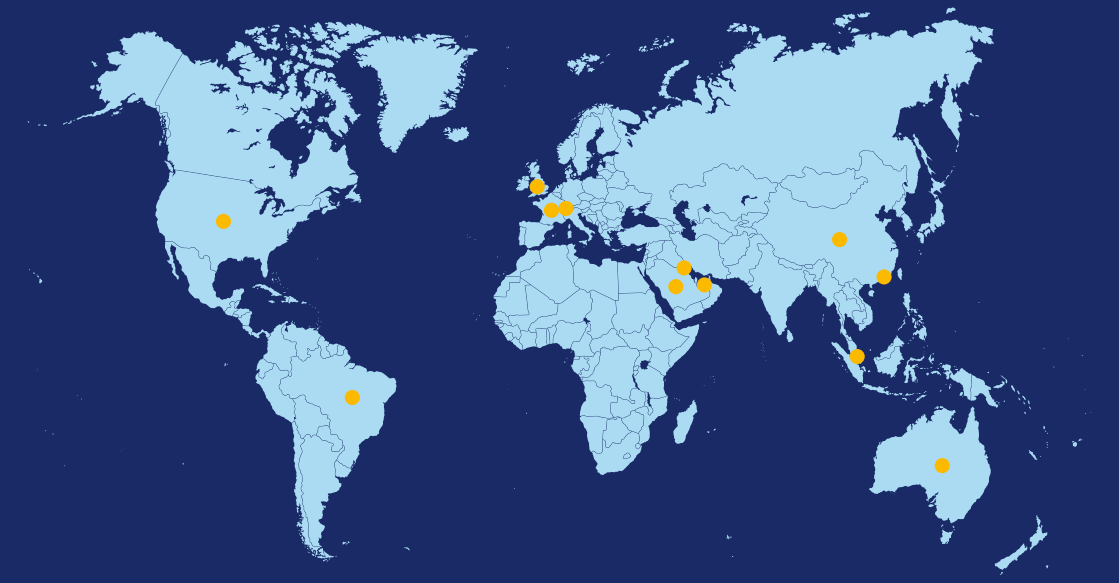
HFW

INTERNATIONAL ARBITRATION

PASSPORT 2019



A JURISDICTIONAL GUIDE TO INTERNATIONAL ARBITRATION

CONTENTS

INTRODUCTION

We are a global, sector-focused law firm with approximately 600 lawyers working across the Americas, Europe, the Middle East, Asia, and Australia. We pride ourselves on our deep industry expertise and our entrepreneurial, creative, and collaborative culture.

Disputes work is at the very core of our firm, accounting for over 70 per cent of our total business. We are recognised by our clients and the legal directories as a leading disputes practice, with prominent rankings in The Legal 500, Chambers and Partners, and GAR100, among others. We regularly appear in national and international courts, and are listed by The Lawyer's English Court Tracker as the most active law firm in the English Commercial Court, including for arbitration related litigation.

Five reasons why you should choose HFW for your disputes:

1. **Industry expertise:** we specialise in the Aerospace, Commodities, Construction, Energy and Resources, Insurance and Shipping sectors, and many of our lawyers previously held roles within these industries. This gives us an intimate understanding of our clients' businesses and the sectors in which they operate. We actively work to develop the law in the areas in which we specialise and are regularly called upon to be advisors to governments, business institutions and regulatory authorities.
2. **International reach:** we have an extensive network of offices across the Americas, Europe, the Middle East, Asia, and Australia. Our lawyers have expert knowledge of their local legal systems and business environments.
3. **Responsiveness:** we support clients in dealing with crises anywhere in the world at a moment's notice. Our lawyers are pragmatic, commercial and don't sit on the fence.
4. **Adaptable and pragmatic:** we stay on top of market developments to make sure that we offer clients advice that meets their shifting commercial requirements. We are relentless when it comes to protecting and enforcing our clients' interests, but we do not waste time on point scoring or needless and expensive litigation. If a deal can be struck or a settlement reached, we know how to do it, and we get it done.
5. **Service excellence:** we strive to be the best in every area of our practice and seek regular feedback from clients as to how we can improve our services. We work closely with our clients to ensure that the services we provide are exactly what they require and are staffed appropriately.

HFW
Friary Court, 65 Crutched Friars
London EC3N 2AE
T +44 20 7264 8000
F +44 20 7264 8888

FOREWORD

One of HFW's key strengths is the collaborative nature of the firm. The creation of the Passport is an example of our offices working together to produce the first HFW IA Passport: a comparative guide to International Arbitration, drawing on the experience of our arbitration experts across our office locations and jurisdictions.

We hope you find the Passport a helpful resource, and we welcome your feedback.

This year represents 60 years since the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) was adopted by the United Nations, and which subsequently entered into force on 7 June 1959. It has been ratified by 159 countries, and is the single most recognised and used arbitration enforcement convention.

The New York Convention is at the heart of International Arbitration, and embodies the very nature of this industry – namely that it is: international, commercially pragmatic, and effective. Over the decades since the adoption of the New York Convention, trade has become ever more global in nature, and has required dispute resolution mechanisms to keep pace and provide efficient resolution to the increasingly complex disputes in which businesses are often entangled.

Arbitration continues to be the method by which most international businesses choose to resolve their disputes, largely because of the privacy and ease of enforcement it offers. There are however concerns over delay, and the ever increasing cost, neither of which compare favourably against litigation, especially English litigation. The industry has seen and is responding to these criticisms, with the main arbitral institutions having put in better award monitoring systems. The success of initiatives such as the Arbitration Pledge, and the Alliance, which together with the introduction of tribunal secretaries to support arbitrators, will, it is hoped, eventually lead to a new generation of arbitrators from which to

choose – thereby avoiding the classic complaint that arbitration is made up of "white, stale, males" – as well as being slow and inefficient.

WHAT DOES THE FUTURE HOLD?

We see technology as crucial to enabling arbitration to remain efficient, and are seeing greater acceptance of the use of edisclosure, video conferencing, ebundles, and virtual rooms: all of which reduce the time and resources needed to run an arbitration; this has to be good news for all involved.

New markets for arbitration are opening up – all of which provide opportunities and challenges. The Belt and Road Initiative (**BRI**) has already resulted in a number of new institutions being developed, e.g. the Shenzen Court of IA (**SCIA**), providing localised arbitration opportunities, and main institutions are creating committees to review the impact of the BRI, all of which will no doubt challenge the status quo; which is, in itself, rarely a bad thing.

A greater acceptance of third party funding in arbitration enables equality of arms amongst the parties and is being introduced in jurisdictions which were previously concerned about issues of control, e.g. Singapore, and Hong Kong (where we await funding to become lawful for arbitration). Whether the existence of funding should be disclosed is controversial. In our view, the existence of funding is likely to show that, at the very least, the funder considers the merits to be strong. The debate continues however.

Investment treaty arbitration is a developing area globally, but in Achmea v Slovak Republic, investor state disputes settlement (**ISDS**) provisions were held to be incompatible with EU law, meaning that almost 200 Bilateral Investment Treaties (**BITs**) with these clauses are unable to be enforced against EU member states. The CJEU judgment was supported more recently by the European Commission which has given direction to the European Council and Parliament confirming that investors would not be able to bring cases against EU member states under ISDS provisions in Energy Charter Treaties (**ECT**). This might lead to the use of non-EU states (including the UK, post-March 2019) being used as a vehicle to enable intra-EU investors to obtain the benefit of the ISDS provisions.

Our next edition of the IA Passport will comment on these, and other developments in IA.

Lastly, this publication would not have been possible without the help and assistance of our colleagues – whether those named as chapter authors, or those involved behind the scenes, and we thank all of you, although take full responsibility for any errors or omissions.

Best wishes

Damian Honey
Head of Disputes, and IA

Nicola Gare
Disputes PSL

NEW YORK CONVENTION SIGNATORIES

JURISDICTIONS

This table is intended as a "snapshot" only and there may be some circumstances where exceptions or caveats apply to the above summary. Please therefore refer to the individual chapters for more detailed information.

	Jurisdiction	Severance	Kompetenz-Kompetenz
	Australia	✔	✔
	Brazil	✔	✔
	People's Republic of China	✔	✘
	England & Wales (UK Signatory)	✔	✔
	France	✔	✔
	Hong Kong	✔	✔
	Kuwait	✔	✔
	Saudi Arabia	✔	✔
	Singapore	✔	✔
	Switzerland	✔	✔
	UAE	✔	✔
	USA	✔	✔

Enforceability of Foreign Arbitral Awards	Emergency Powers	New York Convention 1958 (NYC) – Ratification, Accession, Succession	Signatory to the Washington Convention 1965 (ICSID)
✔	✔	26/03/1975	24/03/1975
✔	✘	07/06/2002	✘
✔	✘	22/01/1987	09/02/1990
✔	✔	24/09/1975	26/05/1965
✔	✔	26/06/1959	22/12/1965
✔	✔	24/09/1975[1]	✘[2]
✔[3]	✔	28/04/1978	09/02/1978
✔[4]	✘	19/04/1994	28/09/1979
✔	✔	21/08/1986	02/02/1968
✔	✔[5]	01/06/1965	22/09/1967
✔	✘	21/08/2006	23/12/1981
✔	✔	30/09/1970	27/08/1965

1 Contracting State on the basis that they were an overseas territory of the UK in 1975 and continue to be a member under the PRC membership.
2 Contracting State under the umbrella of PRC membership with limitations.
3 Enforcement of foreign arbitral awards is subject to reciprocity. See chapter on Kuwait at 9.2.
4 See Saudi Arabia chapter for details of the "reciprocity reservation" which Saudi Arabia invoked when it became a signatory to the NYC 1958.
5 See chapter for more details.

GLOSSARY OF TERMS

INSTITUTIONS

ACICA	Australian Centre for International Commercial Arbitration
CIETAC	China International Economic and Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
LCIA	London Court of International Arbitration
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre

TERMS

BIT	Bilateral Investment Treaty
FAA	Federal Arbitration Act
FTA	Free Trade Agreement
IAA	International Arbitration Act 1974
IBA Rules on The Taking of Evidence	A set of rules used as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966
Kompetenz-Kompetenz	The rule that provides that an arbitral tribunal may rule on its own jurisdiction
Model Law	UNICITRAL Model Law (1985 as amended in 2006)
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Severability	Reference to the provision in a contract which states that if parts of the contract are held to be illegal or otherwise unenforceable, the remainder of the contract should still apply.

AUSTRALIA

This chapter was written by Nick Longley, Hazel Brewer, Simon Shaddick and Chris Lockwood

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

International Arbitration in Australia is governed by the International Arbitration Act 1974 (Cth) (**IAA**) as amended in 2010 and 2015. The IAA adopts the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**NYC**) and the UNCITRAL Model Law (1985 as amended in 2006) (**Model Law**). By incorporating the Model Law, the Australian government sought to give parties confidence when choosing Australia as a forum for international arbitration. Australia has a reputation for being a safe, neutral seat for arbitration, with a well developed legal system and pool of sophisticated arbitrators and legal practitioners.

2. ARBITRAL INSTITUTIONS

Procedural flexibility is the hallmark of arbitration in Australia allowing the parties to choose to have their arbitrations administered by an institution or on an ad hoc basis. Institutions include: the Australian Centre for International Commercial Arbitration (**ACICA**); the Australian Maritime and Transport Arbitration Commission (**AMTAC**); the Resolution Institute (formerly IAMA); the Perth Centre for Energy and Resources Arbitration (**PCERA**); and the Chartered Institute of Arbitrators (Australian Chapter).

Foreign international commercial arbitration rules may also be used in Australia (e.g. ICC or LCIA).

ACICA is the sole default appointing authority competent to perform the arbitrator appointment functions under the IAA. ACICA offers different options for arbitration rules, including Expedited Arbitration Rules 2016 which can be used for a fast tracked arbitration, typically for lower value or less complex disputes.

3. ARBITRATION AGREEMENT

The arbitration agreement must be in writing, whether in paper form or electronically.

3.1 Governing law

The IAA gives the Model Law effect in Australia with two limitations: namely, that the arbitration must be international, and commercial.

Most commercial matters are arbitrable. Some areas of commercial law are reserved for the courts. Care must be taken when using arbitration to resolve disputes relating to: patents, trade marks, copyright, taxation, insurance, competition law and allegations of fraud.

3.2 Choice of law/seat

The arbitral tribunal is required to decide the dispute in accordance with the *"rules of law"* chosen by the parties, as applicable to the substance of the dispute.[1] Where no choice is made by the parties, the tribunal must apply the law determined by the conflict of law rules. This is likely to be the law of the seat of the arbitration.[2]

3.3 Mandatory/non-mandatory provisions

As a general rule, the parties are free to agree with the tribunal as to how the arbitration will be conducted. However, the IAA mandates that the parties are to be given a reasonable opportunity to present their case; the parties are to be treated equally; and the parties are to be given sufficient notice of any hearing.

3.4 Severability

An arbitration clause, which forms part of a contract, is treated as an agreement independent of the other terms of the contract and the arbitration agreement is severable. A decision by the arbitral tribunal that the contract is null and void will not invalidate the arbitration clause.

4. CONFIDENTIALITY/PRIVACY

The general rule now is that international arbitrations seated in Australia will be confidential, unless the parties agree otherwise.

There are a number of exceptions to the general rule; for example, where the parties consent; where the information is required to be disclosed to a professional or other advisor to one of the parties; where the disclosure is necessary for the presentation of the case; for the purposes of enforcement; or where required by a subpoena or other court order. The tribunal may also make an order for disclosure upon request. However, the parties to the arbitration may still be obliged to keep such disclosed information confidential.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The parties are free to agree upon the appointment of arbitrators, the number required to make up the tribunal and the procedure to be followed. If the parties fail to agree upon the number of arbitrators, the default number is three.[3]

Australia does not impose any special requirements with regard to the arbitrator's professional qualifications, nationality or residence. Parties may

1 Model Law (2006) – Article 28(1)
2 Model Law (2006) – Article 28(2)
3 Model Law (2006) – Article 10

agree upon any qualifications that an arbitrator must have and a party may validly challenge an appointment if the arbitrator does not have those qualifications.[4]

A prospective arbitrator is required to disclose any circumstances that may impact upon their impartiality or independence.[5]

5.2 Jurisdiction - kompetenz-kompetenz

The Model Law incorporates the principle of kompetenz-kompetenz, which permits a tribunal to rule on its own jurisdiction.[6] Any plea that the tribunal does not have jurisdiction must be raised no later than in the statement of defence.

5.3 Powers

ACICA's arbitration rules allow a party to apply for emergency interim measures of protection (e.g. orders preventing dissipation of assets). An application may be made prior to the constitution of the arbitral tribunal.

Provided the arbitration agreement does not specify to the contrary, parties are able to apply to the arbitral tribunal for interim measures, including any temporary measure ordering a party to preserve evidence that may be relevant to the dispute, or provide security for legal costs.

Any interim measures ordered by an arbitral tribunal are enforceable under the IAA.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

The tribunal has flexibility to determine the procedure to be applied to the conduct of the arbitration, subject to the mandatory sections of the IAA, any agreement between the parties and any applicable institutional rules.

The length of arbitral proceedings will vary and depends upon the complexity of the matter, the number of arbitrators and the willingness of the parties to progress the arbitration.

The current ACICA Rules (2016 Edition) require each party to use its best endeavours to ensure that its legal representatives comply with the *IBA Guidelines on Party Representation in International Arbitration*.[7]

There is no restriction in Australia on the use of foreign international commercial arbitration guidelines (*e.g. the IBA Guidelines, the UNCITRAL Notes, the Chartered Institute of Arbitrators Guidelines*).

A party may represent itself, or choose to be represented. There are no restrictions on foreign lawyers representing a party to an arbitration or upon foreign nationals acting as arbitrators.

6.2 Evidence

The parties have considerable freedom to determine the procedure for production of documents. Failing agreement, the Model Law gives the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight of the evidence. The tribunal is not bound by local rules of evidence.[8]

The tribunal has broad discretion under the IAA to rule on the scope and extent of disclosure and factual and expert evidence.

4 Model Law (2006) – Article 12
5 Model Law (2006) – Article 12
6 Model Law (2006) – Article 16
7 Article 8.2
8 Model Law (2006) – Article 19.

Although tribunals enjoy freedom in the taking of evidence, in practice they will often have regard to: the *IBA Rules on the Taking of Evidence and the Chartered Institute of Arbitrators Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration*.

6.3 The Award

The arbitration award must be in writing; signed by a majority of the arbitrators; give reasons for any omitted signature; contain reasons, unless the parties otherwise agree; state the date and place of the arbitration; and be delivered to all the parties. The Model Law does not prescribe the time allowed for the delivery of an award.

The question of whether punitive or exemplary damages can be awarded by a tribunal is subject to doubt as it has not yet been tested by the courts.

Tribunals have the power to order interest, unless the parties have agreed otherwise. Simple or compound interest at a "*reasonable rate*" may be awarded for post-award interest. In practice, the rate is often linked to the Supreme Court judgment debt rate for a State or Territory. For New South Wales, this is currently between 5.5 per cent and 7.5 per cent.

Errors in awards can be corrected under the "*slip rule*", which provides for requests to be made, with notice to the other party, within 30 days of receiving the award, or by the tribunal's own initiative.

7. ROLE OF THE COURT

The Australian courts have a strong history of supporting the autonomy of arbitral proceedings. The court's powers are restricted under the Model Law and the IAA. However, the court does have the power to grant interim measures to appoint arbitrators where there is a failure by the parties to agree, to decide on a challenge to an arbitrator, to decide upon a possible termination of a mandate of an arbitrator, to decide upon the jurisdiction of the tribunal where the tribunal has ruled on a plea, to assist in the taking of evidence (including the issue of subpoenas) and to set aside an award.

8. APPEALS

The only recourse against an international arbitration award is to seek to have it set aside on grounds that mirror those for refusal of enforcement under the New York Convention 1958 and the Model Law[9] (e.g. incapacity, invalidity, procedural irregularities in this respect). An award cannot be appealed to the court on any other basis, e.g. appeals on the basis of an incorrect finding of fact or law are not permitted.

An application must be made within three months from the date on which the party making the application received the award.[10]

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

The successful party may apply to the court for an order in the same terms as the award.[11] An order made by the court is enforceable as a court judgment using the ordinary measures available under Australian laws.

9 Model Law (2006) – Article 34
10 Model Law (2006) – Article 33
11 Model Law (2006) – Article 35 & Section 8 of the IAA

9.2 Foreign Awards

The IAA includes provisions for the recognition and enforcement of foreign awards in Australia. These reflect the New York Convention 1958 (Australia became a signatory in 1975 without reservations), and the Model Law. Arbitral awards can be enforced in Australia, regardless of where they were made.

An authenticated original award and arbitration agreement (or duly certified copies) must be provided. Recognition may be refused if the court finds that the dispute was not capable of settlement through arbitration or enforcement is against Australian public policy.[12]

10. COSTS, FUNDING AND INTEREST

Parties to an arbitration in Australia have the option (exercisable in writing) to incorporate a provision of the IAA that the costs of the arbitration will be at the discretion of the tribunal. The tribunal has a general discretion to: direct to whom, by whom and in what manner costs are to be paid; and to determine the amount or arrange for its assessment.

The courts do not have the express power to review an arbitrator's decisions on costs.

Australian lawyers are prohibited from entering into contingency fee arrangements. This prohibition does not apply to litigation funders. Australian lawyers can enter into conditional costs agreements, allowing for the payment of a premium or uplift fee calculated against legal fees (as opposed to the amount of the award).

Litigation funding is lawful and on the increase in Australia. The involvement of litigation funders is a material consideration for the grant of security for costs, where the court's approach has been that they should bear the risks and burdens when they seek to benefit from the outcome.

11. THE FUTURE

Recent changes to the IAA relating to the enforcement of foreign arbitration awards and confidentiality of arbitral proceedings are seen as significant steps towards improving the appeal of Australia as a viable seat for international arbitration.

The overriding objective of the ACICA Rules is to provide arbitration that is quick, cost effective and fair, considering the amounts in dispute and complexity of issues or facts involved. ACICA is in the process of revising its arbitration rules and new rules are expected in 2019. The intention of the new rules is to make international arbitration even more cost effective and efficient for users.

12. INVESTOR STATE ARBITRATIONS

Part IV of the IAA gives effect to the Washington Convention on Settlement of Investment Disputes Between States and Nationals of Other States 1966 (**ICSID Convention**).

Australia is a party to a number of bilateral investment treaties (**BITs**) and free trade agreements (**FTAs**). Some of Australia's FTAs contain investment protection provisions which provide for disputes that are not resolved by negotiation, to be referred to arbitration under the ICSID Convention, the UNCITRAL arbitration rules or the ICSID Additional Facility Rules.

In 2011, the Australian government stated that it would no longer include provisions providing for investor state dispute resettlement in future BITs and FTAs.

12 Model Law (2006) – Article 34

Australia signed the Energy Charter Treaty in 1994 but has not ratified it.

State immunity is not an available defense to Australia, save for in exceptional circumstances. Foreign states are able to claim immunity under limited circumstances in accordance with the *Foreign States Immunities Act 1985*. This Act, however, excludes commercial activities.

Note: a version of this chapter appears in the ICLG IA Guide

BRAZIL

This chapter was written by Flávio Spaccaquerche Barbosa and Eduardo Damião Gonçalves of Mattos Filho

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

The Brazilian Arbitration Act (Brazilian Arbitration Law 9.307/1996 **BAL**) was enacted in 1996, inspired by the UNCITRAL Model Law and the New York Convention 1958 (ratified by Brazil in 2002). In 2001, the Federal Supreme Court declared the law constitutional. Its popularity and use has been increasing exponentially ever since. In 2015, Congress passed a law amending the BAL, in order to reflect positions of the courts and scholars, including an express provision allowing arbitration with government entities. From 2010 to 2013, the six major Brazilian arbitration institutions are reported to have administered approximately 600 new cases, with the aggregate amount in dispute equalling approximately BRL15 billion.

2. ARBITRAL INSTITUTIONS

The most frequent Brazilian and international arbitration institutions are:

- The Centre for Mediation and Arbitration of the Brazil-Canada Chamber of Commerce (**CAM-CCBC**);
- The Centre for Conciliation, Mediation and Arbitration of the São Paulo Federation of Industries (**CCMA CIESP-FIESP**);
- The Centre for Arbitration and Mediation of the Brazilian Stock Exchange (**CAM-BOVESPA**);
- The Corporate Arbitration Chamber (CAMARB); and
- The International Chamber of Commerce (**ICC**) is also strongly used in Brazil and by far the most used foreign institution in Brazil.

3. ARBITRATION AGREEMENT

There are two requirements for an arbitration agreement to be valid: (i) it has to be in writing. It may be inserted into

a contract or an autonomous document signed by the parties; and (ii) consent of the parties, which does not need to be expressed in writing. There are also limitations on subjective and objective arbitrability that may affect the overall validity of an arbitration agreement.

Unilateral clauses are allowed, although they have to be written in bold font (highlighted), and parties have to specifically sign that clause. In addition, the party who agreed to the unilateral clause has to either start arbitration, or specifically consent to arbitrating the dispute.

Hybrid clauses (mediation preceding arbitration, for instance) are also allowed and are frequently used in commercial agreements.

Depending on the case, they may be advisable or not, as mediation can be mandatory if so provided for by the parties.

3.1 Governing law

Only matters related to freely transferable patrimonial rights are arbitrable. All matters beyond this scope are not arbitrable (e.g. issues of Family Law).

3.2 Choice of law/seat

In the context of an international contract where a conflict of laws arises and the seat of arbitration is in Brazil, most Brazilian institutional rules provide for the arbitrators' discretion in determining the law applicable to the substance of a dispute. Arbitrators, on the other hand, may resort to the Brazilian rules of private international law, provided for in Law n. 4,657/1942.

Mandatory rules will prevail over the law chosen by the parties if the matters in dispute involve public policy issues. For instance, if a party is sued for a criminal offence or if the tribunal must rule over violations of constitutional rights (e.g. the right to present a case; due process of law, etc.) the choice of law must be set aside.

The BAL governs the formation, validity and legality of arbitration agreements whenever Brazil is the seat of the arbitration.

3.3 Mandatory/non-mandatory provisions

In Brazil, mandatory provisions include: (i) Brazilian criminal code; (ii) employment and labour rights; (iii) constitutional guarantees and other non-transferable rights; (iv) consumer's rights; (v) some procedural rules, such as (a) due process, (b) right to be heard, (c) equal treatment among parties; (d) independence and impartiality of arbitrators etc. Consequently, the parties may freely choose the provisions they wish to apply to their patrimonial disposable rights.

3.4 Severability

The BAL provides that an arbitration agreement will remain valid even if the underlying contract is void.

4. CONFIDENTIALITY/PRIVACY

By default, arbitration in Brazil is not confidential. However, most arbitration rules from Brazilian arbitration institutions provide for confidentiality of the entire proceedings. Parties may also agree on a stand-alone confidentiality clause. In any case, and generally speaking, a confidentiality clause binds all parties, arbitrators and institutions, and covers the entire proceedings, including all evidence, decisions and written briefs.

However, proceedings are not protected by confidentiality if a government entity is involved in the arbitration.

The confidentiality of arbitration proceedings is partly governed by BAL (Law n. 9,307/96) and partly by the Brazilian Code of Civil Procedure (Law n.13,105/15), which states that judicial

proceedings related to an arbitration are confidential, as long as the parties prove that the arbitration itself is confidential.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The parties have autonomy to select arbitrators. The BAL grants full discretion to parties to determine their own selection procedure, or apply institutional rules.

The only instance where courts may intervene in the selection of arbitrators is if (i) an appointed arbitrator rejects the appointment, or it becomes impossible to act as an arbitrator after accepting the appointment (conflict, death etc.); (ii) the arbitration agreement (or institutional rules) does not govern this situation specifically; and (iii) the parties fail to agree on a substitute arbitrator. If that is the case, then a party may apply for an arbitrator appointment by the court.

Arbitrators are bound by the same independence, neutrality and impartiality principles applicable to court judges. Arbitrators also frequently take into account the IBA Guidelines on Conflict of Interests to ascertain if there is any impediment or disclosure that is necessary. Upon being appointed, the Brazilian Arbitration Act requires that an arbitrator disclose any fact that may give rise to a reasonable doubt of their independence and impartiality. Arbitration institutional rules also add that any supervening facts that may give rise to such reasonable doubt be disclosed to the parties.

5.2 Jurisdiction - kompetenz-kompetenz

Arbitrators are permitted to rule on the question of their own jurisdiction (kompetenz-kompetenz).

A party may bring a challenge to the tribunal's jurisdiction directly to the tribunal itself. If the challenge is rejected by the tribunal, and only if the challenge was brought to arbitrators, a party may later challenge the award in the local courts.

The tribunal determines issues of jurisdiction, and local courts may later hear a challenge to the arbitral award based on lack of jurisdiction.

5.3 Powers

(a) Emergency powers

The BAL does not recognise emergency powers.

Once it is constituted, an arbitral tribunal has all the emergency and interim powers a normal court would have, except for the fact that it lacks the power to enforce such decisions (e.g. by attaching a bank account or seizing an asset).

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Counsel conduct is governed by the Brazilian Bar Association's Code of Ethics, and arbitrator conduct is usually governed (by reference) by the rules of the Brazilian Code of Civil Procedure applicable to judges.

The arbitration process is typically divided into five stages: (i) the constitution of the arbitral tribunal; (ii) discussion and execution of the terms of reference; (iii) written briefs and evidence production; (iv) hearing; and (v) drafting of the award. A typical arbitration in Brazil may last from 12 to 36 months.

6.2 Evidence

If Brazilian law is chosen, evidence production is largely governed by the Brazilian Code of Civil Procedure, but is, nonetheless, largely on par with international practices for evidence production (e.g. discovery, witness statements, hot-tubbing, cross-examination etc.).

Witnesses are not required to be sworn in, but they are warned of the penalties, including of committing criminal offence, if they commit perjury. There is no requirement for written testimonies, although witnesses are usually required to confirm their witness testimony at the hearing.

6.3 Privilege

The Brazilian Code of Civil Procedure establishes that a party is exempted from disclosing documents if such disclosure violates a professional duty of confidentiality. This principle is applied to arbitrations, and the arbitral tribunal will analyse on a case-by-case basis a request for disclosure of privileged information.

An arbitrator has full discretion and authority to order the parties to an arbitration to disclose documents, but it may not order third parties, due to jurisdictional restrictions and subjective scope of the arbitration agreement.

A court may (i) issue pre-arbitration relief to order the disclosure of documents if there is urgency that justifies such order; and (ii) enforce orders to disclose documents or to allow inspection of documents.

6.4 Disclosure

The IBA Rules on the Taking of Evidence are not very commonly used, or incorporated into the procedural rules via terms of reference or via the tribunal's decision. They are more frequently used as guidance in specific cases where American-style discovery or document disclosure is necessary.

The Brazilian Code of Civil Procedure provides for the possibility of a request for document disclosure, as long as the requesting party specifies as best as it can: (i) which documents are necessary; (ii) its purpose and relation to the disputed facts of the case; and (iii) the reason why it believes the opposing party is in possession of such documents. Albeit not directly applicable to arbitration, these principles are used in arbitration proceedings as guidance, also taking into consideration that they are on par with international principles for document disclosure in international arbitrations.

6.5 The Award

Arbitral awards may order compensation for any form of damages (except for punitive damages, which are not allowed under Brazilian law as a whole and assuming Brazilian Law is applied); grant declaratory relief or command specific performance. Executive orders, such as attachment and seizure of assets, however, are not allowed.

Most arbitration rules from Brazilian arbitration institutions provide for the payment in advance of fees and expenses, and if parties fail to pay, or fail to pay for the other party's share, then arbitration is stayed altogether. One may assume that if parties have reached the award issuing phase, then no fees are owed, especially for obtaining the award.

The award must (i) contain the names of the parties involved; (ii) contain a summary of facts, claims and arguments; (iii) provide sufficient and adequate reasoning; (iv) specify the decision(s) vis-à-vis the parties' claims; (v) specify the date and place where it was issued; (vi) be signed by the arbitrator(s); and (vii) be issued within the term agreed to by the parties.

7. ROLE OF THE COURT

Local courts can (i) provide pre-arbitration urgent or provisional relief, prior to the constitution of the arbitral tribunal; (ii) compel parties to arbitration; (iii) issue subpoenas for witnesses; (iv) enforce an arbitral award; (v) enforce decisions from arbitrators; and (vi) hear challenges to the arbitral award.

8. APPEALS

An award may be challenged if (i) the arbitration agreement is null and void; (ii) the arbitrator was prevented from acting on the case; (iii) it does not contain the requirements specified above (see section 6.5 – The Award); (iv) it deals with matters beyond the scope of the arbitration agreement; (v) there is proof of corruption, malfeasance or extortion; (vi) it was issued after the term of issuance of an award; (vii) any of the principles of due process and right to be heard, equal treatment of the parties, impartiality and independence of the arbitrators were not respected.

Parties cannot agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law.

Appeals of an arbitral award are not allowed. Awards are final and binding.

In order to challenge the award, parties have 90 days to file for a set aside motion as from the receipt of the final decision. Costs may vary a great deal depending on the court in which they are filed.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

Any competent local court may enforce a national award.

9.2 Foreign Awards

Brazil ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention 1958) (**NYC**) in 2002 (Decree n. 4.311, dated 23 July 2002).

Any foreign arbitral award is enforceable in Brazilian federal courts after confirmation by the Superior Court of Justice.

The enforcement process is straightforward: the requesting party files a request for recognition with all necessary documents, and the opposing party may object to the request. The grounds for objecting recognition under the BAL and the NYC are almost identical. The Federal Prosecutor's Office is called to issue a formal opinion. A decision is taken by a panel of Justices of the Superior Court of Justice. The whole process may last from one to five years, and it costs less than US$50.00.

There is no limitation period for applying for recognition, but once recognition is granted by the Superior Court of Justice, an action for enforcement is subject to the same statute of limitation periods provided for in the Brazilian Civil Code.

Brazilian law does provide for refusal to enforce on the grounds of public policy but does not define what is the scope of public policy. The Superior Court of Justice has also never made a decision on its meaning. Nonetheless, this court has faced specific situations and denied recognition to an arbitral award for violation of public policy, either for lack of proof of parties' intent to submit disputes to arbitration, or because the party requesting recognition of the arbitral award had already been compensated for the same credit via bankruptcy proceedings in Brazil. In other examples, only a partial recognition was granted, either because the award restricted a party's ability to avail itself of its constitutional right of action, or because the award contained an order for payment in foreign currency, but with Brazilian interest and monetary adjustment rates.

10. COSTS, FUNDING AND INTEREST

Interest claims are available in connection with monetary claims. The rate of interest is determined by the parties' contract, or by law, which is not compounded.

Parties are entitled to recover fees and/or costs incurred in the arbitration, unless the parties have agreed otherwise.

The award itself is not subject to taxes.

There are no restrictions on third parties, including lawyers, funding claims. Contingency fees are legal. Third party funding is a new market in Brazil. Some investment funds are starting to play a role in the market. In litigation this is uncommon.

The most common types of dispute that are referred to arbitration are corporate, construction, contract interpretation, oil and gas and energy disputes.

11. THE FUTURE

Brazilian arbitration institutions have not taken significant steps to address current issues in arbitration, besides multi-party arbitration.

The current trend is for arbitration involving governmental entities. There is no pending federal legislation but some governmental authorities – regulatory bodies – may consider regulating the arbitration procedure for their specific sectors.

12. INVESTOR STATE ARBITRATIONS

Brazil has not signed or ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1966) (**ICSID**).

Brazil is party to the multi-party MERCOSUR treaty (Common Market of South America), and other bilateral treaties with Uruguay, Argentina, Suriname, Venezuela and Peru, which are mostly commercial agreements. Recently, Brazil has also entered into bilateral treaties with Mexico, Mozambique and Angola, Cooperation and Facilitation Investment Agreements (**CFIAs**), that, according to the Brazilian Ministry of Foreign Affairs, ensure "disclosure of business opportunities, exchange of information about regulations and an adequate mechanism for the prevention and, eventually, settlement of disputes."

Brazil does not have "standard clauses" for BITs. There is no mention of "protection of investments." Nevertheless, these CFIAs include provisions that inter alia prohibit direct expropriation, ensure national and "most favoured nation" treatment and require regulatory transparency and the observance of undertakings. On the other hand, the treaty creates an obligation on the investors and the investments to attempt (i.e. an obligation of means/"best efforts") to observe principles of corporate social responsibility.

National courts recognise a state's immunity from jurisdiction and execution, except for employment matters involving local consulates or embassies.

PEOPLE'S REPUBLIC OF CHINA

This chapter was written by Nicholas Poynder and Jenny Chester

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

The PRC joined the New York Convention 1958 (**NYC**) in 1987.

There was not a statute specifically enacted to regulate arbitration until the PRC Arbitration Law came into force on 31 August 1994, amended in 2009 and 2017. This Act is supplemented by a judicial Interpretation under the Application of Arbitration Law issued by the Supreme Court on 23 August 2006, amended in 2008. There are more than 180 arbitration institutions in China dealing with commercial disputes.

Ad hoc arbitration is not recognised in the PRC.

2. ARBITRAL INSTITUTIONS

The most frequently used institutions are the China International Economic and Trade Arbitration Commission (**CIETAC**), Shanghai International Economic and Trade Arbitration Commission or Shanghai International Arbitration Commission (**SHIAC**) and the China Maritime Arbitration Commission (**CMAC**). On 8 January 2018, the merger was announced of the Shenzhen Arbitration Commission (**SAC**) and the Shenzhen Court of International Arbitration (**SCIA**) to form the Shenzhen Court of International Arbitration, Shenzhen Arbitration Commission (**SCIA-SCA**).

3. ARBITRATION AGREEMENT

Pursuant to Articles 16 and 17 of the PRC Arbitration Law, an arbitration agreement must contain (i) an expression of intention to apply for determination by arbitration; (ii) the matters to be arbitrated; (iii) the designated arbitration institution decided on; (iv) confirmation that the agreed matters for arbitration are within the scope of arbitrable matters specified by law; (v) confirmation that the parties have capacity; and (vi) that one party did not coerce the other into concluding the agreement.

A dispute is not arbitrable if it relates to marital, adoption, guardianship, support and succession, or if the dispute is an administrative one that should be handled as required by law. PRC Arbitration Law does not specify the language to be used, but institutional rules may, e.g. the CIETAC Rules.

Unilateral or hybrid clauses will create uncertainty and potential obstacles to enforcement, and are not recommended.

Pursuant to Article 18 of the PRC Arbitration Law, where an arbitration agreement fails to identify arbitration institution or arbitration matters and parties cannot reach an agreement on this at a later time, the arbitration agreement is invalid.

3.1 Choice of law/seat

Arbitration is consensual and the parties are able to choose their seat of arbitration.

3.2 Severability

The arbitration agreement can remain valid even if the actual agreement is void (Article 19 of the PRC Arbitration Law).

4. CONFIDENTIALITY/PRIVACY

Save for cases relating to state secrets, the scope of confidentiality is left for the parties to agree upon, or for the arbitration institution to regulate through its arbitration rules. The law does not clarify who is subject to the obligation, but it is generally understood that arbitrators and institutions are subject to it.

Where the parties have agreed to hear the case in open session and the dispute is not relating to state secrets, the hearing will not be protected by confidentiality. Article 40 of the PRC Arbitration Law provides that the arbitration tribunal may not hear a case in open session unless otherwise agreed by the parties.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The PRC Arbitration Law and jurisdictional rules provide for visa procedures which must be followed for arbitrators.

There are no provisions enabling the courts to intervene in the appointment of the arbitrator process. Article 13 of the PRC Arbitration Law provides that arbitrators shall be fair minded and respectable persons having one of the following qualifications: (i) eight years of arbitration experience, (ii) worked as a lawyer for eight years, (iii) served as a judge for eight years, (iv) studied law or engaged in educational work and have a senior professional title, or (v) have legal knowledge, worked in the fields of economics or trade with a senior professional title or equivalent professional expertise. Article 34 further sets out that an arbitrator shall withdraw from serving on the tribunal where they are: (i) one of the litigants or are a close relative of any litigant or their attorney in the arbitration, (ii) have a vital interest in the arbitration, (iii) are related to the litigants or their attorneys in other respects and the relationship may affect an impartial arbitration, (iv) have had private meetings with the litigants or their attorneys, or when they have accepted the invitation of the litigants or their attorneys to dinner or accepted their gifts.

Nearly all arbitration institutions have published their own requirements in this regard; for example, the Beijing Arbitration Commission requires that an arbitrator shall disclose any issues that may raise parties' suspicions in relation to their fairness and independence.

5.2 Jurisdiction - kompetenz-kompetenz

Arbitrators are not permitted to rule on the question of their own jurisdiction (kompetenz-kompetenz).

Where one party rejects the tribunal's jurisdiction, either party may request either the tribunal or court to determine the tribunal's jurisdiction. If one party requests the court to determine the issues of jurisdiction, the court's ruling will prevail.

5.3 Powers

(a) Emergency powers

The PRC Arbitration Law does not provide for emergency powers. Under the PRC Arbitration Law, only the court has the power to grant interim measures (property preservation and evidence preservation).

CIETAC's 2015 Rules provide for an emergency arbitrator in anticipation of a change of law in China.

Under the Rules, before composition of the tribunal, the parties can apply for an emergency arbitrator to grant urgent interim relief, either with the agreement of the parties or in accordance with the law applicable to the arbitration (i.e. the law of the arbitral seat). Unless otherwise agreed by the parties, the emergency arbitrator shall not act as arbitrator to the tribunal. The emergency arbitrator's powers cease on constitution of the arbitral tribunal, and the existence of emergency proceedings does not preclude a party from applying to any competent court for interim relief.

The courts' attitude towards enforcement of the emergency arbitrator's decision on interim relief is unclear.

(b) Interim relief

The tribunal does not have the power to order interim relief. The power to order interim relief rests with the court.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Conduct of counsel is governed by the Laws of the PRC on Lawyers and the Lawyers' Code of Conduct.

Article 38 of the Arbitration Law provides that the arbitrator shall assume liability for misconduct if they meet parties or their attorneys privately, or accept their invitation to dinner, or accept their gifts, or demand or accept bribes or pervert the law in making the arbitral award.

Each arbitration institution has its own rules governing the conduct of their arbitrators.

Foreign lawyers are not permitted to opine on matters of Chinese law, but can take part in arbitration in China.

The process is governed by the rules of the applicable arbitration institution. For example, Articles 12 to 16 of the CIETAC's Rules 2015.

6.2 Evidence

Unless otherwise agreed by the parties, the tribunal will apply PRC Civil Procedure Law and the Supreme Court's Provision on Rules of Evidence for Civil Proceedings.

CIETC 2015 Guidelines on Evidence also set out the approach regarding evidence and are based on the IBA's Rules on the Taking of Evidence in International Arbitration.

PRC Civil Procedure Law and the Supreme Court's Provision on Rules of Evidence for Civil Proceedings will also apply to the production of written and/or oral witness testimony. Witnesses do not need to be sworn in before the tribunal and cross examination is allowed.

6.3 Privilege

Under PRC law, there is no separate concept of legal professional privilege between lawyers, including in-house counsel, and client. This means that the confidentiality obligation of lawyers does not override the courts' or other authorities' power to compel disclosure of information. However, due to lack of general disclosure requirements in civil proceedings, privilege is seldom a problematic issue in China and courts rarely exercise their power to ask for disclosure of information by lawyers or law firms, except in politically sensitive cases.

The 2015 CIETAC Guidelines provide some guidance on privilege, including enabling a tribunal to dismiss arguments based upon violation of "professional ethics" (A. 703).

6.4 Disclosure

There is no established procedure for disclosure or discovery under PRC law. The parties are free to agree on the procedure and scope of evidence. Unless agreed by the parties, or where the CIETAC Guidelines are adopted, the IBA Rules on Privilege are not generally followed.

The general principle is that a party is responsible for adducing evidence in support of its claims. However, the tribunal may collect evidence by itself if necessary. Further, a party is entitled to request the other party to provide a specific document or categories of documents to support its claim. If the other party does not comply with such request for disclosure, the tribunal may draw an adverse inference.

Where the evidence is perishable, or if the evidence may be hard to obtain in the future, parties may seek an order to preserve the evidence. Where there is a request to preserve evidence, the arbitration tribunal will submit the request to the local court. Local courts can intervene to assist arbitration proceedings by ordering evidence preservation.

6.5 The Award

The tribunal normally only awards compensation for actual loss suffered; punitive damages are not generally awarded, unless for product liability or consumer protection matters.

The arbitration institution's and tribunal's costs are due when an arbitration hearing is commenced. Once the award is ready, it will be sent to the parties without the need for further payment.

Pursuant to Article 54 of the PRC Arbitration Law, an award must set out the arbitration claim, facts in dispute, the tribunal's decision and reasons for that decision, the apportionment of arbitration costs and the date of the award. An award must be signed by the arbitrators and have the seal of the relevant arbitration institution. Arbitrators with dissenting opinions may choose not to sign the award.

7. ROLE OF THE COURT

Local courts can assist arbitration proceedings. However, relief is limited to the preservation of property or evidence (Articles 28 and 46 of the PRC Arbitration Law).

Local courts will hear a challenge to the tribunal's jurisdiction (Article 20) and may set aside an arbitration award on various procedural grounds (see Section 8).

8. APPEALS

Grounds for setting aside domestic awards and foreign-related awards are different.

8.1 Domestic awards

Article 58 of the PRC Arbitration Law and Article 237 of the Civil Procedure Law provide that awards granted in domestic disputes can be set aside on one of the following grounds:

- lack of an arbitration agreement between the parties;
- matters determined fall outside the scope of the arbitration agreement or the jurisdiction of the arbitration institution;
- composition of the tribunal or arbitration procedure contravenes the applicable legal procedure;
- evidence on which the award is based was falsified;
- concealment of important evidence that affected the impartiality of the arbitration;
- arbitrators demanded or accepted bribes, or in some other way were corrupt or perverted the law in making the arbitral award; and
- enforcement would be against the public interest.

8.2 Foreign-related awards

Article 274 of the Civil Procedure Law sets out grounds for setting aside awards granted in foreign-related disputes as follows:

- lack of an arbitration agreement between the parties;
- the respondent did not receive notice of arbitral proceedings, or did not appoint an arbitrator or was unable to state their opinions;
- procedural irregularities concerning the arbitration;
- matters decided in the award exceed the tribunal's or institution's authority; and
- enforcement would be against the public interest.

Parties can agree that an arbitral award is final and binding but this will not prejudice the above grounds for setting aside the award.

Parties cannot agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws.

An arbitration award cannot be appealed in China.

An application to set aside an arbitration award must be made within six months of the date of the receipt of the award (Article 59 of the PRC Arbitration Law). The court must make a decision within two months of accepting the application (Article 60 of the PRC Arbitration Law).

The court fees are RMB400 (approximately US$60).

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

When a party fails to comply with a domestic award, the other party can apply to a competent court to enforce it. Where there are grounds for the award to be set aside (as set out in Art. 237 of the Civil Procedure Law), the court will refuse to enforce the award.

When a party fails to comply with a foreign-related award, the other party can apply for enforcement to the intermediate People's Court of the place where the respondent is domiciled, or of the place where the asset is located. The court will refuse to enforce the award if there are any grounds for the award to be set aside (Article 274 of the Civil Procedure Law).

9.2 Foreign Awards

China acceded to the New York Convention 1958 (**NYC**) on 22 January 1987, with the reservation that it would only apply the Convention to an award made in the territory of another contracting state and only to disputes

arising out of legal relationships, whether contractual or not, that are considered commercial under national law. China has also ratified the Washington (ICSID) Convention, which entered into force for China on 6 February 1993.

In deciding whether or not to recognise a foreign arbitral award, the courts will consider and examine the following elements:

- whether the application for enforcement is made within two years from the last day of the period of performance specified in the award;
- whether enforcement conforms with Convention requirements as applied in the PRC;
- whether the respondent alleges and furnishes proof to the court that any one of five situations specified in Article V.1 of the Convention applies; and
- whether the enforcement of the award is contrary to public policy.

Further, the enforcement is subject to a reporting regime. Before refusing to enforce, lower courts need to refer the decision to the higher courts. The Supreme Court is the only court that can refuse enforcement of a foreign arbitration award.

To apply for recognition and enforcement, the applicant must provide the award, a copy of the arbitration agreement, a written application for recognition and enforcement, together with the applicant's incorporation documents and power of attorney. Any documents in a foreign language must be translated into Chinese, notarised and legalised.

Article 4 of the Supreme Court's Regulations regarding Court Fees for the Recognition and Enforcement of Foreign Arbitration Awards and Examination Periods provides that the court will decide within two months as to whether to recognise the award, and will complete enforcement proceedings within six months following the judgment unless there are any special circumstances. Practically timing varies on a case-by-case basis.

"Public policy" is defined in the Civil Procedure Law as being in "the social and public interest". There is no judicial definition of "public policy" in the PRC, which may result in different interpretations being given at local court level.

10. COSTS, FUNDING AND INTEREST

The tribunal will examine the relevant provision(s) stipulating the interest rate in the contract concluded between the parties, and apply that rate.

Where the parties have not specified the interest rate for delayed payment, the tribunal has the authority to determine the interest rate, and will usually apply the rate used by the Bank of China for loan default, at the time of writing, 4.75 per cent.

Usually, the unsuccessful party bears the costs. Where the tribunal only decides in favour of part, and not all, of a party's claims, the tribunal may award issue based costs.

Generally speaking, arbitral awards are not subject to PRC tax.

There are no laws or regulations that expressly prohibit third-party funding of arbitration in the PRC, and it appears that the PRC may be open to allowing third-party funding.

Contingency fees are legal, subject to the limitations in the Regulations for the Administration of Lawyers' charges, but most of these will not be relevant to International Arbitration. Contingency fees cannot exceed 30 per cent of the proceeds (A.13).

We are not aware of any professional third-party funders active in the PRC at the moment.

11. THE FUTURE

On 7 July 2015, the Supreme Court issued "Several Opinions on Providing Judicial Services and Guarantee for the Building of One Belt One Road by People's Courts" (No. 9 [2015] of the Supreme People's Court) and published eight typical cases, one of which is in relation to ascertaining the validity of the hybrid arbitration clause. This illustrates the PRC courts' respect for the parties' agreement on arbitration and the willingness to promote international arbitration.

CIETAC's revised arbitration rules came into force on 1 January 2015.

The changes are designed to improve the efficiency of CIETAC arbitral proceedings and bring the CIETAC Rules further into line with international best practice. Key amendments include:

- extended grounds for consolidating arbitrations into a single arbitration, in addition to consolidation with the consent of all parties;
- where disputes arise out of or in connection with multiple contracts, the claimant may commence a single arbitration under certain circumstances;
- joinder of an additional party to the arbitration;
- mechanism for appointing emergency arbitrators under the applicable law or by agreement of the parties;
- increased threshold for applying the summary procedure;
- introduction of special provisions in relation to arbitrations administered by the CIETAC Hong Kong Arbitration Centre, including Hong Kong as the default seat and Hong Kong law as the applicable law of the arbitral proceedings, power for Hong Kong seated tribunals to order interim relief, and separate provisions for administrative and arbitrator fees; and
- further improvement or clarification of procedural matters, including methods for serving arbitration documents and increased powers to the presiding arbitrator of the tribunal.

The prominence of ad hoc arbitration is growing following its introduction in Free Trade Zones.

12. INVESTOR STATE ARBITRATIONS

The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (**ICSID**) entered force in China on 6 February 1993.

China has entered into approximately 130 bilateral investment treaties (**BITs**) with other countries, of which approximately 100 have already come into force. China is an observer to, but not yet a member of, the Energy Charter Treaty (**ECT**).

There are no standard clauses; for example, in relation to "most favoured nation" or exhaustion of local remedies provisions.

China is a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property 2005; however, the convention has not come into force. PRC Law on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures provides special protection to the property of foreign central banks in the PRC, on a reciprocal basis.

ENGLAND AND WALES

This chapter was written by Damian Honey and Nicola Gare

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

England, and in particular London, is internationally recognised as a leading centre for commercial arbitration. This is due to the global use of the English language; its history as a centre for international trade and finance; the excellent reputation of its legal systems and legal profession, and the pro-arbitration, non-interventionist stance of the courts, leading to the widespread use and development of English law as a widely used governing law for these transactions. International Arbitration (and domestic arbitration) in England and Wales is governed by the Arbitration Act 1996 (**AA1996**) which consolidated and developed earlier Acts. The AA1996 is based on the UNCITRAL Model Law (to which the UK is not a signatory), with notable key differences, and contains mandatory and non-mandatory provisions recognising party autonomy in deciding on how to resolve disputes.

England is a signatory to the New York Convention 1958 (**NYC**).

2. ARBITRAL INSTITUTIONS

The most prominent institutions for International Arbitration in London include the London Court of International Arbitration (**LCIA**) and the International Chamber of Commerce (**ICC**).

London is also home to various international commercial arbitration associations, such as the Chartered Institute of Arbitrators, and the London Maritime Arbitrators Association (**LMAA**), as well as exchanges and trade associations which provide arbitration services. These include the Grain & Feed Trade Association (**GAFTA**), the Federation of Oils, Seeds & Fats Association (**FOSFA**), the Sugar Association of London, the Refined Sugar Association and the London Metal Exchange (**LME**).

International arbitration in London is also conducted on an ad hoc basis, often using the UNCITRAL Model Law despite the UK not being a signatory.

3. ARBITRATION AGREEMENT

Only written arbitration agreements are recognised as being valid agreements (s5 AA1996) and the agreement must submit a dispute, present or future, to arbitration (s6 AA1996). The term "written agreement" is broadly defined under the AA1996 and will include an exchange of correspondence.

Arbitration agreements do not need to be signed to be valid (s5 (2)(a) AA1996).

Oral arbitration agreements can be valid, however evidentially they are very difficult to prove and not recommended. Issues also arise on enforcement, where parties need to commence litigation to obtain a judgment based on an oral arbitration agreement. This is in contrast to the quicker, easier and cheaper enforcement procedure under the AA1996 for awards based on a written arbitration agreement.

The English court's have ruled that unilateral clauses (where one party has the right to choose arbitration) are valid under the AA1996[1] and have been recognised under English law, however these asymmetric clauses should be approached with caution because they may give rise to potential problems on enforcement of an award under local laws.

3.1 Governing law

Parties are free to choose the governing law of the arbitration agreement, which may be the same as the underlying contract. Parties are also free to choose to have the dispute heard in accordance with the relevant industry's practice (the 'lex mercatoria'); however, this is very rarely used.

If the arbitration agreement does not provide for the governing law, the tribunal will determine the applicable law, applying the conflict of laws rules under common law principles, by identifying which jurisdiction has the "closest and most real" connection with the arbitration agreement. It is worth noting that neither the Regulation on the Law Applicable to Contractual Obligations adopted by the European Community on 17 June 2008 (Rome I), nor the Regulation on the Law Applicable to Non-Contractual Obligations (Rome II) apply to arbitration.

3.2 Choice of law/seat

Parties may choose the seat, that is the location of the arbitration, whose mandatory laws will then apply to the procedural aspects of the arbitration. This may be different to the governing law of the arbitration, i.e. the basis on which the tribunal will decide on the merits. In this jurisdiction, the mandatory sections of the AA1996 will apply irrespective of whether the parties have chosen to opt out of them in the arbitration agreement. The mandatory provisions are clearly set out in schedule 1 of the AA1996, and include the court's powers to remove arbitrators, duties of parties and the tribunal, and the right to challenge the award where there has been a serious irregularity, or the tribunal lacks jurisdiction (for example, where the dispute is not covered by the arbitration agreement).

The seat and the governing law may be different, but in practice parties often choose the same law to apply to both.

1 Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another [2013] EWHC 1328 (Comm)

Certain mandatory provisions of the AA1996 will apply to international arbitrations, even if the arbitration seat is not determined by the arbitration agreement or is outside of England and Wales. These include provisions concerning the stay of legal proceedings, enforcement of arbitral awards, securing the attendance of witnesses and the court's powers in supporting arbitral proceedings.

3.3 Mandatory/non-mandatory provisions

The AA1996's mandatory provisions are set out in schedule 1 and include:

- provisions relating to the court's power to stay legal proceedings where the subject matter of the proceedings is to be determined by arbitration (s9-11);
- the court's power to extend agreed time limits (s12);
- the application of the Limitation Act 1980 (s13);
- provisions relating to arbitrators, including the court's power to remove an arbitrator (s24), the effect of an arbitrator (s26), the joint and several liability of parties for arbitrators' fees and expenses (s28) and the arbitrator's immunity (s29);
- general duties of the tribunal to act fairly and impartially (s33); and
- provisions relating to the enforcement of an award (s66) and the grounds for challenging an award (s67-68).

Where provisions are non-mandatory, parties can "contract-out" of them and are free to agree their own arrangements. If they do not make alternative arrangements, the AA1996 and the non-mandatory provisions will apply.

3.4 Severability

In accordance with the UNCITRAL Model Law article 16 (1), and as reflected by many of the key institutional arbitration rules (including the LCIA, ICC), and many other modern jurisdictions, the AA1996 provides that the arbitration agreement is separate/severable from the underlying contract (s7), and therefore will remain valid even if the underlying contract is void, or there are claims that the contract did not exist. This is a practical answer to an issue that may otherwise result in the tribunal not having jurisdiction to determine disputes arising under the underlying contract.

4. CONFIDENTIALITY/PRIVACY

The AA1996 does not expressly provide for confidentiality or privacy in arbitration. There is however an implied duty of confidentiality in England and Wales, which is supported by case law.[2] This duty is applicable to the hearing, documents generated and disclosed during the proceedings, and to the award.

Privacy is generally seen as applying only to the hearing, and refers to limiting the admittance of only the parties to the hearing, unless otherwise agreed.

Most institutional rules include privacy and confidential provisions.

Confidentiality can be waived, and is subject to numerous exceptions including the express or implied consent of the parties, where it is necessary for the protection or establishment of a party's legal rights or ordered or permitted by court, and where it is in the public interest.

In general terms, the best way to maximise rights of confidentiality in English arbitrations is to make express

2 Emmott v Michael Wilson & Partners [2008] EWCA Civ 184

provision for it in the arbitration clause. Even then, the practical enforceability of the provision may depend upon the nature of the disclosed documents and the use to which such documents are being put.

If the governing law is English, but the seat is elsewhere, it may be that local law will not apply an obligation of confidentiality. Parties will need to check this, and again a practical safeguard is to make confidentiality a term of the arbitration agreement.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The appointment procedure is subject to any agreement between the parties, or the relevant institutional rules.

In the absence of agreement by the parties as to the number of arbitrators, s15(3) AA1996 provides for a sole arbitrator to be appointed, largely on the grounds that this is cheaper and more efficient.

If the agreement is for each party to appoint an arbitrator and one party fails to do so, the other party may appoint their candidate to act as sole arbitrator (s17 AA1996). This appointment can only be overturned by the court. If the parties do not agree on a minimum of three arbitrators, they may face difficulty enforcing the award abroad.

If the appointment procedure fails altogether, a party can apply to the court to make an appointment (s18 AA1996).

There are no specific provisions regulating the qualifications of arbitrators. However, section 24 contains an express requirement of impartiality. There is no requirement of independence except where a lack of independence also affects an arbitrator's impartiality. The court has power to remove an arbitrator in appropriate circumstances, including for bias (s24).

The AA1996 does not require disclosure of potential conflicts, however there is an overriding requirement in AA1996 that arbitration is the fair determination of disputes by an "impartial tribunal" (s1(1a)). However, recent cases have found that arbitrators risk findings of bias if it is shown that they are overly reliant on one of the parties for appointments or income.[3] Most recently, it has been held that an arbitrator appointed in overlapping or related arbitrations (known as "daisy chain" arbitrations) will not of itself amount to a conflict.[4]

The main institutional rules include a disclosure requirement of possible conflict of interest, for example the LCIA Rules (article 5.4), as does the relevant guidance in the IBA Guidelines on Conflicts of Interest in International Arbitration, and also the protocols produced by the Chartered Institute of Arbitrators.

5.2 Jurisdiction - kompetenz-kompetenz

Unless agreed otherwise, the tribunal has jurisdiction under the kompetenz-kompetenz principle to determine its jurisdiction and is able to rule on whether the arbitration agreement is valid, whether the tribunal has been properly constituted, and what matters have been submitted to the arbitration (s30 AA1996). However, any ruling by the tribunal on its own jurisdiction is not binding and can be appealed, usually to the court, unless the parties agree otherwise.

3 Cofely Ltd v Bingham [2016] EWCH 240 (Comm)

4 Halliburton Company V Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817

The court may also rule on jurisdiction if the tribunal or the parties by agreement have referred the question to them (s32 AA1996).

Any objections to the substantive jurisdiction of the tribunal must be made by the party at the outset and no later than the first substantive step in the proceedings, or the objection may be considered to have been waived, this is a mandatory provision on which the parties cannot opt out even if the arbitration clause states that it has been excluded (s31 AA1996). The full grounds of your objections must be stated within time, parties will generally not be permitted to argue additional grounds at a later time (s73 AA1996).

A party who has not participated in the proceedings in any way may also challenge the jurisdiction by referring the question to the courts (s72 AA1996).

UNCITRAL Model Law article 23, and several of the main institutions also recognise the principle of kompetenz-kompetenz, e.g. article 23 of the LCIA Rules 1998 and 2014. These provisions also impose strict time limits on when the challenge may be made.

5.3 Powers

(a) Emergency powers

The AA1996 does not provide for emergency arbitrators to be appointed.

Several of the institutions do, however, now provide for emergency powers, the LCIA Rules 2014 (article 9) provide for a process for the "accelerated appointment of a permanent tribunal or replacement arbitrator in cases of exceptional urgency".

The emergency powers are generally limited, and often used to obtain security. The LCIA Rules do, however, expressly provide that the emergency arbitrator may make any order or award that a fully constituted panel might make.

Orders of an emergency arbitrator will not bind the formal tribunal once it is constituted.

It is unusual for the emergency arbitrator to become part of the formal tribunal. However, the majority of the institutional rules provide that the parties may agree to this, the notable exceptions being the ICC Rules (2012 and 2017) (where it is excluded), and the LCIA Rules (which do not make a reference to it).

(b) Interim relief

Unless the parties agree otherwise, the tribunal may order a variety of interim measures (s38 AA1996), including ordering a claimant to provide security for the costs of the arbitration (although this may not be granted solely on grounds that the claimant is resident abroad), and making orders to preserve property or evidence. If the tribunal's order is not obeyed, a party may apply to court for an order, failure to comply with which may constitute a contempt of court.

Where the tribunal or institution doesn't have the power, the court has power to make orders in support of all arbitral proceedings (whether seated in England or elsewhere) to the same extent that it does in relation to court proceedings to include preservation of property, taking of evidence, ordering interim injunctions, e.g. freezing injunctions, search orders, and anti-suit injunctions (preventing an action being heard in a foreign court pending the outcome of the arbitration) (s44 AA1996).

6. THE ARBITRATION PROCEEDINGS

6.1 Process

There is a general duty on arbitrators to determine disputes fairly and impartially, using suitable procedures and ensuring that time and costs are not wasted (s33 AA1996). Subject to that duty, the mandatory sections of the Act, any agreement between the parties, and any

applicable institutional rules, the tribunal has considerable flexibility on procedure.

Parties are free to agree when arbitral proceedings are regarded as commenced. Subject to any agreement otherwise by the parties, AA1996 will provide that commencement will be when one party serves notice on the other in writing requiring it to appoint an arbitrator in accordance with the arbitration agreement (s14 AA1996).

6.2 Evidence

Subject to any agreement by the parties, the tribunal has a broad discretion to rule on the scope and extent of disclosure (s34 AA1996), which is far more limited than in court proceedings, and also factual and expert evidence. The tribunal's powers do not extend to third parties, who cannot therefore be compelled to provide documents, or be required to give evidence. In these circumstances, parties will need to apply to the court for assistance (s43 AA1996).

Although English court rules do not apply to English arbitrations, most practitioners follow the court's procedural rules as to the qualifications and independence of any expert witness used. The tribunal will decide whether to swear witnesses in before the tribunal, and whether to permit cross examination of any witnesses.

6.3 Privilege

Under English law, "legal professional privilege" entitles a party to withhold evidence (electronic, written, or oral) and not disclose it to the counter-party, the court, or regulatory bodies (subject to certain exceptions), and is applicable to arbitration proceedings.

English law recognises two main types of legal professional privilege:

- legal advice privilege: which protects confidential communications between the "client" and their lawyer, provided that the dominant purpose is for the giving or receiving of legal advice, i.e. business advice given by the lawyer will not be covered; and
- litigation privilege: which protects communications between a client, their lawyer, and any third parties, and the client and a third party – provided that the dominant purpose is for either:
  - the giving or receiving of legal advice in connection with litigation; or
  - the collection of evidence for use in litigation. The litigation need not be active, but must be in "reasonable contemplation", i.e. more than simply a possibility.

In this context, adversarial proceedings such as arbitration and tribunal proceedings are also covered by "litigation privilege".

In the context of legal advice privilege, the definition is currently very narrowly interpreted and will only extend to a small number of people who are responsible for the giving of instructions to the lawyers, and for the receiving of legal advice[5].

"Without prejudice" privilege will protect attempts to reach a settlement by preventing the parties from making reference to the negotiations.

Privilege will be lost where the privileged document loses confidentiality, for example by being disclosed, or referred to in submissions or witness statements.

5 Three Rivers District Council & Ors v The Governor & Company of the Bank of England [2003] EWCA Civ 474

6.4 Disclosure

Section 34 AA1996 gives the tribunal the power, in the absence of agreement between the parties, to determine which documents should be disclosed between the parties and at what stage.

In institutional arbitrations, parties frequently use the IBA rules on the Taking of Evidence which restricts the tribunal's power to order disclosure of evidence to those that are "relevant and material" to the issues of the arbitration, a narrow interpretation of disclosure, aimed at reducing time and cost.

In practice, disclosure tends to be more limited than in English court proceedings. If disclosure is required from a non-party, an application to court is required (s44AA1996).

6.5 The Award

Under sections 48 and 49 AA1996, the tribunal can:

- make a declaration as to any matter to be determined in the proceedings;
- order the payment of a sum of money, in any currency;
- order a party to do or refrain from doing something;
- order specific performance of the contract;
- order the rectification, setting aside or cancellation of a deed or other document; and
- award interest (discussed in section 10 below).

The parties can agree on the formal requirements of the award. In the absence of agreement, the Act states that awards must be written, signed by all the arbitrators or all those assenting to the award, must set out reasons and must state the seat of the arbitration and the date that the award was made (s52 AA1996).

The tribunal may refuse to deliver an award to the parties except on full payment of the fees and expenses of the arbitrators (s56 AA1996).

7. ROLE OF THE COURT

Generally, the court's intervention is limited to support rather than interference with the arbitral process in England and Wales and will only intervene as permitted by the AA1996 or in exceptional circumstances, to prevent a substantial injustice.

S44 AA1996 states that, unless otherwise agreed by the parties, the court has the same power of making orders in relation to the below circumstances as it would in relation to legal proceedings:

- the taking of the evidence of witnesses;
- the preservation of evidence; and
- the inspection of property.

Subject to the parties' agreement, a party may also apply to the court to secure the attendance of a witness (s43 AA1996).

8. APPEALS

Appeals are to the Commercial Court and are brought under the AA1996 in three potential circumstances, namely:

- for lack of substantive jurisdiction (s67) mandatory;
- for serious irregularity (s68) mandatory; and
- on a point of law (s69) non-mandatory and often parties and the institutions (including the LCIA and ICC) opt out.

Appeals under these grounds must be made within 28 days of the date of the award (s70 AA1996).

In practice, the number of appeals are limited, and most of those granted permission to appeal eventually fail. The most recent statistics (for 2017) show that to date for:

- s68 appeals – there were 47 challenges of which none succeeded;
- s69 appeals – there were 60 challenges, with 20 appeals permitted, of which four succeeded.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

Arbitration awards are enforceable in the local courts as if they were local court judgments (s66 AA1996).

9.2 Foreign Awards

The English courts are pro-enforcement, and as part of the UK, England and Wales signed and ratified the NYC in 1975. The UK signed with the reservation that it will only apply the NYC to awards made in other signatory states. The UK is also a party to the Geneva Convention on the Execution of Arbitral Awards 1927. Enforcement via the Geneva Convention has greatly diminished following the NYC, however it is still used for countries who are not NYC signatories. The Foreign Judgments (Reciprocal Enforcement) Act 1993 can be used to enforce Commonwealth country awards, although is again used infrequently due to the dominance of the NYC.

Under the NYC, a foreign arbitration award is recognised and enforceable (in part or as a whole) in the same way as a local court judgment (ss100-104 AA1996). The procedure under the NYC requires the party wishing to enforce the award to obtain court permission by providing an original or a certified copy of the award to the English court, supported by written evidence including the original arbitration agreement, with certified translations where the originals are not in English. The application must be made within the relevant limitation period as set out in Limitation Act 1980 and Foreign Limitation Periods Act 1984 which apply to all arbitral proceedings.

It is rare for the English courts to refuse recognition and enforcement. However, they retain discretion and may do so if the award falls within the exceptions under AA1996 (which generally correspond to the Article V NYC defences to enforcement), namely on public policy grounds, incapacity, lack of notice or jurisdiction of the tribunal, where the award was set aside or nullified, and non-arbitrability of the dispute. Of these, public policy is the most widely interpreted and includes the court having refused to recognise and enforce an award obtained by fraud or illegality, breach of EU competition laws, and where the award was unclear as to the obligations of the parties.

10. COSTS, FUNDING AND INTEREST

The tribunal has the power to make costs awards under s61 AA1996. Costs awards tend to be in favour of the successful party, but there are exceptions. For example, a party's adverse behaviour can impact the tribunal's decision, as can the outcome of any counterclaim.

The parties can agree the extent of recoverability, failing which s63 AA1996 gives the tribunal power to do so, with any doubt resolved in favour of the paying party and with costs usually limited to what is determined to be a reasonable amount in the circumstances. Reasonable costs will include the reasonable fees and expenses of the arbitrators.

If the tribunal does not rule on the recoverability of costs, the parties must apply to the court to do so.

Arbitrators have the power to order a claimant to provide security for costs under s38 AA1996, usually in the form of a guarantee or bond.

Third party funding is permitted for international arbitration conducted in England and Wales, as are alternative funding options including damages

based agreements, conditional fee agreements and after the event insurance. Such funding arrangements in England and Wales will likely be influenced by the Association of Litigation Funders of England and Wales Code of Conduct. A recent judgment decided that the costs involved in third party funding (including the amount to be paid to the funder) in an ICC arbitration were recoverable as part of the costs of the arbitration.[6]

A number of institutions have taken steps to improve transparency on their costs and have published guidance to assist tribunals and parties in controlling costs of arbitrations, including the LCIA and ICC.

11. THE FUTURE

The UK will exit the EU on 29 March 2019. However, if an exit deal is agreed, there will be a two year transition period during which the applicable EU laws will continue to apply until the period expires at the end of December 2020, unless otherwise replaced or repealed. Due to the conventions and regulations applicable to litigation, and particularly enforcement of judgments in the EU, it is expected that parties will prefer arbitration as the dispute resolution method due to the ease of enforcement under the NYC.

The legal framework for international arbitration in England and Wales is expected to remain unchanged. Full effect will be given to the NYC, thereby ensuring ease of enforcement of the award in other jurisdictions (including the EU member states who are party to the NYC) and English law will continue to have a pool of arbitrators, experts and legal advisers that is both wide and deep in terms of both experience and quality.

12. INVESTOR STATE ARBITRATIONS

The United Kingdom (including England and Wales) is a signatory to many bilateral (BITs) and multilateral investment treaties (MITs) including 'since 1997' the Energy Charter Treaty (**ECT**), and the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (**ICSID**) which came into force in the UK in 1967. Whilst still a member of the EU[7], the UK is also a party to the numerous BITs to which the EU is a signatory. On leaving the EU on 29 March 2019, or at the end of the expiry of the agreed transition period in December 2020, it is likely that the UK will seek to become a signatory to many of those BITs.

The UK's BITs adopt the "most favoured nation" article (Article 3).

State immunity is available under the State Immunity Act 1978 (**SIA1978**), on two grounds, namely:

- as a party to disputes under the jurisdiction of the English courts, and
- from subsequent enforcement proceedings in the UK.

Arbitration is however, carved out, and so states will not be able to claim immunity in court proceedings that relate to arbitration (s9 SIA1978).

By submitting to the English jurisdiction, states are not automatically waiving jurisdiction and this needs to be expressed in writing. States may waive their immunity in enforcement proceedings, this must be in writing; or where the property in question is in commercial use (s13 SIA1978).

6 Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)
7 The UK will leave the EU on 29 March 2019.

FRANCE

This chapter was written by Stanislas Lequette and Timothy Clemens-Jones

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Although arbitration in France dates back to the Revolution, when it was fixed as a constitutional principle, the use of arbitration was subjected in the early 19th century to severe restrictions and only very limited types of disputes (including disputes relating to commercial companies or maritime insurance) could be arbitrated. In addition, arbitration agreements relating to future disputes were prohibited. Progressively, with effect from 1925, the French legislature amended the provisions of the Civil Code and Code of Civil Procedure (**CCP**) relating to both domestic arbitrations and international arbitration.

France has developed a favourable legal system relating to arbitration, particularly for international arbitration. Moreover, France is a party to many international and European conventions and several arbitration institutions have their seat in France, including the International Chamber of Commerce (**ICC**), before which the largest number of arbitral proceedings generally are filed.

2. ARBITRAL INSTITUTIONS

The main arbitration institutions used in France are:

- the International Chamber of Commerce (ICC) headquartered in Paris;
- the French Arbitration Association (Association Française d'Arbitrage);
- the Paris Centre for Mediation and Arbitration (Centre de Médiation et d'Arbitrage de Paris);
- the International Arbitration Chamber of Paris (Chambre Arbitrale Internationale de Paris);
- the Paris Maritime Arbitration Chamber (Chambre Arbitrale Maritime de Paris); and

- the French Reinsurance and Insurance Arbitration Centre (Centre Français d'Arbitrage de Réassurance et d'Assurance).

Timothy Clemens-Jones and Robert Follie amongst the Paris office partners have each been appointed as arbitrators in ICC arbitrations (and partners and other fee earners regularly act as legal counsel on behalf of parties before arbitral tribunals and, therefore have a good knowledge of, and relations with, several arbitrators).

3. ARBITRATION AGREEMENT

3.1 Governing law

In domestic arbitration, the following matters cannot be submitted to arbitration:

- matters relating to the status and capacity of persons;
- divorce and judicial separation;
- matters relating to consumers' contracts;
- disputes concerning public bodies (the state and local authorities, public entities and public institutions, except when authorised to engage in commercial activity); and
- matters involving public policy.

(Article 2059 – 2060 of the Civil Code)

In international arbitration, there are no such restrictions, subject to compliance with French international public policy.

3.2 Choice of law/seat

The parties are free to choose the law applicable to the dispute. In the absence of such a choice, the arbitral tribunal will determine the rules of law that they consider appropriate to apply, on the basis that it is compelled to take trade customs into consideration (Article 1511 of the CCP).

Arbitrators can only act as *amiable* compositeur if expressly empowered by the parties to do so (Article 1512 of the CCP).

The arbitral tribunal may, in certain circumstances, apply conflict of laws rules leading to the application of mandatory laws other than the system of law chosen by the parties although the French courts have developed a number of "material rules" (règles matérielles) whose aim is to ensure the efficiency of the arbitral process by avoiding recourse to strict conflict of laws rules. The arbitral tribunal may however, consider that, in order for the award to comply with international public policy rules, certain mandatory rules must prevail over the law chosen by the parties.

Under French law, an arbitration agreement can be subject to a different applicable law than the law governing the main contract (based on the principle of autonomy of the arbitration agreement – see below 3.4).

The French Cour de cassation has based the validity of the arbitration agreement on a material rule (règle matérielle) which allows the French courts to bypass any conflict of laws rule that would identify the national law governing the validity of the arbitration agreement.

Therefore, arbitration agreements are governed on their formation, validity and legality, by the material rule of validity instead of any domestic law.

In practice, an arbitration agreement will be valid if the consent of the parties is established and if it does not purport to violate international public policy.

3.3 Mandatory/Non-mandatory provisions

Some provisions of the CCP are mandatory, and in particular:

- guarantee of the parties' equality and respect of the adversarial principle (Article 1510 of the CCP);
- taking trade usages into account (Article 1511 of the CCP);

- compliance with international public policy (Article 1514 of the CCP).

3.4 Severability

The principles of autonomy and severability govern arbitration agreements (Article 1447 of the CCP).

Therefore, the nullity of the contract containing the arbitration agreement does not of itself have any effect on the validity of the arbitration agreement and vice versa.

4. CONFIDENTIALITY/PRIVACY

French law provides that arbitration proceedings in the domestic context are confidential, unless the parties agree otherwise (Article 1464 of the CCP). Parties, arbitrators and institutions are bound by the confidentiality of the arbitration.

In international arbitration, there is no similar express confidentiality provision. The parties should therefore include in their arbitration agreement (or verify that any applicable institutional arbitration rules chosen to apply contain) an obligation of confidentiality.

The arbitral tribunal's deliberations must, in any case remain secret (Article 1479 of the CCP).

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The parties can appoint arbitrators directly or in accordance with arbitral or procedural rules. In domestic arbitration exclusively, arbitrators must be natural persons (Article 1450 of the CCP). The arbitral tribunal can be composed of one or more arbitrators, but there must always be an odd number of arbitrators.

Where the parties fail to agree on the arbitrators' appointment, Article 1452 of the CCP provides that:

- a sole arbitrator will be appointed by the person in charge of the administration of the arbitration (for instance, ICC); or by the judge acting in support of the arbitration "juge d'appui" (who may be seised by any one of the parties);
- for an arbitral tribunal composed of three arbitrators, each party chooses one arbitrator and the two so appointed appoint a third arbitrator.

The judge acting in support of the arbitration "juge d'appui" seised by at least one of the parties will intervene in the selection of arbitrators when one party has not appointed its arbitrator within one-month from the date of receipt of such request, or if the two appointed arbitrators cannot agree on the appointment of the third arbitrator. The "juge d'appui" will also intervene when one of the parties is facing a risk of denial of justice.

The arbitrator, before accepting their mandate, must disclose to the parties any circumstances or interests, whether before or during the arbitration proceedings, which could influence their judgment and could create, in the mind of the parties, a reasonable doubt as to their impartiality and independence (Article 1456 of the CCP).

5.2 Jurisdiction - kompetenz-kompetenz

The arbitral tribunal has exclusive jurisdiction to rule on objections to its own jurisdiction (Article 1465 of the CCP).

Consequently, the courts cannot rule on issues relating to the jurisdiction of an arbitral tribunal. Article 1448 of the CCP provides that, when a dispute arising under an arbitration agreement is brought before a court, the court must decline jurisdiction in favour of the arbitral tribunal, save where no arbitral tribunal has yet been constituted and the arbitration agreement is manifestly void or inapplicable.

5.3 Powers

(a) Emergency Powers

The arbitral tribunal has the power to order any emergency or measures (provisional or interim measures) that it deems appropriate. The arbitral tribunal may amend or add conditions to such measures and impose penalties related to it.

(b) Interim Relief

The arbitral tribunal can, on the conditions it determines and, if necessary, under sanction of penalties, order the parties to take any provisional or interim measures it considers appropriate (Article 1468 of the CCP). However, the state court alone has jurisdiction to order conservatory or provisional attachments and judicial security rights (imposition of charges on property, etc.).

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Prior to accepting their appointment, arbitrators are required to disclose any circumstances that may affect their independence and impartiality (Article1456 of the CCP). In the absence of a choice of procedural rules by the parties, the arbitral tribunal has the discretion to determine the rules which will apply and to order any provisional measures it deems necessary. Arbitrators and parties will conduct the proceedings under the principles of diligence and fairness, (Article1464 - 2 of the CCP). The arbitral tribunal must ensure the equal treatment of the parties and observe the due process in the proceedings (Article 1510 of the CCP).

Subject to any express procedural rules, the arbitration proceedings are conducted in the following key procedural stages:

- the submission of an arbitration request by the claimant;
- the parties proceed to appoint the arbitrator(s);
- after the acceptance of their mandate, the arbitrator(s) will determine the procedural rules and procedural timetable for the arbitration together with the "terms of reference" which fix the scope of the disputes to be determined. Upon signature of the terms of reference (by the parties and by the members of the arbitral tribunal), the tribunal is deemed to be constituted;
- the parties exchange written memoranda of claim and defence containing their arguments, the facts, and the legal framework of their demands;
- if necessary, the arbitral tribunal may organise an oral hearing and the cross examination of the relevant witnesses;
- the arbitrators may order the production of evidentiary elements (Article 1467 of the CCP);
- finally, an oral hearing for the pleading of the claim and defence is organised and the arbitrator(s) proceed(s) to issue the final award;
- the arbitral award will succinctly set forth the respective claims and arguments of the parties. The award will state the reasons upon which it is based (Article 1482 of the CCP); and
- a party may request judicial enforcement of the final award through exequatur proceedings.

6.2 Evidence

As already mentioned, the parties can determine in the arbitration agreement the procedural rules applicable to the arbitration proceedings and the specific powers conferred on the arbitrators.

When no express agreement exists, the arbitrator can, on the basis of Article 1467 of the CCP:

- order the necessary investigative measures;
- compel persons to appear and be questioned;
- compel a party to disclose any document and evidence.

6.3 Privilege

In France, the protection of legal opinions and documents which support them is afforded by the principle of professional secrecy for lawyers. Article 226-13 of the French Criminal Code provides that: "The disclosure of information of a confidential nature by a person who is entrusted with such information, either by reason of their office or profession, or by reason of a mission or temporary position, is punishable by a year of imprisonment and a fine in an amount of Euro€15 000". Professional secrecy under French law is not quite as extensive as legal privilege of the common law jurisdiction (e.g. England and Wales). Parties can use the "most favourable nation" rule to benefit from the broadest protection rules regarding privilege.

According to IBA rules, an arbitral tribunal can admit or exclude evidence on the basis of privilege.

Under French law, there are some limits to the scope of the arbitral tribunal's authority to order the disclosure of documents. In a situation where the production of third party evidence is necessary in an arbitral procedure, the arbitral tribunal can authorise the party to seek an order from the courts for its production.

The President of the Competent Tribunal de Grande Instance will make an order for the production of the evidentiary document through expedited proceedings (référés). If the judge considers the party's request to be well established, it will order the production of the evidence by the other party (or the third party) with a penalty for non-compliance if necessary. This decision is not immediately enforceable and may be appealed within 15 days (Article 1469 of the CCP).

6.4 Disclosure

The parties can agree to apply the IBA rules on the Taking of Evidence in International Arbitration 1999, which are often used in arbitration proceedings seated in France. Where not so agreed, the rules may also be applied by the tribunal itself where considered to be appropriate, and it is not uncommon for these rules to be applied.

6.5 The Award

The CCP does not contain any statutory provision regarding the remedies an arbitral tribunal can award. Therefore, under French law, the arbitrators benefit from a wide discretion as to the remedies they grant. Punitive damages are not recognised under French law, although case law has already determined that such damages are not contrary to French international public policy and, accordingly, can be enforced in France as long they are not disproportionate to the damage suffered.

There are no specific legal processes laid down by law as a requirement for obtaining the award, although generally, payment of the full amount of the arbitration fees is required before the award is made available.

The award must succinctly describe the respective claims and arguments of the parties and must state the reasons upon which it has been made (Article 1482 of the CCP).

Pursuant to Article 1481 of the CCP, the arbitral award will state:

- the full names of the parties as well as their domiciles or headquarters;
- as the case may be, names of the legal counsel or any person having represented or assisted the parties;

- the name(s) of the arbitrator(s) who rendered the award;
- the date on which it was made; and
- the place where the award was made.

Furthermore, the award will be made by majority decision, and has to be signed by all the arbitrator(s).

Parties are usually notified of the award by the arbitrator or the arbitral institution. There is no formal requirement as to the notification of an international award. However, regarding domestic arbitration, the award needs to be formally served on the parties, unless otherwise agreed by the parties (Article 1484 of the CCP).

7. ROLE OF THE COURT

Local courts will support the arbitral proceedings as follows:

- assisting in appointing the arbitral tribunal (Article 1451 to 1453 of the CCP);
- ordering the production of evidence owned by or in the possession of a third party to the arbitration (Article 1469 of the CCP);
- ordering interim measures when the arbitral tribunal is not yet constituted (Article 1449 of the CCP);
- ordering security at the request of the parties or the arbitral tribunal (Article 1468 of the CCP);
- deciding on the questions of enforcement, appeal, and setting aside of the arbitral award;
- no need to nominate arbitrators where the arbitration agreement is void (Article 1455 of the CCP).

8. APPEALS

In domestic arbitration, there is no possibility of appeal unless the parties have agreed otherwise (Article 1489 of the CCP). However, the award can be set aside, unless the parties agree to allow the appeal (Article 1491 of the CCP).

In domestic arbitration, an arbitral award can be set aside if (Article 1492 of the CCP):

- the arbitral tribunal declared itself incompetent; the arbitral tribunal was irregularly constituted; the arbitral tribunal lacks jurisdiction to rule on the dispute; the adversarial principle has not been respected; the arbitral award is contrary to public policy; or the arbitral award is not grounded or does not state the date on which was given, or the name of the arbitrator(s), or does not include the required signature(s), or was not decided upon by a majority vote.
- in international arbitration, an award rendered in France cannot be appealed, but can be set aside by the court of appeal of the arbitration's seat (Article 1518 of the CCP). The exequatur decision can be appealed (Article 1525 of the CCP).

In international arbitration, an arbitral award can be set aside if (Article 1520 of the CCP):

- the arbitral tribunal declared itself incompetent; the arbitral tribunal was irregularly constituted; the arbitral tribunal lacks jurisdiction to rule on the dispute;
- the adversarial principle has not been respected; or the recognition or enforcement of the arbitral award is contrary to international public policy.

The parties may not agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law. They may exclude annulment by providing that they agreed on a right to lodge an appeal against the award.

An appeal against the award does not impact its enforceability (i.e. the award remains enforceable in spite of the appeal). The limitation period (for requesting the setting aside or appeal) is

one month from the date of notification of the award (Article 1494 of the CCP), extended by two months if the party is located abroad.

The time and cost varies but it takes approximately six to 12 months for a challenge before the courts of appeal, and a further 12 to 18 months if appealed to Supreme Court.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

To be enforceable or recognised in French courts, a domestic arbitration award must be followed by an enforcement decision made by the Tribunal de Grande Instance having jurisdiction over the place where the award was made. A party who wants to obtain recognition or enforcement of an arbitral award in France must establish the existence of the arbitral award, which must not be manifestly contrary to French international public policy (Article 1488 of the CCP). The party must provide the courts with the originals or copies of the arbitral award and arbitration agreement (Article 1487 of the CCP).

The procedure to obtain enforcement of an arbitral award is not subject to the adversarial principle (Article 1487 of the CCP).

The rules for enforcement by local courts of international arbitration awards made in France are subject to French procedural rules for the enforcement of foreign awards (see below).

9.2 Foreign Awards

France is a party to three international treaties relating to the recognition and enforcement of foreign awards:

- The New York Convention 1958 (**NYC**), aiming to simplify recognition and enforcement of international arbitral awards by providing common legislative standards;
- The European Convention on International Commercial Arbitration; and
- The Washington Convention on the Settlement of Investment disputes (**ICSID**).

France ratified the NYC in 1959.

Foreign awards are enforceable through an enforcement order. A party who wants to obtain recognition or enforcement in France of a foreign or international arbitral award must do all of the following:

- establish the existence of the arbitral award;
- demonstrate that the arbitral award is not manifestly contrary to French international public policy (Article 1514 of the CCP);
- provide the French courts with the originals or copies of the arbitral award and arbitration agreement. If these documents are in a foreign language, they must be translated into French (Article 1515 of the CCP); and
- initiate the procedure before the Tribunal de Grande Instance (**TGI**) of Paris.

Obtaining an enforcement order of an arbitral award usually takes a few weeks. The procedure to obtain enforcement of an arbitral award is made without notice to the counterparty and is not subject to the adversarial principle. When the court denies enforcement of the award, an appeal can be made within one month of service of the enforcement order (Article 1523 of the CCP).

There is no statutory limitation period applicable to enforcement of an international arbitral award.

The standard ground for refusing enforcement of an arbitral award on the grounds of public policy is a "genuine violation of international public policy" (Article 1514 of the CCP).

10. COSTS, FUNDING AND INTEREST

Under French law, there is no specific rule concerning the interest rate to be awarded, recovery of fees or the costs of the arbitration proceedings.

Where thought appropriate and/or applicable, the tribunal might apply the French "legal rate" of interest (which varies, usually annually) or other rate applicable, e.g. the EU Late Payments Directive, but otherwise has a wide discretion in relation to the award of interest.

Arbitrators' fees are usually agreed on with the parties or determined by the arbitral institution. The parties can agree on how to apportion the fees between them. The arbitral tribunal may determine the allocation of costs among the parties by taking into account an existing agreement on the costs between the parties, the good or bad faith of each party, and the costs estimates submitted by them.

For lawyers' costs, parties can either decide to apply hourly rates or flat fees. Under French law, success fees, which can be seen as contingent fees, can be added to the arbitration costs if they are not manifestly excessive.

The practice of third party funding has been developed in French international arbitration. Professional funders were very active in France in 2013, only about ten "third party funds" were sharing approximately 90 per cent of the French market and most of them were foreign funds.

11. THE FUTURE

There are no noteworthy trends in or current issues affecting the use of arbitration in France, nor any trends regarding the type of disputes commonly being referred to arbitration. No recent step, specific to France, has been taken to address current issues in arbitration.

The most recent modernisation of French arbitration law took place in 2011. There are no plans to reform French arbitration law at the moment.

12. INVESTOR STATE ARBITRATIONS

France is a party to the Washington Convention (since 1967) (**ICSID**).

According to the United Nations Conference on Trade and Development (**UNCTAD**), France has signed 115 Bilateral Investment Treaties and 73 treaties with investment provisions.

Standard clauses exist concerning notably the "most favoured nation" and exhaustion of local remedies provisions. The "most favoured nation" clause aims to guarantee the same best treatment to all the investors who are contracting with a State. The exhaustion of local remedies provisions means that the claimant should bring their request before the local jurisdictions prior to arbitration proceedings.

French national courts consider that there is no jurisdictional immunity when the State is engaging in commercial acts that exclude the principle of sovereignty. Therefore, immunity from jurisdiction is not granted to public bodies which are acting as 'private parties' and only acts contributing to sovereignty are covered by this defence.

Concerning the immunity regarding execution, any execution measure related to properties located on the French territory against a foreign State is submitted to the prior authorisation of a judge and is subject to certain conditions (Article L. 111-1-2 of the French Civil Code of the Enforcement Procedures).

HONG KONG

This chapter was written by Peter Murphy and Fergus Saurin

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Hong Kong is one of the world's leading international arbitration and dispute resolution centres and occupies a unique position as a bridge between the People's Republic of China (the **PRC**) and the rest of the world, as well as being a hub for dispute resolution in North East and East Asia more generally.

Historically, Hong Kong arbitration law largely reflected English law. In 1989, Hong Kong effected a decisive change from English law and adopted the UNCITRAL Model Law on International Commercial Arbitration (the **Model Law**). The Model Law is currently given effect in Hong Kong by the Arbitration Ordinance, Cap. 609 (the **Ordinance**), which is the principal legislation pertaining to arbitration in Hong Kong.

As with other Model Law countries, it is important to recognise that the law in Hong Kong does not provide a complete code for the conduct of arbitrations, but instead provides a framework within which all kinds of ad hoc and institutional arbitrations may be carried out. Party autonomy and non-intervention by the court are the guiding principles in Hong Kong.

2. ARBITRAL INSTITUTIONS

- Hong Kong International Arbitration Centre (the **HKIAC**)
- The Chartered Institute of Arbitrators (East Asia Branch) (the **CIArb East Asia**)
- International Court of Arbitration of the International Chamber of Commerce (the **ICC**)
- China International Economic and Trade Arbitration Commission (**CIETAC**)
- Hong Kong Institute of Arbitrators

Hong Kong partners, Henry Fung and Nick Longley are on the panel of arbitrators of the HKIAC and Nick Longley,

is former Honourable Secretary of the CIArb East Asia. A number of other partners and fee earners are also (non-arbitrator) members of the HKIAC and of the CIArb East Asia and involved in the administration of the former.

3. ARBITRATION AGREEMENT

The only formal requirement for an arbitration agreement to be enforceable in Hong Kong is that it be in writing (but it need not be signed). An arbitration agreement is considered to be in writing if its content is recorded in any form (e.g. an exchange of emails) and whether or not the underlying arbitration agreement or contract has been concluded orally, by conduct or by other means. The terms of the arbitration agreement, like any other agreement, must also be certain if the arbitration agreement is to be valid. However, the court will take a relatively lenient view when considering arbitration agreements so as to give effect to them where at all possible.

Unilateral arbitration clauses, in other words, clauses whereby the election of court proceedings or arbitration is given to one party, are enforceable in principle, as are clauses whereby both parties are afforded the option.

There is no objection to these type of clauses as a matter of Hong Kong law, albeit special care must be taken when drafting them so as to ensure that they are expressed with sufficient clarity to be enforceable. Careful consideration should be given to their use because not all jurisdictions will recognise an award rendered pursuant to such a clause (e.g. the Russian Federation).

Hybrid arbitration clauses are also enforceable in principle, but due to uncertainty are not advisable.

3.1 Governing law

The main categories of matters not capable of resolution by arbitration include:

- Actions *in rem* against ships;
- Criminal charges;
- Competition and anti-trust disputes;
- Matters reserved for resolution by state agencies and tribunals; and
- Choice of law/seat.

The parties have complete autonomy to determine the law applicable to the substance of the dispute, which must be bona fide and not contrary to Hong Kong public policy.

Where the law or legal system of a given state is not designated by the parties (e.g. because the contract in question does not contain a governing law clause), the tribunal is empowered to determine the issue. In determining the applicable law, the tribunal will consider various factors including the place of performance of the contract, the place of business of the parties, their domicile or residence or the place of arbitration as well as usages of the trade in question.

3.2 Choice of law/seat

In the absence of an express choice of law, there may be several legal systems relevant to a single arbitration agreement, namely: (i) the law which determines whether the parties had capacity to make the arbitration agreement; (ii) the law which governs whether the arbitration agreement is formally valid; and (iii) the law which determines its substantive validity which will be determined by the proper law of the contract. However, the contract will be invalid under Hong Kong law if performance of it would be unlawful under the law of the country where it is to be performed.

3.3 Mandatory/non-mandatory provisions

The principal mandatory provisions (provisions that may not be excluded by the parties) are:

- the application of the Limitation Ordinance (Cap. 347);
- the requirement for the arbitration agreement to be in writing;
- the court's power to order a stay of court proceedings in favour of arbitration proceedings unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed;
- the competence of the tribunal to rule on its own jurisdiction;
- the requirement that the parties must be treated with equality;
- the court's power to extend agreed time limits to commence arbitration proceedings, or to commence any other dispute resolution procedure that must be exhausted before arbitral proceedings can be commenced;
- the court's power to order recovery of the tribunal's fees and the tribunal's power to withhold an award for non-payment of the arbitrators' fees and expenses;
- the court's power to set aside an award (e.g. on the basis that the award is in conflict with the public policy of Hong Kong); and
- the tribunal's or mediator's liability for certain acts and omissions, and the liability of persons who appoint the tribunal, mediator, or who administer arbitration proceedings.

The following provisions will also apply if, either: (i) the arbitration agreement in question expressly stipulates that any or all of the provisions apply (in other words, the parties "opt-in" to the provisions); or (ii) the arbitration agreement was entered into before, or within the six years following, 1 June 2011 and it states that the arbitration is "domestic":

- submission of disputes to a sole arbitrator;
- consolidation of arbitrations;
- decision on a preliminary question of law by court;
- challenging arbitral award on grounds of serious irregularity; and
- appeal against arbitral award on a question of law.

3.4 Severability

The principle of severability applies. The arbitration agreement is separate from the underlying or substantive agreement between the parties. A decision by the tribunal that the underlying contract is null and void will not of itself invalidate the arbitration clause.

4. CONFIDENTIALITY/PRIVACY

The Ordinance governs confidentiality, and provides that unless otherwise agreed, no party may publish, disclose or communicate any information relating to the arbitral proceedings under an arbitration agreement or an award made in those arbitral proceedings, unless the publication, disclosure or communication is made to:

- protect or pursue a legal right or interest of the party or to enforce or challenge any award;
- any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
- a professional or other adviser of the parties.

The duty of confidentiality extends only to the parties, and not to the arbitrators or any other parties in the arbitration. The HKIAC Rules require parties, and

arbitrators, to treat information relating to the arbitration as confidential (Article 45.2 of the 2018 HKIAC Rules).

In the case of court proceedings relating to arbitrations, the presumption is that these are not to be heard in open court, in which case they will retain a high degree of confidentiality. However, the court may order the proceedings to be heard in open court. In addition, where a judgment is of major legal interest, the court must direct that reports of the judgment may be published (redacted at the request of the parties).

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The parties have wide autonomy in their selection of arbitrators, including the number of arbitrators, the use of a chairman or an umpire, the arbitrators' qualifications and the method of appointment.

If the parties fail to agree on the number of arbitrators, and the sole arbitrator opt-in provision does not apply, the number of arbitrators must be either one or three as decided by the HKIAC on the application of a party.

The court, on the application of one of the parties to the arbitration agreement, may remove an arbitrator in the event that they fail to comply with their duties of impartiality and/or independence.

An arbitrator owes the following mandatory duties to the parties:

- to treat the parties with equality;
- to be independent;
- to act fairly and impartially between the parties, giving them a reasonable opportunity to present their case and to deal with the case of their opponents; and
- to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, thus providing a fair means for resolving the dispute to which proceedings relate.

5.2 Jurisdiction - kompetenz-kompetenz

The tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, the tribunal's constitution and what matters have been submitted to arbitration in accordance with the arbitration agreement.

Both the tribunal and the court have the jurisdiction to determine issues of jurisdiction. Typically, following an objection by one or other party to its jurisdiction, the tribunal will determine the question as a preliminary issue and then the court, on the application of either party, may review the decision. There is no right of appeal to the court where the tribunal rules that it does not have jurisdiction to determine a dispute.

5.3 Powers

(a) Emergency powers

Hong Kong law does not confer on a tribunal any emergency powers as such, albeit a number of institutional rules do, for example, the 2018 HKIAC Rules (Schedule 4).

In the absence of any prescribed emergency powers, the tribunal can exercise its powers to grant interim relief on an emergency basis.

In addition, any emergency relief granted, whether in or outside of Hong Kong, by an emergency arbitrator appointed under institutional rules is enforceable in the same manner as an order or direction of the court that has the same effect, but only with leave of the court.

(b) Interim relief

Unless otherwise agreed by the parties, the tribunal has the power to grant interim relief to:

- maintain or restore the status quo pending determination of the underlying dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- preserve assets out of which a subsequent award can be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

In addition, any interim relief granted is enforceable in the same manner as an order or direction of the court that has the same effect, but only with leave of the court.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Parties are free to agree on the procedural rules, and institutional rules routinely include more or less detailed procedural rules. If the parties fail to agree (and any applicable institutional rules do not otherwise prescribe procedure), the tribunal can conduct the arbitration in the manner that it considers appropriate. Hong Kong adopts a predominantly adversarial (as opposed to inquisitorial) format to proceedings.

A typical arbitration will involve: (i) exchange of statements of case; (ii) disclosure of documents (typically more limited than in litigation); (iii) exchange of evidence (factual and expert); and (iv) hearing (or if the case is to be determined on documents alone, exchange of closing statements).

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

The duration of the arbitration depends on a number of factors including the complexity of the case, the cooperation of the parties and the schedule of counsel, witnesses (factual and expert) and the tribunal. However, for cases of moderate complexity, a year is typical, while document-only arbitrations may be completed in as little as two to three months and those cases involving complex legal, evidential or technical matters typically last longer.

6.2 Evidence

The tribunal is not bound by the strict rules of evidence that apply in proceedings before the court (except for the rules relating to privilege). Subject to the agreement of the parties and any institutional rules, the tribunal can decide what evidence to admit and then how that evidence should be weighed in reaching its findings of fact. It is not uncommon for parties to adopt the IBA Rules on the Taking of Evidence in International Arbitration.

In the absence of party agreement, the tribunal will decide whether or not a witness or party will be required to provide oral evidence and, if so, the manner in which that should be done and the questions that should be put to, and answered by, the respective parties.

Unless otherwise agreed, the tribunal also has power to direct that a particular witness or party be examined on oath or affirmation. There is no strict requirement that oral evidence be provided on oath or affirmation; it is a matter for the tribunal's discretion.

The tribunal does not have the power to compel the attendance of a witness. However, a party can apply to the court to order the attendance of a witness in order to give oral testimony (or to produce documents).

Unless the parties agree otherwise, the tribunal is empowered to appoint (i) experts or legal advisors to report to it and the parties, and/or (ii) assessors to assist it on technical matters. The parties must, however, be given a reasonable opportunity to comment on any information, opinion or advice offered by such a person.

The conduct of lawyers with regard to the preparation of witness testimony is often regulated by the rules of professional conduct of the jurisdiction in which that lawyer is admitted to practise.

6.3 Privilege

A party is not required to produce any document or other evidence they could not be required to produce in civil proceedings before the court, which would include privileged documents.

6.4 Disclosure

The tribunal cannot compel the disclosure of documents by third parties.

The court, on the application of the tribunal, or a party with the approval of the tribunal, may order a person (including a third party) to produce documents or evidence.

The parties are free to agree on disclosure and inspection of documents. If there is no agreement, the matter is left to the tribunal's discretion. The tribunal cannot compel the disclosure of documents by third parties, or a party to produce any document or other material evidence that they would not be required to produce in civil proceedings before the court.

The practice in Hong Kong is generally for voluntary disclosure as a first stage, followed by requests for specific documents. In line with international practice, parties to international arbitration often apply the IBA Rules on the Taking of Evidence in International Arbitration.

6.5 The Award

Unless otherwise agreed, a tribunal can award the same remedy or relief that can be ordered by Hong Kong courts, including: damages, specific performance, declarations, injunctions, restitution, rectification of the contract, interest and costs.

Although a tribunal would have the power to award punitive damages, it would do so rarely and only in exceptional circumstances.

After considering the evidence and the parties' submissions, the arbitrator will make an award (partial/interim, or final). Subject to any applicable institutional rules, the tribunal will notify the parties of the publication of the award and invite them to collect it, usually following payment for the award. A tribunal may refuse to deliver an award to the parties unless full payment of the fees and expenses of the tribunal is made.

An award must be made in writing and signed by the arbitrator or arbitrators. Unless the parties have agreed otherwise, the award must state the reasons upon which it is based. It must also state its date and the place of arbitration and a signed copy must be delivered to each party.

7. ROLE OF THE COURT

The court will in certain circumstances intervene to assist in arbitration proceedings. This is consistent with Hong Kong's generally pro-arbitration stance.

The powers of the court in respect of arbitration include the power to:

- stay court proceedings brought before it in a matter that is the subject of an arbitration agreement;
- determine a challenge to the appointment of an arbitrator;
- grant interim measures, including injunctions;
- assist in the taking of evidence;
- order a person to attend proceedings before a tribunal to give evidence or to produce documents or other evidence;
- extend the time to commence arbitration proceedings, or (in restricted circumstances) to dismiss a claim for unreasonable delay;
- make an order:
  - directing the inspection, photographing, preservation, custody, detention or sale of any relevant property by the tribunal, a party to the arbitral proceedings, or an expert; and
  - directing samples be taken from, observations made of, or experiments conducted on any relevant property.
- set aside an award;
- enforce an award; and
- under the opt-in provisions, the parties can confer on the Hong Kong court the power to determine:
  - a preliminary question of law;
  - a challenge to an award on the grounds of serious irregularity; and
  - an appeal against an award on a point of law.

8. APPEALS

Unless agreed otherwise, an award made by a tribunal under an arbitration agreement is final and binding both on the parties and on any person claiming through or under any of the parties.

Unless the parties have opted into the right to appeal on a point of law, there is no general right of appeal (as opposed to challenge) against an award. Challenges to an award may only be made on procedural grounds. These are limited to:

- where a party was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it or that of Hong Kong;
- where a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case;
- where the award deals with a dispute not contemplated by the terms of the submission to arbitration;
- where the composition of the tribunal or the procedure was not in accordance with the agreement of the parties;
- where the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law;
- where the award is in conflict with the public policy of Hong Kong; and
- on the basis of serious irregularity, but only if they have opted into this right.

Parties do not have the right to appeal an award on a question of law, or to challenge an award on the grounds of serious irregularity. In order to confer this right, the parties must opt-in to these rights. The parties may not exclude the right to challenge an award on the procedural grounds set out above.

Under the opt-in provisions, the parties can confer on the Hong Kong court the power to determine:

- A challenge to an award on the grounds of serious irregularity; and
- An appeal against an award on a point of law.

In the limited circumstances mentioned, an application to challenge an arbitral award on procedural grounds or by virtue of serious irregularity, or to appeal it on a question of law, must be made by originating summons to the court. However, in order to appeal against an arbitral award on a question of law, the Hong Kong court must also grant leave to appeal, or all the parties to the arbitral proceedings must agree to the appeal. The application must be made within three months of the award if on procedural grounds, or within 30 days if a challenge for serious irregularity, or on a point of law.

The costs of these applications can vary considerably.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

An arbitration award made in Hong Kong is enforceable in the same manner as a court judgment, but requires leave of the court. Enforcement of an award may be refused if the person against whom it is invoked proves:

- incapacity of one of the parties;
- that the arbitration agreement was not valid;
- that the person: (i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or (ii) was otherwise unable to present the person's case;
- that the award goes beyond the scope of the submission to arbitration;
- that the constitution of the tribunal or procedure were not as agreed by the parties, or in accordance with the law of the country where the arbitration took place;
- that the award is not binding, or its enforcement would be contrary to public policy; or
- foreign awards.

Hong Kong is not a contracting state to the New York Convention 1958. However, the government of the PRC extended the territorial application of the New York Convention 1958 to Hong Kong, subject to the provisos originally made by the PRC upon accession to the Convention. This means that, for all practical purposes, Hong Kong will be treated as a Contracting State under the Convention.

A foreign arbitration award (including a New York Convention 1958 award and an award which is made in mainland China) is enforceable in the same manner as a judgment of the court that has the same effect, but only with the leave of the court.

The enforcing party must make an application for the recognition and enforcement of the award by way of ex parte (without notice) originating summons supported by an affidavit stating the prescribed particulars and filed with a draft order.

If the application is successful, the court will make an order for recognition and enforcement of the award. The order is enforceable 14 days from the date of service or, if the defendant applies within that period to set aside the order, once the application is finally disposed of.

The process usually takes two to three weeks from filing the application to receiving the order for recognition and enforcement. Assuming there is no application to set aside the order, the entire process usually costs no more than US$10,000, albeit this will depend on the precise circumstances of the case.

The limitation period is six years from the date on which the award was dishonoured.

The court applies the public policy grounds sparingly. The court will refuse enforcement on grounds of public policy where the award has been obtained by fraud, criminal, oppressive or otherwise unconscionable behaviour.

10. COSTS, FUNDING AND INTEREST

Subject to the agreement of the parties or any applicable institutional rules, the tribunal can award simple or compound interest from the dates, at the rates, and with the rests the tribunal considers appropriate, on any money awarded by the tribunal, on money outstanding at the commencement of the reference but paid during the course of the reference and on costs awarded or ordered by the tribunal.

Subject to the agreement of the parties or any applicable institutional rules, the tribunal can award costs. Costs will include the costs of the parties' professional advisors and experts, the tribunal's fees and expenses and other costs of the hearing, and may include those of any arbitral institution concerned.

Payment of tax is a personal matter for the party to whom damages are paid and will depend on, amongst other things, the jurisdiction of incorporation of the recipient of funds.

Third party funding for arbitration claims is due to come into force in Hong Kong, but, at the time of writing, this is still not permitted.

We know a number of funders who are active in Hong Kong in the discrete areas where third party funding *is* currently permissible, for example, insolvency proceedings.

11. THE FUTURE

Following Hong Kong's decision to allow third party funding in arbitration as from 1 February 2019, we anticipate a significant increase in the number of matters referred to arbitration. We also anticipate that Hong Kong will be a forum of choice for dispute resolution in the context of the Belt and Road infrastructure projects.

12. INVESTOR STATE ARBITRATIONS

Hong Kong is not itself a contracting party to the ICSID Convention. Before 1997, the ICSID Convention was applied to Hong Kong by the UK. Following the handover, the PRC government notified both the United Nations and the World Bank that the ICSID Convention should apply to Hong Kong. The consequence of this is that a foreign investor seeking to rely on the substantive provisions of any Hong Kong Bilateral Investment Treaty (**BIT**) would not be able to submit the dispute to arbitration under the ICSID Arbitration Rules if they wanted to establish liability on the part of the Hong Kong Government for the breach of any provisions of the BIT.

Hong Kong has the power to enter into its own international agreements in a number of areas, including investment and trade. Hong Kong is a party to BITs with Australia, Austria, the Belgo-Luxembourg Economic Union, Denmark, Finland, France, Germany, Italy, Japan, Republic of Korea, Kuwait, Netherlands, New Zealand, Sweden, Switzerland. Thailand and the United Kingdom. Hong Kong also concluded a BIT with Canada, although it has not yet come into force. The PRC has also entered into at least 127 BITs (amongst the highest number of BITs concluded by any individual state). The extent to which any PRC BIT will confer protection on Hong Kong investors will depend on the circumstances of the case and the specific terms of the BIT in question.

The BITs include all the substantive protection standards habitually included in modern investment treaties, e.g. "most favoured nation" treatment, no unreasonable or discriminatory treatment, fair and equitable treatment, no expropriation without compensation and security and protection.

Foreign states enjoy absolute immunity from enforcement and jurisdiction in Hong Kong. As such, an arbitral award against a foreign state cannot be enforced in Hong Kong unless the foreign state expressly waives immunity from the jurisdiction of the court. Even if there is a waiver clause in the underlying contract, the court will, in all likelihood, decline jurisdiction over the foreign state unless, at the time of appearing before the court, the foreign state expressly waives immunity.

Note: a version of this chapter has previously appeared in the Hong Kong chapter of the ICLG IA Guide

KUWAIT

This chapter was written by Rula Dajani Abuljebain and Dr Julian Awwad

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Beginning in the 1980s, Kuwait introduced legislation governing arbitration as a mechanism for dispute resolution. Arbitration is featured in two Kuwaiti laws: (i) Decree Law No. 38 of 1980 Promulgating the Civil and Commercial Procedure Law (**Civil and Commercial Procedure Law**) contains provisions which govern arbitration in general; and (ii) Law No. 11 of 1995 Regarding Judicial Arbitration in Civil and Commercial Matters (**Judicial Arbitration Law**) specifically governs arbitration through the Kuwait Court of Appeal.

2. ARBITRAL INSTITUTIONS

The Kuwait Mediation and International Arbitration Centre of the Kuwait Chamber of Commerce and Industry (**KMIAC**) is the main arbitration body in Kuwait. Arbitration councils of the Kuwait Court of Appeal also arbitrate civil and commercial disputes pursuant to the Judicial Arbitration Law. Other specialised bodies, such as the Kuwait Stock Exchange, have established their own arbitration committees.

In addition, many parties with Kuwait-based claims tend to resort to regional or international arbitral forums such as the Dubai International Financial Centre (DIFC) and the London Court of International Arbitration Centre (LCIA) or International Chamber of Commerce (ICC). As a Gulf Cooperation Council (**GCC**) member, Kuwait recognises arbitral awards rendered by the GCC Commercial Arbitration Centre which is headquartered in Bahrain.

3. ARBITRATION AGREEMENT

Under the Civil and Commercial Procedure Law, an arbitration agreement must be in writing and must set out the subject or nature of the dispute in order to be valid. The agreement must

be executed by a person with authority or capacity in respect of the claim or dispute. The dispute must also not be the subject of reconciliation or settlement. Arbitration of "urgent matters", such as interim injunctive relief, is only valid if it is expressly agreed by the parties.

3.1. Governing law

Parties are generally free to negotiate and agree on the governing law relating to disputes of a commercial nature.

3.2. Choice of law/seat

Parties can agree on the choice of law and the seat of arbitration. Under the KMIAC rules, if the parties fail to agree on a governing law, the arbitrators are required to apply the legal principles that are objectively most related to the subject matter of the arbitration, as well as the terms of the agreement, current commercial custom, or prior performance between the parties. Similarly, the seat of arbitration is the KMIAC if the parties fail to agree on the seat of arbitration, and the arbitrators may determine an alternative seat if that is more appropriate for the circumstances of the arbitration.

Although parties are generally free to agree the governing law in the agreement, Kuwaiti legislation may endow Kuwaiti courts with the jurisdiction to review and decide claims in respect of specific disputes. For example, any disputes arising from commercial agency arrangements are subject to the jurisdiction of the Kuwaiti courts where it concerns the application of Law No. 13 of 2016 on the Regulation of Commercial Agencies, even though the parties are endowed with the right to agree to arbitrate the agency agreement itself.

3.3. Mandatory/non-mandatory provisions

Aside from setting out the subject matter of a dispute and the requirement that the agreement be in writing, the Civil and Commercial Procedure Law does not mandate the inclusion of any specific provisions. Parties may agree a deadline, or extension of a deadline, for arbitrators to render their decision, which if otherwise omitted from the agreement, will trigger the six month deadline rule under the Civil and Commercial Procedure Law.

No such deadline or default rule pertaining to such deadline applies to arbitration decisions rendered under the Judicial Arbitration Law. The Judicial Arbitration Law does not stipulate the inclusion of any specific provisions.

3.4. Severability

Under the Kuwait Civil Code (Decree Law No. 67 of 1980), the validity of the remainder of an agreement is not affected if only part of the agreement is rendered or deemed void.

4. CONFIDENTIALITY/PRIVACY

There is no statutory provision expressly governing confidentiality under either the Judicial Arbitration Law or the Civil and Commercial Procedure Law.

Nevertheless, in addition to remaining neutral and independent, the KMIAC rules stipulate that all parties, as well as the chief executive officer and the executive of the KMIAC, must maintain the confidentiality of all documents including any experts' reports, witness statements and all procedures subject to any express legal provisions to the contrary. Any documents and correspondence between the executive, the arbitrators and the parties must be destroyed six months after the rendering of the decision, unless a written request is made particularly in respect of any original documents.

The Judicial Arbitration Law prohibits the publication of an arbitral award, whether in whole or in part, unless the parties agree to such publication. The publication of any decision or judgment under the KMIAC rules is also prohibited without the prior written consent of the parties.

5. THE ARBITRATION TRIBUNAL

5.1. Appointment

Parties are free to appoint arbitrators and adopt any agreed procedures for such appointment. However, under the Civil and Commercial Procedure Law, the parties may appoint only an odd number of arbitrators in total. If the parties have failed to agree on the appointment of arbitrators, or if one or more arbitrators fail or decline to undertake their duties, then the court with original jurisdiction appoints the arbitrator(s) in accordance with the number of arbitrators agreed by the parties, subsequent to an application submitted by one of the parties. The application is submitted according to the ordinary procedures for filing a claim with the courts.

Under the Judicial Arbitration Law, an arbitration council is appointed comprising of three members of the judiciary and two arbitrators selected by each party to a dispute from a list of arbitrators prepared by the Arbitration Department in the Court of Appeal (**Department**). If a party fails to appoint the arbitrator within ten days, then the Department undertakes their appointment.

Under the KMIAC rules, the number of arbitrators are three in total unless the parties agree otherwise, such agreement being one arbitrator or an odd number of arbitrators. If a party fails to appoint an arbitrator, then the chief executive officer of the KMIAC, including the executive of the KMIAC, appoints one or more arbitrators in accordance with the parties agreement.

5.2. Jurisdiction - kompetenz-kompetenz

Under the KMIAC rules, the arbitrators only have jurisdiction to determine their jurisdiction. A party disputing the jurisdiction of the arbitrators may do so by a deadline not exceeding that for the submission of the defence or response to a counterclaim.

If the parties agree to arbitration under the Judicial Arbitration Law, or if they agree to an arbitration clause that fails to specify an arbitral body, the arbitration council of the Kuwait Court of Appeal will assume jurisdiction to arbitrate civil and commercial disputes. Arbitration councils will also assume jurisdiction over disputes arising between governmental bodies (e.g. ministries and public authorities) or between such bodies and state-owned companies, as well as disputes between individuals or corporate entities and governmental bodies or state-owned companies.

5.3. Powers

(a) Emergency powers

The Civil and Commercial Procedure Law excludes "urgent matters" from arbitration unless otherwise agreed by the parties. Therefore, the arbitrators appointed pursuant to the Judicial Arbitration Law may decide "urgent matters" where agreed by the parties.

(b) Interim relief

The KMIAC rules endow the arbitrators with the authority to issue any preliminary or interim relief, order or arrangement upon request by a party. Nonetheless, a request from the judicial authorities for such relief or arrangements is not deemed to contradict the agreement to arbitrate or a deviation there from under the KMIAC rules.

6. THE ARBITRATION PROCEEDINGS

6.1. Process

The arbitration process varies, depending on the legal framework governing the arbitration, particularly in respect of timing. Under the Civil and Commercial Procedure Law, the tribunal appointed pursuant to the agreement sets the date and place of the first hearing, in addition to the deadline for submitting claims and supporting documentation, within a maximum of 30 days from the date it accepts the appointment. Parties may also agree to adopt other procedures.

Under the Judicial Arbitration Law, an application for arbitration is submitted to the Department which subsequently records it in the relevant schedules. During the course of the following three days, the application is submitted to the head of the tribunal (the most senior member of the judiciary) to proceed with the appointment of the remaining arbitrators. The head of the tribunal assesses the fees of arbitrators chosen by the parties, such fees to be deposited in the arbitrator's account (if not already settled) within the following ten days. The head of the tribunal also schedules the date of the first hearing within the following five days, including the deadline for submitting the parties' claims and supporting documentation.

The KMIAC rules set out more detailed requirements regarding the process, including timelines that vary from both the provisions under the Civil and Commercial Law and the Judicial Arbitration Law. For example, in respect of timing, the respondent is notified of the claim within seven days of the applicant's submission and payment of the application fees. Parties may also agree to adopt other procedures than those set out under the KMIAC rules so long as they do not contradict with the jurisdiction of the KMIAC or the authorities of the tribunal.

6.2. Evidence

The Civil and Commercial Procedure Law and the Judicial Arbitration Law do not set out specific rules regarding evidence. Under the KMIAC, the burden of proof lies with any party that wishes to substantiate a claim or defence. The tribunal may request the assistance of one or more experts in respect of technical matters. In respect of the hearing of witness testimony, the KMIAC rules provide that a party requesting the hearing of witness testimony must provide the names and addresses of witnesses, in addition to the issues about which, and language in which, the witness will testify. Witnesses are given notice to appear before the hearing 15 days prior to the hearing date. Witness testimony is orally heard in closed sessions, and the tribunal may also request that witness testimony is provided by way of affidavit. The tribunal may also request that witnesses swear an oath in accordance with applicable laws.

6.3. Privilege

The Civil and Commercial Procedure Law, the Judicial Arbitration Law and the KMIAC rules do not set out any express rules relating to privilege including any rules that limit the tribunal's authority to order the disclosure of documentary evidence.

6.4. Disclosure

The KMIAC rules expressly obligate the parties to disclose any and all documentary evidence supporting any of their claims. The tribunal may request any party to submit to the tribunal or to the other party a summary of any documents or evidence, during the course of the proceeding, to support the facts in

dispute as set out in that party's claim or response in addition to any evidence that may be in the possession of that party.

6.5. The Award

Awards must be in writing and include a summary of the arbitration agreement, statements of the parties, their documents, reasons for, and the text of the award, as well as the date and place of issue, and names and signature of the arbitrators. Under the KMIAC rules, the award must also include the nationalities of the arbitrators, names and addresses of the parties and a copy of the arbitration agreement. The reasons for the award may be excluded if the parties agreed the same.

Unless the parties agree otherwise, the award must be issued in Arabic under both the provisions of the Civil and Commercial Procedure Law and KMIAC rules. If the award is issued in a language other than Arabic, then a certified translation is also required.

7. ROLE OF THE COURT

The Civil and Commercial Procedure Law maintains the jurisdiction of the Kuwaiti courts to decide matters that arise during the proceedings or that are beyond the jurisdiction of the arbitrator. Such matters include, for example, issues of document forgery, criminal procedures or acts, the provision of documents in the possession of a party, or matters relating to the absence of witnesses or if they decline to provide responses.

It is noteworthy that Kuwaiti courts may also assume jurisdiction to review disputes under the Civil and Commercial Procedure Law, if the dispute is submitted before the courts and the party is a Kuwaiti national or foreign national residing in Kuwait despite any choice of law or seat, particularly if the subject matter is strictly related to, or relevant for, Kuwait. This is particularly the case where the subject matter of the dispute is deemed to concern national security, public policy or welfare, or the public interest at large. Kuwaiti courts may also review a case if a party submits the dispute to the Kuwaiti courts for failure by the arbitrators to render their decision by the agreed or default deadline under the Civil and Commercial Procedure Law.

8. APPEALS

Arbitral awards are final and not subject to appeal, unless the parties have agreed otherwise. In this instance, the appeal is made to the Court of First Instance acting in an appellate capacity to review the award pursuant to the procedural rules applying to appeal court judgments within 30 days of the award date. However, the award cannot be appealed if the arbitrator or tribunal were also authorised to act as *amiable compositeur*, the value of the claim does not exceed KWD 1,000, or the award was issued pursuant to arbitration under the Judicial Arbitration Law.

Under the Judicial Arbitration Law, an appeal of the arbitral award may be made within 30 days to the Court of Cassation. This appeal is subject to a deposit of KD 100 (approximately US$300) as security.

9. RECOGNITION AND ENFORCEMENT

9.1. National Awards

A valid arbitral award issued in Kuwait is generally enforceable by the Kuwaiti courts. An award properly issued pursuant to arbitration under the Judicial Arbitration Law is automatically enforceable. Other arbitral awards issued in Kuwait are enforceable pursuant to an order by the chief justice of the court in which a relevant party files the award.

9.2. Foreign Awards

Kuwait is party to the New York Convention 1958 (**NYC**) to which it acceded on 28 April 1978; however, the enforcement of arbitral awards issued in a non-signatory state is subject to reciprocity. Enforceability of arbitral awards rendered in NYC member states is subject to the following: the subject matter of the award is one that can be arbitrated under Kuwaiti law, and the award can be enforced in the jurisdiction in which it was rendered. Enforcement may nevertheless be refused on public policy grounds which is not always based on a specific, express legal standard, and remains at the discretion of the Kuwaiti courts. The courts operate under a civil law system and are not bound by court precedent.

A request for enforcement is submitted to the manager of the Execution Department who reviews its eligibility for enforcement including its enforceability in the jurisdiction of origin and its conformity with Kuwaiti public order and policy.

10. COSTS, FUNDING AND INTEREST

Costs of arbitration will depend on whether the parties agree to ad hoc or institutional arbitration. The costs of an ad hoc arbitration are subject to party agreement. In an institutional setting, arbitration under KMIAC, for example, is subject to arbitration fees estimated by the KMIAC executive on an ad valorem basis (based on the value of the dispute), including counterclaims (if any), and in accordance with an established schedule of fees.

There are no legal fees for the tribunal deciding disputes under the Judicial Arbitration Law. However, each party is obligated to pay fees for its selected arbitrator. These fees are reviewed by the head of the tribunal.

11. THE FUTURE

There are no anticipated changes to the legislative framework currently in place in Kuwait with respect to arbitration.

12. INVESTOR STATE ARBITRATIONS

Kuwait signed the International Centre for Settlement of International Disputes Convention on 9 February 1978 and ratified it on 2 February 1979. To date, Kuwait has signed approximately 80 bilateral investment treaties (**BITs**) although not all these treaties are in force. In addition, Kuwait is signatory to more than ten multi-party investment treaties with investment provisions, such treaties being part of a GCC or Arab framework. Arbitration provisions in respect of bilateral investment treaties tend to be more or less standard. In some instances, arbitration provisions permit an investor to resort to the Kuwaiti courts for interim relief to preserve rights and interests if Kuwait is a party to the dispute. The Kuwaiti courts are not bound by case precedent, it is difficult to ascertain a trend regarding the Kuwaiti courts' position with respect to a state immunity defence; court decisions will likely be based on the specific facts of each case.

SAUDI ARABIA

This chapter was written by Mohammed Abdulrahman Alkhliwi and John Barlow

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Royal Decree No M/34, dated 24/05/1433H (corresponding to 16/04/2012G), approved the new arbitration law for the Kingdom of Saudi Arabia which came into effect in July 2012. It allowed the parties to arbitration to tailor their arbitration proceedings by explicitly recognising their right to adopt institutional arbitration rules. It has also recognised domestic and international arbitration.

Saudi Arabia signed and executed several international conventions and bilateral agreements in connection with arbitration and investment. One of the main challenges relating to arbitration in Saudi Arabia is the strict adherence to Sharia law rendering the enforcement of foreign arbitral awards an uncertain prospect despite Saudi Arabia's obligations under international conventions.

2. ARBITRAL INSTITUTIONS

- Saudi Centre for Commercial Arbitration
- GCC Commercial Arbitration Centre
- Riyadh and Jeddah Chambers of Commerce

3. ARBITRATION AGREEMENT

According to Article 9 of the Saudi Law of Arbitration, the agreement to arbitrate may (i) either be concluded prior to the occurrence of a dispute in the form of a separate agreement or stipulated for within the agreement, or (ii) may be concluded after the occurrence of a dispute, even if the dispute was subject of an action before the competent court.

The agreement shall determine matters to be arbitrated and shall be in writing, otherwise, it shall be void.

The agreement to arbitrate shall be deemed written, if it is included in (i) a document executed by both parties, (ii) an exchange of documented correspondence, telegrams or any other electronic or written means of communication, (iii) a reference in a contract or a mention therein of any document containing an arbitration clause, and (iv) any reference in the contract to the provision of an international convention, a model contract or any other instrument containing an arbitration clause, if such reference clearly deems such clause as part of the contract.

An arbitration agreement may only be concluded by a natural person, or its assignee if any, or a legal entity having legal capacity to dispose of their rights.

Unless otherwise provided for under the law, government entities may not conclude arbitration agreements except with the approval of the Prime Minister.

The Saudi Law of Arbitration is silent regarding the enforceability of unilateral/hybrid clauses. However, Saudi courts often refuse to enforce agreements conferring one of the parties a unilateral right to arbitrate.

3.1 Governing law

According to Article 2 of the Saudi Law of Arbitration, arbitration will not apply to personal status disputes and to matters not subject to reconciliation (bankruptcy, liquidation, etc.).

Pursuant to Article 5 of the Saudi Law of Arbitration, if the parties to arbitration have mutually agreed to subject their relationship to the provisions of any instrument (international convention, model agreement, etc.), the provision of such instrument, those related to arbitration, shall apply provided they do not conflict with the provisions and principles of Islamic Sharia law.

3.2 Choice of law/seat

Based on Article 2 of the Saudi law of Arbitration, regardless of the nature of the legal relationship which is the subject of the dispute, and without prejudice to the provisions of international conventions that the Kingdom is party to and that of Islamic Sharia, the provisions of the Saudi Law of Arbitration shall apply to any arbitration taking place in Saudi or to any international commercial arbitration taking place abroad if the parties have agreed to subject such arbitration to the aforementioned law.

The parties to arbitration may agree on the seat of arbitration whether within or outside the Kingdom. In the absence of such agreement, the seat shall be determined by the arbitral tribunal while taking into consideration the circumstances of the case and the convenience of both parties, and without prejudice to the ability of the arbitral tribunal to convene in any other place as it deems appropriate in order to undertake deliberation, hear witnesses, experts or parties, to inspect the place of dispute, and to verify and review documents.

Subject to the provisions of public order and Sharia in the Kingdom, the arbitration tribunal shall apply to the subject matter of dispute rules agreed upon by the parties. When such agreement refers to the law of a certain country, and unless provided otherwise, then the substantive provisions of such law shall apply excluding the rules relating to the conflict of laws.

The arbitral tribunal shall apply the substantive rules of the laws it deems most appropriate and connected to the subject matter of dispute, whenever the parties fail to agree on the statutory rules to be applied.

The arbitral tribunal shall apply the terms of the contract subject to dispute, while taking into consideration prevailing customs and practices applicable to the transaction as well as previous dealings between the parties.

The arbitral tribunal may rule on the dispute in accordance with the rules of equity and justice if the parties to arbitration expressly agreed to authorise the arbitral tribunal to settle the dispute amicably.

3.3 Mandatory/non-mandatory provisions

The mandatory/non-mandatory provisions are set out in section 3.2 above.

3.4 Severability

Article 21 of the Saudi Law of Arbitration expressly addresses the principle of severability of the arbitral clause/agreement from the main agreement. An arbitration clause inserted into a main agreement shall be regarded as an agreement independent of the other terms of the main agreement and the nullification, revocation or termination of the main agreement, will not entail the nullification of the arbitration clause, if such clause is valid.

The arbitrator's appointment might be challenged on the same grounds as judges recusal for reasons arising or becoming known after their appointment.

4. CONFIDENTIALITY/PRIVACY

The Saudi Law of Arbitration is silent as to the confidentiality of the arbitral proceedings. However, according to Article 43 of the Law of Arbitration, the arbitral award shall not be published in whole or in part except with the written approval of both parties. Practically, privacy and confidentiality issues do not arise.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The arbitration tribunal will be based on one or several arbitrators, provided the number is an odd number, otherwise, the arbitration shall be void.

An arbitrator must be (i) fully qualified, (ii) of good conduct and reputation, and (iii) the holder of at least a degree in Sharia law.

If the arbitration tribunal is constituted of several arbitrators, it would be sufficient for the abovementioned conditions to be met by the president of the tribunal.

The parties to the arbitration may agree on the appointment of the arbitrators, otherwise:

- if the arbitral tribunal is composed of one arbitrator, the competent tribunal shall appoint such an arbitrator; or
- if the arbitral tribunal is composed of three arbitrators (or more), each party shall appoint one arbitrator and the two appointed arbitrators must appoint the third arbitrator to preside over the arbitration tribunal. If a party fails to appoint their arbitrator or if the two appointed arbitrators fail to appoint the third arbitrator, within 15 days from receipt of a petition to this effect or from the appointment of the last arbitrator as the case may be, then the competent court shall appoint the arbitrator within 15 days from the date of submission of the petition.

If the parties to arbitration fail to agree on the procedures for appointment of arbitrators, or if one party thereof fails to adhere to such procedures, or if two appointed arbitrators fail to agree on a matter that requires their agreement, the competent court will, pursuant to a petition filed by a party, take the necessary actions and measures unless the arbitration agreement provides for a specific method for accomplishing such action or measure.

The arbitrator must have no interest in the dispute. Accordingly, it shall, from the time of their appointment and throughout the arbitration process, disclose to the parties in writing any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

An arbitrator may be challenged on the same grounds as judicial recusal, even if none of the parties requested their recusal.

5.2 Jurisdiction - kompetenz-kompetenz

Pursuant to Article 20 of the Law of Arbitration, the tribunal shall be entitled to decide on any matter in connection with its jurisdiction, including those based on the absence of an arbitration agreement, expiry or nullity of such agreement or the non-inclusion of the matter subject of dispute in the agreement.

If the tribunal decided to dismiss the pleading or the claim, such a claim may only be challenged by filing an application for annulment of the arbitral award.

5.3 Powers

(a) Emergency powers

No emergency powers are provided for under Saudi Law of Arbitration.

(b) Interim relief

The competent court may, upon the request of either party, order provisional or interim measures prior to commencing arbitration proceedings or during the arbitration process upon the tribunal's request. Such measures may be reinstated in the same manner, unless otherwise agreed by the parties.

The parties to an arbitration may agree that the tribunal shall, upon the request of either party, order either party to take, as it deems fit, any interim or precautionary measures required by the nature of the dispute. The tribunal may require the party requesting such measures to provide sufficient financial guarantee for the execution of such measures.

On failure by a party to execute such measures, the tribunal may, upon the request of the other party, authorise said party to take necessary measures for its execution, without prejudice to the right of the tribunal or the other party to request enforcement of such measure before the competent authority.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

The parties may agree on the procedures to be followed by the tribunal and they should be entitled to subject such proceedings to the rules and regulations of any organisation, agency or arbitration centre within the Kingdom or abroad, provided said rules are not in conflict with Islamic Sharia law. In the absence of such agreement and subject to the provisions of the law and Sharia law, the tribunal may decide the arbitration proceedings it deems fit.

Unless agreed otherwise, arbitration proceedings will commence on the day a party's request for arbitration is received by the other party.

Parties to arbitration must be treated equally and must be allowed an equal opportunity to present their case and defence.

Arbitration must be conducted in the Arabic language, unless otherwise decided by the tribunal, or agreed between the parties. Such agreement will apply to all instruments, notifications, notices, decisions and awards issued throughout the arbitration process.

According to Article 40 of the Law of Arbitration, the arbitral tribunal must render the final award ending the dispute within the period agreed upon

between the parties. In the absence of such an agreement, the award must be rendered within 12 months from the date of commencement of the arbitral process. The tribunal may extend such period provided that the extension does not exceed six months, unless otherwise agreed between the parties. If the award is not rendered within the period, either party may request from the competent court to specify an additional period or to terminate the arbitration proceeding, in which case either party may file the case before the competent court.

6.2 Evidence

The arbitration tribunal may, as it deems fit, seek the assistance of the competent entity in the arbitration proceedings, such as calling an expert or a witness, ordering submission or review of a document or a copy thereof, as well as the undertaking of any other proceeding, without prejudice to the right of the tribunal to conduct said proceeding independently.

The tribunal may appoint expert(s) to provide written and/or oral reports on certain issues as determined by the tribunal to be recorded in the minutes of the hearing and notified to both parties. Each party must provide the expert(s) with information related to the dispute and enable him to examine and inspect any documents, goods or property in connection with the dispute as may be required.

The Law of Arbitration does not expressly address proceedings and regulations regarding the admission and presentation of witness testimony.

6.3 Privilege

The law is silent as to rules applicable to privilege, and the parties should therefore presume that it does not apply to the Kingdom of Saudi Arabia.

6.4 Disclosure

The IBA Rules on The Taking of Evidence are not followed. However, the parties may mutually agree on the adoption of the Rules.

The tribunal may, as it deems fit, seek the assistance of the competent entity in the arbitration proceedings, such as calling an expert or a witness, ordering submission or review of a document or a copy thereof, as well as the undertaking of any other proceedings without prejudice to the right of the tribunal to conduct said proceeding independently.

6.5 The Award

Injunctive remedies as judicial remedies in the Kingdom of Saudi Arabia are only available in certain limited circumstances. Damages for loss of profits, consequential damages or other speculative damages are generally not awarded in the Kingdom of Saudi Arabia by the courts or judicial committees, and only actual, direct and proven damages are so awarded.

If the tribunal is constituted of more than a single arbitrator, the award will be rendered by majority votes of its members after deliberation held in secrecy. If it is impossible to attain a majority, the tribunal may appoint a casting arbitrator within 15 days. Otherwise, the competent court will appoint the casting arbitrator.

If the tribunal is authorised to settle the dispute amicably, the award must be rendered unanimously.

The award must be reasoned and rendered in writing signed by the arbitrators. In case of multiple arbitrators, the signature of the majority of the arbitrators may be sufficient provided that the minutes refer to the grounds on which the minority refused to sign.

The arbitration award will include the following:

- date and place of issuance of the award;
- names and addresses of the parties;
- names, addresses, nationalities and capacities of the arbitrators;
- a summary of the arbitration agreement;
- a summary of the statements, requests, pleadings and documents presented by each party;
- a summary of the expert's report, if any;
- the pronouncement of the judgment; and
- the arbitrators fees, costs of arbitration and the distribution thereof between the parties.

7. ROLE OF THE COURT

In the course of the arbitration proceedings, the competent court will have jurisdiction to decide upon any matter that is outside the jurisdiction of the tribunal or in connection with any submitted document that is challenged for forgery or for any other criminal act.

Competent courts may interfere in case of failure by the parties to appoint their respective arbitrators or the third arbitrator as referred to in section 5.1 above.

If the parties to arbitration fail to agree on the procedures for appointment of arbitrators, or if one party thereof fails to adhere to such procedures, or if two appointed arbitrators fail to agree on a matter that requires their agreement, the competent court will, pursuant to a petition filed by a party, take the necessary actions and measures unless the arbitration agreement provides for a specific method for accomplishing such action or measure.

The competent court may, upon the request of either party, order provisional or interim measures prior to commencing arbitration proceedings or during the arbitration process upon the arbitral tribunal request.

If the award is not rendered within the time limit provided for under section 6.1, either party may request from the competent court to specify an additional period or to terminate the arbitration proceedings. In which case, either party may file the case before the competent court.

The competent court may appoint the casting arbitrator as set out at section 5.1 above.

The competent court has the power to oversee and decide on applications for annulment of arbitral awards.

8. APPEALS

Arbitral awards rendered in accordance with the Saudi Law of Arbitration are not subject to any recourse or any challenge except for a recourse for annulment filed in accordance with the provision of the aforementioned law.

A recourse for annulment is only allowed in the following cases:

- in the absence of an arbitration agreement, or if such agreement is void, voidable or expired;
- if either party, at the time of execution of the arbitration agreement, lacked legal capacity pursuant to the law governing their capacity;
- if either party was unable to exercise their right of defence due to improper notification of the appointment of the arbitrator or of the arbitration proceedings or for any other reason beyond that party's control;
- if the award excluded the application of any rules which was agreed by the parties to apply to the subject of the dispute;

- if the composition of the arbitral tribunal or the appointment of the arbitrators was carried out in a manner violating the law or the agreement of the parties;
- if the arbitral award ruled on matters not included in the arbitration agreement. Nevertheless, if it is possible to separate the parts of the award ruling on matters not subject to arbitration from that relating to parts that are subject thereto, then the annulment shall only apply to the parts that are not subject to arbitration; or
- if the tribunal failed to observe conditions required in the award in a manner that affected its substance, or if the award was given based on void arbitral proceedings that affect it.

The competent court overseeing a recourse for annulment will on its own volition nullify an award that violates the provisions of Islamic Sharia law or public policy in the Kingdom, or the agreement of the parties, or if the subject of the dispute cannot be referred to arbitration.

The competent court will review and consider the recourse for annulment in any of the aforementioned cases without inspecting the facts and subject matter of the dispute.

The Court of Appeal that is originally competent to decide the dispute will have jurisdiction to consider any recourse for the annulment of the arbitration award as well as on all matters referred to the competent court in pursuance to the Saudi Law of Arbitration. As for international commercial arbitration within or outside the Kingdom, the competent Court of Appeal in the City of Riyadh will have jurisdiction, unless the parties have agreed to refer to another Court of Appeal within the Kingdom.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

An arbitration award issued locally is enforced by adopting the following process:

Once the award is rendered, the tribunal will deposit the original award or a signed copy thereof in its original language with the competent court within 15 days of its date of issuance, along with an Arabic translation of the award attested by an accredited body if the award was not rendered in Arabic.

According to Article 55 of the Law of Arbitration, an order to enforce the arbitration award in accordance with the provision of the Saudi Law of Arbitration may not be issued except after verification of the following:

- the award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide upon the subject of the dispute in the Kingdom of Saudi Arabia;
- the award does not violate the provisions of Sharia or public policy in the Kingdom. Otherwise, if the part that violates Sharia or public policy might be separated, then an order for enforcement of the part not violating the aforementioned provision may be issued; and
- the award is properly notified to the party against whom it is rendered.

9.2 Foreign Awards

The Kingdom of Saudi Arabia is a signatory to the NYC; however, it invoked a "reciprocity reservation" so as to limit its recognition of awards made in foreign jurisdictions. In principle, a foreign arbitral award may be submitted to the relevant Saudi courts which will enforce all of such arbitral award or a part thereof provided that the award is not inconsistent with

Saudi Arabian laws and regulations. However, the ability to enforce any foreign arbitral award in Saudi Arabia remained, until recently, difficult given the prevailing legal regime and limitations under applicable laws and notably the Islamic Sharia law. In reality, any foreign arbitral award had to be ratified by the Board of Grievances (the commercial court in Saudi Arabia) which used to undertake a full merits review (essentially a retrial) to ensure that the award does not violate any of the Sharia law principles as determined subjectively by the presiding Judge, without the benefit of any judicial precedent.

This process – including all documents, submissions, and oral presentations – had to be in Arabic and comply with all other procedural requirements imposed by Saudi courts. Historically, it used to take years to complete this judicial review and subsequent appeal and rarely have we seen foreign awards being enforced.

Things have changed recently, with the recent enactment of a new "enforcement law". The new Enforcement Law abandons the old system of enforcement proceedings before the Board of Grievances and entrusts enforcement to an Enforcement Department/Judge. The procedure before a judge specialised in the enforcement of such awards and judgments aims to be smoother and faster.

While the enforcement judge is still required to ensure compliance of the award with the Islamic Sharia principles, they are encouraged to limit their review to specific elements of the award/judgment. The enforcement judge would enforce a foreign arbitral award if (i) the award was rendered following proceedings in compliance with the requirements of due process, (ii) the award is in final form as per the law of the seat of the arbitration, (iii) the award does not contradict a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in KSA, and (iv) the award does not contain anything that contradicts Saudi public policy. The enforcement judge has to ensure of the reciprocity principle as well. In short and in theory, the new Enforcement Law aims to guarantee that the merits of the dispute will not be revisited.

Note however, that the new Enforcement Law is not yet fully tested and is currently being applied inconsistently.

In all cases, the request for enforcement of a foreign arbitral award must be accompanied by the following:

- the original award or an attested copy thereof;
- a true copy of the arbitration agreement;
- an Arabic translation of the award attested by an accredited body, if the award is not issued in Arabic; and
- a proof of deposit of the award before the competent court.

10. COSTS, FUNDING AND INTEREST

Payment of any interest of whatever kind is prohibited under Saudi and Sharia laws and therefore an award providing for the payment of interest or for any damages (such as punitive and exemplary damages) not permissible under Sharia law will not be enforced. We note, however, that such unenforceability would not, of itself, cause any other valid obligation under the award to become unenforceable.

According to Article 42 of the Saudi Law of Arbitration, the arbitration award will determine inter alia the arbitrators' fees, costs of arbitration and their distribution between the parties. However, parties to the arbitration are normally able to recover fees and/or costs incurred.

Arbitral awards are not subject to tax.

11. THE FUTURE

In July 2014, the Council of Saudi Chambers, in coordination with the Minister of Commerce and the Minister of Justice, announced the formation of the board of the Saudi Centre for Commercial Arbitration to operate under its umbrella following the issuance of the decision of the Saudi Council of Ministers to this regard.

12. INVESTOR STATE ARBITRATIONS

Saudi Arabia is party to multiple international and bilateral conventions including the following:

- 1952 Arab League Convention on the Enforcement of Judgments and Arbitral Awards;
- 1983 Riyadh Convention on Judicial Cooperation between States of the Arab League; and
- Washington Convention on the Settlement of Investment Disputes 1965 (**ICSID**).

SINGAPORE

This chapter was written by Paul Aston, Chanaka Kumarasinghe and Suzanne Meiklejohn

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Singapore is fast growing as a centre for international arbitration and offers a challenge to other established centres, such as London, Paris, New York and Stockholm. Singapore is recognised as one of the top five preferred seats for arbitration. The laws which govern domestic and international arbitration in Singapore are the Arbitration Act and International Arbitration Act (**IAA**), respectively.

The IAA adopts the UNCITRAL Model Law on International Commercial Arbitration (the **Model Law**) with some modifications, giving it the force of law in Singapore.

2. ARBITRAL INSTITUTIONS

The main international arbitration institution is the Singapore International Arbitration Centre (**SIAC**), which is now a world leader.

The SIAC is preferred for Singapore seated arbitrations, and recorded 452 new cases in 2017, a 32 per cent increase in cases filed in 2016, amounting to a total claim value of US$$4.07 billion (SGD5.44 billion).[1]

The SIAC is also known as being a forward-looking and dynamic institution. The SIAC recently released the first edition of its Investment Arbitration Rules (**SIAC IA Rules 2017**), a specialised set of rules dealing with the conduct of international investment arbitration, which came into effect on 1 January 2017. In addition, the SIAC announced on 19 December 2017 its proposal on a cross-institution consolidation protocol, which envisages the consolidation of arbitral proceedings subject to different institutional arbitration rules.[2]

1 http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf

2 http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol

Since opening an office in Singapore over 25 years ago, HFW has forged close links with the Singapore arbitration community, and particularly SIAC, and has historically sponsored the SIAC Congress, a premier arbitration event, not just in Asia but also globally.

3. ARBITRATION AGREEMENT

For an arbitration agreement to be valid under Singapore law, the parties must have agreed to submit to arbitration all disputes which arise between them, in respect of a defined legal relationship, whether contractual or not (s.2A IAA). This agreement must be in writing.

The Singapore law requirement for an arbitration agreement to be "*in writing*" can be satisfied by electronic communication, or by reference to a separate document containing a written arbitration agreement. Likewise, an orally concluded arbitration agreement is considered "*written*" if its content is recorded in any form.

"Asymmetric" or "unilateral" clauses (providing a unilateral option for one party to commence proceedings in one of several jurisdictions) are valid and enforceable in Singapore.

3.1 Governing law

There is a presumption of arbitrability in Singapore, so long as the dispute falls within the scope of an arbitration agreement (s11 IAA). This presumption may be rebutted by showing that: (i) the Singapore parliament intended to preclude a particular type of dispute from being arbitrated; or (ii) it would be "*contrary to public policy*" to permit the dispute to be resolved by arbitration.[3]

3.2 Choice of law/seat

Where the *lex arbitri* (procedural law) is determined to be Singapore law, Singapore law will usually govern: (i) the capacity of the parties to enter into an arbitration agreement, (ii) the existence and performance of the arbitration agreement, and (iii) the formation and authority of the arbitral tribunal.

The substantive dispute will be decided in accordance with the rules of law chosen, expressly or impliedly, by the parties;[4] in default of this it will be determined according to Singapore's conflict of law rules (i.e. the "closest and most real connection" test).

Any governing rules of law chosen by the parties will be deemed a direct reference to that legal system's substantive rules of law.

3.3 Mandatory/non-mandatory provisions

The provisions of Part II of the International Arbitration Act (Cap 143A) and the Model Law are mandatory provisions, and cannot be avoided by the parties (s15A(1) IAA), and include provisions relating to the enforcement, setting aside and/or appeal of the award.

3.4 Severability

In Singapore, a decision by the arbitral tribunal that the contract is null and void will not void the arbitration agreement.

3 Tomolugen Holdings Ltd and another v Silica Investors Ltd [2016] 1 SLR 373

4 Article 28 of the UNCITRAL Model Law, First Schedule of the International Arbitration Act (Cap 143A).

4. CONFIDENTIALITY/PRIVACY

It is usually an implied term under Singapore law that arbitral proceedings and documents arising there from will be regarded as confidential.[5] This obligation will normally bind the parties to the arbitration. It is however unclear whether this contractual obligation of confidence in Article 28 of the UNCITRAL Model Law, First Schedule of the International Arbitration Act (Cap 143A) would extend to experts or witnesses to an arbitration, or a selected arbitral institution, without these third parties' consent.

Arbitral awards may be disclosed in specified circumstances, such as where disclosure is required for the enforcement of the parties' rights embodied in such award (Rule 39.2 of the SIAC Rules 2016). Commercial convenience is unlikely to fall within this exception.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

The appointment procedure in Singapore is subject to agreement between the parties and any institutional rules that apply.[6]

Where the parties have not agreed the number of arbitrators, the default position is that the tribunal will be formed of a sole arbitrator (s9 IAA), to be agreed between the parties, or in default appointed by the President of the Court of Arbitration of the SIAC, if a SIAC arbitration (s8 IAA).

Under the UNCITRAL Model Law (art.12(2)), an arbitrator's appointment can only be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if the arbitrator does not possess the qualifications agreed between the parties. In this regard, an arbitrator is under a duty to disclose any potential conflicts of interest and/or lack of qualification.

A party who intends to challenge an arbitrator must send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of being aware of the constitution of the tribunal. If such challenge fails, the challenging party may request, within 30 days of receiving notice of the decision rejecting the challenge, the Singapore High Court to decide on the challenge.

5.2 Jurisdiction - kompetenz-kompetenz

Under the UNCITRAL Model Law (art.16(1)), a tribunal may rule on its own jurisdiction (kompetenz-kompetenz), including any objections with respect to the existence or validity of the arbitration agreement.

A plea that the tribunal does not have jurisdiction should at its latest be raised with the statement of defence, although the tribunal has a discretion to admit a later plea. Jurisdiction can be determined either as a preliminary issue, or as part of the substantive award.

Within 30 days of the tribunal's decision on jurisdiction, if made as either as a preliminary question or rejecting its jurisdiction, any party may appeal the decision to the Singapore High Court.

The Singapore High Court may also set aside an arbitral award within three months of the applicant receiving the award if the applicant party can show the arbitration agreement is not valid under the relevant applicable.

5 Myanma Yaung Chi Oo Co Ltd v Win Win Nu [2003] SGHC 124; AAY v AAZ [2011] 1 SLR 1093.

6 Article 11(2) of the UNCITRAL Model Law, First Schedule of the International Arbitration Act (Cap 143A).

5.3 Emergency Powers and Interim Relief

(a) There is nothing in the IAA which provides for emergency powers. However, in cases of urgency, or with the permission of the tribunal/agreement of the parties, the Singapore High Court is able to order most of the interim measures exercised by the tribunal (s.12A(2)-(5) IAA).

The SIAC Rules 2013 and 2016 also provide for the appointment of an "*emergency arbitrator*" pursuant to an emergency procedure, who on average render their awards within 2.5 days.

(b) A tribunal has the power to make orders or give directions to any party for:

- security for costs;
- discovery/disclosure of documents and interrogatories;
- giving of evidence by affidavit;
- preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute;
- taking samples from, or any observation to be made of, or experiment conducted upon, any property which is or forms part of the subject matter of the dispute;
- the preservation and interim custody of any evidence for the purposes of the proceedings;
- securing the amount in dispute;
- ensuring that any award which may be made in arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- an interim injunction or any interim measure.

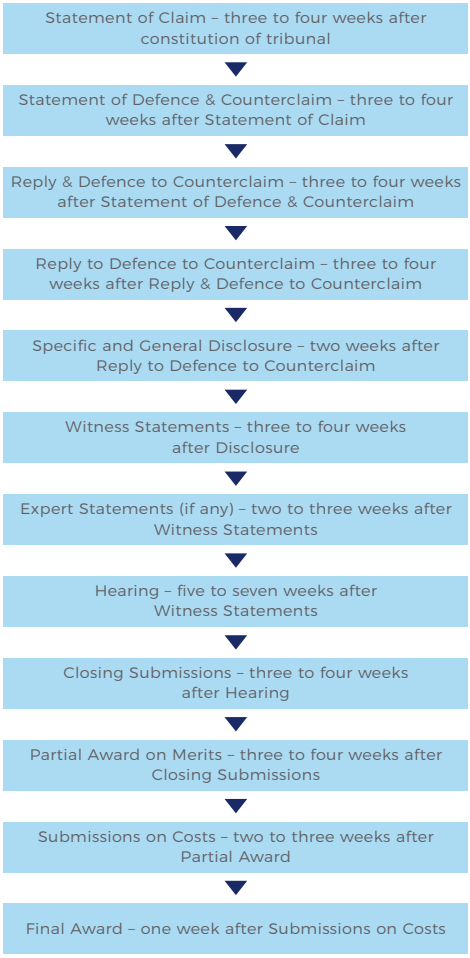
6. THE ARBITRATION PROCEEDINGS

6.1 Process

Save where otherwise agreed by the parties, a tribunal is afforded a wide discretion to "*conduct the arbitration as it considers appropriate*," pursuant to Article 19(2) of the UNCITRAL Model Law.

Service of statements of claim and defence will be in accordance with the institutional rules chosen, or as agreed by the parties, or determined by the tribunal, with any further submissions/evidence/hearings being determined at the tribunal's discretion.

Assuming there is to be an oral hearing, proceedings frequently can develop as follows:



The tribunal generally maintains a wide discretion as to the conduct of proceedings under both the SIAC Rules 2013 and 2016, unless it is decided that the SIAC expedited procedure applies, in which case a final award will need to be rendered within six months of the tribunal being constituted (unless exceptional circumstances necessitate the granting of a time extension).

6.2 Evidence

No specific rules of evidence (i.e. the IBA Rules on The Taking of Evidence in International Commercial Arbitration (IBA Rules)) apply unless expressly agreed by the parties or are ordered by the tribunal.

There are no laws, regulations or professional rules which apply to the production of written or oral witness testimony, unless otherwise agreed by the parties/ordered by the tribunal.

Under the SIAC Rules 2016, witnesses giving oral evidence may be questioned "*in such manner as the Tribunal may determine*". Written evidence may be presented as either a signed statement or sworn affidavit or "*any other form of recording*".

6.3 Privilege

The IAA is silent on the existence and treatment of issues of privilege. The SIAC Rules 2016 give the tribunal the power to "*determine any claim of legal or other privilege*".

Tribunals frequently elect to adopt the IBA Rules, and will exclude from evidence any document, statement or testimony which includes "*legal impediment or privilege under the legal or ethical rules determined by the tribunal to be applicable*."

6.4 Disclosure

There are no specific guidelines in the IAA on the nature of the documents that parties must disclose. Parties or tribunals commonly adopt the IBA Rules.

Generally, parties agree to disclose:

- documents in support of the party's case;
- documents which are relevant and material to the case, at the other party's request; and
- documents which the tribunal directs should be disclosed.

6.5 The Award

There are no express limits in the IAA on the types of remedies that are available in arbitration, save for those provided by the substantive or governing law of the dispute (i.e. punitive damages under English law).

In a recent Singapore High Court decision,[7] the court recognised the "*lacuna*" in Singapore procedural law on the tribunal's power to give permanent, as opposed to interim, injunctive relief (specifically, an anti-suit injunction). It was held however that where there was an arbitration clause providing for international arbitration in Singapore, the innocent party could seek a permanent anti-suit injunction under the Singapore Court's general injunctive jurisdiction. The award must be in writing and signed by the arbitrator(s) (or a majority, with the reason for any omitted signature). The award also must state the reasons upon which it is based (unless it is a consent award), as well as the date and place of the arbitration. After the award is made, a copy is to be delivered to each party.

7 R1 International Pte Ltd v Lonstroff AG [2014] 3 SLR 166.

7. ROLE OF THE COURT

The Singapore courts take a facilitative and supportive approach to arbitration.

"*...[T]he courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.*"

The Singapore High Court will intervene to assist arbitral proceedings in the following situations:

- S12A IAA provides that interim relief can be granted for:
  - giving of evidence by affidavit; the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute; samples to be taken from, or any observation to be made of or experiment conducted on, any property which is or forms part of the subject matter of the dispute; the preservation and interim custody of any evidence for the purposes of the proceedings; securing the amount in dispute; ensuring that any award made in the arbitration proceedings is not rendered ineffectual by dissipation of assets by a party; or for an interim juncture or any other interim measures.
- To issue subpoenas for witnesses to attend before the arbitral tribunal to testify; or for parties to produce documents.
- to enforce an arbitration agreement by granting a stay of court proceedings; to decide on a decision rejecting a challenge to an arbitrator/terminating the mandate of an arbitrator; to decide on appeals on jurisdictional rulings; and to decide challenges to arbitral awards.

8. APPEALS

A party can apply to have an award set aside by a court if any of the following apply:

- The arbitration agreement between the parties is not valid under the law governing that agreement; 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 their case; the award was made by an arbitral tribunal in excess of its authority; if there was procedural irregularity in the award, such that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with:
  - the agreement of the parties; or the UNCITRAL Model Law, in the absence of such an agreement.
- the award is in conflict with the public policy of Singapore; the subject matter of the dispute is not capable of settlement by arbitration under Singapore law; breach of the rules of natural justice in making the award by which the rights of any party have been prejudiced; the making of the award was induced by fraud or corruption.

Under the Singapore Rules of Court, an application to set aside an award must be made by originating summons (along with a supporting affidavit) which must contain the following:

- a statement of the grounds in support of the application; any evidence relied on by the applicant; and the arbitration agreement, the award and other documents relied on by the applicant.

The application must be made within three months from the date of receipt by the applicant of the award or the corrected award.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

Enforcement of arbitral awards made in Singapore by way of execution proceedings require leave of the court. In cases of urgency, *ex parte* applications (without notice) are permissible on such terms as may be imposed by the courts.

9.2 Foreign Awards

Singapore is a party to the New York Convention 1958 (**NYC**).

The party seeking to enforce a foreign award must produce to the court:

- the arbitration agreement; the duly authenticated/certified copy of the original award; information regarding the name and address of the person against whom enforcement is sought; the extent to which the award has not been complied with.

Under s31(2) NYC enforcement may be refused where:

- the party being enforced against did not have capacity under the applicable law to enter into the arbitration agreement at the time it was entered into; the arbitration agreement is not valid under the governing law/law of country where award was made; the party being enforced against was not given proper notice of the appointment of arbitration/arbitral proceedings, or was deprived an adequate opportunity to present their case; the award deals with a dispute beyond the scope of the submission to arbitration; the composition of the arbitral authority/ arbitral procedure was defective; the award has not yet become binding or has been set aside by a competent authority.

10. COSTS, FUNDING AND INTEREST

Arbitrators have a wide discretion to make an award as to costs (subject to any agreed/applicable institutional rules), but will generally follow the principle that "*costs follow the event*."

In calculating and apportioning costs, the tribunal is likely to take into account:

- the overall success of parties in their claims or on particular issues or at particular stages or in particular applications through the course of the arbitration; the conduct of the parties; the complexity of the case; the length of the proceedings; the reasonableness and proportionality of the costs.

Under SIAC (and ICC) arbitrations, arbitrator costs are assessed on an ad hoc basis, that is by reference to the amounts in dispute.

Interest may be payable on arbitral awards, simple or compound, from such date at such rate and with such rests as the tribunal considers appropriate.[8] Interest awards should be compensatory, not penal, and are usually awarded on the basis of the commercial rate that would have applied had the successful party had to borrow the money due and owing to them.[9]

Third party funding is now permitted in Singapore, and we expect to see an increasing number of arbitrations brought with the support of funders.

Contingency fee arrangements are not permitted under the Legal Profession (Professional Conduct) Rules 2015.

8 Section 20 of the International Arbitration Act (Cap 143A).

9 The Oriental Insurance Co Ltd v reliance National Asia Re Pte Ltd [2009] 2 SLR(R) 385.

11. THE FUTURE

The SIAC's Investment Arbitration Rules came into effect on 1 January 2017. These are rules specially tailored to address the unique issues present in the conduct of international investment arbitration. The SIAC has also shown itself to be a dynamic organisation by introducing a proposal on cross-institution consolidation protocol. The proposed adoption of such protocol would permit arbitral proceedings subject to different institutional arbitration rules to be consolidated, thereby facilitating the efficient and enforceable resolution of international commercial disputes.

12. INVESTOR STATE ARBITRATIONS

The ICSID Convention entered into force for Singapore on 13 November 1968. Singapore has over 30 bilateral treaties (BITs) in place.

Singapore allows awards to be enforced against sovereign state property where they arise from commercial and contractual matters.

Note: a version of this chapter has previously appeared in the Singapore chapter of the ICLG IA Guide

SWITZERLAND

This chapter was written by Michael Buisset, Sarah Hunt and William Hold

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Switzerland is one of the biggest centres of international arbitration in the world, with some domestic curial rules that make Swiss seat arbitrations particularly attractive to parties. The ICC has recently published statistics, which show that more ICC arbitrations were held in Switzerland than in the UK, or indeed any country other than France, where the ICC is based (according to Issue 2 of the ICC Dispute Resolution Bulletin 2017, 96 arbitrations were held in Paris; 65 in London; 54 in Geneva; and 28 in Zurich in 2016). Switzerland has a long history of hosting institutional and ad hoc arbitrations due to its traditions of neutrality, its location, discretion and judicial non-interference and a strong international outlook due to the presence of various international organisations.

2. ARBITRAL INSTITUTIONS

Arbitral tribunals seated in Switzerland that deal with a dispute, where at least one party has its residence or place of business outside Switzerland, are governed by the 12th chapter of the Swiss Private International Law Act (**PILA**), which contains 19 articles in total, which demonstrates Switzerland's unintrusive approach to arbitration. The parties are free to agree the arbitral procedure to apply and often parties choose to incorporate existing rules of procedure of specialised institutions.

Most institutional arbitrations in Switzerland are either administered by the ICC under the ICC Rules or by the Swiss Chambers' Arbitration Institution (**SCAI**) under the Swiss Rules. The Swiss Rules 2012 are based on the Swiss Rules 2004, which were in turn based on the UNCITRAL Arbitration Rules of 1976 and were drafted in order to harmonise the rules of the seven Swiss Chambers of Commerce and Industry (Basel, Bern, Geneva, Ticino, Vaud, Zurich and

Neuchatel). These seven Chambers of Commerce established the SCAI, which provides dispute resolution services on their behalf.

Two other major international arbitration institutions are frequently used in Switzerland, WIPO (through its arbitration centre) and the Court of Arbitration for Sport (**CAS**).

3. ARBITRATION AGREEMENT

Pursuant to Article 178 of Switzerland's Federal Act on Private International Law of 1987 (**PILA**), the arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by text.

The arbitration agreement can also be contained in general terms and conditions or the bye-laws of a company or association, and may thus also be incorporated into an agreement by reference.

Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law.

The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

The Swiss Mediation Rules lay out a model clause for only one type of two-tiered clause: mediation followed by arbitration, wherein the parties are required to attempt mediation for a period of 60 days before commencing arbitration under the Swiss Arbitration Rules. The Swiss Arbitration Rules and the Swiss Mediation Rules specifically support recourse to arbitration after the commencement of mediation and vice-versa.

Under Swiss law, two-tiered clauses are, in principle, enforceable.

3.1 Governing law

Article 177 of PILA provides that any dispute of economic interest can be the subject of an arbitration. The courts interpret the term "*economic interest*" very widely, in favour of arbitrability. This includes matters which many other jurisdictions would not necessarily consider arbitrable, such as matters relating to employment, antitrust, family law, shareholder and real estate disputes.

3.2 Choice of law/seat

Pursuant to Article 187 (1) of PILA, the arbitral tribunal shall decide the case according to the rules of law chosen by the parties, or in the absence thereof, according to the rules of law with which the case has the closest connection.

Pursuant to Article 187 (2) of PILA, the parties may authorise the arbitral tribunal to decide ex aequo et bono.

Matters of public policy will prevail over the law chosen by the parties if they have a close connection with the dispute and appear to be reasonable and appropriate from a transnational perspective. This is a very high bar.

The law having the closest connection with a particular non-contractual aspect of the dispute may apply to that aspect, as. for example, the right of suit against a legal entity or the effect of insolvency on pending arbitration proceedings.

Pursuant to Article 178 (2) of PILA, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law.

3.3 Mandatory/non-mandatory provisions

Most provisions of PILA can be modified by the parties' agreement and only very few are considered mandatory. The mandatory rules are essentially those that ensure due process and equal treatment at Articles 180, 181 and 182 of PILA as well as those that deal with arbitrability at Article 177 and those that give the judge authority to render judicial assistance at Article 185.

3.4 Severability

Switzerland recognises the rule of severability of the arbitration agreement and, pursuant to Article 178 (3) of PILA, an arbitration agreement cannot be contested on the grounds that the main contract is not valid.

4. CONFIDENTIALITY/PRIVACY

Unless the parties agree on confidentiality provisions (either expressly or by reference to a set of rules), there is no express duty of confidentiality under Swiss law applying to the parties to an arbitration. PILA is silent on the matter. Whilst the arbitrators have to keep the proceedings confidential, the parties are not obliged to keep the existence and content of the proceedings secret. There is however a widely-held view that there is an implied duty of confidentiality.

Article 44 of the Swiss Rules, however, contains an undertaking by the parties to keep the arbitration confidential.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

Pursuant to Article 179 (1) of PILA, the arbitrators will be appointed, removed or replaced in accordance with the agreement of the parties. The only limits to this autonomy concern the arbitrators' independence and impartiality.

Pursuant to Article 179 (2) of PILA, in the absence of such agreement, the judge where the arbitral tribunal has its seat may be seized with the question. He will apply, by analogy, the provisions of the domestic Code of Civil Procedure on appointment, removal or replacement of arbitrators. The domestic law provides for a tribunal of three arbitrators, with each party nominating an arbitrator (failing which, the court on behalf of such party) and the two nominated arbitrators will nominate the chairman.

The court can intervene in the constitution of the arbitral tribunal at the request of one party. For example, the court can intervene if one party fails to appoint its arbitrator or if the nominated arbitrators fail to agree on the chairman.

Pursuant to Article 180 (3) of PILA, to the extent that the parties have not made provisions for this challenge procedure, the judge at the seat of the arbitral tribunal shall make the final decision.

Pursuant to Article 180 (1) of PILA, an arbitrator may be challenged:

- if he or she does not meet the qualifications agreed upon by the parties;
- if a ground for challenge exists under the rules of arbitration agreed upon by the parties; or
- if circumstances exist that give rise to justifiable doubts as to his or her independence.

Arbitrators are considered to have a duty to disclose circumstances which may be grounds for questioning their impartiality or independence.

The IBA Guidelines on Conflicts of Interest are often used by the Swiss courts as a reference to ensure impartiality and independence of arbitrators, but are not binding as such. The Swiss courts tend to have high standards when deciding

whether an arbitrator is biased or appears to be biased.

5.2 Jurisdiction - kompetenz-kompetenz

Pursuant to Article 186 paragraph 1 and 1bis of PILA, the tribunal will itself decide on its jurisdiction and will do so notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.

The remainder of Article 186 of PILA provides that a plea of lack of jurisdiction must be raised prior to any defence on the merits and that the tribunal will, as a rule, decide on its jurisdiction by preliminary award.

Articles 190, 191 and 192 the PILA provide that preliminary awards on the tribunal's jurisdiction can be annulled by the Swiss Supreme Court, unless the parties have waived the right to such appeal.

If the courts are asked to assist in the nomination of a tribunal under Article 179 of PILA, the courts will automatically determine issues of jurisdiction.

5.3 Powers

(a) Emergency powers

Under Article 42 of the Swiss Rules, the parties can agree to conduct the arbitral proceedings in accordance with the Expedited Procedure under the Swiss Rules. The possibility of emergency relief even before the constitution of the tribunal was a major change introduced by the Swiss Rules 2012. Upon receipt of an application, the Arbitration Court will appoint and transmit the file to a sole emergency arbitrator, who will then render a decision within 15 days. The decision will have the same effect as tribunal-ordered interim measures.

(b) Interim relief

Pursuant to Article 183 paragraph 1 of PILA, unless the parties have otherwise agreed, the tribunal may order provisional or conservatory measures. Although a tribunal will likely be unable to order an arrest of assets, it will be able to order any other measure to secure assets or prevent irreparable harm.

Although interim measures ordered by the tribunal are binding on the parties to the arbitration proceeding, a tribunal does not have the powers of the courts to enforce such measures. The tribunal can, however, request the assistance of the state judge if the party concerned does not voluntarily comply with the measures.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Pursuant to Article 182 paragraph 3 of PILA, the tribunal will comply with an overriding duty of fairness.

Swiss Counsel registered in Switzerland are subject to certain provisions of the Swiss Attorneys-at-Law Act (Federal Act on the Free Movement of Lawyers, 2000), the Professional Rules of the Swiss Bar Association, and the Code of Conduct for European Lawyers.

Pursuant to Article 182 of PILA, the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice. If the parties have not determined the procedure, the tribunal will determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration. Regardless of the procedure chosen, the tribunal will ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.

Under the Swiss Rules, the proceedings are "front loaded" – i.e. all documents and other evidence a party relies on must as a rule be attached to the statement of claim or statement of defence. If the

expedited procedure is chosen under the Rules, an award will be rendered within six months from the date of transmission of the file to the tribunal.

6.2 Evidence

The procedure is determined by the agreement of the parties and, insofar as the parties have not agreed the applicable rules, the tribunal determines the procedure to the extent necessary (Article 182 of PILA).

Pursuant to Article 184 of PILA, the tribunal will itself conduct the taking of evidence but can, if necessary, request the assistance of the state judge of the seat of the tribunal. Swiss tribunals only rarely order standard disclosure and specific disclosure requests are the norm.

Again, the parties are free to decide upon the procedure to be followed according to Article 182 of PILA, failing which the arbitrators will decide.

Submission of written witness statements as evidence is common and the parties can submit expert reports, as necessary. Witnesses and experts are usually cross-examined at an oral hearing. They are not formally sworn in, but are made aware of their duty to tell the truth under threat of perjury under Swiss law.

The tribunal can order the production of evidence or compel the appearance of unwilling witnesses. The state court can request the assistance of foreign courts by way of letters rogatory.

6.3 Privilege

Rules concerning professional privilege are observed. Swiss lawyers have an obligation of professional secrecy. Privilege also applies to correspondence between a party and its attorney, provided that this correspondence concerns professional legal representation. Correspondence with in-house counsel, however, is not currently protected to the same extent as correspondence with external counsel.

Pursuant to Article 184 of PILA, the tribunal will itself conduct the taking of evidence but can, if necessary, request the assistance of the state judge at the seat of the tribunal. Swiss tribunals only rarely issue wide-ranging disclosure orders, and specific disclosure requests are the norm.

6.4 Disclosure

Procedural matters concerning evidence are determined by the parties and the tribunal. It is common in Swiss international arbitration to use the IBA Rules on the Taking of Evidence as guidelines. Evidence is usually submitted as exhibits to statements and copies must be sent to each arbitrator.

6.5 The Award

The substantive law of the arbitration determines the remedies available such as damages. There is no limit on such type of remedies under Swiss arbitration law.

Punitive damages are very rarely allowed under Swiss law because they are limited by Swiss public policy. Nevertheless, a tribunal applying another substantive law will not be bound by these limits and may choose to apply punitive damages as required by the substantive law.

Pursuant to Article 189 of PILA, the arbitral award will be rendered in conformity with the agreed rules of procedure and in the form agreed upon by the parties. In the absence of such agreement, the arbitral award will be made by a majority, or, in the absence of a majority, by the chairman alone. The award will be in writing, supported by reasons, dated and signed. Not every page needs to be signed and a signature by the chairman is sufficient.

7. ROLE OF THE COURT

The Swiss courts rarely intervene in international arbitrations, and the tribunals are granted wide powers. The Swiss courts can nevertheless provide active assistance in arbitration proceedings. When called upon, the courts can appoint arbitrators (Art 179(1) of PILA), assist in granting interim relief (article 183(2) of PILA), or assist in the taking of evidence (Art 184 of PILA).

The Swiss courts also provide protection from unwarranted court interference and arbitration is actively supported by the Swiss authorities. The Swiss Supreme Court does not entertain any appeals on points of law and has shown reluctance to interfere with arbitration proceedings and their results.

8. APPEALS

Arbitral awards have the same standing within Switzerland as domestic state court judgments and are directly enforceable. Setting aside proceedings to challenge the award will not, as a general rule, stay the enforceability of arbitral awards, although this may be granted upon request in exceptional cases.

Swiss law provides for very limited grounds upon which arbitral awards may be challenged. These grounds, which are set out at Article 190(2) of PILA, reflect those in the New York Convention 1958, include: (i) improper constitution of the arbitral tribunal; (ii) incorrect decision on jurisdiction; (iii) award beyond the claims submitted or failing to decide all claims submitted; (iv) violation of a party's right to be heard or of its right to equal treatment; and (v) incompatibility of the award with public policy. The parties are free to waive these grounds for challenge to the extent that none of them is domiciled in Switzerland.

All challenges to international arbitral awards rendered in Switzerland are heard by the Swiss Supreme Court directly, the highest court in the country. No other courts have jurisdiction to hear such challenges.

The Swiss Supreme Court is known for its efficient case management. Statistical data confirms that the average duration of setting aside proceedings is roughly six months from the date of the award.

Proceedings before the Swiss Supreme Court are very streamlined. Challenges must be filed within 30 days in any of the official Swiss languages (German, French and Italian). English documents (including the award) need not be translated. At least in practice, there is no taking of evidence and the arbitrators do not need to testify.

The Supreme Court has an openly stated arbitration-friendly policy. It is reluctant to second-guess the decisions of the arbitrators, and intervenes mainly where the arbitrators wrongly decided on their jurisdiction or failed to safeguard the minimal standards of due process. Statistical data analysing the Supreme Court's decisions show that less than 10 per cent of challenges are successful.

9. RECOGNITION AND ENFORCEMENT

9.1 National Awards

Arbitration awards are enforced in Switzerland as a matter of course. Arbitration awards are final and there is no possibility of review on the merits. The grounds to set aside an award are limited and the Supreme Court confirms over 90 per cent of the awards that are appealed.

9.2 Foreign Awards

Switzerland ratified the New York Convention 1958 (NYC) on 2 March 1965 and it has had the force of law in Switzerland since 30 August 1965.

Article 194 of PILA reinforces the applicability of the NYC to all foreign awards.

Arbitration awards can be enforced by way of debt enforcement proceedings and can be linked to attachment proceedings against the debtor's assets. If the debtor objects to enforcement, a judge will be asked to rule on the setting aside of the objection.

There is no limitation period under Swiss law for enforcement of foreign international arbitral awards. If a debt arising out of a foreign award becomes time-barred, that defence could however be raised.

Similarly to annulment of an award on the grounds of public policy, the courts are very reluctant to refuse enforcement of a foreign arbitral award on the grounds of public policy. There must be an obvious and clear violation of public policy either in the procedure followed or on the substantive law applied.

10. COSTS, FUNDING AND INTEREST

There are no restrictions on the award of interest under Swiss law. The rate of interest applicable on damages awarded will be determined by the arbitrators on the basis of the substantive law applicable.

The determination of costs is subject to the agreement between the parties. In the absence of agreement, the costs will be determined by the tribunal or by applicable rules. For example, if the Swiss Rules apply, the tribunal will have powers to determine the costs of legal representation to the extent that the amount of such costs are reasonable. Generally, the successful party recovers about 70-90 per cent of its legal fees.

There is no tax on arbitral awards in Switzerland. The arbitrators' fees may be exempt from Swiss VAT.

Switzerland recognises the right of economic freedom and applies no restrictions on third party funding. The only restrictions are those applied by the Swiss Bar rules to Swiss lawyers acting in arbitration, which prohibit pure contingency fees. Reduced fees linked to success are permissible.

11. THE FUTURE

One major trend is the significant rise of cases administered by the SCAI under the Expedited Procedure of the Swiss Rules. In 2014, 40 per cent of the cases submitted were conducted under this procedure, which provides for publication of an award within six months from the file being transferred to the arbitrators.

The Swiss Federal Government has been tasked to prepare a revision of PILA, primarily to reinforce the attractive features of the Swiss legal arbitration framework and to codify some of the Supreme Court's jurisprudence. Some of the possible revisions may include:

- loosening the formal requirements for arbitration clauses to be valid and making it easier for unilateral acts to become arbitrable;
- procedures for the correction or interpretation of awards by arbitral tribunals;
- specific rules for the revision of awards; and
- the use of English as an official language in setting aside proceedings before the Supreme Court, notwithstanding that English is not an official language in Switzerland.

The Swiss government submitted the first draft bill containing the amendments for public comments on 11 January 2017. The period for comments to be submitted closed on 31 May 2017, and the amendments to the draft are currently being made on that basis. It is anticipated that the bill will be approved by parliament and will enter into force some time in 2019.

Switzerland has entered into 134 Bilateral Investment Treaties (**BITs**), most of which refer disputes to ICSID.

UAE
ONSHORE

This chapter was written by Beau McLaren, Jane Miles, Gerard Moore and Derek Bayley

1. INTRODUCTION TO (ONSHORE) COUNTRY JURISDICTION/OVERVIEW

The UAE's first arbitration centre, the Abu Dhabi Commercial Conciliation and Arbitration Centre (**ADCCAC**), was established in 1993. Since then, a number of arbitration centres have opened up across the UAE, both "onshore" and, more recently, "offshore" in the country's two financial free zones: the Dubai International Financial Centre (**DIFC**) established in 2004, and Abu Dhabi Global Market (**ADGM**) established in 2013. Each of these free zones is a separate, "offshore" common law jurisdiction, geographically carved out from the UAE's otherwise civil law jurisdiction. Arbitration in these separate free zones is discussed later in this chapter.

Arbitration is generally seen as a comparatively attractive forum for dispute resolution in the UAE, although some concerns over the process remain (see below). For non-UAE companies, arbitration is perceived as providing greater control and certainty of process – not to mention outcome – than litigation in the local "onshore" courts might offer.

Until recently, arbitration had been addressed in a short chapter of the UAE's Federal Law No. 11 of 1992, Concerning Civil Procedures (**CPL**), which comprised just 16 articles (these were Articles 203 to 218 of the CPL). On 3 May 2018, Federal Law No. 6 of 2018 on Arbitration (the **Arbitration Law**) was issued repealing the Articles in the CPL applicable to arbitration and any other provisions contrary to the Arbitration Law.

The Arbitration Law is largely based upon the UNCITRAL Model Law and will apply to all UAE-seated arbitration proceedings, including those that were initiated prior to the Arbitration Law coming into force. Any arbitration proceedings that have been conducted in accordance with the

provisions of the previous law will remain valid.

The Arbitration Law was published in the Official Gazette on 15 May 2015 and came into force on 16 June 2018. Accordingly, at the time of writing, the local courts' approach to applying and interpreting the Arbitration Law – which has similar, yet distinct, features to the CPL – remains to be seen.

2. ARBITRAL INSTITUTIONS

Each of the UAE's seven Emirates, (Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al-Quwain) has its own, independent arbitration institution catering to domestic and international arbitrations. Each of these local arbitration centres is administered by the relevant Emirate's Chamber of Commerce and Industry and provides its own arbitration rules, though usage and popularity varies considerably between them.

Of these local arbitration centres, the Dubai International Arbitration Centre (**DIAC**) and ADCCAC are the best recognised and most used, though arbitration under the rules of international institutions, such as the LCIA or ICC, remains common (perhaps prompting the ICC's recent move to set up a regional office in ADGM).

This guide uses as a reference the current, 2013 ADCCAC Procedural Regulations of Arbitration (the **ADCCAC Regulations**) and 2007 DIAC Arbitration Rules (the **DIAC Rules**)[1] both of which are based, in part, on the model UNCITRAL Arbitration Rules. However, specific provisions can vary between rules and institutions.

3. ARBITRATION AGREEMENT

The Arbitration Law retains the CPL requirement that to be valid an arbitration agreement must be in writing.[2] However, the Arbitration Law is much more prescriptive as to what constitutes "in writing" than the CPL, adopting in large part the UNCITRAL Model Law's concepts of an arbitration agreement.[3] For example, under the Arbitration Law, an arbitration agreement may only be concluded by either:

- a natural person having the legal capacity to dispose of his rights; or
- on behalf of a juridical person (such as a company) by a representative with specific authority to arbitrate.

If a person purports to conclude an arbitration agreement without this authority, the arbitration agreement will be null and void.

This is because arbitration is seen as exceptional, with a party choosing to step away from the rights and protections guaranteed in the local courts. Accordingly, proper authority to decline those protections is seen as essential. This authority is usually granted in the Memorandum of Association of a company or by way of a special power of attorney to the relevant individual.

Under the previous CPL regime, specific requirements relating to particular branches of law were recognised in the context of arbitration. For example, for an arbitration agreement in an insurance

1 The 2007 DIAC Rules are expected to be updated in 2019. The new rules will apply to all arbitrations commenced after their enactment by the Ruler of Dubai, unless the parties expressly elect to apply the 2007 Rules.

2 Article 7(1) of the Arbitration Law.

3 Article 7(2) of the Arbitration Law.

policy to be valid under UAE law, it has to appear in an agreement separate from the general printed conditions in the policy of insurance (pursuant to UAE Federal Law No 5 of 1985 the Civil Transactions Law, as amended by Law No 1 of 1987, also known as the **Civil Code**).

It is arguable that this requirement has been repealed under the Arbitration Law,[4] which provides that any reference in a contract to any other document (such as the general printed conditions in the policy of insurance) containing an arbitration clause is considered a valid arbitration agreement. However, until the local courts have resolved this potential issue, best practice would be to continue to comply with the requirements in the Civil Code.

Article 4(2) of the Arbitration Law provides that arbitration is not permitted in "*matters which do not permit compromise*". This suggests that, under the Arbitration Law, the courts would acknowledge the same exceptions to arbitration as were recognised under the CPL that is, those involving criminal matters, and matters of public order (such as, but not limited to: employment, sovereignty, freedom of trade, and matters which conflict with principles of Sharia law).

3.1 Governing Law

Parties are free to choose the governing, or substantive law that will apply to their dispute (being the laws that will govern the subject matter in dispute), provided that there is no conflict with UAE public order or morality.[5] However, for contracts performed in the UAE, this may not be sufficient to avoid mandatory provisions of UAE law.

The parties may also subject their legal relationship to the provisions of any "*model contract, international convention, or any other document*", provided that this creates no conflict with UAE public order or morality.[6]

If the parties do not specify the substantive law governing their dispute, the Arbitration Law provides that the tribunal will apply the substantive law it deems most closely connected to the dispute. In such event, the tribunal will give consideration to the terms of the contract, subject of the dispute and past practices between the parties, amongst other things.[7] This is reflected in the DIAC Rules and the ADCCAC Regulations.

3.2 Choice of Seat

Under the Arbitration Law, whilst the default seat for proceedings is the UAE, parties may specify an alternative legal seat of their proceedings, subject to there being no conflict with UAE public order or morality.[8] The legal seat dictates the procedural laws that will apply to the arbitration, the courts that will have supervisory jurisdiction over the proceedings and the "nationality" of any award. For example, if the seat is specified to be onshore in the UAE, such as in one of the Emirates (but not in the DIFC or ADGM), the Arbitration Law will apply and the courts of the relevant Emirate will have supervisory jurisdiction. The award

4 Article 60(2) of the Arbitration Law provides that any other provision of law which conflicts with the Arbitration law is repealed.
5 Articles 37(1) of the Arbitration Law.
6 Article 37(2) of the Arbitration Law.
7 Articles 38(1) and 38 (2) of the Arbitration Law.
8 Article 1 (1) of the Arbitration Law.

will be a "UAE" award for the purposes of foreign enforcement.

The Arbitration Law also applies to international arbitration conducted abroad where the parties choose to adopt it, and to any arbitration governed by UAE law, except where special provisions will apply.[9]

If the parties fail to specify a legal seat of arbitration, the DIAC Rules provide that the default seat will be (onshore) Dubai, unless the DIAC's Executive Committee determines that another seat is more appropriate in the circumstances. (In contrast, under DIAC's proposed 2019 Arbitration Rules, the default seat will be the DIFC). The ADCCAC Regulations provide that the tribunal will determine the default seat. Typically, the location for the performance of the contract and what is otherwise provided for in the contract will influence which procedural laws apply in the absence of express provisions.

The UAE courts tend to respect the distinction between the "legal seat" of the arbitration and the physical venue for procedural meetings and hearings. As such, the courts will generally uphold the parties' agreement to hold hearings outside the seat.

Unless otherwise agreed by the parties, the tribunal may hold hearings in any place it considers appropriate and may utilise video-conferencing and similar means, if appropriate, negating the need for the physical presence of the parties at the hearing.[10]

The DIAC Rules and ADCCAC Regulations permit the tribunal, after consultation with the parties, to conduct hearings or meetings at any place it deems appropriate. Further, the tribunal is permitted to deliberate on the matters in the arbitration wherever it considers appropriate, with the award deemed to have been made at the seat of the arbitration (though subject to the mandatory requirements of the CPL).

In practice, hearings in arbitrations under the ADCCAC Regulations generally take place other than at the seat of arbitration.

3.3 Severability

Under the Arbitration Law, an arbitration clause is deemed an agreement independent of the remaining terms of the contract to which it relates. This means that the nullity, rescission or termination of the contract does not affect the status of the arbitration clause (provided that the clause itself is valid and the matter to be addressed does not relate to an alleged incapacity of the parties).[11]

This is reflected in both the DIAC Rules and the ADCCAC Regulations, which provide that, unless the parties have agreed otherwise, an arbitration agreement that forms part of a wider agreement will not be rendered invalid because the remainder of the agreement is deemed invalid or ineffective.

4. CONFIDENTIALITY/PRIVACY

The Arbitration Law does not expressly provide that arbitral proceedings are confidential, although all arbitral awards are confidential, unless written consent is obtained from both parties to publish the whole or part of an award. The exception to this is that publication of a judicial

9 Article 2 (2) and 2 (3) of the Arbitration Law.
10 Articles 28(2) and 33(3) of the Arbitration Law.
11 Article 6(1) of the Arbitration Law.

ruling that deals with an arbitral award will not be deemed a breach of the Arbitration Law in this regard.[12]

That said, both the DIAC Rules and the ADCCAC Regulations provide that proceedings under their rules – along with the awards, orders and materials produced for the purposes of the arbitration – are to be kept confidential. Exceptions are where the information is already in the public domain, the parties have agreed in writing to disclosure, or as may be required by law.

Further, pursuant to the DIAC Rules, the deliberations of the tribunal will remain confidential to its members unless disclosure is required by law, such as where an arbitrator has refused to participate in the arbitration.

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

Parties have autonomy to nominate the arbitrator(s) to determine their dispute, subject to the nominees being legally permitted to undertake the role, having the qualifications and characteristics set out in the Arbitration Law. Parties may select the number of arbitrators, which must be an uneven number pursuant to the Arbitration Law, otherwise the arbitration will be deemed void.[13] The Arbitration Law's default position is that the tribunal will consist of three members, unless the "Concerned Body" (administrating body or the court) decides otherwise.[14]

The appointment process is usually set out in the arbitration clause itself, or is incorporated by reference to institutional rules. Both the DIAC Rules and ADCCAC Regulations provide for the constitution of a tribunal where the arbitration agreement is silent or the parties cannot agree on the number or procedure for appointment of members of the tribunal. The Arbitration Law makes provision for the constitution of the tribunal in the event that the arbitration agreement fails to do so expressly or by reference to any institutional rules (which typically include such provision).

The default number of arbitrators in a DIAC or ADCCAC arbitration is one, although this may be varied where the particular circumstances of a dispute require a panel of three.

Under the Arbitration Law, arbitrators are required to be impartial and independent, and have a continuing obligation to disclose any circumstances likely to give rise to any doubt as to their impartiality and independence. This requirement is repeated in the arbitral rules of the DIAC and ADCCAC.

5.2 Jurisdiction – kompetenz-kompetenz

The Arbitration Law provides that any duly constituted tribunal may rule on its own jurisdiction, including any objections raised with regard to the existence or validity of the arbitration agreement or its inclusion of the subject matter of the dispute. A tribunal may determine the matter as a preliminary issue or in a final award on the merits.

Where a tribunal opts to address a jurisdictional challenge as a preliminary issue, either party may refer the matter to the competent court for it to determine the matter within 15 days of receipt of the ruling. The court has 30 days to

12 Article 48 of the Arbitration Law.
13 Article 9 (2) of the Arbitration Law.
14 Article 9 (1) of the Arbitration Law.

determine the matter and its decision is final. During such time, the arbitral proceedings are to be suspended unless the tribunal decides to continue upon the request of one of the parties. In such event, the requesting party will bear the costs of the arbitration should the court determine that the tribunal has no jurisdiction.

The Arbitration law also sets time limits on a party's ability to raise such objections, with a challenge to the tribunal's jurisdiction permitted no later than the submission of the respondent's defence and a challenge to issues being raised beyond the scope of the arbitration agreement permitted no later than the hearing following the hearing in which the issue(s) were raised. That said, the tribunal has the discretion to admit a later challenge if it considers the delay justified.

The DIAC Rules also grant the tribunal the ability to rule on its own jurisdiction, with any challenge to the tribunal's jurisdiction to be raised no later than the statement of defence, or in a reply to any counterclaim. The DIAC Rules suggest that a tribunal rule on any challenge to its jurisdiction as a preliminary issue but permit the tribunal to address the matter in the arbitral award.

The ADCCAC Regulations echo a combination of the provisions in the Arbitration Law and the DIAC Rules in this respect.

5.3 Powers

(a) Emergency powers

None of the Arbitration Law, the DIAC Rules or the ADCCAC Regulations provide for the appointment of an emergency arbitrator. However, the DIAC's 2019 arbitration rules (when enacted) are expected to include provision for the appointment of an emergency arbitrator.

(b) Interim relief

Whilst the CPL did not grant arbitrators any specific powers to order interim relief, the Arbitration Law empowers the tribunal to order interim or conservatory measures it deems appropriate such as an order to preserve evidence, goods or assets or an order to act or refrain to act in order to protect the arbitration process itself.[15]

The supervising courts may also order any appropriate interim or conservatory measure upon the request of a party or the tribunal for existing or potential arbitral proceedings.[16]

Subject to the applicable law in the proceedings, the DIAC Rules and the ADCCAC Regulations permit a tribunal to order interim conservatory measures such as an injunction requiring goods to be deposited with a third party, or an order for sale of perishable goods. These measures may be subject to the provision of appropriate security by the requesting party and usually take the form of an order or interim award. In order to enforce such interim relief, recourse to the courts of the applicable law is usually required.

5.4 Liability of the tribunal

Pursuant to the amendments to the UAE Penal Code (in UAE Federal Law No. 7 of 2016), arbitrators may be subject to criminal proceedings if they make a decision or render an award "*contrary to the duty of objectivity and integrity*". An individual found guilty may be imprisoned.

15 Article 21 of the Arbitration Law.
16 Article 18 (2) of the Arbitration Law.

There is no explanation provided in the Penal Code (or elsewhere) as to what constitutes "*the duty of objectivity and integrity*". Similarly, there is no guidance as to what will suffice as evidence of contravention of that duty and there is in practice limited recourse against a baseless complaint in the UAE.[17]

We understand that an amendment to the UAE Penal Code is planned to clarify this provision.

The DIAC Rules provide that no member of a tribunal (or expert to the tribunal) shall be liable to any person for any act or omission in connection with the arbitration. Similarly, the ADCCAC Regulations preclude the tribunal (and any expert it appoints) from responsibility towards any of the parties to an arbitration or to any third parties for any action, act or "*inadvertence*" related to the arbitration "*taken or arising in good faith*".

5.5 Removal

Under the Arbitration Law, an arbitrator may withdraw from the tribunal or may be removed by the parties' agreement. An arbitrator may only be challenged in circumstances where justifiable doubts as to their impartiality or independence arise, or if the arbitrator does not have the qualifications agreed by the parties or stipulated by the Arbitration Law.[18] Otherwise, an arbitrator will be removed from the tribunal when:

- the arbitrator is unable to or ceases to perform the role;
- the arbitrator otherwise fails to act, or acts in a manner that leads to unjustifiable delay in the proceedings;
- the arbitrator deliberately fails to act in accordance with the arbitration agreement despite being notified by all means of applicable notification and communication in the UAE.

In these circumstances, the arbitral institution (or the court) may, at a party's request, terminate the arbitrator's mandate. Such decisions are not subject to appeal.[19]

Under the DIAC Rules, an arbitrator may be removed from the tribunal when the arbitrator:

- gives written notice of their resignation or becomes unfit or unable to continue to serve; or
- violates the arbitration agreement, fails to act fairly and impartially as between the parties or fails to conduct the arbitration with reasonable diligence to avoid unnecessary delay or expense, in which case the DIAC may deem the arbitrator unfit to serve; or
- is challenged by any party when circumstances arise in which justifiable doubts exist as to that arbitrator's impartiality and independence.

Under the ADCCAC Regulations, an arbitrator may be removed from the tribunal when:

- the appointment is challenged on the grounds that there exist justifiable doubts over the arbitrator's neutrality or independence or if the arbitrator proves to be lacking in qualifications which the parties had agreed upon prior to the appointment. Such challenges are to be submitted to the ADCCAC's Director setting out the reasons for the

17 This is addressed in further detail in a separate HFW client briefing, a copy of which we can provide to you upon request.

18 Article 14 of the Arbitration Law.

19 Article 16 of the Arbitration Law.

challenge together with supporting documents;

- the arbitrator renounces the appointment or the parties agree to dismiss an arbitrator; or
- the arbitrator causes an unjustifiable delay in the proceedings and does not step down. In such circumstances, the ADCCAC Committee may terminate the arbitrator's assignment at the request of the ADCCAC Director or one of the parties upon due consideration of the matter.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Unless otherwise agreed between the parties, the tribunal must render the final award within six months of the date of the first hearing. The tribunal may extend the time for the final award by up to six months unless the parties agree otherwise.[20]

Under the Arbitration Law, the parties are free to agree on the procedure for appointing the tribunal and the procedure to be followed by the tribunal in conducting the proceedings. This includes adopting the procedural rules of any arbitration institution in the UAE or abroad.[21]

In the absence of agreement between the parties, the Arbitration Law provides that the tribunal may adopt any procedures it deems appropriate. This is subject to the provisions of the Arbitration Law and fundamental principles of litigation and international agreements to which the UAE is a party.[22]

Under the Arbitration Law, an arbitration commences on the day following the date when composition of the tribunal is completed (unless otherwise agreed by the parties).[23]

Unless otherwise agreed by the parties, or determined by the tribunal:[24]

- the claimant has 14 days from the composition of the tribunal to submit its statement of claim to the tribunal and the respondent;
- the respondent has 14 days from the day after receiving the statement of claim to submit its statement of defence, and any counterclaim, to the tribunal and the claimant;
- a party may amend or supplement its claim or defence or file a counterclaim, unless the tribunal considers it inappropriate having regard to the delay in settling the dispute or its remit;
- unless otherwise agreed, arbitral proceedings are to be conducted in Arabic and any written statements, and any award, are to be in Arabic.

Under the DIAC Rules and ADCCAC Regulations, an arbitration commences when a request for arbitration (the **Request**) is submitted by the claimant to the relevant centre together with the necessary filing fee. The respondent must then submit its answer to the Request (the **Answer**) within 30 days (to DIAC) or 21 days (to ADCCAC) of receipt of the Request. A 14 day extension of time for the Answer is available to the respondent upon application (and typically granted). If the respondent wishes to bring a counterclaim, it may do so with its

20 Article 42 (1) of the Arbitration Law.
21 Article 23(1) of the Arbitration Law.
22 Article 23(2) of the Arbitration Law.
23 Article 27 of the Arbitration Law.
24 Articles 29 and 30 of the Arbitration Law.

Answer or at a later date, if permitted by the tribunal. The filing of a counterclaim will also trigger a filing fee.

Under the DIAC Rules:

- the tribunal must notify the parties of the date of the preliminary hearing within 30 days of its receipt of the file. This hearing is usually to agree the timetable and day-to-day procedure for the arbitration;
- unless otherwise agreed (in the preliminary hearing) or already submitted with its Request, the claimant has 30 days from receipt of that notice to submit its statement of claim;
- unless agreed otherwise (in the preliminary hearing) or already submitted with its Answer, the respondent has 30 days from receipt of the statement of claim to submit its statement of defence and any counterclaim;
- further written statements (a reply to the defence/defence to counterclaims by the claimant or any rejoinder or other responsive document by the respondent) are at the discretion of the tribunal (unless otherwise agreed);
- the tribunal must render its award within six months of the date of its receipt of the file, although it may extend this by a further six months on its own initiative, or longer by application to the Executive Committee;
- the default language of arbitral proceedings (including the language in which the final award is to be rendered) under the DIAC Rules is that of the arbitration agreement.

Under the ADCCAC Regulations:

- the timetable will be determined by the tribunal. While there is no provision for a preliminary hearing to be held, this is subordinate to the requirements of the CPL;
- subject to the agreed timetable for ADCCAC proceedings, the claimant must submit its statement or 'memorandum' of claim followed by submission by the respondent of its defence (and any relevant counterclaims);
- an ADCCAC tribunal has six months from the date on which the sole arbitrator or chair of the tribunal received the file to render its final award, but may extend this of its own volition by up to three months. Alternatively, the ADCCAC Committee may (on one or more occasions) extend the date for rendering of the final award on application by the tribunal or one of the parties;
- unless otherwise agreed, the default language of an arbitration under the ADCCAC Regulations is Arabic.

6.2 Evidence

Witnesses of fact and expert witnesses are typically used to provide evidence supporting the parties' case (where the burden of proof is generally on the claimant (or, in respect of counterclaims, the respondent) in the form of written witness statements or expert reports. In onshore proceedings under the CPL, all witnesses have to confirm their evidence under oath, requiring a hearing. This requirement is reflected in the DIAC Rules and ADCCAC Regulations. As a result, those witnesses will generally give oral evidence (and be questioned on their evidence) at the evidential hearing.

Under the Arbitration Law, the parties and tribunal are given greater flexibility as to how proceedings are conducted. The Arbitration Law provides that the hearing of witnesses, including experts, is to be conducted under the laws of the UAE (which includes the UAE Evidence Law that requires the oath to be administered), unless otherwise agreed

by the parties.[25] The Arbitration Law states that the tribunal is afforded discretion to determine the rules of evidence to be followed.[26] Additionally, the tribunal may hear witness evidence through, for example, videoconferencing technology without the need for witnesses to physically attend the arbitral hearing.[27]

The DIAC Rules contain provision for the hearing of oral evidence, with express provision for examination and cross-examination of witnesses by the parties. A DIAC tribunal also has express authority to ask questions of either party's witnesses. The ADCCAC Regulations are silent on these points.

The CPL did not specifically address the use of expert evidence in arbitration. In practice, the requirements in respect of witnesses of fact applied. The Arbitration Law, on the other hand, contemplates the parties' use of expert evidence and allows the parties to agree laws and procedures for hearing expert witness evidence.[28] The Arbitration Law also allows the tribunal to appoint assisting experts, unless agreed otherwise between the parties. The parties are required to engage with such experts and provide relevant information or provide documents, goods or produce for inspection, as may be required. The parties are only permitted to object to the appointment of an expert once appointed where concerns arise as to the expert's qualifications, impartiality or independence.[29]

Whilst it is common place for the parties to engage their own independent expert witnesses, the DIAC Rules allow the tribunal to appoint its own experts to report on specific issues. In such circumstances, the parties are entitled to comment in writing on the expert report(s) produced and, on request, can interrogate the expert's evidence during a hearing.

The ADCCAC Regulations contain no express provisions with regard to the engagement of independent expert witnesses by an ADCCAC tribunal.

Under each of the DIAC Rules and ADCCAC Regulations, the tribunal is able to determine the rules of evidence to be applied in the proceedings, typically agreed between the parties and the tribunal at the outset of the proceedings, with the IBA Rules on the Taking of Evidence in International Arbitration (2010) often adopted.

6.3 Disclosure

In arbitral proceedings conducted under the CPL, the general rule was that disclosure was limited to documents on which a party intends to rely – there was no general duty to disclose documents detrimental to one's case (unless otherwise agreed).

The position is similar under the Arbitration Law: the parties may submit with the statement of claim or defence copies of any supporting documents or refer to documents and evidence they intend to submit.[30] There is no requirement to disclose documents detrimental to one's case (unless otherwise agreed or determined by the tribunal).

25 Article 33 (7) of the Arbitration Law.
26 Article 33(8) of the Arbitration Law.
27 Article 35 of the Arbitration Law.
28 Article 33(5) and 33(7) of the Arbitration Law.
29 Article 34(1), 34(2) and 33(4) of the Arbitration Law.
30 Article 31 of the Arbitration Law.

Pursuant to the DIAC Rules and the ADCCAC Regulations, a tribunal may also order disclosure of documents. This is typically provided for in an arbitration timetable and associated procedural order.

6.4 Privilege

The common law concepts of legal and litigation privilege are not recognised by UAE onshore civil law (although communications between a lawyer and client are generally held to be confidential). The concept of "without prejudice" communications is also not recognised, meaning there is no protection preventing reliance on such communications in later proceedings.

Privilege is not a concept addressed by the DIAC Rules or the ADCCAC Regulations. In such absence, the parties may choose to adopt the concept through the terms of reference to be agreed at the outset of proceedings.

6.5 The Award

Under the Arbitration Law, the final award must be a majority award. The final award must be in writing and include:

- any dissenting opinion;
- the text of the arbitration agreement;
- a summary of the claims, statements and documents of the parties;
- the reasons for the award and the order made, unless otherwise agreed by the parties or not required by the law applicable to the proceedings;
- names and addresses of the parties, the names of the arbitrators, their nationalities and addresses;
- the date and place at which it was issued; and
- the signatures of the arbitrators or the majority, provided that the reason for any omitted signature is stated.[31]

Unless otherwise agreed by the parties, the award is deemed to be issued in the seat of arbitration agreed by the parties or determined by the tribunal.[32] If an arbitrator declines to sign the final award, the reasons for this must be stated.[33] The award must be written in Arabic or the language of the arbitration the parties have agreed.[34] The arbitrators must provide a copy of the award to each party within 15 days of it being issued, deemed to be the date on which the last of the arbitrators signs the award.[35] The award may, however, be withheld where the costs of the arbitration have not been paid.[36]

There is no specific limit on the available remedies, save that remedies awarded must be in accordance with UAE law. The DIAC Rules and ADCCAC Regulations reflect the now superseded CPL's provisions in terms of requirements of the final award. The new DIAC Rules, anticipated to be released during 2019, are expected to reflect the different requirements under the new Arbitration Law, as set out above.

The ADCCAC Regulations are more prescriptive in terms of the exact details to be included in the award and expressly

31 Article 41 of the Arbitration Law.
32 Article 41(6) of the Arbitration Law.
33 Article 41 (3) of the Arbitration Law.
34 Articles 29(2) and 41(1) of the Arbitration Law.
35 Articles 41(7) and 44 of the Arbitration Law.
36 Article 47 of the Arbitration Law.

require that any dissenting opinions must be included.

Under DIAC Rules and ADCCAC Regulations, originals of the award (one for each party, each arbitrator and the centre) must be provided to the relevant centre by the tribunal. The centre will only provide copies of the original award to each party once all costs and fees in the arbitration have been paid.

Pursuant to the CPL, the award had to be physically signed by the tribunal in the UAE, even if that increased costs or was otherwise inconvenient. Validity of any such award would otherwise be subject to procedural challenge and, potentially, the refusal of its recognition and enforcement by the UAE onshore courts. Under the Arbitration Law, it is no longer a requirement that the award must be issued and signed in the UAE. In practice, under the CPL, the requirement to sign the award and the grounds for the decision meant that the award had to be signed (or at least initialled) on each page. It is unclear whether this practice will continue under the Arbitration Law, given that the Arbitration Law states that only the award has to be signed.[37] Best practice will be to continue with previous custom until this issue is clarified.

7. ROLE OF THE COURT

The existence of an arbitration agreement between the parties does not entirely prevent a claim being brought before the local courts. It is up to the defending party to challenge the court proceedings and raise the existence of the arbitration agreement before submitting any motion or plea on the merits (such as a statement of defence), otherwise the parties are considered to have waived the agreement to arbitrate their dispute.[38]

Arbitral proceedings conducted before any of the local arbitration centres (such as DIAC or ADCCAC) are supervised by the respective local courts of the Emirate in which the arbitration proceedings take place.

It is permissible for parties to apply to the local courts in respect of interim or conservatory measures without waiving the arbitration agreement pursuant to DIAC Rules and ADCCAC Regulations. However, given the tribunal's power to order such measures under the Arbitration Law,[39] such applications to the court are likely to be made less frequently.

In onshore proceedings, a party may apply to the relevant court to intervene in the arbitral proceedings in an administrative capacity in limited circumstances, such as a jurisdictional challenge, a challenge to the appointment of the arbitrator(s) or to provide assistance in taking evidence.[40]

Under the Arbitration Law, the defendant must plead the existence of an arbitration agreement before submitting any request or plea on the merits of the dispute, if it wishes to enforce its right to arbitrate a dispute. If the defendant does this, the court must decline the case unless it is satisfied that the arbitration agreement is void or incapable of being performed for some reason.[41]

37 Article 41(3) of the Arbitration Law.
38 Article 8(1) of the Arbitration Law.
39 Article 21 of the Arbitration Law.
40 Articles 15(2), 19(2) and 36 of the Arbitration Law.
41 Article 8 (1) of the Arbitration Law.

8. APPEALS

In arbitration subject to the Arbitration Law, parties may not appeal the merits of the final award.

Parties may, however, apply for the award to be set aside on the following limited grounds, before the court or whilst an application to confirm the award is pending:[42]

- no arbitration agreement exists, or it is void or has lapsed;
- a party was under some incapacity at the time the arbitration agreement was concluded;
- when the tribunal is not properly constituted in accordance with the Arbitration Law or the parties' agreement;
- the arbitration agreement was concluded by a person without proper authority to do so;
- a party fails to present its case for any reason beyond its control (such as where it was not given proper notice of the tribunal's appointment or the proceedings);
- where the arbitral award excludes the application of the parties' choice of law;
- the award contains decisions not within the scope of the arbitration agreement (provided that only that part of the award will be set aside); and
- where a procedural irregularity has occurred (which extends beyond the grounds set out above) or the award is otherwise not issued within the required timeframe.

Any action to set aside an award will be time barred if not made within 30 days of the award being notified to the parties.[43]

Under the DIAC Rules, arbitral awards are final and binding and the parties waive their right to appeal or a review, both to the tribunal and to any judicial body. The ADCCAC Regulations do not specifically state that there is no right of appeal, but do acknowledge that an ADCCAC award is final and binding. Neither will, in practice, prevent an award debtor challenging enforcement under the CPL.

Parties may, however, request that the tribunal:

- give an interpretation of the award;
- rectify a clerical, typographical or computational error in the award; or
- make an additional award in relation to any matters not dealt with in the original award.

9. RECOGNITION AND ENFORCEMENT

9.1 National awards

Once rendered by the tribunal, an onshore award (whether ad hoc or rendered via a local institution) is immediately enforceable onshore in the UAE through the Dubai courts. Historically, it has been common for the losing party to challenge enforcement of the award. The limited grounds for challenging an award under the Arbitration Law may act as a deterrent in future.

Enforcement proceedings typically last between six and 18 months, depending on the challenges to enforcement raised and appeals lodged. Should an onshore award need to be enforced elsewhere – whether in offshore UAE or overseas – the relevant protocol or convention will apply.

Under the Arbitration Law, the award debtor seeking to enforce the award must

42 Article 53 of the Arbitration Law.
43 Article 54(2) of the Arbitration Law.

submit a request for confirmation and enforcement in the local or federal Court of Appeal (depending upon the Emirate in which enforcement is sought).[44] The request must be submitted together with various other information, including:[45]

- the original award or certified copy;
- a copy of the arbitration agreement;
- an Arabic translation of the award which has been attested.

The award will be confirmed and enforced within 60 days, provided that it has not been set aside on one of the grounds set out above.[46]

9.2 Foreign awards

Foreign awards may be enforced onshore in the UAE under the provisions of the Arbitration Law or any applicable treaty.

An award issued outside of the UAE must be notarised at the UAE Embassy in its country of issue, then authenticated by the UAE Ministry of Foreign Affairs in the UAE and translated into Arabic. An application to enforce the award must then be made to the court.

Historically, the lower courts in the UAE have (on occasion) proven reluctant to enforce foreign arbitration awards. However, in recent years, the courts appear to have adopted a more pro-arbitration approach. This expected to continue under the Arbitration Law.

The UAE is party to a number of international treaties relating to the enforcement of arbitral awards. In 2006, the UAE became party to the 1958 Convention of the Recognition and Enforcement of Foreign Arbitral Awards (otherwise known as the New York Convention 1958). The UAE is also signatory to the Arab Convention on Judicial Cooperation (the Riyadh Convention), the Agreement of Enforcement of Judgments, Letters Rogatory and Service of Process (the GCC Treaty) and has various other agreements with countries such as Tunisia, France and India.

These treaties usually set out the grounds on which enforcement may be refused, which generally include the grounds of public policy if the award contradicts either the provisions of Sharia law or the UAE's constitution.

These treaties should, in principle, take precedence over, and apply in place of, the Arbitration Law. Again, however, the approach of the local courts in this regard has been inconsistent to date.

10. COSTS, FUNDING AND INTEREST

Unless agreed otherwise by the parties, the Arbitration Law provides that the tribunal will assess the fees and costs of the arbitration including the fees and expenses of the tribunal and any tribunal-appointed experts. The tribunal has the authority to apportion the costs of the arbitration between the parties as it sees fit.[47] Either of the parties may request that the local courts amend such assessment,[48] but the local courts are not familiar with assessing legal costs in any detail (in court proceedings only nominal costs are awarded).

44 Article 55(1) of the Arbitration Law.
45 Article 55(1) of the Arbitration Law.
46 Article 55(2) of the Arbitration Law.
47 Article 46 of the Arbitration Law.
48 A party cannot apply to the courts for a review of a costs order if they have been fixed by agreement (Article 46(3) of the Arbitration Law).

Both the DIAC Rules and ADCCAC Regulations provide a schedule of costs per arbitrator and set their own administrative costs. These costs are calculated on a sliding scale, in connection with the sums claimed in the dispute and are to be paid in advance of the commencement of proceedings on a 50-50 basis between the parties.

The Appendix to the DIAC Rules expands upon the DIAC Rules themselves and provides that the "*final Award shall fix the costs of the arbitration and decide which of the parties shall bear them*" or in what proportion costs are to be allocated to the parties. This wording has been the subject of legal proceedings in the local courts. A Dubai court previously determined that "*costs of the arbitration*" were limited to the costs of the centre and the tribunal as opposed to being a reference to all costs and expenses – such as legal fees – incurred in the course of arbitral proceedings. It is generally understood that the authors of the DIAC Rules intended to capture all legal costs and expenses incurred and this judgment is seen as an anomaly. The DIAC's 2019 Rules are expected to clarify the point when brought into effect.

The ADCCAC Rules require that an arbitral award shall determine which of the parties shall bear the "*arbitration expenses*".

Pursuant to the UAE's Law No 18 of 1993, the Commercial Transactions Law, simple interest may accrue on an award, with parties typically applying for the maximum rate of 12 per cent to be applied. Tribunals usually apply an interest rate of 9 per cent in line with the custom and practice adopted by the local courts.

There are no specific provisions dealing with interest in the institutional rules.

Contingency fee arrangements are not permitted in the UAE (either onshore or offshore). Third party funding is permitted, in certain circumstances.

11. INVESTOR-STATE ARBITRATIONS

The UAE has ratified the Washington Convention on the Settlement of Investment Disputes 1965 (ICSID Convention). The UAE is a party to more than 40 bilateral investment treaties (BITs), with nearly all in force.

Most of these treaties contain the standard investment treaty clauses, including "most favoured nation" clauses.

UAE
OFFSHORE

This chapter was written by Beau McLaren and Jane Miles

1. INTRODUCTION TO (OFFSHORE) COUNTRY JURISDICTION/OVERVIEW

The UAE has established two financial free zones within its borders: the Dubai International Financial Centre (**DIFC**), established in 2004, and Abu Dhabi Global Market (**ADGM**), established in 2013. Each of these free zones is a separate, "offshore" common law jurisdiction, geographically carved out from the UAE's otherwise civil law jurisdiction.

Both free zones have established their own arbitration centres. This guide focuses on arbitration in these free zones. Arbitration pursuant to local "onshore" law in the UAE is addressed earlier in this chapter.

2. ARBITRAL INSTITUTIONS

Both the DIFC and ADGM have their own autonomous civil judicial systems, independent of the local civil law court system (although criminal and certain other matters remain the purview of the onshore court system).

Operating as independent common law jurisdictions in their respective Emirates, each has its own arbitration law (based on the UNCITRAL Model Law): the DIFC has a dedicated Arbitration Law (DIFC Law No.1 of 2008, as amended), while the ADGM's Arbitration Regulations (the ADGM's equivalent arbitration law) closely mirrors the DIFC Arbitration Law.

In 2008, the DIFC launched the DIFC-LCIA Arbitration Centre (**DIFC-LCIA**) in cooperation with the London Court of International Arbitration (**LCIA**). The centre later re-launched in November 2015, having addressed certain legislative issues which impacted its jurisdictional reach. The DIFC-LCIA publishes its own institutional arbitration rules, which were updated in 2016 (the **DIFC-LCIA Rules**).

In July 2017, the ADGM Arbitration Centre was announced and became fully operational during the latter part of 2018. However, the ADGM Arbitration

Centre will not administer arbitral proceedings and provides no set of rules for the management of an ADGM-seated arbitration – the parties are free to adopt any set of rules that they wish to apply to their dispute.

In September 2017, the ICC launched its first Middle East office in the ADGM, in recognition of the increasing relevance of international arbitration in the MENA region. Whilst the ICC plans to work in co-operation with the ADGM Arbitration Centre, this is not to be confused with a tie-up between the ADGM and ICC for the purposes of administrating ADGM arbitrations.

It is therefore important to distinguish the DIFC-LCIA, which is an administrative centre with its own set of procedural rules that govern a DIFC-LCIA arbitration, and the ADGM Arbitration Centre, which will merely be a facility for hire at which arbitral proceedings can be conducted.

3. ARBITRATION AGREEMENT

In both the DIFC and ADGM, arbitration agreements must be evidenced in writing in order to be valid, although what constitutes a written agreement is more widely construed than under UAE onshore law.

The DIFC Arbitration Law recognises arbitration agreements for the resolution of disputes whether they arise under contract or otherwise. An arbitration agreement may be in the form of an arbitration clause in a contract or a form of separate agreement. Such agreement may be demonstrated by an exchange of written communications or incorporated by reference to another document.

A written agreement may be in the form of an electronic communication, such as electronic mail, telegram, telex or telecopy.

An agreement to arbitrate may also be demonstrated in writing if contained in an exchange of statements of claim and defence, in which the existence of an arbitration agreement is alleged by one party and not denied by the other.

These provisions are echoed in the ADGM Arbitration Regulations.

In order to be valid, a reference must concern matters capable of settlement by way of arbitration. Both the DIFC Arbitration Law and the ADGM Arbitration Regulations provide that an award may be set aside in circumstances where the award purports to determine subject matters which are not capable of settlement by arbitration pursuant to the laws of the relevant offshore jurisdiction.

In addition, the DIFC Arbitration Law expressly excludes parties from agreeing to arbitrate future disputes arising out of or in connection with a contract of employment (pursuant to DIFC Employment Law) or a contract for the supply of goods or services (other than residential property) to consumers, save in certain circumstances.

3.1 Governing law

Parties are free to choose the governing or substantive law that will apply to their dispute.

3.2 Choice of Seat

Parties may also specify the legal seat of their proceedings, which dictates the procedural laws that will apply; the courts that will have supervisory jurisdiction over the proceedings; and the "nationality" of any award. For example, if the seat is specified to be the DIFC, the DIFC Arbitration Law shall apply and the DIFC courts will have supervisory jurisdiction. However, in both the DIFC and ADGM, any award issued will still be considered a "UAE" award – as opposed to a DIFC or ADGM award – for the purposes of foreign enforcement.

The DIFC Arbitration Law specifies that, in the absence of an agreement between the parties as to the seat of the arbitration and

where any dispute is governed by DIFC law, the seat will be the DIFC. That said, the tribunal may, unless otherwise agreed between the parties, meet at any place it considers appropriate, including for the hearing of evidence and any inspection of goods, other property or documents.

The ADGM Regulations specify that, in the absence of agreement between the parties, the seat will be determined by:

- any arbitral or other institution or person vested by the parties with powers to do so; or
- the tribunal, having regard to the circumstances of the case, including the convenience of the parties.

In addition to these legislative provisions, most institutional arbitration rules provide a default position or allow for determination of the seat by the relevant institution if the parties fail to specify a legal seat of arbitration. For example, the DIFC-LCIA Rules provide that the default seat will be the DIFC unless and until the tribunal considers that a different seat is more appropriate in the circumstances. Typically, the location for the performance of the contract and what is otherwise provided for in its terms will influence the choice of seat.

The DIFC Arbitration Law and ADGM Arbitration Regulations recognise the distinction between the "legal seat" of the arbitration and the physical venue for procedural meetings and hearings. Both permit hearings to take place away from the seat.

The DIFC-LCIA Rules also permit hearings to take place away from the legal seat of the arbitration. The tribunal may schedule any hearing at any convenient geographical place following consultation with the parties. In such event, the arbitration will be treated as having been conducted at the arbitral seat. Any order or award will be deemed to have been made at the legal seat of the arbitration.

3.3 Severability

The autonomy of an agreement to arbitrate within a contract is recognised in both the DIFC Arbitration Law and ADGM Arbitration Regulations. Under the DIFC-LCIA Rules, an arbitration clause which forms (or was intended to form) part of another agreement is deemed independent of the agreement in which it is contained. Any decision of a tribunal that the agreement itself containing the arbitration clause is non-existent, invalid or ineffective shall not extend to the arbitration clause.

4. CONFIDENTIALITY/PRIVACY

Under the DIFC Arbitration Law, all information relating to the proceedings will be kept confidential except where disclosure is required by order of the DIFC Court.

The ADGM Arbitration Regulations also impose a general duty of confidentiality. Exceptions include where disclosure is required by law or is necessary to protect or pursue a legal right; is necessary in relation to regulatory obligations; or for the purposes of obtaining professional advice.

The DIFC-LCIA Rules require the parties to maintain confidentiality of all awards rendered and all materials produced for the purposes of the arbitration. The obligation to maintain confidentiality also extends to all other documents produced by another party in the proceedings unless those documents are otherwise in the public domain, or disclosure is required:

- pursuant to a legal duty;
- to protect or pursue a legal right; or
- to enforce or challenge an award in legal proceedings.

In addition:

- the deliberations of a DIFC-LCIA tribunal will remain confidential to its members unless required by any applicable law and to the extent that disclosure of

an arbitrator's refusal to participate is required of the other members of the tribunal; and

- the arbitrators will not advise any other party of the parties' dispute nor the outcome of the arbitration.

No DIFC-LCIA award will be published (in whole or in part) without securing prior written consent of the parties and the tribunal.

5. THE ARBITRAL TRIBUNAL

5.1 Appointment

Under the DIFC Arbitration Law and ADGM Arbitration Regulations, the parties have autonomy to nominate the arbitrator(s) to determine their dispute.

The parties are permitted to select the number of arbitrators (typically an odd number – being one or three) and the mechanism by which the arbitrator(s) will be appointed to the tribunal. Failing agreement between the parties, recourse to the courts for assistance, or to the relevant arbitration centre, may be appropriate. The arbitrators to be appointed will be (and will remain) impartial and independent of the parties throughout the proceedings with an on-going duty to disclose any circumstances that arise which may give rise to justifiable doubts as to their impartiality or independence.

The DIFC-LCIA Rules take a slightly different approach to their onshore counterparts. Whilst any mechanism agreed between the parties will generally be recognised by the DIFC-LCIA, it is the LCIA court that oversees the constitution of the tribunal. The default number of arbitrators is one, unless the LCIA court determines that a three-member panel (or more) is appropriate in the circumstances.

The arbitrators to be appointed under the DIFC-LCIA Rules must be (and must remain) impartial and independent of the parties throughout the proceedings.

As a result of the growing popularity of arbitration as a mechanism for dispute resolution, the availability of appointed arbitrators to oversee proceedings has become more of an issue in recent years. Some arbitral proceedings have become unnecessarily protracted, due to a lack of availability in the diaries of the arbitral tribunal. In response, the DIFC-LCIA Rules now require a declaration from the nominated arbitrator(s) that they are "*ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration*".

5.2 Jurisdiction – kompetenz-kompetenz

Both the DIFC Arbitration Law and ADGM Arbitration Regulations provide that any tribunal appointed may rule on its own jurisdiction, including any objections raised as to the validity of the relevant arbitration agreement.

Any tribunal appointed under the DIFC-LCIA Rules has the authority to rule on its own jurisdiction and authority – such decision to be recorded in a specific award as to jurisdiction or later as part of an award on the merits in the case, as the tribunal considers appropriate.

5.3 Powers

(a) Emergency powers

Neither of the DIFC Arbitration Law or ADGM Arbitration Regulations provide for appointment of an emergency arbitrator.

However, the DIFC-LCIA Rules provide for the appointment of an emergency arbitrator at any time prior to the formation of the tribunal, upon application to the LCIA court.

An emergency arbitrator may conduct emergency proceedings or grant emergency relief through an order or award (which may later be ratified or revoked by the arbitral tribunal to be appointed for the remainder of the proceedings).

(b) Interim relief

Pursuant to DIFC Arbitration Law or ADGM Arbitration Regulations, a tribunal may order interim relief as it deems necessary, including for the preservation of assets or evidence, with such order or award enforceable by the competent court in each jurisdiction.

Where a requesting party seeks interim relief from a tribunal under DIFC Arbitration Law or ADGM Arbitration Regulations, it is required to satisfy the tribunal that:

- any harm which may be caused by granting the interim measures will be substantially outweighed by any harm it will suffer in the event the interim relief is not granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of its claim.

The applicant may also be required to provide security in connection with the measures sought, such as security for legal or other costs in the form of a deposit or bank guarantee. Such interim orders or awards are enforceable by the competent court within each offshore jurisdiction and, in principle, may be taken onshore into the UAE (though practice has shown this to be difficult to achieve).

Similarly, the DIFC-LCIA Rules include provision interim measures, with the tribunal given the authority to order a requesting party to provide security by way of deposit or bank guarantee.

The DIFC-LCIA Rules also recognise that the parties may apply to a state court or other legal authority for interim or conservatory measures, both before the formation of the tribunal or, in exceptional circumstances and with the tribunal's consent, afterwards. Otherwise, parties to a DIFC-LCIA arbitration are deemed to have agreed not to apply to a state court of other legal authority for security for legal costs or arbitration costs.

5.4 Liability of the tribunal

The DIFC Arbitration Law or ADGM Arbitration Regulations provide that no member of a tribunal shall be liable to any person for any act or omission in connection with the arbitration, unless they are proven to have caused damage by conscious and deliberate wrongdoing. However, the DIFC Arbitration Law excludes from that general protection liability of any arbitrator arising out of his or her resignation.

In addition to the provisions of the DIFC and ADGM arbitration laws, arbitrators may be exposed to criminal liability under UAE Federal law (the DIFC and the ADGM do not have their own criminal laws or criminal courts.) The provisions of the UAE Penal Code (Federal Law No. 3 of 1987) apply both onshore and offshore in the UAE.

Pursuant to the 2016 revisions to the UAE Penal Code (Federal Law No.7 of 2016), arbitrators may be subject to criminal proceedings if they make a decision or render an award "*contrary to the duty of objectivity and integrity*". An individual found guilty may be imprisoned.

There is no explanation provided in the Penal Code (or elsewhere) as to what constitutes "*the duty of objectivity and integrity*". Similarly, there is no guidance as to what will suffice as evidence of contravention of that duty and there is

in practice limited recourse against a baseless complaint in the UAE.[1]

We understand that an amendment to the Penal Code is planned to clarify this provision.

The DIFC-LCIA Rules preclude any arbitrator (and any expert to the tribunal) from liability to any party for any act or omission arising in connection with any arbitration except:

- where the act or omission constitutes conscious and deliberate wrongdoing; or
- to the extent that such limitation of liability is prohibited by any applicable law.

5.5 Removal

Under the DIFC Arbitration Law or ADGM Arbitration Regulations, an arbitrator shall be removed from the tribunal when:

- circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality or independence; or
- the arbitrator does not possess qualifications agreed on by the parties (e.g. the arbitrator must be an expert in a specialist technical area relevant to the matters in dispute).

The parties may agree on a procedure for the challenge of an arbitrator. However, in the absence of such agreement, the DIFC Arbitration Law or ADGM Arbitration Regulations each provide a default procedure which includes a timeframe within which such challenges shall be raised and addressed. Recourse to the DIFC courts or ADGM courts is available to the parties should one of them not be satisfied with the outcome of such challenge.

Otherwise, when an arbitrator becomes incapable of performing the role as a matter of fact or law, the appointment shall be terminated when the arbitrator withdraws or the parties agree on the termination. In the event of some controversy in this regard, recourse to the DIFC courts or ADGM courts may be had to determine the matter. Any such decision of the relevant court shall not be subject to appeal.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

Pursuant to the DIFC Arbitration Law or ADGM Arbitration Regulations, the parties are generally free to agree on the procedure and applicable timetable. One key difference in the offshore jurisdictions of the DIFC and ADGM is that, unlike arbitrations seated onshore, there is no set time limit within which the tribunal must render its final award.

The language of proceedings may be agreed in the first instance between the parties, or, failing that, is to be determined by the tribunal.

Insofar as the DIFC-LCIA Rules are concerned, the parties and tribunal are to contact each other within 21 days of receipt of written confirmation of constitution of the tribunal. The parties may agree on joint proposals to the tribunal for the conduct (and timetable) of the proceedings, which is to be recorded in writing.

The DIFC-LCIA Rules also provide a default timetable for the exchange of initial pleadings (e.g. statements of claim, defence (and any counterclaim) and reply (and any defence to counterclaim), giving each party 28 days to submit a pleading or responsive pleading until the process has been concluded.

1 This is addressed in further detail in a separate HFW client briefing, a copy of which we can provide to you upon request.

6.2 Evidence

Witnesses of fact and expert witnesses are used to evidence the parties' case by way of written witness statements and expert reports. The witnesses will (generally) later be required to give oral evidence at the final hearing in the proceedings.

The DIFC Arbitration Law or ADGM Arbitration Regulations do not set out prescriptive rules for the taking of evidence, nor do they require evidence to be given under oath. In each jurisdiction, the tribunal is authorised to determine the use of an oral hearing, unless the parties have expressly agreed that no hearing shall be held.

The DIFC-LCIA Rules also provide for oral hearings, except where the parties have agreed otherwise.

The DIFC Arbitration Law and ADGM Arbitration Regulations expressly provide that the tribunal may appoint an expert to report to it on specific issues; this can be in addition to party appointed experts.

The tribunal may order that the parties provide to such experts specific documents for their review and opinion. The expert may produce a report and/or appear at a hearing for oral examination.

The DIFC-LCIA Rules also make provision for the appointment of an expert by the tribunal to report on specific issues. Parties are entitled to comment in writing on the expert report and, upon request, can examine the expert's evidence during a hearing.

Under the DIFC Arbitration Law and ADGM Arbitration Regulations, the parties are free to agree on the procedure to be implemented by the tribunal in the proceedings. In the absence of such agreement, the tribunal may, subject to the relevant law, conduct the arbitration in such manner as it considers appropriate. The power conferred on the tribunal includes the power to determine the admissibility, relevance, materiality and weight of such evidence.

Under the DIFC-LCIA Rules, the tribunal is granted the express authority to determine the rules of evidence to be applied in the proceedings. This is typically agreed between the parties and the tribunal at the outset of the proceedings. For example, parties often agree to adopt the IBA Rules on the Taking of Evidence in International Arbitration (2010).

6.3 Disclosure

In arbitral proceedings conducted under the DIFC Arbitration Law and ADGM Arbitration Regulations, submission of supporting documents is permitted but there is no general duty to disclose documents detrimental to one's case. Under both the DIFC Arbitration Law and ADGM Arbitration Regulations, the parties are free to agree on the procedure to be implemented by the tribunal, which allows the parties to include disclosure in the timetable for the management of the dispute.

The DIFC-LCIA Rules require submissions be accompanied by "all essential documents" and the express powers of a DIFC-LCIA constituted tribunal extend to authority to order document production.

6.4 Privilege

Legal and litigation privilege are common law concepts often relied upon in response to requests for document production.

The concept of privilege is recognised within the relevant procedural rules of each of the DIFC's and ADGM's courts (and by extension, within those jurisdictions).

Privilege is not a concept addressed by the DIFC-LCIA Rules. That said, parties may choose expressly to adopt the concept through the terms of reference to be agreed at the outset of proceedings.

6.5 The Award

Under the DIFC Arbitration Law or ADGM Arbitration Regulations, the award shall be made in writing and signed by at least a majority of the tribunal. Under the DIFC Arbitration Law, reasons are required for non-signature by any arbitrator, whilst the ADGM Arbitration Regulations permit that an award may be made by the chair of the tribunal alone if there is no majority ruling. In each jurisdiction, the award must state the reasons on which it is based, unless otherwise agreed by the parties.

Once the award is rendered, a signed copy shall be delivered to each party. A tribunal constituted under either of the DIFC Arbitration Law or ADGM Arbitration Regulations may refuse to deliver the award, unless all its fees and expenses have been paid in full by the parties.

Under the DIFC Arbitration Law, there are no specific provisions that limit the remedies available, save that certain matters may not be arbitrated (see section 3 above).

The ADGM Arbitration Regulations provide that a tribunal may grant any remedy permitted under the substantive law of the arbitration. This includes, but is not limited to, declarations; payment of a sum of money; injunctions; orders for specific performance; and rectification, setting aside or cancellation of documents.

The DIFC-LCIA Rules also require that an award be made in writing, with the reasons for the award contained in it, unless the parties agree otherwise in writing. The award must also be signed by the tribunal or at least by those assenting members, or, failing a majority, signed by the presiding arbitrator. No DIFC-LCIA award will be published (in whole or in part) without securing prior written consent of the parties and the tribunal.

7. ROLE OF THE COURTS

Arbitrations conducted in the DIFC and ADGM are supervised by their respective courts.

The DIFC court is specifically empowered by the DIFC Arbitration Law to be the curial court for DIFC-seated arbitrations and to perform certain functions, such as providing assistance in relation to appointment of arbitrators; handling jurisdictional and procedural challenges; interim measures; and providing assistance with taking evidence.

The ADGM court is similarly empowered by the ADGM Arbitration Regulations.

8. APPEALS

In the offshore jurisdictions, parties may apply to the tribunal for an interpretation of the award, the correction of errors and for the rendering of an additional award to deal with claims omitted from the original award.

An arbitral award issued in the DIFC or ADGM is recognised as binding within each respective jurisdiction. However, there are a number of grounds under the DIFC Arbitration Law or ADGM Arbitration Regulations pursuant to which a party may seek to have an award set aside. For example, where:

- the party to an agreement to arbitrate did not have the proper authority to enter into such agreement;
- the arbitration agreement is not valid under the law to which the parties subjected it, or in the absence of such indication, under the law of the state or jurisdiction;
- the award falls outside the scope of the terms of reference or arbitration agreement;
- the composition of the tribunal was not in accordance with the agreement between the parties;

- the subject matter of the dispute is not capable of being arbitrated; or
- recognition or enforcement of the award would by contrary to the public policy of the UAE.

Under the DIFC-LCIA Rules, every award is final and binding on the parties and the parties undertake to carry out any award immediately and without any delay. The parties also irrevocably waive their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver is not prohibited under any applicable law.

Parties may, however, request that the tribunal:

- correct any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature in the award; or
- make an additional award in relation to any matters not dealt with in the original award.

Of its own volition, the tribunal may also correct any clerical, typographical or computational error (or any error of a similar nature), after consultation with the parties.

9. RECOGNITION AND ENFORCEMENT

9.1 National awards

Once rendered by the tribunal, an offshore award (whether *ad hoc* or rendered via a local institution) is immediately enforceable through the courts of the jurisdiction in which it was seated (DIFC or ADGM as appropriate). Such proceedings may be subject to challenge as addressed in section 8 above.

Should an offshore award need to be enforced elsewhere – whether in onshore UAE or overseas – the relevant protocol or convention will apply.

9.2 Foreign awards

Although they are separate jurisdictions within the UAE, both the DIFC and ADGM remain subject to treaties entered into by the UAE as a state. These include:

- the 1958 Convention of the Recognition and Enforcement of Foreign Arbitral Awards (otherwise known as the **New York Convention 1958**);
- the Arab Convention on Judicial Cooperation (the **Riyadh Convention**);
- the Agreement of Enforcement of Judgments, Letters Rogatory and Service of Process (the **GCC Treaty**); and
- various other agreements with countries such as Tunisia, France and India.

Accordingly, foreign awards are, in principle, enforceable under the terms of those arrangements, subject to any grounds for challenges to enforcement they may contain.

10. COSTS, FUNDING AND INTEREST

Both the DIFC Arbitration Law and ADGM Arbitration Regulations provide that the tribunal will set the costs of the arbitration, with these to be addressed (and allocated) in the final award. The relevant provisions are prescriptive, detailing the categories of costs that are incurred by parties in arbitral proceedings.

Under the ADGM Arbitration Regulations, a party to the proceedings may apply to the tribunal for a separate costs award within 30 days of the substantive award, if the costs have not been addressed in the substantive award.

The DIFC-LCIA Rules require the tribunal to specify and allocate the costs of arbitration (excluding legal or other expenses incurred by the parties themselves) in its award. These costs are determined by the LCIA court and, unlike many other arbitration centres that operate on an ad valorem basis (including its onshore counterparts DIAC and ADCCAC), the DIFC-LCIA applies

hourly rates (subject to certain limitations) to the time-related administrative costs of the centre and the tribunal alike (with expenses paid in addition).

Under the DIFC-LCIA Rules, the parties are deemed jointly and severally liable to the DIFC-LCIA and the tribunal for their respective costs. Advance payments are to be made by the parties throughout the proceedings, deposited with the LCIA court for payment to the DIFC-LCIA and tribunal. A separate fee rate (on a lump-sum basis) applies in the event that an emergency arbitrator is appointed.

The tribunal may also award legal and other party-incurred costs in its award, along with interest.

Under the DIFC Arbitration Law, the tribunal has broad powers to determine the period of interest, though interest generally accrues from the time when payment fell due until the time that the payment is made.

The ADGM Arbitration Regulations address entitlement to claim interest in detail. Subject to any contrary agreement between the parties or applicable substantive law, the tribunal may determine:

- whether to make an award of interest;
- whether to apply simple or compound interest;
- the applicable rates of interest; and
- the period of accrual.

The default position pursuant to the DIFC-LCIA Rules is that the tribunal is permitted to award either simple or compound interest on any sum awarded, at such rates as the tribunal deems appropriate, without being bound by rates of interest applied by any particular state court or other legal authority.

Contingency fee arrangements are not permitted in the UAE (either onshore or offshore). Funding by third parties is permitted, in certain circumstances.

11. THE FUTURE

The Emirates Maritime Arbitration Centre (**EMAC**) opened in the DIFC in September 2016. As the name suggests, EMAC has been established as a specialist centre to deal with maritime arbitrations and has its own set of arbitration rules. Unless otherwise agreed between the parties, the DIFC courts shall have jurisdiction to determine any claim, application or challenge relating to any award issued or procedures of arbitration adopted by an EMAC arbitral tribunal.

From an enforcement perspective, parties often experience delays when enforcing an award in the UAE's onshore courts. As a result, parties have in recent times sought to take advantage of DIFC's pro-arbitration stance, using it as a conduit jurisdiction to enforce awards onshore in the UAE without having to use the onshore courts.

This approach has not found favour with local courts, leading to the creation of a "Judicial Tribunal" to determine jurisdictional conflicts between the DIFC courts and those onshore.

The recent trend of the Judicial Tribunal has been to narrow the scope to use the DIFC as a conduit – a trend we expect to continue.

12. INVESTOR STATE ARBITRATIONS

The UAE has ratified the Washington Convention on the Settlement of Investment Disputes 1965 (**ICSID Convention**). The UAE is a party to more than 40 bilateral investment treaties (**BITs**) with nearly all in force. Most of these treaties contain the standard investment treaty clauses, including "most favoured nation" clauses.

USA

This chapter was written by Glenn R. Legge and Jeanie Tate Goodwin

1. INTRODUCTION TO COUNTRY JURISDICTION/OVERVIEW

Historically in the US, courts refused to enforce arbitration agreements under the common law because they represented a threat to the power of the courts. Around the time of the Industrial Revolution, however, large corporations realised that arbitration was faster, less adversarial and less expensive. This new attitude resulted in passage of the New York Arbitration Act of 1920, followed by the United States Arbitration Act of 1925 (now known as the **Federal Arbitration Act or FAA**).

2. ARBITRAL INSTITUTIONS

The most prominent arbitral institutions in the US are the American Arbitration Association (**AAA**), International Centre for Dispute Resolution (**ICDR**), Judicial Arbitration and Mediation Services (**JAMS**), International Institute for Conflict Prevention and Resolution (**CPR**), and International Court of Arbitration of the International Chamber of Commerce (**SICANA in North America**).

3. ARBITRATION AGREEMENT

3.1 Governing law

In the US, the FAA provides a basis to enforce an arbitration clause in any contract involving a maritime transaction or related to foreign or interstate commerce. The FAA creates a strong presumption in favour of arbitration clauses. In fact, federal law protects arbitration clauses from state legislation that could invalidate the terms of an arbitration clause.

Typically, any dispute of a civil or commercial nature between private persons or entities can be arbitrated unless prohibited by statute or other public policy. Criminal cases and some family law disputes cannot be arbitrated.

Unilateral clauses offer advantages to the opting party and are generally

enforceable in commercial contracts; however, some US jurisdictions have found them lacking in mutuality and/or unconscionable, especially in employment contracts or contracts of adhesion (i.e. standard form contract).

Hybrid clauses are often enforceable in the US; however, as institutions may differ significantly in terms of organisational, functional or governing structures, requiring one institution to administer a proceeding using the rules of another institution may create practical difficulties, if not legal risks.

3.2 Choice of law/seat

Generally, parties entering a commercial transaction are free to choose the law applicable to such agreement. In the absence of an express agreement regarding choice of law applicable to the contract, courts and arbitral tribunals resolve choice of law questions by assessing party intent and selecting the law that the parties presumptively intended to choose at the time of the transaction. In cases where no inference as to intent of the parties can be drawn, however, the governing law of the contract shall be the one determined by the law of the seat of arbitration.

The validity of a contractual agreement to arbitrate is generally determined by the relevant state's law governing the formation of contracts.

The enforceability of the arbitration provision, however, is almost always governed by the FAA. Indeed, the FAA governs any parties' agreement to arbitrate in the US whether or not the FAA is expressly mentioned in the agreement. Further, the FAA pre-empts the state law selected in a general choice-of-law provision unless the contract expressly evidences the parties' intent that state arbitration law applies in place of or in addition to the FAA.

3.3 Mandatory/non-mandatory provisions

The FAA provides the legislative framework for enforcing agreements to arbitrate and for enforcing and challenging arbitral awards.

3.4 Severability

According to the severability doctrine, the invalidity of the underlying agreement does not impact the validity of the arbitration clause; likewise, the invalidity of the arbitration clause does not render the underlying agreement invalid.

4. CONFIDENTIALITY/PRIVACY

The FAA intends for arbitration in the US to be private, but the evidence and awards are not always confidential without an agreement between the parties. The parties may include confidentiality terms in the arbitration agreement or once the parties have triggered the arbitration process. Without a specific confidentiality agreement between the parties, the arbitral forum's rules will govern – some mandating confidentiality, while others do not. Further, at least four states have enacted statutes mandating confidentiality of arbitration (Arkansas, California, Florida, Texas).

5. THE ARBITRATION TRIBUNAL

5.1 Appointment

Under the FAA, the parties to the arbitration agreement may agree the method of naming or appointing the arbitrator(s). Otherwise, the court will designate and appoint the arbitrator(s) upon application by either party. Unless the parties' agreement states otherwise, a single arbitrator will conduct the arbitration.

Under the AAA Commercial Rules, an arbitrator is expected to be impartial and independent from the parties and to

perform their duties with diligence and in good faith. However, if the parties agree to appoint non-neutral arbitrators, then such arbitrators need not be impartial or independent.

5.2 Jurisdiction - kompetenz-kompetenz

Parties may specify in their arbitration agreement whether a particular matter is for the arbitrator or court to decide. But if the contract is silent on this issue, the court will determine the parties' intent with the help of presumptions. One such presumption is that courts, rather than arbitrators, should decide disputes related to "arbitrability". Disputes related to arbitrability include whether the parties are bound by a given arbitration clause and whether an arbitration clause applies to a particular type of controversy.

5.3 Powers

(a) Emergency powers

The AAA Commercial Rules outline the procedures for emergency measures of protection. Upon notice by the party seeking emergency relief, the AAA can appoint a single emergency arbitrator who can rule on applications for emergency relief.

(b) Interim relief

If the emergency arbitrator determines that the party seeking emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of such relief, he or she can enter an interim order or award granting such relief. The interim award may be conditional upon a party providing appropriate security. The emergency arbitrator will initially apportion the costs associated with the emergency relief, subject to the final determination of such costs by the tribunal.

6. THE ARBITRATION PROCEEDINGS

6.1 Process

The arbitration agreement dictates the arbitration process, usually by referencing the rules of a certain arbitral association. The AAA is the leading US arbitral association. A claimant's demand for arbitration filed with the AAA commences the arbitration proceeding. The arbitrator sets the hearing schedule and provides the notice of hearing. The arbitrator issues the award no later than 30 days after the closing of the hearing. The arbitration agreement may generally modify any of these procedural rules.

6.2 Evidence

The AAA Commercial Rules specifically state that the evidence need not conform to legal rules of evidence. In an AAA proceeding, the arbitrator will determine the admissibility, relevance, and materiality of offered evidence, and they may exclude evidence deemed cumulative or irrelevant. Regarding oral evidence, the arbitrator may require witnesses to testify under oath if it is required by local law or requested by any party.

Practically, however, most parties will create their own set of rules to govern procedural and evidentiary issues. Some agree to follow the rules of evidence established in the jurisdiction set forth in the contract's choice of law clause. Others adopt the local rules of civil procedure, while agreeing to work under a more relaxed set of evidentiary rules.

6.3 Privilege

The AAA Commercial Rules direct the arbitrator to take into account applicable rules regarding legal privilege, such as those involving confidentiality between a lawyer and client. The arbitrator determines which rules are applicable by looking to choice of law provisions in the underlying arbitration agreement.

The FAA authorises an arbitrator to issue a subpoena compelling testimony and the production of documents at the arbitration hearing. It further states that if the target of the subpoena refuses to comply, the local federal district court can compel the witness attendance or punish the witness for failing to attend the hearing.

While the FAA is clear about an arbitrator's power to compel witnesses or documents to the hearing, it is silent as to the same power pre-hearing. Currently, federal circuit courts are split regarding whether or not an arbitrator may effectively issue a subpoena for documents or compel witness testimony prior to the hearing.

6.4 Disclosure

Under the AAA, the arbitrator manages the exchange of information and documents amongst the parties. He or she may require the parties to exchange documents in their custody or possession on which they intend to rely at the hearing.

6.5 The Award

Remedies available in arbitrations are generally derived from the arbitration agreement. Under the AAA Commercial Rules, the arbitrator may grant any award that is just and equitable and within the scope of the arbitration agreement.

The award should be in writing and signed by the arbitrators. A reasoned award is not required unless the parties request the same or the arbitrator determines that such is appropriate.

7. ROLE OF THE COURT

If a plaintiff files suit in federal court on a dispute subject to mandatory arbitration, either party may move to compel arbitration. Similarly, if a party refuses to arbitrate despite a valid agreement to arbitrate, a party aggrieved by the failure may sue in federal court to compel arbitration.

A party seeking to enforce a promise to arbitrate must prove that (i) the parties agreed to arbitration; and (ii) the claim is arbitrable. When ruling on the motion to compel, the court should resolve any doubts about the arbitrability of claims in favour of arbitration, while leaving subsidiary questions to the arbitrator. Some questions for the court include whether the parties are bound by an arbitration clause in a contract, whether an arbitration clause applies to a particular type of controversy, whether the parties actually entered into an arbitration agreement and whether the arbitration clause is valid. Questions for the arbitrator include procedural issues such as whether time limits, notice, laches, estoppel, waiver, and other contractual conditions precedent to an obligation to arbitrate have been met, and whether the entire contract is valid.

8. APPEALS

The FAA provides limited rights to appeal or challenge an arbitration award, none of which involve the merits of the award. Within three months of issuing an award, parties may challenge the award in only one of two ways: (i) by motion to modify or correct the award; or (ii) by motion to vacate the award.

Grounds for moving to modify or correct the award include: (i) where the award contains an evident miscalculation of numbers or a material mistake in the description of any person, thing or property referred to in the award; (ii) where the award resolves a matter not submitted to arbitration, unless such matter does not affect the decision on the properly submitted matter; and (iii) where the award contains an error in the form of the award not affecting the merits of the controversy.

Grounds for moving to vacate the award include: (i) where the award was procured by corruption, fraud or other undue means; (ii) where there was evident partiality or corruption by the arbitrator; (iii) where the arbitrator committed misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence material to the controversy, or misbehaved in such a way as to prejudice the rights of any party; and (iv) where the arbitrator exceeded their power, or so imperfectly executed them that a mutual, final and definite award on the subject submitted was not made.

Once the trial court has ruled on the motion to modify, correct or vacate, a party may follow the normal process in appealing those orders.

Federal courts differ over whether parties may contractually limit judicial review under the FAA. Some courts have held that parties may not waive judicial review of arbitration awards because the limited scope of appeal already set out in the FAA protects the integrity of the arbitral process. Others, however, allow for some restrictions on the FAA's already limited grounds to appeal an award. Generally, the courts emphasise the importance of protecting the parties and the judicial system by not wholly eliminating the right to appeal.

Parties may not agree to expand judicial review of an award rendered under the FAA beyond the grounds mentioned above. At least one state high court has recognised, however, that parties may contractually agree to expand judicial review of arbitration awards rendered under the California Arbitration Act.

Although judicial expansion of appellate rights is not permissible under the FAA, parties may provide for review by a different arbitration panel. For example, the AAA has created Optional Appellate Arbitration Rules to govern those situations where the parties need a more comprehensive appeal of an award in the arbitral process.

9. RECOGNITION AND ENFORCEMENT

Within one year after issue of a domestic award, a party may file a motion with the trial court to confirm the award. The motion should be filed in the court specified in the arbitration agreement, or if no such court is specified, in the US federal district court in the district where the award was made.

The FAA permits the confirmation of a foreign arbitration award if the party seeking confirmation complies with the relevant convention and the party opposing confirmation proves no grounds to bar the confirmation. Both the New York Convention 1958 (accession 1970) and Panama Convention (ratified 1986) are incorporated into US law through the FAA.

A party can file in US federal district court a motion to confirm a foreign arbitration award under the New York or Panama Conventions within three years after the award was made. For these conventions to apply, the award must be a foreign commercial arbitration award made within a signatory country. An award is foreign when it (i) is not entirely between citizens of the US, (ii) involves property located outside the US, (iii) involves contractual performance outside the US, or (iv) has some other reasonable relation to one or more foreign countries.

A party may challenge the motion to confirm a foreign arbitration award. Where the award was made outside the US, the party challenging the motion is limited to the grounds for refusing or deferring the award's confirmation under the relevant convention. For instance, the New York and Panama Conventions allow for the challenge of a foreign award if it would be contrary to public policy

of the country in which confirmation or enforcement is sought. This ground for refusing confirmation, however, applies only when confirmation would violate the most basic notions of morality and justice.

The duration of an enforcement proceeding varies depending on the court's schedule and the complexity of the issues. These proceedings could take from less than one to several years.

10. COSTS, FUNDING AND INTEREST

Under the AAA, interest can be included in the award based on a rate that the arbitrator deems appropriate. Attorney's fees may also be awarded if all parties have requested same or if the arbitration agreement or law allows for same. Taxation of arbitration awards is treated similarly to taxation of judgments: the arbitration will be taxed if a court judgment would be taxed under the federal or state jurisprudence governing the arbitration. Generally, third-party funding is an acceptable practice in the US, but depending on the specific venue, the state may have enacted statutes regulating the funding. Contingency fees are also generally acceptable.

11. THE FUTURE

11.1 Litigation Funding Issues

Since the 2016 *Essar Oilfield Services v. Norscot Rig Management* opinion was issued by the High Court of England and Wales, which upheld an arbitration award that included amounts paid by the claimant to a third party litigation funding entity, US arbitrators have been faced with similar situations. Although this is an issue related more to common law determination, rather than arbitration rule change, we anticipate that the arbitration rules may address this issue in the near future.

11.2 Discovery/Disclosure Conducted in US Related to Foreign Arbitration Proceedings

28 USC § 1782 allows parties in proceedings before a "foreign or international tribunal" with access to US courts to obtain written discovery and oral testimony without the use of letters rogatory or international conventions. For years, the extent of the term "tribunal" has been subject to judicial determination, e.g. whether it was restricted to judicial proceedings or extended to private arbitrations. In November 2016, the United States District Court for the Southern District of New York allowed discovery to be conducted in the US in relation to a commercial arbitration proceeding in London. See, *In re Ex Parte Application of Kleimar N.V.*, 2016 WL 69067.

12. INVESTOR STATE ARBITRATIONS

The US is a signatory and contracting State to Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965 (**ICSID**)).

US Bilateral Investment Treaties (**BITs**) frequently contain the following clauses:

- National treatment;
- "Most favoured nation" treatment;
- Fair and equitable treatment; and
- Compensation in the event of expropriation.

Most US BITs allow foreign investors to sue states directly for claims related to breach of the BIT by submitting the claims through arbitration tribunals rather than the local or national courts.

Under 28 USC § 1610, certain property located in the US but owned by a foreign state that is used for commercial activity in the US is not immune from attachment to aid in execution, or from execution,

upon a judgment entered by a court in the US or of a state, under limited circumstances listed in §1610:

- The foreign state has waived immunity from attachment explicitly or by implication;
- The property is or was used for commercial activity upon which the claim is based;
- The execution relates to a judgment establishing rights in property which has been taken in violation of international law;
- The execution relates to a judgment establishing rights in the property;
- The property consists of any contractual obligation related to an indemnity obligation toward the foreign state or employee under a policy of automobile or other liability/casualty insurance; and
- The judgment is based on an order confirming an arbitral award rendered against a foreign state, provided the attachment in aid of execution, or execution, would not be inconsistent with any provision of the arbitral agreement.

THE AUTHORS

AUSTRALIA

NICK LONGLEY
Partner
T +61 (0)3 8601 4585
E nick.longley@hfw.com

HAZEL BREWER
Partner
T +61 (0)8 9422 4702
E hazel.brewer@hfw.com

SIMON SHADDICK
Partner
T +61 (0)3 8601 4554
E simon.shaddick@hfw.com

CHRIS LOCKWOOD
Consultant
T +61 (0)3 8601 4508
E chris.lockwood@hfw.com

BRAZIL

FLÁVIO SPACCAQUERCHE BARBOSA
T 55 21 3231 8225
E flavio.spacca@mattosfilho.com.br

EDUARDO DAMIÃO GONÇALVES
T 55 11 3147 7608
E eduardo.damiao@mattosfilho.com.br

PEOPLE'S REPUBLIC OF CHINA

NICHOLAS POYNDER
Partner
T +86 21 2080 1001
E nicholas.poynder@hfw.com

JENNY CHESTER
Senior Manager
T +86 21 2080 1100
E jenny.chester@hfw.com

ENGLAND & WALES

DAMIAN HONEY
Partner
T +44 20 7264 8354
E damian.honey@hfw.com

NICOLA GARE
Disputes Professional Support Lawyer
T +44 20 7264 8158
E nicola.gare@hfw.com

FRANCE

STANISLAS LEQUETTE
Partner
T +33 1 44 94 40 50
E stanislas.lequette@hfw.com

TIMOTHY CLEMENS-JONES
Partner
T +33 1 44 94 40 50
E timothy.clemens-jones@hfw.com

HONG KONG

PETER MURPHY
Partner
T +852 3983 7700
E peter.murphy@hfw.com

FERGUS SAURIN
Senior Associate
T +852 3983 7693
E fergus.saurin@hfw.com

KUWAIT

RULA DAJANI ABULJEBAIN
Partner
T +965 9733 7400
E rula.dajaniabuljebain@hfw.com

DR JULIAN AWWAD
Senior Associate
T +965 2220 3668
E julian.awwad@hfw.com

SAUDI ARABIA

MOHAMMED ABDULRAHMAN ALKHLIWI
Senior Executive
T +966 50 055 7890
E mohammed.alkhliwi@hfw.com

JOHN BARLOW
Partner
T +971 56 466 3690
E john.barlow@hfw.com

SINGAPORE

PAUL ASTON
Partner
T +65 6411 5338
E paul.aston@hfw.com

CHANAKA KUMARASINGHE
Partner
T +65 6411 5314
E chanaka.kumarasinghe@hfw.com

SUZANNE MEIKLEJOHN
Associate
T +65 6411 5300
E suzanne.meiklejohn@hfw.com

SWITZERLAND

MICHAEL BUISSET
Partner
T +41 (0)22 322 4801
E michael.buisset@hfw.com

SARAH HUNT
Partner
T +41 (0)22 322 4816
E sarah.hunt@hfw.com

WILLIAM HOLD
Senior Associate
T +41 (0)22 322 4811
E william.hold@hfw.com

UAE

BEAU MCLAREN
Partner
T +971 4 423 0521
E beau.mcLaren@hfw.com

JANE MILES
Senior Associate
T +971 4 423 0548
E jane.miles@hfw.com

GERARD MOORE
Associate
T +971 4 423 0569
E gerard.moore@hfw.com

DEREK BAYLEY
Associate
T +971 4 423 0580
E derek.bayley@hfw.com

US

GLENN R. LEGGE
Partner
T +1 (713) 706 1941
E glenn.legge@hfw.com

JEANIE TATE GOODWIN
Partner
T +1 (713) 706 1945
E jeanie.goodwin@hfw.com

This is the first edition of HFW's International Arbitration Passport, a comparative jurisdiction guide to international arbitration, and the first in a series of planned 'Passports' covering key Disputes topics.

The International Arbitration Passport includes 12 country chapters, which have been written by lawyers in our International Arbitration Group. The Passport gives a readily accessible overview of those jurisdictions. However, readers are encouraged to contact the authors, or their usual HFW contact to discuss particular jurisdictions where detail and up to the minute advice is needed.

MIX
Paper from responsible sources
FSC® C017916

Printed using vegetable based inks on paper from sustainable sources, using ISO 14001 accredited working practices to minimise environmental impact.

hfw.com

Americas | Europe | Middle East | Asia Pacific