parties or of their representatives, if any;
- legal grounds and reasons upon which the award is based and if compensation is claimed, the amount of compensation awarded;
- seat of arbitration and date of the award;
- name(s) and surname(s) of the sole arbitrator or the members of the arbitral tribunal rendering the award along with their signatures or dissents; and
- a statement that an application may be filed requesting that the award be set aside.66

7.3 Settlement
7.3.1 If the parties settle the dispute during the arbitral proceedings, the arbitrator or the arbitral tribunal will terminate 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 on agreed terms.67

7.4 Power to award interest and cost
7.4.1 An award must take into account the expenses of the arbitration.68 Arbitration expenses cover the arbitrator fees and all other legal expenses of the arbitral tribunal (e.g. travel and accommodation costs of arbitrators, expert witness fees, costs of any site visits and attorney fees of the successful party). Under Turkish law, costs incurred by parties themselves are normally to be borne by them.

7.4.2 There is no provision in the Turkish Arbitration Law that precludes the arbitral tribunal from awarding interest.

7.5 Termination of the proceedings
7.5.1 The arbitral proceedings will be terminated by a final award or by an order of the arbitral tribunal:
- when the claimant withdraws his claim, unless the respondent objects and the arbitrator or arbitral tribunal recognises his/her legitimate interest in obtaining a final settlement of the dispute;
- if the parties agree on the termination of the proceedings;

67 Ibid, art 12.
68 Ibid, art 16.
— if the arbitrator or arbitral tribunal is of the opinion that the continuation of the proceedings is unnecessary or impossible due to other reasons;
— if the request for the extension of the arbitration term is dismissed by the competent court of first instance;
— if the arbitral tribunal fails to render a unanimous award where the parties requested that the decision be unanimous;
— if the arbitration is stayed due to loss of capacity by a party to the arbitration;\(^69\)
    and
— if no advance payment for fees and expenses was deposited despite the arbitral tribunal’s specific instruction.\(^70\)

7.5.2 The powers of the arbitral tribunal will be annulled upon the termination of the arbitration.

7.6 Effect of the award

7.6.1 Unless an application is made to set aside the award, or if such application is made and dismissed by the competent court of first instance, any party may acquire a document from the court of first instance indicating that the award rendered is final and binding.\(^71\) This applies to arbitrations which are subject to Turkish Arbitration Law. Otherwise, the enforcement of foreign awards is subject to the New York Convention\(^72\) to which Turkey is a signatory.

7.7 Correction, clarification and issue of supplemental award

7.7.1 Either party may request the arbitral tribunal to correct the award within 30 days if there are any errors in its computation or any clerical, typographical or other errors of a similar nature. Either party may request that the arbitral tribunal give an interpretation of the award, either in whole or in part. After consulting the other party, if the arbitral tribunal considers the request to be justified, the correction shall be made or the award shall be interpreted within 30 days of receipt of such request by the arbitral tribunal.\(^73\) The arbitral tribunal may also correct the above-mentioned errors of its own volition within 30 days of the award date.

7.7.2 Furthermore, either party may request the issuance of a complementary award on any matter which has been alleged during the arbitral proceedings but which has not been covered by the award, provided that the other party is informed of such

\(^{69}\) See section 6.5.1 above.

\(^{70}\) Turkish Arbitration Law, art 13.

\(^{71}\) Ibid, art 15.


\(^{73}\) Turkish Arbitration Law, art 14.
request. Such a request may be made within 30 days following the service of the award. If the arbitral tribunal deems that such request is justified, it may issue the complementary award within 60 days.

7.7.3 Awards relating to the correction and interpretation of the original award, including complementary awards, are considered to form part of the original award.

8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 The court of first instance where the respondent’s usual residence, domicile or place of business is located will have jurisdiction over the dispute in the circumstances stipulated in the Turkish Arbitration Law. If the respondent’s usual residence, domicile or place of business is located outside Turkey, the Istanbul Civil Court of First Instance will have jurisdiction.

8.1.2 The court may only intervene in a dispute referred to arbitration to the extent permitted by the provisions of the Turkish Arbitration Law.

8.2 Stay of court proceedings
8.2.1 If the parties agree to refer the dispute to arbitration pending a court case on the same subject-matter, the court must stay the court proceedings and refer the parties to arbitration.

8.3 Preliminary rulings on jurisdiction
8.3.1 If court proceedings are initiated regarding a dispute which is the subject of an arbitration agreement, the non-initiating party may raise an objection with the court on the grounds that the parties had agreed to submit the dispute to arbitration. If the objection is accepted, the court will dismiss the proceedings on procedural grounds.

8.4 Interim protective measures
8.4.1 If a party requests that the court impose a preliminary injunction or provisional attachment prior to, or during the arbitral proceedings, this will not constitute a breach of the arbitration agreement.

74 Ibid.
75 Ibid, art 3.
76 Ibid, art 5.
77 Ibid.
78 Ibid, art 6.
8.4.2 If a party fails to enforce the preliminary injunction or provisional attachment rendered by the arbitrator or arbitral tribunal, the other party may request that the competent court issue an order for the preliminary injunction or provisional attachment.  

8.4.3 The parties may file a request for interim protective measures in accordance with CPL No 6100 and the Turkish Execution and Bankruptcy Law at any stage of the proceedings.  

8.5 Obtaining evidence and other court assistance

8.5.1 The arbitrator or arbitral tribunal may seek the assistance of the court of first instance to collect evidence.

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

9.1.1 The court of first instance, where the respondent’s usual residence, domicile or place of business is located will have jurisdiction to hear an application for setting aside an award. If the respondent’s usual residence, domicile or place of business is located outside of Turkey, the Istanbul Civil Court of First Instance will have jurisdiction to hear such an application.

9.2 Applications to set aside an award

9.2.1 The Turkish Arbitration Law excludes the possibility of any appeal on the merits of the dispute. It only provides for the setting aside of an award under the limited grounds of procedure, arbitrability and public policy.

9.2.2 An arbitral award may be set aside by the court if:
   — a party to the arbitration agreement lacks the necessary competence;
   — the arbitration agreement is invalid under the applicable law or, if the applicable law is not agreed by the parties, under the law of Turkey;
   — the arbitrator or the arbitral tribunal was not appointed in accordance with the procedure agreed between the parties or in accordance with the Turkish Arbitration Law;

---

79 Ibid.
80 Ibid.
81 Ibid, arts 3 and 50.
82 Turkish Arbitration Law, art 15, which is based on the same principles as the New York Convention, art V (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).
— the award was not rendered within the agreed or statutory term for arbitration;
— the arbitrator or the arbitral tribunal did not have jurisdiction to hear the dispute;
— the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the award contains decisions on matters beyond the scope of the submission to arbitration or the arbitrator or the arbitral tribunal has exceeded its competence;
— the arbitral proceedings were not carried out in accordance with the procedures agreed between the parties or, failing such agreement, in accordance with the procedures of the Turkish Arbitration Law and this failure had an impact on the merits of the award;
— the principle of equality of the parties was not respected;
— the subject-matter of the dispute is not capable of settlement by arbitration under Turkish law; or
— the award is in conflict with Turkish public policy.\(^83\)

9.2.3 An action for setting aside the award should be filed before the competent court of first instance within 30 days from delivery of the award or, as case may be, within 30 days of the correction, interpretation or complementary award.\(^84\) The court will give priority to this action and conclude it promptly.

9.2.4 Pursuant to the Turkish Arbitration Law, the parties may partially or fully waive their right to file an action to set aside the award.\(^85\) However, parties residing abroad may only fully waive their right to file a setting aside action by an express declaration in writing or as provided by the arbitration agreement.\(^86\)

9.3 Appeals
9.3.1 The parties are entitled to appeal a decision to set aside an award in line with the provisions of the CPL No 6100. An appeal is limited to the legal grounds applicable to the setting aside of the award.\(^87\)
10. Recognition and enforcement of awards

10.1 Awards
10.1.1 Foreign and domestic arbitral awards are subject to different regimes under Turkish law and as such the definition of “foreign arbitral award” is vitally important.

10.2 Domestic awards
10.2.1 Domestic awards issued in the territory of Turkey are rendered as a result of arbitral proceedings conducted in accordance with applicable provisions of the CPL No 6100. These awards can be set aside.\(^88\)

10.2.2 A review of the request will be carried out on file and will not suspend the execution of the award unless the applicant pays a security deposit. Either of the parties is entitled to appeal against the award issued through a cancellation action.\(^89\)

10.3 Foreign awards
10.3.1 The provisions of the New York Convention\(^90\) have the same force in Turkey as Turkish statutory provisions, and are treated as part of the domestic legal system. In terms of enforcing foreign arbitral awards, Turkish law gives precedence to the application of the New York Convention\(^91\) over Law No 5718. If the award is rendered in the territory of a state other than the Turkish Republic and if the award is not deemed a domestic award under Turkish law, the New York Convention\(^92\) applies.

10.3.2 Turkey enacted the New York Convention\(^93\) with two reservations which means that the enforcement of foreign awards will be subject to the New York Convention\(^94\) if (i) the award was rendered in another signatory state, and (ii) the relevant dispute is defined as commercial under the Turkish Commercial Code.\(^95\) If these requirements are not fulfilled the recognition and enforcement of foreign awards will be governed by the Law No 5718.

\(^{88}\) CPL No 6100, art 439.
\(^{89}\) Turkish Arbitration Law, art 16.
\(^{91}\) Ibid.
\(^{92}\) Ibid.
\(^{93}\) Ibid.
\(^{94}\) Ibid.
\(^{95}\) Turkey limited the enforcement of foreign awards to awards of a commercial nature by reserving its rights under art I (3) of the New York Convention (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).
10.3.3 Law No 5718 and the New York Convention\textsuperscript{96} provide similar grounds for refusal of the recognition and enforcement of an award with one distinction. Pursuant to Article V(1) of the New York Convention\textsuperscript{97}, enforcement of an award may be refused if the party against whom the award is invoked proves the existence of any grounds for refusal of enforcement. By contrast, Law No 5718 provides that enforcement of an award shall be refused if the party against whom the award is invoked proves the existence of any grounds for such refusal. Therefore, while under the New York Convention\textsuperscript{98} it is at the discretion of the enforcing court to decide whether the award will be enforced, under the Law No 5718, the enforcing court is obliged to refuse enforcement if one of the refusal grounds is proven. Under both the New York Convention\textsuperscript{99} and Law No 5718, the burden of proof lies with the party arguing for refusal of enforcement. However, where questions of the violation of public policy or non-arbitrability arise, the enforcing court may consider these two grounds on its own volition.

10.3.4 The grounds for refusal of enforcement of foreign awards under Law No 5718 are as follows:

- the award is not yet binding, has been set aside or suspended by a court;
- the subject matter of the dispute is not arbitrable; or
- the award is a violation of public policy.\textsuperscript{100}

10.3.5 Violation of public policy is a ground for refusing recognition or enforcement of foreign awards.\textsuperscript{101} The New York Convention\textsuperscript{102} stipulates that recognition or enforcement of an award may be refused if “recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement are sought.” Law No 5718 stipulates that recognition or enforcement shall be refused “if the award is contrary to the public order or public morality.”

10.3.6 Public policy is often regarded as a vague concept and is interpreted by the Turkish courts on a \textit{sui generis} basis. The Turkish courts face a dilemma between the goal of protecting the state’s authority to refuse enforcement of awards which contravene domestic values in terms of public policy and, on the other hand, the

\textsuperscript{96} CMS Guide to Arbitration, vol II, appendix 1.1.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid.
\textsuperscript{99} Ibid.
\textsuperscript{100} Law No 5718, art 61.
\textsuperscript{101} See Law No 5718, art 62.1(b) and New York Convention, arts V(1) and (2) (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).
\textsuperscript{102} CMS Guide to Arbitration, vol II, appendix 1.1.
desire to respect the finality of foreign awards (the révision au fond prohibition). In this respect, Law No 5718 stipulates that only explicit violations of public policy can be considered grounds for refusing enforcement, including:
— lack of due process;
— invalidity of the arbitration agreement under the law of the country to which the parties have subjected it;
— improper arbitral procedure or composition of the arbitral tribunal;
— inarbitrability of the subject matter; or
— the non-existence of reciprocity.¹⁰³

10.3.7 The Law No 5718 refers to the principle of reciprocity in the recognition and enforcement of foreign awards, meaning that the enforcement of awards will be recognised in Turkey provided that they were granted in a country:
— which is party to a reciprocity agreement, whereby it undertook to enforce and recognise arbitral awards made in Turkey; or
— which is obliged to recognise and enforce arbitral awards made in Turkey pursuant to its domestic laws or the established practice of its courts.¹⁰⁴

11. Special provisions and considerations

11.1 Non-arbitrable subject matter
11.1.1 The Turkish principle that restricts arbitrability is that of the parties’ free disposal of their rights, i.e. if the parties are not entitled to freely settle a dispute or to decide on its fate, such subject matter is non-arbitrable.

11.2 Consumers
11.2.1 There are no specific prohibitions under the CPL No 6100 that restrict consumers from entering into arbitration agreements.

11.3 Employment law
11.3.1 In view of the mandatory nature of employment law and the provisions of the Labor Law No 4857, employees are not entitled to enter into arbitration agreements with respect to their salaries, notice periods, severance payments or paid annual leave. There are mandatory arbitration procedures regarding the resolution of some collective labor disputes.¹⁰⁵

¹⁰³ Law No 5718, art 61.
¹⁰⁴ Turkey brought the requirement of reciprocity by reserving its right under art I(3) of the New York Convention (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).
¹⁰⁵ Art 52, et seq. of Law No 2822 of 5 May 1983 published in the Official Gazette No 18040 on 7 May 1983.
12. Concluding thoughts and themes

12.1.1 The last decade has been an exceptional era for Turkey. Foreign investment has dramatically increased, loans have been extended by foreign banks and numerous new projects have been undertaken. Privatisations have enabled prominent international service providers to operate in many sectors including telecommunications, gas and electricity. The developments in the finance sector and Turkey’s integration with the European Union have led to the adoption of a variety of legislation to facilitate and encourage investors and foreign investment in Turkey. The Turkish Arbitration Law came into force 2001 and aimed to develop and promote Turkey as a hub for international arbitration. In 2003 the Direct Foreign Investment Law stipulated that foreign and domestic investments should be treated equally and removed barriers to international competition. In 2007, the replacement of International Private Law and Procedure No 2675 by the Law No 5718 was seen as an opportunity to ensure a speedy and inexpensive procedure for the recognition and enforcement of foreign awards that previously had commonly been put off by the “public interest” test.

12.1.2 In 2010 there were a total of 76 arbitration referrals from Turkey to the ICC and Turkish parties acted as claimants in 31 arbitrations. In the remaining 45 disputes, Turkish parties were respondents. These figures demonstrate the Turkish businesses’ trust in the ICC Rules and arbitration in general. Turkey’s reputation as a reliable forum for the settlement of international disputes depends heavily on how it can further promote the implementation of the Turkish Arbitration Law and the speedy enforcement of foreign awards by Turkish courts under Law No 5718.

---

107 ICC National Committee in Turkey.
13. **Contacts**

**Hergüner Bilgen Özeke Attorney Partnership**  
Suleyman Seba Cad.  
Siraevler 55, Akaretler  
34357 Besiktas-Istanbul  
Turkey

**Ümit Hergüner**  
T +90 212 310 1822  
E uherguner@herguner.av.tr

**Hande Yayla**  
T +90 212 310 1864  
E hyayla@herguner.av.tr

**İpek Bozkurt**  
T +90 212 310 1885  
E ibozkurt@herguner.av.tr

**Noyan Göksu**  
T +90 212 310 1804  
E ngoksu@herguner.av.tr
ARBITRATION IN UKRAINE

By Sergiy Gryshko and Oleksandr Gudko, CMS
Table of Contents

1. Legislative framework 935

2. Scope of application and general provisions of the Ukrainian Arbitration Act 936
   2.1 Subject matter 936
   2.2 Structure of the law 936
   2.3 General principles 938

3. The arbitration agreement 939
   3.1 Definitions 939
   3.2 Formal requirements 939
   3.3 Special tests and requirements for jurisdiction 940
   3.4 Separability 941
   3.5 Legal consequences of a binding arbitration agreement 941

4. Composition of the arbitral tribunal 942
   4.1 Constitution of the arbitral tribunal 942
   4.2 The challenge and substitution of arbitrators 943
   4.3 Responsibility of the arbitrators 944
   4.4 Arbitration fees 944
   4.5 Arbitrator immunity 944

5. Jurisdiction of the arbitral tribunal 945
   5.1 Competence to rule on jurisdiction 945
   5.2 Power to order interim measures 945

6. Conduct of proceedings 946
   6.1 Commencement of arbitration 946
   6.2 General procedural principles 946
   6.3 Seat and language of arbitration 946
   6.4 Multi-party issues (intervention and joinder) 947
   6.5 Oral hearings and written proceedings 947
   6.6 Default by one of the parties 948
   6.7 Evidence generally 949
   6.8 Appointment of experts 949
   6.9 Confidentiality 950
7. **Making of the award and termination of proceedings**  
   7.1 Choice of law  
   7.2 Timing, form, content and notification of award  
   7.3 Settlement  
   7.4 Power to award interest and costs  
   7.5 Termination of the proceedings  
   7.6 Effect of the award  
   7.7 Correction, clarification and issue of a supplemental award  

8. **Role of the courts**  
   8.1 Jurisdiction of the courts  
   8.2 Termination and stay of court proceedings  
   8.3 Preliminary rulings on jurisdiction  
   8.4 Interim protective measures  
   8.5 Obtaining evidence and other court assistance  

9. **Challenging an award through the courts**  
   9.1 Jurisdiction of the courts  
   9.2 Appeals  
   9.3 Applications to set aside an international award  
   9.4 Application to set aside a domestic award  

10. **Recognition and enforcement of awards**  
    10.1 Domestic awards  
    10.2 Foreign awards  

11. **Special provisions and considerations**  
    11.1 Consumer disputes  
    11.2 Disputes arising out of corporate governance relations  
    11.3 Correct spelling of the arbitration forum’s name in the arbitration agreement  

12. **Concluding thoughts and themes**  

13. **Contacts**
1. Legislative framework

1.1 The right for parties to arbitrate their disputes in Ukraine is enshrined in national legislation and in a number of international treaties. In the event of a conflict between the national legislation and the provisions of a treaty to which Ukraine is a party, the treaty prevails.

1.1.1 The treaties to which Ukraine is a party include, amongst others, the New York Convention; the 1961 European Convention; and the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention).

1.1.2 When discussing the national legislation, it is important to note that Ukraine has separate legal regimes for international and domestic arbitral proceedings. The Law “On International Commercial Arbitration” (Ukrainian Arbitration Act) governs all international arbitral proceedings conducted in Ukraine. Domestic arbitral proceedings, on the other hand, are governed by the provisions of Ukrainian Law “On Courts of Arbitration” (Law on Domestic Arbitration).

1.1.3 The Ukrainian Arbitration Act is complemented by the Ukrainian Civil Procedure Code dated 18 March 2004 (CPC). The CPC regulates, amongst others, the procedure for recognition and enforcement of foreign court decisions and international awards. Other relevant legislation includes the Commercial Procedure Code (CoPC), which limits the types of disputes that can be submitted to domestic or international arbitration.

1.1.4 A useful analysis of court practice in Ukraine on the recognition and enforcement of foreign awards can be found in a dated yet still effective Resolution of the Plenum of the Supreme Court of Ukraine “On the Court Practice of Entertaining Applications for the Recognition and Enforcement of the Judgments of Foreign

---

1 For the full text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.
5 The Code was adopted by the Verkhovna Rada on 18 March 2004 and came into force on 1 September 2005.
6 Law No 1798-XII, 6 November 1991.
Courts and Foreign Arbitral Awards Rendered in the Course of International Commercial Arbitration in Ukraine”.

2. Scope of application and general provisions of the Ukrainian Arbitration Act

2.1 Subject matter
2.1.1 The Ukrainian Arbitration Act is based on the Model Law (1985) and divides the responsibility for assisting and supervising arbitral proceedings (with the seat of arbitration in Ukraine) between the President of the Ukrainian Chamber of Commerce and Industry (UCCI President) and the local courts of Ukraine.

2.1.2 In adhering to the legislative practice of the former USSR, the Ukrainian Arbitration Act establishes two permanent arbitral institutions under the auspices of the Ukrainian Chamber of Commerce and Industry (UCCI), namely the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC). The powers and legal status of these local arbitral institutions are set forth in two appendices to the Ukrainian Arbitration Act. In contrast with the Russian Federation that has a similar arbitration act, the ICAC and the MAC are, at the present time, the only institutions established in Ukraine that are authorised to administer arbitral proceedings involving foreign parties in Ukraine. However, it does not necessarily follow that arbitrations seated in Ukraine cannot be administered by foreign arbitral institutions (e.g. under the ICC Arbitration Rules).

2.1.3 It is also worth noting that the Ukrainian Arbitration Act is the mirror image of the Russian Law “On International Commercial Arbitration”. However, the Ukrainian and Russian courts have not necessarily interpreted the provisions of their respective laws in the same way.

2.2 Structure of the law
2.2.1 Although the Ukrainian Arbitration Act is based on the structure of the Model Law (1985), there are differences.

7 Resolution No 12, 24 December 1999.
2.2.2 For example, the jurisdiction provisions of the Ukrainian Arbitration Act differ from those of the Model Law (1985).\footnote{The provisions of the Model Law (1985), ch 1, art 1(3)(b) and 1(3)(c) are not reflected in the Ukrainian Arbitration Act. For the Model Law (1985) see CMS Guide to Arbitration, vol II, appendix 2.1.} The Ukrainian Arbitration Act provides that disputes involving Ukrainian legal entities with foreign investment (arguably with at least 10% foreign shareholding)\footnote{Commercial Code of Ukraine \textit{(Commercial Code)} No 436-IV, 16 January 2003, ch 2, art 116. We note, however, that the Ukrainian Arbitration Act does not provide any definition of a “company with foreign investment” and there is no court practice confirming the view that the provisions of the Commercial Code shall apply in this case. Thus, whether this 10% threshold is to be construed to create jurisdiction for an international arbitral tribunal remains to be clarified.} or involving participants of such legal entities can be submitted to international arbitration.\footnote{Ukrainian Arbitration Act, ch 1, art 1(2).}

2.2.3 The Ukrainian Arbitration Act provides that the provisions of a treaty to which Ukraine is a party should prevail over the provisions of the Ukrainian Arbitration Act in case of any discrepancy.\footnote{Ibid, ch 1, art 1(5).} It follows that where differences arise, the provisions of the New York Convention\footnote{CMS Guide to Arbitration, vol II, appendix 1.1.} and/or the 1961 European Convention will prevail over the Ukrainian Arbitration Act.

2.2.4 The Ukrainian Arbitration Act contains a definition of “commercial” which is absent from the Model Law (1985).\footnote{Ukrainian Arbitration Act, ch 1, art 2. For the Model Law (1985) see CMS Guide to Arbitration, vol II, appendix 2.1.} The term “commercial” is interpreted broadly to include trade relations, which can be either contractual or non-contractual. Further, it contains a non-exhaustive list of examples of such trade relations (e.g. sale of goods and services, leasing, financing and transportation of goods and passengers).

2.2.5 The Ukrainian Arbitration Act also contains a preamble emphasising the important role of international arbitration.\footnote{The preamble follows the preamble of the respective arbitration act adopted in the Russian Federation. The text of the preamble is based on the preamble of the Resolution No 40/72 of the UN General Assembly (1985) whereby the General Assembly requested the Model Law (1985) to be circulated to the governments of member states, arbitration institutions and other interested parties.} The other provisions of the Ukrainian Arbitration Act generally follow the wording of the Model Law (1985)\footnote{CMS Guide to Arbitration, vol II, appendix 2.1.} and have only been modified in order to fit in the general drafting language and practicalities of Ukrainian law.
2.3 General principles

2.3.1 Following the wording of the Model Law (1985), the Ukrainian Arbitration Act stipulates that it shall apply to all international commercial arbitral proceedings where the seat of arbitration is in Ukraine. Some provisions, however, apply even if the arbitral proceedings do not take place in Ukraine, for example:
— stay of court proceedings in favour of arbitration;
— interim measures granted by the court in support of arbitral proceedings; and
— recognition and enforcement of awards.

2.3.2 As mentioned at paragraph 1.1.3 above, the Ukrainian Arbitration Act applies exclusively to international commercial arbitration. This is why the range of disputes capable of resolution by way of arbitral proceedings is limited to:
— disputes which arise out of contractual and other civil law relationships in the course of foreign trade and other types of international relations, provided that one of the parties is a commercial entity located outside Ukraine; and
— disputes involving entities with foreign investment and/or international associations and organisations established in the territory of Ukraine.

2.3.3 Thus, in contrast to the Model Law (1985), the Ukrainian Arbitration Act allows arbitration of essentially domestic disputes between Ukrainian companies, where at least one of them has “foreign investment”. In practice, the “foreign investment requirement” has been interpreted to imply that the company in question has foreign shareholders. The thresholds for such foreign shareholdings are currently not clear-cut.

2.3.4 As a result of the wording of the Ukrainian Arbitration Act, the jurisdiction of the “international” arbitral tribunals and the “domestic” arbitral tribunals may significantly overlap. The demarcation line between domestic and international disputes that may be submitted to international arbitration is still to be drawn.

20 Ibid
22 Ibid, ch 2, art 8.
23 Ibid, ch 2, art 9.
24 Ibid, ch 8, arts 35–36.
25 Ibid, ch 1, art 1(2).
26 Whether such disputes arise between the entities, the participants of such entities or between a foreign investment (or international) entity and an entity incorporated under the laws of Ukraine.
28 Ukrainian Arbitration Act, ch 1, art 1(2).
29 See paragraph 2.2.2 above for more detail.
2.3.5 In line with the Model Law (1985), the Ukrainian Arbitration Act defines “arbitration” to include both institutional and ad hoc arbitration. In practice, ad hoc arbitration, including under UNCITRAL Arbitration Rules, is very rarely, if ever, used. This is probably due to the numerous practical and technical complexities of conducting proceedings and eventually attempting to enforce the award, which will have to be certified as effective in order to be enforced in Ukraine. The lack of information about this procedure may also be an impediment to the growth of ad hoc arbitration. However, there is information in the public domain about certain high profile disputes over stakes in a major ferroalloy company between large business groups (Interpipe and Privat) which were submitted to ad hoc arbitration.

3. The arbitration agreement

3.1 Definitions
3.1.1 The Ukrainian Arbitration Act defines an arbitration agreement as:
“[A]n agreement between parties to refer to international commercial arbitration all or certain disputes, which have arisen or may arise between parties concerning their legal relationship irrespective of whether they are contractual or not.”

3.2 Formal requirements
3.2.1 The arbitration agreement must be in writing. It may be concluded in the form of a separate agreement, exchange of letters or in the form of a clause in a contract. An arbitration agreement is also deemed to have been validly concluded if the parties exchange a written claim and a written defence in which one of the parties asserts and the other party does not deny the existence of an arbitration agreement.

3.2.2 The arbitration agreement must expressly indicate the full name of any arbitral institution and the range of disputes that the parties have agreed to submit to arbitration. Parties should be careful to comply precisely with these requirements as, on a number of occasions, the Ukrainian courts have held an arbitration agreement to be invalid as a result of a mere misspelling of the name of the arbitral

---

31 Ukrainian Arbitration Act, ch 1, art 2.
34 Ukrainian Arbitration Act, ch 2, art 7(1).
35 Ibid, art 7(2).
Parties normally indicate the law governing both the dispute and the procedure for appointing the arbitrator(s) and the seat and language of the arbitration in the arbitration agreement.

3.2.3 An arbitration agreement may also be incorporated by reference into the parties’ contract. According to the Ukrainian Arbitration Act, a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is executed in writing and the reference is such as to make the outstanding clause a part of the contract. The parties should include a clear and express reference to ensure that the respective provisions of, for example, the general terms and conditions constitute an integral part of the contract.

3.2.4 It is unclear whether two Ukrainian parties may submit their disputes to an arbitration seated overseas. Since Article 1 of the Ukrainian Arbitration Act – which provides for a right of Ukrainian entities “with foreign investment” to submit their disputes to international arbitration – is not one of the Articles applicable to arbitration both in Ukraine and abroad, companies registered in Ukraine may not submit their disputes to arbitration institutions or ad hoc tribunals based elsewhere. There is no case law to put an end to this ambiguity, but, as a matter of practice, it is not uncommon for Ukrainian companies with foreign shareholdings to agree on arbitration seated abroad.

3.3 Special tests and requirements for jurisdiction

3.3.1 While Ukrainian law does not provide a comprehensive list of disputes that can or cannot be submitted to arbitration, the Ukrainian Law “On Private International Law” (Law on Private International Law) provides a useful list of the disputes that fall within the exclusive jurisdiction of the Ukrainian courts. The list includes, inter alia, disputes:

— concerning real estate property located in the territory of Ukraine;
— relating to the formalisation of intellectual property rights (e.g. registration or certification (patent) issues);
— relating to the registration or liquidation of foreign legal entities or sole traders in Ukraine;
— relating to the validity of information contained in state registries in Ukraine;
— relating to the issuance or cancellation of securities in Ukraine; or
— arising out of the bankruptcy of an entity that is established in Ukraine.

---

37 See further examples at section 11.3.
38 Ukrainian Arbitration Act, ch 2, art 7(2).
39 Law No 2709-IV, 23 June 2005, art 77.
3.3.2 These provisions vest Ukrainian courts with exclusive jurisdiction over the disputes listed above and are likely to be construed to prohibit arbitral tribunals from resolving them.

3.3.3 The CoPC provides that the local courts shall have exclusive jurisdiction to entertain actions relating to the conclusion, amendment, termination and execution of contracts for the procurement of goods, work and services for “state needs” (public procurement) and corporate governance disputes.\(^{40}\)

3.3.4 Moreover, arbitral tribunals may not entertain cases of a non-adversarial nature that do not involve a legal dispute. In particular, the disclosure of bank secrets and the restoration of title for lost bearer securities or promissory notes must be considered by the general state courts in a non-adversarial proceeding.\(^{41}\)

3.4 Separability

3.4.1 The Ukrainian Arbitration Act provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract for the purposes of determining the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement. The fact that the main contract may be null and void therefore does not invalidate the arbitration clause as a matter of law.\(^{42}\)

3.5 Legal consequences of a binding arbitration agreement

3.5.1 The Ukrainian Arbitration Act prohibits national courts from intervening in arbitral proceedings except in the circumstances expressly prescribed by the Ukrainian Arbitration Act.\(^{43}\) The circumstances in which national courts are entitled to intervene include:

— ruling on the jurisdiction of the arbitral tribunal;\(^{44}\) and

— ruling on applications to set aside awards.\(^{45}\)

---

40 CoPC, s III, art 12, as discussed in section 11.2 below.
41 CPC, art 234 and 235.
42 Ukrainian Arbitration Act, ch 4, art 16.
43 Ibid, ch 1, art 5.
44 Ibid, ch 4, art 16.
45 Ukrainian Arbitration Act, ch 7, art 34.
3.5.2 In keeping with the provisions of the Model Law (1985)\textsuperscript{46} and the New York Convention,\textsuperscript{47} the Ukrainian Arbitration Act provides that in the event an action is brought before a state court in a matter which falls within the scope of an arbitration agreement, a state court shall\textsuperscript{48} terminate the proceedings and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.\textsuperscript{49}

3.5.3 However, in practice, a state court does not really “refer parties to arbitration”. Rather, the court terminates proceedings. Where an action falling within the ambit of an arbitration agreement is brought before a state court, a party wishing to enforce an arbitration agreement should request the court to terminate the proceedings.\textsuperscript{50} The termination of proceedings is discussed in more detail at section 8.2 below.

3.5.4 The Ukrainian Arbitration Act also provides that an action before a state court should not delay the arbitral proceedings, arbitral proceedings may be commenced or continued and an award may be entered into.\textsuperscript{51}

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The Ukrainian Arbitration Act provides that an arbitral tribunal shall consist of three members, unless otherwise agreed by the parties.\textsuperscript{52} Each party appoints one arbitrator and the appointed arbitrators appoint the third arbitrator. Under the ICAC Rules, the arbitrator appointed by the two members of the arbitral tribunal shall “automatically” be the chair.\textsuperscript{53} If the parties do not agree upon the procedure for appointing the arbitrators or if, for example, one of the parties does not appoint an arbitrator, the arbitrator(s) shall be appointed by the UCCI President

\textsuperscript{46} CMS Guide to Arbitration, vol II, appendix 2.1.
\textsuperscript{47} CMS Guide to Arbitration, vol II, appendix 1.1.
\textsuperscript{48} If the party seeking to enforce the arbitration agreement does so before submitting its first statement to the court on the substance of the dispute.
\textsuperscript{49} Ukrainian Arbitration Act, ch 2, art 8(1).
\textsuperscript{50} See further at section 7.5.
\textsuperscript{51} Ukrainian Arbitration Act, ch 2, art 8(2).
\textsuperscript{52} Ibid, ch 3, art 10.
\textsuperscript{53} ICAC Rules, ch 3, s 4, art 27(2).
upon the request of either of the parties. The UCCI President’s decision is binding on the parties and may not be appealed or cancelled.

4.2 The challenge and substitution of arbitrators

Challenge of arbitrators

4.2.1 An arbitrator may only be challenged if he or she lacks the qualifications required by the parties in their arbitration agreement or if the parties establish the existence of facts giving rise to justifiable doubts as to his or her impartiality or independence.

4.2.2 To limit the need for future challenges, the Ukrainian Arbitration Act requires an arbitrator, prior to his or her appointment, to disclose any circumstances, which could give rise to reasonable doubts as to his or her impartiality and independence. This duty of disclosure is a continuing duty with the consequence that arbitrators must disclose any circumstances that arise during the course of the arbitral proceedings that could bring their impartiality or independence into doubt.

Procedure for challenging an arbitrator

4.2.3 Each of the parties may challenge the arbitrator(s) within 15 days from the date on which they are notified of the constitution of the arbitral tribunal or from the date on which they become aware of the circumstances allegedly giving rise to doubts as to the arbitrator’s impartiality or independence. If the arbitral tribunal rejects the challenge, the challenging party may, within 30 days of receipt of the rejection of the challenge, request the UCCI President to rule on the challenge. The UCCI President’s decision on challenges is final (i.e. it is not subject to appeal).

4.2.4 There is no clear guidance as to whether the arbitral tribunal and the UCCI President should apply the “appearance of bias” test or the “actual bias” test when ruling on challenges to arbitrators.

Substitution of arbitrators

4.2.5 An arbitrator may also resign, die, or have his or her mandate terminated in circumstances where he or she is de jure or de facto incapable of performing his or her functions. In such cases, a substitute arbitrator will be appointed in accordance with the same procedure as that set out in paragraph 4.1.1 above.
4.3 Responsibility of the arbitrators

4.3.1 Arbitrators derive their authority from an arbitration agreement, which is entered into by the parties pursuant to the principle of party autonomy incorporated in Ukrainian legislation. The Ukrainian Arbitration Act and the ICAC Rules are silent on the responsibility of arbitrators. The Law on Domestic Arbitration only provides that arbitrators may be held responsible for not complying with the obligations of the arbitrator in accordance with the applicable rules or the contract entered into between the parties and arbitrators.

4.3.2 In July 2011, a new anti-corruption law introduced criminal liability for arbitrators as well as for parties. Arbitrators may now be held liable for abuse of their powers, excess of powers, issuing false documents or misrepresentation in such documents, gross negligence, extortion of a bribe, unlawful enrichment and taking bribes. Under the new law, parties may also be prosecuted for bribing an arbitrator. Legal entities may not be held liable for criminal offences. Instead, an individual actually giving a bribe on behalf of a legal entity can be prosecuted.

4.4 Arbitration fees

4.4.1 The Ukrainian Arbitration Act is silent on the fees and expenses of arbitrators. However, under the ICAC Rules, the claimant shall pay registration and arbitration fees.

4.4.2 In ad hoc arbitrations, the arbitrators’ fees and expenses are subject to the parties’ and the arbitrators’ mutual consent.

4.5 Arbitrator immunity

4.5.1 Ukrainian legislation currently does not provide for arbitrator immunity.

---

63 Ibid, ch 2, art 365.
64 Ibid, ch 2, art 366.
65 Ibid, ch 2, art 367.
66 Ibid, ch 2, art 370.
68 Ibid, ch 2, art 368.
69 Ibid, ch 2, art 369.
70 ICAC Rules, ch 3, s 1, art 16(1).
5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 Article 16 of the Ukrainian Arbitration Act, based on the Model Law (1985), provides that the arbitral tribunal is competent to rule on its own jurisdiction (including on the existence or validity of the arbitration agreement). Procedurally, any challenge to the jurisdiction of the arbitral tribunal must be made to the arbitral tribunal no later than the filing of the statement of defence. Similarly, any objection that the arbitral tribunal acted in excess of its jurisdiction should be raised as soon as the facts underpinning such an objection arise in the course of the arbitral proceedings.

5.1.2 The arbitral tribunal may rule on the challenge to its jurisdiction either as a preliminary issue (by rendering an interim order on jurisdiction) or as part of its final award. If the arbitral tribunal determines the issue of jurisdiction by way of an interim order, either party may challenge such order before the competent national court, within 30 days of receipt of the interim order. The decision of the national court is not subject to any further appeal. Pending the outcome of the application to the national court, the arbitral tribunal may continue the arbitral proceedings and issue an award, which may subsequently be set aside if the court finds that the arbitral tribunal lacked or exceeded its jurisdiction.

5.2 Power to order interim measures

5.2.1 The Ukrainian Arbitration Act, the ICAC Rules and the MAC Rules permit arbitrators to grant interim measures at a party’s request. Such interim measures may be obtained at any stage of the arbitral proceedings, as well as before proceedings commence. For example, the ICAC President or the MAC President are authorised to grant interim measures on the party’s request even before the arbitral tribunal is constituted. After the constitution of the arbitral tribunal, the arbitral tribunal may grant interim measures. The ICAC Rules provide that an award on security for costs is binding on the parties and remains in force until the end of the arbitral proceedings.

---

72 Ukrainian Arbitration Act, ch 4, art 16.
73 Ibid, ch 4, art 16(2).
74 Ibid., ch 4, art 16(2).
75 Ibid, ch 4, art 16(3).
76 Ibid, ch 4, art 16(3).
77 Ukrainian Arbitration Act, ch 4, art 17; ICAC Rules, ch 1, art 4; and MAC Rules, ch 1, art 1.9.
78 ICAC Rules, ch 1, art 4 and MAC Rules, ch 1, art 1.9.
proceedings. However, interim measures are difficult to enforce, not least because there is no provision under Ukrainian law entitling parties to apply to local courts to enforce such measures.

5.2.2 Interim measures can take many forms, including, asset freezing orders, anti-suit injunctions and orders for disclosure of documents. The MAC President can even grant interim measures in the form of attachment orders against ships or cargo currently located in a Ukrainian port.

6. Conduct of proceedings

6.1 Commencement of arbitration

6.1.1 According to the Ukrainian Arbitration Act, arbitral proceedings (whether institutional or ad hoc) are deemed to commence on the date when the request to submit a particular dispute to arbitration has been received by the respondent. However, the ICAC Rules stipulate that the arbitral proceedings are not deemed to have commenced until the claim has been filed with the ICAC and the registration fee has been paid.

6.2 General procedural principles

6.2.1 The main principles of the Ukrainian arbitration legislation are as follows:
— independence and impartiality of the arbitrators;
— equal rights of the parties to participate in the arbitral proceedings and to provide the arbitral tribunal with their evidence; and
— party autonomy.

6.2.2 The arbitral tribunal is entitled to conduct the arbitral proceedings in the manner that it deems appropriate, unless the parties have determined the procedure for the arbitration.

6.3 Seat and language of arbitration

6.3.1 Unless otherwise agreed by the parties, the seat of the arbitration is determined by the arbitral tribunal taking into account the circumstances of the case and the circumstances of the case and the
interests of the parties. However, it is important to emphasise that the arbitral tribunal is at all times free to meet for consultation among the arbitrators and examine evidence (including witnesses) at a location other than the seat of arbitration.

6.3.2 In the absence of agreement between the parties, the arbitral tribunal shall choose the language of the arbitration and impose requirements on the parties relating to the translation of documents relevant to the arbitral proceedings.

6.4 Multi-party issues (intervention and joinder)

6.4.1 The Ukrainian Arbitration Act is silent on multi-party arbitral proceedings. The ICAC Rules contain a small number of provisions to regulate such arbitral proceedings.

6.4.2 The consolidation of arbitral proceedings is not addressed in either the Ukrainian Arbitration Act or the ICAC Rules. In multi-claim arbitral proceedings, the ICAC Rules provide that where a statement of claim contains claims arising out of several contracts, it shall be accepted for arbitration provided that there is an arbitration agreement covering all such claims and that the fulfillment of obligations under these contracts cannot be separated under several claims. Where these prerequisites are not met, the ICAC will propose that the claimant separates his claims and submits independent statements of claim under each contract.

6.4.3 Furthermore, it is worth noting that the intervention of a third party is allowed, subject to the parties’ written consent. The parties may apply for joining a third party only before the statement of defence is submitted to the arbitral tribunal.

6.5 Oral hearings and written proceedings

6.5.1 Where the parties have not explicitly decided on the issue of an oral hearing, the decision is made by the arbitral tribunal, subject to a request of one of the parties. If the parties have not agreed to an oral hearing and no request is made to the

---

86 Ukrainian Arbitration Act, ch 5, art 20(1).
87 Ibid, ch 5, art 20(2).
88 Ibid, ch 5, art 22.
89 For example, multiple claimants or multiple respondents shall jointly nominate an arbitrator. A 30-day period is provided to agree on the respective candidate. In the case of a failure to appoint, the default procedure for appointment will apply. ICAC Rules, ch 3, s 4, art 27(3).
90 ICAC Rules, ch 3, s 2, art 19(2).
91 Ibid, ch 3, s 6, art 43.
92 Ibid, ch 3, s 6, art 43.
93 Ukrainian Arbitration Act, ch 5, art 24(1).
arbitral tribunal, the arbitral tribunal may decide whether to have an oral hearing for the parties to present their evidence and pleadings, or to decide the case based on the written evidence and other materials submitted by the parties.\textsuperscript{94}

6.5.2 The Ukrainian Arbitration Act states that all declarations, documents and other information to be submitted to the arbitral tribunal shall be delivered simultaneously to the other party. Both parties shall also receive any other expert reports, opinions or other documents which may be decisive for the arbitral tribunal.\textsuperscript{95}

6.5.3 The format and content of the parties’ submissions to the arbitral institutions, as well as the timetable for filing such submissions, shall be determined by the respective rules. For example, the ICAC Rules require all documents and other evidence to be submitted in no less than three copies.\textsuperscript{96} The ICAC Secretariat is responsible for dispatching all the documents in a timely manner.\textsuperscript{97} Copies of the statement of claim or the statement of defence and other important documents may be delivered or handed to the parties against receipt of delivery.\textsuperscript{98}

6.5.4 The Ukrainian Arbitration Act also allows the parties (subject to their consent) to change or amend their statements of case during the course of the arbitral proceedings unless the arbitral tribunal considers such changes or amendments to be late.\textsuperscript{99}

6.6 Default by one of the parties

6.6.1 Unless otherwise agreed by the parties and in line with the Model Law (1985),\textsuperscript{100} the Ukrainian Arbitration Act provides for the following:
— where the claimant fails to communicate his statement of claim (with sufficient detail as required by the Ukrainian Arbitration Act),\textsuperscript{101} the arbitral tribunal shall terminate the arbitral proceedings;
— where the respondent fails to communicate his statement of defence (with sufficient detail as required by the Ukrainian Arbitration Act),\textsuperscript{102} the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations; or

\textsuperscript{94} Ukrainian Arbitration Act, ch 5, art 24(1).
\textsuperscript{95} Ibid, ch 5, art 24(3).
\textsuperscript{96} ICAC Rules, ch 3, s 1, art 15(1).
\textsuperscript{97} Ibid, ch 3, s 1, art 15(3).
\textsuperscript{98} Ibid, ch 3, s 1, art 15(4).
\textsuperscript{99} Ukrainian Arbitration Act, ch 5, art 23(2).
\textsuperscript{100} CMS Guide to Arbitration, vol II, appendix 2.1.
\textsuperscript{101} Ukrainian Arbitration Act, ch 5, art 23(1).
\textsuperscript{102} Ibid, ch 5, art 23(1).
— where any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the award on the evidence before it.\(^\text{103}\)

6.7 Evidence generally

6.7.1 The Ukrainian Arbitration Act contains only limited provisions on the submission of evidence.\(^\text{104}\) Each party has the burden of adducing evidence sufficient to prove the facts upon which it seeks to rely in support of its claims or defences. As under the Model Law (1985),\(^\text{105}\) the Ukrainian Arbitration Act requires that any information provided by one party to the arbitral tribunal shall be shared with all other parties to the arbitral proceedings.\(^\text{106}\)

6.8 Appointment of experts

6.8.1 The arbitral tribunal is entitled to appoint an expert to report on specific issues.\(^\text{107}\) The arbitral tribunal may at its discretion or at the request of either of the parties, order an expert to examine certain goods or documents.\(^\text{108}\) The tribunal-appointed expert does not need to be a certified expert according to Ukrainian Law “On Forensic Expertise”.\(^\text{109}\)

6.8.2 The parties may also submit to the arbitral tribunal reports prepared by party-appointed experts in support of their claims or defences. The arbitral tribunal is free to determine the weight that it wishes to attach to any evidence submitted by the parties.\(^\text{110}\)

6.8.3 The parties may at their discretion choose an expert to deliver an expert opinion that will be submitted to the arbitral tribunal as evidence. The arbitral tribunal usually requests the party-appointed expert to provide its written opinion in advance. Unless otherwise agreed by the parties, if a party requests, or if the arbitral tribunal considers it necessary, a tribunal-appointed expert shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to examine him or her and to present party appointed expert witnesses in order to testify on the points at issue.\(^\text{111}\)

\(^{103}\) Ibid, ch 5, art 25.  
\(^{104}\) Ibid, ch 3, art 27.  
\(^{106}\) Ukrainian Arbitration Act, ch 5, art 24(3).  
\(^{107}\) Ibid, ch 5, art 26.  
\(^{108}\) Ibid.  
\(^{109}\) Law No 4038a-XII, 25 February 2004.  
\(^{110}\) Ukrainian Arbitration Act, ch 5, art 19(2).  
\(^{111}\) Ibid, ch 5, art 26(2).
6.8.4 The ICAC Rules state that the arbitrators are free to decide on the admissibility of any evidence, including that of expert witnesses. The arbitral tribunal shall assess the evidence according to its sole discretion.\(^\text{112}\)

6.8.5 Unless the parties have agreed otherwise, it is within the arbitral tribunal’s powers to define the questions that will need to be reported upon by an arbitral tribunal-appointed expert.\(^\text{113}\) Any reports prepared by tribunal-appointed experts shall be transmitted to the parties.\(^\text{114}\)

6.8.6 Any expert (whether party or tribunal-appointed) may be challenged by a party on the same grounds as an arbitrator (i.e. if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed by the parties).

6.9 Confidentiality

6.9.1 The Ukrainian Arbitration Act does not address the issue of confidentiality. However, the arbitral proceedings are considered confidential in Ukraine and awards are not published. The ICAC Rules state that the ICAC President, his or her deputies, arbitrators and the ICAC Secretariat are bound by the duty of confidentiality relating to information that they have become aware of in the course of the arbitration.\(^\text{115}\) Parties to arbitration are not mentioned in the above list. Therefore, it is advisable for the parties to include provisions on confidentiality into the arbitration agreement where Ukrainian law governs the arbitration. ICAC can publish summaries and excerpts from awards but in these instances all information regarding the parties is excluded.

6.9.2 Arbitral proceedings in Ukraine are not subject to privilege. In cases where a party to arbitration is represented by a lawyer admitted to the bar, communications and relations between a client and an attorney-at-law are subject to legal privilege. However, admission to the bar is voluntary in Ukraine and many practicing lawyers are not admitted.

\(^{112}\) ICAC Rules, ch 3, s 6, art 42(5).

\(^{113}\) Ukrainian Arbitration Act, ch 5, art 26(1) and ICAC Rules, ch 3, s 6, art 44.

\(^{114}\) Ukrainian Arbitration Act, ch 5, art 24 (3) and ICAC Rules, ch 3, s 1, art 15(2).

\(^{115}\) ICAC Rules, ch 3, s 1, art 12.
7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 The arbitral tribunal must resolve the dispute in accordance with the law chosen by the parties. Unless otherwise agreed, the parties’ agreement on the governing law refers only to the substantive law of the chosen country and not to its conflict of laws rules.\(^{116}\) In the absence of agreement between the parties on the governing law, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers to be appropriate.\(^{117}\)

7.2 Timing, form, content and notification of award

7.2.1 The Ukrainian Arbitration Act provides that an award must comply with the following formal requirements:

\begin{itemize}
  \item[(i)] it shall be made in writing and shall be signed by the arbitrator(s); and
  \item[(ii)] it shall contain the date and seat of the arbitration, the reasons upon which it is based, the arbitral tribunal’s findings on the issues submitted for consideration and the allocation of costs between the parties.\(^{118}\)
\end{itemize}

7.2.2 The ICAC Rules additionally require that the award should contain:

\begin{itemize}
  \item[(i)] the name of the ICAC;
  \item[(ii)] case registration number;
  \item[(iii)] full names of the arbitrators;
  \item[(iv)] names of the parties in dispute and other persons participating in the arbitral proceedings;
  \item[(v)] subject matter of the dispute and a summary of the circumstances of the case; and
  \item[(vi)] conclusion on the granting or dismissal of the claim.\(^{119}\)
\end{itemize}

7.2.3 Dissenting opinions of arbitrators may be set forth in awards or in a separate document.\(^{120}\) After the award has been made, each party should receive a copy of the award signed by the arbitrator (if the dispute has been resolved by a sole arbitrator) or by the majority of arbitrators (if the arbitral tribunal consists of three members).\(^{121}\) The reasons for the absence of any signatures should be indicated in the award.\(^{122}\)

\(^{116}\) Ukrainian Arbitration Act, ch 6, art 28(1).
\(^{117}\) Ibid, ch 6, art 28(2).
\(^{118}\) Ibid, ch 6, art 31(2).
\(^{119}\) ICAC Rules, ch 3, s 7, art 49(4).
\(^{120}\) Ibid, ch 3, s 7, art 49(3).
\(^{121}\) Ukrainian Arbitration Act, ch 6, art 31(4).
\(^{122}\) Ibid, ch 6, art 31(1).
The ICAC Rules provide that after rendering an award, the arbitral tribunal should announce the operative part (i.e. disposition) of the award to the representatives of the parties. The ICAC Secretariat should forward a reasoned award to the parties within 15 days from the date that the disposition is announced to parties. In exceptional circumstances the ICAC President may extend the term by ten days.

In cases of particular complexity, an ICAC arbitral tribunal may, after the oral hearing is finished, decide that the award will be forwarded to the parties without the announcement of the operative part (i.e. disposition) of the award within a period not exceeding 20 days.

**Settlement**

The parties are free to settle their dispute during the course of arbitral proceedings. A settlement by the parties will result in the termination of the arbitral proceedings. In the event that the parties do not wish to record their settlement in the form of an award, they may notify the arbitral tribunal that they have reached the settlement and request that the arbitral tribunal terminates the arbitral proceedings.

The arbitral tribunal may, at the request of the parties, record such a settlement in the form of an award on the agreed terms. Such an award shall indicate that it is an award. This award will be subject to the same requirements – and will have the same status and effect – as any other award rendered by the arbitral tribunal.

**Power to award interest and costs**

*Interest*

Arbitral tribunals are empowered to award interest upon the claimant’s request. Such interest is normally determined in accordance with the law applicable to the dispute at hand. Ukrainian law also permits awarding liquidated damages according to the rates (if any) stipulated in the contract between the parties. However, Ukrainian legislation prohibits ordering penalties exceeding double the discount rate of the National Bank of Ukraine for the relevant period, unless

---

123 ICAC Rules, ch 3, s 7, art 52(1).
124 Ibid, ch 3, s 7, art 52(2).
125 Ibid, ch 3, s 7, art 52(3).
126 Ukrainian Arbitration Act, ch 6, art 30(1).
127 Ibid, ch 6, art 30(1).
128 Ibid, ch 6, art 30(2).
129 Commercial Code, ch 35, art 343.
otherwise agreed by parties to a contract.\textsuperscript{130} It is unclear whether the “double discount rate” rule also applies to contracts that are governed by foreign law.

Costs

7.4.2 The Ukrainian Arbitration Act does not address the allocation of costs of the arbitration between the parties. This matter is left to either the agreement of the parties or in case there is no such agreement to the discretion of the arbitral tribunal.\textsuperscript{131}

7.4.3 The ICAC Rules provide that all the costs and fees shall be reimbursed by the unsuccessful party to the successful one, unless otherwise agreed by the parties.\textsuperscript{132}

7.5 Termination of the proceedings

7.5.1 Arbitral proceedings may result either in termination or in a final award. The Ukrainian Arbitration Act provides that the arbitral tribunal may terminate the proceedings where:

(i) the claimant withdraws its claim and the respondent does not object thereto or the arbitral tribunal does not recognise such objections to be reasonable;
(ii) the parties agree to terminate the proceedings; or
(iii) for any other reason, the arbitral tribunal considers that continuation of the proceedings would be unnecessary or impossible.\textsuperscript{133}

7.6 Effect of the award

7.6.1 The award is considered to be final and binding upon the parties. The award is not subject to ordinary appeal on the issues of law or fact.\textsuperscript{134} However, the effect of an award on the same disputes involving the same parties, in particular, the \textit{res judicata}, remains debated.

7.6.2 The \textit{res judicata} effect of an award under Ukrainian law is that a commercial court shall terminate court proceedings if the award has been rendered in a case between the same parties, on the same issue and arising out of the same grounds.\textsuperscript{135}

\textsuperscript{130} Ibid, ch 26, art 231.
\textsuperscript{131} Ukrainian Arbitration Act, ch 6, art 31(2).
\textsuperscript{132} ICAC Rules, Schedule on Arbitration Fees and Costs, s 6.
\textsuperscript{133} Ukrainian Arbitration Act, ch 6, art 32(2).
\textsuperscript{134} However, it may be set aside by the local courts on certain limited grounds. See further at section 9.3 below.
\textsuperscript{135} CoPC, s XI, art 80.
7.6.3 Where at least one of the parties is an individual the case falls to be heard by the general (civil) courts. In contrast with commercial courts, the civil courts apply different provisions with respect to res judicata which only refer to decisions of “arbitration courts”.\(^{136}\) This will most likely be considered to refer only to domestic arbitration courts, as Ukraine has two different legal frameworks for international and domestic arbitration. Ukraine’s higher courts have yet to clarify this issue so no guidance can be drawn from available court practice now. Therefore, whether court proceedings before the general (civil) court are to be terminated in cases where an award is in place will depend on the judge hearing the particular case.

7.6.4 Thus, facts established in an award may be recognised as res judicata only by the commercial court. The CoPC excludes only domestic arbitration courts in this respect and, implicitly, allows recognition as res judicata of facts established in a foreign award.\(^{137}\) By contrast, the CPC is silent with respect to this and it only stipulates that civil courts extend the res judicata effect to the facts established by courts of law only.\(^{138}\)

7.7 Correction, clarification and issue of a supplemental award

7.7.1 The Ukrainian Arbitration Act allows an arbitral tribunal (on a party’s request or on its own initiative) to correct any errors (misprints, errors of calculations, etc) in the award.\(^{139}\) The parties have 30 days to apply for such corrections from the date the award has been received by the parties.\(^{140}\) The arbitral tribunal may also clarify anything that is unclear in the award (subject to the parties’ consent). Such corrections or clarifications shall become integral parts of the award.\(^{141}\)

7.7.2 The parties may also request the arbitral tribunal to make an additional award. Such awards may cover issues that were submitted to the arbitral tribunal for consideration but were not resolved in the “main” award. If such requests are considered by the arbitral tribunal to be proper, it has a further 60 days to make an additional award.\(^{142}\)

\(^{136}\) CPC, s V, ch 6, art 205.
\(^{137}\) CoPC, s V, art 35.
\(^{138}\) CPC, s I, ch 5, art 61.
\(^{139}\) Ukrainian Arbitration Act, ch 6, art 33.
\(^{140}\) Ibid, ch 6, art 33(1).
\(^{141}\) Ibid, ch 6, art 33(5).
\(^{142}\) Ibid, ch 6, art 33(3).
8. Role of the courts

8.1 Jurisdiction of the courts
8.1.1 The Ukrainian Arbitration Act prohibits national courts from intervening in arbitral proceedings except in the circumstances expressly prescribed by the Ukrainian Arbitration Act. The circumstances in which national courts are entitled to intervene include:
(i) ruling on the jurisdiction of the arbitral tribunal; and
(ii) ruling on applications to set aside awards.

8.2 Termination and stay of court proceedings
8.2.1 In line with the provisions of the Model Law (1985) and the New York Convention, Article 8 of the Ukrainian Arbitration Act provides that the court shall terminate its proceedings as soon as it becomes aware of the existence of a binding arbitration agreement. However, if both parties waive their right to arbitration, the court may proceed to hear the case on the merits.

8.2.2 The court will also have jurisdiction to hear a case if it establishes that, under Ukrainian law, the case is non-arbitrable or that the arbitration agreement is invalid, inoperative or incapable of being performed. The Higher Commercial Court has provided guidance to the commercial courts on how the Ukrainian Arbitration Act must be construed and applied by Ukrainian courts. According to the Higher Commercial Court, the decision to terminate proceedings due to an arbitration clause must be taken by a court following a full hearing on the issue of the validity of an arbitration agreement. Therefore, Ukrainian courts, unlike other less intervening jurisdictions, are not required to give any deference to an arbitral tribunal’s competence to rule on their own jurisdiction (competence-competence). It follows that regardless of the determination of the issue of enforceability, validity or effect of an arbitration clause by the arbitral tribunal in question, the court seized to rule on the same issues will do so independently.

---

143 Ibid, ch 1, art 5.
146 The court will become so aware if an application contesting the court’s jurisdiction is made by the respondent. The application should be made no later than the submission of the statement of defence.
147 Ukrainian Arbitration Act, ch 2, art 8(1).
148 Ibid, ch 2, art 8(1).
8.2.3 The legal effect of the termination of the court proceedings is that the claimant is precluded from filing the same claim with Ukrainian courts.\footnote{CoPC, s XI, art 80.}

8.2.4 The stay of court proceedings in favour of the ongoing arbitral proceedings is provided for in the 1961 European Convention.\footnote{1961 European Convention, art 6(3).} In particular, it provides that if the court proceedings challenging the existence, validity or scope of the arbitration agreement were issued after the commencement of arbitral proceedings, the court must stay such proceedings until the arbitrators have ruled upon their own jurisdiction.\footnote{Ibid.} If the arbitral tribunal decides that it has jurisdiction, the court must decline jurisdiction. That said, the parties may later challenge the arbitral tribunal’s assumption of jurisdiction by applying to the court to set aside the arbitral tribunal’s award for lack of jurisdiction.\footnote{Further details are set out at section 9.1 below.} If the 1961 European Convention applies to the arbitration agreement,\footnote{The 1961 European Convention applies to arbitration agreements when both parties thereto have their habitual place of residence or their seat in different Contracting States.} the Ukrainian court will be precluded from deciding upon the validity, enforceability or effect of an arbitration clause and will stay the proceedings.

8.3 Preliminary rulings on jurisdiction

8.3.1 The Ukrainian Arbitration Act provides that local civil courts in the seat of arbitration are vested with the power to assist in international arbitrations.\footnote{Ukrainian Arbitration Act, ch 1, art 6(2).} In particular, local civil courts are authorised to rule on the jurisdiction of the arbitral tribunal as contemplated by the Ukrainian Arbitration Act. The Ukrainian Arbitration Act provides that both parties to arbitral proceedings may challenge the ruling of the arbitral tribunal on its jurisdiction within 30 days from the date when the parties have learned about such ruling.\footnote{Ibid, ch 4, art 16(3).}

8.3.2 In addition, Ukrainian legislation does not provide for declaratory judgments in aid of international arbitration.

8.4 Interim protective measures

8.4.1 While the Ukrainian Arbitration Act permits arbitrators to grant interim measures at a party’s request, the Ukrainian rules of procedure in both the CPC and CoPC fall short of any provisions to implement this part of the Ukrainian Arbitration Act.
The Ukrainian law does not have a discrete procedure for issuing interim injunctions. Injunctive relief may only be sought and obtained when a suit is filed with a court in Ukraine. Thus, no powers to grant interim measures in furtherance of arbitration are vested in Ukrainian courts.

8.4.2 The absence of an appropriate procedural framework for Ukrainian courts renders meaningless the Ukrainian Arbitration Act provisions on interim measures in support of foreign and Ukrainian arbitrations.\(^\text{157}\) In particular, in accordance with the Ukrainian Arbitration Act, the local courts are authorised to enforce the interim conservatory measures granted by an arbitral tribunal.\(^\text{158}\) However, neither CPC nor CoPC provide for a power of a court in Ukraine to endorse conservatory measures granted by an arbitral tribunal. Without the “blessing” of a Ukrainian court conservatory measures ordered by a tribunal will not be enforceable (i.e. bailiffs will not look for or arrest the assets as would be the case with a court injunction).

8.4.3 The CPC has recently been amended\(^\text{159}\) to provide for interim measures in the course of recognition and enforcement proceedings with respect to foreign awards. Thus, an award creditor requesting a state court to enforce an award may apply for interim measures.\(^\text{160}\) Interim measures may be granted by a state court at any time during consideration of the enforcement application provided that the absence of certain interim measures of protection may significantly complicate future enforcement or make it impossible.\(^\text{161}\)

8.5 Obtaining evidence and other court assistance

8.5.1 The Ukrainian Arbitration Act provides that the arbitral tribunal or a party to an arbitration with the permission of the arbitral tribunal may address a competent court of Ukraine with a request for assistance in collecting evidence.\(^\text{162}\) Similar provisions are provided for by the ICAC Rules.\(^\text{163}\) However, as in the case of interim relief, Ukrainian procedural law fails to implement effectively this provision of the Ukrainian Arbitration Act into the general legislation. Thus, the assistance of Ukrainian courts in collecting evidence in support of the arbitral proceedings is not available.

\(^\text{157\, Ibid, ch 2, art 9.}\)
\(^\text{158\, Ibid, ch 2, art 9.}\)
\(^\text{159\, Law No 3776-IV, 22 September 2011, art 1.}\)
\(^\text{160\, CPC, s VIII, ch 1, art 394.}\)
\(^\text{161\, CPC, s III, ch 3, art 151(3).}\)
\(^\text{162\, Ukrainian Arbitration Act, ch 5, art 27.}\)
\(^\text{163\, ICAC Rules, ch 3, s 6, art 42(4).}\)
9. Challenging an award through the courts

9.1 Jurisdiction of the courts

9.1.1 Since 29 September 2005, all awards rendered by an arbitral tribunal constituted under the auspices of the ICAC or MAC may be challenged before the Shevchenkivsky District Court of the City of Kyiv.\footnote{ICAC Rules, ch 1, s 2, art 3.} There are no provisions in the Ukrainian Arbitration Act which allow an appeal of awards on their merits. A challenge against an award may be made only by initiating proceedings to set aside the award before a competent court.

9.1.2 Awards issued by other arbitral tribunals may be challenged to a local court at the seat of the arbitration.\footnote{Ukrainian Arbitration Act, ch 1, art 6(2).} Since there are no arbitral institutions in Ukraine other than ICAC and MAC, and no awards of ad hoc arbitral tribunals are reported to have been challenged to date, no other courts have entertained challenges to awards.

9.2 Appeals

9.2.1 Although awards are not subject to appeal, court decisions to set aside an award can be challenged in higher courts. For example, a decision of the Shevchenkivsky District Court can be appealed to the Kyiv Court of Appeal, Higher Specialised Court for Civil and Criminal Cases and to the Supreme Court of Ukraine.\footnote{For discretionary review on limited grounds.} Needless to say, the existence of these various venues of appeal can result in substantial delays in the enforcement of awards.

9.3 Applications to set aside an international award

9.3.1 The Ukrainian Arbitration Act contains an exhaustive list of the grounds for setting aside an award, which mirrors the grounds contained in the Model Law (1985),\footnote{CMS Guide to Arbitration, vol II, appendix 2.1.} namely:

(i) if the party making the application furnishes proof that:
   — a party to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of the law, under Ukrainian law;
   — the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
— the award deals with a dispute that was 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. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

— the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with mandatory provision of the Ukrainian Arbitration Act or, failing such agreement, does not accord with the Ukrainian Arbitration Act; or

(ii) if the court finds that:

— the subject matter of the dispute is not capable of settlement by arbitration under Ukrainian law; or

— the award is in conflict with Ukrainian public policy.\(^{168}\)

9.3.2 In practice, one of the popular grounds for challenging awards is that the recognition and enforcement of the award is contrary to Ukrainian public policy. This ground is popular in part due to the allegedly broad definition of “public policy” contained in a resolution of the Supreme Court of Ukraine.\(^{169}\) In some past high-profile cases, the courts were inclined to use this “catch-all” ground to set aside awards that were felt to be contrary to Ukrainian national interests.\(^{170}\) However, there have not been any recent reported cases that would suggest that the public policy argument has been successful and that this trend is progressing.

9.3.3 The award may be set aside by the court of its own motion or on the application of one of the parties. The application to set aside the award must be submitted to the court within three months of receipt of the award by the challenging party, although this time limit may be extended by the court.\(^{171}\)

9.3.4 If the award is set aside, the dispute may be resolved by another arbitral tribunal, unless the dispute is considered to be non-arbitrable.

\(^{168}\) Ukrainian Arbitration Act, ch 7, art 34.

\(^{169}\) Resolution of the Plenum of the Supreme Court of Ukraine, Resolution No 12, 24 December 1999.

\(^{170}\) See ex. Ruling of the Supreme Court No. 6-2941ca05, 13 December 2006.

\(^{171}\) Ukrainian Arbitration Act, ch 7, art 34(3).
9.4 Application to set aside a domestic award

9.4.1 The Law on Domestic Arbitration sets out four grounds upon which a domestic award may be challenged:

(i) the award deals with a non-arbitrable dispute;
(ii) the award is rendered on a dispute that was not covered by the respective arbitration agreement, or on matters beyond the scope of competence of the arbitral tribunal;
(iii) the arbitration agreement is considered to be invalid by the competent court; or
(iv) the arbitral tribunal was not composed in accordance with the relevant provisions of the Law on Domestic Arbitration.\footnote{Law No 1701-IV, 11 May 2004, ch 6, art 51.}

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Domestic awards, if not honoured by the parties voluntarily, are enforced on a basis of a writ of execution issued by the local courts. Such enforcement is regulated by the Law on Domestic Arbitration and by the Law of Ukraine “On Enforcement Proceedings” (Enforcement Law).\footnote{Law No 606-XIV, 21 April 1999.} According to the Enforcement Law, an award creditor must submit the application with a writ of execution to the state enforcement office at the location of the respondent’s operating office or the place at which the respondent’s property is situated.\footnote{Enforcement Law, ch 3, art 19 and 20.}

10.2 Foreign awards

General Overview

10.2.1 Foreign awards in Ukraine may be enforced in Ukraine only after being recognised by the Ukrainian courts pursuant to the New York Convention\footnote{CMS Guide to Arbitration, vol II, appendix 1.1.} or any other applicable instrument.\footnote{CPC, s VIII, ch 1 art 390(1).} In the absence of a treaty providing for recognition and enforcement, foreign awards will be recognised and enforced based on the reciprocity principle.\footnote{Reciprocity is presumed unless proved otherwise by a party contesting enforcement. CPC, s VIII, ch 1, art 390(2).} The most important treaty concerning recognition and enforcement of foreign awards is the New York Convention.\footnote{CMS Guide to Arbitration, vol II, appendix 1.1.}
10.2.2 Ukraine is a signatory to the New York Convention. However, it has made a reciprocity reservation to the effect that Ukraine is only obliged to enforce awards originating in countries that have also ratified the New York Convention.

10.2.3 Awards may be submitted to enforcement within three years from the date on which the award became effective, although this term may be extended by the courts “on the basis of valid excuses”.

Grounds for refusing recognition and enforcement

10.2.4 The Ukrainian Arbitration Act sets out the grounds upon which a Ukrainian court may refuse recognition and enforcement of a foreign award. In summary, the grounds for refusing recognition and enforcement are the same as those for setting aside an award. However, an additional ground is provided by the Ukrainian Arbitration Act – the Ukrainian courts may refuse recognition and enforcement if the award has not yet become binding on the parties, or if it was annulled or terminated by the courts of the country where, or under which law, it was made.

10.2.5 If an application for setting aside or suspension of an award has been made to a competent court, the court where recognition or enforcement is sought may (if it considers it proper) adjourn its decision. It may also order the other party to provide appropriate security.

Enforcement procedure

10.2.6 In Ukraine, foreign awards are enforced under the “partial” control of the courts (i.e. the award is considered to be binding on the parties from the date upon which it is received by the parties, but may be enforced only upon application in writing to the competent court). Decisions of foreign courts shall be recognised and enforced in Ukraine by the general courts of first instance at the place of the respondent’s domicile or – if the respondent has no domicile in Ukraine or his domicile is unknown – at the place in which his property is situated.

---

179 Ibid.
180 New York Convention, art 1(3) (see CMS Guide to Arbitration, vol II, appendix 1.1).
181 CPC, s I, ch 6, art 73.
182 Ukrainian Arbitration Act, ch 8, art 36.
183 As listed at paragraph 9.3.1 above.
184 Ukrainian Arbitration Act, ch 8, art 36(1)(v).
185 The court will be able to do so by an application of the party claiming recognition or enforcement of the award. Ukrainian Arbitration Act, ch 8, art 36(2).
186 Ukrainian Arbitration Act, ch 8, art 35.
187 Ibid, ch 1, art 6.
10.2.7 The decision of the court of first instance may be appealed to the local courts of appeal, to the Higher Specialised Court on Civil and Criminal Cases and to the Supreme Court of Ukraine. The case may be referred back to the court of first instance by the appeal court or the Higher Specialised Court on Civil and Criminal Cases. Such appeals will delay enforcement of the award.

10.2.8 When making an application to recognise and enforce an award, a party must submit the following documents:

(i) a duly certified copy of the award;
(ii) an official document certifying that the award has entered into force (if the award itself is silent on this issue);
(iii) a document certifying that the party against whom the award was rendered and who did not take part in the arbitral proceedings, was duly notified about the place and time of the hearings;
(iv) a document (if any) stating whether enforcement is being sought fully or in part in another country; and
(v) if the award is in a language other than Ukrainian or Russian, the party must also produce a translation of such document certified by an official or sworn translator, or by a diplomatic or consular agent.

10.2.9 In addition to these documents, the New York Convention also requires parties in the context of a foreign award to produce a copy of the arbitration agreement and a certified Ukrainian translation.

10.2.10 If the application is filed by a representative of a party, that representative must file a power of attorney certifying his or her power to represent the party in question.

10.2.11 A party seeking to enforce a foreign award in Ukraine may benefit from interim measures that may be granted by a state court considering an application to enforce an award in question.

---

188 CPC, s V, ch 1, art 311(1).
190 New York Convention, art 4(2) (see CMS Guide to Arbitration, vol II, appendix 1.1).
191 Enforcement Law, ch 2, art 9.
192 See paragraph 8.4.3 above.
11. **Special provisions and considerations**

11.1 **Consumer disputes**

11.1.1 Amendments to the Law on Domestic Arbitration, introduced in early 2011, rendered disputes with respect to the protection of consumers’ rights (including consumers of banking services) non-arbitrable. Considering that the Law on Domestic Arbitration governs only domestic arbitration and specifically provides that it does not govern international commercial arbitration, the latter can still be a forum for resolution of consumer disputes.

11.1.2 Not long before those amendments were introduced, the Supreme Court of Ukraine clarified that not all the disputes between a consumer and a bank fall within the meaning of a “consumer dispute”.\(^\text{193}\) The Supreme Court took the view that a dispute can be deemed a consumer dispute in cases where the claim concerns, *inter alia*, providing adequate information to the consumer as to the terms of a loan, types of interest rate, currency risks and procedure of performance of the loan agreement that precedes the signing of the loan agreement. The Supreme Court went on to conclude that after the loan agreement is entered into by the parties, the nature of legal relations between the parties changes as they become involved in credit relations and, therefore, general rules of civil law on loans and credits should apply instead. One may understand this to mean that a debt collection claim filed by the bank does not fall within the meaning of a “consumer dispute”.

11.1.3 The effect of these recent amendments and clarifications is yet to be seen. It is not yet clear how Ukrainian courts will apply the provisions in question and whether they will follow the logic of the Supreme Court of Ukraine as regards the scope of the term “consumer disputes”.

11.2 **Disputes arising out of corporate governance relations**

11.2.1 As briefly mentioned in paragraph 3.3.3 above, the CoPC reserves exclusive jurisdiction to the local courts to entertain corporate governance disputes that are defined as disputes arising out of corporate relations between legal entities and their participants. Such disputes can relate to situations where a participant has withdrawn from the company, or can be between participants of legal entities relating to the establishment, activity, management and termination of the legal entity.\(^\text{194}\)


\(^\text{194}\) CoPC, § III, art 14.
11.2.2 The non-arbitrability of corporate governance disputes was first introduced in the recommendations to lower commercial courts issued by the Higher Commercial Court of Ukraine in 2007. It provided that corporate disputes involving Ukrainian companies are non-arbitrable.

11.2.3 Later, the Supreme Court of Ukraine, supporting the overall approach of the Higher Commercial Court, clarified that the term “corporate disputes” should be construed restrictively, as it only encompasses disputes arising out of corporate governance relations and does not include disputes related to shares and purchase of shares in Ukrainian companies. It is likely that any arbitration agreements in respect of corporate governance relations will be considered void by the Ukrainian courts. The enforcement of foreign awards concerning this type of dispute that have been rendered in Ukraine is likely to be denied.

11.3 Correct spelling of the arbitration forum’s name in the arbitration agreement

11.3.1 Pursuant to the provisions the Ukrainian Arbitration Act, a state court before which an action is brought in a matter which is subject to an arbitration agreement may continue the proceedings if it finds that the arbitration agreement in question is null and void, inoperative or incapable of being performed.

11.3.2 The Ukrainian Arbitration Act does not specify under which conditions the arbitration agreement is incapable of being performed. However, this issue has been clarified by the High Commercial Court of Ukraine. According to this clarification, “an arbitration agreement is incapable of being performed where the parties have stipulated the wrong name of the arbitration court or have indicated an arbitral institution that does not exist.”

11.3.3 This view has been confirmed by the Ukrainian courts, which have held on a number of occasions that such pathological arbitration agreements are incapable of being performed and invalidated them, thereby preventing the successful enforcement of foreign awards. This practice has recently shifted to the field of

---

197 Ukrainian Arbitration Act, ch 2, art 8.
198 Clarification of the High Commercial Court of Ukraine “On Certain Questions of Practice of Resolving Cases to Which Foreign Companies and Organizations are Parties”, Clarification No 04-5/608, 31 May 2002.
199 See Judgment of the Kyiv Oblast Commercial Court, Case No 4/184-09, 29 September 2009.
setting aside of awards. The Supreme Court of Ukraine\textsuperscript{200} upheld the decisions setting aside the award made on grounds that the parties had indicated the incorrect name of the arbitral institution and had provided for arbitration in the "International commercial arbitration court at the Chamber of Commerce and Industry of Kyiv".\textsuperscript{201}

11.3.4 Therefore, the parties should at all times ensure the correct spelling of the name of the arbitral institution in order to be able to enforce their arbitration agreement and any subsequent award.

12. Concluding thoughts and themes

12.1.1 Recourse to arbitration as a means of resolving commercial disputes is becoming more and more popular in Ukraine. Generally speaking, Ukraine’s legislative framework supports the conduct of arbitral proceedings and Ukraine is party to all of the main international conventions. The principal obstacle to be overcome in Ukraine at the present time is the relative inexperience of the judiciary in handling sometimes complex issues that can arise in the context of arbitral proceedings. The judiciary remains cautious about the quality and robustness of “private justice” that arbitral tribunals provide. Until judicial attitudes change, parties should expect a degree of unpredictability when it comes, amongst others, to the issue of enforcing foreign awards in Ukraine.

\textsuperscript{200} Ruling of the Supreme Court of Ukraine, Case No N/A, 13 October 2010.

\textsuperscript{201} The correct name of the arbitral institution is: the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine.
13. Contacts

CMS Cameron McKenna LLC
6th Floor, 38, Volodymyrska Street
01034 Kyiv
Ukraine

Olexander Martinenko
Partner
T  +380 44 39133 77
E  olexander.martinenko@cms-cmck.com

Sergiy Gryshko
Associate
T  +380 44 39133 77
E  sergiy.gryshko@cms-cmck.com

Oleksandr Gudko
Associate
T  +380 44 39133 77
E  oleksandr.gudko@cms-cmck.com
The CMS Guide to Arbitration is also available online at eguides.cmslegal.com/arbitration
The CMS Guide to Arbitration is also available online at eguides.cmslegal.com/arbitration
The CMS Guide to Arbitration is also available online at eguides.cmslegal.com/arbitration
CMS Legal Services EEIG is a European Economic Interest Grouping that coordinates an organisation of independent member firms. CMS Legal Services EEIG provides no client services. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, CMS is used as a brand or business name of some or all of the member firms. CMS Legal Services EEIG and its member firms are legally distinct and separate entities. They do not have, and nothing contained herein shall be construed to place these entities in, the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to bind CMS Legal Services EEIG or any other member firm in any manner whatsoever.

CMS member firms are:
CMS Adonnino Ascoli & Cavasola Scamoni (Italy);
CMS Albiñana & Suárez de Lezo, S. L. P. (Spain);
CMS Bureau Francis Lefebvre S. E. L. A. F. A. (France);
CMS Cameron McKenna LLP (UK);
CMS DeBacker SCRL/CVBA (Belgium);
CMS Derks Star Busmann N. V. (The Netherlands);
CMS von Erlach Henrici Ltd (Switzerland);
CMS Hasche Sigle, Partnerschaft von Rechtsanwälten und Steuerberatern (Germany);
CMS Reich-Rohrwig Hainz Rechtsanwalte GmbH (Austria) and
CMS Rui Pena, Arnaut & Associados RL (Portugal).


www.cmslegal.com

Editors: Torsten Lörcher, Guy Pendell and Jeremy Wilson

CMS Guide to Arbitration

VOLUME I

With contributions from law firms Hergün Bilgen Özeke Attorney Partnership, Khaitan & Co, Minter Ellison and Setterwalls

Fourth Edition