ALLEN & OVERY

International Arbitration: Choosing the Seat

2013

Introduction

As arbitration has continued its march forward as parties' first choice for resolving complex, cross-border disputes and as increasing numbers of actors from various jurisdictions foray into this arena, the choice of seat has taken on a significance with many ramifications. Getting the seat right may be crucial to ensuring an effective arbitration and an enforceable award. It is therefore one of the most important decisions to make when entering into an arbitration agreement.

The growth of arbitration as a dispute resolution mechanism has also resulted in competition between different locations to attract this lucrative business. Facilities have been developed and sustained efforts made to attract the users of arbitration to different centres around the globe. How then should a party distinguish between them?

Quite apart from infrastructure and facilities, the importance of the seat (typically a major city) is that it places an arbitration within the legal framework of a particular jurisdiction (regardless of where any hearings in the arbitration are physically held). The legal framework, and hence the seat, will have an important impact on the arbitration and any award.

Enforcement: An arbitral award is often only as good as the ability to effectively enforce it. Companies operating internationally typically hold assets in many jurisdictions. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) maximises the chances of being able to access the relevant jurisdictions for the purposes of enforcement by creating a favourable international regime for the recognition and enforcement of arbitral awards. Whether an award is a "New York Convention award" for purposes of enforcement is determined by the seat. An award issued in a seat which is in a contracting state to the New York Convention can be enforced under this regime in the courts of another contracting state. Given that there are currently 147 contracting states to the New York Convention, it is imperative that parties choose a New York Convention seat (especially where enforcement of court judgments between jurisdictions is often more complex).

National courts: The national courts at the seat have "supervisory" jurisdiction over the arbitration. This can have an important impact because those courts can be supportive to the arbitral process by, for example, staying concurrent court proceedings or granting injunctive relief to protect assets subject to the arbitration. On the other hand, an unsympathetic court can be disruptive by, for example, considering and determining issues that are to be determined in the arbitration or interfering with the arbitral process. It is also the courts of the seat that will generally be competent to hear applications to set aside an arbitral award.

Doctrines of separability and "competence-competence": Both these doctrines are now well recognised and fundamental concepts in arbitration law. The first ensures that the arbitration agreement is deemed a separate contract even when embedded in another agreement such that it exists independently and will not be assailed by invalidity or breach of the other agreement. The second, provides that the arbitral tribunal is entitled to determine its own jurisdiction. Both protect the integrity of the arbitral process and its independence from court proceedings. They are recognised in most sophisticated arbitration-friendly states, but not all.

Procedure: Most national arbitration laws, incorporated through selection of the seat, include mandatory provisions of procedure (e.g. the power of the courts to remove arbitrators) which will apply regardless of any contrary stipulation in the parties' arbitration agreement. It is therefore important that such provisions are appropriate for international commercial disputes.

This booklet aims to act as a comparative review of some of the important seats currently used in international arbitration. I hope you find it a useful aid.

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Arbitration seat comparison

Australia

Is the seat a signatory of the New York Convention

Yes: ratified on 26/03/1975 and entered into force on 24/06/1975.

What are the main arbitral institutions?

The main arbitral institution in Australia is The Australian Centre for International Commercial Arbitration (ACICA) (www.acica.org.au). ACICA was established in 1985. On 30 August 2011, ACICA launched its Arbitration Rules incorporating the Emergency Arbitrator Provisions (ACICA Rules).

Other arbitral institutions that are commonly used in Australia include:

– The Institute of Arbitrators & Mediators Australia (IAMA) (www.iama.org.au);

– Singapore International Arbitration Centre (SIAC) (www.siac.org.sg); and

– International Chamber of Commerce (ICC) (www.iccwbo.org).

What is the procedural legislative framework?

Arbitrations in Australia are governed by two separate legal regimes:

– International arbitrations are governed by the International Arbitration Act 1974 (the Act). The Act broadly adopts the UNCITRAL Model Law on International Commercial Arbitration as amended on 7 July 2006; and

– Domestic arbitrations are governed by the Commercial Arbitration Act of the relevant Australian State in which the arbitration is seated.

What are the formal requirements for the arbitration agreement?

An arbitration agreement will be valid if it is in writing and does not need to be signed by the parties provided that the content of the agreement is recorded in any form, including in exchanges of electronic communications.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The arbitral tribunal can join a third party to the arbitration provided that the parties to the arbitration and the third party have consented in writing.

Will the arbitration be confidential?

The Act contains a comprehensive confidentiality regime (sections 23C to 23G), which protects pleadings and any other information submitted to the arbitral tribunal, as well as transcripts, rulings and awards. These confidentiality provisions operate on an "opt-in" basis, so parties who wish to adopt the regime should expressly agree to do so.

The regime permits disclosure in limited circumstances; for instance, in order to enforce an award.

Furthermore, unless the parties agree otherwise in writing, arbitrations conducted under the ACICA Rules will be confidential, including all matters relating to the arbitration (such as the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party (Rule 18).

What are the powers of the arbitrator?

Absent contrary party agreement, the arbitral tribunal has a broad range of powers, including the powers to determine the procedure to be followed, as well as the place and language of the proceedings; order parties to produce documents; appoint an expert and require parties to produce documents to that expert; order a party to pay security for costs; and determine the admissibility, relevance, materiality and weight of any evidence.

Can the arbitrator award interim measures?

The arbitral tribunal will have the power to grant interim measures, including injunctions and asset preservation orders, unless the parties agree otherwise.

The ACICA Rules also provide an emergency arbitrator procedure for emergency interim relief prior to the constitution of the arbitral tribunal, unless the parties agree otherwise in writing (Schedule 2).

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

The Federal Court of Australia or the Supreme Court of the State or Territory in which the arbitration in seated (together "Australian Courts") must stay the proceedings and refer the parties to arbitration (section 7(2) of the Act), provided those proceedings involve the determination of a matter that is capable of settlement by arbitration, the arbitration agreement is valid and the relevant dispute falls within the scope of the arbitration agreement.

Foreign proceedings in breach of a valid arbitration clause:

Australian Courts may issue an anti-suit injunction to restrain a party from commencing or continuing proceedings before a foreign court in breach of an arbitration agreement.

Will the court intervene in arbitration?

Australian Courts are supportive of arbitration and will not generally intervene to undermine or otherwise hinder arbitration proceedings. Furthermore, the Act grants the Australian Courts various powers to assist arbitral proceedings, including the power to:

– issue any interim measure which the Australian Courts would ordinarily have the power to issue in court proceedings;

– issue subpoenas to require the attendance of a person or the production of documents to the arbitral tribunal;

– prohibit the disclosure of confidential information related to arbitral proceedings; and

– decide in challenges to the appointment of the arbitral tribunal.

How are costs allocated in arbitration?

Arbitral tribunals seated in Australia generally apply the principle that the costs follow the event, however it ultimately retains a discretion to fix costs (including the arbitrator's fees and expenses) as it deems appropriate.

If an arbitral tribunal's award includes no direction on the payment of costs, a party may apply to the tribunal to have the award amended by adding to it such directions as the tribunal thinks proper with respect to the payment of the costs of the arbitration (section 27 of the Act).

Can the arbitral award be appealed, and if so, on what grounds?

Grounds for appeal: The Act provides very limited grounds for setting aside an arbitral award, which include the arbitration agreement being invalid; the applicant not being able to present its case; that the award deals with a dispute not contemplated by, or not falling within, the terms of submission to arbitration; that the subject matter of the dispute is not capable of settlement by arbitration; or the award is in conflict with Australian public policy.

It should be noted that there is no avenue for appealing an arbitral award on a question of law and there are very few instances where the Australian Courts have set aside an arbitral award.

Timing: A challenge to an arbitral award must be brought within three months of the date of the receipt of the award by the party making the application.

To what extent are awards enforceable?

Local enforcement: A party may apply to any of the Australian Courts to enforce an arbitral award. If leave is granted, a party may enforce that arbitral award in any of the Australian Courts as if the award were a judgment or order of those courts.

International enforcement: As Australia is a signatory to the New York Convention, awards issued in arbitrations seated in Australia should be enforceable in all other signatory states.

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China

Beijing

Is the seat a signatory of the New York Convention?

Yes: ratified on 22/01/1987 and entered into force on 22/04/1987.

What are the main arbitration institutions?

The China International Economic and Trade Arbitration Commission (CIETAC), headquartered in Beijing, is the leading domestic arbitral organisation and has a reasonably good reputation. Most of its cases are administered under the CIETAC Arbitration Rules, the most recent version of which came into force on 1 May 2012.

There are also many local arbitration commissions, some of which accept international arbitration cases. The most frequently used of those is the Beijing Arbitration Commission.

Among the foreign institutions that handle China-related cases, the HKIAC and the SIAC have been gaining considerable popularity in recent years, although they, as with all non-Chinese arbitration institutions, such as the ICC, cannot administer arbitrations in mainland China itself.

What is the procedural legislative framework?

The PRC Arbitration Law (1997) and PRC Civil Procedure Law (amended in 2007) govern all domestic and international arbitrations seated in China.

What are the formal requirements for the arbitration agreement?

An arbitration agreement will be valid if it is concluded in written contracts or in agreements to submit to arbitration that are concluded in writing before or after a dispute occurs. According to a 2006 Supreme People's Court Notice, the written form requirement includes contracts, correspondence and electronic data messages (including telegrams, telexes, facsimiles, electronic data exchange and emails).

An arbitration agreement should contain the following particulars:

(1) an indication of the intention to apply for arbitration;

(2) the arbitrable matters; and

(3) the selected arbitration commission.

Does the doctrine of separability apply?

The doctrine of separability applies to arbitration agreements in the PRC. Therefore the arbitration agreement will stand independently and its validity shall not be affected by changes to, or dissolution, termination or invalidity of the underlying contract.

Can third parties be bound to an arbitration agreement?

The general rule is that an arbitration agreement only binds the parties that are party to that agreement. It can be extended to third parties in cases of succession and assignment.

Will the arbitration be confidential?

Arbitration proceedings are confidential under the PRC Arbitration Law and the CIETAC Rules. However, as with the situation in many other countries, it would be difficult to enforce the confidentiality obligations since there is no consistent approach in tribunals (or courts) in the PRC in compelling compliance with such obligations.

If the parties agree to have the proceedings conducted in open session, the arbitral tribunal may decide to have an open session for the hearing. Further, confidentiality may be overridden if a party has been required by PRC courts or other authorities to disclose certain information related to the arbitrations.

What are the powers of the arbitrator?

There are no codified guidelines in the law. Under the CIETAC Rules, arbitrators are generally free to exercise their discretion in resolving procedural matters. The arbitral tribunal may hear a witness in any way it deems appropriate and appoint experts. However, the arbitral tribunal may not compel an unwilling witness to appear in arbitration proceedings. The arbitral tribunal may adopt an adversarial approach and conduct cross-examination. This opens the possibility of having disclosure and cross-examination procedures in CIETAC arbitration cases. That being said, in most arbitration proceedings there is no disclosure procedure as commonly used in common law countries.

Can the arbitrator award interim measures?

The arbitration commission must transfer any application by a party for preliminary or interim relief to the national courts.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration clause:

Where the parties have concluded an arbitration agreement and one party institutes an action in a PRC court without declaring the existence of the agreement and, after the court accepts the case, the other party submits the arbitration agreement to the court prior to the first hearing, the court shall overrule the action except in the case of the arbitration agreement being void. Where the other party has not raised an objection to the court's acceptance of the case prior to the first hearing, he shall be deemed to have renounced the arbitration agreement and the court shall proceed with the trial. Where a party declares the existence of an arbitration agreement when instituting action before a court, the courts are prohibited from accepting the case, unless the arbitration agreement is null and void.

Injunction against proceedings in foreign jurisdictions:

The PRC courts are very unlikely (if at all) to grant an injunction restraining foreign proceedings in breach of a valid arbitration agreement.

Will the court intervene in arbitration?

The PRC courts' power to interfere in arbitration proceedings relates to two major aspects. First, upon request of the arbitration commission, PRC courts may give interim relief in aid of arbitration proceedings. Second, PRC courts have jurisdiction to rule on the validity of an arbitration agreement. Under the PRC Arbitration Law, with respect to the validity of the arbitration agreement, if one party requests the arbitration commission to make a decision and the other party requests the court to make a ruling, the validity of the arbitration agreement shall be decided by the court. The arbitration proceedings will be suspended pending the ruling of the court.

How are costs allocated in arbitration?

Generally, cost allocation is done on the general principle of "costs follow the event". This is to say, the arbitral tribunal may decide that the losing party shall compensate the winning party for all expenses reasonably incurred, taking into account such factors as the outcome and complexity of the case, the workload of the winning party and its representatives and the amount in dispute.

Can the arbitral award be appealed, and if so, on what grounds?

China has a bifurcated system for setting aside an arbitral award, applicable to domestic arbitral awards and "foreign-related" arbitral awards respectively.

For domestic awards, there are broadly two groups of grounds upon which an applicant may apply to set aside an award: substantive grounds and procedural grounds. Substantive grounds include: (1) the evidence on which the award is based was forged; and (2) the other party has withheld evidence which is sufficient to affect the impartiality of the arbitration. Procedural grounds include: (1) there is no arbitration agreement; (2) the subject matter to be arbitrated falls outside the scope of the arbitration agreement; and (3) the formation of the tribunal or the arbitral procedure violates statutory procedures.

By contrast, review of foreign-related awards is restricted to purely procedural matters, which exactly mirrors the provisions of the New York Convention. In addition, the court may set aside both the foreign-related and domestic awards on the grounds of violation of public policy.

The local Intermediate People's Court has jurisdiction over the setting aside of arbitral awards. Its decision is final and not subject to further appeal. However, if the local intermediate court is minded to set aside an arbitral award, the court is obliged to pass that decision up to the provincial level Higher People's Court for further review, and then up to the Supreme People's Court (SPC) for final review. Only with the final approval of the SPC can the Intermediate People's Court set aside the award.

Timing of appeals: Annulment of a domestic arbitral award generally takes two months after an application is made. However, where foreign-related awards are involved, it usually takes longer because of the internal reporting system mentioned above. No time limit has been set for such internal reporting system. The time span for each annulment case depends on the complexity of the issues involved.

To what extent are awards enforceable?

Local enforcement: It will take approximately six months to have local awards enforced from the date when an application is made. However, as with the case of setting aside the award, enforcing a foreign award may take longer, mainly because of the reporting system as mentioned above.

International enforcement: As the PRC is a signatory to the New York Convention any award in a PRC seated arbitration should be enforceable in another signatory state.

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Czech Republic

Prague

Is the seat a signatory of the New York Convention?

Yes: ratified in Czechoslovakia on 27/04/1959 and entered into force on 10/10/1959. The Czech Republic succeeded to the New York convention as of 1 January 1993.

What are the main arbitration organisations?

The Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic (http://en.soud.cz/).

What is the procedural legislative framework?

Arbitration seated in the Czech Republic is governed by the Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards, as amended (the **Act**). Some sections of the Act No. 99/1963 Coll., Code of Civil Procedure, as amended (the **Civil Procedure Code**) apply to the relationship between courts and tribunals.

What are the formal requirements for the arbitration agreement?

The arbitration agreement must be in writing. This includes arbitration agreements concluded by telegraph or by electronic means, so long as the content and the parties to the agreement are clearly identified. The arbitration agreement may either be concluded as an arbitration clause in the main agreement or as a separate agreement.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The general rule is that an arbitration agreement cannot be invoked or enforced against a non-signatory.

Will the arbitration be confidential?

Arbitrators are bound by a statutory confidentiality duty and have to keep all information received in connection with the arbitration proceedings as strictly confidential, subject to exceptions. The arbitration proceedings are private by virtue of law. However, the statutory confidentiality duty does not apply to the parties of the arbitration.

Arbitrators have a notification duty in case of certain serious crimes. Arbitrators may further be released from their confidentiality duty by the parties to the arbitration or by a decision of the respective Czech district court.

What are the powers of an arbitrator?

The arbitrators can hear witnesses, experts and the parties only if they voluntarily appear before the tribunal, and they can collect other evidence only if voluntarily submitted. The arbitrators can apply to a court to take evidence on their behalf and the court has a statutory obligation to provide such assistance unless the assistance is not be permitted by law.

Can the arbitrator award interim measures

The arbitrators do not have power to grant interim relief. However, in cases where future enforcement of an arbitral award could be jeopardized, a court may award interim measures upon the request of a party.

What court remedies are available when proceedings are brought in breach of the arbitration agreement?

Court proceedings in breach of an arbitration agreement:

Where a claim is brought before the local courts in breach of an arbitration agreement, the defendant must claim the lack of jurisdiction in his first act in the proceedings concerning the merits of the case. Once the courts ascertains that the matter is to be properly decided in an arbitration, it will grant a stay of the proceedings and refer the matter to arbitration.

The court will refuse to grant a stay if it ascertains that: (i) the arbitration agreement is invalid; (ii) non-existent; (iii) the matter exceeds the powers entrusted to the arbitrators in the arbitration agreement; or (iv) the arbitrators have refused to discuss the matter.

Injunction against proceedings in foreign jurisdictions:

Under Czech law, a court cannot intervene in foreign court proceedings, for example, by issuing an anti-suit injunction.

Will the court intervene in arbitration?

Generally speaking no, unless it is asked to take evidence on behalf of the arbitrators or to grant interim relief such as a freezing injunction.

How are costs allocated in arbitration?

In the absence of agreement between the parties, the tribunal has the power to determine the allocation of costs as part of the final award or by a separate costs order.

Can the arbitral award be appealed, and if so, on what grounds?

The parties may agree on a review of the award by other arbitrators.

Arbitration proceedings cannot be appealed before local courts. However, arbitration awards issued in Czech territory can be set aside by a court upon application of any party for the following limited reasons:

(a) the arbitration award was issued in relation to a non-arbitrable dispute;

(b) the arbitration agreement is invalid, cancelled or does not apply to the subject matter;

(c) an arbitrator was not entitled to decide based on the arbitration agreement or otherwise, or an arbitrator lacked the capacity to act as an arbitrator;

(d) the arbitral award was not adopted by the majority of the arbitrators;

(e) a party was not provided with the possibility to be heard by the arbitrators;

(f) the arbitral award requires a party to satisfy an impossible obligation or an obligation not requested by the claimant, or an obligation that is impossible or unlawful under domestic law; or

(g) it is established that reasons exist on the basis of which it is possible to request the re-opening of court proceedings under the Civil Procedure Code. For instance, where material facts, decisions or evidence come to light that the party seeking the appeal could not adduce in the original proceedings through no fault of its own.

The application must be lodged within three months following the delivery of the final award.

To what extent are awards enforceable?

Local enforcement: Foreign arbitration awards issued in jurisdictions party to the New York Convention may be enforced in the same manner as domestic arbitration awards. Similarly, a foreign award may be enforced if it is issued in a jurisdiction that has a reciprocity agreement with the Czech Republic.

International enforcement: As the Czech Republic is a signatory to the New York Convention, awards issued in arbitrations seated in the Czech Republic should be enforceable in all other signatory states.

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England & Wales

London

Is the seat a signatory of the New York Convention?

Yes: ratified on 24/09/1975 and entered into force on 23/12/1975.

What are the main arbitration institutions?

The commonly used arbitration institutions are:

– International Chamber of Commerce (ICC) (www.iccwbo.org).

– London Court of International Arbitration (LCIA) (www.lcia.org).

What is the procedural legislative framework?

The Arbitration Act 1996 (the Act) governs all domestic and international arbitrations seated in England, Wales and Northern Ireland.

What are the formal requirements for the arbitration agreement?

For an arbitration agreement to be valid it must be in writing (section 5(1) of the Act), yet this written agreement need not be signed (section 5(2)).

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

Only parties to the arbitration agreement can arbitrate. An exemption to this privity of contract doctrine is the Contracts (Rights of Third Parties) Act 1999 (the 1999 Act). The 1999 Act obliges any third party who has certain rights under a contract to which they are not party to enforce that positive right through arbitration, where it is subject to an arbitration agreement.

To avoid the involvement of third parties, however, the contracting parties can explicitly exclude the 1999 Act from their contract.

Will the arbitration be confidential?

Confidentiality is implied under English law but its limits are uncertain. The Act does not deal with confidentiality but English case law has provided that any documents generated and disclosed during the proceedings can only be released with the consent of all parties. An exception to this general duty of confidentiality is when disclosure is reasonably necessary to establish or protect a party's rights as against a third party.

If privacy and confidentiality are key it is advised that specific provisions in relation to it are included in the arbitration agreement.

What are the powers of the arbitrator?

Where there is no express agreement between the parties the arbitrator has the power, amongst other things: to order disclosure, although disclosure is not necessary (section 43(2)(d)); to appoint experts (section 37); and to order that a witness is examined (section 38(5)).

In practice disclosure is more limited and focused in English-seated arbitrations than it is in English litigation but some level of disclosure is usually always ordered.

Can the arbitrator award interim measures?

The default position in English-seated arbitrations is that, unless the parties agree to the contrary, tribunals will have the power to award interim measures.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration clause:

When litigation is started in breach of an arbitration agreement, one of the parties may apply to the court for a stay of proceedings pending arbitration (section 9).

Injunction against proceedings in foreign jurisdictions:

Where proceedings to challenge arbitration are started outside the EU an injunction can be awarded under section 44 of the Act or section 37 of the Supreme Court Act 1981 to restrain the respondent in those proceedings. Due to recent case law (Allianz SpA v West Tanker Inc) injunctions cannot be awarded against parties starting proceedings in another EU state; instead it is for that member state to recognise and enforce the arbitration agreement.

Injunctions against third parties:

The courts of England and Wales recently ruled that they would be willing to enforce an anti-suit injunction against a non-party to an arbitration agreement where that non-party had colluded with one of the parties to bring foreign proceedings in an attempt to subvert the arbitration agreement.

Will the court intervene in arbitration?

The courts of England and Wales are supportive of arbitration and will not generally interfere to undermine it.

The Act itself contains certain restrictions on when the court can intervene. The Act also specifies the various powers of the court to assist arbitration. These powers include: the granting of a stay of proceedings in favour of arbitration (sections 9-11); requiring witnesses to comply with directions in the arbitral proceedings (section 43); and granting certain orders to assist with the arbitration, including the power to grant an interim injunction or appoint a receiver (section 44).

How are costs allocated in arbitration?

Cost allocation is done on the general principle of "costs follow the event". However the tribunal has the discretion to make an alternative cost order in the appropriate circumstances, including taking into account how the parties have conducted the arbitration.

Can the arbitral award be appealed, and if so, on what grounds?

Grounds for application to the court for appeal: The only grounds on which a challenge to the arbitral award in court can be made are: a challenge to the tribunal's substantive jurisdiction (section 67); a challenge on the grounds of serious irregularity (section 68); or an appeal on a point of law (this can only be brought with the agreement of all parties or with leave of the court and can be excluded) (section 69).

Excluding the right of appeal: Section 69 of the Act stipulates that parties can only exclude a right to challenge an award on a point of law. This exclusion must be made expressly (for example both the ICC and the LCIA rules exclude such a challenge).

Timing of appeals: Appeals in the courts of England and Wales take an average of six months to a year.

To what extent are awards enforceable?

Local enforcement: The courts of England and Wales have a good record of enforcing arbitral awards. Section 66 of the Act allows a party, with permission of the court, to enforce their award with the same effect as a court judgment.

International enforcement: As the UK is a signatory to the New York Convention any award in a UK seated arbitration should be enforceable in another signatory state.

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France

Paris

Is the seat a signatory of the New York Convention?

Yes: ratified on 26/06/1959 and entered into force on 24/09/1959.

What are the main arbitration institutions?

The most commonly used arbitration institutions include:

– International Chamber of Commerce (ICC) (www.iccwbo.org).

– London Court of International Arbitration (LCIA) (www.lcia.org).

– French Arbitration Association (Association française d'arbitrage) (www.afa-arbitrage.com)

What is the procedural legislative framework?

French arbitration law was codified in the 1980s with the Book IV of the French Code of Civil Procedure (CPC). This was updated in January 2011 by the enactment of Decree No. 2011-48 of 13 January 2011 (the New Decree).

What are the formal requirements for the arbitration agreement?

Except for the rules governing the arbitrability of a dispute there are no formal requirements for an arbitration agreement to be valid and enforceable.

There is therefore no requirement for the arbitration agreement to be in a particular form, nor is it required to be in writing. This has been expressly indicated in Article 1507 of the CPC.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The general rule is that an arbitration agreement cannot be invoked or enforced against a non-signatory. However, there are times when a third party will be joined to an arbitration agreement, beyond those times provided for solely by the institutional rules.

The French courts have extended an arbitration clause to non-signatories in situations involving groups of companies. One recent case has seen the arbitration clause subscribed to by a state-owned entity extended to a sovereign state. The courts have urged, however, that the arbitration clause will only be extended to states or other companies in a group where there is a high degree of proof of their involvement in the performance of the underlying contract.

Will the arbitration be confidential?

The CPC now explicitly provides that domestic arbitration agreements shall remain confidential (Article 1464, CPC) unless the parties agree otherwise. This provision of the CPC is not expressly made applicable to international arbitrations.

Although case law and French arbitration authors do suggest that confidentiality will be upheld in French seated arbitrations, it is advised that confidentiality agreements be incorporated into arbitration agreements if confidentiality is key.

What are the powers of the arbitrator?

Arbitrators are generally free to exercise their discretion in resolving procedural matters. Since there are no codified guidelines, in practice, French-seated arbitral tribunals seek the input of the parties regarding disclosure and the use of witnesses and experts etc. A party can ask the tribunal to order the other party who is in possession of an item of evidence to produce it. The French courts have ruled that the arbitrator can attach financial penalties to such an injunction. It should be noted however, that a party can invoke confidentiality concerns in order to limit its obligations to disclose to its opponents all documents it submits to the tribunal.

Can the arbitrator award interim measures?

Tribunals have the power to award interim orders (Articles 1468 and 1506, CPC).

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

When a dispute which is subject to an arbitration agreement is brought before the French courts, the courts will be obliged to decline jurisdiction. It is the tribunal's responsibility to decide on its own jurisdiction.

Injunction against proceedings in foreign jurisdictions:

French courts are generally less favourable to the award of anti-suit injunctions than the courts of England and Wales. As with English-seated arbitrations, anti-suit injunctions will not be awarded against proceedings started in other EU states, but recent case law has shown the French courts are willing to grant an injunction restraining proceedings brought in breach of an arbitration agreement outside the EU (decision of the Court de Cassation).

Will the court intervene in arbitration?

French courts are reluctant to become involved in arbitration and will only do so when their assistance is needed to ensure that proceedings can be initiated effectively. The appointment of a *juge d'appui* can help with the appointment of arbitrators. The French courts can also extend the time period given for the arbitration (Article 1463, CPC).

The French courts will also be willing to become involved in helping parties to gather the evidence needed in arbitral proceedings. A French judge has the power to order the preservation or production of documents for disclosure (Article 145 and 1449).

How are costs allocated in arbitration?

French law does not oblige the unsuccessful party to bear its opponent's fees. Decisions on the allocation of costs are left to the tribunal's discretion.

Can the arbitral award be appealed, and if so, on what grounds?

Grounds for appeal: The French courts may set aside an award if the grounds of appeal are met. The grounds for setting aside an award under the New Decree are: the arbitral tribunal wrongfully found that it had, or did not have, jurisdiction; an irregularity in the appointment of the tribunal; the tribunal failed to conform to the mission bestowed on it; there was a failure to respect the principles of due process and fair trial; or, the recognition or enforcement of the award conflicts with international public policy.

Timing of the appeal: The annulment process in France usually takes around a year.

To what extent are awards enforceable?

Local enforcement: Enforcement of an award is made before the judge of the Tribunal de Grande Instance (TGI) within whose jurisdiction the award is issued (Article 1516, CPC). The application for enforcement is made *ex parte* and is very simple, a short demand together with a copy of the arbitration agreement needing to be submitted. There is no appeal against a TGI decision.

International enforcement: As France is a signatory to the New York Convention any award in a French seated arbitration should be enforceable in another signatory state. There are limited grounds for refusal to enforce under Article V of the Convention.

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Germany

Frankfurt

Is the seat a signatory of the New York Convention?

Yes: ratified on 30/06/1961 and entered into force on 28/09/1961.

What are the main arbitration organisations?

The most prominent arbitration organisations in Germany are:

– the German Institution of Arbitration *(Deutsche Institution für Schiedsgerichtsbarkeit)* (DIS) (www.dis-arb.de). The DIS was formed in 1992. The DIS Arbitration Rules (the DIS Rules) have been in force since 1 July 1998; and

– The International Chamber of Commerce (ICC) (www.iccwbo.org) is also widely used.

What is the procedural legislative framework?

The law on arbitration is contained in sections 1025 to 1066 of the 10th book, of the Code of Civil Procedure *(Zivilprozessordnung)* (ZPO) which has been in effect since 1 January 1998. It regulates all arbitration proceedings with their seat in Germany without distinguishing between domestic and international arbitration. With few exceptions, it adopts the UNCITRAL Model Law.

What are the formal requirements for the arbitration agreement?

The arbitration agreement must be contained either in a document signed by the parties or in an exchange of communication which provides a record of the agreement.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

Under German law an arbitration agreement only binds the signatories of the agreement, although it can be extended to third parties in cases of assignment, agency, succession and insolvency.

The group of companies doctrine, which in jurisdictions such as France sometimes binds certain third parties to an arbitration agreement which are not privy to the arbitration agreement, has not been adopted in German court practice. A third party can only be joined in an arbitration if:

– all parties and the arbitral tribunal agree to the joinder; and

– the third party agrees to be submitted to the arbitration proceedings.

Will the arbitration be confidential?

There is no provision on confidentiality in German arbitration law. The case law is not clear as to whether there is an implicit duty to maintain confidentiality absent an express provision to that effect. However, there is a very broad confidentiality provision under section 43 of the DIS Rules whereby the parties and the arbitrators must maintain confidentiality towards all persons regarding the conduct of arbitration proceedings.

It is nonetheless advised that if the parties seek confidentiality, they should agree to this by way of a confidentiality agreement.

What are the powers of the arbitrator?

The tribunal can order disclosure of documents and attendance of factual and expert witnesses. However, they do not have the power to enforce these orders. If a party fails to comply with an order, the arbitral tribunal can either request the assistance of the state courts or draw negative inferences.

Can the arbitrator award interim measures?

German seated tribunals have the power to award interim measures and the German courts will be willing to enforce such measures unless a party has concurrently applied to the court.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

The court will refuse to hear an application in breach of an arbitration agreement unless the court finds that the arbitration agreement is null and void; inoperative; or incapable of being performed (section 1032, ZPO). There is a specific provision in German law which is not taken from the UNCITRAL Model Law pursuant to which the parties can request state courts to clarify at an early stage whether a valid and binding agreement to arbitrate exists (section 1032 (2) ZPO). German law has also introduced a specific remedy (*Zwischenentscheid,* section 1040(3) ZPO) providing for an early court review of an affirmative decision on jurisdiction.

It should be noted that any objection to the tribunal's jurisdiction must be raised before the beginning of the oral hearing on the substance of the dispute. Failure to comply with this time limit prevents the respondent from raising an objection.

Injunction against proceedings in foreign jurisdictions:

German courts are very unlikely (if at all) to grant an injunction restraining foreign proceedings in breach of a valid arbitration agreement.

Will the court intervene in arbitration?

German courts do not intervene during a pending arbitration. They can assist upon request, however, to: grant or enforce interim relief (section 1041, ZPO) or in taking evidence (section 1050, ZPO).

Assistance in taking evidence includes compelling witnesses to attend. However, German courts are bound by their own procedural rules in assisting arbitration proceedings. They, therefore cannot assist in enforcing broad disclosure orders which would be inadmissible under German procedural law.

How are costs allocated in arbitration?

Unless the parties agree otherwise, the arbitral tribunal allocates, in the award, the costs of the arbitration between the parties, including the parties' costs incurred in pursuing their claim or defence. The tribunal allocates costs at its discretion and takes into consideration all circumstances of the case, in particular the outcome of the proceedings (section 1057, ZPO and section 35, DIS Rules).

Can the arbitral award be appealed, and if so, on what grounds?

Grounds for appeal: The German courts will grant an appeal where: a party to the arbitration agreement was under some incapacity; the agreement is not valid under the law to which the parties have subjected it; a party was not given proper notice of the appointment of an arbitrator; the award deals with a dispute not contemplated by the terms of the submission to arbitration; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of the German arbitration law. The grounds thus mirror the cases where enforcement will be denied under the New York Convention.

Timing of the appeal: All arbitration matters are handled by the German courts of second instance, the Higher Regional Courts. An aggrieved party may file a request for legal review of the Federal Supreme Court. Appeals take around three months to a year.

To what extent are awards enforceable?

Local enforcement: Enforcement of an arbitration award takes place in German courts if the award has been declared enforceable.

International enforcement: As Germany is a signatory to the New York Convention any award in a German seated arbitration should be enforceable in another signatory state.

Our German arbitration contacts:
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Hong Kong

Is the seat a signatory of the New York Convention?

Yes: ratified by China on 22/01/1987, entered into force on 22/04/1987 and extended to Hong Kong upon resumption of sovereignty over Hong Kong on 1 July 1997.

What are the main arbitration organisations?

In addition to the main international institutions administering arbitration, the following are prevalent in Hong Kong:

– Hong Kong International Arbitration Centre (www.hkiac.org)

– ICC International Court of Arbitration – Asia Office (www.iccwbo.org/court)

What is the procedural legislative framework?

The New Ordinance (Cap 609) (New Ordinance) took effect on 1 June 2011. The New Ordinance abolished the separate regimes for domestic and international arbitrations. Arbitrations in Hong Kong will therefore be governed by a unitary regime based on the UNCITRAL Model Law.

What are the formal requirements for the arbitration agreement?

Under the UNCITRAL Model Law, when arbitrations are seated in Hong Kong, there is a requirement that the arbitration agreement must be in writing. The document need not be signed by the parties, as with English seated arbitrations. It can therefore be formed from communication between the parties.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

There are no provisions under the New Ordinance concerning third parties. However, under sections 99 to 101 of the New Ordinance, parties can agree to opt-in to a regime resembling the old domestic regime. One provision under the domestic regime that parties can opt into is the court's power to consolidate claims. The courts can consolidate two or more arbitration proceedings under any terms they consider just and appropriate. They can also order that arbitrations be heard at the same time, or one after the other.

Under HKIAC Rules, the tribunal can join a third party to the arbitration, provided the applicant party and that third party have both consented in writing.

Will the arbitration be confidential?

Arbitration proceedings and arbitral awards are confidential pursuant to section 18 of the New Ordinance. This confidentiality extends to documents disclosed in an arbitration.

What are the powers of the arbitrator?

The New Ordinance grants various powers to the tribunal including, amongst others, the power to: require a claimant to give security for the costs of the arbitration; direct the discovery of documents or the delivery of interrogatories; direct the attendance of witnesses in order to give evidence; and the power to award simple or compound interest from such dates, and at such rates, as the tribunal considers appropriate.

Can the arbitrator award interim measures?

The tribunal of a Hong Kong-seated arbitration will have the power to make interim orders, provided the parties have agreed that the tribunal shall have such competence. Similarly, the tribunal will be able to award injunctions and temporary restraining orders as if they were awarded by the courts.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

The court will stay proceedings and refer the parties to arbitration, unless the arbitration agreement is: null and void, inoperative or incapable of being performed.

Foreign proceedings in breach of a valid arbitration clause:

Hong Kong courts have the discretion to issue anti-suit injunctions and enforce arbitration agreements by restraining a party from pursuing foreign litigation. As anti-suit injunctions have an indirect effect on a foreign court, Hong Kong courts exercise this discretion with caution.

Will the court intervene in arbitration?

The New Ordinance expressly dictates when the court can intervene in proceedings. They will intervene: to enforce the arbitration agreement by ordering a stay of court proceedings and referring the parties to arbitration; to order interim protective measures; in challenges to the appointed arbitrator(s); to review, on appeal, the decision of an arbitral tribunal that it has jurisdiction; to provide assistance in either the hearing of evidence, or the collection of evidence; and to set aside an arbitral award.

How are costs allocated in arbitration?

Tribunals seated in Hong Kong generally apply the principle that the costs follow the event, although the tribunal can refuse to award costs to the successful party, if it has incurred unnecessary costs and expenses, or has failed on certain claims or issues.

Can the arbitral award be appealed, and if so, on what grounds?

Appeal through the courts: For international arbitrations seated in Hong Kong, awards are not subject to appeal unless the parties have agreed to adopt the domestic regime. For domestic arbitrations, an appeal on a question of law concerning an award is allowed with leave of the court.

Grounds for appeal: Grounds for appeal include: the arbitration agreement being invalid; the applicant not being able to present its case; the award dealing with a dispute not contemplated by, or not falling within, the terms of submission to arbitration; or the award conflicting with Hong Kong public policy.

Timing of the appeal: The appeal process is likely to take a few months. It should be noted that there are very few instances where the Hong Kong courts have annulled an arbitral award.

To what extent are awards enforceable?

Local enforcement: The parties can apply to the Hong Kong courts to enforce their award. If leave is granted, the award can be enforced in the same manner as a court judgment. The application for leave is normally made *ex parte*, supported by an affidavit evidencing the arbitration agreement and award.

International enforcement: As a signatory to the New York Convention any award in a Hong Kong seated arbitration should be enforceable in another signatory state. There are limited grounds for refusal to enforce under Article V of the Convention.

Our Hong Kong arbitration contacts:
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Hungary

Budapest

Is the seat a signatory of the New York convention?

Yes: ratified on 05/03/1962 and entered into force on 02/06/1962.

What are the main arbitration organisations?

The most commonly used arbitration institutions include:

– The Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (the HCCI); and

– The Permanent Arbitration Court of Money and Capital Markets.

What is the procedural legislative framework?

The law on arbitration was codified in 1994 in the Hungarian Arbitration Act (the Act). In addition to the Act, the Rules of Proceedings of the HCCI (the HCCI-Rules) is also an important source (it being the main arbitral institution in Hungary).

What are the formal requirements for the arbitration agreement?

An agreement to arbitrate must define a specific legal relationship and expressly submit disputes to arbitration. An arbitration agreement must also be in writing.

Under the Act, an agreement is in writing if it has come into existence through an exchange of letters, telegrams, telex or any other means of exchanging communication between the parties that are capable of producing a permanent record of the messages.

Furthermore, it will also be regarded as a written arbitration agreement if one of the parties states in his statement of claim that an arbitration agreement was in fact concluded between the parties, and the other party does not deny this in his defence.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

No, unless they submit to the arbitration in writing.

Will the arbitration be confidential?

Yes. Under the Act, unless the parties agree otherwise, public access is excluded and the arbitrators must treat as confidential any kind of information that they acquire during the arbitration process. Confidentiality extends to all stages of arbitration, namely the existence of the arbitration, pleadings, documents produced during the arbitration and the award.

What are the powers of an arbitrator?

Under Hungarian law, the arbitral tribunal is in essence obliged to follow the parties' instructions in conducting proceedings. In the absence of the parties' agreement, the tribunal has power to determine the procedures to be followed. The tribunal may specify the procedural language, request documents which they consider appropriate, evaluate the evidence or appoint experts. If any of the arbitrators' orders is not complied with, the tribunal may request legal assistance from local courts in form of warrants and fines for non-compliance.

Can the arbitrator award interim measures

Under the Act, unless the parties agree otherwise, the tribunal is permitted to award interim relief. However, interim measures issued by the courts are more efficient than interim measures issued by arbitral tribunals due to their coercive force.

What court remedies are available when proceedings are brought in breach of the arbitration agreement?

Court proceedings in breach of an arbitration agreement

Except where the subject matter of a dispute falls within the exclusive jurisdiction of the courts, Hungarian courts must reject any claims brought in breach of an arbitration agreement. The court would grant a stay of ongoing proceedings upon the request of either party, unless it finds the arbitration agreement null and void, inoperative or incapable of being performed. The party seeking a stay must, at the latest, file its claim as a first statement on the merits. In any event, court proceedings do not prejudice arbitration and the tribunal is free to proceed and issue an award on the merits of the case.

Injunction against proceedings in foreign jurisdictions

Parties may request local courts to award interim relief in parallel with the arbitration proceedings. There is no specific legislation dealing with anti-suit injunctions.

Will the court intervene in arbitration?

The state courts may assist arbitral tribunals by, inter alia: (i) the appointment of the arbitrator in case of failure of the parties to do so; (ii) a decision on the challenge of arbitrators; (iii) a decision on other grounds of termination of the arbitrators' mandate; (iv) the review of the tribunal's positive decision on its own jurisdiction; (v) ordering different kinds of interim measures; or (vi) legal assistance for the taking of evidence.

How are costs allocated in arbitration?

The general principle of cost allocation is that each party bears costs in proportion to the extent it has lost the case. It is for the tribunal to determine the amount of costs. According to Hungarian legislation, interest normally accrues from the date the arbitrated claims become due instead of when the arbitration award is delivered.

Can the arbitral award be appealed, and if so, on what grounds?

Under the Act, no appeal may lie against an arbitral award. However, a party affected by the award may, within 60 days of the award being rendered, initiate an action before the competent county court to have it set aside. The grounds for doing so are listed in the Act.

The specific grounds, which are in compliance with Art. V of the New York Convention and Art. 34 of the UNCITRAL Model Law are as follows:

(a) the party having concluded the arbitration contract had no legal capacity or capacity to act;

(b) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under Hungarian law;

(c) 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;

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

(e) the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties;

(f) the subject matter of the dispute is not capable of resolution by arbitration under Hungarian law; or

(g) the award is in conflict with the rules of Hungarian public policy.

The last two grounds will be examined by the courts of law ex officio even if the claimant of the setting aside procedure relies only on other grounds mentioned above.

The only recourse against the decision of the court is to apply for the revision of the decision with the Supreme Court. However, the plea of revision may only be founded on an alleged and exactly specified breach of law and no review of facts may take place.

Timing of the appeal: Annulment proceedings usually take between six months and three years.

To what extent are awards enforceable?

Hungary is a party to the New York Convention and therefore foreign awards shall be enforced in compliance with international standards. There are several occasions, however, when foreign arbitral awards will not be enforced: first, when the subject matter of the dispute is not capable of resolution by arbitration under Hungarian law; and secondly, when the award has not yet become binding, has been set aside or suspended. Finally, where the subject matter of the award violates Hungarian public policy.

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India

Is the seat a signatory of the New York Convention?

Yes: ratified on 13/07/1960 and entered into force on 11/10/1960. Note however that despite it being a party to the New York Convention, India only applies the New York Convention enforcement regime to arbitral awards of approximately 50 countries that have been notified of the fact by the Indian government under its domestic law. This includes the UK, US and Hong Kong, among others.

What are the main arbitration institutions?

In India the vast majority of cases are resolved through ad hoc arbitration, although the following institutions are also used:

– the Indian Council of Arbitration (ICA), headquartered in New Delhi, is the leading domestic arbitral organisation and has a very good reputation; and

– among the foreign institutions, the International Chamber of Commerce (ICC) is the most popular in India and is frequently used by both the public and private sectors. Lately, the Singapore International Arbitration Centre has been gaining considerable popularity.

What is the procedural legislative framework?

The main legislative framework that applies to arbitrations is the Arbitration and Conciliation Act 1996, a two part Act (the Act). Part I provides a complete framework for any arbitration in India (whether between Indian or foreign parties). Part II contains provisions that essentially concern the enforcement of foreign awards.

The Act is largely based on the UNCITRAL Model Law and the UNCITRAL Arbitration Rules 1976, subject to a few differences.

What are the formal requirements for the arbitration agreement?

Under Indian law an arbitration agreement must be in writing. As with other jurisdictions it may be contained in correspondence or in any means of communication that provides a record of the agreement.

The agreement need not be signed. An unsigned agreement affirmed by the parties' conduct is valid.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

Under Indian law the arbitration agreement will only apply to those party to it. A third party therefore cannot be joined to an arbitration without its consent.

Will the arbitration be confidential?

There is no express or implied obligation to treat an arbitration agreement, or proceedings arising from it, as confidential. It is advised therefore that if confidentiality is required, the parties' agreement must provide for it.

However, it must be noted that the efficacy of such a confidentiality agreement is unclear in disputes between large corporate entities or government since there is a requirement under Indian law that such corporations and such entities must act transparently.

What are the powers of the arbitrator?

Among other things, the tribunal has the power to appoint witnesses and compel witnesses to give evidence under oath as well as appoint experts in relation to any specific issue.

Can the arbitrator award interim measures?

The tribunal can award interim measures such as, among others: prevention, interim custody or sale of any goods which are the subject matter of the arbitration agreement, securing the amount in dispute in the arbitration, and interim injunctions.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

In relation to a domestic arbitration, if an action is brought before a judicial authority in breach of an arbitration agreement, that authority must refer the parties to arbitration (section 8, the Act). In relation to international arbitrations only, the Indian courts may refuse to refer the parties to arbitration if it finds that an arbitration is null and void, inoperative or incapable of being performed.

Foreign proceedings in breach of a valid arbitration clause:

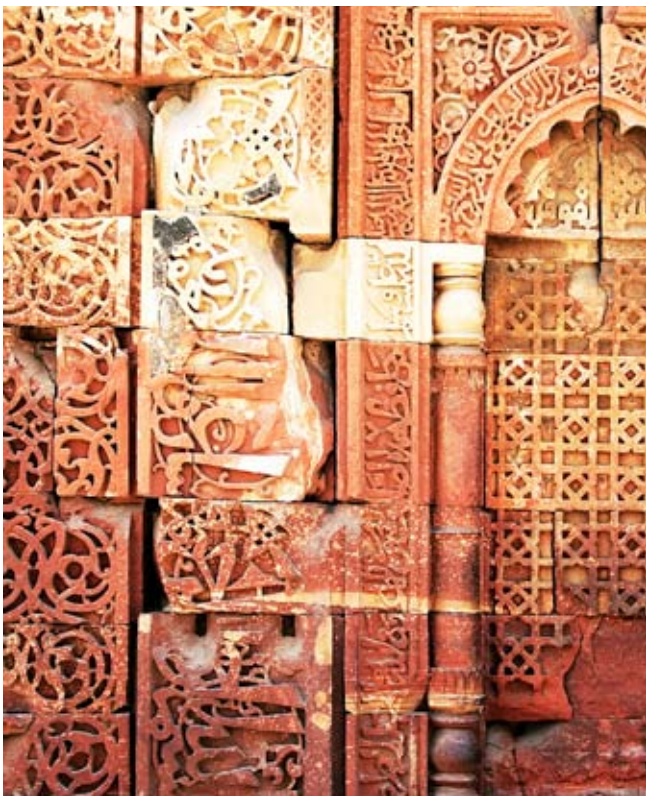
The Indian courts may grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement, although there have been few instances of such cases.

Will the court intervene in arbitration?

The courts can intervene to assist arbitration proceedings in three circumstances: in appointing arbitrators; in determining whether to terminate the arbitrator's mandate because he is unable to perform his functions or because he fails to proceed without undue delay (section 14(2), the Act); and in providing assistance in taking evidence.

How are costs allocated in arbitration?

The general rule is that costs follow the event. The tribunal may not award the actual costs but only what it deems to be reasonable. It will also look at the conduct of the parties e.g. as to whether either party may be guilty of deliberately delaying proceedings or filing trivial applications.



Can the arbitral award be appealed, and if so, on what grounds?

In domestic arbitrations, an appeal can be made against an order setting aside or refusing to set aside the arbitral award. In foreign arbitrations, only an order refusing to enforce the award can be appealed. As such, there is no right of appeal if the foreign award is enforced. Note however that in either case, further appeal to the Supreme Court may be allowed on a discretionary basis but this is extremely rare.

Grounds for appeal: The grounds for setting aside a domestic award are those under the UNCITRAL Model Law Article 34 and include: the incapacity of one of the parties; one party not being given proper notice of the appointment of arbitrators; the award dealing with issues falling outside the prescribed terms of the arbitration agreement; and the composition of the tribunal not being in accordance with the arbitration agreement. For foreign awards, the grounds for refusing to enforce are as set out in the New York Convention, Article V.

Timing of the appeal: Delays and uncertainty remain the main criticisms of Indian court involvement; appeals may, therefore, be subject to delays.

To what extent are awards enforceable?

Local enforcement: One of the objectives of the Indian Arbitration Act is "to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court" (Statement of Objects and Reasons). Arbitration awards are therefore enforceable like court judgments.

International enforcement: As India is a signatory to the New York Convention any award in an Indian seated arbitration should be enforceable in another signatory state. There are limited grounds for refusal to enforce under Article V of the Convention.

Our India arbitration contacts:

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The Netherlands

Amsterdam

Is the seat a signatory of the New York Convention?

Yes: ratified on 24/04/1964 and entered into force on 23/07/1964.

What are the main arbitration institutions?

The most commonly used arbitration institutions include:

– International Chamber of Commerce (ICC) (www.iccwbo.org).

– The Netherlands Arbitration Institute (NAI) (www.nai-nl.org).

– The Permanent Court of Arbitration (PCA) in The Hague for investor-state and state-to-state arbitration (www.pca-cpa.org).

What is the procedural legislative framework?

The Dutch Arbitration Act of 1986 is enacted in Book IV of the Dutch Code of Civil Procedure (DCCP). It governs all arbitration proceedings with their seat in the Netherlands without distinguishing between domestic and international arbitration.

What are the formal requirements for the arbitration agreement?

There are no formal requirements for an arbitration agreement to be valid. If disputed, it must, however, be proven by an instrument in writing or by electronic data. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The general rule is that an arbitration agreement only binds the parties that are party to that agreement. It can be extended to third parties in cases of succession, assignment, agency and insolvency.

The group of companies doctrine has not been adopted in Dutch court practice. Third parties with an interest in the arbitral proceedings may join or intervene in these proceedings if allowed by the tribunal and if the third party agrees to submit to the arbitration agreement (Article 1045 DCCP). If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, any of the parties may, unless the parties have agreed otherwise, request the President of the District Court in Amsterdam to order a consolidation of the proceedings (Article 1064 DCCP).

Will the arbitration be confidential?

The Dutch Arbitration Act contains no provisions relating to confidentiality. Article 55 of the NAI Arbitration Rules, however, explicitly provides that arbitration is confidential and that all individuals involved either directly or indirectly are bound to secrecy, save and insofar as disclosure ensues from the law or the agreement of the parties.

If confidentiality is important in Dutch-seated arbitrations it is advisable to include specific arrangements in the arbitration agreement.

What are the powers of the arbitrator?

Arbitrators are, subject to agreement between the parties, generally free to set the procedure of the arbitration. They may, among other things, order production of documents (Article 1039(4) DCCP) and appoint experts (Article 1042 DCCP).

Can the arbitrator award interim measures?

Arbitral tribunals seated in the Netherlands may, to the extent the parties have not agreed otherwise, issue interim procedural orders. In addition the parties may agree to empower the arbitral tribunal or its chairman to render decision in summary arbitral proceedings, which shall be regarded as an arbitral award (Article 1051 DCCP). Under the NAI Arbitration Rules summary arbitral proceedings can also be commenced before or together with the commencement of an arbitration on the merits.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

When a dispute which is subject to an arbitration agreement is brought before the Dutch courts, the court shall declare that it has no jurisdiction if a party invokes the existence of the agreement before submitting a defence, unless that agreement is invalid (Article 1022 DCCP).

Injunction against proceedings in foreign jurisdictions:

There have been no cases where the Dutch courts have granted such an injunction restraining foreign proceedings in breach of a valid arbitration agreement.

Will the court intervene in arbitration?

The courts are favourable to arbitration and will therefore only become involved in proceedings where their assistance is needed to ensure that they can proceed effectively. In this respect Dutch courts may assist in the appointment of arbitrators, grant interim measures of protection, or assist in taking evidence (e.g. compelling attendance of witnesses to be heard before the court in assistance of the arbitral proceedings).

How are costs allocated in arbitration?

Unless the parties agree otherwise, the tribunal will allocate the costs of the arbitration between the parties, taking into consideration all relevant circumstances, including the parties' costs incurred in pursuing their claim or defence.

Can the arbitral award be appealed, and if so, on what grounds?

Grounds for appeal: An appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have agreed to it (Article 1051 DCCP). An appeal to the Dutch courts is only possible in the form of setting aside the award on one or more of the following grounds (Article 1065(1) DCCP): absence of a valid arbitration agreement; the tribunal was constituted in violation of the applicable rules; the tribunal has not complied with its mandate; the award is not signed or does not contain reasons; and the award, or the manner in which it was made, violates public policy or good morals.

Timing of the appeal: The annulment process in the Netherlands usually takes around a year. The decision of the District Court is subject to appeal to the Appeal Court and subsequently to the Supreme Court.

To what extent are awards enforceable?

Local enforcement: Enforcement in the Netherlands of a final or partial award can take place after the District Court has granted leave for enforcement (Article 1062(1) DCCP).

International enforcement: As the Netherlands is a signatory to the New York Convention any award in a Dutch seated arbitration should be enforceable in another signatory state.

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Poland

Warsaw

Is the seat a signatory of the New York convention?

Yes. the New York Convention was ratified in Poland on 3 October 1961 and entered into force on 1 January 1962.

What are the main arbitration organisations?

There are a number of arbitration organisations, the most notable of them being the Polish Arbitration Association (http://www.pssp.org.pl/a_index.htm).

The main local arbitration courts are:

(a) The Court of Arbitration at the Polish Chamber of Commerce (http://www.sad-arbitrazowy.pl/); and

(b) The Lewiatan Court of Arbitration (http://www.sadarbitrazowy.org.pl/en/homepage).

What is the procedural legislative framework?

Arbitration is regulated by Part V of the Polish Civil Procedure Code (the Code) (Arts. 1154 – 1217 of the Code) and the New York Convention. Within the scope of its application, the New York Convention takes precedence over the provisions of the Code. In extraordinary circumstances, certain substantive provisions of law may have an impact on procedural issues.

Part V of the Code came into force on 17 October 2005 and implements the UNCITRAL Model Law on International Commercial Arbitration from 1985 (the Model Law). The amendments to the Model Law made in 2006 are not implemented.

What are the formal requirements for the arbitration agreement?

The agreement must be in writing (Art. 1162 of the Code). This requirement is also met if the content of the clause is preserved in a durable form in distance communication. The parties to the agreement must indicate the subject matter of an existing or potential dispute, or the legal relationships covered by the agreement to arbitrate. An arbitration clause may also be incorporated by reference to another document.

The principle of equality between the parties must always be respected. Consequently, optional arbitration clauses, which favour one party over the other in terms of, e.g. right to select forum, may be challenged.

Does the doctrine of separability apply?

Yes. Consequently, a broad arbitration clause may cover such claims as unjust enrichment and undue performance.

Can third parties be bound to an arbitration agreement?

In general, the arbitration agreement is deemed binding towards assignees and transferees. In addition, an arbitration clause inserted into articles of association or a company statute binds the company and its shareholders. However, it is doubtful that this applies also to a recourse against resolutions of corporate bodies.

An agreement to the benefit of a third party (pactum in favorem tertii) is also a controversial issue. Attempts to bind a third party by an arbitration agreement may also be disputed in the case of promissory notes, due to specific regulations. Similarly, a jointly and severally liable debtor will not always be bound by an arbitration agreement concluded by the common creditor with one of the other debtors.

Other instances in which third parties may be bound by an arbitration agreement, e.g. "piercing the corporate veil" and actions against a guarantor or an agent brought under an arbitration clause from the main agreement (that is when the guarantee or the agency agreement does not contain an arbitration clause), despite being discussed in legal doctrine, receive little or no recognition in the judiciary.

Will the arbitration be confidential?

The status of confidentiality in Polish-seated arbitration is not expressly regulated by law, however confidentiality may be regulated by the procedural rules adopted by the parties, or the parties may regulate confidentiality in an agreement. It is also sometimes recognised as praxis domestic and an international custom.

What are the powers of an arbitrator?

The powers of an arbitrator under Polish law are similar to those under the Model Law.

The tribunal does not have power to order disclosure of evidence. However, the tribunal may request a district court to assist in taking evidence (Art. 1192 of the Code). Further, the parties may agree on a procedure for disclosure or such procedure may be provided for in the rules of the arbitration.

The tribunal may decide on its own jurisdiction (Art. 1180.1 of the Code).

Can the arbitrator award interim measures?

The parties can request interim measures from the tribunal unless agreed otherwise. The requesting party should substantiate its request. The interim measure issued by a Tribunal may be enforced by a state court.

What court remedies are available when proceedings are brought in breach of the arbitration agreement?

Court proceedings in breach of an arbitration agreement:

Under Art. 1165 of the Code, the state court must reject a statement of claim if the case should be heard by an arbitral tribunal. In such case, the state court proceedings are discontinued. This decision is subject to an appeal.

Injunction against proceedings in foreign jurisdictions:

There is no specific law on such injunction, therefore any motion to that effect would be decided on in accordance with general principles.

Will the court intervene in arbitration?

As a general rule, state courts are not allowed to interfere with arbitral proceedings. Such interventions are limited only to instances expressly listed in the Code. This primarily concerns appointing an arbitrator (in case a party or an appointing authority fails to do so), assisting in obtaining evidence and recognising or enforcing an award or an interim measure granted by an arbitral tribunal.

A party may request a state court to grant an interim measure. A Polish state court is competent to grant an interim measure both in domestic and international arbitration, including arbitration where the seat and place of arbitration is outside of Poland.

How are costs allocated in arbitration?

The parties are entitled to recover fees and costs in accordance with the procedural rules agreed upon.

Can the arbitral award be appealed, and if so, on what grounds?

Awards issued by arbitral tribunals with a seat in Poland may be annulled by a state court. Art. 1206 of the Code lists two groups of grounds for annulment. The first group is materially the same as the grounds indicated in Art. 34 of the Model Law and Art. V of the New York Convention (excluding Art. V.1(e) of the latter). The second group contains such grounds as: obtaining the award by means of a crime, basing the award on forged or unlawfully altered documents and issuing an award in a case which was already previously adjudicated on.

Annulment proceedings can be brought within three months after an award is issued and take approximately three years (two instances). In addition, the judgment of the court of the second instance may be subject to an extraordinary appeal (cassation) to the Supreme Court.

To what extent are awards enforceable?

Local enforcement: A party may apply to the local courts to enforce an arbitral award. When the court's judgement on recognition or enforcement is final, the award or the settlement concluded before an arbitral tribunal is equal to a final judgement of a state court.

International enforcement: As Poland is a signatory to the New York Convention, awards issued in arbitrations seated in Poland should be enforceable in all other signatory states.

Our Polish arbitration contact:
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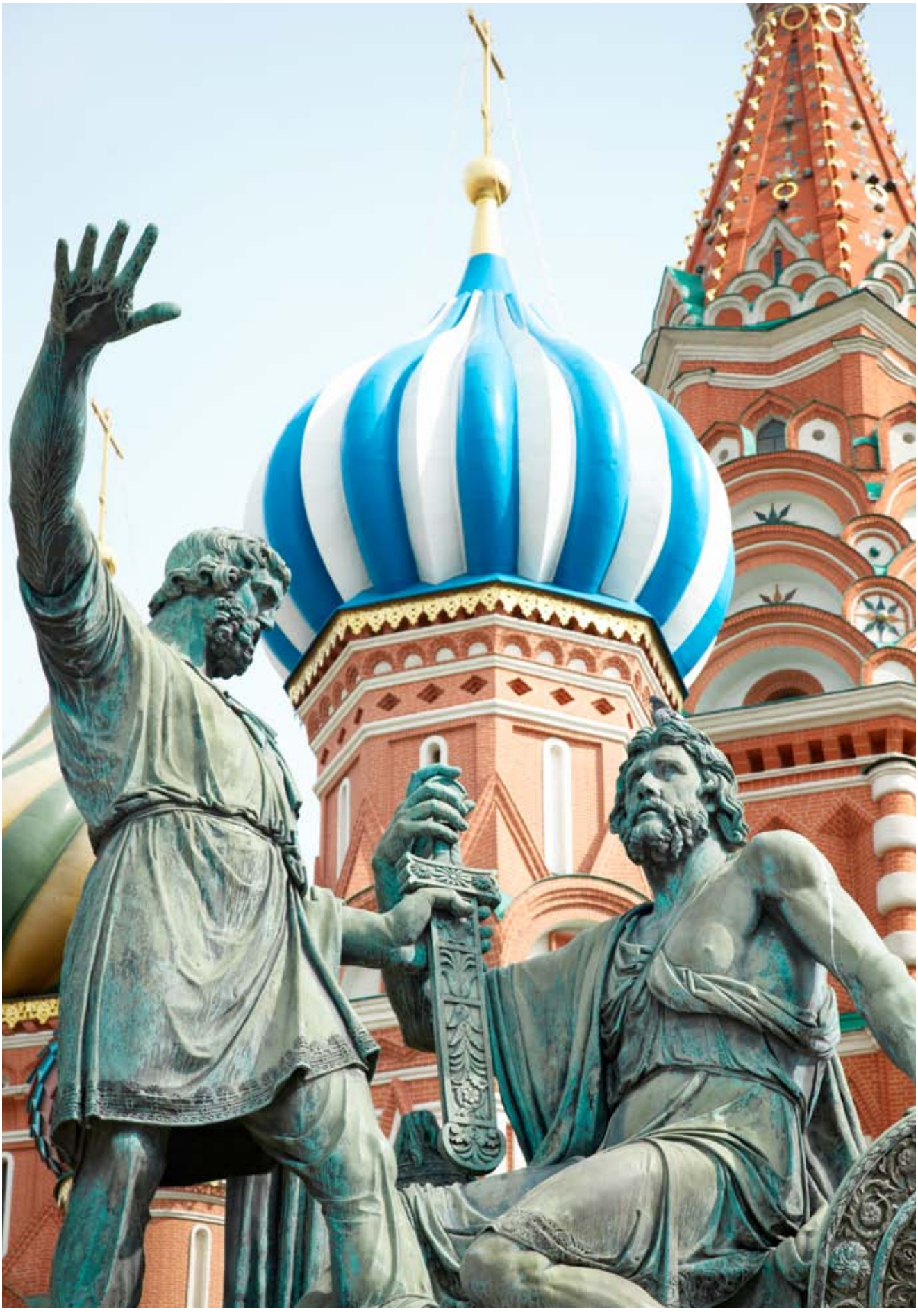

Russia

Moscow

Is the seat a signatory of the New York convention?

Yes: ratified in the Soviet Union on 10 August 1960 and entered into force on 22 November 1960. The Russian Federation as a sovereign state succeeded to the New York Convention.

What are the main arbitration organisations?

The most commonly used international commercial arbitration institutions include:

– the International Commercial Arbitration Court (ICAC) of the Chamber of Commerce and Industry of the Russian Federation (www.tpprf-mkac.ru);

– the Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; and

– other arbitration institutions set up by various professional associations or specialised arbitrations.

What is the procedural legislative framework?

The primary sources of the international commercial arbitration rules in Russia are (1) the Federal Law "On International Commercial Arbitration" No. 250-FZ dated 3 December 2008 (the "**Arbitration Law**"), and (2) the Arbitrazh Procedure Code (this code regulates procedure in commercial courts of law and includes rules on enforcement of arbitral awards by local courts).

What are the formal requirements for the arbitration agreement?

Whether concluded as a separate agreement or as a contractual clause, the arbitration agreement must be in writing and signed in order to be valid. Written form is maintained even if the agreement is included in an exchange of letters, faxes or any other telecommunication devices, provided the content and parties to the agreement are clearly identified. In particular, Russian courts will recognise an arbitration clause in a document concluded by the exchange of SWIFT messages (e.g. bank guarantees) as a proper written arbitration agreement.

The Arbitration Law also recognises inclusion of an arbitration agreement by reference to an arbitration clause in another document, provided that such other document is in a proper written form.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The general rule is that an arbitration agreement cannot be invoked or enforced against a non-signatory.

Will the arbitration be confidential?

There is no general rule in the Arbitration Law dealing with confidentiality of the arbitration. This matter is normally regulated by the rules of the relevant arbitration institution. For example, the ICAC Rules provide that the arbitrators, experts and employees of ICAC are bound by law to keep confidential all information they come across during the arbitral proceedings. This duty of confidentiality is not, however, extended to parties or their representatives. It is therefore recommended that parties that wish to resolve their dispute confidentially insert an express confidentiality clause into their arbitral agreement.

What are the powers of an arbitrator?

Arbitrators are generally free, in the absence of agreement between the parties, to conduct proceedings at their discretion. The Arbitration Law sets forth only general principles of conducting such proceedings. For example, the tribunal may only consider evidence submitted by the parties. However, the tribunal may apply to the local courts to take or secure any relevant evidence.

Can the arbitrator award interim measures?

In principle, the tribunal may award interim measures, but Russian courts are reluctant to enforce them as they do not view such awards as final and binding awards on the relevant case. However, the Arbitration Law allows the parties to apply directly to local courts to obtain interim measures in support of the arbitration.

What court remedies are available when proceedings are brought in breach of the arbitration agreement?

A party seeking a stay of court proceedings in favour of arbitration must expressly challenge the jurisdiction of the court. If neither party raises an objection to the court's jurisdiction before making the first statement on the merits of the case, it is deemed as a waiver of the arbitration agreement. However, Russian courts will refuse to refer the parties to arbitration if the dispute under consideration is not arbitrable or the arbitration agreement is invalid, non-existent or may not be performed.

It should be noted that recent Russian court practice has been that split jurisdiction clauses, where one party is granted a right to choose between proceedings before the courts or arbitration and the other party is not, are not recognised.

Will the court intervene in arbitration?

Courts are required by law not to interfere with arbitral proceedings in a detrimental way. On the other hand, courts may support arbitral proceedings by way of interim measures. A tribunal may also request a state court to assist in taking evidence.

How are costs allocated in arbitration?

Determining the allocation of costs between the parties is left entirely to the tribunal. The parties may, however, specify rules governing the costs of arbitration in their agreement or they may be provided in the arbitral rules.

Can the arbitral award be appealed, and if so, on what grounds?

Parties may challenge any award before the courts and demand its annulment within three months from the day of its delivery to the respective party. The challenge may be brought on the following grounds, inter alia:

(a) the arbitration award was issued in a matter outside the jurisdiction of the arbitral tribunal (dispute being non-arbitrable);

(b) any of the parties to the arbitration agreement did not have the requisite capacity or the arbitration agreement is invalid in accordance with the laws to which it is expressed to be governed (or, in absence of the governing law agreement, in accordance with Russian law);

(c) any party was not properly notified of the appointment of an arbitrator or the arbitration proceedings (improper service of process) or was not otherwise able to present its arguments;

(d) a composition of the arbitration tribunal or the arbitration procedure did not comply with the agreement between the parties (arbitration agreement), unless such arbitration agreement contradicts the mandatory provisions of the Arbitration Law;

(e) a matter, which did not fall within the scope of the arbitration agreement was decided by the arbitral tribunal; and

(f) the arbitration award is contrary to the public policy of the Russian Federation.

To what extent are awards enforceable?

A valid international arbitral award delivered in Russia is enforceable under the national rules for enforcement contained in the Arbitrazh Procedure Code and the Arbitration Law. These rules generally follow the rules set out in the New York Convention.

As Russia is a signatory to the New York Convention, any award in a Russian seated international arbitration should be enforceable in another signatory state.

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Singapore

Is the seat a signatory of the New York Convention?

Yes: ratified on 21/08/1986 and entered into force on 19/11/1986.

What are the main arbitration institutions?

The Singapore International Arbitration Centre (SIAC) is Singapore's main arbitral institution where parties can resolve their disputes and receive institutional support for the conduct of their arbitration. Most cases are administered under SIAC's in-house Arbitration Rules (SIAC Rules).

The International Chamber of Commerce (ICC) (www.iccwbo.org) is also widely used in Singapore.

What is the procedural legislative framework?

Arbitration in Singapore is governed by two separate legal regimes: the Arbitration Act (Cap. 10) (AA) governs domestic arbitrations, and the International Arbitration Act (Cap. 143A) (IAA) governs international arbitrations.

The primary difference between the two regimes is that court intervention in the arbitral process is more limited under the international arbitration regime.

What are the formal requirements for the arbitration agreement?

The recent International Arbitration (Amendment) Bill 2012, which came into force on 1 June 2012, relaxes the previous requirement that the arbitration agreement had to be in writing. Under the IAA, the definition of "arbitration agreement" includes arbitration agreements concluded by any means, as long as they are recorded, contemporaneously or subsequently, in any form. The amended definition would include arbitration agreements concluded orally or by conduct and later recorded in writing, or by email or by audio recording.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

In general, a third party cannot be bound by an arbitration agreement based on the doctrine of privity of contract. A third party may, however, be able to rely on an arbitration agreement under the Contracts (Rights of Third Parties) Act 2001 (Cap. 53B) where that party is seeking to enforce a substantive term of a contract and that contract is subject to an arbitration agreement.

Will the arbitration be confidential?

A duty of confidentiality in respect of arbitral proceedings is not expressly contained within the IAA, although a duty is implied under the common law.

Rules 21.4 and 35 of the SIAC Rules provide that all matters relating to the arbitration proceedings shall be private and confidential, unless the parties to the arbitration agree otherwise. Rule 35.4 provides the arbitral tribunal with the power to take appropriate measures if a party breaches the requirement for confidentiality.

What are the powers of the arbitrator?

The powers of an arbitral tribunal are set out in Section 12 of the IAA and Rule 24 of the SIAC Rules. Subject to any agreement between the parties to the contrary, an arbitral tribunal has the power to call witnesses and request the production and disclosure of documents, among others.

Can the arbitrator award interim measures?

Section 12 of the IAA and Rule 26 of the SIAC Rules allow an arbitral tribunal to grant an injunction or other interim relief which it deems appropriate. The SIAC Rules also provide an emergency arbitrator procedure for emergency interim relief prior to the constitution of the arbitral tribunal (Schedule 1) and such procedure is now supported by the IAA.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Court proceedings in breach of an arbitration agreement:

The AA and IAA both provide for the stay of court proceedings which are commenced in breach of an arbitration agreement, but the power to grant a stay under the AA is discretionary.

Foreign proceedings in breach of a valid arbitration clause:

The Singapore High Court has acknowledged that it has a duty under the New York Convention to uphold arbitration agreements and therefore will, as a result, be willing to grant anti-suit injunctions to restrain any foreign proceedings brought in breach of a valid arbitration agreement.

Will the court intervene in arbitration?

The Singapore courts are generally arbitration friendly and maintain a non-interventionist role in international arbitration proceedings. The courts do have the power to order certain interim measures, however, under Article 12A of the IAA.

Parties to domestic arbitration agreements are permitted to contract out of appeals to the Court provided for under the AA.

How are costs allocated in arbitration?

Rule 33 of the SIAC Rules allows for an order to be made by the arbitral tribunal for the legal costs incurred by a party to be paid in part or in full by the other party. Costs usually follow the event. If the arbitrator does not fix the costs, Section 21 of the IAA allows for taxation of costs by the Registrar of the SIAC.

Can the arbitral award be appealed, and if so, on what grounds?

Grounds for Appeal: Section 19B(4) of the IAA is to be read together with Article 34(2) of the Model Law, which sets out particular circumstances in which a party to an arbitration may make an application to the court for the arbitral award to be set aside. An arbitral award may be set aside in the following circumstances: a party to the arbitration was under some incapacity; the arbitration agreement is not valid; improper notice of the arbitration or the appointment of an arbitrator was given; the dispute did not fall within the terms of the arbitration agreement; the composition of the arbitral tribunal of the procedure was not in accordance with the agreement of the parties; the subject matter of the dispute is not arbitrable; or the award is in conflict with the public policy of Singapore.

Under Section 24 of the IAA, the High Court may, in addition to the grounds enumerated in the Model Law, set aside an award if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Timing: Article 34(3) of the Model Law requires that a challenge of an arbitral award must be brought within three months of the date of receipt of the award by the party making the application.

To what extent are awards enforceable?

Local enforcement: Section 19 of the IAA states that an arbitral award may, by leave of the High Court, be enforceable in the same manner as a judgment or an order of the court. Under Section 29 of the IAA, a foreign award may be enforced in the same manner as a Singapore-based award. The refusal of the enforcement of a foreign award is dealt with under Section 31 of the IAA.

International enforcement: As Singapore is a signatory to the New York Convention, any award in a Singapore seated arbitration should be enforceable in another signatory state.

Our Singapore arbitration contacts:

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Slovakia

Bratislava

Note that Slovak arbitration law is currently undergoing a major legislative overhaul and information provided in this booklet is therefore subject to revision in due course. Allen & Overy Bratislava is taking part in this legislative initiative and can be contacted for up to date advice.

Is the seat a signatory of the New York convention?

Yes: Ratified in Czechoslovakia on 27/04/1959 and entered into force on 10/10/1959. Slovakia as a sovereign state succeeded to the New York Convention as of 1 January 1993.

What are the main arbitration organisations?

The most commonly used arbitration institutions include:

– the Slovak Banking Association Arbitration Court (http://www.sbaonline.sk/en/projects/the-arbitration-court/); and

– the Arbitration Court of the Slovak Chamber of Commerce and Industry (http://web.scci.sk/view.php?cisloclanku=2002100101).

What is the procedural legislative framework?

Slovak arbitration law was codified in 2002 in the Act No. 244/2002 Coll., on Arbitration Proceedings (the Act) and governs all arbitrations seated in Slovakia. Some sections of Act No. 99/1963 Coll., the Code of Civil Procedure (the Code) apply to the relationship between courts and tribunals.

What are the formal requirements for the arbitration agreement?

Whether concluded as a separate agreement or as a contractual clause, the arbitration agreement has to be in writing and signed in order to be valid. Written form is maintained even if the agreement is included in an exchange of letters, faxes or any other telecommunication devices, provided the content and parties to the agreement are clearly identified.

In practice, Slovak courts tend to require that the actual document containing the arbitration clause be signed. Courts are reluctant to enforce arbitration agreements which are incorporated by reference to a company's standard commercial terms and conditions.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The general rule is that an arbitration agreement cannot be invoked or enforced against a non-signatory.

Will the arbitration be confidential?

Slovak seated arbitrations are private under the Act. Arbitrators are bound by law to keep confidential all the information they come across during the arbitral proceedings. This duty of confidentiality is not, however, extended to parties or their representatives. The duty of confidentiality that is placed on the arbitrators may also be waived by agreement of the parties. It is therefore recommended that parties that wish to resolve their dispute confidentially insert an express confidentiality clause into their arbitral agreement.

What are the powers of an arbitrator?

Arbitrators are generally free, in the absence of an agreement by the parties, to conduct the proceedings at their discretion. The tribunal may only consider evidence submitted by one of the parties.

Can the arbitrator award interim measures?

Tribunals have power to award interim measures (Section 22 of the Act).

What court remedies are available when proceedings are brought in breach of the arbitration agreement?

Court proceedings in breach of an arbitration agreement:

A party seeking a stay of court proceedings in favour of arbitration must expressly challenge the jurisdiction of the court. If neither party raises an objection to the court's jurisdiction, it is deemed as a waiver of the arbitration agreement. Slovak courts would refuse to refer the parties to arbitration if a dispute under consideration is not arbitrable or the arbitration agreement is invalid or non-existent.

Injunction against proceedings in foreign jurisdictions:

Anti-suit injunctions are rather unknown to Slovak jurisprudence and the courts are unlikely to issue them. Nevertheless, the provision on interim measures in the Code is wide enough to encompass injunctive relief if a party to an arbitration pursues such claim.

Will the court intervene in arbitration?

Courts are required by law not to interfere with arbitral proceedings in a detrimental way. On the other hand, courts may support arbitral proceedings by way of interim measures. Furthermore, a tribunal may request a state court to assist in taking evidence. Generally speaking, state courts are under an obligation to take the requested evidence themselves or to pass the request to the competent court.

How are costs allocated in arbitration?

Decision on the allocation of costs between the parties is left entirely to the tribunal. Parties may specify rules governing the costs of arbitration in their agreement or arbitral rules.

Can the arbitral award be appealed, and if so, on what grounds?

The parties may challenge the arbitral award in state courts and demand its annulment within 30 days from the day of its delivery to the respective party. The challenge may be brought on the following grounds, inter alia:

(a) the arbitration award was issued in a matter outside the jurisdiction of the arbitral tribunal;

(b) the award concerns a matter which has already been decided by another arbitral tribunal or by a state court (res judicata);

(c) a party contests the validity of the arbitration clause/agreement;

(d) a matter, which did not fall into the scope of the arbitration agreement, was decided by the arbitral tribunal; and

(e) the principle of equality between the parties was not followed.

Timing of the appeal: Annulment would usually take between one and two years.

To what extent are awards enforceable?

Local enforcement: A valid domestic arbitral award is enforceable under the national rules for enforcement contained in the Code or in the Execution Code (in terms of enforcement of commercial matters, the Execution Code is predominantly used).

International enforcement: As Slovakia is a signatory to the New York Convention, any award in a Slovak seated arbitration should be enforceable in another signatory state.

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Spain

Madrid

Is the seat a signatory of the New York Convention?

Yes: ratified on 12/05/1977 and entered into force on 10/08/1977.

What are the main arbitration institutions?

The most prominent arbitration institutions based in Spain are:

– the Court of Arbitration of the Official Chamber of Commerce of Madrid *(Corte de Arbitraje de la Camara de Comercio de Madrid);*

– the Arbitral Tribunal of Barcelona *(Tribunal Arbitral de Barcelona);* and

– the Civil and Mercantile Court of Arbitration *(Corte Civil y Mercantil de Arbitraje).*

What is the procedural legislative framework?

The Spanish Arbitration Act of 2003 (the Act) was amended in November 2011. It is based on the UNCITRAL Model Law, the notable differences being a default time limit of six months for the rendering of the award (although this six month time limit can be extended) and a single arbitrator as the default tribunal size.

The most recent amendment of the Act provides that unless otherwise agreed by the parties, the arbitrators shall decide the dispute within six months from the date of submission of the statement of defence or from the expiry of the period of time to submit it. Unless otherwise agreed by the parties, this period of time may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision. The expiry of the period of time without the definitive award having been rendered shall not affect the validity of the arbitration agreement or the validity of the award rendered unless the parties agree otherwise.

What are the formal requirements for the arbitration agreement?

For international arbitrations the Act liberally provides that the arbitration agreement shall be valid if the requirements contained in the institution rules chosen by the parties, or if the rules of law chosen by the parties to govern the arbitration agreement, or if the rules of law applicable to the merits of the dispute, or Spanish law, are met.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

Third parties who do not sign the arbitration agreement cannot be compelled to engage in arbitration proceedings. However, nothing will impede a third party from joining arbitration proceedings if all the relevant parties mutually agree to the joinder.

It should be noted that there is no support for the group of companies doctrine under Spanish law. Only in cases of fraud or abuse of the corporate form have the Spanish courts been willing to pierce the corporate veil.

Will the arbitration be confidential?

Article 24.2 of the Act provides that "the arbitrators, the parties and the arbitral institutions, as the case may be, are bound to maintain the confidentiality of information they may have access to in the course of the arbitration proceedings". Furthermore, most Spanish Bar Association Rules of Ethics oblige the lawyers involved to observe the secrecy of all information obtained during the process.

What are the powers of the arbitrator?

The Act respects party autonomy and ensures that the arbitral tribunal acts expeditiously. The Act also allows the Chairman of the tribunal alone – after consultation with the parties, as he may consider appropriate – to adopt any procedural decisions that may be deemed necessary in relation to procedural, scheduling or other non-substantive arbitration issues.

Article 25 of the Act provides that the parties are free to agree on the powers exercisable by the arbitral tribunal in relation to the proceedings. Powers conferred upon arbitrators include the determination of the admissibility, relevance and usefulness of any evidence, the manner of taking evidence – including on the arbitrator's own motion – and its weight and the ordering of interim measures (Article 23 of the Act).

Can the arbitrator award interim measures?

Unless otherwise agreed by the parties, the arbitrators may, upon request of any party, order such interim measures as they may consider necessary in respect of the subject matter of the dispute. In addition, as per article 10.3 of the Act "the arbitration agreement shall not prevent any of the parties, before or during the arbitration proceedings, from requesting interim measures from a court, nor shall it prevent the court from granting such measures".

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Proceedings brought in breach of a valid arbitration agreement:

The Act 1/2000 on Civil Procedure implements the principle that the judge must determine whether proceedings are to be stayed at the earliest possible procedural stage. Article 11 of the Act provides that "the arbitration agreement binds the parties to comply with its terms and prevents the courts from hearing disputes submitted to arbitration, provided that the concerned party invokes the arbitration agreement by means of a plea objecting to the jurisdiction of the court. The plea to the jurisdiction must be filed within the first ten days of the term provided to answer the claim. The objection to jurisdiction shall not prevent the commencement or continuation of the arbitration proceedings".

Injunction to restrain foreign proceedings:

Following the ECJ decisions in Allianz SpA v West Tankers Inc (case c-185/07) the Spanish courts will not award an injunction to restrain proceedings started elsewhere in the EU in breach of a valid arbitration agreement.

Will the court intervene in arbitration?

The Spanish courts tend to be supportive of arbitration and will only become involved when they are requested to do so by one of the parties. Specifically, courts will assist in the judicial appointment and removal of arbitrators, judicial assistance in the taking of evidence, adoption of interim measures, enforcement of the award and setting aside awards (Article 8 of the Act).

How are costs allocated in arbitration?

Subject to the agreement of the parties, the arbitrators can decide who bears the responsibility for costs related to the arbitration.

With respect to cost recoverability, unless otherwise agreed by the parties, the arbitrators are not bound by any rules as the Act is silent in this respect. The arbitrators may make their orders on arbitration costs on the basis that the decision proportionally reflects the relative success and failure of the party's respective positions in the case.

Can the arbitral award be appealed, and if so, on what grounds?

Under Spanish law there is no appeal of arbitral awards on merits. However, within two months of the notification of an award, an action to set aside a definitive arbitral award may be brought before the High court of the Autonomous Region *(Tribunales Superiores de Justicia)* of the place where the award was made, on the following grounds:

– the arbitration agreement does not exist or is not valid;

– the party requesting annulment 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 arbitrators have decided on questions not submitted to their decision;

– the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a mandatory provision of the Act, or, failing such agreement, was not in accordance with the Act;

– the arbitrators have decided on questions not capable of being settled by arbitration; or

– the award is in conflict with public policy.

To what extent are awards enforceable?

Local Enforcement: Awards issued in Spanish-seated arbitration are equivalent to final judgments rendered by local courts and both types of decision are enforced following the same provisions set forth in the Spanish Civil Procedural Rules. With regard to the enforcement in Spain of foreign awards, Article 46 of the Act refers to the regulations of the New York Convention coordinated with the Geneva Convention.

Foreign Enforcement: Since Spain is a signatory of the New York Convention, all awards in Spanish seated arbitrations should be enforceable in other signatory states.

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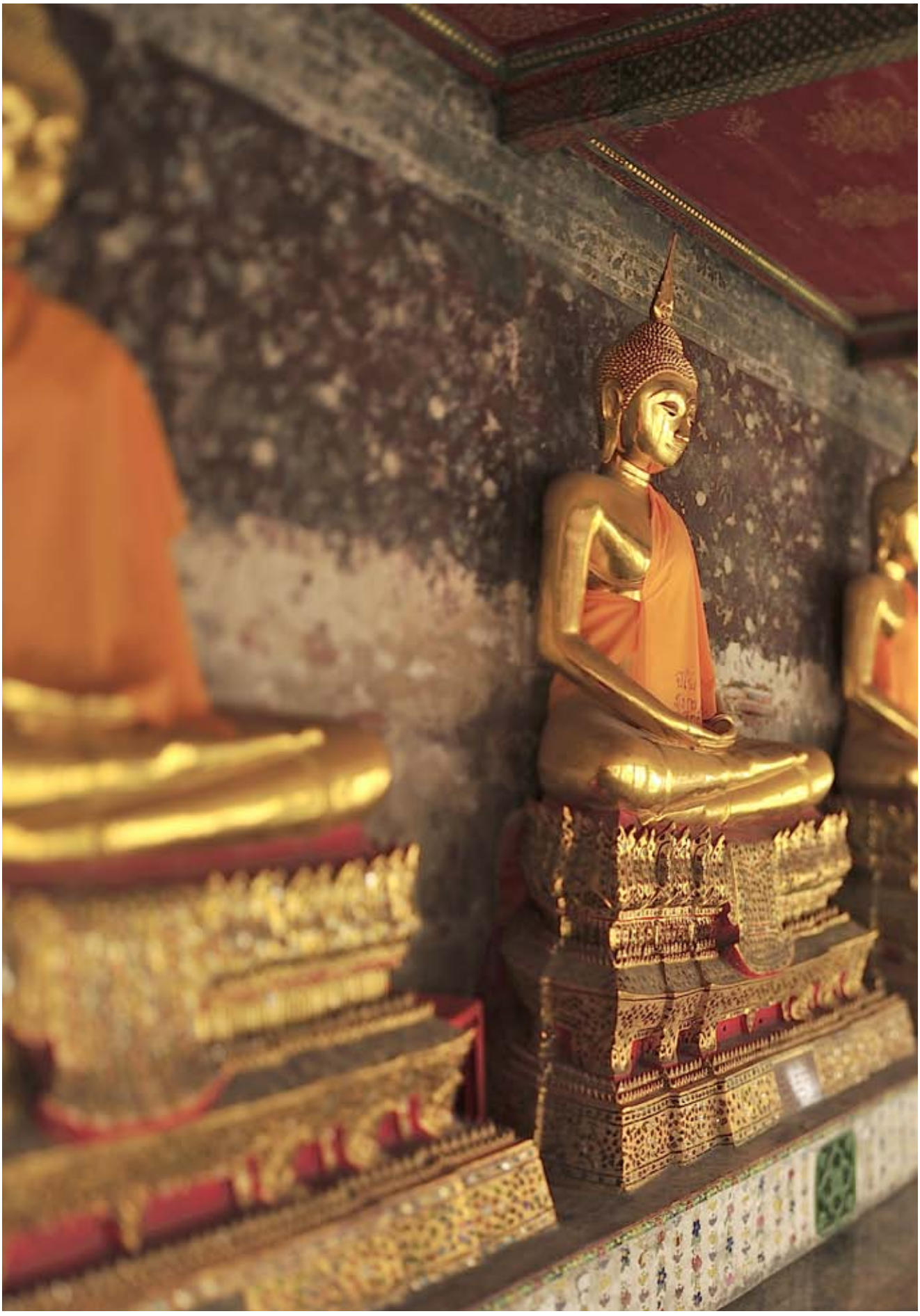

Thailand

Bangkok

Is the seat a signatory of the New York Convention

Yes: ratified on 21/12/1959 and entered into force on 20/03/1960.

What are the main arbitral institutions?

The main arbitration institutions in Thailand are the Thai Arbitration Institute (TAI) and the International Chamber of Commerce (ICC).

Apart from these two institutions, there are other arbitration institutions which have been set up to supervise arbitration proceedings in particular areas, such as the Office of the Arbitration Tribunal of the Board of Trade of Thailand, the Arbitration under the Rules of the Office of Insurance Commission, the Arbitration under the Rules of the Securities and Exchange Commission and the Arbitration under the Rules of Department of Intellectual Property, Ministry of Commerce.

What is the procedural legislative framework?

Arbitrations in Thailand are governed by the Arbitration Act B.E.2545 (2002) (the Act). The Act was drafted based on the UNCITRAL Model Law on International Commercial Arbitration.

What are the formal requirements for the arbitration agreement?

As a general requirement, an arbitration agreement under the Act must be made in writing and signed by the parties.

An arbitration agreement is also deemed to exist where it is contained in an exchange of letters, faxes, telegrams, telexes, exchange of information with electronic signature or other forms of communication which provide a record of the agreement or where an arbitration agreement is claimed to exist in a claim or defence by one party and not denied by the other party.

This is to conclude that the arbitration agreement might not always be in writing, as long as it can be proven to exist in other forms as stated above.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

Third parties can be bound to an arbitration agreement if they explicitly agree to such an agreement. Although the concept of incorporation by reference is not a Thai law concept and there is no court precedent in the context of an arbitration agreement, the general commercial practice of incorporating a clause in another agreement into an agreement between the parties has been recognised by the Thai courts and should therefore also apply in the context of arbitration.

Will the arbitration be confidential?

The Act does not contain any provisions on confidentiality. However, the Arbitration Rules of the TAI and ICC do provide for the parties' duty to keep the proceedings confidential. In case of an arbitration proceeding under other rules, whether the proceeding will be confidential needs to be considered on a case-by-case basis depending on the rules

What are the powers of the arbitrator?

Unless the parties agree otherwise and except where the law specifically grants the power to a competent court, the arbitral tribunal has a broad range of powers under the Act, including the power to determine the procedures to be undertaken, the schedule of the witness hearings, language used in the arbitral proceedings, and the power to order the parties to provide documents, to appoint an expert witness etc.

Can the arbitrator award interim measures?

An arbitral tribunal does not have the power to grant interim measures. A court may do so, however, and an application may be made either before or after the arbitration proceedings have commenced. The criteria for granting an interim measure will be in accordance with the Civil Procedure Code.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

If a party files a claim in court in breach of an arbitration agreement, the court must refer the case to arbitration if:

(a) the party against which the claim is filed submit a petition to the court on the date of submitting a defence or within such time as permitted by law for the court to refer the case to arbitration; and

(b) the court has conducted an inquiry and found that there is an arbitration agreement which is not void, inoperative or unenforceable.

During the court's consideration, the other party who is a claimant in the arbitration proceeding and the arbitral tribunal may continue the arbitral proceeding.

Will the court intervene in arbitration?

Thai courts are supportive of arbitration and will not generally intervene to undermine or otherwise hinder arbitral proceedings. In almost every case, Thai courts uphold an arbitration agreement where it exists between the parties. Furthermore, the Act grants the Thai courts various powers to assist arbitral proceedings, including the powers to:

(a) issue interim measures;

(b) issue subpoenas to require the presence of a person or documents before the arbitral tribunal; and

(c) enforce the arbitral award.

How are costs allocated in arbitration?

The cost allocation method is not specifically provided for in the Act and the TAI Arbitration Rules. The Act and the TAI Arbitration Rules merely provide that the fees and expenses of the arbitral proceedings shall be in accordance with the tribunal's award, including tribunal's remuneration but excluding lawyers' fees and expenses. Generally, the costs of arbitration (i.e. the administrative fees payable to the TAI and arbitrator's fees) are shared equally between the parties and lawyers' fees are borne by each party individually. The concept of "loser pays" is not a norm in the context of Thai arbitration.

Can the arbitral award be appealed, and if so, on what grounds?

The Arbitral award cannot be appealed either on a question of fact or a question of law. It can only be challenged on limited grounds by filing a petition with the competent courts (as defined in the Act).

Grounds for challenge are as follows:

(a) a party to the arbitration agreement was under some incapacity under the law applicable to that party;

(b) the arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under the law of Thailand;

(c) the party making an application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings;

(d) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decision on matter beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope of thereof can be separated from the part that is within the scope of arbitration agreement, the court may set aside only the part that is beyond the scope of arbitration agreement or clause;

(e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, unless otherwise agreed by the parties, in accordance with the Act;

(f) the award deals with a dispute not capable of settlement by arbitration under the law; or

(g) the recognition or enforcement of the award would be contrary to public policy.

Timing of the appeal: A party may challenge the award by filing an application with a competent court within 90 days after the award is granted.

To what extent are awards enforceable?

Local enforcement: A party may seek enforcement of an arbitral award by applying to a competent court for an enforcement order. The competent court would normally enforce the award unless the enforcement would be contrary to public order or morality.

International enforcement: As Thailand is a signatory to the New York Convention, awards issued in arbitrations seated in Thailand should be enforceable in all other signatory states.

Thai courts may refuse to enforce an award, whether domestic or foreign, should a party prove any of six grounds provided in Section 43 of the Act. These include, among others:

(a) where a party was under some incapacity;

(b) where the arbitration agreement is invalid;

(c) where there were procedural deficiencies such as lack of adequate notice;

(d) where the award was beyond the scope of the arbitration agreement;

(e) where the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties; or

(f) where the arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made.

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UAE

Dubai

Is the seat a signatory of the New York Convention?

Yes: ratified on 21/08/2006 and entered into force on 19/11/2006.

What are the main arbitration institutions?

The most commonly used institutions to administer and manage the resolution of large-scale commercial disputes in the UAE are:

– The DIFC-LCIA Arbitration Centre (DIFC-LCIA Centre);

– The Dubai International Arbitration Centre (DIAC); and

– The Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) (this is not recommended as an institution because its rules are limited and archaic and its facility is not of equivalent standard to the DIAC or DIFC-LCIA Centre, but sometimes parties are obliged to use the ADCCAC Rules because Abu Dhabi (usually government-controlled) counterparties require it).

What is the procedural legislative framework?

The Dubai International Financial Centre (DIFC) is an off-shore financial free-zone with its own civil laws and regulations, operating within wider Dubai and the UAE. The legislation applicable to DIFC-seated arbitrations is the DIFC Arbitration Law (Law No. 1 of 2008) (the DIFC Arbitration Law). The DIFC Arbitration Law is largely based on the former UNCITRAL Model Law (prior to the 2006 amendments).

There is no separate arbitration legislation that regulates arbitration in the UAE. The legislation applicable to local (onshore, non free-zone) and foreign arbitration proceedings is contained within the Civil Procedures Law of the United Arab Emirates, Federal Law No. (11) of 1992, as amended (CPC). There are limited provisions in the CPC in relation to arbitration: the rules are archaic and under-developed. There has been discussion as to the potential enactment of a new law on arbitration based on the UNCITRAL Model Law, but there have not been any developments on this front so far.

What are the formal requirements for the arbitration agreement?

Where the seat of the arbitration is the DIFC, the DIFC Arbitration Law applies. This law states that for an arbitration agreement to be valid it must be in the form of an arbitration clause or a separate agreement (Article 12(1)), and it must be in writing (Article 12(3)). Its content may be recorded in any form, whether or not the arbitration agreement has been concluded by conduct or other means (Article 12(4)).

Where the seat of the arbitration is onshore Dubai or the UAE, the CPC applies. Under the CPC, for an arbitration agreement to be valid it must be in writing, and the subject matter of the dispute must be specified in the agreement (Article 203, CPC). There must be a clear indication that the parties have agreed to submit any dispute arising out of an agreement to arbitration. Furthermore, the person signing the arbitration agreement must have been specifically empowered to enter into arbitration agreements.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

The DIFC Arbitration Law does not specifically provide for the joinder of third parties to an arbitration.

This is also the position under the CPC; there is no provision in the CPC which allows a third party to be either be joined to an arbitration or to be bound by an arbitration award.

Therefore, joinder is only possible by agreement of the parties in the arbitration agreement (for instance the DIFC-LCIA Rules allow for joinder upon the application of a party (Article 22.1(h)).

Will the arbitration be confidential?

Under the DIFC Arbitration Law, unless otherwise agreed by the parties, all information relating to arbitral proceedings shall be kept confidential, except where disclosure is required by the DIFC Court (Article 14).

Confidentiality is not protected by default under the CPC. Confidentiality depends on the arbitration agreement or the terms of reference agreed by the parties.

What are the powers of the arbitrator?

The onshore position:

The arbitrators may order the parties to produce documents but disclosure is limited under the CPC (as for many civil law jurisdictions). The arbitral tribunal may also call on witnesses, appoint experts or take any other action possible under law. The tribunal may also request the assistance of the UAE courts in relation to the production of evidence and the compelling of witnesses.
Arbitrators need not follow the formal procedure under the CPC, however, the arbitration shall be conducted in accordance with the rules governing the arbitration or as determined by the tribunal in the absence of rules in the arbitration agreement.

The offshore (DIFC) position:

The arbitral tribunal may appoint experts to report on specific issues where it sees fit, and may require a party to provide any information it considers relevant to the expert to assist him in his task, under Article 33 of the DIFC Arbitration Law. The arbitral tribunal may also call on the DIFC Court's assistance in relation to taking evidence, and the DIFC Court may execute the request in accordance with the Rules of the DIFC Court (Article 34).

Can the arbitrator award interim measures?

The onshore position:

The CPC is limited in this respect. An arbitral tribunal has limited powers when it comes to dealing with urgent/interim applications as such measures do not constitute an "award". Even if an arbitration agreement exists, the power to grant such measures remains with the court, which will have jurisdiction to hear urgent applications or applications for an attachment of assets, irrespective.

The exception is where the parties have specifically decided in the agreement to refer all disputes, including any interim applications, to arbitration (however the rules are said to be unclear on this and there is no precedent on how this will be applied).

The offshore (DIFC) position:

An arbitral tribunal may order interim measures at the request of a party/parties, and this can include a security for costs order against claimant/counter-claimants. The party claiming the interim order must satisfy the tribunal that harm will occur which will not adequately be reparable by damages, if the order is not made and that there is a reasonable possibility that the claimant will succeed on the merits of the claim. The DIFC Court will also have the power to order interim measures in relation to arbitral proceedings under the Arbitration Law, irrespective of whether or not the proceedings are held there (Article 24).

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

The onshore position:

Court proceedings in breach of an arbitration agreement: If court proceedings are started in breach of an arbitration agreement, a jurisdictional objection can be made on the grounds that there exists an arbitration agreement between the parties. However, any such objection must be made at the first hearing, because if this is not done, the court is very likely to assume jurisdiction over the matter.

Foreign proceedings in breach of a valid arbitration clause: A party can make an application to the court, for an injunction to restrain foreign proceedings but it is unlikely to succeed. The UAE courts do not ordinarily grant such injunctions.

The offshore (DIFC) position:

Court proceedings in breach of an arbitration agreement: Under Article 13(1), if an action is brought before the DIFC Court in a matter which is subject to an arbitration agreement, the DIFC Court shall dismiss the action unless it finds that the arbitration agreement is null and void, or inoperative, or incapable of being performed. Arbitral proceedings may nevertheless continue while such jurisdictional challenge is being mounted.

Foreign proceedings in breach of a valid arbitration clause: One of the available forms of relief a defendant can seek in the DIFC Court is an anti-suit injunction against the claimant in the foreign proceedings preventing it from continuing those proceedings so that the dispute is resolved by arbitration alone in accordance with the arbitration agreement. There are also other remedies in connection with this, including claims for damages.

The applicant must first prove that the foreign proceedings are in breach of the arbitration agreement. This involves demonstrating that on the true construction of the clause it encompasses the claim made in the foreign proceedings.

Will the court intervene in arbitration?

The onshore position:

Provided the arbitration clause is valid, the courts of the UAE will not hear an action if the parties have agreed to refer the matter to arbitration. However, this is not a matter of public policy and, as stated above, the person who is challenging the jurisdiction of the court must bring the arbitration agreement to the court's attention at the first hearing (Article 203(5) of the CCP).

The fact the parties have agreed to refer a matter to arbitration does not prevent the courts from hearing urgent applications (such as attachment of assets; but see above in relation to the limitations of this). The courts will therefore consider applications by a party to an arbitration agreement for interim relief, confirmation of the jurisdiction of the tribunal or in challenges to arbitrators (unless the parties have agreed in their agreement to refer urgent or interim applications to arbitration exclusively (see above)). Outside of this they should not interfere with the proceedings.

The offshore (DIFC) position:

The DIFC Court is supportive of arbitration and will not interfere to undermine it. Under Article 10 of the DIFC Arbitration Law, the DIFC Court cannot intervene with arbitration proceedings except to the extent provided in the DIFC Arbitration Law (see above).

The DIFC Arbitration Law specifies the various powers of the court to assist arbitration. Of these, the powers exclusive to the DIFC Court are: the challenge of arbitrators (Article 19), the enforcement of interim measures (Article 24(2)), granting orders in relation to taking of evidence on the request of the arbitral tribunal/a party (Article 34); and determining applications for setting aside an award and the recognition and enforcement of awards (Articles 41-44). Powers of the DIFC Court that may be performed by it subject to any contrary agreement by the parties include: the power to enable disclosure of confidential information (Article 14); the appointment of arbitrators to the tribunal where requested (Article 17(3)-(5)); decisions as to the termination of an arbitrator's mandate or his resignation (Articles 20(1) and 21(2)); determination of preliminary issues (Article 23(3)) and rulings on fees and expenses payable to the arbitral tribunal on closure of proceedings (Article 39(5)).

How are costs allocated in arbitration?

The onshore position:

In principle, under the CPC, the unsuccessful party will be liable for the successful party's costs. This is subject to the determination of fees and costs in accordance with the fees/costs schedules within the rules (such as under the DIFC-LCIA and DIAC Rules). An arbitral tribunal has discretion to set the level and the type of costs recoverable. Legal fees may also be recoverable.

The off-shore (DIFC) position:

Under the DIFC Arbitration Law, the arbitral tribunal is permitted to fix the costs of the arbitration in the award (Article 38(5). As above, this is subject to the determination of fees and costs in accordance with the fees/costs schedules within the rules (such as the DIFC-LCIA and DIAC Rules).

Can the arbitral award be appealed, and if so, on what grounds?

The onshore position:

The CPC does not provide for any rights of appeal in relation to arbitration awards, but awards are subject to a ratification process to ensure their enforcement before the UAE courts. Under UAE law, awards may be challenged during the ratification process.

The grounds for challenge of the validity of an arbitration award are: that it is rendered without a valid arbitration agreement; it has become time barred or *ultra vires*; it was rendered by arbitrators who have not been appointed in accordance with the provisions of law; it was rendered on the basis of an arbitration agreement in which the subject of the dispute had not been determined; the agreement was entered into by someone who did not have authority to agree to the arbitration; or it is invalid, or the proceedings were invalid in a manner that affects the award (Article 216, CPC). In addition, awards are open to challenge on the ground of potential violations of public policy as it is understood in the UAE.

The DIFC (off-shore) position:

Under the DIFC Arbitration Law, recourse to set aside an award may only be made under Article 41 on grounds of (i) incapacity of the contracting parties; (ii) lack of due notice of the proceedings given to the parties; (iii) lack of jurisdiction over the subject matter, by the arbitral tribunal; (iv) lack of proper formation of the arbitral tribunal under the agreement or the DIFC Arbitration Law; (v) conflict with public policy; (vi) the dispute having been referred to a different body or tribunal for resolution. Unless the parties agree otherwise, a challenge may not be brought against the award after three months from the date on which the award was made have elapsed.

To what extent are awards enforceable?

Enforcement of local arbitration awards in the UAE:

Locally rendered awards (which include DIAC, DIFC-LCIA and ADCCAC awards) that are sought to be enforced against assets located onshore must be ratified through the local courts (under the CPC). The party seeking to enforce an award must apply to the local court to have the award ratified (Articles 203-217 of the CPC apply to the enforcement of local awards).

DIFC-LCIA-rendered awards must first be converted into a DIFC court judgment, by application to the DIFC courts. After conversion into a DIFC court judgment, the award may be enforced in the DIFC against assets located within the DIFC.

Or, pursuant to and subject to the conditions of the Judicial Authority Law of 2004 (JAL), if a party wishes to enforce the award against assets located in onshore Dubai, he/she must submit such DIFC court judgment to the Dubai execution courts for direct enforcement against assets. The JAL recognises that a DIFC court judgment will be treated as a Dubai court judgment for the purposes of enforcement against assets in the UAE. There is also a Protocol of Enforcement between the Dubai and DIFC Court that provides for, and facilitates, the enforcement of judgments between the DIFC Court and the Dubai courts.

Enforcement of awards (local and foreign) within the DIFC:

An arbitration award, irrespective of the state or jurisdiction in which it was made, shall be recognised as binding within the DIFC and will be enforced as long as the formalities are observed in the application to enforce the award under Articles 42 and 43 of the DIFC Arbitration Law (these include that a certified copy of the award and the arbitration agreement (in English)) be submitted with the application and that none of the grounds for challenge under Article 44 (similar to the New York Convention grounds for challenge) are invoked successfully.

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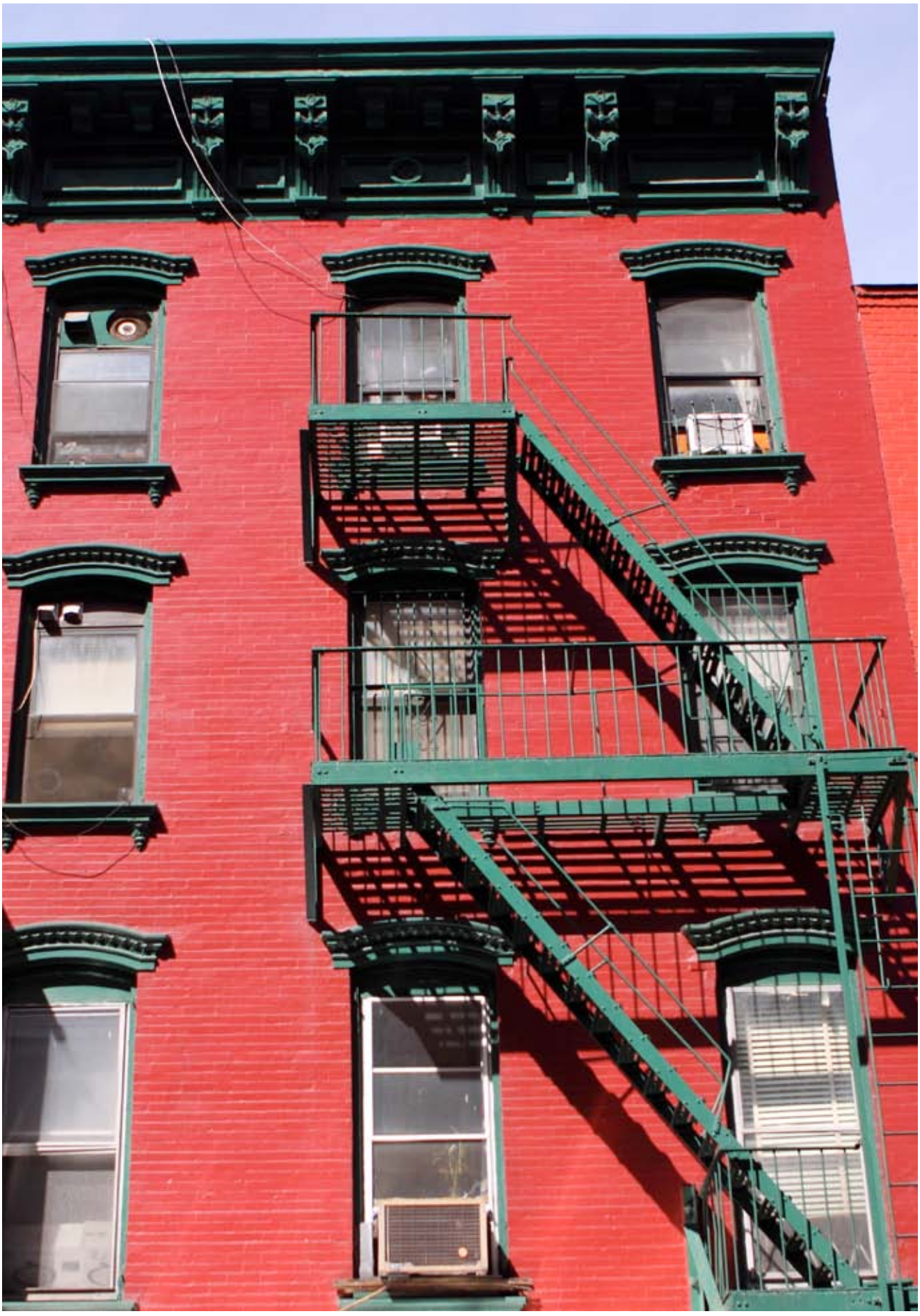

USA

New York

Is the seat a signatory of the New York Convention?

Yes: acceded on 30/09/1970 and entered into force on 29/12/1970.

What are the main arbitration institutions?

The most commonly used arbitration institutions in the USA are:

– The American Arbitration Association (AAA)/ International Centre for Dispute Resolution (ICDR), which administers domestic commercial arbitrations under the AAA's commercial rules (or other specialised sets of rules) and international arbitrations under the ICDR's international arbitration rules.

– JAMS, a private provider of mediation and arbitration services worldwide.

– Institute for Conflict Prevention and Resolution (CPR).

What is the procedural legislative framework?

The Federal Arbitration Act (9 U.S.C. sections 1 et seq.) (the FAA) governs all international commercial arbitrations seated anywhere in the US. Chapter Two of the FAA (9 U.S.C. sections 201–208) implements the New York Convention. US courts have held that a commercial arbitral agreement falls under the Convention unless the agreement is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states.

What are the formal requirements for the arbitration agreement?

The only substantive or formal requirement is that an arbitration agreement must be in writing within the meaning of Article II of the New York Convention. Thus, the arbitration agreement must be signed by the parties or contained in an exchange of writings (including letters, telegrams, emails and faxes). Where the agreement pertains to international arbitration, US courts have declined to recognise arbitration agreements that are both unsigned and unaccompanied by an exchange of written communications.

Does the doctrine of separability apply?

Yes.

Can third parties be bound to an arbitration agreement?

Case law decided under the FAA has shown the US courts willing to bind a non-signatory third party to an arbitration agreement in a limited number of circumstances. The US Supreme Court has explained that state law principles determine whether non-signatories are bound by arbitral agreements and explained that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel.'" (Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009)). Thus, third parties have been bound to arbitration agreements where:

– an arbitration clause is incorporated by reference in a contract signed by the non-signatory;

– the circumstances indicate that the non-signatory has by its conduct become bound by an arbitration clause;

– the arbitration clause was signed by an agent of the non-signatory;

– the principles of piercing the corporate veil/alter ego require that the non-signatory be regarded as party to the contract; or

– the principles of estoppel require that the non-signatory be estopped from denying its obligation to arbitrate with a signatory (or vice versa).

Will the arbitration be confidential?

The FAA does not expressly address the confidentiality of arbitral proceedings and, contrary to what many assume, there is no implied duty of confidentiality.

Therefore arbitration is private in the sense that only the parties have access to the files in the hands of the arbitral institution and the public is not permitted to attend the evidentiary hearing; it is not necessarily confidential. If confidentiality is key, it is advised that the parties enter a separate confidentiality agreement.

At the stage of post-award relief, a confidentiality agreement pertaining to the arbitration is generally not sufficient of its own force to permit the prevailing party to seek recognition and enforcement of the award without disclosure of the award to the court or entry into the public record. However, an award that is subject to confidentiality restrictions may be enforced in US courts by submitting a redacted copy or, in limited cases, submitting the award under seal if the party seeking enforcement can overcome the presumption in the US of public access to judicial documents.

What are the powers of the arbitrator?

Parties are free to expressly provide what the arbitrator's powers will be.

At a minimum, Section 7 of the FAA allows arbitrators to summon witnesses and to have witnesses produce 'material' evidence at the hearing. Courts have found that tribunals in international arbitrations seated in the US have the inherent power to order disclosure from the parties, including electronic discovery, subject to any contrary agreement between the parties. US courts are divided on whether arbitrators can compel pre-hearing document discovery from third parties.

Can the arbitrator award interim measures?

The parties are free to choose what powers the tribunal has and the FAA gives the tribunal various powers to award interim measures.

What court remedies are available when proceedings are brought in breach of an arbitration agreement?

Local proceedings in breach of a valid arbitration agreement:

If a party starts court proceedings in violation of an arbitration clause, the party seeking to arbitrate can make a motion to the relevant court seeking to stay or dismiss the litigation and to compel arbitration.

Injunction against foreign proceedings:

Case law in the US has shown the courts to be willing to issue anti-suit injunctions to prevent foreign proceedings in violation of an arbitration agreement.

Will the court intervene in arbitration?

Given the strong presumption in favour of arbitration, the risk of a US court intervening to frustrate arbitration is minimal. It is far more likely that the courts will intervene to assist an arbitration rather than to frustrate it.

How are costs allocated in arbitration?

The FAA does not address how parties should allocate costs. As a general rule in US proceedings parties bear their own legal fees in litigation irrespective of the outcome of the matter.

US courts do, however, tend to respect awards of costs and fees in arbitration when they depart from this general rule, especially when the arbitral agreement or rules provide for a different allocation.

Can the arbitral award be appealed, and if so, on what grounds?

Arbitration awards made in the US are presumptively binding with only limited grounds for judicial review. Recognition and enforcement of international arbitral awards made in the US may be opposed under the grounds in Article V of the New York Convention. Awards made in the US are further subject to vacatur (annulment) under the FAA, the grounds for which are:

– The award was procured by fraud, corruption or undue means.

– There was evident partiality or bias on the part of one or more arbitrators.

– The arbitrators deprived the unsuccessful party of fair procedures.

– The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made.

To what extent are awards enforceable?

Local enforcement: All awards rendered in US-seated arbitrations are enforceable in the local courts. Once an award is confirmed as a judgment of the applicable local court, through a petition for confirmation of the award, it is enforceable to the same extent as a judgment of that court.

Foreign Enforcement: Since the US is a signatory to the New York Convention, all awards in US-seated arbitrations should be enforceable in other signatory states.

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