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CMS Guide to Arbitration in Europe

Second Edition 2005

Contents

Foreword

Acknowledgements

Introduction

Austria

Belgium

Czech Republic

England and Wales

France

Germany

Hungary

Italy

Netherlands

Poland

Romania

Russian Federation

Scotland

Spain

Switzerland

CMS transnational legal and tax services

Appendix 1 – Sample arbitration clauses

Appendix 2 – Comparative table

Appendix 3 – Arbitration conventions – ratifications, accessions and successions

Appendix 4 – UNCITRAL Model Law

Appendix 5 – Useful addresses

CMS Guide to Arbitration in Europe

Foreword

Arbitration has long been one of the preferred methods for resolving international commercial disputes because of its ability to transcend the restrictions of national court systems and procedural law, and for a variety of other reasons, including its flexibility, and the confidentiality of the process and of the resulting award. In today's climate of increasingly integrated European and global economies, it deserves this position more than ever. Furthermore, many countries in Europe and internationally have recently modernised their arbitration laws and have been guided in that process by the UNCITRAL Model Law of 1985. The resulting harmonisation of national arbitration laws has been intended to increase the efficacy of arbitration as a preferred method for the resolution of international commercial disputes.

The continuously expanding network of CMS member firms, with offices in key European and international business centres, has succeeded in building a strong reputation and practice in the area of international commercial dispute resolution. This Guide is a tribute to the expertise and dynamic team work between our arbitration lawyers across the whole of Europe, and to their ability to provide our clients with an integrated transnational legal dispute resolution service.

In this second edition, we have new chapters from Italy and Spain and all other chapters have been updated to reflect developments in law and practice in the various jurisdictions

covered in this work. Notably, the chapters from Poland and Switzerland have been rewritten to reflect substantial recent developments in arbitration in those jurisdictions.

We wish to thank all those who have contributed to this Guide and, in particular, Neil Aitken and Guy Pendell, who have carried this project through to completion. We hope that you share our appreciation of this Guide as a readily accessible and practical introduction and reference to arbitration across Europe for business leaders and their advisers in a wide range of industry sectors.

Robert Derry-Evans, Executive Partner, CMS
Pierre-Sebastian Thill, Chairman, CMS

Acknowledgments

It is my pleasure to be able to present this comprehensive Guide to arbitration covering all the various European jurisdictions where CMS enjoys a presence as market leader providing a full range of legal and tax services and the reputation of strong and established dispute resolution practices. This tool is an example of CMS's expertise in the area of international commercial arbitration and of our ability to provide integrated cross-border advice to our clients in an increasingly integrated and fast moving international business environment.

I am very grateful to each of the contributors from the CMS member firms and offices throughout Europe who have written the country chapters, and without whom this work would not have been possible. You will find contact names at the end of each country chapter and in the section on CMS Legal Services. Thanks go to Neil Aitken, Head of International Arbitration Group at CMS Cameron McKenna LLP, my predecessor, who initiated this Guide. I am also grateful to Guy Pendell, a partner in the International Arbitration Group at CMS Cameron McKenna LLP, for his considerable assistance in producing this second edition and to all those others who have made their valuable contributions to the production of the Guide.

John Bosnak, Head of the CMS Dispute Resolution Practice Area Group

Introduction

Arbitration explained

Arbitration defined

"Arbitration" has a contractual and a judicial element. It can be defined as a private and consensual form of adjudicative dispute resolution based on an agreement between the parties to refer a current or future dispute between them arising from a defined legal relationship to an impartial third party appointed by the parties (the arbitral tribunal) to settle their dispute in a judicial manner after hearing both sides and to be bound by the result.

Pursuant to the Model Law on International Commercial Arbitration promulgated by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 (the "UNCITRAL Model Law"), an arbitration may be defined as an "international" arbitration if:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- one of the following places is situated outside the State in which the parties have their places of business:
  - the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  - any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

- the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Institutional and ad hoc arbitration

Institutional arbitration

An "institutional" arbitration is an arbitration conducted pursuant to the rules of an established arbitration institution. In institutional arbitrations, certain procedural steps, for example, the appointment of the arbitral tribunal, or service of documents, may involve or be administered by the president or secretariat of the institution (see further below).

In the area of international commercial arbitration, there are a number of leading international arbitration institutions, such as the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Deutsche Institution für Schiedsgerichtsbarkeit (DIS), and others. In addition, most countries have their own commercial arbitration institutions which deal both with domestic and international arbitrations.

There are also a number of specialist trade associations which administer their own arbitration schemes, dealing with disputes concerning, for example, particular internationally traded commodities, or shipping. Leading examples of such specialist arbitration schemes are those set up by the Grain and Feed Trade Association (GAFTA), the Federation of Oils, Seeds & Fats Associations (FOSFA), the Liverpool Cotton Association, the London Metal Exchange (LME), or the London Maritime Arbitrators Association (LMAA). Many countries also have arbitration institutions which deal primarily with disputes in the construction industry.

Most arbitration institutions have published their own arbitration rules, which parties may incorporate into their arbitration agreements by reference, using standard form arbitration clauses suggested by these arbitration institutions. Sample clauses recommended by selected leading arbitration institutions are set out in Appendix 1 to this Guide.

If institutional arbitration rules are adopted by the parties in their arbitration agreement, these rules replace (to the extent permitted by the substantive law governing the arbitration agreement and the procedural law governing the arbitration proceedings, and to the extent that the parties have not agreed otherwise) the statutory arbitration procedure provided for by the national arbitration laws of the country where the arbitration is to take place (or has its juridical "seat").

Most arbitration institutions also have a secretariat which, in return for payment of a fee, will assist the parties with the administration of their arbitration proceedings and with constituting an arbitral tribunal by appointing arbitrators where this cannot be achieved by agreement between the parties.

The advantages for the parties to an arbitration agreement of agreeing to the rules of an international arbitration institution, and of thereby benefiting from the services provided by that institution in relation to any arbitration which arises, may include the following:

- the arbitration will take place within an internationally recognised and established procedural framework pursuant to comprehensive, clear and tested arbitration rules with the administrative assistance of an experienced secretariat;
- if the dispute concerns a particular trade or industry, the arbitration institution may be able to nominate expert arbitrators from its panel of approved arbitrators;
- some arbitration institutions (in particular the ICC) carry out quality control over the work of the arbitral tribunals appointed under their auspices and monitor the progress of the proceedings; and
- disputes between the parties about the application of statutory arbitration procedures of a particular country can be avoided in so far as the provisions of the arbitration law of the country where the arbitration takes place are not mandatory; and
- in international commercial arbitration, institutional arbitration is often regarded as a "neutral choice".

The disadvantages of institutional arbitration are that:

- additional costs are incurred by the parties in the way of fees for the administrative services provided by the institution; if these are linked to the value of the claim in dispute between the parties, they can be substantial; and
- the involvement of a secretariat may delay the arbitration proceedings.

Ad hoc arbitration

An "ad hoc" arbitration is an arbitration pursuant to an arbitration agreement between the parties which does not specify an arbitration institution to provide administrative services and/or the procedural rules pursuant to which an arbitration shall be conducted. When agreeing to an ad hoc arbitration, the parties can either design their own arbitration procedure to suit their particular requirements, or refer to "non-institutional" arbitration rules, such as the UNCITRAL Arbitration Rules, or they can simply rely on the arbitration law of the country where the arbitration has its juridical seat to provide the procedural framework for their arbitration proceedings.

There is no test as to whether institutional or ad hoc arbitration is to be preferred. There are advantages and disadvantages connected with both. However, the main international arbitration institutions have certainly revised and brought up-to-date their rules, and they are generally keen to ensure that the parties, having chosen arbitration to resolve their disputes, benefit from the flexibilities that choice provides for them. For example, they may exercise some informal control over the speed with which the arbitrators deal with the matter, and the level of their fees, controls which, with ad hoc arbitration, lie only with the goodwill of the arbitrators themselves.

This Guide will explore the national arbitration laws applicable in some of the leading European arbitration centres and provide selected reference materials on international commercial arbitration.

In an international context, national arbitration legislation remains relevant. Not only does it provide back-up procedures, which apply if the parties have not adopted a

specific set of institutional arbitration rules in their arbitration agreement, or have not included in their arbitration agreement rules dealing with the specific procedural issues which arise: there are a number of important areas in which national arbitration law continues to apply even where the application of such institutional arbitration rules has been contractually agreed between the parties, or the parties have agreed their own procedural framework.

Thus, the national arbitration laws of the country or countries in which the arbitration has its (juridical) seat, where the arbitration proceedings or some part of them take place, where relevant evidence or assets are located, or where an arbitration award is to be enforced, may all apply to the same arbitration proceedings to the extent that the arbitration proceedings affect that country and may confer jurisdiction on the national courts of that country to deal with issues arising from such arbitration proceedings.

National arbitration law continues to determine, in particular, issues such as:

- the validity and scope of the arbitration agreement;
- the arbitrability of disputes;
- mandatory rules of law;
- the remedies the arbitral tribunal may grant;
- the right of the parties to invoke the jurisdiction of the courts in arbitration applications including appeals and challenges to arbitration awards before national courts; and
- the recognition and enforcement of arbitral awards.

The arbitration process

Because the parties have to pay for an arbitral tribunal to hear their dispute, arbitration has been described as "privatised court proceedings". Court and arbitration proceedings are essentially adjudicative processes and arbitration proceedings often reflect the court procedures adopted in the courts of the judicial seat of the arbitration. Following constitution of the arbitral tribunal, the parties

file their submissions. Thereafter, they produce their evidence (which may be documentary, written or oral, or a combination of all three). There will usually be one or more hearings before the arbitral tribunal (unless the arbitral tribunal will decide only on the basis of the written submissions and documents submitted by the parties). Therefore, the parties will normally have their "day in court". Following the substantive hearing, the arbitral tribunal will deliver its award which, if not satisfied, may then be enforced in the same way as a court judgment.

While it is important that due process considerations are satisfied when parties set out to resolve their disputes by arbitration (indeed, this is one of the main concerns of the arbitration laws discussed in this Guide), it can prove unsatisfactory if arbitrators simply copy court procedure. Such an approach does not make use of the principal advantage of arbitration over court litigation: that of flexibility. A party aware of the potential flexibility of arbitration proceedings may have an advantage over his opponent by seeking to agree or asking the tribunal to adopt procedures appropriate to the nature of the dispute in question.

The speed and efficiency of "look and sniff" commodity arbitrations are only one example of how arbitration can help parties to resolve their disputes speedily and efficiently. Indeed, one of the key features of the arbitration laws discussed in this Guide is that (in keeping with the objectives of the UNCITRAL Model Law) they provide the parties with a large degree of autonomy in the conduct of their arbitration proceedings, and the arbitrators with wide-ranging procedural powers, to ensure that the conduct of any arbitration is proportionate and appropriate to the issues in dispute, subject only to such safeguards as are necessary in the public interest.

Arbitration distinguished

Arbitration/litigation

Litigation seeks to resolve disputes between parties in a public hearing before a judge in a court of competent jurisdiction provided by the state; the judge obtains his authority to act in the proceedings between the parties from the state.

Arbitration, by contrast, is a private (and generally confidential) form of dispute resolution based on an agreement between the parties to refer a current or future dispute between them to arbitration. Instead of a judge, the parties appoint an arbitral tribunal (usually consisting of one or three arbitrators) as an impartial third party to resolve their dispute in a judicial manner after hearing both sides, and agree to be bound by the result. The arbitral tribunal obtains its authority to act in the arbitration from the agreement of the parties to refer their dispute to arbitration. The members of the arbitral tribunal need not be lawyers or legally qualified and may be selected for their specialist knowledge of particular fields in commerce, industry, science, etc.

Arbitration/ADR

The term Alternative Dispute Resolution ("ADR") covers a wide range of dispute resolution techniques ranging from structured negotiation, through mediation and conciliation to adjudication, early neutral evaluation, expert determination, mini trial, and many others.

The common characteristic of mediation and conciliation, in particular, is that they aim to produce an amicable settlement between the parties while avoiding formal proceedings, and thereby to create a "win/win" solution to the dispute from which both parties benefit without there necessarily being a winner and a loser. These methods seek to neutralise the adversarial nature of formal legal proceedings.

Although ADR can be useful as a complement to litigation or arbitration, and can often assist in solving disputes

before litigation or arbitration becomes necessary, the success of ADR is dependent on the continuing co-operation and goodwill of the parties: they need to be prepared to settle their dispute by agreement. However, once a substantial dispute has arisen between the parties, the scope for party co-operation may often already have been exhausted. Unless and until the parties agree to mediate their dispute, and reach a contractually binding settlement agreement as a result of such mediation, there is no element of compulsion connected with ADR. But when parties have fallen out with each other there must, as a last resort, be a mechanism by which one party can enforce its rights as against the other and obtain a binding and enforceable ruling from an impartial tribunal. This only litigation or arbitration can provide.

The comparative advantages and disadvantages of arbitration and litigation

The tribunal

In arbitration the parties are free to choose their own tribunal and can appoint an arbitrator with special technical or commercial qualifications, expertise, and knowledge of the subject matter of their dispute, of the technical terminology, and of the customs of their trade.

This can contribute to the overall efficiency, speed, and cost effectiveness of the dispute resolution process because an arbitrator chosen for his specialist knowledge or experience of a trade, industry, product, or process, does not need lengthy technical explanations of such matters, as a judge may do. Also, an arbitrator's award may be better reasoned because of a more thorough understanding of the issues underlying the dispute.

Where the substantive issue between the parties raises primarily difficult questions of law, it may be more prudent for the parties to choose legal proceedings in the courts or legally qualified arbitrators.

In an arbitration there is continuity in the composition of the tribunal appointed to settle the dispute, unlike court proceedings in many countries, such as England, where a number of different judges may be involved in a case at its various stages. An arbitrator is in principle appointed to deal with a particular dispute from beginning to end. This continuity enables the arbitrator to get to know the parties, their advisers, and the case as it develops. Should the opportunity arise, he is therefore well placed to guide the parties in developing a suitable procedure for resolving their disputes (and, perhaps, in reaching a negotiated settlement in the course of the proceedings).

On the other hand, the powers which may be exercised by an arbitral tribunal are more limited than those conferred on a court of law. Should it become necessary for an arbitral tribunal to take enforcement steps to deal properly with the case before it (for example, in relation to interim protective measures, or compelling the attendance of witnesses to give evidence before it, or the enforcement of awards), such action can generally only be taken indirectly by the arbitral tribunal with the assistance of the courts.

Representation

In arbitration the parties can also decide whether they want to be represented in the proceedings by a lawyer, or by a technical expert, or by any other person of their choice, or whether they prefer to dispense with representation altogether. Generally, in court proceedings, corporate parties are often required to be represented by advocates qualified in the jurisdiction of the relevant court.

Flexibility

A major advantage of arbitration is its flexibility. Arbitration does not need to follow established court rules and can therefore take better account of the fact that the resolution

of different disputes may require different approaches. The parties to an arbitration are able to exercise greater control over the dispute resolution process than in court proceedings and may design the arbitration process so that it is best suited and appropriate to dispose of the issues in dispute between them in order to meet their commercial and other requirements.

The parties may agree on measures to reduce costs and to speed up the proceedings. For example, they may: adopt fast track procedures replacing the exchange of formal statements of case; limit the evidence which may be presented to the arbitrator; limit the extent of disclosure of documents to certain types or categories of documents; agree to submit evidence in writing; provide for a decision being made on the basis of documents only, or on written submissions plus a short oral hearing; provide for written openings and closings; and impose time limits on the length of oral submissions at any hearing. Often, by adopting modern rules of arbitration of an international arbitration institution in their arbitration agreement, the parties will enable themselves to benefit in those respects since those rules will authorise the arbitrators to adopt such measures if they consider them to be appropriate.

Unless these options are actively considered by the parties in each individual case, and canvassed by the arbitrators where appropriate, arbitration proceedings run the risk of becoming a mere replication of court proceedings and of their inherent disadvantages.

Furthermore, the parties may also agree to make the arbitration process more convenient by holding hearings in unconventional places (for example, on a construction site, or on board a ship), or at unconventional times (for example, by making use of video-link facilities while bridging different time zones), or by communicating by e-mail.

Finally, the parties may choose the substantive law to be applied by the arbitrator in arriving at his decision; or they

may agree that the arbitrator does not have to make his decision based strictly on the basis of the law but based on other principles, such as trade usage, or even ex aequo et bono (i.e., on the basis of equitable principles of fair dealing), or under the principles of the lex mercatoria (i.e., internationally recognised principles of merchant law and trade customs).

Speed

Arbitration proceedings have a potential to be speedier than court proceedings, in particular, in countries with over-burdened court systems. The parties can control the procedure applied to the arbitration proceedings and may agree a more or less strict timetable. There is, however, no guarantee that arbitration will necessarily save time compared to litigation. Arbitration is to a certain extent consent driven and arbitrators have less robust armoury in the face of a recalcitrant party than a court judge. In addition, the arbitrators' conduct of the proceedings may be subject to review by the courts. There may therefore be greater opportunity in arbitration for an obstructive party to delay the proceedings.

Quicker and cheaper proceedings, such as summary proceedings to enforce payment of liquidated debts, are sometimes available in the courts, although most modern arbitration rules will allow arbitrators to make interim awards. In the early stages of any dispute the immediacy of arbitration may be less than that of court proceedings because it may take time for the arbitral tribunal to be constituted. But in some jurisdictions the courts are so over-burdened that even this impediment may result in a significantly earlier arbitration award than any court judgment.

Costs

Arbitrating a dispute rather than taking it to court may result in a saving of costs but arbitration is not necessarily a cheaper method of resolving disputes than litigation. In arbitration proceedings the fees and expenses of the arbitrators must be paid by the parties. It may also be

necessary to pay the administrative fees and expenses of an arbitral institution. Both can be substantial, in particular, when they are assessed by reference to the amounts in dispute. Rooms for meetings and hearings and other services also have to be paid for by the parties to arbitration proceedings. The arbitrator's fees and expenses are usually payable (ultimately at least) by the party taking up the award and may in practice not be recoverable from an impecunious opposing party, even if that party has been ordered to pay the costs of the award or of the arbitration.

In litigation, the services of the judge and court officers, and the premises for hearings, are provided by the state and covered by the (generally lower) court fees, although awards of costs against an impecunious opposing party are no more likely to result in a successful recovery.

Confidentiality

Arbitration is a private process and hearings are normally conducted in private. Court hearings are generally held in public. In arbitration the documents produced by the parties, and the arbitrator's award, generally remain confidential; it is therefore easier for the parties to avoid damaging publicity, trade secrets can be preserved, and sensitive commercial information protected. This may also help to maintain a valuable business relationship between the parties for the future. Not all jurisdictions in which an arbitration may take place hold that arbitration is confidential as a matter of principle. But, if there is any doubt, confidentiality provisions can be (and often should be) built into the arbitration agreement. Such provisions are usually upheld in most jurisdictions.

Certainty

Arbitration may provide certainty more quickly than litigation. Under modern arbitration statutes, the arbitration award is normally final and binding, with only limited grounds for any appeal or challenge of the award. Any right as there may be to appeal or challenge an award may be further restricted in the arbitration agreement. In a commercial environment, where all parties need to know where they stand as soon as possible, this can be a

considerable advantage. If necessary, an arbitration award can in most circumstances readily be enforced through the courts in the same way as a court judgment.

International disputes

Arbitration has particular advantages in relation to disputes with an international element. When agreeing to arbitration, a claimant does not have to submit the dispute to the jurisdiction of a foreign court, which will (under the rules of international civil procedure as established, for example, by the 1968 Brussels Convention (or in the EU (excluding Denmark) Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements) or the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention" and the "Lugano Convention")) frequently be a court in the defendant's home country, with whose laws and procedures the claimant may not be familiar, and where he will not be able to instruct the lawyers with whom he is used to dealing, who know his business, and in whom he trusts.

An arbitral tribunal need not be representative of the home courts of one party only and a "neutral" territory can be selected as the juridical seat of and/or venue for the arbitration. This can be of particular relevance if a foreign state or foreign state entity is involved in the dispute as a party, and sovereignty considerations prevent submission under the jurisdiction of the courts of another country. The parties are also free to agree on the language (or languages) of the arbitration.

Many leading trading nations have now ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and other multi-lateral conventions or bi-lateral treaties providing for the recognition and enforcement of arbitral awards. It is therefore generally possible to enforce an arbitration award in another jurisdiction more easily than

a foreign court judgment (unless there exist (reciprocal) enforcement arrangements between the jurisdictions in question). Enforcement of arbitral awards will be addressed in more detail in the individual country chapters. A list of the signatories to the New York Convention is in Appendix 3 of this Guide.

International arbitrations, while constrained by the applicable procedural law of the juridical seat, can adopt procedures recognizing that the parties may come from different legal systems. Those procedures could represent a compromise reflecting a middle course between the parties legal systems[1] or an entirely different approach to the parties national courts.

Bilateral Investment Treaties

Most European member states have entered into a large number of bilateral investment treaties (BITs). Arbitration represents the common method of dispute resolution for BIT disputes. As BITs have become increasingly significant in international trade and investment, so have the arbitrations conducted pursuant to the BITs. In addition to being parties to BITs, European states can be the designated seat of the arbitrations under BITs as a neutral venue.

Limitations on arbitration

Arbitration is a contract based process and the submission of disputes to arbitration is limited to disputes arising between the contracting parties and covered by the arbitration agreement. This principle of contractual privity can give rise to problems in multi-party situations where the rights of third parties may be affected by a dispute. However, such circumstances can often be anticipated and appropriate provision be made in the arbitration agreement at the contract drafting stage. Some national arbitration laws and institutional arbitration rules expressly address specific problems to which multi-party disputes may give rise.

[1] The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration include elements of procedure used in many different legal systems but may be a useful resource in an international arbitration when the parties come from different legal cultures.

Absent agreement between all parties involved, it may otherwise not be possible to consolidate multi-party disputes before one and the same arbitral tribunal; whereas in court litigation all relevant parties can usually be joined in one action and multiple proceedings concerning the same parties or subject matter be consolidated on application so that they can be heard (and decided) at the same time. Moreover, unless all the issues arising between the parties are covered by the arbitration agreement, it may only be possible to resolve the overall dispute in separate but parallel court and/or arbitration proceedings, which may give rise to an inherent risk of conflicting decisions in relation to the subject-matter of the dispute.

Finally, certain civil and commercial disputes are often regarded as not arbitrable as a matter of national public policy.

Conclusion

Arbitration can have clear advantages over litigation as a means of settling commercial disputes. It is important to appreciate that there may be a choice between litigation or arbitration and that the most appropriate dispute resolution mechanism should always be determined on a case by case basis, depending on the particular circumstances of each case. The nature of the dispute, the identity of the parties, the courts which might otherwise have jurisdiction, and the location of assets are only some of the many factors which should be taken into account when deciding which form of dispute resolution to agree. Absent an express dispute resolution agreement, the only certainty is that any dispute will end up before a court somewhere. The risk is that that court, for a variety of reasons, may not have been the first choice of one or other (or, indeed, any) of the parties to the resulting litigation.

Dispute resolution in Europe

An overview

Historical background

The countries covered in this guide have historically quite different legal traditions. Comparative law distinguishes (amongst others) between the Napoleonic, Germanic and Common Law systems of law, all of which have in turn been influenced to a greater or lesser extent by Roman law. In addition, the former socialist countries in Central and Eastern Europe are in the process of adapting their legal systems to the economic and political circumstances of democratically governed market economies.

But today an increasing number of these countries all have one overriding factor in common, which has already had, and continues to have, a substantial impact on the recent development and future convergence of their legal systems: they are members of the European Union ("EU") and subject to an ever increasing volume of primary and secondary EU legislation and instruments.

Dispute resolution techniques: the choice

Where negotiation fails, disputes can be resolved either through litigation in the state courts or through a private dispute resolution mechanism such as arbitration. These two more traditional methods of resolving disputes have in recent years been complemented by ADR techniques. ADR applies in the context of cross-border European or international commercial disputes as much as in relation to purely national disputes.

ADR and, in particular, mediation, originated in the United States but is now widely accepted and practised in the United Kingdom, and increasingly also receives interest throughout the rest of Europe. ADR can readily be combined as a complementary first step in a structured contractual dispute resolution procedure agreed between the parties. A structured dispute resolution clause may, for example, stipulate that the parties may only resort to arbitration or litigation once ADR has failed to produce a settlement of the dispute within a reasonable and agreed

time frame. Such combined clauses are sometimes referred to as "med/arb" or "med/lit" clauses. See, for example, the "med/arb" precedent clause in Appendix 1 to this Guide. It is of course also possible to agree to ADR ad hoc once a dispute has already arisen.

Although this Guide focuses on arbitration, it is important for parties to a contract and their legal advisers to appreciate that there are clear choices which can and should consciously be exercised when it comes to drafting dispute resolution clauses.

Dispute resolution does not necessarily simply mean suing the other party and going to court. Often a much more mutually advantageous result can be achieved for both parties if they agree upon a dispute resolution technique (or combination of techniques) which may more easily and effectively take into account the parties' mutual interests and benefits and their commercial objectives.

The guiding principle is that courts determine disputes in accordance with the law. Arbitrators generally have more latitude to encourage the parties to consider their commercial interests. ADR techniques can produce results (by agreement of the parties) which no adjudicative method of dispute resolution could, by looking beyond and behind the issues in dispute between the parties.

Litigation

Cross-border litigation in Europe was simplified by two conventions applied throughout the Member States of the EU, one on substantive and one on procedural law: the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the "Rome Convention") and the Brussels Convention. The Lugano Convention also makes parallel provision for civil litigation matters as between the member states of the EU and the European Free Trade Area ("EFTA"), by adopting the rules of the Brussels Convention, with some minor modifications. The Brussels and Lugano Conventions have now been replaced, for EU Member States (except Denmark) by Regulation (EC) No. 44/2001 on jurisdiction and the

recognition of judgments in civil and commercial matters ("Regulation 44/2001").

Regulation 44/2001 provides common and binding rules on the jurisdiction of the courts of EU Member States in civil and commercial matters as well as for the ("full faith and credit") recognition and enforcement of final court judgments and orders made in any Member State. The Brussels Convention will continue to apply to Denmark; the Lugano Convention will continue to apply to the non-EU EFTA members. In practical terms, an EU or EFTA court judgment is today basically as readily enforceable in another EU or EFTA jurisdiction as in the jurisdiction in which it was made.

These conventions have made cross-border litigation in Europe a much more predictable experience, although there remain differences in the way in which the conventions are applied by the national courts of the Member States. This problem is remedied to some extent by the fact that the European Court of Justice ("ECJ") has over the years created a substantial body of case law on the interpretation and application of the provisions of the conventions. In the case of the Brussels Convention and latterly Regulation 14/2001, such case law is binding on the (courts of the) EU Member States and, in the case of the Lugano Convention, constitutes persuasive authority.

The Rome Convention sets out rules on how the law applicable to the substance of contractual disputes is to be determined. The applicable law so identified will, however, still be the internal national law of a specific country.

Thus, although within the EU litigation is now a fairly predictable enterprise, nevertheless, litigation essentially remains tied to a given national system of law and court procedure. It suffers not only from the general and system inherent disadvantages of litigation discussed above but also from all the additional specific problems afflicting the civil justice systems and litigation in any particular country.

The costs of litigation and the scale of court fees vary widely throughout the EU; some countries calculate court

fees by reference to the amount in dispute; in other countries court fees are calculated essentially as flat fees regardless of the amount in dispute. There are also substantial differences in the way lawyers calculate their professional fees and in the rates charged.

Other differences between the national courts of the Member States of the EU concern the time it takes to bring court proceedings to a conclusion, from the issuing and service of proceedings to final judgment (and through any available appeal process). The performance of courts does not only vary between the courts of different countries but even between the courts of different regions within the same country or within the court structure of each country.

Arbitration

For all of these reasons, arbitration remains attractive on a European level; this is true even more in relation to international disputes on a wider scale to which the framework provided by Regulation 44/2001 or the Brussels and Lugano Conventions does not apply. For example, even in relation to, say, such important European trading partners as the United States or Japan, there do not exist common treaty rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

There is at present no EU framework for arbitration, and arbitration is expressly excluded from the application of Regulation 44/2001, the Brussels Convention (and in relation to EFTA, the Lugano Convention). However, most (if not all) of the countries covered in this Guide have in recent years reformed their national arbitration legislation to a greater or lesser extent on the basis of or by reference to the UNCITRAL Model Law[2], which is increasingly accepted internationally as the model to

[2] England, Wales and Northern Ireland, Germany, the Netherlands, Scotland, Hungary, Russian Federation, Italy and Spain

which countries look when it comes to updating their arbitration legislation. As a result, the emerging international similarity of approach makes arbitration laws increasingly more uniform and arbitration more attractive as a means of resolving international business disputes.

Many of the countries covered in this Guide are old trading nations and have a long-standing tradition of arbitration as a preferred dispute resolution mechanism for trade disputes, sometimes going back to the days of the Hansa and further; they have sophisticated arbitration laws and distinguished arbitration institutions and encourage and support dispute resolution by arbitration.

Nearly all of the world's leading trading nations are today signatories to the New York Convention, which is designed to ensure that written arbitration agreements are universally recognised and enforced between signatory states, and to provide a framework for the recognition and enforcement of foreign arbitration awards. Arbitration awards are today much more readily enforceable in a much larger number of countries than are court judgments; only within the EU and EFTA is the enforcement of judgments from other member states as fast and relatively easy as international enforcement of arbitration awards under the New York Convention. Nevertheless, arbitration remains a genuine alternative to litigation when choosing between dispute resolution techniques in the EU and/or EFTA because of other potential advantages of arbitration such as flexibility, speed and confidentiality and ready enforceability of arbitration awards beyond the EU and EFTA.

ADR

ADR has over the last few years become an integral (albeit not compulsory) part of the civil justice system in England and Wales and has by and large been enthusiastically endorsed by the legal profession and the judiciary. A number of ADR institutions, such as the Centre for Dispute Resolution (CEDR), ADR Group, ADR Net, and the City Disputes Panel, have dedicated themselves to furthering ADR's acceptance in the legal and business community as a genuine alternative to more conventional approaches to dispute settlement.

While some other European countries (such as the Netherlands) have for many years practised ADR, ADR is now increasingly also finding reception and interest throughout the rest of Europe although there it is still much more in its infancy. Legislation has been passed in Italy, Belgium and Hungary to facilitate ADR. However, in civil law jurisdiction generally there is an obligation on the judge hearing the dispute actively to encourage settlement. The different level of progress in the adoption of ADR as an accepted part of dispute settlement procedures can make it (more) difficult to employ ADR in cross-border disputes, and may require legal and cultural barriers to be overcome. The real merits of ADR lie probably less in providing a complete alternative to litigation or arbitration but in its potential for facilitating settlement of commercial disputes at any stage of the dispute, pre- and post-commencement of contentious legal proceedings.

Common law and civil law

An introduction

The common law and civil law systems of law are the two main streams of Western legal tradition. They are historically defined primarily by reference to their sources of law. On the one hand common law, with its judge made law and doctrines of judicial precedent and stare decises, and on the other hand civil law, with its pronounced Roman law roots and the great codifications of the 19th century such as the French Civil Code and Code de Procedure, and the German Bürgerliches Gesetzbuch and Zivilprozeßordnung.

All this is familiar ground to legal historians, but how relevant is this distinction still today? What is left of the differences between common law and civil law in every day legal practice in an age of global markets and how does it affect arbitration? Are there today more similarities than differences between the systems?

Perhaps one of the more surprising realisations of modern European comparative law is how the classical distinctions and differences between common law and civil law have become less and less clear. In the civil law countries the code based law can today hardly be understood or applied in practice without recourse to an ever increasing body of case law, which interprets the codes and adapts them in a continuing process to the ever changing requirements of modern society. In common law countries, on the other hand, most areas of the law are today either directly governed by statute law or are, at least indirectly, affected by primary or secondary legislation.

Whilst in practical terms the boundaries between both systems become more and more blurred and both systems are, in addition, increasingly suffused and harmonised by an increasing volume of supra-national EU regulations and directions, differences nevertheless remain in two important areas: legal methodology (i.e., the way lawyers think and work) and the way in which court litigation is conducted. We shall look below in some more detail at some of the main differences in the way court proceedings are conducted in civil law and common law jurisdictions and at the way in which this affects arbitration. Nevertheless, even in relation to court proceedings, the civil justice reforms in England and Wales in the late 1990's, and the Civil Procedure Rules which were introduced as a result, have adopted new concepts into English procedural law which are clearly derived from continental European procedural practice.

This Guide is primarily concerned with arbitration rather than litigation in the state courts; but the legal system of a country and, in particular, its civil procedure, colour the perceptions and expectations of the parties and their legal representatives as to the way disputes should be resolved and their understanding of due process and procedural fairness. Understanding the differences between legal (and business) cultures helps parties to arbitration proceedings and their legal representatives to bridge this cultural gap

and to identify and agree procedures which afford both parties the feeling that, no matter what the outcome of the proceedings, they were given an opportunity to put forward their arguments, and that those arguments were duly considered by the tribunal and resulted in a fair and just award.

Codification and judicial precedent

In England and Wales, the law consists of a mixture of common law and legislation. Judges can create new law by the decisions they make and lower courts are bound by the doctrine of precedent to follow the judgments of higher courts unless the case before them can be distinguished on the facts. Law text books are, save for a handful of exceptional treatise, not recognised as authoritative sources of the law in court proceedings. Legislation is generally passed by Parliament in a piecemeal fashion to deal with specific issues as and when they arise. Acts of Parliament are interpreted by the courts strictly, having regard to the meaning of the words used rather than to the underlying purpose or spirit of the legislation (although recent years have seen a move away from this literal approach).

In civil law countries, the law is traditionally found primarily in a series of codes. These are intended to be comprehensive and are normally written in broader and more conceptual language than common law statutes. The courts interpret the codes having regard to the purpose of the law and seek to give effect to their underlying legislative intention. Decisions of higher courts are not necessarily binding on lower courts but they are persuasive, especially those of the supreme courts. Academics play a greater role in civil law countries than they do in common law countries and their views on the interpretation of code law can be as influential as the judgments of higher courts.

Inquisitorial and adversarial court procedure

Proceedings in the courts of civil law countries are described as "inquisitorial" rather than as "adversarial", which is the description normally given to court

procedure in common law countries. This can be explained by looking at the following procedural differences between the systems.

Statements of case

In England and Wales, statements of case remain formal written submissions served by the parties and filed at court which set out the facts of the case but do not normally cover in detail the evidence or law on which the parties intended to rely, or the arguments which they intended to raise at the hearing.

In civil law jurisdictions, the parties' submissions tend to set out their respective cases much more fully and to contain submissions on the relevant facts, evidence and law. The documents on which the parties rely in support of their submissions are normally exhibited to the pleadings and relevant witnesses are named therein and a description of this evidence is normally given.

Disclosure

Under the common law system, the parties do not normally exhibit the documents which are relevant to the dispute to their statements of case. Instead, there is a procedure known as "disclosure", by which the parties must disclose to each other in the form of lists all relevant documents in their control - an obligation that is very widely defined and includes also documents which are detrimental to that party's own case or support the opposing party's case. These lists may have to be verified on oath. The documents on the list can subsequently be inspected and copied by the other party. A party can ask the court to order further specific disclosure if it believes full disclosure of all relevant documents has so far not been made.

Documents which are detrimental to a party's own case, or documents on which a party does not rely in support of its case, are not normally produced by that party in

civil law proceedings unless the court makes a specific order for disclosure of individual clearly identified documents. All other documents which the parties consider relevant to their respective cases will have already been exhibited to their submissions.

Witnesses

Under common law procedure, detailed written statements of the witnesses' evidence are taken and exchanged before trial. The parties are witnesses in their own cause.

In civil law jurisdictions written witness statements are not frequently used and there is no general procedure for the exchange of such statements before trial. Parties cannot normally give evidence in their own cause.

In a common law trials, witnesses are examined in chief or their written statement will stand as their evidence in chief. The witness is then cross-examined by the parties' lawyers. The judge will ask few (if any) questions, mainly to clarify the evidence which a witness has given, rather than to elicit further evidence. In a civil law trial, the judge will do the main questioning of the witnesses with the parties' lawyers asking additional questions thereafter. Cross-examination of witnesses is practically unknown.

Equally, in common law proceedings it is traditional for each party to appoint its own expert (witness); expert reports are exchanged between the parties before trial and agreed between the experts as far as possible. In England and Wales however, the new Civil Procedure Rules make provision for court appointed experts and clarify that the duty of experts (whether appointed by a party or by the court) is to the court.

In civil law proceedings, experts are typically appointed by - and report to - the court. Parties may appoint their own experts, but relatively less weight may be given to the evidence of party-appointed experts.

The hearing and the role of the judge

The court hearing (or "trial" in common law proceedings) is the main forum for the parties to present all their evidence and arguments to the court. A common law judge presiding at the trial will not be familiar with the case and will receive short written summaries of each party's case ("skeleton arguments") and a reading list for the main statements of case and (witness and documentary) evidence only shortly before the hearing. More often than not, the judge will only have had a passing look at the court bundles prior to the hearing.

The parties are fully in charge not only of preparing the case for trial (albeit subject to the court's case management powers) but are also the main actors at trial. It is traditional in common law systems for the judge to take the role simply of the passive umpire in a match between two opposing parties and to declare the winner at the end. The judge is not concerned so much with taking an active part in ascertaining the truth but rather in deciding which of the parties' cases he finds more convincing. Indeed, the judge's active role only really starts after the parties have made their final closing submissions. However, common law proceedings can often involve a very broad examination of the facts and background to a dispute if either party chooses to adopt that approach. Although there will be some constraint on the scope of factual investigations, the common law procedure and particularly disclosure can lead to such a result.

In civil law systems, the court takes charge of the case when proceedings are first issued, and thereafter (normally the same judge) remains actively involved in the management of the case; usually there will be several short hearings before that judge as the matter progresses. This can result in the narrowing of issues at an early stage potentially reducing the cost and duration of proceedings. Nonetheless, the civil law judge generally has a duty to seek the substantive truth. Civil law systems place a greater reliance on the written submissions of the parties

throughout the proceedings and the final hearing is not used as a forum for a re-run of all the arguments.

The impact of the differences between common law and civil law on arbitration

Procedurally, and to the extent that arbitration has been described as "privatised court proceedings", the background of the parties and their lawyers involved in international arbitration proceedings will pre-determine the expectations and concepts which they hold as to how such proceedings should be conducted in the interest of justice and fairness.

Parties and lawyers from common law countries will normally expect there to be disclosure of documents, and that detailed witness statements will be prepared and exchanged between the parties, followed by cross-examination of witnesses at the main hearing. In such cases the arbitral tribunal will therefore be confronted with a much larger volume of factual material than would be the case in arbitrations involving only parties and lawyers from civil law countries with more limited disclosure of documents. Equally, arbitrators from common law countries will often consider this the most appropriate procedure and will also put more weight on oral hearings than an arbitral tribunal composed of civil lawyers, who can normally be expected to rely to a greater extent on written submissions and to reduce the number and length of oral hearings.

Finally, arbitrators from civil law countries may be more likely to take an active part in the management of the arbitration proceedings than their common law colleagues although the English Arbitration Act 1996 has provided arbitrators with wide procedural powers.

Getting the best of both worlds

In a cross-border commercial dispute between, say, a German and an English party, the parties and the arbitrators have a unique opportunity to resolve the dispute in the most just and efficient manner possible by taking advantage of the flexibility of arbitration and by choosing and

combining the procedures from both their legal systems best suited to the circumstances of their case.

For example, it may be beneficial for the parties to prepare comprehensive written submissions addressing the underlying facts, the relevant evidence (exhibiting to the submissions copies of any relevant documents), and legal argument. Thereafter, an early first hearing before the tribunal may help to resolve procedural issues, to narrow the substantive issues in dispute and to agree a procedural order and timetable for the further conduct of the proceedings. It may be possible to restrict further disclosure to a limited number of specific documents or categories of documents. Further, time could be saved at the main hearing through the preparation and exchange by the parties of written witness statements to stand as evidence at the hearing. Finally, permitting brief cross-examination of witnesses may still be the best means of testing the veracity of their evidence and of the parties' respective cases.

Drafting the arbitration agreement

Commercial disputes can only be referred to and resolved by arbitration if the parties make an arbitration agreement. An arbitration agreement can be made at any time - even after a dispute has arisen - although it may by that stage be more difficult to achieve a consensus between the parties. Normally, the arbitration agreement is concluded at the same time as the main commercial contract to which it relates, and simply forms a clause in that main contract (albeit that the arbitration agreement remains technically a separate or separable contract).

The arbitration agreement sets out the terms on which the parties agree to refer defined disputes to arbitration. The main purpose of an arbitration agreement is to establish a practical, efficient and objectively fair method of dispute resolution and to ensure that the arbitrators' decision can be widely enforced. An effective and well considered arbitration agreement is essential for a successful arbitration. Every

arbitration agreement should be tailored to the circumstances of the contract in which it is incorporated.

Generally, the arbitration agreement should spell out:

- that the parties agree finally to resolve specific disputes between them arising from a defined legal relationship by reference to arbitration;
- what disputes the arbitral tribunal has jurisdiction to decide (e.g., all disputes arising out of or in connection with a specific contract, or only disputes relating, say, to technical issues);
- what rules of arbitration the arbitrators are to follow;
- the number of arbitrators;
- the place of the arbitration proceedings;
- the language of the arbitration proceedings;
- any specific procedural powers granted to the arbitrators;
- any specific remedies which the arbitrators may award;
- whether there is a right to appeal the award; and
- the law to be applied by the arbitrators to the substance of the dispute.

The arbitrators obtain their authority to settle a dispute from the arbitration agreement between the parties. It is the parties who determine the extent of the arbitrators' powers as well as other aspects of the way in which an arbitration is to be conducted. This can be done:

- expressly in the arbitration clause by specifying the arbitrators powers or by selecting a particular set of arbitration rules; and/or
- by implication through the law of the place where the arbitration is to take place.

A number of selected arbitration clauses are in Appendix 1 to this Guide.

Appointing the right legal representatives

Getting the right firm of lawyers involved, who understand your business and have a sound commercial approach to dispute resolution work, as soon as a dispute arises can help minimise any negative impact which a dispute may have on your business or business relationships: They can, in particular:

- advise you on the best options for dispute resolution at the contract drafting stage and on the right dispute resolution clause for your contract;
- advise you on the legal and commercial strengths and weaknesses of your case and of that of your opponent once a dispute has arisen;
- draw on their wide experience with international commercial conflicts and help you develop a commercially sound and legally successful strategy for resolving your dispute;
- help you enter settlement negotiations informed, focused and with realistic expectations;
- help you to control and manage the costs of the dispute resolution process;
- help you preserve vital evidence and prevent the creation of damaging new correspondence and documentation;
- advise on the ins and outs of international arbitration, ADR and court litigation and how to achieve your best advantage when a dispute cannot be settled;
- represent your interests in any resulting legal proceedings;
- advise you on the choice of arbitrators;
- help you take control of the dispute and its timetable, whether you are a claimant or defendant; and
- help you to enforce arbitration awards.

Arbitration in Austria

CMS Reich-Rohrwig Hainz

Historical background

In Austria, the law of arbitration is governed by the Code of Civil Procedure ("CCP") (Zivilprozessordnung – ZPO) of 1895, which sets out the main arbitration provisions. The last amendment was the amending law Zivilverfahrens-Novelle 2004, Federal Law Gazette No. I 2004/128. The provisions were originally intended for domestic arbitrations, but have proved flexible enough for international proceedings as well.

Since the 1970's, Austria has increasingly been used as a neutral venue for the resolution of international commercial disputes by arbitration. As a result, in 1975, the Austrian Federal Economic Chamber established the Vienna International Arbitral Centre (VIAC). It makes arrangements for the settlement by arbitration of disputes where not all contracting parties that concluded the arbitration agreement had their place of business or normal residence in Austria at the time of the conclusion of that agreement. In addition, the jurisdiction of the Centre can also be agreed by parties whose place of business or normal residence is in Austria when dealing with the settlement of disputes which have an international character.

If the parties have agreed to the jurisdiction of the VIAC, the Rules of Arbitration and Conciliation – Vienna Rules (Schieds- und Schlichtungsordnung - Wiener Regeln) – adopted by the General Assembly of the Austrian Federal Economic Chamber on the 30 November 2000, with effect from 1 January 2001, shall thereby apply in the version valid at the time of commencement of the proceedings.

In May 1983, the Federal Law of 2 February 1983 concerning Provisions on Civil Procedures took effect. It included a number of recommendations as a result of which the arbitration provisions of the CCP were adapted in order to be more suitable to international arbitration. General procedural rules on arbitration are contained in Chapter 4, sect. 577 to 599 of the CCP. They apply to domestic as well as international arbitration.

Austrian law removes arbitration matters almost completely from the supervision of the courts, and affords the parties and arbitrators wide autonomy to conduct the arbitration as they deem best. Thus, arbitration enjoys a privileged position in the Austrian legal system.

Scope of application and general provisions of the arbitration provisions in the CCP

Scope of application

There are only a few provisions on arbitration in the Austrian CCP, so it is mainly up to the parties' discretion to determine the arbitration procedure. They apply both to ad hoc and statutory arbitration procedures or arbitration procedures provided for by testamentary or ex parte disposition, except for institutional arbitrations or arbitrations within an association.

General principles

The underlying general principles of Austrian arbitration law are:

- **equality and objectivity**; all parties must be treated equally
- **autonomy:** the parties enjoy great autonomy. There are only a few legal provisions which cannot be waived by agreement and which are mandatory i.e., sect. 586 CCP (challenge to arbitrators), sect. 592 CCP (form and service of the award) and sect. 595 CCP (grounds for challenging an award) and
- **due process:** all parties must have the opportunity to present their case.

The Arbitration agreement

Formal requirements

An arbitration agreement is the agreement that a legal dispute shall be settled by one or more arbitrators. Such an agreement can also provide for future disputes arising from a specified legal relationship (sect. 577 para. 1 and 2 CCP).

An arbitration agreement must clearly express the intention of both parties to submit the dispute in question to arbitration. It must also clearly define the legal relationship to which the arbitration agreement relates and designate the parties thereto.

Arbitration agreements must be in writing; however, they may be contained in telegrams, telexes or electronic representations exchanged between the parties (sect. 577 para. 3 CCP). In such cases, the parties, the arbitration agreement and the confirmation by the opponent have to be clearly determined. Therefore, in these cases the relevant documents are not required to be signed by both parties.

The handwritten signature of the relevant telefax or electronic representation of the party suffices.

If the arbitration agreement is concluded by an agent or representative, special power has to be given in writing.

Arbitrability

Parties

All persons who have the capacity to conclude a settlement agreement in relation to the subject matter of the dispute may resort to arbitration, including a State in respect of disputes with Austrian nationals as well as foreigners. There are no further specific restrictions on either natural or legal persons being a party to arbitration proceedings.

The personal arbitrability of foreigners complies with their personal statute (sect. 9 f Austrian Conflict Law) according to sect. 595 para. 1 lit 1 CCP. For the legal representative of a minor or foster child the permission of the legal representative is required. This legal representative has to have a special written power for entering into an arbitration agreement according to sect.

1008 of the Austrian Code of Civil Law. The legal representatives of legal entities are authorized to conclude an arbitration agreement unless the articles of association determine otherwise.

Subject matter

According to sect. 577 para. 1 CCP the arbitration agreement is only valid when the subject matter can be settled by compromise. As long as the parties have the capacity to conclude a settlement agreement regarding the subject matter of their dispute, there are no further restrictions on the possible subject matters of arbitration.

The following disputes cannot be settled by arbitration:

- social security claims, such as claims of invalidity and retirement
- disputes about the annulment of a marriage or its existence
- challenge to legitimate birth
- contesting the declaration of the legitimacy of the birth
- declaration of illegitimate paternity
- claim for compensation against the managing director of a limited liability company
- payment of the capital invested according to sect. 10 Austrian Limited Liability Company Law (GmbH-Gesetz)
- claims regarding the execution according to sectt. 35, 36, 37, 233, 258 and 308 of Austrian Enforcement Code (Exekutionsordnung)
- disputes about land tenancy regarding the amount of the rent and the duration
- labour law
- bills of exchange (except for the contract itself)
- bankruptcy and attachment, but arbitration agreements concluded by the debtor before the start of the bankruptcy proceedings remain valid

Arbitrable are e.g.:

- patents and trademarks disputes (except for issues of validity of the granting, rectification or annulment of industrial property rights)

- cartel agreements, but certain disputes may be brought before an ordinary court regardless of the arbitration clause, unless arbitration has already been initiated (sect. 124 para. 1 of the Cartel Act (Kartellgesetz)).

Mandatory/non-mandatory provisions

If the parties wish the arbitration to be conducted under specific procedural rules (e.g., the UNCITRAL Arbitration Rules) they should designate the applicable rules in their arbitration agreement in an unambiguous way.

The arbitration agreement has to contain the exact description of the parties and the referral of the dispute or the future disputes arising form a specified legal relationship to arbitration (mandatory provisions).

The arbitration agreement can contain provisions regarding the venue of the arbitration tribunal, the identity, the number or method of appointing arbitrators, their qualifications, the language of the arbitration tribunal, procedural issues, the claim of cost compensation or whether an arbitration award may be reviewed by an appeal arbitral body (non-mandatory provisions).

Composition of the arbitral tribunal

The constitution of the arbitral tribunal

Only a natural person who is fully contractually capable can be appointed as an arbitrator. Judges are prohibited from accepting appointment as arbitrator during their tenure of judicial office (sect. 578 CCP).

According to sect. 579 CCP nobody is bound to accept the appointment as arbitrator and an arbitrator may resign, even after accepting appointment, if he has a reasonable ground to do so.

An arbitrator can be nominated either through appointment in the arbitration agreement (contractually appointed arbitrator) or by complying with the number of arbitrators and the form of appointment provided for in the arbitration agreement (this last method of nomination is in line with the general practice). If the arbitration agreement does not

contain a provision for nomination, each party can nominate an arbitrator (post-nominated arbitrator) according to sect. 580 CCP.

The tribunal may consist of any number of arbitrators, even or uneven. In practice, arbitral tribunals are generally composed of one to three arbitrators. According to Art. 9 para. 1 of the Vienna Arbitration Rules the parties can stipulate that the dispute will be settled by one arbitrator or a senate of arbitrators consisting of three arbitrators.

If the number of arbitrators is not provided for in the arbitration agreement or by the parties, the chairman of the Board of the VIAC of the Austrian Federal Economic Chamber can determine the number of arbitrators considering the difficulty of the case, the magnitude of the amount in dispute or the interest of the parties in a rapid and cost-effective decision (Art. 9 para. 2 of the Vienna Arbitration Rules).

If the arbitration agreement contains neither names of the arbitrators nor a provision concerning the number and appointment of arbitrators, the appointment of the arbitrators is provided for in sect. 580 CCP. Pursuant to this general rule, each party shall appoint an arbitrator, and the appointed arbitrators in turn shall appoint the chairman of the arbitral tribunal. If this appointment is not made within proper time or if the arbitrators cannot agree upon a chairman, the court shall upon application make the appointment. The arbitration tribunal should normally consist of three arbitrators.

If, pursuant to the appointment procedure set out in the arbitration agreement, a party (or a third party) shall appoint an arbitrator, the other party can request that the appointment be made within fourteen days. Such a request can also be made if an arbitrator, who has already been appointed refuses to act, dies in the course of the proceedings, is successfully challenged or drops out because of another reason (sect. 581 para. 1 CCP). If the party making the demand is also under a duty to appoint an arbitrator, the demand shall also give notice of the person appointed as arbitrator (sect. 581 para. 2 CCP).

If an appointment is not made within the time limit or the two appointed arbitrators cannot agree on a chairman, any of the parties can request the court to make the appointment (sect. 582 para. 1 CCP). If the arbitration agreement stipulates that both parties must jointly agree on an arbitrator and they fail to do so, or if the agreement names an arbitrator who has died, ceased to act consequent upon a challenge or for any other reason, refuses to accept office as arbitrator or withdraws from the contract concluded with him because of his appointment, the court can be requested to pronounce the rescission of the arbitration agreement The same procedure applies, if an arbitrator who is named in the arbitration agreement or appointed by a party pursuant to the arbitration agreement or by the court pursuant to sect. 582 refuses to fulfill the obligation assumed by his acceptance of office as arbitrator, or delays unreasonably the fulfillment of this obligation. (sect. 583 CCP).

The challenge to arbitrators

Arbitrators can be challenged on the same grounds on which judges can be challenged in civil cases (sect 586 para. 1 CCP). These grounds are set out in sect.19 and 20 of the Judicature Act (Jurisdiktionsnorm) and are as follows:

- if the arbitrator is excluded by statute from acting judicially in the particular case;
- there is sufficient reason to doubt the arbitrator's impartiality;
- in cases where the arbitrator is himself a party or where in relation to the subject matter of the dispute he has rights or liabilities in common with a party or is liable to indemnify a party;
- in cases concerning the arbitrator's spouse or persons directly related to the spouse by blood or marriage or persons related collaterally to the arbitrator by blood to the fourth remove or by marriage to the second remove;
- in cases concerning the arbitrator's adoptive or foster-parents, adoptive or foster-children, and their wards;

- in cases in which the arbitrator held or holds power of attorney from a party ;
- in cases in which the arbitrator took part in the making by a lower court of the judgment or decision appealed against.

The arbitral tribunal decides on the challenge itself. The unjustifiable rejection of a challenge to an arbitrator by the arbitration tribunal is one of the grounds for rescission of the arbitration award (sect. 595 para. 1 lit 4 CCP). The rules of arbitration of many institutional arbitration courts vest the power to decide on the challenge on an arbitrator in other institutions of the particular arbitration court.

The party who appoints an arbitrator alone or jointly with the opposing party is entitled to challenge him only if the reason for the challenge arose or became known, to the party after the appointment (sect. 586 para. 2 CCP).

The appointment of substitute arbitrators

The CCP has no specific rules regarding the appointment of substitute arbitrators. Sect. 581 para. 1 CCP, however, provides that, if an appointed arbitrator refuses to act, is successfully challenged, dies in the course of the proceedings or drops out because of another reason the other party may request the appointing party to appoint a new arbitrator within fourteen days.

If an arbitrator is not nominated in time or the nominated arbitrators cannot find consent about the person of the chairman, the court can be requested to nominate a substitute (sect. 582 CCP). Sect. 582 CCP does not apply, if the parties have stipulated that a third person in case of discord between the arbitrators is entitled to nominate a chairman.

Most rules of procedure of institutional arbitration courts transfer the substitute nomination to special bodies of the arbitration court, for example, the UNCITRAL-Rule of Arbitration transfers this duty to a so called "Appointing Authority".

Arbitrators' fees, expenses, liabilities and immunity

Arbitrators are entitled to adequate remuneration, but no statutory provisions exist to determine the amount of the fee. In ad hoc proceedings, the arbitrators' fees are contractually agreed upon between the parties and the arbitrators. In institutional arbitration proceedings, they are normally determined by the fee schedules of the arbitration institution.

There are no statutory provisions requiring the parties to pay deposits on account of the arbitrators' fees and expenses. In ad hoc proceedings, the arbitrators usually require a deposit as security for fees and expenses which is kept in escrow by the tribunal chairman or the sole arbitrator. In institutional arbitration proceedings the rules of Austrian arbitration institutions usually contain specific provisions regarding deposits for anticipated fees and expenses.

If an arbitrator does not at all fulfill the duties he assumed by accepting his appointment or does not fulfill them in a timely manner (e.g. the duty to conduct the proceedings in an appropriate way, to render an award, to give leave to enforce the award and to be objective), he is liable to the parties for any loss caused by his wrongful refusal or delay (sect. 584 para. 2 CCP). The CCP does not contain provisions regarding arbitrators' liability for awards wrongly decided on the merit of the case. However, there is legal authority for the proposition that parties may request compensation from the arbitrator for losses resulting from a wrongly decided award, if such award is the result of gross negligence.

Costs of the proceedings can only be claimed in the procedure of the arbitration court in which they are caused (and not with claim before ordinary courts). The bases for the award of costs are explicit provisions or orders of the arbitrators to present a schedule of costs.

According to Art. 19 of the Vienna Arbitration Rules the sole arbitrator (or arbitral tribunal) has to determine already in the award the amount of the costs of the

parties and state who should bear the costs of the proceedings or the proportion in which the costs of the proceedings are to be shared.

The costs of the proceedings consist of the costs of arbitration (the outlay of the Centre, arbitrators' fees and cash outlay) and the costs of the parties (appropriate expenses of the parties for their representation and other outlay related to the proceedings) (Art. 21 of the Vienna Arbitration Rules).

Jurisdiction of the arbitral tribunal

Competence to rule on jurisdiction

The jurisdiction of the arbitrators is established by the arbitration agreement. Simultaneously, a valid and binding arbitration agreement generally excludes the courts from assuming jurisdiction. Therefore, arbitrators decide on whether they have jurisdiction in a dispute.

The arbitration agreement has two effects: It constitutes the permission of the decision-making-power and the jurisdiction of the arbitral tribunal (positive effect). Each party can exhibit the arbitration claim before the arbitral tribunal. The pendancy of the arbitration dispute starts with the service of the claim to the opposing party. The result is an impediment to an action before court (negative effect).

The arbitral tribunal is responsible to decide itself about the jurisdiction (Kompetenz-Kompetenz). However, the ordinary courts are not bound by such a decision because the court can avoid the award on the ground of lack of jurisdiction of the arbitral tribunal.

Power to order interim measures

Under Austrian statutory law, arbitrators have no power to apply coercive measures or award punishments against parties or other persons. The arbitral tribunal may request the assistance of the ordinary courts in judicial matters. The court to which the application is made shall accede to it according to sect. 588 CCP unless the request is legally inadmissible. The request only concerns judicial acts such as summons, examinations, administration of oaths, the

appointment of experts, the conducting of inspections and of documentary evidences, the addressing inquiries to the authorities, the service of documents or the hearing of testimony (sect. 589 CCP).

Conduct of arbitral proceedings

Commencement of arbitration

Under Austrian law, there is no statutory provision as to how arbitration proceedings are commenced. Thus, unless the parties make specific provisions in the arbitration agreement, a request to the other party to nominate an arbitrator, accompanied, if applicable, by a nomination pursuant to sect. 581 paras. 1 and 2 CCP, will suffice to commence arbitration proceedings.

General procedural principles

The CCP provides that arbitrators "shall hear the parties and investigate the facts of the case before making their award" (sect. 587 para. 1 CCP). However, this does not mean that oral hearings are mandatory, only that the parties must have an opportunity to present their case.

The arbitrator has to argue with the personally present persons (sect. 587 para. 2 CCP). The presence and the evidence of the parties, witnesses and experts may not be enforced through the order of compulsory measures. The parties and witnesses may only be heard unsworn.

Procedural powers of the tribunal

According to sect. 587 para. 1 CCP the arbitral procedure is determined by the arbitrators at their own discretion unless the arbitration agreement or a subsequent written agreement provides otherwise. This authority is limited by the mandatory provisions of sect. 586, 592 and 595 CCP and constitutes a cause of cancellation of the award pursuant to sect. 595 para. 1 CCP.

Place and language of arbitration

Under Austrian law, there are no specific statutory provisions regarding the place where arbitration is to be held. In ad hoc proceedings the appropriate court is usually determined in the arbitration agreement or will be the court where the arbitral tribunal should be held

according to the arbitration agreement. If there are no such provisions in the arbitration agreement, then the appropriate court will be the court which would be responsible for the dispute if there were no arbitration agreement. If it is not possible to establish a locally competent court, the court of the first district of Vienna shall be locally competent .

In the case of institutional arbitrations, the place of arbitration is usually the seat of the relevant arbitral institution, unless its rules provide otherwise. Since the Austrian rules of substantive and procedural law apply in the same way throughout Austria, it makes no legally significant difference where within the country the arbitration is held.

In the absence of a specific provision in the arbitration agreement, the choice of language is at the arbitrators' discretion. But according to Art. 4a of the Vienna Arbitration Rules the correspondence of the parties with the arbitration court shall be conducted in German or English.

Submissions

The CCP does not contain any rules on the form and content of the parties' submissions to the arbitral tribunal. In the absence of specific provisions in the arbitration agreement, the arbitrators determine the format, timetable and contents of the submissions at their own discretion.

Oral hearings and written proceedings, default by parties

Oral hearings are customary but not mandatory in arbitration proceedings. The procedure can only be held in writing, unless the parties make an agreement to the contrary.

If a party is duly notified about the proceedings but fails to attend the hearing before the arbitrators, the hearing shall continue in the presence of the other party. The ensuing award will be binding on both parties (sect. 587 para. 2 CCP).

Evidence

All usual means of evidence can be relied upon in support of a party's case in arbitration proceedings. The arbitrators may hear parties or witnesses who voluntarily appear before them. The arbitrators cannot administer the oath to the parties, witnesses or experts according to sect. 588 CCP. The arbitration courts may not compel parties to appear before the tribunal or impose sanctions for absence. If such measures are necessary, the arbitration court may request the competent court to issue a letter summoning the parties' attendance.

There are no statutory provisions regarding disclosure of documents, production of written evidence, etc. Arbitrators have the discretion of evaluating the evidence before them and also the conduct of the parties, including their refusal to produce specific documents, as they deem appropriate.

The arbitrators may appoint experts, if necessary. Experts owe their duty to the tribunal but not to the parties.

Making of the award and termination of proceedings

Choice of law

Arbitrators have to make their decisions based on the applicable law, unless the parties agree otherwise. The parties may authorize the arbitrators in writing to make the decision based on principles of equity (ex aequo et bono).

The parties are free to stipulate the applicable law (unless the Austrian ordre public is infringed). If the parties have not chosen the applicable law, the arbitration court has to apply substantial domestic law (or such foreign law to which the Private International Law Act refers).

Decision making by the tribunal

The arbitrators may make final awards regarding all claims in the case, as well as partial or interim awards. There is no statutory time limit within which an award has to be made. However, arbitrators have the duty not to delay the proceedings unduly.

If the tribunal consists of two arbitrators, the decision must be unanimous. If there are more than two arbitrators, the decision must be made by an absolute majority, unless the arbitration agreement determines otherwise (sect. 590 CCP). If a majority or, in the case of two arbitrators, unanimity, cannot be reached, the arbitrators have to inform the parties thereof. Unless the parties provided a remedy for this situation in their arbitration agreement, any party can request the competent court to declare the arbitration agreement ineffective in general or (if it continues to apply in relation to other or possible future disputes) only in relation to this particular case (sect. 591 CCP).

Form, content and effect of the award

According to sect. 592 para. 2 CCP the award must be in writing, dated and signed by the arbitrators. Generally, the award must be signed by all the arbitrators. However, the signature of a majority of the arbitrators is sufficient if:

- the award contains a statement that the minority refuses to sign; or
- the minority's signature cannot be obtained because of an obstacle which cannot be overcome within a reasonable period of time.

The CCP does not require the arbitrators to give a reason for their decision in the award. However, in Austria it is customary to do so.

Copies of the award must be served on the parties either in person, or by registered mail, per postal delivery, through a public notary or in the way of electronic mail (sect. 592 para. 1 CCP). The original and copy awards must contain the date of the decision and the signatures of the arbitrators. The original award and documents confirming service on the parties must be kept by a person specified in the arbitration agreement. In the absence of such an agreement or in the case of death of the depositary the arbitrators have to decide the form of the deposit. In case of doubt, the award must be deposited at a public notary in the district where the tribunal is located (sect. 593 para. 1 CCP). The original award and the document confirming the service on the

parties present a joint document. Failure to deposit the award does not affect its validity.

An award has the effect of a final and binding court judgment between the parties, unless in the arbitration agreement the parties have provided for the possibility of an appeal to a second-level arbitral body (sect. 594 para. 1 CCP). Each party can request the chairman of the tribunal or, if he is unable to act, any other arbitrator, to confirm in writing on a copy of the award the final and binding nature and the enforceability. This is a prerequisite for enforcement in Austria.

The award takes effect on the parties at the moment of delivery.

Settlement

Domestic enforcement

A settlement reached by the parties in the course of the arbitration proceedings may be recorded in the form of a settlement agreement. The settlement has to be signed by both parties and all arbitrators. Sect. 592 para. 2 CCP does not apply because a settlement can only result from the appearance of the whole arbitration court. Such a settlement agreement is enforceable in Austria in the same way as an arbitral award, once the arbitrators have confirmed in writing the enforceability of the settlement agreement on the agreement itself.

International enforcement

If the settlement agreement may need to be enforced abroad, it may be necessary to draw up the settlement in the form of an arbitral award on agreed terms to ensure its enforceability abroad (e.g., under the 1958 New York Convention); this is permitted under Austrian law.

Termination of proceedings

In Austrian law arbitration proceedings may terminate either as a result of settlement or of a final award.

Costs

The arbitrators may apportion the costs of the arbitration between the parties at their discretion. It is, however, common practice that the losing party pays the total amount of the arbitrators' fees and the costs of the proceedings, including the other party's reasonable costs of legal representation.

Correction and interpretation of the award

The arbitrators may correct clerical mistakes, typing errors and mathematical errors, either on their own initiative or at the request of any of the parties. However, there is no statutory provision regarding interpretation of the award by the arbitrators after it has been served on the parties.

The role of the courts

The jurisdiction of the courts

The arbitration agreement establishes the jurisdiction of the arbitrators and, depending on the scope of the arbitration agreement, excludes the ordinary courts from assuming jurisdiction, either over the specific dispute which forms the subject of the arbitration proceedings or any dispute which may arise out of the legal relationship between the parties specified in the arbitration agreement.

The courts only have a limited jurisdiction in arbitration matters, including the following:

- **appointment of arbitrators:** if the appointment of an arbitrator is not made in a timely manner by the parties or if the two appointed arbitrators cannot agree on a chairman, the competent court can be requested to make the appointment (sect. 582 para. 1 CCP);
- **rescission of arbitration agreements:** if the parties are not able to agree on the nomination of arbitrators who should be jointly appointed, the court can be requested to declare the agreement invalid. The same applies if the agreement names an arbitrator who has died, ceases to act consequent upon a challenge or for any other reason, refuses to accept office as arbitrator or withdraws from the agreed contract. Further, if an

arbitrator refuses to fulfill the obligations assumed by his acceptance of office as arbitrator or delays unreasonably in their fulfillment, the parties can request that the court shall declare the arbitration agreement invalid (sect. 583 CCP);

- **tribunal's inability to reach a decision:** if the tribunal cannot have the necessary majority (or in case of only two arbitrators unanimity) to reach a decision and the parties have not made provisions for resolving this problem in their arbitration agreement, they can request the court to declare the arbitration agreement or parts of it invalid (sect. 591 para. 2 CCP);
- **reversal of an award:** the competent court can reverse an arbitration award if it is invalid for one of the reasons listed in sect. 595 para. 1 CCP and
- **other judicial assistance:** due to a request of the arbitrators a state court shall accede to the application and carry out those judicial acts insofar as it is not legally inadmissible and that it is considered necessary by the arbitrators and for which the arbitrators have got no jurisdiction. In case of doubt, the district court is locally competent where the act is to be carried out or the evidence is to be taken (sect. 589 CCP).

Stay of court proceedings and preliminary rulings on points of jurisdiction

Under Austrian law, there is no express statutory provision to the effect that court proceedings must be stayed whenever arbitration has been commenced. The Austrian Supreme Court has held that the courts have jurisdiction to decide whether the arbitrators have jurisdiction to determine the dispute. While determination of this issue is pending in the court, the arbitrators have discretion whether to stay the arbitration proceedings. If the court finds that the arbitrators have jurisdiction, it must reject the claim. In this case, the court is incompetent according to the arbitration agreement regulating the subject matter jurisdiction. However, the parties can chose to proceed with the trial. In the event that the arbitrators issue an award and the

court finds that they did not have jurisdiction, the arbitration award can be successfully challenged.

Obtaining evidence and other court assistance

The arbitrators may request the assistance of the ordinary courts in judicial matters which are rejected by the arbitral tribunal according to sect. 588 CCP unless they are legally inadmissible. The request regards only judicial acts like summons, examinations, administration of oaths, the appointment of experts, the conducting of inspections and of documentary evidences, the addressing inquiries to the authorities, the service of documents or the hearing of testimony (sect. 589 CCP).

Challenging the award before the courts

Austrian law does not permit arbitration awards to be appealed to the courts. An appeal to a second-level arbitral body is only possible if the parties have stipulated it in the arbitration agreement. The challenging claim can only rise against the arbitration award and because of serious failings.

An arbitration award can be challenged by application to the competent court for the award to be set aside on any of the grounds listed in sect. 595 para. 1 CCP. If one of the grounds listed below applies, the award will be rendered invalid:

- if there is no valid arbitration agreement, because an arbitration agreement does not exist according to sect. 577, has become invalid before making the award or ceased to have effect for the particular case or if a party was unable to conclude the arbitration agreement because of is status;
- if the party applying to have the award set aside was unable to present its case in the proceedings before the arbitrators or, if required by statute to be represented by an agent or guardian, the party was not so represented in those proceedings (unless in the latter case the procedure has been subsequently properly ratified);

- if statutory or contractual provisions regarding the composition of the arbitral tribunal or the decision making process have been infringed or if the original award has not been signed according to sect. 592 para. 2 CCP;
- if the tribunal unjustifiably rejected a challenge to an arbitrator;
- if the tribunal dealt with matters beyond those referred to it;
- if the award is incompatible with the basic principles of the Austrian legal system or if it infringes mandatory provisions of the law, the application of which cannot be set aside by a choice of law of the parties even in a case where a foreign contract according to sect. 35 of the Austrian International Private Law Act is involved;
- if the conditions are present in which a request can be made for a Court judgment to be set aside and the case re-opened according to sect. 530 para. 1 lit 1 to 7 CCP by means of a claim of revision.

According to sect. 595 para. 2 CCP the arbitration agreement regarding the subject matters of the arbitration procedure set out in para. 1 lit 2 to 7 becomes invalid if an arbitral award thereupon has been set aside twice by final and binding court judgment. These grounds largely correspond with Article V of the 1958 New York Convention. They are mandatory and cannot be waived by agreement of the parties.

An exception is sect. 595 para. 1 lit 7 CCP, which can be waived by parties signing the arbitration agreement as businessmen in the sense of the Consumer Protection Law (rather than individuals in their private capacity or as consumers).

Applications under sect. 595 para. 1 lit 6 CCP have to be made within three months from the day of service of the award on the party concerned or, if the ground for rescission only came to the party's notice later, from the day when the party became aware of the said ground. Applications under sect. 595 para. 1 lit 7 CCP have to be

made within one month from the day of discovery of the ground thereof, but in no case later than ten years after the day of service of the award on the party concerned.

Sect. 595 para. 1 lit 6 CCP limits the power of the Austrian courts to set aside an award on the grounds of infringement of fundamental principles of the Austrian legal system, which the courts interpret very restrictively. These fundamental principles like the principles of the federal constitutional law, the criminal law, civil procedural law and public law include rules in relation to consumer contracts, contracts regarding the use of real estate and employment contracts.

Recognition and enforcement of awards

Domestic awards

The competent court for enforcement of domestic awards is the District Court (Bezirksgericht). The arbitration court itself has no power of enforcement. According to prevailing opinion, the arbitration courts are not allowed to order preliminary injunction or other measures of protection. The court decides on the application without hearing the defendant.

Foreign awards

Any arbitral award made outside of Austria will be regarded as a foreign award. For such awards, an application for leave for enforcement must be made before the court of first instance (Landesgericht) in the district in which the defendant is domiciled. The court decides on the application without hearing the defendant. An order granting leave for enforcement may be challenged through an "appeal" before the Court of Appeal, or an "opposition" before the originating court of first instance. An "appeal" must be based on the same facts on which the court granted the leave for enforcement. An "opposition" can be based on new facts. In certain cases, the decision may be appealed to the Supreme Court.

Foreign awards will be enforced based on the provisions of multilateral conventions ratified by Austria or bilateral treaties providing for recognition and enforcement of arbitral awards made in another country.

The relevant multilateral conventions are:

- Protocol on Arbitration Clauses, Geneva (24 September 1924)
- Convention on the Execution of Foreign Arbitral Awards, Geneva (24 September 1927)
- Convention on the Recognition on the Enforcement of Foreign Arbitral Awards, New York (10 June 1958)
- European Convention on International Commercial Arbitration, Geneva (21st April 1961)
- Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington (18 March 1965) and
- other multilateral conventions with provisions regarding arbitration.

Austrian law expressly requires formal reciprocity of enforcement of an arbitral award. An award therefore cannot be enforced without an applicable convention or treaty.

The Austrian Federal Economic Chamber has a cooperation and friendship conventions with the following institutions:

- The American Arbitration Association (AAA) 1990
- The Scottish Council for Arbitration 1990
- The Belgium Centre for Studies and Practice of the national and international arbitration (CEPANI) 1993
- The Cairo Regional Centre for International Commercial Arbitration 1994
- The German Institution of Arbitration – Deutsche Institution für Schiedsgerichtsbarkeit (DIS) 1994
- The China International Economic and Trade Arbitration Commission (CIETAC) 1994
- The Korean Commercial Arbitration Board (KCAB) 1996
- The Australian Centre for International Commercial Arbitration (ACICA) 1997
- The Chartered Institute of Arbitrators 2002

Questions not addressed by legislation

Because of the principle of parties' autonomy, there are only a few express provisions on procedural issues in arbitration proceedings in the CCP.

Specific issues not expressly addressed include:

- multi-party arbitrations;
- privacy and confidentiality of arbitrations; and
- commencement, stay and termination of proceedings.

Conclusion

Austria has a long-standing tradition as one of the most important venues for arbitration proceedings in Central Europe. A statutory framework for arbitration ensuring a high level of party autonomy, a highly sophisticated legal system, as well as the extensive experience of both arbitrators and advisors in the field of arbitration ensure that Austria is often chosen as a neutral venue for arbitration proceedings.

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Arbitration in Belgium

CMS DeBacker

Historical background

The Belgian arbitration legislation dates from 1972. It is contained in articles 1676 to 1723 of the Code Judiciaire/ Gerechtelijk Wetboek ("the Judicial Code"). It is based on the Model Law annexed to the Strasbourg Convention of 20th January 1966.

The Belgian legislation on arbitration was amended twice:

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

Scope of application and general provisions

Scope of application

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

General principles

The Belgian legislation is founded on the following principles:

- equality of the parties and due process;
- party autonomy;
- non-intervention by local courts;
- the parties' freedom to determine the arbitral procedure.

The Arbitration agreement

Formal requirements

According to article 1677 of the Judicial Code, an arbitration agreement shall be in writing and signed by the parties, or be contained in other documents which are binding on the parties and evidence their intention to refer their disputes to arbitration. Article 1677 of the Judicial Code is construed as a rule ad probationem and non ad validatem, i.e., a rule of evidence. In other words, subject to the more stringent requirements of article II(2) of the 1958 New York Convention (whenever applicable), an oral arbitration agreement can be perfectly valid under Belgian law as long as its existence is not denied by one of the parties. Therefore disrespect of the requirement of written agreement does not affect the validity of the agreement, but may lead to problems of evidence.

Other requirements

According to article 1678 of the Judicial Code, an arbitration agreement shall not be valid if it gives one of

the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators.

Arbitrability

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

Objective arbitrability

The arbitrability of commercial disputes is widely recognized in Belgium. According to article 1678 of the Judicial Code, any dispute which has arisen or may arise out of a specific legal relationship, and in respect of which a compromise agreement may be made, may be the subject of an arbitration agreement.

Subject to certain restrictions and limitations, which are generally recognized in most European countries, and which reserve exclusive competence for certain issues to European Union or national courts or authorities, even antitrust, intellectual property, and bankruptcy disputes are arbitrable.

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

- labour law (see article 13 of the Law of 3rd July 1976 on employment contracts; and also article 1678.2 of the Judicial Code, pursuant to which an agreement to arbitrate labour disputes falling within the competence of the Labour Courts as determined by articles 578 to 583 of the Judicial Code may only be concluded after the dispute has arisen); or
- insurance law (see article 36 of the Law of 25th June 1992 on insurance contracts).
- law of 28 March 1984 on patents (disputes relating to mandatory licences are excluded from arbitration.

The legal position is not always entirely clear as, for example, in relation to the arbitrability of disputes arising from the termination of exclusive distributorship agreements of indefinite duration (see the Law of 27th July 1961); or in relation to the Law of 13th April 1995

on commercial agents although, in this latter case, the overwhelming majority of legal commentators seem rightly to consider that such disputes are arbitrable.

Subjective arbitrability

According to article 1676.2 of the Judicial Code, "Anyone who has the capacity or power to contract may conclude an arbitration agreement". The prohibition against public legal entities concluding arbitration agreements, which previously existed under the Judicial Code, has been deleted. According to the new article 1676.2, public legal entities are authorized to conclude an arbitration agreement, provided that it relates to the settlement of disputes regarding the formation or the performance of a contract. Such an arbitration agreement is subject to the same conditions as to its conclusion as the underlying agreement, whose performance forms the subject matter of the arbitration agreement. Furthermore, public legal entities may conclude an arbitration agreement in respect of any matter determined by law or by a Royal Decree deliberated by the Council of Ministers. The Royal Decree may also determine the conditions and the rules to be complied with in relation to the conclusion of the agreement.

Belgium is also a party to the 1961 Geneva Convention, whose article II(1) provides that "In the cases referred to in article I(1) of this Convention, legal persons considered by the law which is applicable to them as legal persons of public law have a right to conclude valid arbitration agreements".

Separability of the arbitration agreement

According to Belgian law, an arbitration clause is entirely autonomous from the underlying commercial agreement. Therefore, unless the arbitration clause itself can be avoided, it remains valid even if the underlying agreement is null and void or has been terminated. Article 1697 of the Judicial Code provides that "[a] ruling that a contract is invalid shall not ipso iure entail the nullity of the arbitration agreement contained in it". In other words, the validity of the arbitration clause has to be determined separately from the validity of the main agreement.

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

According to article 1681 of the Judicial Code, the arbitral tribunal must be composed of an uneven number of arbitrators. There may be a sole arbitrator.

The sole arbitrator or the panel, as the case may be, are appointed by the parties themselves or by an arbitral institution as provided by the parties in their arbitration agreement.

The challenge of arbitrators and the appointment of substitute arbitrators

Arbitrators may be challenged when circumstances exist that give rise to justifiable doubts as to their impartiality or independence. However, a challenge is possible only for reasons which a party becomes aware of after the appointment has been made (article 1690).

When institutional arbitration rules apply, the challenge is normally governed by the procedures contained in these arbitration rules. In an ad hoc arbitration, article 1691.2 of the Judicial Code provides for notification of the challenge to the arbitrator concerned. If he does not resign, the issue must be brought before the Court of First Instance (Tribunal de Première Instance) by the party bringing the challenge. The decision of the court may be appealed.

In case the arbitrator resigns, or if the challenge is allowed by the court, the arbitrator shall be replaced according to the same rules as governed his appointment. However, if he has been named in the arbitration agreement, the agreement shall terminate ipso iure, unless the parties have provided otherwise.

Arbitrators' fees, expenses and immunity

There is no specific provision in Belgian arbitration law which deals with the issue of arbitrators' fees and expenses. It is therefore up to the parties to determine in their arbitration agreement how the fees and expenses will be advanced by and finally allocated between the parties. If the arbitration agreement does not address

this issue, it is generally accepted that the arbitrators themselves have the power to determine the amount of their fees as well as the party or parties who will finally bear them. In practice, it is often the rule that "costs follow the event".

In case of an arbitration conducted under the rules of an arbitral institution, the matter will generally be dealt with in the rules of the arbitration institution.

There is no general immunity protecting arbitrators from claims by the parties. Arbitrators may be liable in case of wrongful performance of their duties (e.g., non compliance with certain deadlines; refusal to file the original copy of the award with the Court of First Instance; failure to decide certain issues, non-observance of certain mandatory provisions relating to the award, etc). As in any other case of wrongful performance, the claimant will have to prove the existence of a default committed by the arbitrator, the existence of damage and the causal link between the default and damage.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

Under article 1679.1 of the Judicial Code, a court "seized of a dispute which is the subject of an arbitration agreement shall, at the request of a party, declare that it has no jurisdiction, unless, in relation to the dispute, the agreement is not valid or has come to an end". Article 1679.1 further provides that such an objection of lack of jurisdiction must be raised in limine litis, i.e., before any other argument.

A party to a valid arbitration agreement may, therefore, invoke lack of jurisdiction if the other party starts court proceedings in relation to a matter which is the subject of an arbitration agreement. This is in line with the provision in article II of the 1958 New York Convention.

However, pursuant to article 1697.1 of the Judicial Code, "The arbitral tribunal may rule on its own jurisdiction and may, for this purpose, examine the validity of the

arbitration agreement". Article 1697.3 further provides that "The decision by which the arbitral tribunal declares that it has jurisdiction may only challenged ... together with the final award and by the same procedure ...". Arbitrators therefore have competence to rule on their own jurisdiction (principle of Kompetenz-Kompetenz). However, such a ruling is subject to judicial control.

Power to order interim measures

Article 1696.1 of the Judicial Code (inserted into the Code by the 1998 Law) gives arbitrators the power to order interim or protective measures, with the exception of an attachment of goods (which remains within the exclusive jurisdiction of the courts).

However, this provision does not bar the parties from introducing an action for interim or protective measures before the state courts (article 1679.2 of the Judicial Code). This applies, in particular, in the case of urgent matters, which require the recourse to summary proceedings, when for instance the time required to convene the arbitrators and have the issue decided by them would make their intervention belated. However, once the arbitral tribunal is constituted, the Belgian courts will generally refuse to entertain jurisdiction in relation to interim measures, save in very exceptional cases.

Conduct of arbitral proceedings

Commencement of arbitration

Article 1683 of the Judicial Code provides that a party who wishes to initiate arbitration must give notice to the other party. The notification, which will take the form of a request (requête), must refer to the arbitration agreement and specify the subject matter of the dispute where this has not already been done in the arbitration agreement.

Where more than one arbitrator has to be appointed by the parties, the notification must also specify the name(s) of the arbitrator(s) to be appointed by the claimant. It must also contain an invitation to the respondent to nominate the arbitrator(s) which he intends to appoint. If

the panel is to be appointed by a third party (an arbitration institution, the court, or another appointing body), that third party should also be notified and be invited to make the required appointment(s).

Article 1683.4 further provides that the appointment of an arbitrator may not be withdrawn once notification has been given. The notification must be in writing and sent by registered post (article 32 of the Judicial Code). It has the effect of setting the arbitration proceedings in motion.

General procedural principles and the place of arbitration

Article 1693 of the Judicial Code provides that "Without prejudice to the provisions of article 1694, the parties may agree on the rules of the arbitral procedure and on the place of arbitration". The parties and the arbitral tribunal are free to organize the arbitral procedure as they see fit, as long as the procedure respects the principle of equality between the parties, the right of defense, and the right to a fair hearing.

Failing such an agreement between the parties within the time limits fixed by the tribunal, the arbitration procedure and the place of arbitration are determined by the arbitrators. If the place of arbitration has not been fixed by the parties or the arbitrators, the place stated in the award shall be deemed to be the place of arbitration.

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

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

Pursuant to article 1694.1, the arbitral tribunal shall "give each party an opportunity to substantiate his claims and to present his case". Article 1694.4 further provides that each party may appear in person or represented by a lawyer or any person of his choice, approved by the arbitral tribunal.

Procedural powers of the tribunal

Pursuant to article 1696.2 of the Judicial Code, the arbitral tribunal is free to determine the admissibility of evidence and its evidentiary weight, unless the parties have agreed otherwise. Article 1696.3 of the Judicial Code provides that the arbitral tribunal may order the hearing of witnesses, an appraisal by experts, a site visit, and the appearance of parties in person; it may also accept an oath as being decisive or may request a supplementary oath. Finally, it may order the production of documents held by a party in accordance with the conditions provided in article 877 of the Judicial Code.

The tribunal may not, however, order the verification of signatures, rule on an objection relating to the production of documents, or upon the alleged forgery of documents. In these cases, the tribunal will leave it to the parties to take the matter to the Court of First Instance for a ruling and the arbitration will ipso iure be suspended until the date on which the arbitral tribunal receives notification of the final decision on the matter.

Finally, article 1709bis of the Judicial Code authorizes the arbitrators to impose a fine (astreinte) on a party which does not comply with its decisions or orders, to put this party under pressure. This is a very original and efficient feature of the Belgian legislation. These fines have been used by Belgian courts for many years and they have proved to be a very efficient means of ensuring compliance with court orders. In case of non compliance, the fine has to be paid to the other party. Difficulties in executing the astreinte are decided by the seizure judge (juge des saisies) in accordance with articles 1385bis to octies of the Judicial Code. Astreintes may not be imposed to ensure compliance with decisions ordering the payment of sums of money.

Language of arbitration

The language of the arbitration is determined by the parties. It is quite common in Belgium to have arbitration proceedings conducted in more than one language (e.g., French and English).

Third party intervention and consolidation of proceedings

Pursuant to article 1696bis.1, any affected third party may upon written request addressed to the arbitral tribunal intervene in the arbitration proceedings. The arbitral tribunal shall communicate the request to the parties. Pursuant to article 1696bis.2, a party may also serve a notice of intervention to a third party.

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

As far as multi-party arbitrations and consolidation of proceedings are concerned, the solution contained in article 12 of the arbitration rules of the Belgian Centre for the Study and Practice of National and International Arbitration (CEPANI) is worth mentioning. It provides as follows:

"When several contracts containing the Cepani arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman of Cepani shall be empowered to order the consolidation of the arbitration proceedings.

This decision shall be taken, either at the request of the arbitrator or arbitrators, or, prior to any other measure, at the request of the parties or of the earliest petitioner, or even on Cepani's own motion.

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

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

The said Committee or the said Chairman may not order the consolidation of disputes in which an interim award, or an award on admissibility, or an award on the merits of the claim has already been rendered."

Submissions, oral hearings and written proceedings, default by parties

According to article 1694 of the Judicial Code, the arbitral tribunal shall give each party an opportunity to substantiate its claims and to present its case. It shall make its award after oral proceedings, although the procedure may be in writing where the parties have so agreed or in so far as they have waived the requirement for oral proceedings.

Default proceedings are dealt with in article 1695, which provides that if, without legitimate cause, a party properly summoned does not appear, or does not present its case at the date fixed for the hearing, the arbitral tribunal may proceed and render an award, unless the other party requests a postponement.

Evidence

While it is not common to call witnesses in court proceedings in Belgium, this is, however, becoming more and more usual in arbitration proceedings, especially if the parties have elected to a follow a common law type of procedure.

By providing in the new article 1696.2 that "Unless the parties have agreed otherwise, the arbitral tribunal is free to determine the admissibility of evidence and its evidentiary weight", the legislator intended to allow maximum flexibility in the organization of the arbitral procedure.

Making of the award and termination of proceedings

Choice of law

The section on arbitration in the Judicial Code does not contain any rules regarding the choice of the law applicable to the substance of the dispute. This issue is governed by the general conflict of law rules under Belgian law. If the parties have agreed to submit their dispute to a specific law, this choice will be upheld by the arbitral tribunal. Absent such a choice, the arbitral tribunal will determine the applicable law.

Procedure

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

In ad hoc arbitration proceedings, the parties will generally refer to the rules of arbitration procedure contained in the sixth part of the Judicial Code or to the UNCITRAL Arbitration Rules.

Merits

Article 1700 of the Judicial Code provides that, unless the parties have agreed otherwise, the arbitrators shall decide a dispute in accordance with the rules of law.

The possibility for the arbitral tribunal to sit as amiable compositeur is no longer restricted, except when a public legal entity is a party to the arbitration agreement. In that case, the arbitrator must apply strict rules of law. Under the former article 1700, a provision stating that the arbitrators would decide the case as amiables compositeurs, was valid only if agreed upon after the dispute had arisen.

Decision making by the tribunal

Although it is quite unusual, the parties may set out in their arbitration agreement the rules to be followed by the arbitrators in order to reach a decision. In the absence of such an agreement, articles 1701.1 to 1701.3 of the Judicial Code set out the following rules:

- the decision must be made by an absolute majority of votes;
- the parties may give the chairman of the tribunal a casting vote, in case no majority can be found;

- on monetary matters, if no majority can be found for a specific amount, the votes expressed for the highest amount shall be counted as votes for the next lowest sum, until a majority is obtained.

Dissenting opinions are not authorized in Belgium. The deliberations of the tribunal are confidential.

Form, contents and effect of the award

An award must be in writing and must be signed by the arbitrators, or at least by a majority of them. If an arbitrator is unable or unwilling to sign, that fact must be recorded in the award.

In addition to the operative part, the award must contain the following information (article 1701.5):

- the name and address of the arbitrator(s);
- the names and addresses of the parties;
- a description of the subject-matter of the dispute;
- the date on which the award was made; and
- the seat of the arbitration and place where the award was made.

The reasons for the award must be stated (article 1701.6), even where the arbitrators act as amiables compositeurs. The parties may not discharge the arbitrators from this obligation.

The chairman of the tribunal must notify the award to the parties (by sending them a signed copy of the award) and deposit the original award with the registrar of the Court of First Instance of the place of the arbitration (article 1702). The parties may waive this latter requirement.

Unless the award is against public policy, or the dispute was not capable of settlement by arbitration, an arbitral award has the force of res judicata once it has been notified to the parties and may no longer be contested before the arbitrators (article 1703).

In the event that the parties did agree in their arbitration agreement on an appeal procedure, an award may be provisionally enforced, notwithstanding any appeal, if the arbitrators have so ordered. The arbitral tribunal may also

order that the provisional enforcement of the award shall be subject to provision of a guarantee (article 1709).

Settlement

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

Termination of proceedings

According to article 1702.3 of the Judicial Code, the arbitrators' appointment comes to an end when the final award terminating the proceedings has been notified to the parties and has been deposited with the registrar of the Court of First Instance (save where the parties have waived this latter requirement).

Costs

The Judicial Code does not deal with the issue of the costs of the arbitration. It is up to the parties to provide for the allocation of costs in their arbitration agreement. If there is no such provision, the final allocation of the costs of the arbitration will be decided upon by the arbitrators.

Correction and interpretation of the award

Article 1702bis contains the rules applicable to the correction or interpretation of the award.

Any party may, within thirty days of notification of the award (unless the parties have agreed another time limit), request the tribunal to correct any clerical error, error in computation, typographical error or any error of a similar nature in the award. If so agreed by the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award. In both cases, the request must be notified to the other party.

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

The tribunal may also, within thirty days of the award, correct the award on its own initiative.

When it is no longer possible to bring together the arbitrators, the request for correction or interpretation of the award shall be made to the Court of First Instance whose President has jurisdiction to grant the exequatur in accordance with the provisions of the Judicial Code (see further below).

The role of the courts

The jurisdiction of the courts

According to article 1717 of the Judicial Code, the court designated in the arbitration agreement or in a later agreement, concluded before the parties have chosen the place of arbitration, is competent to apply the arbitration provisions of the Judicial Code. In the absence of such an agreement between the parties, the court which has jurisdiction is the court of the place of the arbitration. If the parties have not chosen a place of arbitration, jurisdiction lies with the court which would have been competent to decide the dispute had it not been submitted to arbitration.

Various provisions of the Judicial Code give competence to local courts to deal with specific issues upon application of one of the parties, including:

- appointment of an arbitrator (article 1684);
- challenge of an arbitrator (article 1691);
- refusal of a witness to appear (article 1696.4);
- verification of signatures, objections relating to the production of documents or the alleged falseness of documents (article 1696.5); and
- determination of the time period within which the award must be rendered (article 1698).

Stay of court proceedings

This issue is dealt with in article 1679.1 of the Judicial Code, see above.

Preliminary rulings on points of jurisdiction

As already mentioned above, the arbitral tribunal is competent to determine its jurisdiction to decide a dispute, subject to judicial review in the context of the procedure for setting aside an award.

Interim protective measures

Article 1679.2 of the Judicial Code provides that an application to the court for conservatory or provisional (interim) measures is not incompatible with an arbitration agreement and shall not imply a waiver of the agreement. Such an application can also be made in the course of arbitration proceedings if it would not be possible or practicable to convene a session of the arbitral tribunal in time for the purpose of granting an interim protective measure.

Obtaining evidence

When the tribunal has ordered a hearing and the witnesses do not appear voluntarily, or refuse to take the oath or to testify, the arbitral tribunal will authorize the parties or one of them, to request the Court of First Instance to appoint a juge-commissaire who will be in charge of hearing the testimony (article 1696.4). It is also possible, albeit unusual, for a party to the arbitral proceedings to apply to the local courts to obtain an order for the production of documents, especially from a third party.

Challenging the award before the courts

The Law of 27th March 1985 had eliminated the possibility of setting aside an award made in Belgium when none of the parties was an individual with Belgian nationality or a residence in Belgium, or a legal entity incorporated in Belgium or having a branch or place of business in Belgium. This provision has however been repealed by the 1998 Law.

The new article 1717.4 of the Judicial Code now provides that: "The parties may, by an express statement in the arbitration agreement, or by a subsequent agreement, exclude any recourse right to apply for an arbitral award to be set aside when none of the parties is either an

individual having the Belgian citizenship or residing in Belgium, or a legal person having its principal place of business or a branch there".

The notion of an "express statement" in article 1717.4 must be strictly interpreted: a reference by the parties in the arbitration agreement or in the terms of reference to arbitration rules which provide for a waiver of any right of recourse does not amount to such an "express statement". The parties should, therefore, be advised to state expressly that they waive all rights to apply to have the award set aside, either in their arbitration agreement, or later, for example, in their terms of reference.

If proceedings for the setting aside of an award are available, or have not been excluded, they may only be started in the cases mentioned in article 1704 of the judicial Code. The grounds for setting aside the award are listed in article 1704 of the Judicial Code:

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

Actions for an award to be set aside are, however, very rare and are also very rarely successful.

Proceedings for setting aside an award are commenced by way of request (requête) before the Court of first Instance (Tribunal de Première Instance). The decision of the court is subject to appeal.

Reference should finally be made to article 1703.2 of the Judicial Code which provides that an appeal against an arbitral award may only be made if the parties have expressly provided for such a possibility in the arbitration agreement. Such provisions are rather unusual except in some industry specific arbitrations.

Recognition and enforcement of awards

Domestic awards

The enforcement of domestic awards is governed by articles 1710 to 1718 of the Judicial Code.

In order to be enforceable, a domestic award must be granted exequatur (a formal authorization of enforcement) by the President of the Court of First Instance of the place of the arbitration, acting upon the request of one of the parties. At this stage, the party against whom enforcement is sought is not a party to the application.

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

The President of the court will grant the exequatur when the award is no longer open to appeal before the arbitrators or if the latter have made an order granting provisional enforcement notwithstanding an appeal. The President's decision is enforceable notwithstanding any recourse rights.

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

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

Foreign awards

Belgium has ratified the 1958 New York Convention.

In relation to awards originating from countries which have not ratified the 1958 New York Convention, the enforcement procedure is set out in articles 1719 to 1723 of the Judicial Code, whose provisions are to a large extent similar to those applicable to the enforcement of domestic awards. A party seeking enforcement of a foreign award may always base its request on these provisions, in accordance with article VII of the 1958 New York Convention, even if the latter would apply, if it considers that the above rules are more favorable than those contained in the convention.

The request for exequatur must be submitted to the President of the Court of First Instance of the place where the party against whom enforcement is sought has its domicile or residence, or if it has no domicile or residence in Belgium, of the place where the award will be enforced. The petitioner elects domicile in the court's district.

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

Unlike in the procedure for the enforcement of domestic awards, the President of the court may call the parties to hear their arguments on the request. However, even in the unusual event that he takes this step, the procedure remains ex parte at this stage.

The President of the court refuses to grant exequatur if:

- the arbitral award is still open to appeal before the arbitrators and if the arbitrators have not ordered provisional enforcement notwithstanding any such appeal;
- the award or its enforcement is contrary to public policy;
- the dispute was not capable of settlement by arbitration; or
- there is a ground for setting aside the award as provided in article 1704.

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

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

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

Conclusion

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

There is in Belgium no tradition of interference of local courts in arbitration proceedings. Moreover, the courts' attitude in proceedings for the setting aside or enforcement of arbitral awards is invariably inclined in favorem arbitrandum.

This probably explains why Brussels is more and more frequently chosen as the seat of major international arbitrations.

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Arbitration in the Czech Republic

CMS Cameron McKenna

Historical background

Commercial arbitration in the Czech Republic has undergone a renaissance since 1995. The pre-communist Czechoslovak legal roots were strongly influenced by the Austro-Hungarian legal system and prior to 1939 commercial arbitration was well established.

After the communist reformation of the Czechoslovak legal system, only foreign trade disputes between state trading organisations of the member states of the Council for Mutual Economic Assistance ("COMECON") could be referred to arbitration before the Permanent Court of Arbitration attached to the Czechoslovak Chamber of Commerce. Such arbitrations were governed by the relevant provisions in the 1972 Moscow Convention, the 1963 Arbitration Act, and the 1963 Civil Procedure Code.[1] Since the division of Czechoslovakia and the creation of the Czech Republic in 1993, the Permanent Court of Arbitration now operates under the name of the Arbitration Court Attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic ("the Arbitration Court").

[1] In addition, Act No. 121/1962 Coll. on Economic Arbitration established a system under which it was possiblefor disputes between Czechoslovak companies to be dealt with by the by use of a sole arbitrator (section 32(7)), if the subject matter of the dispute amounted to be less that 500,000 CZK. This system, however, bore few similarities to arbitration proceedings as understood today, and was utilised infrequently.

Following the velvet revolution of 1989, as part of an extensive programme of legal reform, a legislative commission was formed with the task of producing a new arbitration law. It was hoped that modernisation of the law of arbitration would help to secure inward foreign investment by providing an internationally acceptable and politically neutral system of commercial dispute resolution. There was also a concern that, in the post-communist era, an increasing number of foreign investment contracts were providing for arbitration abroad (e.g., in Vienna or London) rather than in the Czech Republic.

As a result, the new Czech Arbitration Act 1994 (Act No 216/1994 Coll. on Arbitral Proceedings and Enforcement of Arbitral Awards "the Arbitration Act" or "the Act") was adopted. The Arbitration Act is based on the old 1963 legislation and, in contrast with the new arbitration laws in many jurisdictions elsewhere in Central and Eastern Europe, it is not based on the UNCITRAL Model Law although many of the underlying concepts and procedural provisions are similar.

The Arbitration Act brought about wide-ranging changes to the Czech arbitration regime. A key change effected by the Arbitration Act was to enable domestic as well as international disputes to be referred to arbitration. It also widened the range of disputes which are capable of being arbitrated. These are significant changes from the old law which, as explained above, restricted the use of arbitration to disputes arising from international trade agreements between state trading organisations.

The Arbitration Court remains the premier permanent arbitration institution in the Czech Republic for the resolution of both domestic and international disputes. It adopted two new sets of Rules in 1996: one concerning international arbitration ("the Rules"), and the other concerning internal arbitration. The rules contain differences on various issues including the fees charged and the language and place in which proceedings are heard. Both rules provide a comprehensive framework for commercial arbitrations in the Czech Republic. Since 1994, the Arbitration Court no

longer has a monopoly in relation to institutional arbitration and arbitrations under the rules of other international arbitral institutions, such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC) are now also permitted in the Czech Republic, as are ad hoc arbitrations, including arbitrations under the UNCITRAL Arbitration Rules.[2] This overview will focus on the statutory provisions which apply under the Arbitration Act to the extent that the parties have not (validly) agreed the application of institutional arbitration rules or otherwise determined the applicable procedural rules governing the arbitration proceedings. However, the Rules of the Arbitration Court will also be mentioned where they contain provisions of particular interest.

Scope of application and general provisions of the Arbitration Act

Scope of application

Pursuant to the transitional provisions in section 48 of the Arbitration Act, the Act governs all arbitral proceedings taking place under arbitration agreements made after 1st January 1995. Arbitrations arising from agreements made before 1st January 1995 will continue to be governed by the 1963 legislation, regardless of when proceedings are started. The 1963 legislation will therefore continue to be in use for some years to come.

The 1963 Civil Procedure Code, as amended by the Arbitration Act, also continues to apply to arbitral proceedings, subject to any expressly incorporated institutional rules, such as those of the Arbitration Court or of the ICC. Where the arbitration involves foreign

[2] Since 2002, Act No. 229/2002 Coll. has established the position of a so-called "financial arbitrator" in order to deal with disputes between banks and their clients. This Act ws adopted to meet the requirements set in Section 10 of the Directive 97/5/ES and Recommendation No. 98/257/ES.

parties or elements, the 1963 Private International Law and Law of International Procedure Act, which deals with conflicts of law issues also applies.

General principles

The general principles of Czech Arbitration law include:

- Section 18 of the Arbitration Act provides that the parties shall have equal standing in the arbitral proceedings and shall be given full opportunity of presenting their respective cases.
- Section 19 of the Arbitration Act provides that the parties shall be free to agree on the procedural rules to be followed in the arbitration proceedings. In international arbitrations, the parties are also free to determine the law applicable to the substance of their dispute.
- In addition to the general principle as expressed in Section 1 of the Arbitration Act, a number of further provisions of the Arbitration Act are designed to ensure the independence and impartiality of arbitrators.
- Section 19(3) of the Arbitration Act provides that the arbitration hearings are not public and arbitrators have a statutory duty of confidentiality (section 6 of the Arbitration Act).

Domestic and international arbitrations

The Arbitration Act contains in Part 5 (sections 36 to 40), under the heading "Relations to Foreign Countries", additional specific provisions which apply to international arbitrations. They address such matters as the validity of the arbitration agreement, choice of law, and the recognition and enforcement of foreign arbitral awards; these subjects will be addressed further below in the relevant context.

The arbitration agreement

Formal requirements

Section 3 of the Arbitration Act requires arbitration agreements to be made in writing. An arbitration agreement made by telegram, telex, or other electronic means, enabling the contents of the agreement to be

ascertained, and the parties to the agreement to be determined, is deemed to have been made in writing.

If the arbitration agreement is contained in general terms and conditions governing the main contract to which the arbitration agreement applies, then the arbitration agreement is validly concluded if the offer of the main contract is accepted by the other party and there is no doubt that this acceptance extends to the arbitration agreement.

Section 2(5) of the Arbitration Act clarifies that the arbitration agreement also binds the legal successors of the parties thereto, unless expressly otherwise agreed.

In international arbitrations, the arbitrability of disputes to be resolved in the Czech Republic is determined according to Czech law pursuant to section 36(1) of the Act. However, according to section 36(2), the arbitration agreement will be valid if its form complies either with Czech law or the law of the place where the arbitration agreement was made.

Arbitrability

Pursuant to section 2(3) of the Arbitration Act, an arbitration agreement may be entered into either in relation to a specific already existing dispute, or in relation to future disputes arising out of a given legal relationship. Unless expressly excluded by the arbitration agreement, the arbitration agreement is binding on the legal successors of the parties to the original agreement.

Section 1(1) of the Arbitration Act further provides that most disputes relating to "property" are arbitrable. The precise ambit of this term is unclear, but it is generally accepted to include most claims of a financial or monetary nature. Generally, an arbitration agreement may be validly entered into if the parties are free at law (in particular pursuant to section 99 of the 1963 Civil Procedure Code) to conclude a settlement in respect of the subject matter of the dispute referred to arbitration.

Accordingly, only disputes regarding to personal status (such as divorce, annulment of marriage, paternity, etc), cases where court proceedings can be initiated in the absence of a motion (i.e., cases involving care of minors, legal capacity, guardianship, inheritance, etc), or cases in which the substantive law does not permit an agreement between the parties which is contrary to mandatory statutory requirements, are not arbitrable. This also covers disputes relating to the enforcement of decisions, or disputes arising as a result of bankruptcy proceedings or receivership.

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

Pursuant to section 4 of the Arbitration Act, both Czech and foreign citizens may act as arbitrators, provided they are of full age and enjoy capacity to act under the law of their country, or under the law of the Czech Republic.

The appointment of arbitrators is dealt with in section 7 of the Arbitration Act. The parties are free to determine the number of arbitrators in the arbitration agreement. The arbitration agreement should also set out the identity of the arbitrators, or otherwise how the number of arbitrators shall be determined, and the arbitrator shall be appointed. The final number of arbitrators must always be uneven.

If the parties have not made any provision in relation to the number and appointment of arbitrators in the arbitration agreement, each party shall be entitled to appoint one arbitrator. The party appointed arbitrators shall then select the presiding arbitrator to act as president of the tribunal.

Section 8 of the Arbitration Act requires a proposed arbitrator to disclose to the parties or to the court forthwith all circumstances which are likely to give rise to serious doubts as to his impartiality and which would disqualify him from acting as arbitrator.

Section 9 of the Arbitration Act sets out the procedure to be followed in the event that a party who has to appoint an arbitrator fails to do so within 30 days of receipt of an

invitation by the other party to make the appointment, or if the party appointed arbitrators are unable to agree on the person of the president of the arbitral tribunal. Unless otherwise agreed by the parties in their arbitration agreement, the court shall in such circumstances appoint the arbitrator or president of the arbitral tribunal, as the case may be. The application to the court for such nomination may be made by any party to the proceedings or any of the arbitrators already appointed.

The Rules provide in section 3(2) for arbitral tribunals to consist of three arbitrators (or a sole arbitrator, if so agreed by both parties to the proceedings,) and set out in section 21 the appointment procedures to be followed, including a provision in relation to multi-party disputes. Generally, if the parties or the party appointed arbitrators fail to make an appointment, the appointment will be made by the president of the Arbitration Court.

The challenge of arbitrators

Section 11 of the Arbitration Act provides that an arbitrator who has been named in the arbitration agreement or appointed by the parties shall be disqualified from hearing the dispute if circumstances giving rise to serious doubts as to his impartiality are disclosed at a later date. Section 12(1) of the Arbitration Act requires the arbitrator to resign from his office in the event that such circumstances are disclosed. If he fails to do so, the parties have the right pursuant to section 12(2) to agree on the further steps to be taken in respect of the arbitrator's disqualification. In addition, either party has the right to apply to the court for a disqualification order.

The detailed challenge procedures in section 22 of the Rules give each party the right to challenge any of the arbitrators, experts or interpreters employed in the proceedings, on the grounds that, in its opinion, they are biased, or if it may be presumed that they are directly or indirectly interested in the outcome of the proceedings.

The appointment of substitute arbitrators

In the event that an arbitrator already appointed by the parties resigns from his office, or is otherwise no longer in a position to exercise his function, section 9(2) of the Arbitration Act states that the court shall appoint a new arbitrator upon application of any party, or of another arbitrator, unless otherwise agreed by the parties. When making the substitute appointment, the court is required by section 10 of the Arbitration Act to take into consideration circumstances guaranteeing the arbitrator's independent and impartial decision making.

Arbitrators' fees, expenses and immunity

The Arbitration Act does not contain express provisions regarding the fees and expenses of the arbitrators or their liability for breach of duty. In ad hoc arbitrations, the arbitrators' fees and expenses (including a payment schedule) will be determined by agreement between the parties and the arbitrator.

In institutional arbitration proceedings, the arbitrators' fees and expenses will generally be determined by the rules and fee schedules applied by the relevant institution. In relation to proceedings before the Arbitration Court, the relevant provisions on payment of arbitration fees, costs, etc, are set out in the Annex to the Rules. The arbitration fees are calculated by reference to the value of the claim although other factors, such as the number of parties and arbitrators, are also taken into account. The arbitration fee is payable upon filing of the statement of claim or counterclaim as the case may be. A lump sum payment on account of administrative costs will also be requested from the claimant.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

The scope of the tribunal's jurisdiction is determined in the first instance by the terms of the arbitration agreement between the parties. Section 15(1) of the Arbitration Act provides that the arbitrators have the power to rule on

their own jurisdiction. If the arbitrators come to the conclusion that they lack the necessary jurisdiction, they shall make a decree of discontinuance.

Pursuant to section 15(2) of the Arbitration Act, an objection by a party to the jurisdiction of the tribunal on the grounds of the non-existence, invalidity, or termination of the arbitration agreement must be raised no later than when taking the first step in the proceedings relating to the merits of the case, unless the objection is based on the allegation that the subject matter of the dispute is not arbitral. In that event, the objection can be raised at any stage of the arbitral process. The right to object to the award may otherwise be lost pursuant to section 33 of the Act.

In institutional arbitration proceedings, jurisdictional challenges are decided according to section 23 of the Rules by the Court of Arbitration pursuant to a reference from the arbitral tribunal.

Power to order interim measures

The Arbitration Act does not give the arbitrators power to order preliminary measures such as injunctions. However, see below as to the court's jurisdiction to grant such matters in support of the arbitral process.

Conduct of the arbitral proceedings

Commencement of arbitration

Pursuant of section 14(1) of the Arbitration Act, arbitral proceedings shall be commenced by lodging a statement of claim. The day on which the statement of claim is lodged shall be the day of commencement of the arbitral proceedings. Lodging a statement of claim with an arbitral tribunal has the same legal consequences (e.g., with regard to limitation of claims) as if the same were lodged with a court.

The statement of claim must be lodged in the case of institutional arbitration with the permanent arbitration

court or, in ad hoc proceedings, with the president of the arbitral tribunal, provided he has already been determined or appointed. If the president of the arbitral tribunal has not yet been determined or appointed, then the statement of claim shall be lodged with any arbitrator already determined or appointed (section 14(2) of the Arbitration Act).

Section 16 of the Rules contains parallel provisions for the commencement of institutional arbitration proceedings but requires the claimant to pre-pay the arbitration fees and a lump sum to cover the administrative costs of the Arbitration Court upon filing the statement of claim.

Procedural powers of the tribunal

Section 19 of the Arbitration Act expressly provides the parties with freedom to agree on the procedural rules to be followed in the arbitration. Such agreement by the parties is binding on the arbitrators. To the extent that the parties have not made provision for procedural issues in their arbitration agreement, the Arbitration Act provides in section 19(1) that procedural issues may be decided by the president of the arbitral tribunal, provided that the parties or all arbitrators authorise him to do so. If no such agreement has been made, the arbitrators shall be free to conduct the proceedings in the manner they deem fit. Section 19(2) of the Arbitration Act expressly provides that, when doing so, the arbitrators shall avoid all superfluous formalities but shall give full opportunities to the parties to present their respective cases and shall make findings of fact on which the decision is to be based.

Pursuant to section 30 of the Arbitration Act, the arbitrators shall apply the provisions of the 1963 Civil Procedure Code to proceedings pending before them in a reasonable manner unless otherwise provided by the Arbitration Act. The 1963 Civil Procedure Code therefore serves to provide a fall-back position in the event that the Arbitration Act or the arbitration agreement between the parties does not contain any provision in relation to any given procedural issue arising in the proceedings.

Place and language of arbitration

Section 17 of the Arbitration Act provides that the arbitration proceedings shall be conducted at the place agreed upon by the parties. If no such place has been agreed, then the proceedings shall be conducted at the place determined by the arbitrators. When determining the place of arbitration, the arbitrators shall take the legitimate interests of the parties into due consideration.

In institutional arbitration under the Rules, section 5 of the Rules provides hearings are generally held at the seat of the Arbitration Court in Prague, but on the initiative of the arbitral tribunal or by agreement of the parties, hearings may also be held elsewhere in the Czech Republic or abroad.

The Arbitration Act does not contain an express provision in relation to the language of the arbitral proceedings. Generally, all hearings will be held and decisions be made in the Czech (or Slovak) language. However, in international arbitration proceedings, the proceedings may be held and decisions made in a language agreed upon by the parties or determined by institutional arbitration rules or the language of the contract from which the dispute arose. Pursuant to sections 6 and 7 of the Rules, similar provisions apply to arbitrations before the Arbitration Court.

Submissions

The Act does not contain express provisions in relation to the format, content or timetable of the parties' submissions to the arbitral tribunal. However, according to the above-mentioned section 30 of the Act, in circumstances where the Act does not make such express provision, sections 42 and 79 of the Civil Procedure Code will apply, if deemed reasonable to do so, and govern the content of any correspondence , (for instance, statements of claim). To the extent that the arbitration agreement between the parties does not set out the procedure to be followed, this will be determined by the arbitral tribunal or the president of the tribunal.

By contrast, sections 17 and 18 of the Rules sets out the mandatory minimum and recommended additional content of the statement of claim in proceedings before the Arbitration Court. Upon filing, the statement of claim will be reviewed by the secretary of the Arbitration Court and, if necessary, the claimant will be invited to remedy any defects pursuant to section 19 of the Rules. The statement of defence is dealt with in section 20 of the Rules. The statement of claim will generally have to be answered by the defendant within 30 days of service. Section 28 entitles the defendant to bring a counter-claim. Detailed provisions on the service of documents are set out in section 9 of the Rules.

Oral hearing and written proceedings, default by the parties

Section 19(3) of the Arbitration Act requires the proceedings to be oral, unless otherwise agreed by the parties. The parties are therefore free to agree that all or part of the arbitration proceedings shall be conducted in writing.

Section 26 of the Rules makes detailed provision for the conduct of hearings in proceedings before the Arbitration Court and section 27 of the Rules sets out simplified procedures for document only arbitrations, or those proceedings which end in the issuing of an award without the giving of any grounds (these types of proceedings are 20%-30% cheaper than standard arbitration).

In section 21, the Arbitration Act contains an express provision that if a party is unable to participate in the proceedings, either wholly or in part, without such absence constituting a culpable default or if, under the same circumstances, a party fails to take a step in the proceedings necessary to defend its rights, then, upon application by that party, the arbitrators shall take reasonable measures allowing the party in default to take such steps. However, if a party's default is not sufficiently excused, the tribunal may exclude the relevant submissions by the defaulting party. The Rules contain a similar provision in section 11.

Evidence

The arbitrators have power pursuant to section 20 of the Arbitration Act to hear witnesses, experts and the parties, provided they appear voluntarily and do not refuse to give evidence. The tribunal may also take other evidence if it is given voluntarily. However, the arbitral tribunal does not have a power under the Act to compel witnesses, experts or the parties to appear or to give evidence before the tribunal. If necessary, the arbitrators can apply for the court to take any steps in the proceedings which the arbitrators themselves are unable to take (see further below on the courts' powers in such circumstances).

The rules of evidence applicable in arbitration proceedings in the Arbitration Court are set out in sections 31 and 32 of the Rules, pursuant to which the arbitral tribunal takes evidence, assesses it freely at its discretion and may request the parties to produce supplementary evidence.

Multi-party proceedings

The Rules quite helpfully contain a number of provisions, e.g., the appointment provisions in section 21, or the provisions in relation to the joinder of third parties with a legal interest in the outcome of the proceedings in section 13, expressly addressing multi-party dispute situations which frequently pose procedural difficulties under other arbitration regimes. In multi-party arbitrations it may therefore be advisable for parties to opt for institutional arbitration before the Arbitration Court rather than for ad hoc arbitration.

Confidentiality

Section 19(3) of the Arbitration Act makes clear that arbitration proceedings shall not be public. The confidentiality of arbitration proceedings is further protected by section 6(1) of the Arbitration Act, which imposes on the arbitrators a statutory duty of confidentiality. Pursuant to section 6(2), the arbitrators may be relieved of this duty only by the agreement of the parties or (for serious reasons) by order of the court.

Making the award and termination of proceedings

Choice of law

If the arbitral proceedings involve legal relations containing an international element, section 37(1) of the Arbitration Act provides that the arbitrators shall take their decision under the proper law chosen by the parties. If the parties have not determined the applicable law in their contract, section 37(2) of the Arbitration Act provides that the arbitrators shall apply the local conflict of law rules in determining the applicable law. The Arbitration Act clarifies that a choice of law by the parties, or the determination of the applicable law by the arbitral tribunal under the conflict of law rules, shall, unless otherwise agreed by the parties, be taken as a reference to the substantive law of the jurisdiction so chosen or determined under exclusion of its conflict of law rules.

In domestic arbitrations, section 25(3) of the Arbitration Act provides that the arbitrators shall base their decision on the material law applicable to the case. The arbitrators may also decide the case ex aequo et bono, provided the parties expressly authorise them to do so.

In proceedings before the Arbitration Court, section 8 of the Rules requires the tribunal in addition to have regard to the customs of trade.

Decision making by the tribunal

Section 25(1) of the Arbitration Act provides that an arbitral award shall be adopted by a majority of the arbitrators. The same applies pursuant to section 36(1) of the Rules in proceedings before the Arbitration Court, although section 36(2) of the Rules contains special voting rules in relation to the quantum of monetary awards.

Form, contents and effect of the award

Pursuant to section 25(1) of the Arbitration Act, the arbitration award must be reduced to writing and signed by at least a majority of the arbitrators. The Act expressly requires the operative part of the award not to be ambiguous.

Section 25(2) requires that an opinion setting out the tribunal's reasons for the decision and the award shall be

attached to the award, unless the parties by agreement dispense with this requirement. This rule also applies to arbitral awards recording a settlement between the parties (section 25(2) in conjunction with section 24(2) of the Arbitration Act).

Section 28(1) of the Arbitration Act requires the written award to be served on the parties. Upon service, a clause of res judicata shall be apposed to the award. Pursuant to section 28(2), an award which is not subject to review by a second tier arbitral tribunal (as to which see further below), or in respect of which the time limit for lodging an application for revision has been expired, acquires the force of res judicata upon service and thus becomes enforceable in the courts. Section 29 makes provision for the award to be deposited with the courts.

Section 34 of the Rules clarifies that, in proceedings before the Arbitration Court, the arbitral tribunal may also make partial awards (final awards in relation to certain issues in dispute), interim awards (on liability before deciding on quantum), or awards recording a settlement reached between the parties. Section 35 of the Rules sets out the required contents of the award. In addition to being signed by at least two out of three arbitrators or the sole arbitrator, awards in institutional proceedings are also signed by the president and secretary of the Arbitration Court. Pursuant to section 37 of the Rules, the award is either pronounced to the parties orally or served in writing. An arbitral award made in proceedings before the Arbitration Court is final, binding, and enforceable (section 39 of the Rules).

Settlement

Section 24(1) of the Arbitration Act requires the arbitrators to invite the parties to settle their disputes during the course of the proceedings. If the parties reach a settlement while the arbitration proceedings are pending, the settlement may upon application of the parties be incorporated into an arbitral award (see also section 34(1) of the Rules).

Termination of proceedings

Section 23 of the Arbitration Act provides that proceedings shall be terminated either by an arbitral award, or by a decree of discontinuance in cases where no arbitral award will be issued (e.g., because the arbitral tribunal declines jurisdiction over the dispute submitted to it for decision). As with arbitral awards, the decree of discontinuance must be adopted, signed, provided with an opinion, and served on the parties in the same way as an arbitral award.

In section 40, the Rules contain a similar provision for the discontinuance of proceedings without an award if the claimant withdraws the statement of claim, or if the parties conclude a settlement without incorporating the same in an arbitral award, or if the Arbitration Court rules pursuant to section 23 of the Rules that it lacked jurisdiction. The provisions on arbitration awards in sections 34 to 38 of the Rules apply also to rulings and orders of discontinuance.

Interest

Arbitral tribunals have the power to award contractual or statutory default interest if claimed by the Plaintiff in his statement of claim. Pursuant to Section 2(4) of the Arbitration Act, the arbitration agreement (unless it states otherwise) shall cover both the contractual rights directly arising from the agreement as well as legal rights connected thereto. This provision is given a wide interpretation by academic writers and arbitral practice in the Czech Republic, and arbitration awards accordingly also deal both with contractual rights and also with related legal rights, including claims for default interest. Default interest may be awarded either on a contractual basis (if expressly agreed in the main contract), or on the statutory basis of section 517(2) of the Czech Civil Code.

Costs

The Arbitration Act does not contain any express provisions in relation to the payment of the costs of the arbitral proceedings or their allocation as between the parties.

In ad hoc arbitration proceedings, the arbitral tribunal will upon application by a party make provision in the award for the allocation and payment of the costs of the proceedings as between the parties, including a party's reasonable costs of legal representation, if the arbitration agreement between the parties so provides. Arbitral tribunals often apply Decree No 484/2000 Coll which specifies the amount of costs which may be awarded to winning parties by the court (regardless of the actual amount of the costs). Typically, sums awarded under the Decree are lower than the actual costs incurred. See further below as to the costs incurred in connection with applications by the arbitrators to the court for measures in support of the arbitral process.

In institutional arbitration proceedings, the rules of the relevant institution will generally set out detailed cost provisions. Thus, the Annex to the Rules (comprising 15 sections) makes detailed provision on the costs of arbitral proceedings before the Arbitration Court. In principle, the arbitration fees, administrative costs of the proceedings and other specific costs incurred by the Arbitration Court are generally to be borne by the party who loses the case, or split between the parties in proportion to their relative success. In making its cost award, the tribunal may take into account the parties' conduct during the arbitral proceedings. However, each party will generally have to bear its own legal costs, although the tribunal may adjudicate a partial recovery of costs from the other party if good cause is shown for an order in such terms.

Correction and interpretation of the award

Section 26 of the Arbitration Act permits clerical errors, errors of calculation, and other obvious defects of a similar nature in the arbitral award to be corrected by the arbitrators, or by the permanent arbitration court, at any time upon application of a party. Such corrections are made by way of a decree of correction which shall be adopted, signed and served on the parties by the arbitral tribunal in the same way as an arbitral award.

In addition to correction of typing, numerical, or other obvious errors in the award, section 38 of the Rules also gives the arbitral tribunal power in institutional proceedings, upon application of a party filed within 30 days of service of the award, to make an amending award if it appears that the original award failed to deal with all the claims put forward by the parties. However, this requires the parties first to be summoned to a further hearing.

Appeals

Pursuant to section 27 of the Arbitration Act, the parties are free to agree in their arbitration agreement that the tribunal's award shall be subject to review by a second tier arbitral tribunal consisting of other arbitrators. However, unless the parties expressly make such an agreement, the tribunal's award will be final and binding, subject only to the limited circumstances in which an award may be set aside by the court (see below). If an appeal procedure has been agreed by the parties, the application for revision has to be served on the other party within 30 days, unless otherwise agreed. The appeal process forms part of the arbitral proceedings and the provisions of the Arbitration Act apply thereto.

The Role of the courts

The jurisdiction of the courts

The Arbitration Act (as supplemented by the 1963 Civil Procedure Code) contains express provisions as to the courts powers in relation to arbitration matters. In particular, the courts have jurisdiction to support the arbitral process in certain circumstances, e.g., by appointing arbitrators, taking evidence, or granting conservatory or other interim measures. The courts also have jurisdiction in relation to the challenge and enforcement of arbitral awards.

Stay of court proceedings

The Czech Republic is a signatory to the 1958 New York Convention and, pursuant to Article II(3) of the Convention, the Czech courts, when seized of an action in a matter in respect of which the parties have made a written arbitration agreement, are at the request of one of the parties obliged to refer the dispute between the parties to arbitration

unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The Arbitration Act does not make express provision for the stay of court proceedings commenced by a party in relation to a subject matter covered by a valid and binding arbitration agreement.

The stay of court proceedings in such circumstances is dealt with by section 106 of the 1963 Civil Procedure Code (as amended). Section 106(1) provides that, as soon as a court becomes aware through the defendant that a case should properly be dealt with by arbitration, it must stay the proceedings. The defendant must inform the court of this at the earliest opportunity, as soon as the first contact with the court is established. However, if the parties both declare that they do not wish the dispute to be resolved by arbitration, then the court may hear the case.

The court shall also hear the case if it establishes that under Czech law the case cannot be dealt with in arbitration proceedings, that there is no valid and binding arbitration agreement, that the claim falls outside the jurisdiction of the arbitrators, or that the relevant arbitration body has refused to deal with the case.

Where court proceedings are stayed and arbitration proceedings are commenced within 30 days of service of the order staying the court proceedings, the legal effects of the initial action remain in force, e.g., for the purpose of calculating the applicable limitation periods (section 106(2)).

Where court proceedings are commenced after arbitration proceedings have been initiated, the court must suspend such court proceedings if they relate to the existence, validity or termination of the agreement, until the arbitrators have made a decision either as to their competence or on the merits of the case.

Preliminary rulings on jurisdiction

Section 15(1) of the Arbitration Act gives the arbitrators power to decide on their own jurisdiction. The courts therefore do not have jurisdiction to make preliminary rulings on the tribunal's jurisdiction (other than indirectly

in connection with applications for a stay of court proceedings). However, the parties may challenge the tribunal's assumption of jurisdiction subsequently by application to the courts for the award to be set aside for lack of jurisdiction (see further below).

Interim protective measures

As explained above, the arbitral tribunal does not have power to order interim protective measures, or to grant injunctions in support of the enforcement of arbitral awards. Section 22 of the Arbitration Act therefore provides the courts with jurisdiction upon application of any party to order a preliminary measure or injunction if, pending the proceedings, or before their commencement,

circumstances arise which are likely to jeopardise the enforcement or execution of the arbitral award.

Obtaining evidence and other court assistance

Section 20(2) of the Arbitration Act provides that, to the extent that the arbitrators are unable to take steps in the proceedings (due to the limits on their procedural powers), the competent court has jurisdiction to take such steps upon application by the arbitrators. This relates primarily to the power to compel witnesses, experts and parties to give evidence to the court for use in the arbitration proceedings where such evidence is not voluntarily given to the arbitral tribunal direct. The court will sustain the application by the arbitrators unless the steps applied for are prohibited by law. When taking its decision, the court shall take all measures necessary for the successful implementation of the application.

Section 20(3) provides that the costs incurred by the court in the course of taking the steps applied for by the arbitrators in support of the arbitral proceedings shall be covered by the permanent arbitration court or the arbitrators, as the case may be. This provision may at first appear somewhat unusual, but the arbitrators will generally only make such an application if the parties have advanced reasonable funds to the tribunal to cover the costs of the application. Also, any such costs incurred by the arbitral tribunal in

making an application to the court will ordinarily be included in the tribunal's award on costs.

Challenging the award before the courts

The circumstances in which an arbitral award may be set aside by the court upon application by a party are set out in section 31 of the Arbitration Act and include:

- non-arbitrability of the subject matter of the dispute;
- the arbitration agreement is void for other reasons, or has been terminated, or does not cover the subject matter of the dispute;
- an arbitrator takes part in the decision who has not been named in the arbitration agreement or otherwise duly appointed to decide the dispute, or who lacks the capacity to be and to act as arbitrator;
- the arbitral award has not been adopted by a majority of arbitrators;
- the parties have not been given the opportunity duly to present their case;
- the award contains an order against the losing party for relief not claimed by the winning party, or the performance of which is impossible or illegal; or
- the court is satisfied that there are grounds on which it would be possible to apply for a new trial in civil proceedings.

Section 32 of the Arbitration Act requires that an application to set aside an arbitral award must be lodged with the court not later than three months following service of the award on the party seeking to set the same aside. The filing of an application to set an award aside does not have the affect of staying the enforceability of the award. However, the court may, upon application of the losing party, stay the enforceability of the award if execution of the award forthwith would inflict a serious loss on the losing party.

As pointed out above, the right to object to the award on the basis of the invalidity of the arbitration agreement

or the improper appointment of an arbitrator may be lost pursuant to section 33 of the Arbitration Act if the party applying for the award to be set aside on such grounds did not raise an objection to the jurisdiction of the arbitrators no later than when presenting its arguments on the merits of the case.

Section 34 of the Arbitration Act provides that, if the court sets aside an award on the grounds that the subject matter of the dispute was not arbitrable, or the arbitration agreement was void for other reasons, or has been terminated, or does not cover the subject matter of the dispute, the court shall, upon application by either party lodged after the judgment on the setting aside of the award acquired the force of res judicata, proceed with hearing the matter anew and deciding the same.

Pursuant to section 35 of the Act, a party against whom the court decrees a levy of execution may in certain circumstances apply for a stay of execution, even if it failed to lodge an application with the court for the award to be set aside. In addition to certain grounds set out in the Civil Procedure Code, the application may be based on the following grounds:

- that the award suffers from the defect that the subject matter of the dispute was not arbitrable, the arbitral award was not adopted by a majority of the arbitrators, or the award contains an order against the losing party for relief not claimed by the winning party, or the performance of which is impossible or illegal;
- that a party, who can act only through a statutory representative, is not represented in proceedings and that its acts and measures have not subsequently been ratified; or
- that a representative, having taken part in the arbitral proceedings in the name and on behalf of a party, lacks the necessary authority and his steps or measures taken have not subsequently been ratified by that party.

Section 35(2) provides that, if an application for a stay of execution under section 35(1) is lodged with the court in

charge of the levy of execution, it shall stay the proceedings and decree that the applicant shall within 30 days lodge an application for the award to be set aside. If no such application is lodged, the court in charge of the levy of execution shall proceed in the execution proceedings. If the award is set aside as a result of such application, the parties are free to proceed as provided for by section 34, i.e., to apply for the court to hear the matter anew and to decide the same after the judgment setting aside the award acquired the force of res judicata.

Recognition and enforcement of awards

Domestic awards

An award which is not subject to revision by a second tier arbitral tribunal pursuant to section 27 of the Arbitration Act, or in respect of which the term for lodging an application for revision has lapsed without such application having been lodged, acquires the force of res judicata when served on the parties and is enforceable in the courts in accordance with the provisions of the Civil Procedure Code.

Foreign awards

The enforcement of arbitral awards rendered abroad is dealt with in sections 38 to 40 of the Arbitration Act. Czechoslovakia was one of the first countries to ratify the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Czech Republic has become a party to the convention as a legal successor state. Convention awards are therefore enforceable in accordance with the terms of the convention.

In relation to non-convention awards, section 38 of the Arbitration Act provides that arbitral awards rendered abroad shall be recognised and executed in the same way as local awards if reciprocity of enforcement is granted by the country from which the arbitral award originates. Section 38 of the Arbitration Act clarifies that such reciprocity shall be deemed granted if the respective foreign country declares, in a general way, that arbitral awards are enforceable subject to reciprocity. The decision by the court decreeing execution of a foreign award always must set out reasons for the decision.

Pursuant to Section 39 of the Act, recognition and enforcement of a foreign award may (only) be refused if:

- the award has not acquired the force of res judicata under the law of the country where it has been made;
- the award suffers from one of the defects as set out in Section 31 of the Act; or
- the award is against Czech Republic public policy.

Court proceedings

Part 6 (sections 41 to 44) of the Arbitration Act sets out the applicable rules on jurisdiction and venue of the courts.

Pursuant to section 42(1) of the Arbitration Act, jurisdiction and venue of the court to decree steps and measures under section 20(2) in support of the arbitral process shall be vested in the court within the jurisdiction of which the step or measure is to be taken. Section 42(2) adds that, if such a step or measure is to be taken abroad, then the jurisdiction and venue to decree such a step or measure shall be vested in the district court within the jurisdiction of which the arbitration proceedings are taking place.

Jurisdiction to hear applications for a declaration that an arbitration agreement is null and void lies with the court which would have, so-called, "functional" jurisdiction under certain provisions of the Civil Procedure Code, or of other enactments, which would apply but for the existence of the arbitration agreement (section 41 of the Arbitration Act) i.e. the level of court allocated to hear the specific case, depending on a variety of complex factors, including, but not limited to, the subject matter and the claimed amount. If arbitral applications are heard at first instance at a court without the correct level of jurisdiction, the application will be heard and then referred to a court with a higher or lower level of jurisdiction. This process may be lengthy.

The venue for arbitration applications under the provisions of the Act is vested pursuant to section 43 of the Arbitration Act in the court within the local jurisdiction of

which the arbitral proceedings are taking place, or have taken place, provided such places are in the Czech Republic. Otherwise, the venue shall be vested in the court which would have jurisdiction to hear and to determine the dispute were it not for the arbitration agreement.

Section 43 further provides that, in addition to the general rules on venue, the venue for the conduct of proceedings under section 9 (appointment of arbitrator) and section 12(2) (challenge of arbitrator), shall be vested in the court at the seat or residence of the applicant or respondent, as the case may be, if otherwise no venue can be established in the Czech Republic.

Pursuant to section 44 of the Arbitration Act, when hearing arbitration applications under the Arbitration Act, the courts shall apply the provisions of the 1963 Civil Procedure Code.

Conclusion

The introduction of the Arbitration Act in 1995 has been instrumental in reviving arbitration as a means of resolving commercial disputes in the Czech Republic and it now enjoys increasing popularity with the business community for resolving both domestic as well as international commercial disputes. This trend has been supported by the wide enforceability of arbitration awards and the fact that the Czech court system and judiciary can at times today still prove ill-equipped to deal with commercial cases speedily and efficiently.

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Arbitration in England and Wales

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The Arbitration Act 1996

The Arbitration Act 1996 ("the 1996 Act" or "the Act") came into force on 31 January 1997. The Act:

- consolidated and updated the existing legislation on arbitration;
- codified legal rules and principles established by case law;
- brought English law more into line with internationally recognised principles of arbitration law;
- sought to make arbitration in England more attractive both to domestic and international users.

The 1996 Act:

- is broadly based on the UNCITRAL Model Law on International Commercial Arbitration published by The United Nations Commission on International and Trade Law (UNCITRAL) in 1985 ("the UNCITRAL Model Law") but applies equally to domestic and to international arbitration;
- goes beyond the scope of the UNCITRAL Model Law and contains a near comprehensive statement of the English law of arbitration;
- is intended to be user friendly, has a logical structure and is written in plain English;
- states what the objective of arbitration is, although it does not attempt a definition;
- increases the scope of party autonomy;

- strengthens the powers of the arbitral tribunal; and
- limits judicial intervention in the arbitration process while preserving the courts' powers to provide assistance where this is necessary to make arbitration a fair and efficient dispute resolution procedure.

Historical background

Before the 1996 Act came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979. This legislation applied to different aspects of arbitration and was complemented, interpreted and built on by a large body of case law.

Historically, three broad criticisms were levelled at English arbitration:

- it was slow and expensive: "litigation without wigs";
- the law was inaccessible to lay persons and to foreign users; and
- the courts were too ready to intervene in the arbitral process.

As a result arbitration became increasingly unattractive as an option for dispute resolution and London lost out to other jurisdictions as a venue for international commercial arbitrations.

In the 1980s, the Department of Trade and Industry established the Departmental Advisory Committee on Arbitration Law ("the DAC") under the Chairmanship of Lord Justice Mustill (now Lord Mustill). One of the key decisions for the DAC to make was whether to recommend enactment of the UNCITRAL Model Law.

While the DAC decided against adopting the UNCITRAL Model Law wholesale, it did recommend that the new English Arbitration Act should, so far as possible, adopt the structure and language of the UNCITRAL Model Law and be clear and accessible. Despite these aspirations, the first draft bill of February 1994 did little more than consolidate the existing statutes of 1950, 1975 and 1979.

Under the new chairmanship of Lord Justice Saville, the DAC produced an entirely new draft bill by December 1995. After extensive consultation, but with relatively few changes, this became the 1996 Act.

Many provisions of the 1996 Act appear familiar at first sight, but the Act nevertheless implements a number of radical reforms.

The DAC also published Reports on the Arbitration Bill in February 1996 and on the Act in January 1997. These do not form part of the Act but are authoritative guides to its provisions and may be referred to in court and are frequently relied on by arbitrators.

The procedures for arbitration applications to the courts in England and Wales are set out in Part 62 and the Practice Direction to Part 62 of the Civil Procedure Rules. (The courts of Scotland and of Northern Ireland follow their own procedure).

Scope of application and general provisions of the Arbitration Act

Scope of application

The 1996 Act applies to all arbitrations, the legal "seat" or "place" of which is in England and Wales or Northern Ireland. Scotland has its own separate legal system and arbitration law (which is reviewed elsewhere in this Guide). The Act applies to institutional as well as to ad hoc arbitrations.

Certain provisions of the Act apply even if the seat of the arbitration is outside England, Wales and Northern Ireland, or if no seat has been designated or determined. These include:

- Sections 9 to 11 – stay of legal proceedings;
- Section 66 – enforcement of arbitral awards;
- Section 43 – securing the attendance of witnesses; and
- Section 44 – court powers in support of arbitral proceedings.

The provisions of Part I of the Act apply to all arbitrations conducted pursuant to an arbitration agreement. Part II of the Act deals with consumer arbitrations and arbitrations conducted on a statutory basis. Part III deals with the recognition and enforcement of foreign awards and Part IV contains general provisions. This overview will concentrate on the provisions of Part I and Part III of the Act.

General principles

Pursuant to its Section 1, the 1996 Act is founded on and is to be construed in accordance with the following three guiding principles:

Fairness

Section 1(a) states that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

This is primarily a reflection of the rules of natural justice, but there is an additional emphasis on avoiding unnecessary costs and delay.

This principle is given effect in the general duties imposed on the tribunal by Section 33 and on the parties by Section 40.

Party autonomy

Section 1(b) states that the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

These "safeguards" are provided by the mandatory provisions of Part I of the 1996 Act, which apply regardless of any agreement of the parties to the contrary. The Act is structured in such a way as to complement the mandatory provisions with two types of additional provisions: first, those which apply only if the parties expressly so agree (i.e., the parties have "contracted in"); and, secondly, further provisions which apply automatically unless the parties expressly agree otherwise (i.e., the parties have "contracted out").

Non-intervention by the courts

The 1996 Act has limited the scope for court intervention in the arbitral process, and provides that the courts shall not

intervene except as expressly provided by the Act. At the same time, by way of the following provisions, the Act reduces the scope for obstructive parties to delay arbitration proceedings by making applications to the courts:

- Section 9 – mandatory stay of court proceedings in favour of arbitration;
- Section 32(4) – proceedings to continue pending a decision of the court on the tribunal's jurisdiction;
- Section 38(3) – tribunal (not the court) can order security for costs;
- Section 41 – extension of a tribunal's powers in case of party default; and
- Section 44(5) – court may exercise such powers as it has only if the tribunal has no equivalent power.

Transitional provisions

The 1996 Act applies to all arbitration agreements made after 31 January 1997 and to all arbitration proceedings commenced after 31 January 1997, irrespective of the date of the arbitration agreement.

The arbitration agreement

Formal requirements

Section 5 of the 1996 Act stipulates that the arbitration agreement must be made in writing, but construes this requirement broadly so that it can be satisfied not only if there is a written agreement as such, but also if the agreement is contained in an exchange of communications in writing, or if the agreement is merely evidenced in writing or is reached otherwise than in writing but by reference to terms which are in writing (e.g., general terms and conditions). The form requirement is also satisfied if there is an exchange of submissions in arbitral or legal proceedings in which the existence of an arbitration agreement other than in writing is alleged by one party and not denied by the other. The exchange of written submissions between the parties is then taken to constitute the written arbitration agreement. Finally, an agreement is even considered to be in writing if it is recorded by any other means.

Section 6(2) clarifies that a reference in a main agreement to a separate written arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the main agreement. Such an incorporation of the arbitration agreement by reference does, however, require the use of clear and unambiguous words.

Separability

Pursuant to Section 7 of the 1996 Act, the arbitration agreement is treated as separate from the main commercial agreement into which it has been incorporated and the arbitration clause therefore survives the invalidity, non-existence or ineffectiveness of the main agreement.

Mandatory/non-mandatory provisions

The mandatory provisions of Part I of the 1996 Act are listed in Schedule 1 to the Act. They deal with such matters as:

- Section 9 – duty of the court to stay its proceedings;
- Section 12 – power of the court to extend time limits;
- Section 24 – power of the court to remove an arbitrator;
- Section 29 – immunity of arbitrators;
- Section 31 – objections to the tribunal's jurisdiction;
- Section 33 – general duties of the tribunal;
- Section 40 – general duties of the parties;
- Section 66 – enforcement of an award;
- Sections 67 & 68 – challenges to the award; and
- Section 74 – immunity of arbitral institutions.

All other provisions of Part I of the Act are non-mandatory and the parties are free to make their own arrangements. If the parties do not make any such arrangements, the Act provides a set of "model rules" which will apply in the absence of any express agreement by the parties in relation to the non-mandatory provisions.

Where parties agree to incorporate into their arbitration agreement institutional arbitration rules such as those published by UNCITRAL, the LCIA or the ICC. Section 4(3) of the Act provides that this amounts to parties making their own arrangements and displaces non-mandatory provisions in circumstances where arbitration rules are contrary to any such provisions.

Composition of the arbitral tribunal

The constitution of the arbitral tribunal

Pursuant to Section 15 of the 1996 Act, the parties are free to agree on the number of arbitrators and whether there is to be a chairman or umpire. However, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the additional appointment of a chairman, unless the parties agree otherwise. If the parties have agreed that there is to be a chairman or umpire, they are free to agree on his functions, but Sections 20 and 21 contain default provisions. If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.

The procedure for the appointment of the tribunal is also in the first instance determined by the arbitration agreement between the parties, but Section 16 of the 1996 Act makes detailed provision for the appointment of the arbitral tribunal where the parties have not agreed an appointment procedure.

Section 17 provides that, where each of two parties to an arbitration agreement is to appoint an arbitrator but one of the parties refuses or fails to do so within the time specified, the other party, having duly appointed its arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator. If the party in default does not make the required appointment and notify the other party that he has done so within 7 days of that notice, the other party may appoint its arbitrator as sole arbitrator and the arbitrator so appointed may proceed to make an award which is binding on both parties.

If the agreed appointment procedure fails to constitute an arbitral tribunal, the courts are given specific powers under Section 18 to appoint, or assist with securing the constitution of, an arbitral tribunal upon application by one of the parties.

The challenge of arbitrators

Pursuant to Section 23, the authority of an arbitrator can be revoked by agreement of the parties in writing.

The court may order the removal of an arbitrator under Section 24 upon application by one of the parties on any of the following grounds, namely if:

- there exist circumstances which may give rise to justifiable doubts as to his impartiality;
- he does not possess the agreed qualifications;
- he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; or
- he fails to conduct the proceedings properly or with reasonable speed and substantial injustice has been or will be caused to the applicant.

The arbitral tribunal may, however, continue the arbitral proceedings in the meantime and proceed to make an award while the application to the court is pending. The challenge procedure cannot therefore be abused to delay the arbitration proceedings for tactical reasons.

The appointment of substitute arbitrators

Where an arbitrator ceases to hold office (whether it be due to resignation, removal or death) and the parties have not agreed whether, and if so, how the vacancy is to be filled, Section 27 provides that the Section 16 or Section 18 procedures apply to the filling of the vacancy as in relation to the original appointment.

Arbitrators' fees, expenses and immunity

The 1996 Act makes express provision for the parties' liability to the arbitrators for fees and expenses and also stipulates that arbitrators enjoy immunity from claims unless they act in bad faith. Sections 28 and 29 are mandatory provisions.

Jurisdiction of the arbitral tribunal

Competence to rule on jurisdiction

Section 30 of the 1996 Act gives the arbitral tribunal the power to rule on its own jurisdiction. It is up to the tribunal to decide which, if any, of the disputes referred to arbitration are within the scope of the arbitration agreement.

However, under Section 32, the courts have jurisdiction in certain circumstances to determine preliminary points of jurisdiction upon application by one of the parties. The tribunal's decision on jurisdiction may be subject to a rehearing by the courts under Section 67.

Section 31 requires that a party must raise objections to the substantive jurisdiction of the tribunal at the earliest possible stage in the proceedings, i.e., before that party takes any steps in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

The right to object to the tribunal's lack of substantive jurisdiction (and to other irregularities affecting the tribunal or proceedings) may be lost pursuant to Section 73 if the objection is not made at the earliest opportunity.

Power to order interim measures

In Section 39, the 1996 Act contains a new provision whereby the parties can agree to confer the power to make interim or provisional awards on the arbitrators, including an order for the payment of money or in relation to the disposition of property as between the parties.

Nevertheless, particularly in the early stages of a dispute and before a tribunal has been appointed, it will often be faster and more efficient to obtain interim relief from the courts under the powers exercised by the court in support of arbitral proceedings pursuant to Section 44(2). This is the case particularly where the tribunal has not yet been constituted or the court's enforcement powers are necessary to provide effective relief. The interim measures which the court may order include

freezing orders[1] and search orders[2]. However, the right to apply to the court for interim measures under Section 44(2) may be restricted or excluded by agreement of the parties.

Section 44 applies to all arbitral proceedings regardless of whether the seat of the arbitration is in England and Wales. The English Courts can, therefore, in appropriate circumstances grant interim measures in aid of foreign arbitration proceedings which would not otherwise fall within the scope of the 1996 Act if there is a good reason for the court to exercise its discretion and to intervene.

Conduct of arbitral proceedings

Common law tradition

England and Wales is a "common law" (as opposed to "civil law") jurisdiction. The legal process has traditionally emphasised the importance of procedural issues and a number of English procedural concepts, although familiar in other common law jurisdictions such as the United States, Canada, Australia and most Commonwealth member states, are not part of the continental European civil law tradition. These include, e.g., the disclosure and inspection of documents (previously known as "discovery"), the exchange of witness statements, cross-examination of witnesses, and party appointed expert witnesses. Those procedures have been discussed in some more detail in the Introduction to this Guide.

There was a significant shift in approach under the Civil Procedure Rules 1998 (which govern the conduct of cases in the English Courts) towards more pro-active case management by the courts. However, English legal

[1] Freezing orders are interlocutory injunctions granted by the court (normally ex parte and on the basis of affidavit evidence) restricting the respondent's right to dispose of or deal with his assets, requiring the respondent to disclose the nature, value and location of such assets and to provide other information to the applicant. Freezing orders can not only be made in relation to assets located in England and Wales but, in appropriate circumstances, also on a world-wide basis.

[2] Search orders are also interlocutory injunctions granted by the court (normally ex parte and on the basis of affidavit evidence) entitling the applicant to "raid" and search the respondent's premises for certain evidence in relation to the subject matter of court proceedings. Search orders are of particular importance in cases of infringement of intellectual property rights but have a wider scope of application. Both freezing and search orders have been described as the "nuclear weapons of the law" and will be granted only in exceptional circumstances and upon various cross-undertakings by the applicant, including a cross-undertaking in damages.

proceedings in essence remain "adversarial" in approach (i.e., party driven with the judge adopting the position of arbiter between the opposing parties) rather than "inquisitorial" (i.e., more reliant on the judge taking charge of progressing a case). One of the advantages of arbitration over litigation as a means of settling international commercial disputes is that, because of its flexibility, arbitration can transcend the confines of national legal systems and the parties can tailor a procedure to suit their particular needs. English arbitration proceedings under the 1996 Act are not tied to English court procedure. The 1996 Act encourages arbitrators to use the many new and wide-ranging powers it provides (which are much more akin to the case management techniques employed under the continental European procedural system) to ensure that the arbitration progresses efficiently, proportionately and in the interests of the parties.

Commencement of arbitration

Unless otherwise agreed by the parties, Section 14(4) provides that proceedings are commenced when one party serves on the other a written notice requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator.

The Court will interpret Section 14 broadly and flexibly. An implied request to appoint an arbitrator has been found to be sufficient. However, in order to avoid any uncertainty in this respect, the written notice of arbitration should expressly call upon the other party to appoint an arbitrator.

One matter that is not dealt with by Section 14 is the matters in dispute that a party wishes to refer to arbitration. A written notice should clearly specify such matters. However, a party may wish to ensure the notice is drafted widely to ensure all potential matters in dispute are referred to arbitration.

General procedural principles

The 1996 Act expressly defines and imposes duties on the parties and the arbitrators.

General duties of the tribunal: section 33

Section 33(1) is one of the key provisions in the Act and provides that:

" ... The tribunal shall-

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

The express duty to avoid unnecessary delay and expense is new and important. It should encourage arbitrators to impose strict timetables to ensure that the proceedings are progressed with all due expedition.

General duties of the parties

Under Section 40, the parties have a general duty to do everything necessary for the proper and expeditious conduct of the arbitral proceedings and, corresponding to the duties imposed on the tribunal by Section 33, a duty to comply with the tribunal's directions without delay.

Procedural powers of the tribunal

Procedural and evidential matters are decided by the tribunal unless the parties agree otherwise. Section 34(2) sets out a non-exhaustive list of the procedural issues to be determined by the tribunal. Those powers give arbitrators the ability to impose expedited procedures in suitable cases and to dispense with, for example:

- Section 34(2)(c) – written submissions;
- Section 34(2)(d) – discovery;
- Section 34(2)(e) – interrogatories;
- Section 34(2)(f) – oral evidence; and
- Section 34(2)(h) – oral hearings.

The tribunal may refer to Section 34 as a guideline in dispensing with procedures which are not appropriate in the circumstances of a particular case. Nevertheless, arbitrators have to exercise these powers with care so as not to deprive a party of a reasonable opportunity to put its case or to deal with that of its opponent (one of the tribunal's general duties under Section 33(1)(a)). If the tribunal acts contrary to this obligation, the aggrieved party may be able to challenge any subsequent award in the courts on the grounds of "serious irregularity" under Section 68 (see below). However, the English Courts have generally approached this issue in favour of arbitrators actively managing their arbitrations.

The Act provides the tribunal with further express powers, including the power to:

- Section 37 – appoint its own expert(s);
- Section 38(3) – order the claimant to provide security for costs;
- Section 38(5) – direct that a party or witness shall be examined on oath and for that purpose to administer the necessary oath;
- Section 39 – if the parties agree, to order interim payments to be made or to make other provisional awards;
- Sections 41(3) – make an award dismissing a claim for want of prosecution where there has been an inordinate and inexcusable delay on the part of the claimant in pursuing the claim and where the delay prejudices the respondent;
- Section 41(4) – continue the proceedings in the absence of a party who fails to attend a hearing of which proper notice was given without showing sufficient cause;
- Section 41(5) – make a peremptory order where a party fails to comply with an order or direction of the tribunal; the tribunal's peremptory orders may be enforceable by the court pursuant to Section 42;
- Section 47 – make awards on different issues at different times;

- Section 49 – award compound interest;
- Section 65 – direct that the recoverable costs of the arbitration be limited to a specified amount.

Unless the parties specifically agree, the tribunal has no power to consolidate different arbitration proceedings or to order concurrent hearings.

Place and language of arbitration

Pursuant to Section 3 of the Act, the term "seat" of the arbitration means only its "juridical" seat. The fact that the parties have agreed that the seat of the arbitration shall be, for example, London, does not prevent the parties or the arbitrators from deciding to hold any part of the proceedings elsewhere if this is more convenient (Section 34(2)(a)).

The language or languages to be used in the proceedings and the question of whether translations of documents are to be supplied is equally a matter for the parties to decide or, absent any agreement by the parties, for the tribunal to determine (Section 34(2)(b)).

Submissions

The format and timetable for submissions will be determined by the tribunal unless agreed by the parties (Section 34(2)(c)). In English arbitration proceedings, the parties' submissions frequently take the form of formal statements of case, similar to those used in court proceedings and limited to identifying the issues between the parties. They may, however, take the form of more complete submissions which also deal with the relevant facts, evidence and law, similar to continental European court submissions.

Oral hearings and written proceedings

Under the law as it previously stood, either party could effectively require that an oral hearing be held. Under the Act it is now for the tribunal to decide whether there should be an oral hearing including submissions and evidence, subject to the parties' right to agree otherwise (Section 34(2)(h)). In suitable cases the tribunal can therefore make an award on the basis of written proceedings alone.

Evidence

Evidential matters will be determined by the tribunal, subject to any agreement between the parties. These matters might include whether disclosure and inspection of documents should take place between the parties and, if so, whether the scope of disclosure should in any way be restricted to certain documents or classes of documents; whether there should be exchange of witness statements or expert reports; and whether strict rules of evidence should be followed as to admissibility, or the relevance of, or weight to be given to, the evidence adduced by the parties. The Act expressly authorises the tribunal to appoint experts and advisers but the parties must be given an opportunity to comment on the opinion, information or advice provided by any expert appointed by the tribunal direct.

Some of the characteristic common law procedures in relation to evidential matters, such as disclosure of documents, the preparation of witness statements or the cross-examination of witnesses have been described in the Introduction to this Guide. It is important to appreciate, however, that the parties are free (subject only to a limited number of mandatory rules) to agree whether such procedures should be followed, limited or even be dispensed with altogether.

Making of the award and termination of proceedings

Choice of law

Pursuant to Sections 46(1) and (3), the tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or, if and to the extent that there is no such choice or agreement, it shall apply the law determined by the conflict of law rules which it considers applicable. The parties' choice of the laws of a country will be taken to exclude conflict of law rules and to refer to the substantive laws of that country only.

The parties can also authorise the tribunal to decide the dispute on the basis of the lex mercatoria or ex aequo et bono; however, these are very rarely agreed upon in practice, given the uncertainties as to the scope of the lex mercatoria and the principles to be applied in making a decision ex aequo et bono.

Under English conflict of law rules, the applicable law will in most cases be determined in accordance with the provisions of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which was implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990.

Remedies

Subject to any agreement by the parties as to the powers which the tribunal may exercise, Section 48 provides that the tribunal may:

- make a declaration as to the subject matter of the proceedings; or
- order the payment of a sum of money in any currency.

Furthermore, the tribunal has the same powers as the courts to:

- grant a permanent injunction;
- order specific performance of a contract; or
- order the rectification, cancellation, or setting aside of a deed or other document.

The tribunal's powers to grant interim measures are referred to above.

Interest

In the absence of an agreement between the parties, the tribunal has discretionary power under Section 49 to award simple or compound interest, from such dates and at such rates and with such rests as it considers just, on the whole or part of:

- the amount awarded, in respect of any period up to the date of the award;
- any amount claimed in the arbitration and outstanding at the date of commencement of the arbitration but paid before the award was made, in respect of any

period up to the date of payment; and/or

- the outstanding amount of any award from the date of the award until payment.

The fact that the tribunal has discretionary power to award interest does not affect the parties' rights to claim contractual interest.

Decision making by the tribunal

The parties are free to agree how the tribunal is to make its decisions, orders or awards. The 1996 Act sets out detailed rules in Sections 20 to 22 to be followed if there is no such agreement. The Act differentiates between proceedings where there is a chairman, or an umpire, or where the tribunal otherwise consists of two or more arbitrators. Generally, decisions, orders and awards are made by all or by a majority of the arbitrators.

Form, content and effect of the award

Pursuant to Section 58 of the 1996 Act, an arbitral award made by the tribunal pursuant to an arbitration agreement is final and binding on the parties to the arbitration, subject to the limited rights the Act provides for challenge or appeal to the courts.

Section 52 provides that, unless otherwise agreed by the parties, an award shall be in writing, signed by all the arbitrators or a majority of those arbitrators assenting to the award, contain reasons (unless it is an agreed award or the parties have agreed to dispense with reasons), and shall state the seat of the arbitration and the date on which the award was made.

Once an award has been made, it shall be notified to the parties without delay (Section 55), but the tribunal has power pursuant to Section 56 to withhold the award until the arbitrators fees and expenses are paid in full.

Settlement

If the parties settle their dispute in the course of the arbitration, the tribunal shall terminate the substantive proceedings under Section 51 and shall record the settlement in the form of an agreed award if requested to do so by the parties.

Costs

Unlike the UNCITRAL Model Law, Sections 59 to 65 of the 1996 Act make express provision for the allocation of the costs of the arbitration as between the parties. The Act also provides that, unless the parties agree otherwise the tribunal may make an award of costs. The costs of the arbitration include:

- the fees and expenses of the arbitrators;
- the fees and expenses of any arbitral institution concerned; and
- the legal or other costs of the parties.

Generally, an award of costs will "follow the event"[3], but the tribunal has discretion to take other relevant factors into account when making its award on costs. Only reasonably incurred costs of the arbitration and fees and expenses of arbitrators are recoverable. An agreement between the parties that the party is to pay the whole or part of the laws of arbitration is only valid if it has been made after the dispute has arisen.

Correction and interpretation of the award

The 1996 Act makes provision in Section 57 for the tribunal to correct obvious errors, mistakes, omissions or ambiguities in the award, or to make an additional award in respect of claims which were presented to the tribunal but not dealt with in the award. These powers may be exercised by the tribunal either on its own initiative, or upon application of a party, and after hearing representations from the other party.

The role of the courts

The jurisdiction of the courts

The extent to which the courts may interfere in the arbitration process is one of the most important issues for parties to international arbitration proceedings. The 1996 Act follows the scheme of the UNCITRAL Model Law in

[3] This means that the losing party pays the reasonable costs of the arbitration. If a claimant is successful only in part, the costs of the arbitration may be allocated between the parties on a pro rata basis.

this regard: the courts have no jurisdiction in matters relating to arbitration unless expressly provided by the 1996 Act. A distinction can be drawn between the role of the courts (i) before and during the arbitral proceedings and (ii) after the award has been made.

The powers of the court in relation to arbitral proceedings are now limited to those expressly conferred by the 1996 Act. Those powers include:

- Section 44 – preservation orders in relation to evidence and assets;
- Section 45 – the determination of preliminary points of law; and
- Section 47 – the enforcement of peremptory orders made by the tribunal.

Stay of court proceedings

Section 9 provides that, upon application by a party to an arbitration agreement against whom court proceedings are brought in respect of a matter which under the arbitration agreement is to be referred to arbitration, the courts must grant a stay of the court proceedings unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. All disputes that fall within the scope of a valid and binding arbitration agreement must be referred to arbitration.

Although Section 9 is silent on the point, the court decision granting or refusing a stay of proceedings can be appealed, provided permission to appeal is granted either by the High Court judge hearing the application for a stay, or by the Court of Appeal.

A significant number of cases on the stay of court proceedings under Section 9 have reached the courts since the 1996 Act came into force. The case law suggests that the courts' general approach is to enforce arbitration agreements strictly.

Extension of time for commencement of arbitral proceedings

An arbitration agreement may provide that a claim shall

be time barred, or that the claimant's right shall be extinguished, unless the claimant begins within the time fixed by the agreement either arbitral proceedings, or another dispute resolution procedure which must be exhausted before arbitral proceedings may be commenced. In such cases the court may extend the time for taking these steps pursuant to Section 12 of the 1996 Act.

Preliminary rulings on points of jurisdiction and law

Under Section 32, the courts have power to determine preliminary points on the substantive jurisdiction of the tribunal upon the application of a party.

Pursuant to Section 45, the courts may on application of a party to arbitral proceedings determine any preliminary points of law arising in the course of the proceedings if satisfied that it substantially affects the rights of one or more of the parties, unless otherwise agreed by the parties. The court will only consider the application if it is made either with the agreement of all other parties, or with the permission of the tribunal, and if the court is satisfied that the determination of the question is likely to produce substantial cost savings and that the application was made without delay.

While Section 32 is a mandatory provision, the parties are free to exclude the courts' jurisdiction under Section 45 by agreement. Note that an agreement by the parties to dispense with the requirement that the tribunal give reasons in support of its award will be considered as an agreement also to exclude the courts' jurisdiction under Section 45.

Interim protective measures

The courts' jurisdiction to grant interim relief or to provide other assistance under Section 44 in support of the arbitral process is subsidiary to the powers of the tribunal, unless the case is urgent, or the application is made with the permission of the tribunal or the agreement in writing of the other parties. In any event, the courts shall act only to the extent that the tribunal (or any arbitral institution vested by the parties with power in this regard) has no

power or is unable to act effectively in giving such interim relief (for example, where the requirement for such relief arises before the arbitral tribunal has been fully constituted).

However, given the nature of the orders which the courts will normally be requested to make under Section 44(2), an element of urgency will in practice often be present.

Obtaining evidence and other court assistance

An arbitral tribunal has no powers to compel witnesses to attend before it to give evidence. Section 43 therefore provides that a party to arbitration proceedings can use the usual court procedures to secure the attendance of witnesses. Under English civil procedure this means that the party may serve a witness summons on the witness to secure attendance before the tribunal, either for the purpose of giving oral evidence, or for the purpose of producing documents or other evidence. Applications for the preservation of evidence or the taking of witness evidence may be made to the court under Section 44. This also covers applications to the court for the issue of letters of request to judicial authorities overseas in accordance with the 1970 Hague Evidence Convention and other international agreements[1].

Challenging and appealing the award before the courts

Loss of right to object to award

Pursuant to Section 73, the right of a party to object to an award on any of the following grounds may be lost if the aggrieved party does not raise such objections at the earliest possible opportunity in the arbitral proceedings, namely that:

- the tribunal lacked substantive jurisdiction;
- the proceedings were improperly conducted;

[1] EC Regulation 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters came into force on 1 January 2004 with the aim of improving co-operation between the courts of Member States in the taking of evidence. It does not apply to arbitration but expressly states that it prevails over the Hague Evidence Convention 1970. It is not clear whether applications for co-operation between Member States in relation arbitration can still be made under the Hague Evidence Convention, since this remains untested.

- there was a failure to comply with the terms of the arbitration agreement; or
- there was any other irregularity affecting the tribunal or the proceedings.

Challenging the award

An arbitration award once made can only be challenged pursuant to:

- Section 67, on the ground that the tribunal lacked substantive jurisdiction; or
- Section 68, on the ground that there was a serious irregularity affecting the tribunal, the proceedings or the award.

Section 68(2) sets out a list of circumstances which may constitute a serious irregularity.

On applications challenging the award on the grounds that the tribunal lacked jurisdiction under Section 67, the court may either confirm the award, vary the award, or set the award aside in whole or in part.

If the award is successfully challenged on grounds of serious irregularity under Section 68, the court may either remit the award (in whole or in part) to the tribunal for reconsideration, set the award aside, or declare it to be of no effect.

Appeals on point of law

Awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court. The grounds on which such permission to appeal will be granted by the court are set out in Section 69(3). These derive from the pre-1996 Act common law guidelines: "Section 69(3): Leave to appeal shall be given only if the court is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award-

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

On an appeal under Section 69, the court may either confirm the award, vary the award, remit the award to the tribunal for reconsideration in whole or in part, or set the award aside in whole or in part. The court will generally remit the matters in question to the tribunal for reconsideration unless it is satisfied that this would be inappropriate under the circumstances.

Unlike challenges under Sections 67 and 68, the parties' right to appeal on points of law can be excluded by agreement between the parties, either in the arbitration agreement or at a later stage. Pursuant to Section 69(1), the parties' agreement to dispense with the requirement that the tribunal give reasons for its award will be considered an agreement to exclude the right of appeal (see above on the effect of such an agreement on the courts' jurisdiction under Section 45).

Sections 70 to 72 contain supplementary provisions and restrictions in relation to the challenge or appeal of arbitral awards.

Recognition and enforcement of awards

Domestic awards

Section 66 provides that domestic arbitration awards may, as before, be enforced with the permission of the court as if they were court judgments. Permission shall only be refused if the person against whom the award is to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

Foreign awards

The procedure for recognition and enforcement of foreign arbitral awards is covered in Part III of the 1996 Act.

Pursuant to Section 99, the Arbitration Act 1950 continues to apply to the recognition and enforcement of awards under the 1961 Geneva Convention, which continues to apply in relation to certain arbitration awards which cannot be enforced under the 1958 New York Convention.

Most foreign awards are today enforced under the 1958 New York Convention. This requires the award to be a "New York Convention Award", i.e., an award made pursuant to a written arbitration agreement in a state which is a signatory to the 1958 New York Convention. A list of the signatory states to the 1958 New York Convention is in Appendix 3 to this Guide.

The recognition and enforcement of New York Convention Awards are governed by sections 100 to 104 of the 1996 Act and may only be refused if the party against whom it is to be enforced proves one or more of the following:

- incapacity of a party to the arbitration agreement;
- invalidity of the arbitration agreement;
- lack of due notice or opportunity to present its case;
- lack of substantive jurisdiction of the tribunal;
- irregularity in the composition of the tribunal or conduct of the proceedings;
- award not binding on parties, set aside or suspended;
- the subject matter of the arbitration is not capable of settlement by arbitration; or
- recognition and enforcement of the award would be contrary to public policy.

Court proceedings

Arbitration applications are generally dealt with by the Commercial Court or, in relation to cases where the subject matter relates to technology or construction, the Technology and Construction Court ("TCC"), both forming part of the Queen's Bench Division of the High Court of Justice. They are governed by Part 62 and the Practice Direction to Part 62 of the Civil Procedure Rules 1998. Appeals in arbitration matters from decisions of the

Commercial Court or TCC lie to the Court of Appeal but permission to appeal will first be required from the first instance court, either the Commercial Court or TCC as the case may be.

Questions not addressed by the 1996 Act

A number of questions have not been addressed by the 1996 Act and have instead been left open to developments in the jurisprudence. These include, in particular, the following:

Multi-Party disputes and consolidation

Multi-party disputes and consolidation of separate arbitration proceedings give rise to a number of potentially complex issues and require careful consideration on a case by case basis at the contract drafting stage to ensure that adequate provision is made in relation to the appointment procedure for the arbitral tribunal, the tribunal's jurisdiction and procedural matters. Some institutional arbitration rules, for example the 1998 ICC Arbitration Rules, have been drafted to accommodate multi-party disputes.

Privacy and confidentiality

Privacy and confidentiality of the arbitration proceedings and of the subsequent award are traditionally perceived as typical advantages of arbitration over court litigation. Under English law, the confidentiality of arbitration is an implied term of every arbitration agreement. This principle has been clearly confirmed in a number of recent cases, despite conflicting decisions in the Commonwealth. Notwithstanding the position taken by the English Courts. It is advisable for the arbitration agreement expressly to stipulate confidentiality in relation to the arbitral proceedings and the award.

Conclusion

The 1996 Act has contributed significantly to revitalising English arbitration and to ensuring that London remains a leading centre for international commercial arbitrations.

The Act has made arbitration a more attractive option for dispute resolution by increasing party autonomy as well as reducing the scope for court interference in the arbitral

process. Arbitrators have been given wider procedural powers which can contribute to making arbitration more efficient; the success of these provisions depends on arbitrators exercising their powers in practice fairly and imaginatively, distinguishing the parties' choice of arbitration as their preferred method of dispute resolution from more formal and rule-bound court proceedings.

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Arbitration in France

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Historical background

Prior to the 1789 French Revolution, arbitration was not commonly used in France but was allowed in most cases and made compulsory to settle certain family disputes by several ordinances adopted during the sixteenth century.

After the 1789 Revolution, arbitration was widely authorised and promoted in France pursuant to a law entered into force on 16th and 24th August 1790 as a reaction against the legal system established by the Ancien Régime.

The Napoleonic Codes, and in particular the 1806 Code of Civil Procedure and the 1807 Commercial Code, then provided for a restricted use of arbitration in cases such as disputes related to maritime insurance or between shareholders of a commercial company. In other matters, case law authorised the submission of existing disputes to arbitration but arbitration clauses relating to future disputes were not allowed.

Following the signature by France of the 1923 Geneva Protocol on Arbitration Clauses, a law dated 31st December 1925 allowed arbitration clauses in the case of commercial disputes, broadly defined as disputes for which the French commercial courts are competent.

From 1926 to 1975, several laws dealt with the scope of arbitration in specific areas but without amending the rules of procedure, thus French law on arbitration remained essentially the same as set out in the 1806 Code of Civil Procedure. Taking into account France's growing importance

as a major place for international arbitration, French case law tried to adapt the codified provisions. However, this frequently led to confusion and a misuse of the legal procedures available to challenge the validity of arbitration agreements or to set aside awards.

As a result of this situation, new arbitration legislation, mainly codifying the past case law, was enacted in 1980 and 1981.

The French legislation on arbitration is currently found in:

- Book IV of the French New Code of Civil Procedure (Nouveau Code de Procédure Civile "NCPC") which provides for separate regimes for domestic arbitration, enacted by Decree n°80-354 dated 14th May 1980, and for international arbitration, enacted by Decree n°81-500 dated 12th May 1981; and
- Articles 2059, 2060 and 2061 of the French Civil Code dealing with arbitrability and arbitration clause; Article 2061 having been modified by a law dated 15th May 2001.

Scope of application of the French arbitration legislation

Domestic and international arbitration

Book IV of the NCPC named "Arbitration" contains the following six parts, the first four dealing with domestic arbitration and the last two dealing with international arbitration:

- Title I "Arbitration Agreements" (Articles 1442 to 1459);
- Title II "Arbitration Proceedings" (Articles 1460 to 1468);
- Title III "Arbitral Award" (Articles 1469 to 1480);
- Title IV "Forms of Review" (Articles 1481 to 1491);
- Title V "International Arbitration" (Articles 1492 to 1497); and
- Title VI "Recognition, Enforcement and Forms of Review of Arbitral Awards rendered Abroad or in an International Arbitration" (Articles 1498 to 1507).

The French arbitration legislation makes a fundamental distinction between domestic arbitration, i.e. arbitration free from any foreign element, and international

arbitration. The French arbitration legislation allows greater flexibility and party autonomy in international arbitration. For example, when an international arbitration is governed by French law, the provisions of Titles I, II and III are not mandatory but only apply in the absence of a special agreement (Article 1495 NCPC).

According to the French arbitration legislation, an arbitration is international if it deals with "international commercial interests" (Article 1492 NCPC). This notion is intended as a codification of prior case law giving broad scope to the definition of "international". It relies on economic rather than legal criteria and establishes that a transaction is international when it involves the flow of goods, services or currencies over borders, regardless of the parties' nationalities, the applicable law or the place of arbitration.

Arbitrability

Domestic arbitration

Matters of arbitrability are dealt with in Articles 2059 to 2061 of the Civil Code. An arbitration is valid within the limits set out in Articles 2059 and 2060 of the Civil Code according to which:

- a person may submit to arbitration any dispute concerning their rights (Article 2059 Civil Code), which includes most commercial matters;
- matters relating to the status and capacity of persons, to divorce, to State/public entities and more generally to public policy cannot be submitted to arbitration (Article 2060 §1 Civil Code);
- State establishments with an industrial and commercial character may be authorised by decree to submit a dispute to arbitration (Article 2060 §2 Civil Code).

Finally, a special rule exists regarding the arbitration clause, that is the agreement to arbitrate future disputes. Before its amendment introduced by the law dated 15th May 2001, Article 2061 of the Civil Code provided that the arbitration clause was null and void if not authorised by law.

In practice, it meant that arbitration clauses were only authorised in commercial matters. Under Article 2061's

new drafting, and within the limits which might be set out in specific legal provisions, arbitration clause included in contracts relating to a professional activity is now valid.

Thus, the introduction of an arbitration clause, which was already authorised in commercial contracts and in litigation between shareholders in commercial companies, is now also authorised in contracts relating to the activities of, among others, craftsmen, self-employed workers and farmers. However, the arbitration clause still remains invalid in consumer and employment contracts as well as in non-commercial or non-professional disputes. Nevertheless, the parties may validly agree to submit an existing dispute to arbitration by means of a submission to arbitration.

International arbitration

French case law has upheld the principle that arbitration agreements are valid regardless of whether they result from an arbitration clause or from a submission to arbitration. In addition and contrary to domestic law, a State/public entity can be a party to an arbitration. However, if the dispute involves a breach of international public policy (e.g. bribery of civil servants, drug trafficking, terrorism, etc.), international arbitration is not allowed. Finally, it should be emphasised that international arbitration is permitted only if it involves "international commercial interests".

The arbitration agreement

Formal requirements

Domestic arbitration

French arbitration legislation makes a distinction between the agreement to arbitrate future disputes, i.e. the arbitration clause ("clause compromissoire", Article 1442 NCPC) and the agreement to submit an existing dispute to arbitration, i.e. the submission to arbitration ("compromis d'arbitrage", Article 1447 NCPC). The parties may agree to submit a dispute to arbitration even during proceedings which have already started in another jurisdiction (Article 1450 NCPC). Both the arbitration clause and the submission to arbitration must be in writing and appoint the arbitrator(s) or provide a method of appointment

failing which they are deemed null and void (Articles 1443 and 1448 NCPC). The arbitration clause must be inserted into the main agreement or in a document to which the main agreement refers (Article 1443 NCPC). It may be contained in an exchange of letters and telexes or in general conditions. The submission to arbitration must define the subject matter of the dispute, failing which it is null and void (Article 1448 NCPC). It can be a written statement signed by the parties and the arbitrator(s) (Article 1449 NCPC).

International arbitration

French arbitration legislation does not make a distinction between the arbitration clause and the submission to arbitration. Moreover, it does not contain any formal requirements as to the arbitration agreement but contains only indirect references to it. Some provisions provide that the parties may determine certain aspects of the arbitration proceedings in their agreement (Articles 1493 and 1494 NCPC). However, the provision on enforcement of international awards requires that the party seeking enforcement must submit the original award "together with the arbitration agreement" (Article 1499 NCPC), thereby implying the existence of a written arbitration agreement.

Separability

Domestic arbitration

Should the arbitration clause be null and void, it is deemed unwritten (Article 1446 NCPC) and thus shall not affect the validity of the main agreement. French case law has recently and expressly recognised the complete severability of the arbitration clause from the main agreement in domestic arbitration. Therefore, in spite of the nullity of the main agreement, the arbitration clause remains valid and an arbitral tribunal has jurisdiction to rule upon the dispute arising out of this agreement.

International arbitration

In absence of any specific provision on this issue in the French arbitration legislation, French case law has stated for a long time that the arbitration clause is fully severable

from the main agreement, regardless of the applicable law. Consequently, the arbitral tribunal's jurisdiction cannot be defeated by the nullity of the main agreement.

Composition of the arbitral tribunal

The constitution of the arbitral tribunal

Domestic arbitration

Regarding domestic arbitration and as mentioned above, the arbitration agreement, whether it is an arbitration clause or a submission to arbitration, must designate the arbitrator(s) or prescribe the method of appointment failing which it is null and void (Articles 1443 §2 and 1448 §2 NCPC).

The mission of the arbitrator may only be entrusted to a natural person fully entitled to exercise his civil rights (Article 1451 §1 NCPC). Should the arbitration agreement designate a legal person, it is only entitled to organise the arbitration (Article 1451 §2 NCPC). The arbitral tribunal shall be composed of a sole arbitrator or of an odd number of arbitrators (Article 1453 NCPC). In case of an even number, the arbitral tribunal shall be completed by an arbitrator chosen according to the terms and conditions decided by the parties or, in the absence of such terms and conditions, by the already designated arbitrators (Article 1454 NCPC). If a natural or legal person is charged with organising the arbitration, the arbitral mission shall be entrusted to one or more arbitrators accepted by all the parties. Failing this, each party shall be invited to appoint an arbitrator and the arbitrator required to complete the arbitral tribunal will then be appointed by the entity organising the arbitration (Article 1455 §1,2 and 3 NCPC). Where the parties fail to appoint an arbitrator, he is designated by the person charged with organising the arbitration. The arbitral tribunal may also be established directly by the parties according to this method.

International arbitration

The arbitration agreement, either directly or by reference to arbitration rules, may designate the arbitrator(s) or prescribe the method of appointment (Article 1493 §1

NCPC). Hence, and contrary to domestic arbitration, the arbitration agreement is valid even if it does not prescribe a method of constitution of the arbitral tribunal. However, when an international arbitration is governed by French law and in the absence of a specific agreement, the provisions regarding domestic arbitration apply subject to Article 1493 NCPC (Article 1495 NCPC).

The challenge of arbitrators

Domestic arbitration

An arbitrator may be challenged on the same grounds as a court judge, including interest in the outcome of the dispute, financial or family relationship to any of the parties, prior knowledge of the dispute. During the appointment phase, an arbitrator believing that a reason giving rise to a possible challenge might exist must inform the parties accordingly. In this case, he may then only accept his mission with the consent of all parties (Article 1452 §2 NCPC). A designated arbitrator may be discharged only by unanimous consent of the parties (Article 1462 §2 NCPC).

Furthermore, once he has accepted his mission, an arbitrator may be challenged only on a ground revealed or which has occurred after his designation (Article 1463 §1 NCPC).

International arbitration

French arbitration legislation contains no specific provision as to the challenge of arbitrators. However, when an international arbitration is governed by French law, the rules set forth for domestic arbitration shall apply in the absence of a special agreement between the parties (Article 1495 NCPC).

Court assistance in relation to the constitution of the arbitral tribunal

Domestic arbitration

Once the dispute has arisen, if the constitution of the arbitral tribunal encounters an obstacle because of a party or due to the implementation of the appointment method, the President of the competent Civil Court ("Tribunal de Grande Instance") shall appoint the arbitrator(s) (Article 1444 §1 NCPC). This appointment can

also be made by the President of the competent Commercial Court ("Tribunal de Commerce") if the arbitration agreement has expressly provided so (Article 1444 §2 NCPC). In addition, if the parties designate an even number of arbitrators and if either the parties or the arbitrators are unable to complete the arbitral tribunal, the President of the competent Civil Court will complete it (Article 1454 NCPC).

In all the above mentioned cases, the President of the competent Court shall be seized, as in an emergency matter, by a party or by the arbitral tribunal and shall issue an order not subject to review (Article 1457 §1 NCPC). The competent Court is the Civil or Commercial Court designated by the arbitration agreement, or in default, the Court of the place of arbitration fixed in the arbitration agreement. If the arbitration agreement is silent, the competent Court shall be the Civil Court of the respondent's place of business or residence in France, or, failing that, of the claimant's place of business or residence in France (Article 1457 §3 NCPC).

International arbitration

Provided that the arbitration takes place in France or that the parties have agreed to apply the French procedural law, if any difficulty arises in the constitution of the arbitral tribunal, then either party may, if not agreed otherwise, request the President of the Civil Court of Paris to resolve any such difficulty (Article 1493 §2 NCPC).

Court assistance in relation to the appointment of substitute arbitrators

Domestic arbitration

Should any difficulty arise as to the challenge of an arbitrator, the President of the competent Court shall be seized on this issue (Article 1463 NCPC §2).

International arbitration

No specific provision exists as to the challenge of arbitrators but French case law considers that, unless the parties agreed otherwise, the rule provided by Article 1493 NCPC according to which the President of the Civil Court of Paris can be seized to resolve any difficulty as to the

constitution of the arbitral tribunal may also be used in the appointment of substitute arbitrators.

Arbitrators' fees and expenses and immunity

The French arbitration legislation does not contain any specific provision dealing with the issue of the arbitrators' fees and expenses. In the case of an arbitration conducted under the rules of an arbitration institution, the matter will generally be dealt in accordance with said rules. Regarding ad hoc arbitration, it will be up to the parties to determine in the arbitration agreement how the fees and expenses will be advanced by and finally allocated between the parties. If the arbitration agreement does not address this issue, it is accepted that the arbitrators have the power to determine the amount of their fees as well as the party or parties who will finally bear them.

According to French case law, an arbitrator's fees are due even if the arbitrator has not rendered an award as long he has undertaken work and that the lack of award is not due to his negligence.

There is no general immunity protecting arbitrators from claims by the parties. Arbitrators may be liable in case of wrongful performance of their duties. As in other cases of wrongful performance, the claimant will have to prove the existence of a default committed by the arbitrator, the existence of a damage and finally the causal link between the default and the damage.

Furthermore, the arbitrator must carry out his mission until its termination (Article 1462 §1 NCPC). If he does not do so, the arbitrator can be sued for denial of justice.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

Domestic arbitration

The competence of the arbitral tribunal to rule on its own jurisdiction is clearly enacted by the French arbitration legislation according to which if, before the arbitrator, one of the parties challenges his jurisdictional power in principle or in extent, it is up to the said

arbitrator to rule upon the validity or the limits of his nomination (Article 1466 NCPC).

International arbitration

No specific provision exists as to the competence of the arbitrator to rule on its own jurisdiction but long-established French case law considers that this principle also applies. The French courts may only control the competence of the arbitral tribunal when an award determining the tribunal's competence is challenged.

Power to order interim or protective measures

The French arbitration legislation does not contain any specific provision regarding the power of the arbitral tribunal to order interim or protective measures. However, the arbitrator is not only entitled to fix the rules of proceedings but may also compel a party to communicate a piece of evidence (Article 1460 §1 and 3 NCPC). In accordance with this provision, the arbitrator may order protective measures, such as the appointment of experts or the summons of parties to appear, in order to preserve evidence. However, the arbitrator has no power to enforce these measures.

Conduct of arbitral proceedings

General procedural principles

Domestic arbitration

As already mentioned the arbitrators are free to determine the applicable procedural rules, unless the parties have prescribed otherwise (Article 1460 §1 NCPC). However, they have to abide by basic procedural principles applicable to court litigation, reflected in Articles 4 to 11.1 and 13 to 21 NCPC (Article 1460 §2 NCPC).

According to these principles:

- The subject matter of the arbitration is defined by the respective claims of the parties in the request for arbitration and in the memoranda in defence. However, the subject matter may be modified by incidental claims if they are sufficiently related to the initial claims.
- The arbitrator shall make his decision about the points at issue and cannot rule beyond.

- The parties have to invoke the relevant facts to support their claims. The arbitrator cannot base his decision on facts which have not been revealed during the proceedings. He may however take into consideration facts which are not expressly relied upon by the parties when they are relevant to the case.
- The arbitrator may ask the parties to give explanations about the facts if he considers it necessary to the solution of the dispute.
- It rests with each party to prove, in accordance with the law, the facts necessary to the success of their claims.
- The arbitrator has some inquisitorial powers to conduct the case, e.g., by requesting submission of evidence, holding oral hearings or appointing experts.
- The arbitrator has to respect the adversarial principle, giving to each party an opportunity of being heard and providing the same information to all parties.
- The arbitrator has the duty to seek a conciliation between the parties.

International arbitration

French arbitration legislation does not set forth procedural guidelines. Even more, when the international arbitration is subject to French law, it is possible by means of a specific agreement to avoid the French legal provisions applicable to domestic arbitration (Article 1495 NCPC).

Indeed, the arbitration agreement may, directly or by reference to institutional arbitration rules, fix the procedure to be followed in the arbitration proceedings. It may also subject the latter to a designated procedure law. In the case of silence of the arbitration agreement, the arbitrators shall determine the procedure, to the extent necessary, either directly or by reference to an arbitration legislation or to rules from an arbitration institution (Article 1494 NCPC).

Commencement of arbitration

The commencement of the arbitration is subject to no formal requirements. In practice, the request is made in writing by the claimant. In substance, it is the process by

which a party informs the other of his intent to arbitrate and summons the other to appoint the arbitral tribunal and explain his position.

Domestic arbitration

The proceedings start when the arbitrators have all accepted their assignment (Article 1452 §1 NCPC). Once the arbitral tribunal has been constituted, the dispute is submitted either by the parties jointly or by the more diligent party (Article 1445 NCPC).

If the arbitration agreement does not set a time limit, the mission of the arbitrators shall last for six months starting from the date when the last of them has accepted his assignment (Article 1456 §1 NCPC). The legal or contractual time limit may be extended either by agreement of the parties or, upon request by one of them or the arbitral tribunal, by the President of the competent Civil Court or, if the agreement has expressly provided so, by the President of the competent Commercial Court (Article 1456 §2 NCPC).

International arbitration

No statutory time limit is set for the issue of the award, and only the parties have the power to define this time limit and to extend it, even implicitly. However, when French law applies, and provided that the parties have not agreed otherwise, the provisions for domestic arbitration will apply (Article 1495 NCPC).

Compliance with the procedural timetable is essential, both in domestic and international arbitration, as an award issued after the deadline can be set aside (Articles 1484-1 and 1502-1 NCPC).

Place and language of arbitration

The French arbitration legislation does not contain any provision on the determination of the place and language of arbitration. However, regarding domestic arbitration, practicalities dictate that the arbitration will take place in France and the language of arbitration will be French.

Regarding international arbitration, the parties are free to designate the place and the language of arbitration. In the

absence of such an agreement, the arbitrator(s) will be competent to make such a choice (Article 1494 NCPC).

Submissions, oral hearings and written proceedings

Each party's claims are usually supported by written memoranda initiating the written phase of the procedure. They describe the facts and the legal grounds of the claims and are supported by extensive documentation. They are usually followed by oral pleadings. If necessary, the tribunal can ask for additional written submissions.

Evidence

Evidence may be obtained through disclosure of documents, witness statements and expert reports. In all cases, the mandatory rule of the adversarial principle provides that each document presented to the arbitral tribunal must be disclosed to the other party. The parties shall have equal access to and knowledge of information disclosed during the proceedings and shall have the opportunity to discuss it, in accordance with due process principles.

Procedural powers of the tribunal

Domestic arbitration

The arbitrators must make orders and take procedural measures jointly, unless the arbitration agreement authorises the arbitral tribunal to delegate these rights to one of them (Article 1461 §1 NCPC). The arbitral tribunal has the power to rule on claims regarding verification of writings or forgery of documents (Article 1467 NCPC). Furthermore, on the basis of certain general procedural principles applicable to court proceedings which also apply to domestic arbitration in accordance with Article 1460 NCPC (see further below), the arbitral tribunal has the power to decide on the appointment of experts, the hearing of witnesses, the requirement of oral hearings and other measures to obtain evidence. However, the arbitral tribunal may not enforce a sanction in the event that a party does not comply with its order.

International arbitration

No specific provision exists. However, when an international arbitration is governed by French law, the

rules set forth for domestic arbitration shall apply in the absence of a special agreement between the parties (Article 1495 NCPC).

Stay of arbitration proceedings

Domestic arbitration

French arbitration legislation refers to interruption of arbitration proceedings for cases similar to the one provided for court proceedings provided by Articles 369 to 376 NCPC (Article 1465 NCPC). Such interruption can be automatic or following a notification.

A domestic arbitration is automatically suspended by the happening of one of the two following events (Article 369 NCPC): when a party attains their majority and/or there is a judgement as to the bankruptcy or liquidation of a party. A domestic arbitration may also be interrupted for one of the three following events provided that the said event was notified to the opposing party (Article 370 NCPC): (a) death of a party; (b) the termination of the legal representative's assignment of a legally incapable person; and (c) the recovery or the loss by one party of its ability to go to court. However, the proceedings cannot be interrupted if the event occurs or is notified once the oral pleadings have started (Article 371 NCPC).

The interruption of the proceedings does not remove the arbitrator from the dispute and he may invite the parties to resume them. Once interrupted, proceedings may resume voluntarily or by order (Article 373 NCPC). The voluntary resumption does not have any formal requirements and will usually consist of a letter, note or memoranda transmitted either by the parties or their lawyers. Before an arbitral tribunal, the resumption by order cannot be as formal as for court proceedings. A notice is served through a bailiff by a party to the opposite party. The latter is summoned either to send his arguments to the arbitral tribunal or to appear before the arbitrators on a date agreed with them.

Finally, the French arbitration legislation further provides that in case of a criminal plea of forgery, the time limit for the arbitration is suspended until a decision is reached as

to the forgery (Article 1467 §2 NCPC). However, the proceedings do not need to be suspended if the arbitrator feels that a decision on the merits can be reached without relying on the allegedly forged evidence.

International arbitration

French arbitration legislation contains no specific provision as to the stay of the proceedings. However, when an international arbitration is governed by French law, the rules set forth for domestic arbitration shall apply in the absence of a special agreement between the parties (Article 1495 NCPC).

Making of the award and termination of proceedings

Choice of law

Domestic arbitration

An arbitrator shall decide in accordance with the rules of law unless the parties have conferred upon him in the arbitration agreement the mission of deciding as amiable compositeur (Article 1474 NCPC for domestic arbitration; Article 1497 NCPC for international arbitration). When acting as an amiable compositeur, the arbitrator shall seek a fair resolution of the dispute without being bound by any specific legal system or general principles of law.

International arbitration

If the parties did not choose the rules of law applicable to the dispute, the arbitrator shall determine the appropriate rules of law (Article 1496 §1 NCPC). In all cases, the arbitrator shall also take into account the trade practices (Article 1496 §2 NCPC).

Interest

French arbitration legislation does not deal with the issue of interest in arbitration. However, considering that an award is, by application of Article 1476 NCPC, a jurisdictional decision, French case law considers that, in case of an award to be executed in France, a decision by the arbitral tribunal to pay damages involves legal interest which accrues from the date the award is rendered until the effective date of payment.

Decision making by the tribunal

Domestic arbitration

The arbitrators' deliberations are secret (Article 1469 NCPC). The award is rendered by majority vote (Article 1470 NCPC) and must be signed by all the arbitrators failing which it might be declared null and void (Articles 1473 §1 and 1480 NCPC). However, if a minority of the members of an arbitral tribunal refuse to sign the award, the other members shall record this fact and the award shall then have the same effect as if it had been signed by all arbitrators (Article 1473 §2).

International arbitration

French arbitration legislation contains no specific provision. However, when an international arbitration is governed by French law, the rules set forth for domestic arbitration shall apply in the absence of a special agreement between the parties (Article 1495 NCPC).

Form, content and effect of the award

French arbitration legislation does not contain any definition of an award. According to French case law, an award is a decision which puts an end to a dispute. Partial and interim awards are recognised by French case law.

Domestic arbitration

An award must briefly state the respective claims and arguments of the parties (Article 1471 §1 NCPC). It must be reasoned failing which it will be declared null and void (Articles 1471 §2 and 1480 NCPC). Finally, the award shall state (Article 1472 NCPC):

- the arbitrators' names;
- its date;
- the place where it was rendered;
- the full names or commercial denominations of the parties as well as their residence or registered office; and
- the name of the lawyers or any other persons who have represented or assisted the parties.

Should the statements regarding the arbitrators' names and the date be missing, the award will be declared null and void (Article 1480 NCPC).

Subject to the possible correction, interpretation or completion of the award (see below), the award removes the dispute from the arbitrator (Article 1475 §1 NCPC). As soon as it is rendered, the award has the authority of res judicata with respect to the dispute on which it decides (Article 1476 NCPC).

International arbitration

French arbitration legislation contains no specific provision. However, when an international arbitration is governed by French law, the rules set forth for domestic arbitration shall apply in the absence of a special agreement between the parties (Article 1495 NCPC).

When an international arbitration is not governed by French law and when the arbitration agreement or the arbitration rules referred to are silent on the issue of whether or not the award shall be reasoned, the prevailing opinion in French case law is similar to the principle set forth in the 1961 Geneva Convention as well as the UNCITRAL rules, i.e. the parties are presumed to have agreed on the fact that the award must be reasoned unless they expressly stated otherwise. It may be then deemed that, under French law, an international arbitration award rendered in France should not be set aside where reasons are not given in the award, provided that the parties have expressly set forth that the award does not need to be reasoned. In the absence of such clear provision, an award lacking reasons might be set aside using Article 1502-3° NCPC.

Settlement

French arbitration legislation does not contain any provision regarding this matter. However, in practice, the parties may settle their dispute at any time and, at their request, the arbitral tribunal may record such settlement in an award by consent.

Correction and interpretation of the award

Domestic arbitration

Once the award has been rendered and thus the arbitration is at an end, French arbitration legislation recognises the arbitrators' power to interpret the award, to rectify

material errors and omissions and to complete it when he has failed to rule upon a claim, following a request from a party to do so (Article 1475 §2 NCPC). Should it be impossible to recall the arbitral tribunal, this power shall belong to the State court which would have been competent in the absence of arbitration.

International arbitration

French arbitration legislation contains no specific provision. However, when an international arbitration is governed by French law, the rules set forth for domestic arbitration shall apply in the absence of a special agreement between the parties (Article 1495 NCPC).

The role of the courts

Stay of court proceedings

Domestic arbitration

A French court shall declare itself incompetent to deal with a dispute which is subject to an arbitration agreement and of which an arbitral tribunal is already seized (Article 1458 §1 NCPC).

Similarly, a French court will declare itself incompetent to deal with a dispute which is subject to an arbitration agreement and of which an arbitral tribunal is not already seized, unless the arbitration agreement is clearly null and void (Article 1458 §2 NCPC).

However, in both above-mentioned cases, the French court cannot raise the issue of its incompetence on its own initiative (Article 1458 §3 NCPC). The decision of the court on its competence may be challenged by one of the parties within 15 days under a special procedure in order to avoid costs and delay ("contredit de compétence") (Articles 80 to 91 NCPC).

International arbitration

Although no specific provision exists, French case law considers that Article 1458 is also applicable here.

Interim and protective measures

The French arbitration legislation does not contain any specific provision regarding arbitration and interim and protective measures ordered by the State courts except, as

already mentioned above, for specific emergency measures in case of difficulty relating to the constitution of the arbitral tribunal, to extend the deadline of the arbitrators' mission or in case of difficulty as to the challenge of an arbitrator (Articles 1444, 1454, 1456, 1463 NCPC). Regarding proper interim and protective measures, according both to the French case law and to the authors, they are considered to be compatible with the existence of an arbitration agreement as long as the parties or the applicable arbitration rules have not forbidden them. Furthermore, several distinctions must be made, on one hand, as to whether or not the arbitral tribunal was constituted and seized of the dispute and, on the other hand, between interim measures, protective measures and the "référé provision", a sort of summary judgement granting a partial relief. In all cases, the court's powers derive from the general rules of civil procedure (Articles 145, 808 and 809 NCPC). The State court can rule through emergency proceedings ("référé") by non appealable orders but only on matters which do not affect the merits of the dispute.

Before the constitution of the arbitral tribunal, the State court can still intervene although the arbitration has started. Indeed, the State court is empowered to take all necessary measures to protect evidence, to prevent imminent damage or to stop a manifestly illegal disturbance. As for the "référé provision" by which is ordered the payment of a provisional amount or the performance of an unquestionable obligation, the State court can order it exceptionally in case of a characterised emergency.

Once the arbitral tribunal is constituted and seized of the dispute, the State court's intervention as to interim and protective measures, complementary to the arbitration, must be exceptional and justified. Furthermore, the référé-provision is forbidden.

Finally, it should be noted that, in practice, the assistance of State courts for interim and protective measures is rarely used.

Challenging and appealing the awards before the courts

The final nature of the arbitral award is fully accepted by the French judge who will very rarely set aside or revise an award.

Domestic arbitration

The parties have a right to appeal before the competent Court of Appeal in whose jurisdiction the award was rendered on all grounds of fact and law, unless they expressly waived their right to appeal in the arbitration agreement (Article 1482 NCPC). On the other hand, unless the parties expressly agreed otherwise, the provision stating that the arbitrators shall decide as amiable compositeur excludes the right to appeal (Article 1482 NCPC).

Even in the case where the parties have waived their right to appeal, the award may be challenged through a judicial recourse for annulment ("recours en annulation") on the six following limited grounds (Article 1484 NCPC):

- if the arbitrator has decided in the absence of an arbitration agreement or on basis of a void or expired arbitration agreement;
- if the arbitral tribunal was irregularly constituted or the sole arbitrator was irregularly appointed;
- if the arbitrator has decided without complying with its mission;
- if due process has not been complied with;
- in all the cases of nullity mentioned in Article 1480 NCPC (award not reasoned or undated or unsigned, name of the arbitrators not mentioned in the award); and,
- if the arbitrator has breached a rule of public policy.

The appeal and the recourse for annulment against an award can be started as soon as the award is pronounced and must be commenced within one month following the notification of the award to which the exequatur was granted. During the above-mentioned one month period, no enforcement of the award can occur (Article 1486 NCPC).

Like all other decisions rendered by a Court of Appeal, a decision agreeing or refusing to set aside the award may be challenged before the "Cour de Cassation", the French Supreme Court, on the grounds of error in law. The

Supreme Court has the power to annul the decision from the Court of Appeal but not to interpret or vary it. A challenge before the Supreme Court does not suspend the enforcement of the award.

An action to re-open the proceedings ("recours en révision") is available against a domestic award but only in the limited cases of fraud or withholding of evidence (Article 1491 NCPC).

International arbitration

Contrary to awards rendered in domestic arbitration, international arbitration awards cannot be appealed.

However, an award rendered in France in international arbitration may be challenged through a judicial recourse for annulment ("recours en annulation") before the competent Court of Appeal according to the place where the award was rendered. The award may be challenged on the five following limited grounds (Article 1502 NCPC referred to by Article 1504 NCPC), the first four being identical to those provided for domestic arbitration:

- if the arbitrator has decided in the absence of an arbitration agreement or on basis of void or expired arbitration agreement;
- if the arbitral tribunal was irregularly constituted or the sole arbitrator was irregularly appointed;
- if the arbitrator has decided without complying with its mission;
- if due process has not been complied with; and
- if the recognition or enforcement of the award is contrary to international public policy.

Actions for an award to be set aside are very rarely successful. As for domestic arbitration, the recourse for annulment against an award can be introduced as soon as the award is pronounced; it will cease to be available if not started within one month following the notification of the enforceable award (Article 1505 NCPC). The time limit, as well as the recourse for annulment commenced during this time limit, suspends the enforcement of the award (Article 1506 NCPC).

Again, the decision rendered by the Court of Appeal may be challenged before the French Supreme Court.

Recognition and enforcement of awards

Domestic awards

In order to be enforceable, a domestic award must be recognised and granted leave for enforcement ("exequatur") by the competent Civil Court taking into account the place of arbitration (Article 1477 §1 NCPC). The judge shall act upon the request of one of the parties or of one of the arbitrators, who shall submit the original award together with a copy of the arbitration agreement (Article 1477 §3 NCPC). If granted, the exequatur is mentioned on the original award, furthermore the decision that refuses to grant the exequatur must be reasoned (Article 1478 NCPC). At this stage, the party against whom enforcement is sought is not a party to the application.

The decision granting exequatur is not open to any recourse, however, the appeal against the award or the application to set aside the award is considered as a recourse against the said decision (Article 1488 NCPC). The decision refusing exequatur may be appealed within one month of issue (Article 1489 NCPC).

International and foreign awards

France has ratified both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1961 Geneva Convention on International Commercial Arbitration. However, the French arbitration legislation provides a less restrictive regime for the recognition and enforcement of foreign and international awards than do most national arbitration laws and multilateral conventions (most notably the 1958 New York Convention).

A foreign or international award will be recognised in France if its existence is established and if its recognition and enforcement are not clearly contrary to international public policy (Article 1498 §1 NCPC). The award's existence shall be established on the basis of the original award and of the original arbitration agreement or by certified copies of both documents (Article 1499 §1

NCPC); should they be drafted in a foreign language, an official French translation is requested (Article 1499 §2 NCPC). The exequatur must be obtained in the same manner as for domestic awards (Article 1500 NCPC).

The decision refusing the recognition or enforcement is subject to appeal (Article 1501 NCPC).

The decision granting recognition or enforcement of a foreign or international award may be

appealed on the same five limited grounds as for the challenge of an international award (see hereabove) (Article 1502 NCPC). A decision refusing or granting the recognition or enforcement may be appealed within one month from the date on which the appealing party was notified of the decision (Article 1503 NCPC).

Conclusion

Although the current French arbitration legislation entered into force some twenty-five years ago and pre-dates the 1985 UNCITRAL Model Law, it has been established and still is considered as a liberal, modern and flexible framework in particular regarding international arbitration. Not only are the powers of the French State courts to interfere in arbitration proceedings or to review arbitral awards strictly limited, but even more the French judge is considered to be proarbitration.

With all these positive elements, France, and more particularly Paris, appears to be a leading place for international arbitrations.

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Arbitration in Germany

CMS Hasche Sigle

Scope of application and general provisions of arbitration law

Scope of application

The German law of arbitration is included as the 10th book (§§1025 - 1066) in the Code of Civil Procedure (Zivilprozeßordnung ("ZPO")). It largely follows the structure and wording of the UNCITRAL Model Law of 1985. The recognition and enforcement of foreign arbitral awards is based on the New York Convention of 1958.

The 10th book of the ZPO applies to all arbitrations if the place of arbitration is situated in Germany (§1025 (1) of the ZPO). Certain provisions also apply if the place of arbitration is situated outside Germany or has not yet been determined. The 10th book also applies to the recognition and enforcement of foreign arbitral awards in Germany (§1025 (4) of the ZPO and §§1061-1065 of the ZPO). The provision relating to the scope of the application of the Arbitration Act is one of the few mandatory provisions of German arbitration law. Hence the parties cannot agree that an arbitration taking place in Germany should be subject to the arbitration law of another country. However, the parties are free to include individual provisions or procedures of foreign arbitration laws in their arbitration agreement.

§§1025-1066 of the ZPO apply both to ad hoc arbitrations and to institutional arbitrations. By virtue of the autonomy afforded to the parties under the German law of arbitration,

the parties can also agree that their arbitral proceedings shall be conducted according to the procedural rules of one of the domestic or foreign arbitration institutions such as the Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS), the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the American Arbitration Association (AAA).

General provisions

The German law of arbitration contains a small number of mandatory provisions from which the parties may not deviate. Pursuant to §1042 (1) of the ZPO, the parties have to be treated equally by the arbitral tribunal. Each party is entitled to a fair hearing. Pursuant to §1042 (2) of the ZPO, lawyers may not be precluded from acting as counsel representing parties in arbitration proceedings.

Party autonomy

The parties can agree on the procedure to be followed between themselves or with reference to arbitration rules, provided there is no conflict with the mandatory provisions of the 10th book of the ZPO (§1042 (3) of the ZPO). In addition to the above mentioned §1042 of the ZPO, the following provisions in particular are mandatory:

- §1025 of the ZPO: application of the German law of arbitration to arbitration proceedings where the place of arbitration is in Germany;
- §1034 (2) of the ZPO: right of recourse to the state courts if the arbitration agreement disadvantages one party in relation to the constitution of the arbitral tribunal;
- §1037 (3) of the ZPO: right of appeal to the state courts if the arbitral tribunal has rejected the challenge of an arbitrator; and
- §1041 (2) and (3) of the ZPO: enforcement of interim protective measures.

Non-intervention by the courts

§1026 of the ZPO provides that the courts may only intervene in arbitration proceedings to the extent permitted by the 10th book of the ZPO.

Loss of right to object

Pursuant to §1027 of the ZPO, the parties must raise objections to procedural irregularities immediately or within the relevant period provided for by the ZPO. If they fail to do so, the right to raise an objection in relation to the procedural irregularity may be lost. However, this rule does not apply if a party was not and could not have been aware of the irregularity, or if there was an infringement of a mandatory statutory provision on procedure.

The arbitration agreement

Formal requirements

There are relatively few formal requirements for an arbitration agreement. They are set out in detail in §1031 of the ZPO. An arbitration agreement is effective when it is included in a document signed by the parties. The reference to an arbitration agreement in an exchange of written communications between the parties is sufficient if such communications provide a record of the arbitration agreement. The same applies to faxes, telegrams or other forms of telecommunication or electronic communication.

In addition, an arbitration agreement can also be made in a document signed by the parties with reference to an arbitration clause contained in another document (§1031 (3) of the ZPO). For example, an agreement or an exchange of correspondence can refer to an arbitration clause contained in the standard terms and conditions of business of one of the parties and thereby incorporate the arbitration clause into the agreement.

Arbitrability

In principle, any claim involving an economic interest can form the subject of arbitration proceedings (§1030 (1) of the ZPO). For example, disputes concerning a commercial agent's claim for compensation may be referred to an arbitral tribunal, irrespective of the fact that contractual derogations from the statutory provisions on compensation claims are not permissible prior to

termination of the agency contract if they disadvantage the agent. Private disputes in competition law matters may also be referred to an arbitral tribunal including, for example, disputes arising out of an agreement containing restrictive trade practices. It is doubtful whether applications to set aside corporate resolutions adopted in a general meeting of the shareholders of a GmbH or an AG can be referred to an arbitral tribunal. According to a judgment of the Federal Court of Justice (Bundesgerichtshof ("BGH")) of 1996, this is only possible if the arbitration proceedings are conducted in such a way as to ensure that all shareholders are made aware that arbitration proceedings have been commenced and are given the opportunity to join in the arbitration. In the case in question, the BGH found that these conditions had not been fulfilled. In light of this decision, it is unlikely that such disputes will be arbitrated in future.

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

The parties are free to agree on the number of arbitrators. In the absence of an agreement between the parties, the arbitral tribunal shall be composed of three arbitrators (§1034 of the ZPO). The parties are also free to agree a procedure for the appointment of the arbitral tribunal (§1035 of the ZPO). In the most common type of agreement, providing for an arbitral tribunal consisting of three arbitrators, each party generally appoints one arbitrator; the two party appointed arbitrators then appoint the chairperson of the arbitral tribunal (§1035 (3) ZPO). If the party appointed arbitrators cannot agree on the third arbitrator, each party may request that the Higher Regional Court (Oberlandesgericht ("OLG")) with local jurisdiction over the place of arbitration make the appointment (§§1035 (4) of the ZPO; 1062 (1) no.1 of the ZPO). The same applies if the parties have agreed that the tribunal

shall consist of a sole arbitrator but cannot reach agreement on the appointment. In the event that the place of arbitration is not determined in the arbitration agreement, the German courts have jurisdiction if either the claimant or the respondent has its place of business or habitual residence in Germany (§1025 (3) of the ZPO in connection with §§1035, §1062 (3) of the ZPO), unless the parties have agreed otherwise.

Multi-party arbitration

Difficulties arise in the appointment of arbitrators where multiple parties are involved in the arbitration proceedings as claimants or respondents on the same side and their interests need to be balanced in the appointment of the arbitral tribunal. German law does not make express provision for multi-party arbitrations and it is therefore up to the parties to incorporate fair procedures for the appointment of a joint arbitrator for several participating parties in the arbitration agreement. The ICC Rules of Arbitration (1998) as well as the DIS Rules of Arbitration (1998) contain provisions on the appointment of arbitrators in multi-party arbitrations which are accepted by German courts.

The challenge of arbitrators

Arbitrators may be challenged pursuant to § 1036 of the ZPO:

- if circumstances exist which give rise to justifiable doubts as to the impartiality or independence of an arbitrator; or
- if an arbitrator does not fulfil the requirements or does not have the qualifications agreed between the parties for the appointment of an arbitrator.

The parties may agree their own procedure for the challenge of an arbitrator and they may do so by reference to the rules of arbitration, institutions such as the ICC Rules of Arbitration or the DIS Rules of Arbitration. If the parties have not agreed to a procedure for the challenge of an arbitrator, each party can challenge an arbitrator by reasoned request to the arbitral tribunal. The arbitral

tribunal then decides on the challenge unless the challenged arbitrator steps down of his own accord or the other party consents to the challenge. If the challenge is successful, the tribunal's decision is final and the arbitrator subject to the challenge must resign.

If the challenge is unsuccessful, the party making the challenge may apply to the state court for a ruling on the challenge. Pending the outcome of the court proceedings, the arbitral tribunal (including the arbitrator subject to the challenge) may continue the arbitration proceedings and make an award but any such award may subsequently be set aside if the challenge is successful before the court. This procedure is intended to prevent one party from taking proceedings to the courts simply for the purpose of delaying the arbitration. The same applies if the arbitrator does not fulfil his duties within a reasonable period of time (§1038 of the ZPO).

A person who is invited to act as an arbitrator must disclose all circumstances which could give rise to justifiable doubts as to his impartiality or independence. The arbitrator must also immediately disclose any such circumstances if they arise after his/her appointment until the end of the arbitration proceedings. The IBA Guidelines on Conflicts of Interest in International Arbitration 2004 provide useful advice on what circumstances may give rise to doubts with regard to an arbitrator's impartiality. In practice, the parties will frequently make appropriate enquiries with the arbitrators at the beginning of arbitration proceedings. For a challenge to be successful, it does not matter whether the arbitrator was actually independent and impartial. The test is an objective one and it must be shown that a reasonable party would have justifiable doubts as to the independence and impartiality of the arbitrator on the basis of the particular circumstances of the case.

The appointment of substitute arbitrators

If the appointment of an arbitrator is terminated (by challenge, resignation, dismissal or death), a substitute arbitrator shall be appointed (§1039 of the ZPO). The same rules apply to the appointment of a substitute arbitrator as apply to the appointment of the original arbitrator, unless the parties have agreed otherwise.

Arbitrators' fees, expenses and immunity

German arbitration law distinguishes between the arbitration agreement by which the parties submit their dispute to the decision of an arbitral tribunal, and the arbitrators' agreement. The arbitrators' agreement deals with the contractual relationship between the parties and the arbitrators. It is therefore concerned, in particular, with issues such as the payment of the arbitrators' fees and the reimbursement of their expenses. The ZPO is silent on this issue. The arbitrators' agreement is simply regarded as a contract for the supply of services under the general rules of the German Civil Code (Bürgerliches Gesetzbuch ("BGB")).

Under German law, there will generally also be a separate arbitrators' agreement if the arbitration is conducted pursuant to the arbitration rules of DIS. DIS will appoint the arbitrators on behalf of the parties and conclude the arbitrators' agreement in their names with the arbitrators. The arbitrators' fees are in such cases determined in accordance with the fee scales of the relevant arbitration institution. By contrast, if the arbitrators are appointed by the ICC International Court of Arbitration the arbitrators' agreement is concluded between ICC and the arbitrator.

Arbitrators are liable to the parties in the same way as court judges. The law does not contain an express provision to this effect but it is an implied term of the arbitrators' agreement unless there is an express provision to the contrary. In particular, arbitrators are accordingly only liable for the erroneous application of the law if they are guilty of the criminal offence of perversion of justice. Arbitrators may, however, be liable for negligence under the general rules of the law of

obligations. A liability may also arise, for instance, where an arbitrator fails to disclose circumstances giving rise to doubts as to his/her impartiality or independence contrary to §1036 of the ZPO, or in the event of an unjustified resignation or improper delays.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

The arbitral tribunal has jurisdiction to rule on its own jurisdiction (Kompetenz-Kompetenz) and on the existence and validity of the arbitration agreement (§1040 of the ZPO). Objections to the jurisdiction of the arbitral tribunal must be made no later than upon submission of the statement of defence. Otherwise the right to object to the tribunal's assumption of jurisdiction may be lost (§1027 of the ZPO). If the arbitral tribunal rules that it has no jurisdiction, this decision is final. If, on the other hand, the arbitral tribunal assumes jurisdiction, each party can apply for a ruling to the Higher Regional Court with local jurisdiction for the place of arbitration (§1040 (3) of the ZPO).

If the arbitral tribunal has confirmed its jurisdiction and the other party has applied to the court for a ruling on jurisdiction, the arbitral tribunal can continue the arbitration proceedings while the court application is pending and can also make an arbitral award. If the court subsequently finds that the arbitral tribunal had no jurisdiction, any arbitral award made in the meantime may be set aside on application by one of the parties (§1059 (2) no.1c) of the ZPO). This rule is intended to prevent a party from delaying arbitral proceedings by applying to the court and corresponds to the rules applicable to the challenge of arbitrators.

Power to order interim measures

The arbitral tribunal may grant interim injunctions and order interim or protective measures (§1041 of the ZPO). At the request of a party, it may repeal or amend such measures. If an interim measure proves to have been unjustified from the outset, the party who obtained that order is obliged to compensate the other party for any losses it suffered as a result. This claim for damages may be brought in the pending arbitration.

An interim measure ordered by the arbitral tribunal may be enforced with the permission of the courts. Pursuant to §1062 of the ZPO, jurisdiction for enforcement applications lies with the Higher Regional Court. Upon application by a party, the court can also set aside or vary an interim measure ordered by the arbitral tribunal.

Instead of requesting an interim protective measure from the arbitral tribunal, a party may apply to the courts in accordance with the general provisions on interim protective measures (§1033 of the ZPO) and ask for an attachment order (§§916 - 934 of the ZPO) or an interim injunction (§§935 - 945 of the ZPO). In deciding whether to apply for an interim measure to the courts or to the arbitral tribunal, it is important to note that court decisions on applications for interim measures are final pursuant to §1041 of the ZPO: if upon application the arbitral tribunal does not grant the interim measure requested, an application can be made to the court, but not vice versa.

Conduct of arbitral proceedings

The arbitral tribunal shall conduct the proceedings:

- according to the rules agreed by the parties, subject to any mandatory provisions (§1042 (3) of the ZPO);
- in accordance with the optional provisions of the Arbitration Act; or
- otherwise at the discretion of the arbitral tribunal (§1042 (4) of the ZPO).

German arbitration law does not indicate a preference as to whether the arbitration proceedings should be conducted pursuant to Continental European civil law procedures or pursuant to Anglo-Saxon procedural traditions. Instead, the ZPO gives the parties a large amount of autonomy in agreeing the procedure best suited to the determination of their dispute. In the absence of an agreement between the parties, and subject to the mandatory and optional provisions in arbitration law, it is largely left to the arbitrators to

decide on the procedure to be followed. An arbitrator will frequently follow the procedures with which he is most familiar from his own professional background. A German arbitrator will therefore often structure the proceedings in line with the procedural provisions of the ZPO. Thus, the arbitrator will normally start by considering the claimant's claim and ascertain whether there is a legal norm which supports this claim. An arbitrator with a civil law background is likely to review the facts only to the extent that this is necessary in order to decide whether the claim is well founded in law and limit any further investigations to factual matters in dispute which in the arbitrator's view are relevant to the outcome of the proceedings.

The more comprehensive disclosure requirements typical of common law discovery procedures are therefore unlikely to feature in arbitration proceedings conducted by arbitrators with a civil law background unless specifically agreed by the parties. Each party will ordinarily only introduce those documents into the proceedings on which it relies in support of its case. Disclosure proceedings are rare though not forbidden by law, § 142 of the ZPO as introduced in 2001 allows some disclosure in state court proceedings and may influence arbitral proceedings as well. In addition, German substantive civil, commercial and intellectual property law contain a number of specific provisions by which a party may be obliged to provide to the other party certain information on application.

Furthermore, in accordance with German tradition there will be greater reliance on written submissions rather than on oral hearings, and oral evidence will be kept as short as possible. The exchange of written witness statements as produced under common law procedure is unknown in German state court proceedings and arbitrators trained under the German legal tradition will be reluctant to rely on such statements. Finally, a German arbitrator will frequently take an active role in the conduct of the arbitration and management of the proceedings and seek to promote a settlement of the dispute. This approach is

inspired by §279 of the ZPO, pursuant to which the state judge is obliged to encourage settlement of a dispute as a whole or of individual issues at all stages in the proceedings. In arbitration proceedings which involve foreign parties arbitral tribunals in Germany are increasingly found to apply the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999). In consequence the gap between traditional German and civil law approaches in this respect tends to narrow.

Rules of procedure in the Arbitration Act

The fifth chapter of the Arbitration Act contains in §§1042 - 1050 of the ZPO a number of provisions on the conduct of the arbitration, namely:

- §1042 of the ZPO — general rules of procedure;
- §1043 of the ZPO — place of arbitration;
- §1044 of the ZPO — commencement of arbitral proceedings;
- §1045 of the ZPO — language of proceedings;
- §1046 of the ZPO — statements of case and defence;
- §1047 of the ZPO — oral hearings and written submissions;
- §1048 of the ZPO — default of a party;
- §1049 of the ZPO — experts appointed by the arbitral tribunal; and
- §1050 of the ZPO — court assistance in taking evidence and other judicial acts.

Place of arbitration and language of proceedings

The parties are free to agree the place of arbitration and the language of the proceedings. Failing such an agreement, the arbitral tribunal determines the place of arbitration and the language of the proceedings.

The place of arbitration determined by the parties or the arbitral tribunal is of significance for the question whether a subsequent arbitral award will be regarded in Germany as a domestic or a foreign arbitral award. In addition, the jurisdiction of the courts to grant interim measures in support of arbitral proceedings is determined by the

place of arbitration. However, unless otherwise agreed by the parties, the arbitral tribunal can meet at any place which is convenient for oral hearings, taking of evidence or other procedural steps.

Commencement of arbitration

The arbitral proceedings commence when the claimant serves on the respondent a request to refer the dispute to arbitration (§1044 of the ZPO). The request for arbitration may contain details of the facts, law and evidence in support of the claim although the law only requires the request for arbitration to contain the names of the parties, the subject matter of the dispute and a reference to the arbitration agreement. Service of the request for arbitration suspends the limitation period if the claimant has taken all appropriate steps in respect of the arbitration, in particular, with regard to the appointment of an arbitrator (§204 (1) no.11 of the German Civil Code). A specific request to the respondent to appoint an arbitrator is not necessary to suspend the limitation period.

Submissions

Within the period agreed by the parties or determined by the arbitral tribunal, the claimant must complete his statement of case and the respondent must serve his defence (§1046 of the ZPO). Each party may change or amend its written submissions in the course of the proceedings, whereby the deadlines set by the arbitral tribunal must be observed.

Oral hearing and written proceedings; default by parties

Unless otherwise agreed by the parties, the arbitral tribunal decides whether an oral hearing is required or whether the proceedings are to be conducted on the basis of written submissions only. The arbitral tribunal is obliged to hold an oral hearing if the parties have not excluded an oral hearing in their agreement and one of the parties requests an oral hearing.

If a party does not appear at an oral hearing, the arbitral tribunal may continue the proceedings in the absence of that party. Unlike in state court proceedings, however,

absence will not be deemed to be an admission of the factual submissions made by the other party. Rather, the arbitral tribunal must base its award on the evidence then available.

If a party has not made its submissions within the time period determined by the arbitral tribunal, the arbitral tribunal can disregard the submission if the delay is not sufficiently excused. The parties can agree other or supplementary rules. These may be found in institutional arbitration rules incorporated into the arbitration agreement by reference, or in specific terms of reference agreed by the parties.

Evidence

The arbitral tribunal decides whether evidence is required to support a statement of fact. The arbitral tribunal takes evidence and has discretion to assess such evidence freely (§1042 (4) of the ZPO). The arbitral tribunal can, in particular, hear witnesses called by the parties, or appoint experts to report on certain issues to be identified by the arbitral tribunal. The arbitral tribunal can instruct a party to provide the expert with information, or give access to documents and other relevant items for inspection.

The arbitral tribunal cannot compel witnesses to give evidence but can request the assistance of the state courts in accordance with §1050 ZPO if a witness is not prepared to give evidence before the arbitral tribunal. The state courts can order witnesses to give evidence and can impose sanctions for failure to do so.

Making of the award and termination of proceedings

Choice of law

The arbitral tribunal shall make its award on the basis of the law chosen by the parties. Failing a choice of law by the parties, the arbitral tribunal shall apply the law of the jurisdiction with which the subject matter of the proceedings is most closely connected (§1051 of the ZPO). This rule corresponds to the conflict of law rules applicable in most countries and, in particular, to Art 3 and 4 of the

Rome Convention of 1980, which applies between the EU Member States. The parties can also agree that the arbitral tribunal shall apply the rules of the so-called lex mercatoria. This is a set of rules regulating international commercial transactions independent of national legal provisions, which is primarily based on customary law but also on international conventions and international uniform model laws such as, for example, the UN Convention on Contracts for the International Sale of Goods of 1980 ("CISG"). The rules of the lex mercatoria however, still lack precise definition.

Finally, the parties can grant, but rarely do, the arbitral tribunal the authority to decide ex aequo et bono (§1051 (3) of the ZPO).

Decision-making by the tribunal

In arbitral proceedings with more than one arbitrator all decisions must be made by a majority of the members of the arbitral tribunal (§1052 (1) of the ZPO). This applies to arbitral awards and interim awards but also to procedural decisions. The parties may, of course, agree otherwise.

Frequently the parties or the other arbitrators authorise the chairperson of the arbitral tribunal to rule on issues of procedure.

Furthermore, §1052 (2) of the ZPO makes provision in the event that an arbitrator refuses to take part in making a ruling.

Form, contents and effect of the award

The arbitral award shall be made in writing and signed by the members of the arbitral tribunal. If an arbitrator is prevented from signing, or refuses to sign the award, the signature of the majority of the members of the arbitral tribunal shall be sufficient pursuant to §1054 of the ZPO. The tribunal must give reasons for the arbitral award unless the parties have agreed to dispense with reasons. No reasons are required for an award on agreed terms.

Within the scope of its jurisdiction, an arbitral tribunal can make the same orders in its award as could be made in a court judgment.

In particular, the arbitral tribunal can order a party to:

- make a payment;
- deliver goods;
- make a declaration of will;

or determine the existence or non-existence of a legal relationship.

The arbitral award is final and binding unless the parties have agreed to an arbitral process of appeal. The arbitral award must be notified to the parties (§1054 (4) of the ZPO). A particular form of service, such as service by a bailiff or by registered post, is not required by law.

Interest

The arbitral tribunal shall award interest to the extent that the substantive law to be applied by the arbitral tribunal allows a claim for interest. The arbitral tribunal can only award interest as a matter of discretion if the parties have granted the tribunal the right to decide ex aequo et bono (§1051 (2) of the ZPO). The filing of an arbitration claim (as opposed to a court action) does not give the claimant a right to (statutory) interest. However, the debtor will often be in default on a contractual payment and may therefore be obliged to pay contractual interest.

Termination of proceedings and settlement

The claimant can withdraw the claim and thereby terminate the arbitration. In this event the arbitral tribunal shall make an award declaring the arbitral proceedings terminated (§1056 (2) 1(b) of the ZPO). Withdrawal does not result in loss of the claim and thus the claimant is at liberty to institute fresh proceedings.

If the respondent objects to the withdrawal of the claim, and the arbitral tribunal recognises a legitimate interest of the respondent in a final settlement of the dispute, the arbitral tribunal can make an award on the merits of the claim instead of an award declaring the termination of the arbitration.

If the parties reach a settlement in the course of the arbitration, the arbitral tribunal shall also terminate the

proceedings by rendering an award pursuant to §1053 (1) of the ZPO. At the request of one of the parties, the arbitral tribunal records the settlement in the form of an arbitral award on agreed terms. Such an arbitral award can be executed as soon as it is declared enforceable by a state court. Awards on agreed terms can be declared enforceable not only by the courts but also by a notary public with the consent of the parties.

A settlement agreement is also enforceable (independent of the arbitral process) if it was concluded by the lawyers of the parties (§796a of the ZPO) and was declared enforceable by a court or (with the consent of the parties) by a notary public (§§796b and 796c of the ZPO).

Costs

The costs of the arbitration are dealt with in the first instance in accordance with the arbitration agreement between the parties. If the parties have reached no agreement on costs, the arbitral tribunal shall allocate the costs between the parties at its discretion. In exercising its discretion on costs, the tribunal shall take into consideration the circumstances of the individual case, in particular, the outcome of the proceedings (§1057 (1) of the ZPO). The costs of the arbitration also include the costs incurred by parties in the reasonable pursuit of their claims or defences, including legal fees, the costs of expert reports and travel costs. Under German civil procedure rules, the parties generally bear the costs in proportion to their degree of success or failure (§§91 - 98 of the ZPO). It stands to reason that a tribunal consisting of German arbitrators would arrive at a decision on costs pursuant to §1057 of the ZPO basically in the same way as a court making a court decision pursuant to procedural law.

Correction and interpretation of the award

If the arbitral award contains any calculation or typographical errors or similar obvious errors, the arbitral tribunal can correct these on its own initiative or at the request of one of the parties (§1058 (4) of the ZPO). At the request of one of the parties the arbitral tribunal may also:

- provide an interpretation of parts of its award; and/or
- make an additional award in respect of any claim which was presented to the tribunal but was not dealt with by the tribunal.

The role of the courts

General remarks

The courts may only interfere in arbitral proceedings to the extent provided for by the law (§1026 of the ZPO). If a party brings an action before a state court in relation to a dispute which falls within the scope of a valid arbitration agreement, the court must dismiss the action as inadmissible if the respondent invokes the arbitration agreement (§1032 (1) ZPO). Until an arbitral tribunal is properly constituted, each party can apply to the court for a ruling on the question of whether arbitration is admissible (§1032 (2) of the ZPO).

The courts' powers in relation to arbitral proceedings

Pursuant to §1062 of the ZPO, the Higher Regional Court has jurisdiction over the following arbitration matters:

- appointment and challenge of arbitrators and appointment of substitute arbitrators;
- determination of jurisdiction of the arbitral tribunal;
- judicial assistance in relation to interim measures.

The Federal Court of Justice decides on appeals on points of law arising from the decision of the Higher Regional Court. The Local Courts (Amtsgerichte) may be called upon to assist in taking evidence.

Challenging the award before the courts

The parties may agree in their arbitration agreement whether an arbitral award shall be final or whether it is subject to an arbitral appeal process. Unless otherwise agreed, an arbitration award can only be set aside at the

request of one of the parties on one of the grounds conclusively listed in §1059 of the ZPO. These include defects in the arbitration agreement, certain fundamental procedural errors, and conflict with German ordre public. Furthermore, an award is liable to be set aside if it is made pending the outcome of a court challenge to the jurisdiction of the arbitral tribunal or of an arbitrator, and the court holds that the tribunal lacked jurisdiction, or the challenge of an arbitrator was successful. Otherwise, an award can only be set aside for defects in the composition of the tribunal or other procedural irregularities if it can be shown that the error affected the award (§1059 (1) (d) of the ZPO). An application for the award to be set aside can generally only be made within a time period of three months from the day on which the party making the application received notification of the award.

The jurisdiction for challenges to arbitral awards lies with the Higher Regional Court at the place of arbitration. The court can set the award aside or can, in appropriate circumstances, set the arbitral award aside and refer the matter back to the arbitral tribunal (§1059 (4) of the ZPO). If the arbitral award is set aside and the matter is referred back to the tribunal, the proceedings will be continued with the original tribunal in place. If, however, the award is only set aside and the matter is not referred back to the tribunal, the arbitral proceedings must be repeated from the beginning. In such cases a new arbitral tribunal must be constituted because the jurisdiction of the original arbitral tribunal terminates when the arbitral award is set aside (§1056 (3) of the ZPO).

Recognition and enforcement of awards

Domestic awards

An arbitral award can be enforced in Germany if it has been declared enforceable (§1060 of the ZPO). Jurisdiction lies with the Higher Regional Court designated by the parties in the arbitration agreement or, should there be no such designation, with the court in whose district the place of arbitration is situated (§1062 (1) no.4 of the ZPO).

The court may only refuse to make a declaration of enforceability if there are grounds for the setting aside of the arbitral award under §1059 (2) of the ZPO. In particular, the declaration of enforceability cannot be refused on the ground that the arbitral tribunal has made an erroneous decision. Grounds for refusing the declaration of enforceability include significant procedural defects or conflict with public policy.

An award on agreed terms can, with the consent of the parties, also be declared enforceable by a German notary public (§1053 (4) of the ZPO).

Foreign awards

Pursuant to §1061 of the ZPO, the enforcement of foreign awards in Germany is governed by the New York Convention of 1958. If an application for an order declaring a foreign award enforceable is refused, the court must also make a declaration that the award is not to be recognised in Germany.

Legal remedies

Appeals on a point of law from court decisions on applications for the enforcement of arbitral awards can be made to the Federal Court of Justice in the cases set out in §1065 of ZPO.

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Arbitration in Hungary

Ormai és Társai CMS Cameron McKenna LLP

Historical background

The Hungarian legal system was influenced by German and Austrian law and is still based on the 19th century Austrian and German civil and commercial law codes; it has, however, developed significantly from these origins to keep up with the demands of the modern commercial world.

In 1911, shortly after the Austrian Code of Civil Procedure was introduced in 1895, a commercial arbitration system governed by the Hungarian Code of Civil Procedure was established.

In 1952, the Code of Civil Procedure was replaced by the Act on Civil Procedure, and the then existing arbitral tribunals were closed. Only foreign trade disputes could thereafter be referred to arbitration and these were dealt with by the newly-formed Court of Arbitration which was attached to the Hungarian Economic Chamber (now the Hungarian Chamber of Commerce and Industry). Under the Moscow Convention of 1972, all disputes between trading organisations in different member states of the Council for Mutual Economic Assistance ("COMECON") (including Hungary) had to be referred to the arbitral tribunal attached to the chamber of commerce in the country of the defendant. Alternatively, the parties could choose a third country's arbitral tribunal, provided that the country was also a member of COMECON.

In 1994, the new Act LXXI on Arbitration ("the Act") based on the UNCITRAL model law was introduced. The Act has removed the restrictions on arbitration contained in the

Moscow Convention and the previous law governing arbitration in Hungary.

These rules were accompanied by Section 376 of Act CXX of 2001 On the Capital Market ("the Capital Market Act"), which came into force on 1 January 2002, providing frameworks for the establishment of the Permanent Court of Arbitration of the Money and Capital Markets.

Scope of application and general provisions of the Arbitration Act

Scope of application

The provisions of the act apply to both ad hoc and permanent institutional arbitral tribunals, provided that the seat of the arbitration is in Hungary.

Parties

Under the provisions of the Act, there is a restriction on who may choose arbitration instead of court proceedings as a dispute resolution mechanism and who may be a party to arbitration proceedings.

Pursuant to Section 3(1) of the Act, arbitration may only take place if at least one of the parties is a physical or legal person dealing professionally with business activities, and the legal dispute is in connection with this activity. This rule does not apply to the proceedings of the Permanent Court of Arbitration of the Money and Capital Markets, which may also be stipulated in the absence of this condition.

Subject matter

Family law issues, state and private guardianship issues, state administration and employment issues

cannot be submitted to arbitration, but there are no other restrictions on the types of issues which may be determined by arbitration.

General principles

The general principles embodied in the Act include:

Equality of the parties

In the course of the arbitral proceedings, the parties must receive equal treatment.

Party autonomy

The parties have great scope to agree between themselves the rules that will govern the proceedings and there are very few provisions which cannot be waived by agreement (e.g., the right of application for setting aside the award cannot be waived).

Due process

Each party must be given a proper opportunity to present its case.

The arbitration agreement

Section 5(1) of the Act defines an arbitration agreement as an agreement by which the parties agree to submit disputes (which may already have arisen or may in future arise between them in respect of a definite legal relationship), whether contractual or not, to arbitration.

Formal requirements

Sections 5(2) to 5(5) of the Act set out the formal requirements for an arbitration agreement. An arbitration agreement must be in writing. It can be a separate agreement or can form part (as a separate clause) of another agreement. An arbitration agreement will be deemed to be in writing if it is concluded between the parties by way of an exchange of letters, facsimiles, telexes, or by such other means of telecommunication which produce a permanent record of the agreement. It will also be deemed to be in writing if one of the parties states in its statement of claim that an arbitration agreement was entered into between them, and the other party does not deny this in its statement of defence.

If the parties wish their arbitration proceedings to be conducted under specific institutional arbitration rules, they should designate the applicable rules (e.g., the ICC Arbitration Rules) in their arbitration agreement in an unambiguous way. The applicable procedural rules may also be defined by designating in the arbitration agreement a permanent arbitration body which uses its own rules, e.g., the Permanent Court of Arbitration

attached to the Hungarian Chamber of Commerce and Industry ("the Court of Arbitration"). The Court of Arbitration has its own detailed Rules of Proceedings ("the Rules"), but also administers arbitration proceedings under the UNCITRAL Arbitration Rules. Other provisions, e.g., regarding the number and appointment of arbitrators and other procedural issues, may be included in the arbitration agreement but are not mandatory.

Mandatory/non-mandatory provisions

The parties are free to deviate from the provisions of the Act where the Act so provides (Section 61 of the Act).

Generally, however, the parties cannot agree that the arbitration award shall be reviewed by a second-level arbitral body because, under the Act, the arbitration award issued by any permanent or ad hoc arbitral tribunal in Hungary is final and binding.

Domestic and international arbitrations

The Act draws a distinction between domestic and international arbitrations. Chapter VI (Sections 46 to 50) of the Act contains specific provisions applicable to international arbitration proceedings, but the other provisions of the Act apply also in international proceedings unless specifically modified by the provisions in Chapter VI.

Section 47 of the Act defines an arbitration as international if at the time of conclusion of the arbitration agreement:

- the parties have their seat or place of business in different states; or
- one of the following places is situated outside of the state in which the parties have their seat or place of business:
  - the place of arbitration as determined in the arbitration agreement;
  - the place of performance of the obligations originating from the legal relationship of the parties; or
  - the place with which the subject matter of the arbitration is most closely connected.

Section 46(3) provides that in international cases the Court of Arbitration acts as permanent arbitral tribunal. In international arbitrations, the parties

are free to choose the language of the arbitration (Section 48 of the Act) and the applicable substantive law (Section 49 of the Act).

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

Pursuant to Section 12 of the Act, the following persons may not be arbitrators:

- those under 24 years of age;
- those who have been barred from public affairs by a non-appealable (final and binding) court judgement;
- those who have been placed under state guardianship by the court; or
- those who have been sentenced to imprisonment without the right of further appeal, until the conviction has been erased from their criminal record.

Judges are also prohibited from accepting an appointment as arbitrator during the tenure of their office.

Section 13(1) of the Act provides that the parties are free to agree on the number of arbitrators, provided the number of arbitrators is uneven. If the parties fail to agree on the number of arbitrators, the tribunal shall be composed of three arbitrators (Section 13(2) of the Act).

Pursuant to Section 14 of the Act, the parties are also free to agree on the appointment procedure. Failing such agreement, the following rules apply.

Unless the parties otherwise agree, in arbitration proceedings with three arbitrators, each party appoints one arbitrator and the two party appointed arbitrators in turn appoint the third arbitrator, who will be the chairman of the tribunal. Generally, the claimant appoints his arbitrator in the statement of claim. The defendant has 30 days from receipt of the claimant's statement of claim to appoint his arbitrator.

If the claimant fails to appoint his arbitrator, the defendant may request the county court to make the appointment (Section 14(2) of the Act). In proceedings in the Court of Arbitration, the applicable provisions are set out in Article 18 of the Rules:
if the claimant has not appointed his arbitrator in his statement of claim, nor requested that the Court of Arbitration appoint the arbitrator, the Court of Arbitration will request the claimant to remedy such failure. If the claimant fails to comply with the request of the Court of Arbitration within the time limit set out in the Rules, the Court of Arbitration will terminate the proceedings.

If the defendant fails to appoint his arbitrator:

- in the case of arbitration proceedings in the Court of Arbitration, its President shall appoint the defendant's arbitrator (Article 18(7) of the Rules); and
- in the case of ad hoc arbitration proceedings, the county court will appoint the defendant's arbitrator upon the request of the claimant.

If, in an arbitration with a sole arbitrator, the parties cannot agree on the person to be the arbitrator, he shall be appointed by the county court upon the request of either party (Section 14(4) of the Act). The same procedure applies where, in the case of a tribunal consisting of three arbitrators, the two party appointed arbitrators are unable to agree on the appointment of the chairman.

Section 17(1) of the Act provides that a proposed arbitrator shall disclose to the parties without delay any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. An arbitrator shall accept his appointment by written declaration addressed to the parties. The arbitrator's signature on the deed containing the appointment will be regarded as acceptance (Section 17(2) of the Act).

The challenge of arbitrators

The challenge procedures are set out in Sections 18 to 20 of the Act. Each party may challenge an arbitrator (or the chairman) if circumstances exist which give rise to justifiable doubts as to his independence or impartiality, or if the

arbitrator or the chairman does not possess the qualifications specified by the parties in their arbitration agreement. A party may challenge the arbitrator which it appointed only if the circumstances justifying such a challenge became known to it after the appointment was made.

The parties are free to agree on the procedure to be followed to challenge an arbitrator. Failing such agreement, the challenging party must send a written statement containing the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of the constitution of the arbitral tribunal, or within 15 days after becoming aware of any circumstances under which a challenge may take place.

If the challenged arbitrator does not withdraw from office, or if the other party does not agree to the challenge, the other members of the arbitral tribunal will decide the merits of the challenge made by a party. If no agreement can be reached, or if two arbitrators or the sole arbitrator have been challenged, the county court shall decide the merits of the challenge upon the request of the challenging party. While such a request is pending, the arbitral tribunal – including the challenged arbitrator(s) – may continue the arbitral proceedings and make an award. In institutional arbitration proceedings in the Court of Arbitration, the President will decide on the challenge if the arbitral tribunal cannot agree, or if two arbitrators or the sole arbitrator has been challenged.

Appointment of a substitute arbitrator

Section 23 of the Act provides that, if the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the same rules as were applicable to the appointment of the original arbitrator.

Arbitrators' fees, expenses and immunity

The Act makes no provision regarding either the fees and expenses of arbitrators or their liability for breach of their duties. In institutional arbitration proceedings, the fees are set by the fee schedule of the arbitration institution.

In ad hoc arbitration proceedings, the fees are determined based on the agreement between the parties and the arbitrators. The parties and the arbitrators also have to agree on the consequences of a failure by one of the arbitrators to fulfil his mandate.

The arbitrators, like state judges, must be independent and impartial and are not representatives of the parties. They may not receive any instructions from the parties or any institutional body.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

The jurisdiction of the arbitral tribunal is determined by the arbitration agreement made by the parties. Pursuant to Section 24 of the Act, the arbitral tribunal may rule on its own jurisdiction, including the existence or validity of the arbitration agreement. An arbitration clause which is part of another agreement is treated as an independent (and severable) arbitration agreement. Accordingly, if the agreement of which the arbitration clause forms part is found to be null and void, this will not ipso jure affect the validity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction should be raised not later than at the time of submission of the defence on the merits. However, the arbitral tribunal may rule on a plea raised at a later stage, if it considers that the delay was justified (Section 24 of Act). A plea that the arbitral tribunal exceeded its jurisdiction shall be made without delay after the alleged excess of jurisdiction occurred.

The arbitration tribunal may rule on a plea of lack of jurisdiction either when the plea is raised or in its award on the merits. If the arbitral tribunal rules that it has jurisdiction, any party may within 30 days of receiving notice of the ruling request the county court to rule on the jurisdiction of the arbitral tribunal. Regardless of such a request, the arbitral tribunal may continue the proceedings and make an award pending the decision of the county court on jurisdiction.

Power to order interim measures

Pursuant to Section 26 of the Act, unless the parties otherwise agree, the arbitral tribunal may upon request order any party to comply with such interim measures as the arbitral tribunal may consider appropriate in respect of the subject matter of the dispute. In practice, any decision or order on interim measures issued by the arbitral tribunal is not enforceable (only the final arbitration award is enforceable); the arbitral tribunal may therefore request any court having jurisdiction to assist in issuing and enforcing such interim measures (see further below).

Permanent Court of Arbitration of the Money and Capital Markets

According to Section 376 of the Capital Market Act, the trade organisations of exchange markets, credit institutions and investment enterprises may jointly establish and operate the Permanent Court of Arbitration of the Money and Capital Markets. (On the basis of these rules, the Permanent Court of Arbitration of the Money and Capital Markets was actually established on 30 June 2002.) In terms of the competencies and the procedures of the Permanent Court of Arbitration of the Money and Capital Markets, the provisions of the Act shall apply, with certain exceptions laid down below.

The Permanent Court of Arbitration of the Money and Capital Markets shall have jurisdiction in any disputes:

a) in connection with the offering of securities, investment and commodity exchange services, and activities auxiliary to investment services falling within the scope of the Capital Market Act;
b) between investors in connection with investment instruments;
c) in connection with shareholders' rights;
d) in connection with exchange transactions;
e) regarding an investment service provider's refusal to provide service to a client in connection with investment instruments;

f) in connection with the exchange's internal regulations;
g) in connection with the bylaws, standard service agreement and internal regulations of clearing corporations;
h) clearing corporation financial services and activities auxiliary to financial services;
i) in connection with other services provided by investment and financial service providers, if they do not violate any exclusive right, if the parties concerned have stipulated to resort to arbitration in an arbitration agreement and if they are able to freely dispose over the subject of the proceeding.

In the cases defined in Paragraphs a), b) and d)-i) above, the proceedings of the Permanent Court of Arbitration of the Money and Capital Markets may exclusively be stipulated by the parties as a permanent court of abritration with its seat in Hungary, including the cases deemed international under Section 47 of the Act.

Conduct of the arbitral proceedings

Section 28 of the Act expressly provides that, subject to any mandatory provisions of the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal. The parties may also provide that the procedural rules of an arbitral institution shall apply. Failing such agreement, the arbitral tribunal may determine the procedure to be followed at its discretion, subject to the provisions of the Act.

Commencement of arbitration

Unless otherwise agreed by the parties, ad hoc arbitration proceedings are commenced when the other party receives the request to refer the dispute to arbitration (Section 32 of the Act).

In institutional arbitration proceedings in the Court of Arbitration, proceedings are commenced when the statement of claim is filed with the Secretariat.

Procedural powers of the tribunal

Section 28 of the Act provides that, unless the parties agree otherwise, the arbitral tribunal may, subject to the provisions of the Act, determine the rules of procedure at its own discretion. The presiding arbitrator shall decide questions of procedure if so authorised by the parties or by the other members of the arbitral tribunal (Section 38(2) of the Act).

In institutional arbitration proceedings in the Court of Arbitration, the arbitrators will apply the procedural provisions set out in the Rules. If the Rules do not cover the specific point in issue, and if the parties do not agree otherwise, the arbitrators are free to determine the applicable rules (Article 17 of the Rules).

Place and language of arbitration

The parties are free to agree on the place of arbitration both in ad hoc and in institutional arbitration proceedings. Failing such agreement, in an institutional arbitration, the proceedings shall take place at the seat of the Court of Arbitration in Budapest (Article 7 of the Rules), while in the case of an ad hoc arbitration, the place shall be determined by the arbitral tribunal having regard to the circumstances of the case (Section 31(1) of the Act).

Section 30 of the Act allows the parties to determine the language of the proceedings at any time before the commencement of the arbitration. Failing such agreement, the proceedings shall be conducted in the Hungarian language.

Submissions

In relation to ad hoc arbitration proceedings, Section 32(1) provides only that, in its statement of claim, the claimant shall state its claim, the facts supporting it, and the points in issue. The parties may submit with their statements the documents which they consider to be relevant.

The Act contains no other provisions on the format, content, and timetable of the parties' submissions, but requires the parties to name their arbitrator in the statement of claim and the statement of defence.

However, Section 34(3) requires that all submissions to the arbitral tribunal by one party must be communicated to the other party.

In ad hoc arbitration proceedings, the arbitral tribunal will give directions and set the timetable for the parties' submissions, unless otherwise agreed by the parties. In institutional arbitration proceedings, the arbitral tribunal will follow the procedural rules of the institution in relation to submissions.

In relation to institutional arbitration proceedings in the Court of Arbitration, Article 22 of the Rules is more specific and requires the claimant to indicate, in its statement of claim, the following:

- the names and addresses of the parties;
- any record establishing the jurisdiction of the Arbitration Court;
- the claim;
- the legal grounds of the claim;
- the facts on which the claim is based;
- reference to any documents and evidence;
- the amount in dispute;
- the claimant's appointed arbitrator or a request for appointment of an arbitrator by the court of arbitration.

Article 25 of the Rules makes provision in relation to the statement of defence and extends the provisions applicable to the statement of claim to the contents of the statement of defence, where appropriate.

Oral hearing and written proceedings, default by the parties

The arbitral tribunal must hear the parties and give them the opportunity to make submissions at an oral hearing unless the parties agree otherwise (Section 34(1) of the Act). The tribunal shall also hear all the witnesses and experts (if they are called by the tribunal upon the request of the parties to explain their written reports). The parties shall be given sufficient prior notice of any hearings or of any procedural action of the arbitral tribunal which involves the inspection of property or documents

(Section 34 (2) of the Act). The arbitral tribunal will prepare minutes of the proceedings and shall serve a copy thereof on each of the parties (Section 34 (4) of the Act). However, the parties are free to agree that their case shall be dealt with in proceedings in writing without oral hearing.

Pursuant to the default provisions in Section 35 of the Act, unless the parties agree otherwise, the arbitral tribunal shall terminate the proceedings if the claimant fails to present its statement of claim without giving sufficient reasons. If the defendant fails to present its statement of defence, the arbitral tribunal shall continue the proceedings without considering such failure in itself as acceptance of the claimant's allegations. If any of the parties fails to attend any of the arbitral hearings, or fails to produce its evidence, the arbitral tribunal may continue the proceedings and make an award on the basis of the evidence before it.

Confidentiality

The Act contains an express provision in Section 29 that the arbitration proceedings are private and not open to the public unless otherwise agreed by the parties.

Evidence

There is no specific section in the Act dealing with evidence. The parties are free to prove their case by the usual means of documentary, witness or expert evidence. Section 34(1) of the Act clarifies that the arbitral tribunal has no power to compel witnesses to attend and give evidence before it; but, pursuant to Section 37(3) of the Act, the arbitral tribunal may call upon the assistance of the local court in relation to the production of evidence or the examination of witnesses. Pursuant to Section 36 of the Act, unless otherwise agreed by the parties, the arbitral tribunal has power to appoint one or more experts to report on specific issues. The arbitral tribunal may require any party to provide an expert so appointed with relevant information or documents.

In institutional arbitration proceedings, Article 35 of the Rules contains specific procedural rules in relation to evidence.

Making of the award and termination of proceedings

Choice of law

In international arbitrations, the parties are free pursuant to Section 49(1) of the Act to determine the applicable substantive law according to which the arbitral tribunal must make its award. If the parties fail to determine the applicable law, it shall be determined by the arbitral tribunal (Section 49(2) of the Act).

The parties may authorise the arbitral tribunal to make its decision ex aequo et bono (instead of pursuant to the applicable law).

Section 50 of the Act clarifies that the tribunal shall decide the dispute in accordance with the terms of the contract as well as taking into account the trade practices applicable to the transaction in issue.

Decision making by the tribunal

The Act does not stipulate an express time limit within which the tribunal must make its decision, but the arbitral tribunal should make its decision as soon as possible and normally within 30 days of the close of the arbitration proceedings. In institutional arbitration proceedings in the Court of Arbitration, the award, and the reasons on which it is based, shall be delivered in writing to the parties within 30 days (or 60 days in the case of an arbitral tribunal comprising a foreign arbitrator) from close of the oral hearings (Article 41 of the Rules).

If the arbitral tribunal consists of more than one arbitrator, it shall make its decision by a majority of votes, unless the parties agree otherwise. Failing a majority, the presiding arbitrator shall make the decision (Section 38 (1) of the Act and Article 39(1) of the Rules).

Form, contents and effect of the award

Section 40 of the Act provides that the award must be in writing and must be signed by all of the arbitrators. However, in arbitral proceedings with more than one

arbitrator, it is sufficient that the award be signed by a majority of arbitrators, provided that the award states the reason for why signatures were omitted. The award must also state the date on which it is made and the place of the arbitration (Section 41(3) of the Act).

Section 41(2) of the Act requires that the award must state the reasons on which it is based, unless it is an award on agreed terms. A signed copy of the award shall be served on each of the parties (Section 41(4) of the Act).

Article 40 of the Rules makes similar provision as to the form and contents of an award in institutional proceedings in the Court of Arbitration.

The award is final, binding and non-appealable even if the parties have agreed otherwise. The award has the same effect as a court judgement and can be enforced with the assistance of the courts.

Settlement

The proceedings will terminate if the parties settle their dispute. The arbitral tribunal shall record the settlement in the form of an award on agreed terms if so requested by the parties, provided that the arbitral tribunal considers that the settlement is in accordance with the law (Section 39 (2) of the Act). An award on agreed terms has the same effect as any other award made by an arbitral tribunal.

Termination of proceedings

The arbitration can be terminated by a final award on the merits of the claim or by an order for termination of the arbitration. Pursuant to Section 42(2) of the Act, the arbitral tribunal shall issue an order for termination if:

- the claimant fails to submit its statement of claim;
- the claimant withdraws its statement of claim, unless the defendant objects thereto and the arbitral tribunal accepts that the defendant has a legitimate interest in obtaining a final award;

- the parties agree to terminate the proceedings; or
- the arbitral tribunal finds that continuing the proceedings has become unnecessary or impossible for any other reason.

Article 44 of the Rules makes provision for the termination of institutional arbitration proceedings in the Court of Arbitration without a final award on the merits.

Save for the subsequent correction or interpretation of the award, or for the making of an additional award (as to which see further below), the mandate of the arbitral tribunal terminates with the termination of the proceedings.

Costs

Section 41(2) of the Act (and Article 40(1) of the Rules) require the arbitral tribunal to make provision for the costs of the proceedings, including the remuneration of the tribunal, in its final award and to state which party has to pay the costs (or any proportion thereof). The arbitral tribunal will generally apportion the costs between the parties. In practice, the losing party is usually ordered to pay the costs of the proceedings. However, if the winning party is successful only in part, the arbitral tribunal may require the parties to pay the costs in proportion to their relative success or failure.

Correction and interpretation of the award

The relevant rules are set out in Sections 43 to 45 of the Act.

Upon the request of either party, or on the arbitral tribunal's own initiative, the arbitral tribunal may correct any change or error of names, error in numbers or computation, spelling mistakes, or any other typographical errors of a similar nature in the award.

If the parties so agree, the arbitral tribunal may interpret a specific part or point of the award upon the request of either party.

Either party may request an additional award if the arbitral tribunal failed to make an award on any claim presented in the arbitral proceedings.

A request for correction or interpretation of the award, or for an additional award, must be submitted to the arbitral tribunal within 30 days of receipt of the award unless the parties agree otherwise. The request must be made with notice to the other party.

The role of the courts

The jurisdiction of the courts

If a valid and binding arbitration agreement has been made by the parties, the ordinary courts are excluded from assuming jurisdiction over the subject matter specified in the arbitration agreement. Section 7 of the Act expressly provides that the courts shall not intervene in arbitration proceedings except where so provided by the Act.

However, the Act gives the courts limited jurisdiction to provide legal assistance to the arbitral process in certain circumstances. In addition to the courts' powers in relation to the appointment and challenge of arbitrators discussed above, the courts have further powers (discussed below).

Stay of court proceedings

The court before which an action is brought in a matter which is the subject of an arbitration agreement must reject the claim without issuing a summons or shall terminate the action upon the request of any one of the parties, unless it finds the arbitration agreement null and void, inoperative, or incapable of being performed. The application for the non-suit of the action must be made no later than in the defendant's response on the merits.

The court therefore has jurisdiction to determine the validity of the arbitration agreement before dismissing the claim. The court also has jurisdiction to review the arbitral tribunal's assumption of jurisdiction upon application of a party, see further below.

Preliminary rulings on jurisdiction

If the arbitral tribunal finds pursuant to Section 24 of the Act that it has jurisdiction, within 30 days of receiving notice of the ruling, a party may request that the competent county court decide on the jurisdiction of the arbitral tribunal (Section 25(1) of the Act).

Interim protective measures

According to Section 26 of the Act, unless the parties otherwise agree, the arbitral tribunal may, upon request, order any party to take such interim measures as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. In practice, an order granting interim measures issued by the arbitral tribunal is not enforceable (only a final arbitration award is enforceable). Parties to arbitration proceedings therefore may at any stage before or during the arbitration proceedings apply to the competent court for interim measures under Section 37(2) of the Act. The court may order measures to safeguard the claim of one party (e.g., by freezing a bank account) in a case pending before an arbitral tribunal if the party requesting such measure provides sufficient grounds for the measure to be granted and the claim is evidenced by a public or private deed with full probative force (Section 37(2) of the Act). Section 37(1) of the Act expressly provides that such applications are not incompatible with an arbitration agreement.

Obtaining evidence and other court assistance

The local courts have jurisdiction pursuant to Section 37(3) of the Act to assist the arbitral tribunal with obtaining evidence if the production of evidence before the arbitral tribunal is likely to entail considerable difficulties or disproportionately high additional costs.

Challenging the award before the courts

Pursuant to Section 54 of the Act, an arbitration award cannot be appealed to the court. The parties may only challenge the award by applying to the court for the award to be set aside, but only for the reasons specified in Section 55 of the Act. These are:

- the party which concluded the arbitration agreement did not have legal capacity;
- the arbitration agreement is not valid under the law which the parties have chosen, or failing any indication thereon, under Hungarian law;

- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
- the award was made in a legal dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions not submitted to arbitration may be set aside; or
- the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a mandatory provision of the Act, or failing such agreement, was not in accordance with the Act.

The setting aside of the arbitration award may also be requested if:

- the subject matter of the dispute is not capable of settlement by arbitration under Hungarian law; or
- the award is in conflict with the rules of Hungarian public order.

The application for setting aside the award must be submitted to the court within 60 days of the receipt of the award. No appeal may be lodged against the judgement of the court on an application for setting aside of the arbitration award.

Recognition and enforcement of awards

Domestic awards

Pursuant to Section 58 of the Act, the effect of an arbitration award is the same as that of a final and binding (non-appealable) court judgement. The court which has jurisdiction for enforcement is the local court where the defendant has its seat or place of business or where the defendant has saleable property. The enforcement is governed by the legal rules on enforcement by the

court. The court may only refuse enforcement of the award if the subject matter of the dispute is not subject to arbitration under Hungarian law, or if the award is contrary to the rules of Hungarian public order (Section 59 of the Act).

Foreign awards

Awards issued outside of Hungary are enforceable in Hungary according to the provisions of multilateral conventions or bilateral treaties ratified by Hungary. The most important arbitration convention is the 1958 New York Convention on the Recognition on the Enforcement of Foreign Arbitral Awards, to which Hungary is a party.

If there is an international treaty under which the award may be enforced, the competent court for enforcement is the county court where the defendant has its seat or place of business or where the defendant has saleable property. The party applying for enforcement must supply the original award or a certified copy of it and must also attach a certified Hungarian translation if the award was issued in a foreign language.

The court will refuse to enforce the award if (i) the subject matter of the dispute is not subject to arbitration under Hungarian law; or (ii) the award is contrary to the rules of Hungarian public order.

Court proceedings

The local courts have jurisdiction to provide assistance in obtaining evidence and other court assistance in accordance with Section 37 of the Act, whereas the county courts have jurisdiction in all other arbitration matters, including the challenge (setting aside) of an award (Section 51 of the Act).

Conclusion

Arbitration has a long tradition in Hungary but, until the change of regime in 1990, it was not a popular method of dispute resolution and had no comprehensive legal framework. The previous legal system did not recognise ad hoc arbitration and only foreign trade disputes could be arbitrated in Hungary.

The Act, which is based on the UNCITRAL model law, now provides a modern framework for arbitration and assures the autonomy of the parties and of the arbitration process. In accordance with the Act, new permanent arbitration institutions were established to deal with general and specific issues (e.g., e-commerce, stock and commodity exchange disputes). The most popular permanent arbitration institution in Hungary is the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, which is used not only by Hungarian but also by international companies.

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Arbitration in Italy

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Historical background

Arbitration is governed by the Italian Code of Civil Procedure (Book IV, title VIII of the Codice di Procedura Civile) ("CPC").

The traditional Italian statutory rules on arbitration confirmed the restrictive approach of the legislator with regard to derogations to the judicial power pertaining to the State, even if the CPC of 1865 had already accepted the validity of arbitral agreements between parties. Although Italy had ratified several different international conventions regarding arbitration, such restrictive approach could still be found in the CPC, e.g. the "exequatur" proceedings were considered essential for the validity of the award.

The CPC was amended by two important laws:

- Law 9 February 1983, n. 28 which was the first attempt to reduce the rigidity of the Arbitration Act by excluding Italian nationality as a basic requirement in order to be appointed as arbitrator;
- Law 5 January 1994, n. 25 which provided for new rules regarding international arbitration, in compliance with the international conventions (in particular the New York Convention 1958 concerning the recognition and enforcement of awards).

Scope of Application of the Arbitration Legislation

Scope of application

The CPC applies to all arbitration proceedings in Italy whenever statutory rules are not excluded by the parties. The CPC also contains provisions regarding the recognition and enforcement of foreign arbitration awards. Hence, the CPC provides for 3 different bodies of rules depending on the type of arbitration:

National arbitration

The statutory rules governing the national or domestic arbitration apply in the event all the parties reside or have their registered office in Italy and the seat of the arbitration is in the same country.

International arbitration

When, on the date of signature of the arbitration clause, one of the parties has its residence or registered office abroad, or whenever the major part of the obligations in dispute have to be performed abroad, the arbitration is considered international even if the seat of the arbitration is in Italy.

The rules applicable to national arbitration apply to international arbitration, with some minor differences to simplify the proceedings (i.e. the arbitration clause contained in a general contract or in standard forms does not need to be confirmed in writing, the decision can be adopted by the arbitrators in a video conference meeting, etc.).

The award issued in an international arbitration has the same status as a national award. Therefore the national rules on annulment and recognition apply, with some exceptions.

Foreign arbitration

The CPC provides for specific rules regarding foreign arbitration whenever the award has been made in another country and the recognition and enforcement is required in Italy. In such cases, the arbitration shall be considered foreign even if one of the parties is Italian or if the Italian law has been chosen to govern the disputes between the parties.

A specific body of rules provides for recognition of the award. Indeed, to obtain the recognition and the enforcement of an award, the petitioning party has to supply the duly authenticated original award or a duly certified copy and the original agreement between the parties or a duly certified copy thereof. The competent Italian authority, which is the Court of Appeal, may refuse the recognition and the enforcement only if it finds that the matter at controversy was not available to be subject to arbitration under Italian law and that recognition would be contrary to Italian public policy. Nevertheless the party against whom the award is to be enforced may impede recognition only if it proves one or more of the following: (i) incapacity of the other party; (ii) nullity of their agreement; (iii) the fact that the composition of the arbitral authority or the arbitral procedure was not in accordance with either their agreement or with Italian law or that the decision is on matters beyond the scope of the submission to arbitration.

Arbitraton irrituale or free arbitration

A peculiarity of the Italian system in relation to national arbitration is the existence of the "arbitrato irrituale" which differs from the "arbitrato rituale".

The "arbitrato irrituale" is an alternative arbitration proceeding which does not lead to an enforceable award. The final decision is binding on the parties and has the same validity of a contract. In an "arbitrato irrituale" the arbitrator delivers a final decision and the parties are bound to respect the final decision as a consequence of the arbitration agreement. The arbitration agreement may require that the arbitrator is to decide according to law or according to aequo et bono (good and equitable) principles. The parties can decide the procedural rules to be followed by the arbitrator(s): the procedural rules are usually simplified compared to ordinary arbitration, but, due to the adversarial nature of the proceedings, the right to be heard, submit documents and file claims must be granted in favour of both parties.

Given that the parties may decide that the arbitrator may apply the procedural rules provided for ritual arbitration under the CPC and that the arbitrator may be required to conduct the arbitration according to law, in practice, the two types of arbitration are very similar. However, the important difference between the two concerns the enforceability of the award. If the arbitration agreement does not specify the nature of the arbitration (ritual or irritual) and the interpretation of it is doubtful, the arbitration is considered 'irritual' and therefore it may only be enforced other as a contract.

An award following an arbitrato irrituale may only be challenged as a contract, and only on very limited grounds:

- incapacity of the parties or of the arbitrators (legal incapacity or incapacity to understand, which is known by the other party);
- breach of the terms of office by the arbitrators;
- defective consent:
  - relevant and essential mistake on the facts (with the exclusion of mistake of law);
  - coercion (when force or threat were able to cause a reasonable person to fear that he or his properties could or would be exposed to a serious detriment);
  - fraud (when the deception of one of the parties determined the other to enter into the contract).

An award is challenged by ordinary proceedings before the competent Court of First Instance.

The main advantages of this type of arbitration are confidentiality (no intervention of the Court is required) and exemption from stamp duty (which must be paid on ritual awards). On the other hand, since the arbitration reform of 1983 and 1994 has increased the private nature of the procedure, strongly attenuating the procedural requirements, the arbitrato irrituale is less favoured than arbitrato rituale.

General principles

The CPC embodies the following general principles:

Due process

Under this principle the parties to arbitration are entitled to equal treatment by the Courts and must be entitled to submit their requests and be heard at the same conditions. Moreover, the arbitral tribunal has a general obligation to be impartial.

Autonomy

The parties are free to agree on the object of the dispute which they wish to refer to arbitration, as well as on the arbitrators, rules of procedure, seat of arbitration, applicable law, etc. The parties' autonomy is limited by mandatory statutory rules, over which Courts of law have exclusive jurisdiction.

Non-intervention by the Courts

Courts of law cannot intervene in the arbitration procedure or on the arbitration, except where expressly provided for in the CPC, i.e. in those cases relating to the power to grant seizure orders or other urgent preventive measures, or relating to decisions on incidental issues which may arise and which can not be subject to an arbitration.

The Arbitration Agreement

Formal requirements

For the purpose of its validity, the arbitration agreement or the arbitration clause must be in writing and must clearly set out the subject matter submitted to the arbitration (art. 807 CPC). In the absence of written acceptance, the arbitration agreement is void. Nonetheless, the CPC does not require the agreement to be embodied in one single document. Hence, the agreement may arise out of an exchange of letters. Further, following the implementation of Directive 1999/93/CE in Italy, an agreement by exchange of e-mails signed with electronic signature is also considered to meet the legal requirements of a written document.

In the event of an arbitration clause being embodied in the general conditions of sale, this clause has to be explicitly confirmed in writing by the parties. This requirement has somewhat been attenuated with respect to international arbitration. Indeed, in international arbitration, an arbitration clause contained in the general conditions of an agreement, or in standard forms, is considered valid without express confirmation in writing (provided that the agreement is not subject to Italian law). In addition, in international arbitration, an arbitration clause contained in general conditions incorporated in a written agreement is valid if the parties were aware of the clause or should have known of it by using ordinary diligence (art. 833 CPC).

Separability

The validity of the arbitration clause is independent from the contract in which it was included (art. 808 par. 3 CPC). A party's power and capacity to enter into a contract also involves the power to agree on the arbitration clause. An arbitration agreement is subject to the same rules governing the validity of those contracts which exceed the ordinary course of administration. This means and implies that who agrees to an arbitration clause must have full legal capacity to do so and must also fulfil the specific requirements needed for legal representation.

Arbitrability

Pursuant to art. 806 of the CPC, there are certain types of disputes which cannot be submitted to arbitration; among others, claims concerning:

- individual contracts of employment (which can be submitted to arbitration only if expressly provided for in collective labour agreements and if the parties' right to turn to the ordinary Courts is not affected. The arbitration clause in collective or individual labour contracts is null and void if it authorises the arbitrators to decide ex aequo et bono and if it excludes the possibility to challenge the award);
- employment agreements within administrative bodies;
- agency and distribution when executed by individuals;

- social security issues;
- work-related accidents and diseases deriving from carrying out a professional activity;
- agricultural claims (share farming, contracts with farmers);
- patent rights;
- disputes which fall under the criminal jurisdiction;
- bankruptcy (however, where the arbitration proceedings were started before the declaration of bankruptcy, then the receiver would be able to carry on the arbitration);
- civil status (e.g. nationality, electoral issues, etc.);
- divorce;
- matters which cannot be settled by the parties, such as disputes concerning the illegality of a contract or concerning company accounts.

An arbitration award relating to disputes which were not available to be submitted to arbitration in the first place is subject to annulment. Further, the Italian Courts may refuse to recognise or enforce a foreign award if it relates to a dispute which cannot be submitted to arbitration under Italian Law.

The composition of the arbitral tribunal

As a general rule, the parties have to determine the procedure for appointment and the number of arbitrators. The parties may appoint one or more arbitrators, provided that the total number of arbitrators is always an odd number. In the event the parties fixed an even number of arbitrators, an additional arbitrator has to be appointed by the President of the Court, unless appointed by the parties. If no number has been fixed in the agreement and the parties have not reached an agreement on this matter, the number of arbitrators is three. If the parties are unable to appoint the arbitrators, the President of the Court shall proceed with the appointment, unless the parties have provided for an alternative appointment procedure (art. 809 CPC).

If the parties do not appoint the arbitrators in the arbitration clause (and this happens in most cases), either party may serve on the other a deed of appointment prompting the other party to appoint his arbitrator, and give notice of the appointment to the interested arbitrator. The other party has 20 days from receipt of such invitation to appoint its arbitrator. Should he fail to do so, the other party may request the President of the Court of the district in which the arbitration has its seat (or of the place in which the arbitration agreement or contract have been made or, if this place is abroad, the party may apply to the President of the Tribunal of Rome) to appoint the arbitrator. The Court order by which the President appoints the arbitrator may not be appealed (art. 810 CPC).

The same procedure applies where the parties have assigned the power to appoint the arbitrator to a third party, who failed failed to appoint the arbitrator.

Capacity to act as an arbitrator

Under art. 812 the parties may appoint Italian arbitrators as well as foreign ones.

Minors, individuals who are legally incapable, individuals subject to bankruptcy proceedings or barred from holding a public office cannot be appointed as arbitrators.

Acceptance of the arbitrators

Acceptance of the arbitrators must be made in writing, either by signing the arbitration agreement or by virtue of a separate act.

Duties of the arbitrators

The arbitrators have to render their award within the time limit set by the parties or by law; if they fail to do so and the award is declared null a void due to their delay, they are liable for the damages suffered by the parties.

The arbitrators cannot withdraw from their office after having accepted it unless there is a proper justifying cause to do so.

If there is no such cause, they may be held liable for the damages arising from the circumstance that the arbitration did not take place properly.

Unless otherwise agreed, the arbitrator who fails to perform or who postpones any act connected with his office can be replaced by agreement of the parties or by a third party appointed for this purpose by the arbitration agreement. In the event of the parties failing to reach an agreement on the replacement within a period of fifteen days after the notice to the defaulting arbitrator requiring him to perform the act, each party may file an application for removal to the competent Court. The President, having heard the parties and ascertained the arbitrator's failure or delay to perform, may remove the arbitrator from office and replace him. There is no appeal against the President's decision.

Replacing an arbitrator

The Arbitrator may be replaced in case of:

- incapacity;
- conflict of interests;
- failure to act properly or delaying the procedure, provided there is evidence that the parties have prompted the arbitrator to act;
- withdrawal from office for proper justifying cause.

When, for the above reasons, one or more appointed arbitrators are no longer in office, arbitrators must be appointed according to the arbitration agreement and/or the procedure set out above.

Rights of arbitrators (fees and expenses)

Art. 814 of the CPC expressly recognises the arbitrators' entitlement to fees and to reimbursement of their expenses. All parties to the arbitration are jointly and severally liable for the fees and expenses of the arbitration procedure. Each party is nevertheless allowed

to recover from the other the fees and expenses paid to the arbitrators within the limits set out in the award.

It is commonly accepted that the role of the arbitrators also includes the right to determine their own fees in the award. However, subject to the parties' approval, the determination of fees made by the arbitrators is not binding on the parties. Failing any payment, the arbitrators may file an application to the President of the Court in order to have their fees determined. The Court's order cannot be challenged by the parties and is immediately enforceable.

Challenge of the arbitrators

A party may challenge the appointment of the arbitrator chosen by the other party by applying to the President of the Court in the following cases:

- the arbitrator has an interest in the proceedings or in a similar proceedings;
- the arbitrator or his wife/her husband has family ties up to fourth degree, or is living together, or has a close friendship with one of the parties or with one of his lawyers;
- the arbitrator or his wife/her husband are involved in proceedings which are pending against one of the parties of the arbitration; or they are creditor or debtor to one of the parties or to his lawyers;
- there is strong hostility between the arbitrator and one of the parties or one of his lawyers;
- the arbitrator is tutor, agent or employer of one of the parties, or a director of an entity having an interest in the proceedings;
- the arbitrator has advised, has acted as witness or was involved as judge or arbitrator in the same matter;
- there are serious reasons of convenience which make it advisable not to act in the proceedings.

The time-limit to file an application to challenge the appointment is of 10 days from the appointment of the arbitrator or from the date of discovery of the grounds for challenge.

The decision of the President cannot be challenged by the parties.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

The arbitral tribunal is competent to determine the validity of the arbitration agreement, which includes the capacity of the parties, compliance with the requirements of the CPC, the object of the controversy and the appointment of the arbitrators.

Such decision is subject to judicial control upon request of one of the parties.

Conduct of arbitral proceedings

Commencement

The arbitral proceedings are deemed to commence when one of the parties serves on the other party a notice of his/her appointment of the arbitrator and requests the other party to appoint his/her arbitrator.

General procedural principles

The arbitrators benefit from a broad autonomy, but have to comply with the requirements of fair proceedings. No argument of the other party may be taken into consideration unless the other party has the opportunity to reply under the same circumstances.

Rules governing the procedure

Save for the compulsory procedural rules set out above, the parties are free to determine the procedural rules governing the arbitration. These rules have to be determined before the arbitrators accept their office. Upon acceptance, the parties may no longer modify the procedure. It is commonly accepted that it is a proper reason for an arbitrator to withdraw from office should the parties insist on amending the procedure rules during the course of the arbitration.

Where the parties have not agreed on the applicable procedure, the arbitrators shall apply the rules which they deem most suitable. The only mandatory rule that the arbitrators must comply with, is the fixing of the time-limits by which the parties have to submit their demands, documents and replies (art. 816, 4°). This

provision is considered to be the strict minimum to guarantee fair proceedings.

In the event that the arbitrators do not comply with the rules chosen by the parties, the ordinary Court may annul the award.

Seat of the arbitration

The parties shall determine the seat of the arbitration in the Italian territory; otherwise the seat shall be determined by the arbitrators on their first meeting. An international arbitration as defined by the CPC must have its seat in Italy. Nevertheless, it is not necessary for the award to be delivered in Italy.

Language of arbitration

The parties are free to determine the language which shall apply to arbitration proceedings.

In an international arbitration, in the absence of an express provision in the arbitration agreement or in the event the parties fail to reach an agreement in relation to the language to be utilised, the arbitrators may choose the most appropriate language, in light of the given circumstances (art. 835 CPC).

Choice of law

The parties may choose in full autonomy the law applicable to the matter at controversy and where they fail to reach an agreement, arbitrators intervene, determining the applicable law. Unless the parties authorise them to do so, the arbitrators may not apply the ex aequo et bono rules ("equità") or lex mercatoria.

With respect to international arbitration, in the absence of an agreement between the parties, the applicable law shall be the law of the country with which the agreement between the parties is most closely connected. Under art. 834 of the CPC, the arbitrators, when choosing the applicable law, have to take into account both the contract and the trading practice. It is generally accepted that in international arbitration the arbitrators may apply the lex mercatoria or the system of dépeçage (i.e.

application of different legal systems to govern the arbitration procedure).

Submissions

The arbitration agreement, or the arbitrators if there are no provisions on this matter in the agreement, may provide for specific time limits within which the parties have to file their formal statements and deposit all useful documents (art. 816 CPC).

The content of the formal statements as well as the choice of the documents that the parties file with the arbitral tribunal depend exclusively on the parties. The tribunal has no power to order the filing of any particular documents or statements.

The parties are not obliged to disclose the relevant facts or documents and they usually submit to the arbitrators only the facts and documents that they deem useful in order to offer evidence of the grounds of their rights and claims.

Oral hearings and written procedures

The parties may agree to conduct the arbitration by virtue of oral hearings or merely by written procedure. It is common practice, to carry out the proceeding in writing with a final oral hearing in which both parties have the opportunity to set out their arguments.

Evidence

The rules of evidence follow the common structure of the arbitration, i.e. the parties may agree the applicable rules, failing any provision in the arbitration agreement, the tribunal has to fix the most appropriate rules of evidence, which are commonly the Italian statutory rules on evidence matters.

Parties and arbitrators may nevertheless ignore the applicable Italian legislation, by accepting more flexible means of evidence (e.g. e-mail correspondence) or, on the other hand, by limiting the evidence only to written documents. Either way, the arbitrators or the parties can never seek assistance from the Courts in regard of evidence issues.

In addition, the admission of evidence may be delegated to one of the arbitrators.

The arbitrators may hear witnesses in a place of their own choice (e.g. seat of the arbitration, at witnesses' home or office) or require a written statement of their testimony (art. 819 CPC).

Nevertheless it seems that the following activities are deemed to be incompatible with the functions performed by arbitrators:

- to order third parties or the public administration to provide documents or information;
- to force witnesses to appear at the hearings;
- to request that witnesses take a legally binding oath;
- to seek further expert advice when the arbitrators were appointed by the parties for their expertise.

Incidental issues

According to art. 819, the arbitral tribunal may deliver interim awards regarding all queries which arise during the arbitral proceedings (issues relating to evidence, witnesses, etc), as far as they fall within the scope of the arbitration agreement. The arbitrators can revoke these interim measures at any time.

If during the proceedings an issue arises which cannot be settled by arbitration according to the law or the arbitration clause, then the arbitrators shall suspend the proceedings where the decision of the award depends on this issue: in such case, time limits shall be suspended until the judgment on the incidental issue is served on the arbitrators.

In all other cases the arbitrators shall decide on all issues arising from the arbitration proceedings.

Urgent preventive measures

Arbitrators do not have the power to grant seizure orders or other urgent preventive measures. As a consequence the parties would need to file an application to the Court which would be competent for such measures.

The jurisdiction of the arbitration is not excluded by the fact that the dispute referred to it is connected with an action pending before an ordinary Court.

Making of the award and termination of preceedings

Decision making by the tribunal

Besides those mandatory rules on fair proceedings, the parties may lay down in the arbitration agreement specific rules regarding the decision making. In addition, under art. 823 of the CPC the arbitrators must gather in conference and decide by simple majority. With respect to international arbitration, the CPC allows the arbitrators to decide in a personal video telephonic conference, provided that minutes of such meeting are subsequently drafted (art. 837 CPC).

In the absence of agreement between the parties, the arbitrators have to deliver their award within 180 days from the acceptance of their office (art. 820 CPC). When there is more than one arbitrator, the period starts from the latest acceptance. The time limit is suspended where a petition for challenge is filed up until a decision on it is rendered and it is interrupted when it is necessary to replace one or more arbitrators. The CPC provides nevertheless for different cases in which the above period can be extended. Where the tribunal has to admit evidence (e.g. witnesses) or an interlocutory award has been rendered, the period may be extended only once and for no longer than a further 180 days.

In case of death of one of the parties, the time limit is extended by thirty days.

The period can only otherwise be extended by an express written agreement between the parties.

Form, contents and effect of the award

Under art. 823 of the CPC, the award has to be rendered by a majority vote of the arbitrators meeting in personal conference, recorded in writing and must contain the following indications:

- identity of the parties;
- reference to the arbitration agreement and to the submitted dispute;
- a brief statement of the reasons underlining the decision;

- order;
- indication of the seat of the arbitration and of the modalities of approval;
- signatures of all the arbitrators and date of the signature. In this respect, the signature may be placed somewhere different from where the decision is being delivered and it may also be outside of Italy. Where there are more arbitrators, then they may sign in different places. In addition, the signature of the majority of the arbitrators is sufficient provided that the decision was taken in personal conference involving all the arbitrators and that the award mentions explicitly that one or more arbitrators refused or was unable to sign the award.

The award becomes binding on the parties from the moment the last signature is placed.

The arbitrators draft the award in as many originals as there are parties and give notice of it to each party by handing over an original or sending it by registered letter within 10 days from the date of the last signature.

Settlement

If the parties settle their dispute(s) whilst arbitration proceedings are still pending, it is common practise for them to inform the tribunal that they wish to withdraw from the procedure. The parties may also request that the arbitrators record their settlement in the form of an award, but there is no obligation in this respect.

Correction and interpretation of the award

Pursuant to art. 826 of the CPC, the parties may require the same arbitrators who decided the case to rectify the award when it includes formal omissions, errors and miscalculations. The tribunal has to take a decision regarding the corrections within a period of 20 days following the request of one or more parties. Within that same period of time it has an obligation to hear the other parties.

Where the award has been filed with the Court for enforcement, it shall be for the Court to decide on the possible rectifications.

Recognition and enforcement of awards

Domestic award

Under art. 825 of the CPC, the enforcement of a domestic award is subject to an application to the Court where the arbitration has it seat. Upon assessment of the formal requirements of the award, the Court shall issue an execution order ("exequatur").

The parties can file a complaint with the same Court, when the latter denies the enforcement of the award. The Court has to decide on the complaint within 30 days from the notification of the Court's order to the parties. The decision of the Court is final and thus not subject to appeal.

Notwithstanding the outcome of the enforcement procedure, the parties may always apply to the Court of Appeal to require the annulment of the award within the legal time limits.

International award

The statutory rules applicable to the enforcement of domestic awards apply to the enforcement of international awards.

Foreign award

The 1994 reform introduced a recognition and enforcement regime for all foreign arbitral awards, applicable in all cases unless more favourable provisions are available in an international treaty. The recognition and enforcement of foreign awards comply almost entirely with the provisions of the 1958 New York Convention and the grounds of setting aside in the UNCITRAL model law.

In order to enforce a foreign award in Italy, the party has to file an application with the President of the Court of Appeal where the other party has its residence, and with the Court of Appeal of Rome in those cases where the other party is not resident in Italy.

The party has to provide the President of the Court of Appeal with an original copy of the foreign award and the arbitration agreement, together with a certified Italian translation.

Upon assessment of the above formal requirements, the President of the Court of Appeal has to declare the award enforceable in Italy, unless he establishes ex ufficio that:

- the subject-matter of the dispute cannot be settled by arbitration under Italian Law (e.g. civil status and separation of husband and wife, disputes regarding individual contracts of employment, agency relationship, representatives, employment within administrative bodies, social security issues, work-related accidents and diseases deriving from carrying out a professional activity, etc.);
- there is a breach of public policy: the Italian Courts do not apply the domestic concept of public policy but the international public policy one as intended in the New York Convention. The Court of Appeal of Milan described this concept as "a body of universal principles shared by nations of similar civilisations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".

The Court of Appeal shall refuse the recognition and/or the enforcement upon request of the party against whom it is invoked if that party can prove that:

- one of the parties to the arbitration agreement was under some incapacity, or the agreement was not valid under the law chosen by the parties or, failing any indication thereon, under the law of the State in which the award was rendered;
- the applicant party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to defend his case;
- the award deals with a dispute not provided by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; however, where decisions on

matters submitted to arbitration can be separated from those not allowed to submitted, that part of the award which contains decisions on matters which can be submitted to arbitration may be enforced;

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law under which the arbitration was performed;
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The role of the courts

The jurisdiction of the Courts

As a general rule, if the parties agreed on arbitration, the Court has to declare that it has no jurisdiction on the merits of the matter at controversy. Even though the CPC recognizes the autonomy of the arbitral tribunal, the President of the Court has the power to settle conflicts which may arise during the arbitration proceedings, e.g. settlement of the number of the arbitrators, appointment, removal and replacement of the arbitrators as well as settlement of the fees and the costs of the arbitration.

The role of the Court is also important whenever a query arises during the arbitration procedure that cannot be settled by arbitration under Italian law.

Finally, it is important to mention that arbitrators are unable to apply to the Courts when the parties or third parties do not collaborate in the procedure (e.g. appearance in Court of a witness, providing certain evidential documents, etc.).

Urgent protective measures

Art. 818 of the CPC reserves the jurisdiction on urgent preventive measures entirely to the ordinary Courts. However, the proceedings before the ordinary Courts regarding protective measures do not suspend the arbitration proceedings.

Preliminary ruling on points of jurisdiction and law

The CPC did not provide for arbitrator to have the power to submit any preliminary ruling to the Italian Constitutional Court ("Corte Costituzionale") or to the European Court of Justice. The tribunal may nevertheless suspend the arbitration proceedings in order to allow either party to apply to the above Courts in such cases.

Challenging awards before the Courts

The CPC set out the following grounds on which a national award can be challenged:

- lack of a valid arbitration agreement;
- incorrect appointment of arbitrators;
- award rendered by an arbitrator who could not be appointed;
- award given in relation to matters beyond the jurisdiction of the arbitral tribunal, the tribunal has not given judgment on one or several matters or is contradictory;
- non-inclusion of substantial formal requirements (reasons for the decision, order, seat, signature) in the award;
- non-compliance with the time-limits;
- non-compliance with the applicable Italian statutory rules;
- if the award is in conflict with a previous final award between the parties;
- the award was rendered in conflict with the rules on fair proceedings;
- non compliance with law (unless arbitrators were authorized to decide according to ex aequo et bono rules).

Besides the above cases, the parties may agree on other situations in which the award can be challenged.

Awards relating to the substantive issues between the parties or interlocutory measures are the only awards which can be challenged before the Courts.

The award can be challenged with the Court of Appeal ("Corte di Appello") where the arbitration has its seat:

- within 90 days from the service of the award;
- if not served, not later than one year from the date the last signature was placed on the award. If the Court of Appeal annuls the award, it may also rule on the merits of the matter at controversy, unless the parties disagree with this.

A petition to set the award aside does not automatically suspend the enforcement of the award. However, the Court of Appeal may suspend enforcement upon the request of [either] party.

The statutory rules on the challenging of an international award are more or less the same as set out above, with some restrictions such as the exclusion of the possibility of a setting aside in case of non-compliance with the applicable Italian statutory rules and the exclusion of revocation and third party's opposition.

Revocation

The award may be revoked within 30 days from the date one of the following events becomes known:

- the award is the result of fraudulent behaviour of one party against the other;
- it has been rendered on the basis of false evidence;
- one or more relevant documents were discovered at a later stage, which the party could not find before due to the other party's behaviour or force majeure;
- it is the result of fraudulent behaviour of one of the arbitrators.

Third party's opposition

A third party can challenge the award within 30 days from the date it gains knowledge that the award:

- affects his rights;
- is the result of fraudulent behaviour against him, in order to prevent him from recovering his credit or from claiming a right.

Company arbitration in Italy

On the basis of Bill no. 366 dated October 3, 2001, the Italian Government issued legislative decree no. 5/ 2003 (hereinafter d.lgs. 5/2003) in September 2002, introducing a new procedural law to be applied to companies' disputes (with the exception of those companies resorting to the venture capital market) concerning all corporate relations, among which those disputes arising out or in connection with incorporation, modification, winding-up, liability actions against managing and auditing bodies of all kinds of companies, shares transfer.

The legislative decree was approved and came into force as of 1st January 2004.

Company arbitration in Italy is now expressly governed by d.lgs. 5/2003, articles 34,35,36,37,38.

Arbitration Clause (art.34)

The content of the clause

According to article 34, an arbitration clause must provide for the number of arbitrators and rules for appointment. The power to appoint all the arbitrators must be conferred to a third party unconnected with the company, otherwise the clause is null and void.

If the third party fails to fulfil its duty to appoint , then the President of the Court of the district in which the company has its registered office is competent for the appointment (art.34 par 2) and will therefore proceed accordingly. Appointment by third parties is the element differentiating these arbitration proceedings from those governed by the provisions of the CPC. The reasons underlining these provisions are given by the fact that arbitrators connected with a company are unlikely to be totally independent and may therefore not be in the position to guarantee impartiality and fairness.

Arbitrability

The memorandum of association of a company may include clauses submitting to arbitration those disputes concerning disposable rights relating to the By-laws of the company and which may arise:

- between shareholders
- between the company and its shareholders

The object of the clause may relate to disputes concerning the existence or non, the qualification, the regulation of the By-laws of the company or rights deriving therefrom.

The mere inclusion of an arbitration clause in the company's memorandum will make such clause binding on the company, and on all of its shareholders, including those who contest their status as such.

Each and every amendment to the memorandum which either introduces or deletes an arbitration clause, will need to be approved by as many shareholders representing at least 2/3 of the company's capital. Those shareholders who did not vote or participate in the decision are entitled to withdraw from the company within the following 90 days.

If specifically provided for in the memorandum, the clause may also deal with those disputes initiated by or against directors, liquidators and auditors. Such a clause will automatically be binding on them upon acceptance of their post.

Disputes necessarily requiring the intervention of the Public Prosecutor may not be submitted to arbitration (by way of example, disputes concerning the appointment and the removal of liquidators). Should the clause include disputes concerning matters which may not be subject to arbitration proceedings, then the arbitrators are always under an obligation to rule in accordance with prescribed law and to deliver an award which may be challenged.

This rule stands even in the event of the clause providing for the possibility of the arbitrators to rule in accordance with equity (as opposed to prescribed law) and to deliver a non-challengeable award. The same rule is prescribed for those matters concerning the validity of shareholders' resolutions. (art.36 par.1).

Arbitration proceedings

Procedural aspects which are not expressly provided for under d.lgs. 5/2003 are governed by the provisions of CPC. The provisions of d.lgs. 5/2003 are specific for companies and differ from ordinary arbitration proceedings:

- art.35 par.1 provides for a specific formal requirement – the arbitration application must be filed with the companies' registry and it is available to all of its shareholders.
- third parties may intervene in company arbitration proceedings (ex art. 105 CPC). Further, ex parte intervention (ex art. 106 CPC) and intervention by virtue of Court order (ex art.107 CPC) are also allowed. The first kind of intervention is for third parties who are not shareholders; however they may only intervene no later than the first hearing. The other two kinds of intervention are only meant for shareholders. Following intervention, arbitrators may admit new evidence, deferring the terms by which a ruling is to be delivered.
- art. 819 CPC - under which arbitration proceedings are to be suspended where interlocutory issues which are not subject to the jurisdiction of arbitrators arise - do not apply to company arbitration, thus facilitating a rapid outcome and ruling.
- when the dispute concerns the validity of shareholders' resolutions, the arbitrators may always suspend the effects of those resolutions as a preventive measure.

Award

The award is binding on the company and may always be challenged under art. 829 par 1 and art. 831 CPC, even if art. 838 concerning international arbitration states the opposite. Hence, the award may be challenged on the grounds of it being null and void; on the grounds above

indicated for the ordinary arbitration proceedings (art.829 CPC); by revocation; finally, by third party's opposition.

Resolution of conflicts concerning company management

Art.37 of d.lgs 5/2003 states that the memorandum of a Limited Liability Company (Private Limited Company) or of a Partnership may submit the resolution of conflicts concerning company management to third parties.

According to the most relevant authorities in this field, this particular method of resolution is more similar to an arbitrage than an arbitration. In fact the decision may be challenged under art 1349 par. 2 of the Italian Civil Code, a provision that expressly concerns arbitrage.

As this method deals with conflicts on management choices as opposed to disputes of more strict legal nature, it may well be useful to overcome dead-locks, although there is the risk of levering out the directors' management power.

Conclusion

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In light of the considerations above, we summarize below the main features of the Arbitration in Italy:

Free Arbitration and Ordinary Arbitration

As examined in the previous paragraphs, a peculiarity of the Italian system is the existence of the "arbitrato rituale" (ordinary arbitration) and the "arbitrato irrituale" (free arbitration) and the main difference to note is that, unlike the ordinary arbitration, the so called "arbitrato irrituale" does not lead to an enforceable award, which is undoubtedly the main disadvantage of such arbitration. The final decision is binding on the parties with the same validity of a contract, as a consequence in case they no not respect what stated therein, only general rules for the breach of a contract apply.

Main Advantages

- Neutrality and Expertise of the Arbitrators. Through Arbitration, parties may choose to resolve a dispute arisen between them through a private third party or, more frequently, a panel of private arbitrators (generally, each party selects their own arbitrator and, jointly, both arbitrators appoint a third one to act as president of the panel). Consequently, the powers of the arbitrators are granted directly by the parties. The appointed arbitrators are generally private individuals with expertise on the specific subject matter of the dispute; the advantage of this is that they may assess not only the strictly legal aspects of the case but also the general commercial framework of the dispute.

- Less Formality and Brevity. Arbitration is a flexible proceeding; nevertheless, although it can differ depending on which type of Arbitration proceedings the parties choose, it is always simpler than ordinary civil proceedings. The rules concerning Italian Arbitration procedures are formal but they are never as strict as the procedural rules which govern ordinary litigation. Consequently, Arbitration has shorter terms for resolution, also because, generally, Arbitration proceedings ends in first instance. Nevertheless, in the event that the parties do not spontaneously enforce the award, which is binding upon then, proceedings can last longer; in this case, in order to enforce the award the party has to file an application to the competent Court which, after assessing the formal requirements of the award, shall issue an execution order (i.e. "exequatur").

- Confidentiality. Arbitration undoubtedly assures parties a high level of confidentiality. While, ordinary Courts' decisions are generally accessible to third parties who could have access to them in legal journals or obtain copies thereof; the same does not apply to Arbitration awards, unless the parties agree otherwise.

- Possibility of Ruling out the Jurisdiction of the State of the Adverse Party. In international agreements, the parties may rule out the jurisdiction of a state by providing an Arbitration clause; of course, this has practical advantages.

Disadvantages

- Costs of the Proceedings. The main disadvantage of Arbitration is the high costs incurred for the proceedings, compared to the ones incurred in ordinary civil ones. Nevertheless, this drawback is compensated with other aspects, such as the lesser formality and brevity mentioned above among the main advantages. Anyways, Arbitration is unsuitable to resolve international disputes concerning small claims
- Urgent Preventive Measures: Arbitrators do not have powers to grant seizure orders or other urgent preventive measures; therefore in order to obtain such measures, the parties shall need to file the relevant application with the competent ordinary Courts.
- Challenge of the award before the Court: as previously examined, statutory rules on challenging an award are particularly restrictive and they limit the possibility of challenging the award only for formal flaws. Therefore, the arbitration proceedings provides only for two instances of judgment, unlike the ordinary proceedings where there are three instances of judgment.

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Arbitration in the Netherlands

CMS Derks Star Busmann

Historical background

The 1986 Arbitration Act (Book IV of the Code of Civil Procedures - *Wetboek van Burgerlijke Rechtsvordering ("RV")*) ("the Act") came into force in December 1986. In the Antilles, Aruba, Surinam and Indonesia, the regulation of 1838 that had previously governed arbitration in the Netherlands is still in force.

The regulation of 1838 was of course out of date. Amendments had been made to the regulation on several occasions. For example, only since 1954 women were granted the possibility of being appointed as arbitrators.

The Act contains a comprehensive set of rules for arbitration in the Netherlands and some articles regulating arbitration outside the Netherlands.

Every arbitration that takes place in the Netherlands is subject to the Act, even when the parties involved are foreign. The regulations contained in the Act often apply subject to the agreement of the parties and there is considerable scope for the parties to formulate their own arbitral procedure (most commonly by adopting a standard set of arbitration rules promulgated by a domestic or international arbitration institution, as appropriate).

The Act is quite progressive and is designed to promote the Netherlands as a seat for international arbitration. The

UNCITRAL model law has clearly influenced the drafting of the Act in view of the emphasis placed on party autonomy.

One peculiarity of the Act is that in a number of cases the President of the District Court may be called upon to assist with the conduct of the arbitration. One such instance is where the parties have failed to reach agreement on the number of arbitrators. In such a case, the President of the District Court may be petitioned by either party to make a ruling. There is further scope to make applications to the President of the District Court in other cases, such as for the appointment of an arbitrator, the removal of an arbitrator, the examination of an unwilling witness, or the granting or refusal of an enforcement order. In many ways the President's role is akin to that of an arbitral institution and in the greater part any such interference is very limited.

Arbitration experience in the Netherlands

The Netherlands have positive experience with arbitration. There are permanent arbitration boards, for example De Raad van Arbitrage voor de Bouwbedrijven (building industry) and numerous other trade-specific arbitration panels. Arbitration has even made some inroads into sport-related disputes and the KNVB football arbitration board is well established. The leading arbitration institute in the Netherlands is the NAI (Netherlands Arbitration Institute). In the year 2000, the Dutch Centre of the ENDR, a network supported by the European Union for Euro arbitration, was founded.

While not as popular as institutional arbitration in the Netherlands, ad hoc arbitration is also available and the Act contains fall-back provisions which may assist in conducting ad hoc arbitrations.

The oft-cited advantages of arbitration over court proceedings, such as confidentiality, trade expertise of arbitrators, flexibility, and expediency, apply with equal force to arbitration in the Netherlands.

The cost of arbitration proceedings in the Netherlands has not traditionally varied markedly from court proceedings.

Costs may increase if the arbitral award is challenged in the courts, though the Act has curtailed the grounds for challenge.

In addition to arbitration, there are binding ruling procedures in the Netherlands. A binding ruling by an independent third party resembles arbitration but there is one essential difference. A binding ruling can only be declared non-binding if it is in serious conflict with reasonableness and fairness and it would be an abuse of law if the opposite party, on the basis of the binding ruling, should wish to hold the other party to it. In other words, the binding ruling is subject to the marginal review that the ruling is not in serious conflict with reasonableness and fairness. Another difference between binding ruling and arbitration award is in enforcement. An arbitration award can be enforced simply on the basis of an enforcement order. In the case of a binding ruling, the ruling must be brought before the District Court in which the marginal review takes place. Obviously the party who then invokes the binding ruling has a greater advantage because it is the other party which has the burden of establishing that the binding ruling is in conflict with reasonableness and fairness.

Scope of application and general provisions of the Arbitration Act

Scope of application

The Act is applicable to all arbitrations in the Netherlands, whether ad hoc or institutional, and regardless of the nationality of the parties.

General principles

The principle of party autonomy is enshrined in the Act, together with the principle of equality of the parties, and the right of each party to present its case and to be heard (an elaboration of this principle is given in article 1039 par 1 Rv). Infringement of party autonomy may result in the quashing of an arbitral award (article 1065 par 1c and par 5 Rv). Apart from that, parties are also free to

decide to opt for a public court instead of an arbitrator after all (this follows indirectly from article 1065 par 1 sub a Rv). Either party can decide to opt for a public court: the claimant when he issues court proceedings instead of proceeding by way of arbitration; the defendant when he responds to the court proceedings rather than appealing against the competence of the court to hear the claim in place of an arbitral tribunal.

In addition, the fundamental principle of external accessibility (administration of justice and supervision by means of cassation) and the fundamental principle of control and unity should be mentioned. These principles only play an indirect role in arbitration. After all, an arbitration agreement means that parties in fact exclude the right of access to the public court. Parties do however have the right to a genuinely accessible arbitral procedure, so there must be the certainty that a valid arbitration agreement will lead to a transparent, established and predictable system of arbitration.

Transitional provisions

The Act applies to all arbitrations since 1 December 1986.

The arbitration agreement

Formal requirements

An arbitration agreement must be evidenced in writing. The requirement is a new statutory provision, which coincides with arbitration legislation abroad and also with provisions in treaties on arbitration.

In order for the arbitration agreement to be valid, it must meet a number of requirements, set out in article 1020 Rv. Arbitrators do not have jurisdiction to hear a case in the absence of a valid arbitration agreement. Article 1020 Rv implicitly makes reference to a violation of public order: the President of the District Court may refuse to grant an enforcement order on the grounds of an apparent violation of public order, where it concerns a violation of fundamental values. A reversal of the award may be requested where an award or the way in which the decision has been reached is contrary to public order. A substantive violation of public order might, for instance, be an arbitral award rendered in violation of regulations governing

European Union anti-trust law. (However, there is a certain doubt here since Supreme Court 22 Jan 1999 RvdW 8c.)

In procedural terms, one might think of a violation of a fundamental principle of procedural law, for example, the principle of hearing both sides of the argument. A number of specific cases have been included in the law and may not be derogated from. The law is based upon the equal treatment of all parties. Each party should be entitled to defend his own rights and put forward his arguments to that effect. A violation of the principle of equality is a violation of public order and results in the reversal of the arbitral award. Such reversals have been noted more than once in previous decisions.

Arbitrability

The question whether a dispute is suitable for arbitration (arbitrability) may arise in the arbitration itself if there is a challenge to the jurisdiction of the arbitrator pursuant to article 1052 Rv. The issue may also arise if the case comes before an ordinary court where a party invokes the arbitration agreement to stay the court proceedings. Some disputes are not suitable for arbitration, for instance divorce, adoption, etc.

If arbitrators render an award on a matter which is not suitable for arbitration, such an award is in conflict with public policy and can therefore be quashed.

The Dutch Supreme Court has not to date sought to limit the jurisdiction of arbitrators by reference to public policy.

Composition of the arbitration tribunal

The constitution of the arbitral tribunal

The parties are free to agree on the number of arbitrators, provided there is an odd number of arbitrators. (In certain other countries an even number of arbitrators is permitted and the courts in the Netherlands will in such circumstances enforce foreign awards). The arbitrator(s) are appointed according to the procedure agreed between the parties. An appointment shall be made within a period of two months from the date on

which the dispute is submitted to the tribunal, unless the arbitrator(s) had already been appointed. When the parties have incorporated institutional arbitration rules into their arbitration agreement, and dependent on their precise terms, a submission of the dispute to the arbitration institution is considered to be a valid submission for the commencement of the arbitration.

Where a party fails to make an appointment within the two month period, the non-defaulting party may request the President of the District Court to make the appointment.

Replacing an arbitrator

Pursuant to article 1029 Rv, the arbitrator accepts his appointment in writing. He may be relieved from the appointment upon his own request or by the joint decision of the parties. An arbitrator may be challenged if there is justifiable reason to doubt his impartiality or independence (see article 1033 Rv).

An arbitrator selected by one party can only be challenged by that same party for reasons which become known after his appointment. A party cannot challenge an arbitrator appointed by a third party or by the President of the District Court if he has acquiesced in the appointment, unless a reason to challenge the arbitrator becomes known to him thereafter.

The general rule that an arbitrator may be challenged where there are justifiable reasons to doubt his impartiality or independence has been derived from article 10 of the UNCITRAL Arbitration Rules.

In the event that an arbitrator is incapable of performing his duties, he shall be relieved from his appointment upon the request of either party or, in default thereof, by the President of the District Court. Where an arbitrator is thus relieved from his appointment, he shall be replaced in accordance with the same procedure as per the original appointment.

The arbitration is suspended during the period for replacing an arbitrator unless otherwise agreed by the parties.

Arbitrators' fees

The Act does not include stipulations regarding the arbitrators' fees. A distinction should be made between institutional arbitration and ad hoc arbitration. In the former case, the arbitration institution will have a fee schedule, and in the latter case, the determination of fees is left to the arbitrators and the parties. Normally the arbitrators request a deposit before the start of the arbitration.

Arbitrators' liability

The liability of arbitrators in the Netherlands to a large extent mirrors the liability of judges and hence an arbitrator may only be held liable in exceptional cases. Where the arbitrator has ignored fundamental principles of law, this may constitute a violation of public policy which is in turn a ground for refusing to grant an enforcement order and for quashing the arbitral award. In exceptional circumstances, the arbitrator may be liable in damages to the parties for rendering an award which offends public policy and is incapable of being enforced.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

The tribunal has a preliminary competence to rule on its own jurisdiction and will decide upon the existence or validity of the arbitration agreement (subject to subsequent judicial control).

Power to order interim measures

Article 1049 Rv stipulates that the arbitration tribunal may render a final or interim award or interlocutory decision. By an interlocutory decision the tribunal may, for instance, order the submission of documents, or request the examination of a witness.

In practice, where interim protective measures are required, application is made to the President of the relevant District Court for an interim injunction or similar order. Occasionally, the President of the District Court declares that the court lacks jurisdiction. Article 1051 Rv stipulates that the parties in an arbitration can agree on

summary proceedings. This "fast track" arbitration has become more popular in the Netherlands since the NAI (Netherlands Arbitration Institute) included a mechanism for summary proceedings in its rules. Summary proceedings are popular in arbitrations involving the construction industry.

Conduct of arbitral proceedings

Commencement

In general, arbitration proceedings commence when a party to a dispute serves a written notice informing the other party that it is commencing arbitration and setting out the disputes submitted to arbitration. The parties may agree on a different procedure for initiating an arbitration.

General procedural principles

Dutch law includes a number of fundamental principles of procedural law. These principles include the equal treatment of parties and the right of each party to defend its own rights and to put forward arguments to that effect. The arbitration tribunal has the right to request oral submissions and the right to call witnesses or experts, to order the submission of documents, with regard to which the arbitration tribunal is free to apply the rules governing the law of evidence (article 1039 Rv).

Rules governing the procedure

Article 1036 Rv of the Act provides that:
"The arbitration is conducted in a manner agreed upon by the parties or, in the absence of such an agreement, according to the directions of the arbitration tribunal."

The manner in which the arbitration reference is to be conducted is in most cases set out in the arbitration agreement. Where the parties have not agreed on the applicable procedure, the arbitrators determine the manner in which the case is to be conducted (for example, directions on when submissions must be delivered). The chairperson of the arbitration tribunal has an important role in such matters.

Submission of documents

The arbitration tribunal may order the submission of documents (often upon the request of parties). There is no formal sanction for breach of this order; however, the arbitral tribunal is at liberty to draw inferences from this non-compliance. Generally, it is a matter for the parties to determine which documents they disclose. In the event that documents are withheld by a party unconscionably, the resulting arbitral award may be quashed if the other party obtains such documents afterwards which would have affected the decision of the arbitration tribunal.

Procedural powers of the tribunal

The arbitration tribunal may regulate the manner in which witnesses are examined and is entitled to examine witnesses under oath.

In the event that a witness fails to appear voluntarily, or refuses to make a statement, the arbitration tribunal may permit the requesting party, within a term to be determined by the arbitration tribunal, to apply to the President of the District Court requesting the appointment of a delegated judge (*Rechter-Commissaris*) before whom the witness will be examined. Arbitrators have the opportunity to be present at the examination of the witness. Further procedural powers of the tribunal include:

- the selection of an expert to deliver an opinion;
- the termination of an arbitration reference if a claimant fails to take certain procedural steps;
- making an expedited award where the defendant defaults in presenting a defence without good reason;
- ordering parties to provide information to the tribunal; and
- allowing third parties who have an interest in the arbitration to join as a party or be heard as an intervener.

Place and language of arbitration

The language of the proceedings and documents to be submitted to the tribunal is determined by the parties. In the absence of such an agreement the tribunal will

decide the applicable language. The place of the arbitration is usually stipulated by the parties in their agreement; in default thereof it will be determined by the arbitration tribunal having regard to the circumstances of the arbitration (see article 16 of the UNCITRAL Arbitration Rules). The location of the arbitration is important as the arbitration award is filed at the office of the District Court at the locality of the arbitration.

Submissions

The tribunal shall also determine the timetable for submissions, unless the parties have already agreed a timetable.

Oral hearings and written procedures

The arbitration tribunal has discretion as to whether there should be an oral hearing and may request an oral hearing even if the parties have elected a documents only format for the arbitration. Article 1043 of the Act reads:
"At any stage of the proceedings, the tribunal may order the parties to appear in person for the purpose of providing information or attempting to arrive at a settlement."

Evidence

The tribunal shall, subject to any agreement between the parties, determine matters regarding evidence.

The Act authorises the arbitration tribunal to appoint experts and the parties will have an opportunity to pose questions to the expert and comment on the expert's opinion. The cross-examination of witnesses is most unusual in the Netherlands; however, the parties are free to agree on a cross-examination procedure. Dutch lawyers have in general little or no experience with cross-examination.

Choice of law

Parties often select the applicable law in their arbitration agreement and the arbitration tribunal will uphold this choice. The parties are also at liberty to refer to the lex mercatoria, although this choice of substantive law has not enjoyed wide acceptance in the Netherlands.

Where parties have neither selected a national law, nor opted for the lex mercatoria, the arbitration tribunal will

generally select the law of the country most closely connected with the contract between the parties (generally the law of the place where the most characteristic obligation must be performed).

Procedural rulings and making of the award

Decision making by the tribunal

The parties can agree on the procedural aspects of how the tribunal is to render its award. Unless otherwise agreed by the parties, the arbitration tribunal decides by a majority of votes (where there is more than one arbitrator). The appointment of a clerk *(griffier)* to record the arbitral decision is quite popular in the Netherlands. The clerk ensures that certain (agreed) formalities are complied with.

Form, contents and effect of the award

Article 1057 Rv regulates the formal requirements of an arbitral award. The award is made in writing and signed by the arbitrators. Where a minority of arbitrators refuses to sign the award, this shall be recorded in the award.

The requirement of a written award is mandatory. It is common in arbitrations in the building industry for a verbal decision to be made followed by a written award. This procedure often leads to delay in receiving the written award.

Finally, an arbitral award must contain reasons for the decision, otherwise it is liable to be set aside. The extent and effect of this requirement is the subject of much debate.

The Dutch courts have previously dismissed an attempt upon the challenge of an award to review substantive aspects of the reasoning in an award and hence the court will not look into the "quality" of the reasons provided in the award. Both case law and academic writing remain divided on the content of this requirement.

Settlement

In accordance with article 1069 Rv, arbitrators may render an award to reflect a settlement reached by the parties. Such recorded settlement is a valid arbitral award for the purposes of enforcement and can only be

quashed if it is contrary to public order. The settlement award must be signed by both parties.

Costs

The Act does not contain rules on the costs of the arbitration. An arbitration tribunal is free to award costs and has a wide discretion as to how the costs are to be allocated. It is usual practice for costs to follow the event (i.e., costs are awarded in favour of the successful party).

Correction and interpretation of the award

Article 1060 Rv allows for the rectification of an award. The parties are at liberty to request the correction of typographical errors or errors in calculations within 30 days of the award being filed. Corrections of names, addresses, date of signing and place of the award are also permitted within the same period. Enforcement, however, is not suspended through a request for corrections, unless the President of the District Court, who may be called upon for assistance, deems it necessary to suspend further proceedings for urgent reasons until there is a ruling on the request for corrections.

In a situation where the plaintiff has neglected to claim interest or costs of the proceedings, arbitrators may not rectify this omission on their own initiative (Amsterdam Court of Appeal 23 May 1958, NJ 58 465 "Arbitrators exceed their jurisdiction if, on their own initiative, they order the payment of interest or costs of the proceedings").

If such a fundamental principle of procedural law is violated, an award can be quashed (article 1065 par 1 Rv).

The role of the courts

The jurisdiction of the courts

In a number of cases, the Act envisages that the District Court will assist in the conduct of the arbitration. For instance, the District Court may be called upon to appoint an arbitrator, to remove or replace an arbitrator, to examine reluctant witnesses, to obtain information regarding foreign law, to fix a date for the hearing, to lift, suspend or set aside a penalty, and to grant or refuse an enforcement order.

Generally, one might say that the role of the President of the District Court is important in a limited number of cases where the arbitration procedure, for whatever reason, falters. Such instances remain exceptional in Dutch arbitration practice.

Stay of court proceedings

Where parties have referred their dispute to arbitration, a court seized of the dispute must grant a stay of the proceedings.

However, the arbitration agreement does not prevent a party from applying to the President of a District Court for protective measures to preserve the status quo between the parties, e.g., to ensure that no assets will be moved out of jurisdiction, or for a decision in summary proceedings.

An appeal against the competence of the tribunal should at all times be made before the defence against all claims.

Interim protective measures

Article 1022 par 2 Rv contains the following provision in relation to interim protective measures:

"An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings ..."

Obtaining evidence and other court assistance

The arbitral tribunal has no power to compel a witness to give evidence to the tribunal. Article 1041 Rv provides the possibility for the appointment of a judge (Rechter-Commissaris) to hear the witness.

Attendance by the witness can be secured under Dutch Civil Procedure Law by way of a summons (dagvaarding).

Applications for a witness to be heard before the commencement of the arbitration proceedings should be made to the District Court as the Act does not envisage within its terms a witness hearing before the commencement of arbitration proceedings.

Challenging the award before the courts

Article 1065 Rv sets out the grounds on which an award can be challenged.

The grounds are as follows:

- there is no valid arbitration agreement;
- the arbitrator has not been correctly appointed;
- the tribunal lacks substantive jurisdiction;
- the award has not been signed and/or does not contain sufficient reasons; or
- there have been serious irregularities, affecting the proceedings or the award is contrary to public policy.

The court will not automatically set aside an award if a party is successful in challenging the award.

Recognition and enforcement of awards

Domestic awards

Pursuant to article 1062 Rv, the enforcement of an arbitral award in the Netherlands is subject to an application to the President of the relevant District Court.

The President will only grant enforcement of the award after the period for challenging the award has elapsed.

In practice, enforcement of arbitral awards is nearly always granted in the Netherlands, subject only to exceptional cases on grounds set out in article 1065 Rv.

If enforcement has been granted by the President, the only legal remedy available for a respondent is to apply for the annulment of the civil request: a revocation of an award in case of fraud, forgery or new evidence. An application for revocation shall be brought before the Court of Appeal.

Foreign awards

The recognition and enforcement of foreign arbitral awards where no treaty is applicable is governed by article 1076 Rv.

A party may request the enforcement of a foreign arbitral award made in a jurisdiction which has not ratified the 1958 New York Convention or other treaty for the enforcement of arbitral awards to which the Netherlands are a party.

A foreign award may be challenged on several grounds as set out in article 1076 Rv including if:

- the arbitral tribunal exceeded the terms of its reference in the award;
- there was no valid arbitration agreement between the parties; or
- the award is contrary to public policy.

There is case law to the effect that an arbitral award which contradicts European Union competition regulations may be quashed due to a breach of public policy.

An award may also be contrary to public policy if there is a violation of a fundamental principle of fair procedure, such as the denial of one party's right to be heard by the arbitration tribunal.

Article 1076 Rv also applies to foreign awards rendered in New York Convention signatory states. It should be noted that the Dutch requirements for a valid arbitration agreement are less stringent than those prescribed in article II of the 1958 New York Convention. Thus, in summary, a party seeking to enforce a foreign arbitral award in the Netherlands may, in appropriate circumstances, apply to the court either on the basis of article 1076 Rv or the 1958 New York Convention (if applicable).

Court proceedings

An appeal against a decision of the President of the Court will generally be a matter for the Court of Appeal. An appeal against an arbitral award is not possible before the courts in the Netherlands, unless the parties have expressly provided for this in their arbitration agreement.

Questions not addressed by legislation

The Act does not address the problem of multi-party proceedings, nor the possibility of rectifying errors in an interim award.

The Act is also silent on the confidentiality of the arbitral award. It has been the general practice in the Netherlands since 1919 to publish arbitral awards as this is perceived to be in the public interest. There has been some

speculation on the possibility of a party to an arbitral award bringing a claim for damages against an institution which has published the award.

The Act also does not address the issue of dissenting opinions. Dissenting opinions are extremely rare in domestic arbitrations in the Netherlands, however it would appear to be open to arbitrators in an international arbitration to render a dissenting opinion and attach this to the award.

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Arbitration in Poland

CMS Cameron McKenna

Historical background

Domestic and international arbitration in Poland is regulated by the provisions of the Fifth Part of the Code of Civil Procedure ("CCP"). The CCP came into force in 1964, however provisions dedicated to arbitration were largely modified by amendment dated 28 July 2005, which entered into force on 17 October 2005. The new arbitration legislation is based on the UNCITRAL Model Law. The recognition and enforcement of foreign arbitration awards is based either on the 1958 New York Convention or on the provisions of the CCP.

Scope of application and general provisions of the CCP

Scope of application

The provisions of the CCP apply to all arbitration proceedings that take place in Poland, and to other proceedings if the provisions of the CCP provide so. The law does not establish any major difference between institutional and ad hoc arbitrations. One of the main strengths of the provisions of the CCP on arbitration is that they give the parties to disputes a large degree of autonomy. In particular, the parties are free to decide on almost all issues concerning procedure, and to choose the procedural rules, place, language, etc, of the proceedings.

General principles

The CCP contains only a few mandatory provisions regarding arbitration matters. On the basis of these provisions, the following general principles may be identified:

Party autonomy

Pursuant to article 1184 § 1 of the CCP, the parties are free to agree on the procedure to be applied to the resolution of their dispute, as long as it complies with the mandatory provisions of the CCP.

Fairness

Any provisions of an arbitration agreement that would impede the principle of equality are prohibited, including provisions entitling only one party to file a statement of claim before arbitration court or state court. The principle of equal treatment of the parties is expressly stated in article 1183 of the CCP and is binding on the arbitrators.

If a party is not granted the opportunity to defend its rights, the state court may set the arbitration award aside.

Non-intervention by the courts

The courts may intervene in arbitration proceedings only in the cases and to the extent expressly provided by the CCP. For example, the courts have jurisdiction to take the following steps:

- appoint an arbitrator if the parties default in making an appointment (articles 1171 to 1173 of the CCP);
- rule on a challenge to an arbitrator, if the arbitrator has not been removed by the arbitral tribunal or by the parties, or has not resigned himself (article 1176 § 2 and § 4 of the CCP); or
- other steps that cannot be carried out by the arbitral tribunal itself, including compelling the attendance of witnesses (article 1192 § 1 of the CCP).

The arbitration agreement

Formal requirements and severability

An arbitration agreement may be drafted as a separate self-contained document, or may be incorporated into the main agreement to which it relates in the form of an arbitration clause. The severability of the arbitration clause is ensured by article 1180 § 1 of the CCP. The arbitration clause is a separate and independent part of the contract. The validity and existence of the arbitration clause must be construed separately from the other terms of the contract.

The CCP recognises arbitration agreements both in the form of arbitration clauses in contracts intended to govern future disputes between the parties arising from a defined legal relationship, and as agreements to submit existing disputes to arbitration.

The formal requirements for an arbitration agreement are set out in article 1162 § 1 of the CCP, which specifies that it must be made in writing. This requirement is met also if an arbitration agreement / clause is included in letters or statements exchanged between the parties by means of communication that allow its content to be preserved (e.g. faxes). It is also enough for the arbitration clause to be valid if it is included in a separate document (e.g. General Terms and Conditions) referred to in a written contract between the parties. The CCP requires that the subject matter of the dispute, or the legal relationship from which the dispute arises or may arise, is specified in the arbitration agreement. The parties are free to appoint the arbitrators in their arbitration agreement, or to indicate the number of arbitrators and the method of their appointment. As mentioned above, the parties are also free to determine the procedure governing the arbitration proceedings.

An arbitration agreement regarding disputes relating to a company's relations may also be incorporated into the company's articles as provides 1163 § 1 of the CCP. The same possibility relates to acts forming cooperatives and associations.

Employment disputes may be subjected to an arbitration agreement, but must, under article 1164 of the CCP be made explicitly in writing and may only concern existing disputes.

Unless otherwise agreed, according to article 1167 of the CCP, a power of attorney granted by a business entity in relation to a specific act includes also a power of attorney to conclude an arbitration agreement in relation to possible disputes concerning this act.

Arbitrability

The scope of arbitrability was extended by the recent amendment of the CCP. The provisions of the CCP enable the parties to submit most disputes to domestic or foreign arbitration. Article 1157 of the CCP states that all disputes that can be subjected to settlement in court, may be submitted to arbitration, excluding alimony disputes. This new provision will end problems concerning the judgement over what does and what does not constitute a financial right, for the distinction between financial and non-financial rights has ceased to be relevant as far as arbitrability is concerned.

Effects of the arbitration agreement

As long as an arbitration agreement is valid and binding on the parties, the parties cannot demand that a court decides on the dispute. However, if one of the parties brings the case before the court and the other party does not object, the dispute may be determined by the court. The court will reject a statement of claim without considering the merits of the dispute, in accordance with the provisions of article 1165 § 1 of the CCP, but only upon another party's request, referring to the arbitration agreement.

The parties may terminate the arbitration agreement by another agreement, in order to restore the jurisdiction of the courts. Otherwise, the CCP recognises the following three situations where an arbitration agreement may lose its validity and cease to be operative based on the provisions of law.

First, article 1168 § 1 of the CCP deals with the situation where an arbitrator appointed in the arbitration agreement rejects his duties or cannot fulfil his duties for some reason. In such a situation, the arbitration clause becomes void, unless the parties agreed otherwise.

Second, article 1168 § 2 of the CCP deals with the situation where the arbitral tribunal indicated by the parties in the arbitration clause refuses to hear the case or is unable to hear it for other reasons. In such a situation, again the arbitration clause becomes void, unless the parties agreed otherwise.

Third, article 1195 § 4 of the CCP deals with a situation where a majority of votes, or unanimity if required, cannot be reached by the arbitral tribunal when making the award with regard to all or a part of the claim. In such case the arbitration agreement becomes void within this scope.

In any of those situations, the parties are free to commence proceedings in court.

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

Pursuant to article 1170 § 1 of the CCP, any individual with full legal capacity may be an arbitrator. However, article 1170 § 2 of the CCP states that active court judges cannot serve as arbitrators. The law does not require arbitrators to be citizens of Poland, and, as long as the requirements of article 1170 of the CCP are met, a foreign citizen may be appointed to act as an arbitrator. It is uncertain whether this also applies to foreign state court judges.

The person appointed as arbitrator should immediately inform both parties about any circumstances that could raise doubts over his/her impartiality or independence.

In their agreement, the parties are free to decide on the number of arbitrators and the method of their appointment. It is possible for the parties either to appoint the arbitrators in the arbitration agreement, or to select them as and when a dispute arises. It is also possible for

the parties to decide only on an appointing authority, which will then choose the arbitrators when asked to do so by the parties.

If the parties fail to specify the number of arbitrators, the arbitral tribunal will consist of three arbitrators according to article 1169 § 2 of the CCP.

The CCP provides for limited recourse to the courts when a party obliged to appoint an arbitrator (or the appointing authority) fails to do so. In such a case, the court shall appoint an arbitrator at the request of a party pursuant to articles 1171 to 1173 of the CCP.

Challenge and removal of arbitrators

An arbitrator may be removed only if there are justified doubts as to his/her impartiality or independence, as specified in article 1174 § 2 of the CCP, or if he/she does not have the qualifications specified in the arbitration agreement. It is only possible for a party to request the removal of an arbitrator on grounds which that party learned of after the appointment of the arbitrator.

Pursuant to article 1176 of the CCP, the procedure for challenging arbitrators may be agreed between the parties. However, if the arbitrator is not removed within a month from the date of filing a motion to the arbitral tribunal to remove the arbitrator, the party will be entitled to file the relevant motion to the court within a further two weeks. Provisions of an arbitration agreement excluding such possibility will be ineffective under article 1176 § 2 of the CCP.

Unless otherwise agreed, a party demanding the removal of the arbitrator must notify all the arbitrators and the other party, in writing, within two weeks from the date of the requesting party learning of the appointment or about the reason for removing the arbitrator. If the arbitrator does not resign or is not removed by the parties within two weeks from the delivery of the notice to the arbitrator, the party will be entitled to file with the court a motion challenging an arbitrator.

The court is also entitled, by provision of article 1177 § 2 of the CCP, to remove any arbitrator upon a motion from

a party, if it is obvious that the arbitrator will not perform his/her obligation within the specified time, or if he/she delays the performance of his/her obligations without any important reason.

If the case is heard by an arbitrator who, based on the provisions of the CCP, should be removed, this also constitutes grounds for the arbitration award to be set aside.

Appointment of substitute arbitrators

If an arbitrator breaches his/her duties, or if his/her appointment terminates for any other reason, the parties should appoint a substitute arbitrator. This should be done following the same procedure as provided for the appointment of the original arbitrators.

If an arbitrator chosen by one of the parties resigned or was removed twice, then the other party may demand that the court, instead of the opposite party, choose the new arbitrator.

A substitute arbitrator may be also appointed before the expiry of the mandate of any arbitrator (e.g. in an arbitration agreement), pursuant to article 1171 § 3 of the CCP.

Arbitrators' fees, expenses and immunity

Pursuant to article 1179 § 1 of the CCP, the arbitrators are entitled to remuneration for the services rendered, and to reimbursement of expenses borne by them in relation to the resolution of the dispute. The amount of the arbitrators' fees and the method of their payment is a matter for agreement between the parties and the arbitrator. If no agreement is reached between the parties and the arbitrator, the court shall determine the arbitrators' remuneration and the expenses to be reimbursed. This article also provides that the parties are jointly responsible for the payment of the arbitrators' remuneration, and for reimbursement of their expenses.

In institutional arbitration, the rules of the relevant arbitration institution will provide for the amount, method and terms of payment of arbitration fees and expenses.

Article 1175 of the CCP provides that the arbitrator is liable for any losses caused by his resignation, unless there are important reasons for such resignation. The CCP does not make any further provision for the liability of the arbitrators, but established doctrine and practice characterise the relationship between the parties and arbitrators as similar to that between parties contracting for the performance of services. Therefore, should a negligent act or omission on the part of the arbitrator cause a loss to a party, that party may be entitled to damages.

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

As expressly stated in article 1180 § 1 of the CCP, the arbitral tribunal can rule on its own jurisdiction, including the existence and validity of the arbitration agreement. A plea that the arbitral tribunal does not have jurisdiction must be raised, according to article 1180 § 2 of the CCP, not later than in the defence, unless the party did not know and could not have known, even when acting with due diligence, of the grounds to question the court's competence, or if such grounds occurred after the expiry of such term. The parties may also agree to extend this term. A party is not prevented from raising such a plea by the fact that he has appointed, or participated in the appointment of an arbitrator. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. Each party may appeal against a decision of the arbitral tribunal on its jurisdiction to the state court within two weeks from the date of delivery of such decision. The decision of the court may then be subject to a further appeal (zazalenie).

Power to order interim measures

The arbitral tribunal may issue orders imposing interim protective measures, but such measures are not directly enforceable. Issuing such orders may be made conditional, as specified in article 1181 § 1 of the CCP, upon the payment of an appropriate security. If a protective measure was obviously unjustified, then the party which requested its introduction is responsible, pursuant to article 1182 of the

CCP, for any loss caused by such measure. The claim may be pursued before an arbitral tribunal.

However, regardless of pending arbitration proceedings, a party may apply to the state courts and request such measures. An injunction may be granted in accordance with the relevant general provisions of the CCP (articles 730 to 757 of the CCP). Such applications may be allowed notwithstanding the existence of an arbitration agreement, and even if arbitration proceedings are pending abroad.

Conduct of arbitration proceedings

Applicable procedural rules

According to article 1184 § 1 of the CCP, the parties are free to decide on the procedural rules governing the arbitration. Should the parties fail to determine the applicable procedural rules, article 1184 § 2 of the CCP requires the arbitral tribunal to apply the rules of procedure that it deems most appropriate. The provisions of civil procedure applicable to court proceedings are not binding on the arbitral tribunal.

If the parties agree that the arbitration will be in accordance with an institutional arbitration court in arbitration agreement, then article 1161 § 3 of the CCP provides that unless otherwise agreed, the parties are bound by the rules of the relevant arbitration court on the date of concluding the arbitration agreement.

Commencement of arbitration

Unless otherwise agreed by the parties, article 1186 of the CCP provides that the proceedings before the arbitral tribunal commence on the date of serving a notice of arbitration on the respondent. Pursuant to article 1188 § 1 of the CCP, within a period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall make a statement of claim and the respondent may file a defence. The presentation of a statement of claim is obligatory. The lack of this statement results in the

proceedings being discontinued. The parties may submit all documents they consider to be relevant when submitting their statements.

Unless otherwise agreed by the parties, either party may amend or supplement its claim or defence during the course of the arbitration proceedings, unless the arbitral tribunal considers it inappropriate to allow such an amendment, given a delay in making it.

Place and language of arbitration

The parties are free to choose the place of the arbitration according to article 1155 of the CCP. In the absence of a choice by the parties, the arbitral tribunal, bearing in mind the subject of the dispute, the circumstances of the case and the convenience of the parties, shall determine the place of the arbitration. If the place of arbitration was not specified by the parties or by the arbitral tribunal and the arbitration award was given in Poland, it is deemed that the place of arbitration is within the territory of Poland.

The parties are also free, pursuant to article 1187 § 1 of the CCP, to choose the language of the arbitration. If the parties have not expressed a choice of language, the arbitral tribunal shall determine the language of the arbitration.

Hearing and evidence

Unless otherwise agreed by the parties, according to article 1189 § 1 of the CCP the arbitral tribunal shall decide whether to hold oral hearings for the presentation of arguments and evidence to support it, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

Article 1191 § 1 of the CCP provides that an arbitral tribunal may hear witnesses, examine documents and other necessary evidence, but it may not apply any means of compulsion.

The arbitral tribunal cannot compel anyone to appear before it, or fine anyone for failing to do so. In such circumstances, the arbitral tribunal is entitled to ask the courts for assistance. Upon such a request, the court shall summon the witness or expert to appear before the arbitral tribunal and, should he fail to do so, may fine him, and even ask the police to bring him to the hearing. Such cases of recourse to the courts are, however, extremely rare in practice.

Receipt of written communications

The new regulation on arbitration provides for special rules of service. This is due to the fact that many arbitration awards were challenged by losing parties on the basis of faults in service which deprived them of the possibility to present their rights. To avoid such problems in future, deemed service of correspondence is now regulated in detail. Unless otherwise agreed by the parties, according to article 1160 § 1 of the CCP, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address. If the addressee is an entrepreneur entered into the proper register, then a communication is deemed to have been received if it delivered at the address specified in the register.

If none of these places can be found, after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address. In this case, the communication is deemed to be received on the last day that the communication could have been collected by the addressee.

Making the award and closing proceedings

Choice of law

The parties are free to choose the substantive law applicable to their contract and governing the disputes arising from it or in connection with it. The 1965 Conflict of Laws Act provides for a limitation of this rule in relation to obligations and disputes concerning real estate. Under Polish conflict of laws rules, the law of the country where the real estate is located always governs such obligations. Moreover, the Act demands a link between a contract and a law chosen to govern it. However, as soon as the 1980 Rome Convention comes into force in Poland, this latter limitation will be no longer be valid between parties from EU countries, where this Convention is in force. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, and shall take into account the specific nature of the trade applicable to the transaction.

Parties may also, pursuant to article 1194 § 1 of the CCP, authorise the arbitral tribunal to resolve the dispute ex aequo et bono or on general rules of law. The arbitral tribunal may base its award on these rules only upon such an explicit authorisation.

Decision making by the tribunal

Unless a unanimous decision is required by the arbitration agreement, a majority of votes is sufficient to make a valid award (article 1195 § 1 of the CCP). However, a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal, may decide himself on questions regarding the procedure. Any arbitrator who voted against the ruling may signify, next to his signature on the award, that he presented a dissenting opinion, and may prepare a statement of reasons within two weeks from drawing up the reasons for the award.

Form, content and effect of the award

Pursuant to article 1197 § 1 of the CCP, an award must be made in writing and must include:

- a reference to the arbitration agreement;
- the date of the award and the place where it was made;

- an indication of the parties and the arbitrators;
- the decision on the claims of the parties;
- the reasons for the award; and
- the signatures of all the arbitrators (or of a majority of the arbitrators, if the case was judged by three or more arbitrators, and reasons of the absence of other arbitrators' signatures are stated in the award).

The arbitral tribunal shall serve a copy of the award (against receipt) on both parties. In ad hoc arbitration proceedings, the arbitral tribunal then files the records of the case, and the original award (and proof that copies have been served) at the court. In institutional arbitration proceedings, these records are retained by the arbitration institution.

Settlement

Based on the principle of party autonomy, and according to article 1196 § 1 of the CCP, it is open to the parties to settle their dispute in the course of the arbitration proceedings. The essentials of a compromise must be included in the protocol and certified with the parties' signatures. On request from the parties, the arbitral tribunal may provide an award by consent in accordance with the settlement. Settlements concluded before the arbitral tribunal have the same effect and force as arbitration awards, pursuant to article 777 § 1 point 2 of the CCP.

Discontinuation of proceedings

The arbitral tribunal shall discontinue the proceedings if:

- the claimant failed to submit a statement of claim within the prescribed time (article 1190 § 1 of the CCP);
- the claimant withdrew the suit, unless the defendant opposed and the arbitral tribunal decided that the latter has a justified interest in resolving the dispute (article 1198 point 1 of the CCP); or
- the arbitral tribunal concluded that continuing arbitration was unnecessary or impossible for reasons other that withdrawing a statement of claim (article 1198 point 2 of the CCP).

Costs

Pursuant to article 1179 § 1 of the CCP, the parties are jointly and severally liable for payment of the arbitrators' remuneration and reimbursement of their expenses. Institutional arbitration rules usually contain specific provisions concerning the allocation of costs. In the case of ad hoc arbitration, the amount of the arbitrators' remuneration, and the allocation of costs between the parties may be specified in the arbitration agreement, but in practice this happens only rarely. Usually, the costs of the proceedings, including arbitrators' fees and expenses, the parties' costs of legal representation, and other expenses of the proceedings, such as the costs of expert opinions, are dealt with in the arbitration award. The arbitrator may apply to the relevant district court for the arbitrator's fees and expenses to be assessed in separate proceedings. The court will determine, in chambers, the amount of the arbitrators' remuneration, taking into account the amount of time spent on the matter, and the reimbursable expenses. The court's assessment and decision may be appealed.

The CCP does not address the allocation of costs of the arbitration (including arbitrators' fees and expenses, and the parties' costs of legal representation) between the winning and losing party. Under the general rules of civil procedure applicable to court proceedings, the parties bear the costs of the proceedings in accordance with the proportion of their success or failure, as stated in the judgment (articles 98 to 110 CCP). Although the arbitral tribunal is not bound by these rules, they may be applied by analogy in arbitration proceedings.

Correction, interpretation and additional award

The CCP regulates the following issues in articles 1200 to 1203.

Within two weeks of receiving an award, unless another period of time has been agreed upon by the parties:

- a party, with notice to the other party, may request the arbitral tribunal to correct any error in calculation, any clerical or typographical errors, or any errors of a similar nature in the award;

- a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within two weeks of receiving the request. The interpretation shall form part of the award.

The arbitral tribunal may correct any clerical or typographical errors on its own initiative within a month of making the award. The court will inform the parties about any such corrections.

Unless otherwise agreed by the parties, within a month of receiving the award, one party, with notice to the other, may request the arbitral tribunal to make an additional award on claims presented in the arbitration proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within two months from the date of the request in this respect.

If necessary, the arbitral tribunal may extend the period of time within which the parties may file a request for a correction, an interpretation or an additional award.

The role of the courts

The jurisdiction of the courts

In principle, a valid and binding arbitration agreement excludes the courts from the adjudication of disputes covered by such an agreement. As mentioned above, the court shall reject a statement of claim submitted in relation to a dispute covered by an arbitration agreement if the other party invokes that agreement.

However, in some cases it is necessary for the courts to act in order to ensure the effectiveness of arbitration as a dispute resolution mechanism. Such actions may be undertaken even before the arbitration proceedings commence; usually, courts will only intervene if the proper conduct of the arbitration proceedings is in some way jeopardised, or if a party refuses voluntarily to satisfy an award.

The CCP gives the state courts jurisdiction to decide the following arbitration matters upon request of either party:

- the appointment of arbitrators, or of the chairman of the tribunal, if parties (or the arbitrators) fail to make such appointment themselves within the required period of time, or if an appointing authority does not make the appointment within the prescribed term or if such term was not specified;
- an appeal from decision of the arbitral tribunal in the case of a challenge to arbitrators and a challenge to arbitrators under specified conditions;
- the determination of arbitrators' remuneration and of reimbursable expenses, if not determined by the parties;
- other judicial assistance, such as enforcing the appearance of a witness;
- the maintenance of ad hoc arbitration files following service of the final award on the parties; and
- the declaration of the enforceability of an arbitration award or a settlement.

Challenging the award before the courts

An action to set aside an arbitral award should meet all requirements prescribed for a statement of claim as listed in article 187 of the CCP.

According to article 1206 § 1 of the CCP, an arbitration award may be set aside on the following grounds:

- there was no arbitration agreement or the agreement was invalid or became inoperative;
- a party was deprived of the possibility to defend its rights before the arbitral tribunal;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

- the fundamental rules of procedure, as determined by the parties or by statutory provisions, in particular, by the provisions relating to the composition of the arbitral tribunal, were not observed. However, according to article 1193 of the CCP, a party may not raise objection on the grounds of a violation of the provisions of Title Six of the Fifth Part of the CCP, relating to procedure before the arbitral tribunal, and may not challenge the award on such grounds if this party failed to raise the objection immediately upon its notification or within the term settled by the parties;
- the award was issued as a result of a crime, or if a document that formed the grounds for the award was falsified or forged; or
- there is already a judgment with force of law in the case.

Moreover, according to article 1206 § 2 of the CCP, the court may also set aside an arbitration award if it finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration; or
- the award is in contrary to the fundamental rules of Polish legal order (public order clause).

An action to set aside an arbitration award should be filed with the court within three months from the date of serving the arbitration award. If the action is justified by the fact that the award was issued as a result of a crime, or if a document that formed the grounds for the award was falsified or forged, or there was already a judgment with force of law in the subjective case, then the party may file an action to set aside an arbitration award within 3 months from the discovery of one of these facts, but not later than 5 years from the delivery of the arbitration award.

When asked to set aside an award, the court may, where requested by a party, suspend the setting aside proceedings for a determined period of time in order to give the arbitral tribunal an opportunity to resume the arbitration proceedings or to take such other action that, in the arbitral tribunal's opinion, will eliminate the grounds for setting it aside.

Recognition and enforcement of arbitration awards

For an arbitration award (and a settlement concluded by the parties before the arbitral tribunal) to have the same legal force as a judgment of the state court, the court must declare the award enforceable and grant it exequatur, or must recognise the award if unenforceable. The provisions of Title Eight of the Fifth Part of the CCP relate to the same extent to awards given in Poland and abroad as provides article 1212 § 2 of the CCP, unless the award was rendered in a country being a signatory of the 1958 New York Convention. In the latter case, the New York Convention prevails over the rules of the CCP.

The court recognises or declares the enforceability of an award upon a motion from a party. The party has to present the court with the award and the arbitration agreement, in originals or certified copies. In declaring enforceability of the award or recognising the award, the court will not review the merits of the case, but only checks the records filed by the arbitral tribunal at court to see whether the subject-matter of the dispute was capable of settlement by arbitration, and whether the recognition or execution of the award would not be contrary to the fundamental rules of Polish legal order. The last condition is described as a 'public order clause' in article 1214 § 3 point 2 of the CCP.

A foreign arbitration award may be recognised or declared enforceable only after conducting an oral hearing in line with article 1215 § 1 of the CCP. Domestic arbitration awards may be recognised at a closed session, or may be granted exequatur through a simplified procedure described in and regulated by articles 781 to 795 of the CCP.

Based on the CCP, the court will refuse to recognise or declare enforceable a foreign award in the situations described above and, upon a motion from a party, if it is shown that:

- there was no arbitration agreement or the agreement was invalid or became inoperative;
- a party was deprived of the possibility to defend its rights before the arbitral tribunal;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

The above CCP rules of recognising and enforcing foreign arbitration awards apply only to awards coming from non-signatories of the New York Convention. Poland is a party to the 1961 Geneva European Convention and, more importantly, the 1958 New York Convention, both of which have binding force in Poland. The 1958 New York Convention was originally signed subject to two reservations of Article I (3). However, since the reservations were never ratified by Poland, they are not considered to be binding. New York Convention awards will be recognised and enforced through Polish courts in accordance with article V of the New York Convention.

Conclusion

Arbitration is constantly gaining popularity in Poland as a method of resolving commercial disputes, in particular, disputes arising from international commercial transactions. In comparison to proceedings before Polish courts, arbitration proceedings tend to be faster and cheaper, considering that appeals against arbitration awards are generally excluded. Moreover, the new legislation largely incorporates UNCITRAL model law into the CCP. For foreign parties, it should also be of added benefit that arbitration proceedings may be conducted in a foreign language, which reduces the costs and delay caused by translations, and facilitates the resolution of the dispute. Last but not least, arbitration awards are more readily enforceable (both Polish awards abroad and foreign awards in Poland) than court judgments, due to the fact that Poland is a signatory of the 1958 New York Convention. Taken together, these factors constitute strong grounds for preferring arbitration over court proceedings for the resolution of international commercial disputes in Poland.

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Arbitration in Romania

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Historical background

Arbitration in Romania has been regulated since 1865 by the provisions on arbitration contained in the fourth book (articles 340 to 371) of the Romanian Civil Procedure Code ("CPC"). Subject to various amendments, these provisions are still in force. (In Romanian practice, references to articles of the CPC including a superscript number are to articles inserted into the CPC by way of amendment.) During the communist era, they were applied only to international trade disputes, but never expressly repealed.

In 1990, the International Court of Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("the International Arbitration Court") was established, and in 1993 the fourth book of the CPC was substantially amended. The Romanian legal provisions on arbitration now largely follow the principles and the structure of the UNCITRAL Model Law of 1985.

The recognition and enforcement of foreign arbitral awards is comprehensively regulated by articles 370 to 370[3] CPC and by Law No 105/1992 on the Settlement of Private International Law Relations. Romania has ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "1958 New York Convention") and other relevant international conventions and bilateral treaties on arbitration.

Scope of application and general principles of the fourth book of the CPC

Scope of application

The provisions of the fourth book of the CPC constitute a basic framework for all forms of arbitration: they apply to ad hoc arbitration and institutional arbitration, to domestic arbitration and international arbitration, and to arbitration at law and ex aequo et bono. The parties may choose to appoint one or more arbitrators or to refer their dispute for resolution to a specialised arbitral institution such as the International Arbitration Court.

General Principles

Article 358 CPC expressly stipulates two of the most important principles governing Romanian arbitration:

Fairness

The parties have to be treated equally by the arbitral tribunal and each party is entitled to a fair hearing.

Right to defence

The parties must be given a full opportunity to present their cases and the arbitral tribunal must hear both sides. Failure to comply with these principles may make the arbitration award null and void.

In addition, the CPC contains some further mandatory provisions which may also be regarded as stating general principles, including:

Party autonomy

The parties are free to agree on the procedure to be followed between them in their arbitration agreement, or in a subsequent separate written agreement, or by references to arbitration rules, provided there is no conflict with Romanian public order and good morals.

Confidentiality

The appointed arbitrators are liable for damages caused by non-observance of their confidentiality obligation. This obligation to keep the arbitration proceedings confidential represents one of the main differences between arbitration

and court litigation, which is governed by the principle of public hearings.

Non-intervention by the courts

As expressly provided by article 343[3](1) CPC, the conclusion of an arbitration agreement excludes the jurisdiction of the courts to settle the dispute to which the arbitration agreement relates. The court which would have been competent to determine the dispute if no arbitration agreement had been concluded retains, according to the CPC, jurisdiction in relation to certain matters, such as ordering interim measures, ruling on conflicts of jurisdiction, and other matters referred to in more detail below.

The arbitration agreement

Formal requirements

Article 340[1] CPC defines an arbitration agreement as an agreement by which one or more persons are appointed by the parties, or otherwise in accordance with the terms of the arbitration agreement, to adjudge a dispute and to make a final and binding decision. It may be in the form of an arbitration clause in a main contract or in the form of a separate agreement (a submission agreement).

In an arbitration clause, the parties agree to settle all and any future disputes arising from the contract which contains the arbitration clause or arising in connection with it through arbitration proceedings. The arbitration clause shall specify the names of the arbitrators or the method of their appointment (article 343[1] CPC) (see further below on the contents of the arbitration agreement).

In a submission agreement, the parties agree that a dispute which has already arisen between them shall be settled by arbitration. The submission agreement shall specify the subject matter of the dispute and the names of the arbitrators or the method of their appointment. Otherwise it is null and void (article 343[2] CPC).

Pursuant to article 343 CPC, an arbitration agreement must be in writing; otherwise it is null and void.

Subject to the rules of Romanian public policy, good morals and the mandatory provisions of the law, the parties may, by the arbitration agreement or by a subsequent written agreement, or by reference to established arbitration rules, make provision for: the composition of the arbitral tribunal, the appointment, challenge and replacement of arbitrators, the time and place of the arbitration proceedings, the procedural norms to be followed by the arbitral tribunal, including a possible preliminary conciliation, payment of the costs of the arbitration as between the parties, the form and contents of the award, and any other norms necessary for a proper conduct of the arbitration (article 341(2) CPC). In addition, the parties should also identify the language of the arbitration and the substantive law applicable to the merits of their dispute in their arbitration agreement.

Arbitrability

Pursuant to article 340 CPC, persons with full legal capacity to exercise their rights may agree to settle patrimonial disputes by arbitration, except for disputes affecting rights in relation to which the law allows no contractual dispositions. The term "patrimonial disputes" is commonly interpreted as referring to disputes involving a financial interest.

Under Romanian law, contracts may not have as their subject any matters such as the civil status of persons, collective labour conflicts, certain shareholder disputes, annulment of intellectual property rights, or bankruptcy proceedings; disputes concerning such legal relationships are accordingly not arbitrable.

Separability

Pursuant to article 343[1](2) CPC, the validity of the arbitration agreement is treated as independent from the validity of the main agreement into which it has been incorporated. However, certain defects affecting the main contract, such as the legal incapacity of a contracting party, would also affect the validity of an arbitration agreement contained in the main contract.

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

Pursuant to article 344 CPC, in domestic arbitrations, any natural person of Romanian nationality and full legal capacity may be an arbitrator.

Article 347(1) provides that arbitrators shall be appointed, dismissed or replaced in accordance with the terms of the arbitration agreement.

Article 345(1) CPC provides that the parties are free to agree whether the dispute shall be settled by a sole arbitrator or by two or more arbitrators. In the absence of an agreement by the parties, the arbitral tribunal shall be composed of three arbitrators, one appointed by each party, and the third (who shall be the chairman of the tribunal) appointed by the two party appointed arbitrators (article 345(2) CPC).

The default procedure applicable in the event that the sole arbitrator or the arbitrators were not designated in the arbitration agreement, and no provision was made for the method of their appointment, is set out in articles 347 to 348 CPC. The claimant shall invite the other party in writing either to consent to the appointment of the proposed arbitrator in the case of a sole arbitrator, or to nominate its arbitrator in the case of a tribunal consisting of two or more arbitrators. The notice shall give full details of the proposed sole arbitrator or of the arbitrator appointed by the claimant. The party so notified must respond within 10 days of receipt of the notice with its comments on the appointment of the sole arbitrator or with the details of the arbitrator appointed by it, as the case may be.

If there are several claimants and/or respondents, the parties with a common interest shall together appoint an arbitrator (article 345(3) CPC).

The proposed arbitrators have to accept (or decline) their appointment in writing and to notify each party of their acceptance within 5 days of receipt of the appointment proposal (article 349 CPC). The two party appointed

arbitrators shall appoint the chairman within 10 days from the date of the last acceptance (article 350 CPC). Pursuant to article 353[2] CPC, the arbitral tribunal shall be regarded as constituted on the date of acceptance of his mandate by the last arbitrator.

Pursuant to article 346 CPC, any clause in an arbitration agreement stipulating that one party may appoint an arbitrator instead of the other party, or that one party may have more arbitrators than the other party, shall be null and void.

If the parties have agreed that the tribunal shall consist of a sole arbitrator but cannot reach agreement on his appointment, or if a party fails to appoint its arbitrator, or if the party appointed arbitrators cannot agree on the appointment of the third arbitrator, each party may request pursuant to article 351(1) CPC that the competent court make the appointment. The court shall summon the parties and make the appointment within 10 days after the petition was submitted; the decision is not subject to any recourse.

The challenge of arbitrators

Arbitrators may be challenged on legal or contractual grounds pursuant to the provisions in articles 351[1] and 351[2] CPC in circumstances which give rise to justifiable doubts as to their impartiality or independence, or if they do not fulfil the requirements or do not have the qualifications agreed between the parties in their arbitration agreement for the appointment of an arbitrator. The legal grounds for challenge are the same as for judges and are expressly set out in the CPC. A party may not challenge an arbitrator appointed by it except on grounds which become apparent only after the appointment was made (article 351[1](2) CPC).

Pursuant to article 351[1](3) CPC, a person who has been invited to act as an arbitrator must disclose all circumstances which could give rise to justifiable doubts as to his impartiality or independence. The arbitrator must also immediately disclose any such circumstances if they arise after his appointment until the conclusion of the arbitration

proceedings. In such circumstances, the arbitrator cannot further participate in the decision making of the tribunal unless the parties have been appraised of the relevant circumstances and have informed the arbitrator in writing that they do not intend to challenge him (article 351[1](4) CPC).

Article 351[2] CPC provides that any challenge must be made within 10 days of the appointment of the arbitrator or of the occurrence of the circumstances giving rise to justifiable doubts as to his impartiality or independence, as the case may be, and shall be determined by the court. Non-compliance with this time limit may result in the right to challenge the arbitrator or the subsequent award being lost. The parties and the challenged arbitrator must be notified of the challenge. The court's decision on the challenge shall not be subject to appeal.

The appointment of substitute arbitrators

If the appointment of an arbitrator is terminated (by challenge, resignation, dismissal, death, or for any other reason), a substitute arbitrator shall be appointed in accordance with the same rules as applied to the original appointment of the arbitrator to be replaced (article 352 CPC), unless a substitute arbitrator has been named in the arbitration agreement.

Arbitrators' immunity

One of the most important differences between a court judge and an arbitrator is that the arbitrator may be liable for damages pursuant to article 353 CPC, if he:

- resigns from his office without good reason after having accepted appointment as an arbitrator;
- fails without good reason to participate in the hearings and deliberations of the tribunal or to issue the award within the time frame established by the arbitration agreement or by law;
- does not observe his confidentiality obligation and discloses information obtained by him in his capacity as arbitrator without the approval of the parties; or
- is otherwise in material breach of his obligations.

Pursuant to article 353[1] CPC, in the case of institutional arbitrations, the court's powers in relation to the appointment, challenge, or replacement of arbitrators shall be exercised by the relevant institution, unless the institutional rules provide otherwise. This provision reduces court involvement in institutional arbitration proceedings where the applicable arbitration rules contain adequate provisions for resolving such matters.

Arbitrators' fees and expenses

The definition of arbitration expenses, and the question of how these expenses shall be allocated between the parties in the award and paid, is dealt with further below.

However, article 359[1] CPC authorises the arbitral tribunal to make a provisional assessment of the amount of the arbitrators' fees at the outset of the arbitration and to order the parties to deposit that sum in equal amounts. The arbitral tribunal may also order such a deposit to be paid by the parties jointly and severally. Likewise, the arbitral tribunal may order the parties to pay other arbitral expenses in advance (article 359[1](4) CPC). If the respondent fails to pay the required deposit within the time limit established by the arbitral tribunal, the claimant shall pay the whole deposit and the arbitral tribunal shall subsequently establish in its award the amount of the fees due to the arbitrator (and of any other expenses) and how this amount is to be borne by the parties (359[1](3) CPC).

In any event, article 359[2] CPC clarifies that the arbitral tribunal shall not proceed with the arbitration until the deposits or advance payments requested have been made.

Article 359[3] CPC gives either party the right to request the competent court to review the measures ordered by the tribunal and to establish the amount of the arbitrators' fees, and of any deposit, advance, etc.

The arbitrators' fees shall be paid after the arbitration award has been communicated to the parties. If arbitration proceedings are commenced but do not proceed to the making of an award, the arbitrators' fees shall be reduced accordingly (article 359[4] CPC).

Where the arbitral tribunal has ordered payment of a deposit on account of arbitration expenses, article 359[5] CPC requires that the amount of such expenses (and any surplus or deficit) shall subsequently be regulated in the arbitration award, and be paid before the award is communicated to the parties or deposited with the court.

Article 359[6] CPC clarifies that in institutional arbitration proceedings the arbitrators' fees and expenses shall be established and paid in accordance with the rules of the relevant arbitration institution (see further below).

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

Article 343[3](2) CPC gives the arbitral tribunal jurisdiction to rule on its own jurisdiction. At the outset of the arbitration proceedings, the arbitral tribunal examines its jurisdiction to determine the dispute between the parties and may issue an interim award on jurisdiction. Such an award may only be challenged before the courts together with the final decision of the arbitral tribunal.

Power to order interim measures

The arbitral tribunal has jurisdiction to order interim or protective measures during the arbitration. If the parties do not voluntarily comply with such measures, they may be enforced with the permission of the court (article 358[9] CPC).

Conduct of arbitral proceedings

Commencement of arbitration

The arbitral proceedings commence when the claimant serves on the respondent and on each of the arbitrators a copy of his written statement of claim together with copies of the relevant documents on which he relies as evidence in support of his claim (articles 355 and 356 CPC).

Applicable procedural rules

The arbitral tribunal shall conduct the proceedings:

- on the basis of the rules set out in the arbitration agreement concluded between the parties (subject to mandatory provisions of public order and good morals) (article 341(1) and (2) CPC);

- if the parties have not agreed the procedure to be followed, at its procedural discretion (article 341(3) CPC); or
- if the tribunal does not establish any procedural norms, in accordance with the optional procedural rules for the conduct of arbitration proceedings in the provisions of the fourth book of the CPC (article 341(4) CPC) (as to which see further below).

In practice, parties frequently provide in their arbitration agreement for their disputes to be resolved by arbitration before the International Arbitration Court, in accordance with one of its sets of procedural rules. Article 341[1] CPC expressly provides that the parties may agree that the arbitration be organised by such a permanent arbitration institution.

Place of arbitration and language of proceedings

The parties are free to agree the place of arbitration. Failing such an agreement the arbitral tribunal determines the place of arbitration (article 354 CPC). In international arbitration, the parties may stipulate in their agreement that the proceedings shall take place in Romania or in another country (article 369[1](1) CPC).

Domestic arbitration proceedings shall be conducted in the Romanian language. In relation to international arbitration proceedings, article 369.[4]

CPC provides that the language of the proceedings shall be that chosen by the parties in their arbitration agreement, or, absent a contractual choice or any subsequent agreement, in the language of the contract giving rise to the dispute, or in another international language chosen by the arbitral tribunal. The arbitral tribunal shall arrange for the services of a translator at the request of a party which is not familiar with the language of the proceedings and at that party's expense. The parties are free to use their own translators for the purposes of the proceedings.

Submissions

The requirements as to the contents of the written statement of claim are set out in article 355 CPC; it must contain:

- the name, domicile or residence of the parties, or, in the case of legal persons, their name and seat as well as their company registration number, telephone number, and bank account;
- the name and capacity of any representatives of the claimant (documentary evidence of such capacity should be attached to the statement of claim);
- reference to the arbitration agreement or the submission agreement (copies of the main agreement containing the arbitration agreement or of the submission agreement should also be attached to the statement of claim);
- the subject matter and value of the claim and of the calculation by which that value was determined;
- the factual and legal grounds and the evidence on which the claim is based;
- the names and places of residence of the members of the arbitral tribunal; and
- the signature of the claimant.

Within 30 days of receipt of a copy of the statement of claim, the respondent must serve his defence (article 356[1] CPC). The defence must include:

- any objections with regard to the statement of claim;
- the factual and legal reply to the statement of claim and the evidence relied upon; and
- the other contents required of a statement of claim by article 355 CPC.

If the proceedings are delayed because of the respondent's failure to submit his defence on time, article 356[1](3) CPC requires the respondent to pay the costs occasioned by such delay.

After the defence has been filed, additional objections or defences may only be raised until the first hearing (article 356[1](2) CPC). If the respondent has counterclaims arising out of the same contractual relationship, he may submit them to the arbitral tribunal together with his defence, but no later than at the first hearing. The counterclaim must meet the same requirements as the statement of

claim (article 357 CPC). Each party may amend its written submissions in the course of the proceedings, but only until the first hearing before the arbitral tribunal.

All statements of case, written documents and other notifications, which are submitted to the arbitral tribunal by one party, must be copied to the other party. Article 358[1] CPC provides that all communications between the parties and the arbitral tribunal shall be made by registered letter with receipt of delivery or confirmation of receipt. Information may also be transmitted by fax or by any other means of communication that provides evidence of the transmission and of the transmitted text. Documents may also be delivered directly to a party against signature of a receipt.

Oral hearing and written proceedings

Immediately after expiration of the time for filing of the statement of defence, the arbitral tribunal shall examine whether the dispute is ready to be heard and, if necessary, order adequate measures for the completion of any outstanding matters (article 358[2](1) CPC). Article 358[2](2) CPC requires the tribunal to fix the time for the hearing and to summon the parties once the case is ready to be heard and the file completed. Pursuant to Article 358[3] CPC, there shall be an interval of at least 15 days between the date of receipt of the summons by the parties and the date of the hearing. Arbitration hearings are in principle not public.

Pursuant to article 358[4] CPC, the parties may participate in the proceedings (and attend at the hearing) personally or through any representative. A party which attended or was represented at a hearing shall not be summoned again to every hearing in the course of arbitral proceedings, but is deemed to have knowledge of the next hearings date by virtue of its attendance at the previous hearing. Hearing dates of which the parties have been informed, or for which summonses have been served, may only be changed for good reasons and if the parties are notified thereof.

The parties must raise any objections to the existence and validity of the arbitration agreement, the constitution of the arbitral tribunal, the scope of the arbitrator's jurisdiction,

and the conduct of the arbitral proceedings up to that point, no later than at the first hearing, unless a shorter time limit has been agreed. Article 358[12](1) CPC provides that the right to raise such objections may otherwise be lost.

The parties must also present their petitions and any documentary evidence no later than at the first hearing (article 358[12](2) CPC). Any evidence which has not been identified by the parties before the first hearing can no longer be invoked in the arbitration proceedings, except in cases where the need for further evidence has resulted from the proceedings, or the additional evidence does not delay the settlement of the dispute (article 358[12](3) CPC).

Default of a party

Article 358[5] CPC clarifies that failure by a party to attend a hearing although duly summoned, shall not prevent the progress of the proceedings, unless the absent party submits, no later than on the day before the hearing, a request to the arbitral tribunal for adjournment of the hearing on good grounds and notifies the other party thereof. Only one adjournment may be granted.

Either party may request in writing that the dispute be settled in its absence on the basis of the documents filed (article 358[6] CPC).

In case both parties do not attend a hearing on the appointed date although duly summoned, article 358[7] CPC provides that the arbitral tribunal shall proceed with the determination of the dispute, except where the parties have requested an adjournment on good grounds. Alternatively, the arbitral tribunal may also postpone the decision of the dispute and summon the parties where their presence at the hearing or the production of evidence is deemed necessary.

Evidence

The rules on evidence are set out in articles 358[10] and 358[11] CPC, but in addition arbitral tribunals frequently apply the rules of the CPC on witness and expert evidence in court proceedings by analogy in arbitration proceedings.

Each party has the burden of proof in relation to the facts on which it bases its claim or defence. In

determining the dispute, the arbitral tribunal may request the parties to file written submissions on the claim and the facts of the dispute and may order production of any evidence as provided by the law.

Evidence shall be produced during the sessions of the arbitral tribunal. Witnesses and experts shall be heard without taking an oath. The arbitral tribunal cannot compel witnesses or experts to give evidence but may request the assistance of the courts in taking the required measures. The courts may order witnesses to give evidence and make statements and may impose sanctions for failure to do so. Cross-examination is not normally part of the arbitration procedure in Romania but the parties are entitled to put questions to the opponent's witnesses through the conduit of the arbitral tribunal. The arbitrators shall evaluate the evidence in accordance with their personal conviction.

The arbitral tribunal may order the use of an expert to clarify, e.g., technical or accounting issues, at the request of any of the parties or ex officio. The expert may request the parties to produce documents or other information to him and he must take the parties' statements into account when preparing his report. Experts normally summarise their findings in a written report, which is submitted to the arbitral tribunal and communicated by the arbitral tribunal to the parties. The parties may submit comments and questions on the report prior to the hearing. The expert may be questioned by the parties at the hearing.

Article 358[13] CPC requires that the arbitral proceedings shall be recorded in a minute (in Romanian 'incheiere'). Any decision of the arbitral tribunal and the grounds therefore shall be recorded in the minute. The minutes of each session of the arbitral tribunal shall contain:

- the composition of the arbitral tribunal and the date and place of the session;
- full details of the parties, their representatives, and any other persons who participated in the proceedings;
- a brief description of the proceedings at that session;

- the requests and arguments of the parties;
- the reasons for any measures ordered;
- the order of the tribunal; and
- the signatures of the arbitrators.

The parties are entitled to review the contents of the minutes and the documents on the file. The arbitral tribunal may amend or complement the minutes of a session by other minutes upon the parties' request or ex officio. A copy of the minutes of each session shall be served on the parties at their request.

Making of the award and termination of proceedings

Choice of law

Pursuant to article 360(1) CPC, the arbitral tribunal shall make its award on the basis of the provisions of the main contract and the applicable rules of law, taking into consideration the usage of the trade applicable to the dispute. The rules on the law applicable to international contracts are dealt with in articles 73 to 85 of Law No. 105 of 1992 on the Settlement of Private International Law Relations.

The arbitral tribunal may only decide a dispute ex aequo et bono if the parties have expressly authorised it to do so (article 360(2) CPC).

Decision making by the arbitral tribunal

Article 360[1](1) CPC requires that in all cases the arbitrators must participate in private deliberations before issuing the final decision, and that such participation be recorded in the award. Article 360[1](2) CPC permits delivery of the award to be postponed by up to 21 days, provided it is made within the applicable term of the arbitration.

Article 353[3](1) CPC requires that, unless otherwise agreed by the parties, the arbitral tribunal shall make its award within 5 months from the date of constitution of the tribunal. The parties may agree pursuant to article 353[3](3) CPC to extend this term, and the term may also be extended by the arbitral tribunal for good reason by

up to two months (article 353³(4) CPC). In addition, articles 353³(2) and (5) CPC set out the circumstances in which the term of the arbitration is extended or suspended automatically as a matter of law. In the circumstances of article 353³(6) CPC, the arbitration proceedings may terminate if not resolved within the applicable term.

Where the arbitral tribunal is composed of an uneven number of arbitrators, the award shall be made by a majority of votes. Any dissenting opinion must be recorded in writing and signed by the relevant arbitrator, stating the reasons on which it is based (article 360² CPC).

Where the arbitral tribunal is composed of an even number of arbitrators, and they do not agree on the decision to be taken, article 360³ CPC requires that an umpire be appointed in accordance with the terms of the arbitration agreement between the parties, or, in the absence of an agreement, by the competent court. The umpire thus appointed shall accept the decision proposed by one of the arbitrators, which he may amend, or he may render another decision, but only after hearing both parties and following consultation with the other arbitrators.

Form, contents and effect of the award

The arbitral award shall be drawn up in writing and shall include:

- the names of the members of the arbitral tribunal and the place and date of the making of the award;
- parties and their addresses (domicile, residence, or seat) as well as the full names of the parties' representatives and of any other persons who participated in the arbitration proceedings;
- reference to the arbitration agreement on which the proceedings were based;
- the subject matter of the dispute and a summary of the parties' cases;
- the de facto and de jure reasons for the award or, in case of an arbitral award made ex aequo et bono, the grounds on which the decision is based;
- the decisions and orders of the arbitral tribunal; and
- the signatures of all arbitrators.

The arbitration award must be notified to the parties within one month after it was made and, at the request of a party, the arbitral tribunal shall issue a certificate of service. Within 20 days of communicating the final award to the parties, the arbitral tribunal shall deposit the file with the competent court, except if the arbitral tribunal was a specialised institution, in which case that institution archives the file.

An arbitral award which has been served on the parties has the same effects as a judicial decision; it is final and binding (article 363(3) CPC) and also enforceable (see further below).

Interest

The arbitral tribunal is entitled to award interest. If the underlying agreement between the parties makes provision for payment of contractual late payment interest, the arbitral tribunal awards interest at the contractually agreed rate until the date of payment. If no contractual interest has been stipulated, the arbitral tribunal may award interest at the official bank rate of the National Bank of Romania.

Costs

The CPC contains detailed provisions in relation to the arbitration expenses in articles 359 to 359[6] CPC, which have in part already been addressed above.

Arbitration expenses include expenses for:

- the organisation and conduct of the arbitration proceedings;
- taking evidence;
- travel of parties, arbitrators, experts, and witnesses; and
- the arbitrators' fees.

Article 359 CPC provides that such expenses shall be paid by the parties in accordance with their agreement. In the absence of any agreement, they shall be borne by the party which lost the dispute or, if the claimant is only partially successful, by the parties in proportion to their respective success and failure. Unless the parties agree otherwise, the arbitration expenses payable by the losing party do not normally include the legal fees and other costs of representation of the successful party.

Article 359[6] CPC clarifies that, in institutional arbitration proceedings, the arbitration expenses, including the charges for organising the arbitration and the arbitrators' fees, shall be established and paid in accordance with the rules of the relevant institution. The International Arbitration Court, for example, has made detailed provisions in relation to costs in its arbitration rules and has established a fee schedule.

Article 369[5] CPC provides that, in international arbitration proceedings, the fees of the arbitrators and their travel expenses shall be borne by the respective parties who appointed them, unless otherwise agreed. In the case of a sole arbitrator or chairman, these expenses shall be shared equally between the parties.

Correction and interpretation of the award

If the arbitral award contains any material errors in the text of the award, e.g., calculation or typographical errors or similar obvious errors which do not change the substance of the award, the arbitral tribunal may correct such errors by an award of correction on its own initiative or at the request of one of the parties made within 10 days of receipt of the award (article 362(1) CPC).

At the request of one of the parties made within the same time period, the arbitral tribunal may also make an additional award in respect of any claim which was presented to the tribunal but has not been dealt with by the tribunal in its award. The additional award shall be made after summoning the parties (article 362(1) CPC). Parties may not be obliged to pay any additional costs in respect of such a correction of the arbitral award or additional award (article 362(4) CPC). Pursuant to article 362(3) CPC, the additional award or award of correction forms an integral part of the arbitration award.

The CPC does not contain provisions specifically dealing with the interpretation of arbitral awards by the tribunal, but tribunals may arguably accede to applications by a party for clarification of the award by applying the general rules of the CPC accordingly.

International arbitration

Similar to the approach taken by the arbitration legislation of other Central European countries, the fourth book of the CPC draws a distinction between domestic and international arbitrations, and contains specific provisions in chapter X (articles 369 to 369[5]) of the CPC applicable only to international arbitrations; some of these have already been discussed above.

Article 369 CPC defines an arbitration taking place in Romania as international if it arises out of a private law relationship with a foreign element.

Article 369[2] CPC contains supplemental provisions on the appointment and composition of the arbitral tribunal. If international arbitration proceedings take place in Romania, or pursuant to Romanian law, the arbitral tribunal must be composed of an uneven number of arbitrators. Each party has the right to appoint an equal number of arbitrators. The foreign party may appoint a foreign citizen as arbitrator and the parties may agree that the sole arbitrator, or the chairman of a tribunal consisting of several arbitrators, shall be a citizen of a third state not connected with the dispute.

Article 369[3] CPC provides that in international arbitration the time limits allowed the parties for certain procedural steps shall be doubled, in particular, in relation to:

- acceptance by the arbitrators of their mandate (article 349 CPC);
- appointment of the chairman of the tribunal by the two party appointed arbitrators and acceptance by the chairman of his mandate (article 350 CPC);
- appointment of a sole arbitrator, party appointed arbitrator or chairman, by the court under the default appointment procedures (article 351 CPC);
- challenge of arbitrators (article 351[2] CPC);
- service of the summons for attendance at the arbitration hearing (article 358[3] CPC); and
- requests for an additional award or award of correction (article 362 CPC).

The role of the courts

Stay of court proceedings

Where a party commences court proceedings in relation to a subject matter covered by an arbitration agreement concluded between the parties, and the other party invokes the arbitration agreement before the court, the court shall determine its jurisdiction (article 343[4](1) CPC).

Pursuant to article 343[4](2) CPC, the court retains jurisdiction to decide the dispute on its merits if it finds that:

- the arbitration agreement is null and void, inoperative or incapable of being performed;
- the respondent has already submitted his defence on the merits (and any counter-claims) without any reservation based on the arbitration agreement; or
- the arbitral tribunal cannot be constituted for reasons which fall into the sphere of responsibility of the respondent.

Otherwise, the court shall declare at the request of one of the parties that it lacks jurisdiction and refer the parties to arbitration (article 343[4](3) CPC). In the case of a conflict of jurisdiction between the arbitral tribunal and the court, the next higher court to that before which the conflict arose shall decide (article 343[4](4) CPC).

Support of arbitration proceedings

Pursuant to article 342(1) CPC, any interested party may institute proceedings before the court which, in the absence of the arbitration agreement, would have had jurisdiction to adjudge the merits of the dispute at first instance in order to remove any impediments that might arise in the organisation or conduct of the arbitration. The court shall settle such petitions summarily and with priority (article 342(3) CPC).

Interim protective measures

Before or during the arbitration proceedings, any party may request the court to grant interim injunctions, or order other conservatory or protective measures related to the subject matter of the arbitration (article 358[8](1) CPC), or to establish relevant factual circumstances (i.e., preserve evidence). A copy of the statement of claim and of the arbitration agreement must be submitted to the court in

support of the petition (article 358[8](2) CPC). The party requesting such measures before the court shall immediately notify the arbitral tribunal once they have been granted (article 358[8](3) CPC).

Challenging the award before the courts

Parties may agree that an award shall be subject to appeal to a second tier arbitral tribunal. However, there is no right to appeal an award to the courts.

According to article 364 CPC, the arbitral award may only be set aside following a petition for annulment for the following limitative reasons:

- the dispute was not arbitrable;
- the arbitral tribunal decided the dispute in the absence of an arbitration agreement or on the basis of a void or inoperative arbitration agreement;
- the arbitral tribunal was not constituted in accordance with the requirements of the arbitration agreement;
- a party was not present when the proceedings took place and the legal requirements of the summoning procedure were not complied with;
- the arbitration award was rendered after expiry of the five month arbitration term provided under article 353[3] CPC for making the award;
- the arbitral tribunal decided matters which were not the subject of the claim or has failed to decide upon a claim submitted for decision in the request for arbitration, or has awarded more than requested;
- the arbitral award does not include the tribunal's decision or does not give reasons, does not state the date and place where it was made, or it is not signed by the arbitrators;
- the decision in the arbitral award includes provisions which cannot be implemented; or
- the arbitral award infringes against public order, good morals or mandatory provisions of the law.

The parties cannot, in the arbitration agreement, in advance waive the right to institute proceedings for the arbitral award to be set aside; such right may only be waived after the arbitral award was made (article 364[1] CPC).

Article 365(1) CPC provides that jurisdiction for the setting aside proceedings lies with the court which is immediately superior to the court which would have had jurisdiction to determine the dispute in the absence of the arbitration agreement. Setting aside proceedings may be instituted within one month from the date of communication of the arbitral award (article 365(2) CPC). Pending its substantive decision, the court may, after requiring security in an amount fixed by it, suspend the effect of the arbitration award against which setting aside proceedings have been instituted (article 365(3) CPC (as amended)).

The court will decide the request in accordance with the provisions of article 366 CPC. If the court finds the request justified, it shall set the arbitration award aside and, if the dispute is ready to be determined, it shall make a decision on the merits within the limits of the arbitration agreement. If further evidence is needed before a decision on the merits can be made, the court will request the parties to submit that evidence and make its decision on the merits after the evidence has been submitted.

If the court proceeds to determine the dispute on the merits, the court's judgment setting aside the arbitration award can only be challenged together with the judgment on the merits. The judgment of the superior court on the setting aside of the award is subject to further recourse by way of cassation.

Recognition and enforcement of awards

Enforcement of domestic arbitration awards

Article 367 CPC clarifies that an arbitration award is binding and shall be complied with by the party against which it was made immediately or within the time limit established in the arbitration award. If necessary, the successful party may apply for leave to enforce the arbitration award (exequatur) pursuant to article 367[1] CPC. Leave for enforcement shall be granted without a hearing unless there are doubts as to the regularity of the arbitration award, in which case the parties shall be summoned. Once leave for enforcement of the arbitration award has been granted, the award may be enforced in the same way as a

court judgment (article 368 CPC). The award bearing the enforcement formula represents a Writ of execution based on which the party in whose favour it was made may commence the enforcement proceedings.

Recognition and enforcement of foreign arbitration awards

Romania ratified the 1958 New York Convention as early as 1961, and is also a party to the 1961 Geneva Convention and other international arbitration conventions and treaties. If no multi- or bilateral treaty applies, the procedure for recognition and enforcement of foreign arbitral awards is set out in articles 370 to 370[3] CPC and articles 167 to 177 in section 4 of Law No. 105/1992 on the Settlement of Private International Law Relations.

Article 370 CPC defines an arbitration award as foreign if it was made in the territory of a foreign state.

Pursuant to article 370[1] CPC, foreign arbitration awards acquire the force of res judicata in Romania if they are recognised pursuant to articles 167 to 172 of Law No. 105/1992. Article 370[2] CPC provides that a foreign arbitral award which is not complied with voluntarily by the party against which it was made may be enforced in Romania under the provisions of articles 173 to 177 of Law No. 105/1992.

The provisions of section 4 of Law No. 105/1992 relate primarily to the effect given to foreign court decisions in Romania but article 181 clarifies that articles 167 to 178 regarding the recognition and enforcement of foreign judicial decisions apply correspondingly also to foreign arbitral awards.

Pursuant to article 370[3] CPC and article 178 of Law No. 105/1992, foreign arbitral awards made by a competent tribunal have evidential force before the Romanian courts with regard to the facts which they establish without the requirement for formal recognition.

Foreign arbitral awards may be recognised either directly pursuant to an application for recognition or indirectly if

they are relied upon in substantive proceedings pending in the Romanian courts (article 170(2) of Law No. 105/1992).

Foreign arbitral awards granting interim measures of protection or awards which are only provisionally enforceable cannot be enforced in Romania (article 173(2) of Law No. 105/1992).

Conditions for the recognition of a foreign arbitral award

Pursuant to article 167 of Law No. 105/1992, foreign arbitral awards may be recognised in Romania, provided the following conditions are cumulatively met:

- the arbitral award is final under the national law of the state where it was issued; also, the award must have been properly notified to the respondent in order to allow him to exercise any available right of appeal against the award; with regard to the procedure for notifications, the principle of locus regit formam actus applies, i.e., the form of notification is governed by the national law of the country were the award was notified, whereas receipt of the notification is governed by the national law of the party to be notified; Romania is a party to the 1954 Hague Civil Procedure Convention;
- the tribunal that issued the award must have been competent to determine the case under the national law of the state where the award was issued;
- there is reciprocity regarding the recognition of foreign awards between Romania and the state where the arbitral tribunal that issued the award had its judicial seat; it is not necessary to prove that formal legal or diplomatic reciprocity is granted; the law presumes that reciprocity is granted unless the contrary is shown; and
- in the case of an award made in the absence of the losing party, it is shown that that party was properly notified of the claim and summoned to the arbitration hearing and was given the opportunity to defend itself against the claim.

Recognition of a foreign arbitral award may be refused in any of the following situations listed in article 180 of Law No. 105/1992:

- the foreign award is the result of a fraud committed in the foreign proceedings;
- the foreign award violates the public policy of Romanian private international law; Romanian law does not define the concept of public policy, except in respect of certain grounds of exclusive jurisdiction of the Romanian courts; doctrine and jurisprudence have established that, for instance, the violation of the right to defence falls under this concept; or
- the dispute was resolved between the same parties by an earlier judgement issued by a Romanian court, or was in the process of being adjudicated by a Romanian court on the date when the claim in the arbitration proceedings was received by the arbitral tribunal.

Recognition of a foreign arbitral award may not be refused for the sole reason that the arbitral tribunal applied another substantive law to the merits of the case than would have been applicable pursuant to the rules of Romanian private international law. An exception to this rule applies if the proceedings concerned the legal status or capacity of a Romanian citizen and application of the foreign law produced a different result than would have been reached under Romanian law.

Quite importantly, article 169 of Law No. 105/1992 clarifies that, save for a review of the compliance of the foreign arbitral award with the requirements of articles 167 and 168 of Law No. 105/1992, the Romanian courts may not re-examine the merits of the foreign arbitral award or modify it.

Procedure for recognition of a foreign award

Pursuant to article 171 of Law No. 105/1992, the request for recognition of a foreign arbitral award must be drawn up in accordance with the requirements of Romanian procedural law and must be accompanied by the following documents:

- a copy of the foreign award;
- proof of its final character;

- a copy of the proof of notification of the summons and the statement of claim to a party which was not present before the foreign tribunal, as well as of the award; and
- proof that the foreign award meets all other conditions of article 167 of Law No. 105/1992.

All documents need to be accompanied by authorised translations and authenticated by the competent authority in the state of the foreign court, by the relevant Romanian consulate, and by the Romanian Ministry of Foreign Affairs (article 162 of Law No. 105/1992). Romania is a party to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

The request for recognition will be resolved in contradictorial proceedings, i.e., the respondent will be summoned and will be allowed to state his defence, but limited strictly to the grounds in Law No. 105/1992 based on which recognition of the foreign arbitral award may be resisted. The request for recognition may be determined without hearing the parties if it follows from the arbitral award that the respondent admitted the claim (article 172 of Law No. 105/1992). The court decision on recognition is subject to two tiers of appellate jurisdiction.

Conditions for authorisation of enforcement of a foreign award

In addition to the conditions for the recognition of a foreign arbitral award set out above, article 174 of Law No. 105/1992 requires that two further conditions must be met in order to obtain authorisation to enforce a foreign award:

- the award must be enforceable according to the national law of the state where the award was issued; and
- the right to request enforcement must not be time barred; the limitation period is three years under Romanian law, but it may be shorter if the national law of the state where the award was made so provides.

Again, as in the case of recognition of a foreign award, the court will not review the merits of the foreign award, save for compliance with the requirements of articles 167 to 169 of Law No. 105/1992.

Procedure for enforcement of foreign arbitral awards

The same documents as for a request for recognition of a foreign award must be attached to a request for enforcement. In addition, proof that the award is enforceable must be presented, e.g., in the form of a certificate from the arbitral tribunal confirming enforceability of the award (article 175 of Law No. 105/1992) (usually, this follows from the final character of the award).

Pursuant to article 176 of Law No. 105/1992, the respondent will be summoned and allowed to state his defence, but again not on the merits of the case. For instance, the respondent may contend he has paid after the award was issued. The court decision on enforcement is subject to two tiers of appellate jurisdiction.

Once enforcement of the foreign arbitral award in Romania has been authorised, such an award may be enforced in the same way as a domestic award (article 177 of Law No. 105/1992).

Court proceedings

Jurisdiction for applications for court measures in support of the arbitral process generally lies with the court which would have had jurisdiction to determine the merits of the dispute in the absence of a valid and binding arbitration agreement (article 342 CPC). This includes applications:

- to remove any impediments that may arise in the organisation or conduct of the arbitration (article 342 CPC);
- to appoint or replace arbitrators (articles 351, 351^{2} and 352 CPC);
- for interim protective measures (article 358^{8} CPC);
- for taking of evidence where the attendance of witnesses has to be enforced (article 358^{11} CPC);
- to review arbitrators' fees, or deposits, advances or other payments required by the arbitral tribunal (article 359^{3} CPC); and
- for leave for enforcement of domestic arbitration awards (article 367^{1} CPC).

The court immediately superior to that identified by article 342 CPC has jurisdiction for applications for:

- setting aside of arbitral awards (article 365 CPC); and
- settling any conflict of jurisdiction between the arbitral tribunal and the court identified by article 342 CPC (article 343[4] CPC).

Jurisdiction for recognition and enforcement of foreign arbitral awards under the provisions of Law No. 105/1992 lies with the county court in the district where the person refusing recognition of the foreign award has its domicile or seat, or where the award is to be enforced (article 170(1) and 173(1) of Law No. 105/1992).

Conclusion

Arbitration is an increasingly popular method for resolution of commercial disputes in Romania and Romanian arbitration law is in line with modern international practice. Added attractions of arbitration are the wide international enforceability of awards and that private dispute resolution enables the parties to avoid the often still substantial delays encountered in the Romanian courts and the relative lack of experience of complex commercial disputes in the judiciary.

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Arbitration in the Russian Federation

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The Law on International Commercial Arbitration

The law of the Russian Federation "On International Commercial Arbitration" (No 5338-1), approved by the Supreme Soviet of the Russian Federation on 7th July 1993, was enacted on 14th August 1993 ("the 1993 Law").

The 1993 Law:

- consolidated the law applicable to arbitration procedures;
- reformed the status of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("the ICAC") to reflect its international status;
- supplemented the existing legislation with special norms on international arbitration procedures;
- amended the existing legislation to incorporate commercial arbitration provisions contained in various international agreements to which the Russian Federation is a party; and
- resolved various commercial arbitration issues which were not until then regulated by legislation.

The preamble to the 1993 Law states that the legislature recognised the usefulness of arbitration as a method for the resolution of disputes arising from international trade and the need for a comprehensive regulation of international commercial arbitration in the Russian Federation. The 1993

Law was drafted taking into account the arbitration provisions contained in:

- international agreements to which the Russian Federation is a party; and
- the 1985 UNCITRAL model law.

The 1993 Law has two Appendices, which set out the statutes of the two leading Russian arbitration institutions, the ICAC and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation ("the MAC"):

- Appendix 1 contains the "Statute on the Court of International Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation"; and
- Appendix 2 contains the "Statute on the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation".

Prior to the enactment of the 1993 Law, the "Regulations on the Arbitration Court of the USSR Chamber of Commerce and Industry" ("the Regulations"), which were approved by Decree No 8135-11 of the Presidium of the USSR Supreme Soviet on 14th December 1987, governed proceedings in the Arbitration Court. The Regulations made the Arbitration Court a permanent body of the USSR Chamber of Commerce and Industry, and set out general principles for the proceedings of the arbitration court. One of these principles was that the Arbitration Court was to accept any dispute referred to it by a party to a written agreement where such referral was a term of that agreement.

Prior to the enactment of the Regulations, proceedings in the Arbitration Court were regulated by the "Procedural Rules of the Foreign Trade Arbitration Commission of the USSR Chamber of Commerce and Industry" approved by the Resolution of the USSR Chamber of Trade and Industry on 25th June 1975 and enacted on 1st August 1975. The Regulations stipulated that the USSR Chamber of Commerce and Industry was to approve new procedural rules for the Arbitration Court, but such rules were never in fact approved.

Appendix 1 to the 1993 Law provides, inter alia, that the ICAC is the legal successor to the Arbitration Court of the USSR Chamber of Trade and Industry.

The Arbitration Rules of the ICAC, which the Chamber of Commerce and Industry of the Russian Federation developed in accordance with Appendix 1 of the 1993 Law ("the ICAC Rules"), remain the most frequently used institutional arbitration rules in Russia. The ICAC Rules are based on the 1976 UNCITRAL Arbitration Rules and were adopted on 1st May 1995.

Further arbitration courts are attached to a number of regional and local chambers of commerce and industry, such as the Arbitration Court at the St Petersburg Chamber of Commerce and Industry.

Historical background

From 1922 onwards, commercial disputes between domestic parties and state enterprises had to be settled by the newly created state arbitrazh tribunals; these were neither courts in the proper sense of the term nor an arbitration system, but consisted of quasi-judicial panels of adjudicators. Foreign trade disputes, however, were resolved by arbitration, and two specialised permanent arbitration bodies were established in Moscow: in 1930 the Maritime Arbitration Commission was set up, followed in 1932 by the Foreign Trade Arbitration Commission (renamed the Arbitration Court of the USSR Chamber of Trade and Industry in 1987, and then the ICAC in 1993), which dealt with all non-maritime international trade disputes. Only special state-controlled trading enterprises could engage in foreign trade, and these enterprises alone had access to arbitration.

In addition to this system for resolving East/West trade disputes between Soviet foreign trade enterprises and parties from non-communist countries, the 1972 Moscow Convention introduced a compulsory international arbitration scheme for all disputes arising between the state trading enterprises of the member states of the Council for Mutual Economic Assistance (COMECON).

Since 1991, far reaching legal reforms have been implemented, including some in the area of dispute resolution. The state arbitrazh courts were reformed into courts of law proper and now also have jurisdiction to hear foreign trade disputes. The law relating to domestic arbitration was updated by the 1992 Provisional Regulations, which permitted domestic parties to refer their private disputes for resolution to a private arbitral tribunal in Russia. In 2002, the Provisional Regulations were rescinded, effectively replaced by the Federal Law On Arbitration Tribunals in the Russian Federation (_ 102-FZ) ("Russian Arbitration Law"). The Russian Arbitration Law took effect on 27 July 2002.

The 1993 Law was introduced to make international commercial arbitration in Russia more acceptable to foreign parties, in particular, in relation to inward investment and foreign trade disputes. The 1993 Law was therefore based on the internationally recognised standard of the 1985 UNCITRAL Model Law.

Scope of application and general provisions of the 1993 Law and Russian Arbitration Law

Scope of application

Art 1(1) of the 1993 Law provides that the 1993 Law shall apply to international commercial arbitration if the place of arbitration is within the Russian Federation. However, some of the provisions of the 1993 Law also apply to disputes where the place of arbitration is outside of the Russian Federation; these provisions include:

- Art 8 (stay of court proceedings in favour of arbitration);
- Art 9 (court applications for interim protective measures in support of arbitration proceedings); and
- Art 35 and 36 (recognition and enforcement of arbitral awards).

It follows from the wide definition of "arbitration" in Art 2 of the 1993 Law that its provisions apply not only in relation to ICAC or MAC administered arbitrations, but also permit ad hoc arbitrations and arbitrations organised

under the rules of other permanent arbitration institutions, such as the ICC Court of Arbitration.

As indicated above, the 1993 Law does not apply to purely domestic arbitrations, which are presently governed by the 2002 Russian Arbitration Law ("the Russian Arbitration Law"). This section on Arbitration in Russia will focus primarily on international commercial arbitration under the 1993 Law. Some important provisions in the ICAC Rules will also be highlighted.

The Russian Arbitration Law is more developed than were the Provisional Regulations. For example, the law has an introductory chapter on arbitration costs, an arbitrator's duty of confidentiality and the procedure for challenging an arbitral award. The Russian Arbitration Law governs arbitration courts located domestically and permits both institutional and ad hoc arbitration. It does not apply to international commercial arbitration. An institutional domestic arbitration tribunal must hear a case in accordance with its rules, unless otherwise agreed by the parties. An ad hoc hearing is to be conducted under rules agreed by the parties. Subject to compliance with certain legal requirements, practically any Russian registered entity or association has a right to set up an institutional arbitration court.

General principles

Some of the more important provisions of the 1993 Law include that:

- no court interference in the arbitral process may take place except as provided for by the 1993 Law (principle of non-intervention by the courts);
- prior to their appointment, and subsequently at any stage of the arbitration, arbitrators must disclose any information which may give rise to justifiable doubts as to their impartiality or independence, and they may be challenged if such doubts exist (principle of impartiality and independence of the arbitral tribunal);

- the parties to a dispute may decide on particular issues relating to the arbitration procedure to be followed and may thereby deviate from the provisions of the 1993 Law (where so permitted by the 1993 Law) (principle of party autonomy); and that
- the parties to a dispute must be treated equally and without preference and each party must be provided with an opportunity to present its case (principle of equality of the parties, fairness and due process).

The arbitration agreement

Formal requirements

Art 7(1) of the 1993 Law defines an arbitration agreement as an agreement by the parties to submit all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, to arbitration. An arbitration agreement may be in the form of a separate agreement or, more usually, will be incorporated as a clause in the main agreement between the parties to which it relates.

Art 7(2) of the 1993 Law requires that an arbitration agreement must be in writing. The following will satisfy the form requirement for the agreement to be in writing:

- an agreement in the form of a document signed by the parties;
- an exchange of letters, telexes, or other means of telecommunication which provides a record of the parties' agreement;
- an assertion by one party in its statement of claim or defence that there is an agreement between the parties to refer any dispute between them to arbitration which is not denied by the other party; and
- a reference in an agreement to a separate document containing an arbitration clause constitutes an arbitration agreement, provided that the agreement is executed in writing and that the reference to the arbitration clause in the separate document expressly makes that clause part of the agreement.

As with international arbitration, an arbitration agreement executed in writing is required in order to enable parties to refer a dispute to domestic arbitration. Pursuant to Art 5(4) of the Russian Arbitration Law, parties to a dispute have a right to enter into an arbitration agreement up until the point when a state court hands down a decision on the merits of the case.

Arbitrability

Art 1(2) of the 1993 Law provides that the parties may refer the following disputes to international commercial arbitration in their agreement:

- foreign trade disputes resulting from contractual or other civil law relationships, and other forms of international economic relations, if the place of business of at least one of the parties is located outside of Russia; and
- disputes between Russian companies with foreign investment, and disputes between participants in such companies, as well as disputes between such entities and other private or public Russian persons.

Paragraph 1(2) of the ICAC Rules describes the types of disputes which may be referred to ICAC arbitration in similar terms.

However, Art 1(4) of the 1993 Law clarifies that that law forms part of the wider Russian legal framework. The 1993 Law will therefore not apply where a specific legal provision prevents the use of arbitration or imposes an alternative and compulsory dispute resolution method. This relates, e.g., to disputes concerning immovable property or land, which fall within the exclusive jurisdiction of the Russian courts.

Furthermore, Art 1(5) of the 1993 Law provides that, as with all other domestic legislation, international agreements to which the Russian Federation is a party will take precedence over the 1993 Law if and to the extent that such agreements deal with the same subject matter and establish rules which differ from those contained in the 1993 Law or other Russian arbitration legislation.

Under the Russian Arbitration Law, any civil law related dispute may be referred to arbitration unless otherwise is specified by federal law.

Separability

Art 16(1) of the 1993 Law and Paragraph 1(5) of the ICAC Rules provide that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract for the purposes of determining the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement. The fact that the main contract may be null and void therefore does not ipso jure entail the invalidity of the arbitration clause. This is an important pre-condition for the arbitral tribunal's power to rule on its own jurisdiction (see further below).

Mandatory/non-mandatory provisions

The 1993 Law identifies non-mandatory provisions through wording such as "unless otherwise agreed by the parties" or "the parties are free to agree", which indicates that the parties to an arbitration agreement have discretion to make their own arrangements on procedural matters. Any such express provisions in the arbitration agreement between the parties will take precedence over the non-mandatory provisions of the 1993 Law. Where provisions are mandatory, the parties have no discretion to amend them or exclude their application by agreement.

Non-mandatory provisions include, in particular: the power of the arbitral tribunal to order interim protective measures; the issue of notices; the language, place and date of the commencement of proceedings; the number and the procedure for the appointment of arbitrators; and the procedure for the conduct of the arbitration proceedings.

In addition, Art 2 of the 1993 Law provides that, where a provision of the 1993 Law (other than in respect of the law applicable to the substance of the dispute) affords the parties to the arbitration discretion to agree on a particular issue, they may authorise a third party to exercise that discretion. This relates, in particular, to institutional

arbitration, where by adopting institutional arbitration rules, the parties confer on the arbitration institution, e.g., the right to appoint the arbitral tribunal on their behalf. Art 2 of the 1993 Law further clarifies that, where the parties are free to agree on a particular issue, they may do so by incorporating specific (institutional or ad hoc) arbitration rules into their agreement by reference, which are then regarded as containing the agreement of the parties.

As with the 1993 Law, rules agreed by the parties may not contradict the mandatory provisions of the Russian Arbitration Law.

Composition of the arbitral tribunal

Constitution of the arbitral tribunal

Pursuant to Art 10 of the 1993 Law, the parties to an arbitration agreement are free to determine the number of arbitrators. If the parties have not agreed the number of arbitrators, three arbitrators shall be appointed.

Art 11(1) of the 1993 Law provides that, unless otherwise agreed by the parties, nobody may be prevented from being an arbitrator on the grounds of his nationality. It is therefore possible to appoint foreign nationals as arbitrators for the purpose of international arbitration proceedings in Russia.

Art 11(2) of the 1993 Law gives the parties freedom to agree on the procedure for appointment of the arbitrators, subject to the default provisions in Art 11(4) and (5) of the 1993 Law, which are designed to ensure that an arbitral tribunal may properly be constituted even in the event that one of the parties fails to comply with the agreed procedure (see further below).

Art 11(3) of the 1993 Law sets out the appointment procedure to be followed in the absence of any such agreement. If the arbitral tribunal is comprised of three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall jointly appoint

the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receipt of a request from the other party to do so, or if the two party appointed arbitrators fail to agree on the appointment of the third arbitrator within 30 days of their appointment, then the President of the Russian Chamber of Commerce and Industry ("the President") shall make the requisite appointment. The President shall also make the appointment if the parties fail to agree on the appointment of a sole arbitrator.

Art 11(4) of the 1993 Law addresses the situation where the parties have agreed an appointment procedure in their arbitration agreement, but one of the parties does not comply with the agreed procedure, or where the parties, or the two party appointed arbitrators, fail to reach agreement, or where a third party (including an arbitration institution) does not fulfil the functions delegated to it in accordance with the agreed procedure. In such circumstances, either party may request the President to take the necessary measures to complete the appointment of the arbitrators, unless the arbitration agreement provides another mechanism for securing an appointment.

Art 11(5) of the 1993 Law clarifies that any measures taken by the President to complete the constitution of the arbitral tribunal (as outlined above) are not subject to appeal. In appointing an arbitrator, the President shall have regard to the qualifications required of the arbitrator by the agreement of the parties, and to such other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Moreover, where the President is to appoint either the sole arbitrator or the third arbitrator, the 1993 Law obliges him to take into account whether it is advisable to appoint an arbitrator of a nationality other than those of the parties to the dispute. While this provision gives the President discretion as to the nationality of the sole or third arbitrator, it is general practice for the position of such an arbitrator to be filled with a national of a third country not connected with the dispute or the parties thereto.

The ICAC Rules contain general provisions on arbitrators, the requirements as to their impartiality and independence, and regarding their qualifications, in Paragraph 2. The ICAC maintains an approved list of arbitrators, but persons not included on that list may still be appointed to act as arbitrators in ICAC arbitration proceedings. The formation of the arbitral tribunal is governed by Paragraphs 19 to 21 of the ICAC Rules. Unless otherwise agreed by the parties, the ICAC Rules provide for an arbitral tribunal to consist of three arbitrators: one arbitrator appointed by each party, and a chairman of the tribunal appointed by the two party appointed arbitrators. In addition, Paragraph 5 of the ICAC Rules provides for the appointment of a case reporter by the President; the function of the case reporter is to keep the record of the proceedings, participate in the hearings and closed sessions of the tribunal, and execute the orders of the President and the tribunal.

The Russian Arbitration Law sets out that where a dispute is to be heard by a sole arbitrator, the former is required to have a higher degree in law. Should a dispute be heard by a panel, the panel chairman must hold a higher degree in law. The Russian Arbitration Law permits any odd number of arbitrators to sit on a panel. Similar to the 1993 Law, it is a generally accepted rule that three arbitrators are to be appointed in the event that parties have not agreed otherwise.

The challenge and removal of arbitrators

As pointed out above, an arbitrator is required by Art 12(1) of the 1993 Law, prior to his appointment as well as from the time of his appointment throughout the arbitration proceedings, to disclose any circumstances which may give rise to reasonable doubts as to his impartiality or independence.

Art 12(2) of the 1993 Law provides that an arbitrator may only be challenged if grounds exist which give rise to justifiable doubts as to his impartiality or independence, or if he does not have the qualifications required of him by the agreement of the parties.

In order to prevent abuse of the challenge procedure, the Art 12(2) of the 1993 Law further provides that a party may challenge an arbitrator appointed by it, or with its participation, only for reasons of which that party became aware after the appointment was made. The Russian Arbitration Law sets out a similar rule.

In addition to these statutory grounds for challenge, the parties are free to agree on additional grounds for challenge.

Pursuant to Art 13(1) of the 1993 Law the parties are free to agree on the procedure for the challenge of arbitrators. In the absence of an agreed procedure, Art 13(2) of the 1993 Law requires the challenging party to inform the arbitral tribunal of the reasons for the challenge in writing within 15 days of the constitution of the arbitral tribunal, or of the date on which such party learned of the circumstances giving rise to the right of challenge, as the case may be. If a challenged arbitrator does not step down voluntarily, or if the other party to the arbitration objects to his removal, the challenge will be decided by the arbitral tribunal.

If an arbitrator is challenged in accordance with either the procedure agreed by the parties or that provided by Art 13(2) of the 1993 Law, and such challenge is not successful, Art 13(3) gives the challenging party the right, within 30 days of receiving notice of the decision rejecting the challenge, to request the President to decide on the challenge. The President's decision is not subject to further appeal. Pending the President's decision on the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the proceedings and make an award. However, should the challenge subsequently succeed, any such award may be set aside (see further below).

If for any legal or factual reason an arbitrator cannot continue to perform his functions, or if for any other reason an arbitrator fails to fulfil his duties, Art 14(1) of the 1993 Law provides that his mandate terminates either if he resigns or if he is removed by agreement of the parties. If the parties fail to agree on the removal of the arbitrator, and there remains a controversy in this regard,

either party may request the President to intervene and decide on the termination of the arbitrator's mandate.

Art 14(2) of the 1993 Law clarifies that an arbitrator may withdraw from office in the event of a challenge under Art 13 of the 1993 Law without such withdrawal being taken to imply acceptance by the arbitrator that valid grounds for a challenge existed.

The challenge procedures in ICAC arbitration proceedings are set out in Paragraph 24 of the ICAC Rules, which also makes provision for the challenge of experts and interpreters on the same grounds as those on which arbitrators may be challenged. Paragraph 25 of the ICAC Rules deals with the termination of an arbitrator's office for reasons other than doubts as to his independence, impartiality or lack of required qualifications, such as his removal by agreement of the parties, or by the President upon application of a party for failure to fulfil his duties.

The appointment of substitute arbitrators

Pursuant to Art 15 of the 1993 Law, upon the removal or resignation of an arbitrator under Art 13 or 14 of the 1993 Law or for any other reason, a substitute arbitrator shall be appointed in accordance with the procedure which applied to the appointment of the outgoing arbitrator.

In the event that an arbitrator is no longer able to participate in ICAC arbitration proceedings, Paragraph 26 of the ICAC Rules provides that his position shall be taken by the reserve arbitrator appointed at the time of constitution of the arbitral tribunal, thereby minimising the delay and disruption caused to the proceedings by the need to substitute a member of the arbitral tribunal. Only in the event that such substitution is not possible, will a new arbitrator or chairman have to be appointed in accordance with the ICAC Rules.

Arbitrators' fees and expenses

The 1993 Law does not contain an express provision for the amount and payment by the parties of the arbitrators' fees and expenses. In ad hoc arbitration proceedings, these are matters for agreement between the parties and the arbitrators. In institutional arbitration proceedings, the amount and procedure for the payment of the administrative fees of the arbitration court, the arbitrators' fees, and all other arbitration costs and expenses, will be set out in the rules and cost schedules of the relevant arbitration institution.

In the case of ICAC arbitration proceedings, e.g., Paragraph 18 and a separate schedule attached to the ICAC Rules sets out detailed provisions in this regard (see further below).

Jurisdiction of the arbitral tribunal

Competence to rule on its own jurisdiction

Art 16(1) of the 1993 Law and Paragraph 1(5) of the ICAC Rules give the tribunal power to rule on its own jurisdiction, including any objections to the existence or the validity of the arbitration agreement. Art 16(2) of the 1993 Law requires objections to the tribunal's jurisdiction to be raised no later than at the time of submission of the statement of defence. A party is not precluded from raising such objections by the fact that it has appointed, or participated in the appointment of, an arbitrator.

Equally, any argument that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter said to be beyond the scope of the tribunal's authority arises in the course of the proceedings.

In either case, the tribunal may admit the objection later if it considers the delay in raising it justified.

Pursuant to Art 16(3) of the 1993 Law, the arbitral tribunal may rule on the challenge to its jurisdiction either as a preliminary issue by an award on jurisdiction, or in its final award on the merits. If the tribunal determines the issue of jurisdiction by an interim award, either party may,

within 30 days of receipt of notice of the ruling, request the competent court (as to which see further below) to rule on jurisdiction. Such a court ruling is not subject to further appeal. Pending the outcome of the court proceedings, the arbitral tribunal may continue the arbitration proceedings and make an award. However, any such award is subject to being set aside if the court subsequently finds that the arbitral tribunal lacked or exceeded its jurisdiction.

Power to order interim measures

Art 17 of the 1993 Law provides that, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of either party, order such interim measures of protection as it considers necessary for securing the claim regarding the subject-matter of the proceedings. The arbitral tribunal may require any party to provide adequate security in connection with such measures.

Paragraphs 1(6) and 30 of the ICAC Rules contain similar provisions, stating that, at the request of either party, the arbitral tribunal may order such interim measures to secure the claim with respect to the subject-matter of the claim as it deems necessary. Such an order may take the form of an interim award. The arbitral tribunal may request a party to provide appropriate security in connection with such measures.

Similar provisions are contained in the Russian Arbitration Law. In addition, the Russian Arbitration Law provides that the fact that a party has filed an injunction motion at the state court cannot be construed as that party waiving its rights to arbitration. An interim measures motion can be filed at a state court where the arbitration tribunal is located or where the property subject to the imposition of such measures is located.

Conduct of arbitral proceedings

Procedural law

The 1993 Law has been drafted so as to take into account and incorporate legal techniques and provisions both of domestic and international legal and procedural practice.

General procedural principles

The key procedural principles under the 1993 Law have already been referred to above. They include:

- Art 18 of the 1993 Law (Equal Treatment of the Parties), which stipulates that the parties shall be treated equally (without preference) and that each party shall be given a full opportunity to present its case; and
- Art 19 of the 1993 Law (Determination of Rules of Procedure), which (subject to the mandatory provisions of the 1993 Law) gives the parties autonomy to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. In the absence of such agreement, the arbitral tribunal may, again subject to the mandatory provisions of the 1993 Law, conduct the proceedings in such manner as it considers appropriate;

The procedure to be followed in ICAC arbitration proceedings is determined by the ICAC Rules. To the extent that the ICAC Rules and the agreement of the parties do not contain any express provision on a particular procedural issue, paragraph 13(2) of the ICAC Rules stipulates that the arbitral tribunal shall conduct the proceedings in such a manner as it sees fit, subject to the guidance provided by the provisions of the 1993 Law and the overriding principles of equality of the parties and due process considerations.

Commencement of arbitration

Art 21 of the 1993 Law provides that, unless otherwise agreed by the parties, arbitration proceedings in respect of a particular dispute are deemed to commence on the date on which the respondent receives the request from the applicant to refer the dispute to arbitration.

Pursuant to Paragraph 14 of the ICAC Rules, arbitration proceedings are instituted by filing a statement of claim with the ICAC.

Loss of right to object

Art 4 of the 1993 Law contains the important general principle of waiver of the right to object: if a party to arbitration proceedings is aware that any of the non-mandatory provisions of the 1993 Law, or any requirement under the arbitration agreement, has not been complied with, and nevertheless proceeds with the arbitration without objecting to such non-compliance immediately, or within the time limit provided by the agreement of the parties for such objection, that party may be deemed to have accepted the non-compliance and to have waived the right subsequently to object under the 1993 Law or the arbitration agreement.

Place and language of arbitration

Pursuant to Art 20(1) of the 1993 Law, the parties are free to agree the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal taking into account the circumstances of the case and the convenience of the parties.

Pursuant to Paragraph 7 of the ICAC Rules, the place of hearings in ICAC arbitration proceedings shall be Moscow, although the parties, or the arbitral tribunal with the agreement of the President, may agree to hold hearings elsewhere in the Russian Federation.

Notwithstanding the determination of the place of arbitration by the parties or the tribunal pursuant to Art 20(1), unless otherwise agreed by the parties, Art 20(2) of the 1993 Law permits the arbitral tribunal to convene at a different place which it considers appropriate for holding consultations between the arbitrators, for hearing witnesses, experts or the parties, or for examining evidence, other property or documents.

Pursuant to Art 22(1) of the 1993 Law, the parties are also free to agree on the language or languages to be used in the proceedings. In the absence of such agreement, the arbitral tribunal shall determine the language or languages to be used. Such agreement or determination shall, unless provided otherwise, apply to

any written submissions made by the parties, to any hearings, and any awards, decisions, or any other communications by the arbitral tribunal.

Pursuant to Art 22(2) of the 1993 Law, the arbitral tribunal may in appropriate circumstances order that any documentary evidence submitted by the parties shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Paragraph 9 of the ICAC Rules provides that documents (excluding written evidence) submitted by the parties in the arbitration proceedings shall be in the language of the contract or correspondence between them, or in the Russian language. Paragraph 10 of the ICAC Rules provides for the hearings to be conducted in the Russian language unless otherwise agreed by the parties.

Article 21(1) of the Russian Arbitration Law specifies that cases are to be heard in the Russian unless the parties have agreed to the contrary.

Submissions

Art 21 of the 1993 Law does not contain any mandatory requirements as to the form or contents of the request for arbitration, but the request should contain all relevant information required to identify the parties to the dispute, the substantive agreement and the circumstances giving rise to the dispute, and the claims submitted to arbitration. In his request for arbitration, the claimant should also nominate his arbitrator (in the case of a tribunal consisting of three arbitrators) or nominate an arbitrator for appointment (in the case of a sole arbitrator), and require the respondent to nominate his arbitrator, or to consent to the appointment of the sole arbitrator, as the case may be.

With regard to the further conduct of the arbitration following the constitution of the arbitral tribunal, unless the parties have agreed otherwise as to the required contents of their statements of case, Art 23(1) of the 1993 Law provides that, within the time period agreed on by the parties or determined by the arbitral tribunal, the

claimant shall state the facts supporting his claim, the points at issue, and the relief or remedy claimed, and the respondent shall state his defence to the claim. The parties may attach to their statements of case the documents which they consider relevant and on which they rely in support of their case, or may include therein a reference to the documents or other evidence which they intend to submit.

Unless otherwise agreed by the parties, Art 23(2) of the 1993 Law permits the parties to amend or supplement their statements of claim or defence in the course of the arbitration proceedings, unless the arbitral tribunal considers such amendment to be too late.

While the provisions on submissions in the 1993 Law are quite general, Paragraph 15 of the ICAC Rules sets out more detailed requirements as to the contents of the statement of claim to be observed in ICAC arbitration proceedings. A statement of claim should include:

- the names and addresses of the parties;
- the claim(s);
- a substantiation of the ICAC's jurisdiction to hear the dispute;
- a description of the factual and legal basis for the claim and a reference to the supporting evidence;
- the amount of the claim;
- the full names of the arbitrator (and of a reserve arbitrator) nominated by the claimant or a request for the President to make these appointments;
- a list of the documents attached to the statement of claim; and
- the claimant's signature.

If a statement of claim does not meet the above requirements, Paragraph 17 of the ICAC Rules requires the executive secretary of the ICAC to request the claimant to remedy the defects within a specified time period not exceeding two months. If the claimant fails to remedy the defects and insists on the consideration of the case on the basis of the original statement of claim,

then the ICAC may decide either to accept the case for referral to an arbitral tribunal, or to terminate the proceedings.

Paragraph 19 of the ICAC Rules provides that upon receipt of a statement of claim the executive secretary of the ICAC shall notify the respondent thereof and shall forward to the respondent copies of the statement of claim, and of the supporting documentation attached thereto. At the same time, the executive secretary of the ICAC shall invite the respondent to submit his response to the statement of claim (supported by relevant evidence), within 45 days of receipt by him of the copy of the statement of claim.

Paragraph 33 of the ICAC Rules entitles the respondent within the same 45 day period to bring a counterclaim or claim a right of set-off, provided it arises out of the same contract as forms the subject matter of the proceedings. The arbitral tribunal may take into consideration counterclaims or claims for a set-off made at a later point in the proceedings, but the respondent faces the risk of such claims being rejected on the grounds of delay or being burdened with the additional costs occasioned by such delay. A counterclaim or claim for the purpose of a set-off must meet the same requirements as to form and contents as the principal statement of claim.

Within a shorter time period of 30 days from the receipt of the copy of the statement of claim, the respondent shall also indicate to the ICAC the full names of the arbitrator and reserve arbitrator chosen by him, or request the President of the ICAC to make these appointments on his behalf.

Pursuant to Paragraph 22 of the ICAC Rules, the arbitral tribunal when constituted shall review the state of preparation of the case and, if it deems this necessary, shall take such further steps as may be required to prepare the case for examination, including by obtaining additional

written explanations, evidence, or documents from the parties; the tribunal shall also determine the time limits within which such further steps must be taken.

Paragraph 32 of the ICAC Rules provides that either party may amend its claim or defence before the hearing is completed. The arbitral tribunal may disallow such amendments if they are made too late or would cause undue delay. The arbitral tribunal may allow an amendment not withstanding that may cause delay, but in such circumstances the tribunal may impose the additional costs caused thereby on the party making the amendment.

Service and filing of documents

With regard to service and notification of written communications generally, Art 3 of the 1993 Law requires such written communications to be delivered to the addressee personally at his place of business, permanent residence or mailing address, and they are deemed to have been received by him on the day of such delivery. If none of these addresses can be established upon reasonable enquiry, the communication is deemed to have been received upon delivery by registered letter or other means which provides a record of the attempt to deliver it to the addressee's last known place of business, permanent residence or mailing address.

The ICAC Rules also contain detailed provisions on filing and service of documents in Paragraphs 9 and 12. Generally, service of documents in ICAC arbitration proceedings will be effected through the conduit of the ICAC Secretariat.

Oral hearings and written proceedings

Art 24(1) of the 1993 Law provides that, subject to any contrary provision in an arbitration agreement, the arbitral tribunal has authority to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings should be conducted only on the basis of the documents and other materials submitted by the parties. However, unless the parties have agreed that no oral hearings shall be held (documents only arbitration), the arbitral tribunal shall hold such hearings at an appropriate stage in the

proceedings if so requested by a party. Art 24(2) of the 1993 Law requires that the parties are given sufficient advance notice of any hearing or other meeting of the arbitral tribunal for the purpose of taking evidence.

Paragraph 27 of the ICAC Rules envisages that the tribunal shall hold a hearing to enable the parties to present and argue their case in the light of the evidence presented in the proceedings. Paragraph 23 of the ICAC Rules requires that the parties be notified of the place and time of a hearing so as to afford them at least 30 days to prepare for and appear at the hearing. However, the parties may agree on shorter notice periods. The tribunal may hold further hearings if the circumstances so require.

Pursuant to Paragraph 31 of the ICAC Rules, the parties may authorise the arbitral tribunal to settle the dispute on the basis of written materials only without holding a hearing. However, the tribunal may nevertheless order that a hearing be held if the materials submitted by the parties are insufficient for the resolution of the dispute on the merits.

The 1993 Law does not require the arbitral tribunal to keep formal minutes of the arbitration proceedings. Paragraph 37 of the ICAC Rules provides that minutes of arbitration hearings must be kept and that such minutes must, inter alia, contain a brief description of the proceedings at the hearing. Both parties have the right to review these minutes. At the request of either party, the arbitration court may amend or change the minutes, if it considers the request to be justified.

Default by parties

Unless otherwise agreed by the parties, Art 25 of the 1993 Law provides that if, without showing sufficient cause:

- the claimant fails to submit his statement of claim within the time period agreed by the parties or determined by the arbitral tribunal, the arbitral tribunal shall terminate the proceedings;
- the respondent fails to submit his defence to the claim within the time period agreed by the parties or determined by the arbitral tribunal, the arbitral tribunal

shall continue the proceedings without treating such failure in itself as an admission by the respondent of the claimant's allegations; and

- a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award on the basis of the evidence before it.

Paragraph 28 of the ICAC Rules equally gives the arbitral tribunal in ICAC arbitration proceedings discretion to continue the proceedings and make an award in the event that a party who has been duly notified of the hearing fails to appear, but the provision also permits a defaulting party to request the arbitral tribunal in writing to adjourn the proceedings for good reason.

Confidentiality

The 1993 Law does not contain an express confidentiality provision. However, Paragraph 8 of the ICAC Rules imposes an obligation on the arbitrators, case reporter and secretariat to keep confidential any information which becomes known to them about a dispute which forms the subject matter of ICAC arbitration proceedings.

In addition, Paragraph 27 of the ICAC Rules clarifies that the arbitration hearings shall be conducted in private, unless the arbitral tribunal with the consent of the parties permits the attendance of persons not participating in the proceedings.

Pursuant to Art 22 of the Russian Arbitration Law, an arbitrator may not disclose information made known to him in the course of arbitration without the permission of the parties or their successors. Paragraph 2 of this article contains a particularly important rule that an arbitrator cannot be questioned as a witness in respect of information made known to him in the course of arbitration.

Evidence

The 1993 Law contains only limited provisions on the subject of evidence. Generally, each party will have to prove the facts on which it relies in support of its claim

or defence by ethe usual means of evidence, which include documents, real evidence, witnesses, and expert opinions.

In accordance with Art 19(2) of the 1993 Law, unless otherwise agreed by the parties, the arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of the evidence submitted by the parties.

Art 24(3) of the 1993 Law requires that any documents, statements or other information provided by one party to the arbitral tribunal must also be communicated to the other party.

In Art 26, the 1993 Law contains provisions specifically dealing with experts appointed by the arbitral tribunal. Unless otherwise agreed by the parties, Art 26(1) of the 1993 Law gives the arbitral tribunal power to:

- appoint one or more experts to report to it on specific issues determined by the arbitral tribunal; and to
- require a party to provide the expert with any relevant information or to produce (or provide access to) documents, goods, or other property for inspection.

Pursuant to Art 26(2) of the 1993 Law, unless otherwise agreed by the parties, the expert shall after delivery of his report, at the request of a party or if the arbitral tribunal considers this necessary, participate in a hearing where the parties have the opportunity to put questions to him or to present their own expert witnesses to give evidence on the points in issue.

Paragraph 34 of the ICAC Rules expressly requires each party to prove the circumstances on which it relies in support of its pleaded case. The arbitral tribunal may request a party to submit additional evidence. The arbitral tribunal may, at its discretion, order the conduct of an expert examination, request the submission of evidence by third parties and summon and hear witnesses. In ICAC arbitration proceedings too, the arbitrators are free to evaluate the evidence according to their convictions.

Paragraph 30 of the ICAC Rules provides that the secretariat shall provide copies of all documents submitted by a party to the ICAC to the other party. The parties shall

also receive expert reports and other documentary evidence on which the award may be based.

Third party intervention

In Paragraph 35, the ICAC Rules contain an express provision for the joinder of third parties to the arbitration proceedings. Such joinder is possible with the consent of the parties and the written consent of the third party proposed to be joined to the proceedings. The request for joinder of a third party must be made before the time period for the respondent to reply to the statement of claim has expired.

The 1993 Law contains no express provision on the participation of third parties in the proceedings and joinder of the third parties is therefore only possible in ad hoc arbitration proceedings if so agreed by the parties and with the consent of the third party.

Making the award and termination of proceedings

Choice of law

In 2002, an important update was procured to the conflict of laws legislation. The third part of the Russian Civil Code (effected on 1 March 2002) ("the Civil Code") is a cornerstone of the Russian legislation on conflict of laws. Art 1186 of the Civil Code sets out rules for defining the governing law where the breakdown in relations involves a "foreign element." According to the law, the relevant existing legislation will be used to establish governing law by international commercial arbitrators (i.e., Russian international treaties and the 1993 Law). The Civil Code defines the procedure for construction of foreign law and sets out the principal conflict of laws rules. Under Art 1211, should the parties fail to choose governing law the Proper Law of the Contract principle is applied.

Art 28 of the 1993 Law sets out how the law applicable to the substance of the dispute is to be determined. Art 28(1) of the 1993 Law requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of their dispute. Any reference to the law or legal system of a state shall be construed as directly referring to the substantive law of that state and not to its conflict of law rules.

Art 28(2) of the 1993 Law provides that, in the absence of a choice of law by the parties, the arbitral tribunal shall apply the law determined by it in accordance with the conflict of law rules which it considers applicable. This introduces an element of uncertainty for the parties, because their substantive rights and obligations may differ substantially depending on the applicable law. It is therefore always preferable for the parties (and for the tribunal) to include an express choice of law provision into their agreement. This will furthermore assist the parties (or the appointing authority) from the outset of the proceedings to the extent possible to identify and appoint arbitrators with the requisite legal knowledge.

Art 28(3) of the 1993 Law further requires the arbitral tribunal in all cases to decide in accordance with the terms of the underlying agreement between the parties and to take into account the trade customs applicable to the particular transaction in issue in the proceedings.

Pursuant to Paragraph 13(1) of the ICAC Rules, the same principles apply to the determination of the law applicable to the substance of the dispute in ICAC arbitration proceedings.

Remedies

Neither the 1993 Law nor the ICAC Rules define the remedies which the arbitral tribunal has power to grant; but equally the 1993 Law and the ICAC Rules do not limit or otherwise restrict the orders which an arbitral tribunal may make. In accordance with the general procedural rules applicable in the Russian Federation, an arbitral tribunal may allow or disallow a claim in full or in part, order the payment of a sum of money or the transfer of

property, or oblige the respondent to perform certain acts or prevent him from performing certain acts.

Interest

The 1993 Law does not contain any provision for payment of interest on monetary claims. The arbitral tribunal has power to award interest if the underlying agreement between the parties or the law applicable to the substance of the dispute so provides. Art 395 of the Civil Code provides for payment of statutory interest in certain circumstances. The interest rate is determined from time to time by the Central Bank of the Russian Federation but may be varied by the court depending on the circumstances of the case.

Decision making by the tribunal

Unless otherwise agreed by the parties, Art 29 of the 1993 Law requires the decisions of an arbitral tribunal consisting of more than one arbitrator shall be made by a majority of its members. Procedural issues may be decided by the presiding arbitrator if so authorised by the parties or by the other members of the arbitral tribunal.

Paragraph 39(2) of the ICAC Rules provides that if a decision cannot be made by a majority of the arbitrators, then it shall be made by the presiding arbitrator. An arbitrator who does not agree with the majority ruling (or the ruling of the presiding arbitrator) may state his view in a written dissenting opinion, which shall be attached to the arbitral award.

Paragraph 11 of the ICAC Rules contains a provision on the duration of arbitral proceedings and requires the arbitral tribunal to take measures ensuring, as far as possible, that such proceedings be completed within 180 days of the formation of the arbitral tribunal. While in practice that may not always be achievable in more complex commercial disputes, the provision serves as a useful guideline and encourages the tribunal to conduct the proceedings speedily and effectively. Although the 1993 Law does not contain a provision requiring the proceedings to be completed within a certain time period, arbitrators in ad hoc arbitration proceedings are in principle bound by the same duty to pursue and conclude

the proceedings without undue delay; the arbitrators may otherwise risk termination of their mandate by the parties or, at the request of a party, by the President.

Adjournment of hearing and stay of proceedings

Paragraph 36 of the ICAC Rules authorises the arbitral tribunal in ICAC arbitration proceedings to adjourn or stay the proceedings where necessary through a procedural ruling at the request of the parties or on its own initiative. It is submitted that, in ad hoc arbitration proceedings under the 1993 Law, the arbitrators have authority to take the same steps on the basis of their general procedural powers.

Form, contents and effect of the award

Art 31(1) of the 1993 Law provides that an arbitration award shall be made in writing and shall be signed by the arbitrator or arbitrators. If the arbitral tribunal consists of more than one arbitrator, the signatures of a majority of the arbitrators suffice, provided that an explanation is provided why any signatures have been omitted.

Pursuant to Art 31(2) of the 1993 Law, an arbitration award must state the reasons on which it is based, whether the claim is allowed or disallowed, the amount of the arbitration fees and costs, and their allocation between the parties. Art 31(2) of the 1993 Law further requires the award to be dated and to state the place of arbitration as agreed by the parties or determined by the arbitral tribunal. The award will be deemed to have been made at that place. A signed copy of the award shall be delivered to the parties pursuant to Art 31(4) of the 1993 Law.

Pursuant to Paragraph 39 of the ICAC Rules, the arbitral tribunal shall declare the proceedings closed and proceed to making an award when all the facts relating to the dispute have been sufficiently clarified. The award shall be made in a closed session of the arbitral tribunal with a majority of votes. If a majority cannot be reached, the chairman of the tribunal shall make the award.

Paragraph 40 of the ICAC Rules provides that the operative part of the award shall be announced to the parties orally

when the award has been made, or communicated to them in writing within 30 days of completion of the hearing. In either case, the reasons for the award shall be sent to the parties in writing within the same 30 day period. The required contents of the award are set out in detail in Paragraph 41 of the ICAC Rules.

Settlement

If the parties settle their dispute in the course of the arbitration proceedings, Art 30(1) of the 1993 Law and Paragraph 43(1) of the ICAC Rules require the arbitral tribunal to terminate the proceedings and, if so requested by the parties and the arbitral tribunal does not object, to record the settlement in the form of an award on agreed terms. Art 30(2) of the 1993 Law and Paragraph 43(2) of the ICAC Rules clarify that an award on agreed terms shall state that it is an award and comply with the requirements as to form and contents of an award. Such an award on agreed terms has the same status and effect as any other award on the merits of the case.

Termination of proceedings

Pursuant to Art 32(1) of the 1993 Law, the arbitral proceedings are terminated either by a final award or by an order of the arbitral tribunal.

Art 32(2) of the 1993 Law provides that the tribunal shall make an order terminating the arbitral proceedings when:

- the claimant withdraws his claim, unless the respondent objects and the arbitral tribunal recognises that he has a legitimate interest in obtaining a final settlement of the dispute;
- the parties agree to terminate the proceedings; or
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

While the mandate of the arbitrators terminates with the termination of the arbitral proceedings, Art 32(3) of the 1993 Law clarifies that this leaves unaffected the tribunal's standing to make a correction or interpretation of the award, or an additional award, or to resume the

proceedings in cases where the matter is referred back to the tribunal by the court in setting aside proceedings.

Paragraphs 38 and 45 of the ICAC Rules similarly provide for the termination of the proceedings either through the final award on the merits, or through an order for termination of the proceedings, which must comply with the same requirements as a final award on the merits.

Costs

In accordance with Art 31(2) of the 1993 Law, the fees and costs of the arbitration must be assessed and allocated as between the parties in a cost order as part of the arbitration award. There is not yet an established practice in ad hoc arbitration proceedings pursuant to which the winning party may claim reimbursement of all or part of its costs of legal representation and other expenses, although arbitral tribunals in practice sometimes exercise their discretion in relation to such claims upon application of a party and make an award for reimbursement of tribunal costs and expenses. However, even in circumstances where the tribunal makes a cost award to this effect, it is unlikely for a party to make a full recovery on its actual costs and expenses.

Pursuant to Paragraph 18 of the ICAC Rules, the amount of the registration and arbitration fees, the procedure for their payment, their allocation as between the parties, and also the procedure for covering the other costs of the arbitration proceedings, are to be established in accordance with the Schedule on Arbitration Fees and Costs attached to the ICAC Rules.

Paragraph 41 of the ICAC Rules requires the arbitral tribunal in its award to assess the amount of the arbitration costs and fees in the case, and to determine their apportionment as between the parties.

In summary, the registration fee in ICAC arbitration proceedings is a flat rate fee of currently US $750, whereas the arbitration fees, which cover the general

expenses of the ICAC and its secretariat, but also include the arbitrators' fees, are calculated on a sliding scale, depending primarily on the amounts of the claim and of any counterclaim. An arbitration fee of US $2,600 shall be charged if the amount of a claim does not exceed US $10,000. Arbitration fees for claims in excess of US $10,000,000 to be paid at following rates: US $74,600, plus 0.12% of the amount over US $10,000,000. The arbitration fees and other additional costs of the ICAC (such as expert witness or translators' fees, travelling expenses, etc) shall be borne by the losing party, or apportioned between the parties pro rata their respective success or failure if a claim or counterclaim succeeds only in part. In addition, the winning party is entitled to reimbursement of its reasonable legal costs and expenses (including the cost of legal representation) from the losing party.

Correction and interpretation of the award

Pursuant to Art 33(1) of the 1993 Law, each party has the right, within 30 days of receipt of the award (unless another period of time has been agreed upon by the parties) to request the arbitral tribunal to correct any errors in computation, any clerical or typographical errors, or any errors of a similar nature. If so agreed by the parties, the arbitral tribunal may also give an interpretation of a specific point or part of the award. The request for correction or interpretation of the award must be made with notice to the other party. Art 33(2) of the 1993 Law gives the arbitral tribunal power to correct the award on its own initiative within 30 days of the date of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. Any such correction or interpretation shall form part of the original award. Art 33(4) of the 1993 Law gives the

arbitral tribunal discretion to extend the time period within which to make the correction, interpretation or additional award, if necessary.

Unless otherwise agreed by the parties, each party shall further have the right pursuant to Art 33(3) of the 1993 Law, within 30 days of receipt of the arbitral award to request the arbitral tribunal to make an additional award on claims presented in the arbitral proceedings but omitted from the award. The request must be made with notice to the other party. If the arbitral tribunal considers the request to be justified, it shall render an additional award within 60 days.

Pursuant to Art 33(5) of the 1993 Law, the rules as to form and contents of the arbitral award also apply to the correction or interpretation of the original award or to an additional award.

Paragraph 42 of the ICAC Rules sets out the rules on correction, interpretation or making of an additional award in ICAC arbitration proceedings.

The role of the courts

The jurisdiction of the courts

Art 5 of the 1993 Law states the important principle of non-intervention by the courts, i.e., that in matters governed by the 1993 Law, the courts shall not intervene in arbitration proceedings except where expressly so provided by the 1993 Law.

In addition, Art 6(1) of the 1993 Law confers authority for the exercise of most functions in support of the arbitral process on the President rather than on the courts; this re-enforces the position of arbitration as essentially a private and autonomous dispute resolution process. Nevertheless, in certain clearly defined circumstances, the availability of court assistance remains necessary to ensure the effectiveness of arbitration as a dispute resolution mechanism.

Stay of court proceedings

Art 8(1) of the 1993 Law requires a court, in which an action is brought in a matter which is the subject of an arbitration agreement, at the request of a party to stay the

proceedings and refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The request shall be made no later than when the relevant party submits its first statement on the substance of the dispute.

Art 8(2) of the 1993 Law further provides that, if court proceedings are commenced in relation to matters which are covered by an arbitration agreement, arbitration proceedings may nevertheless be commenced or continued, and an arbitration award may be made, pending the decision of the court on the issue of jurisdiction.

Preliminary rulings on points of jurisdiction

As has been pointed out above, if the arbitral tribunal makes a preliminary ruling upon a party's request pursuant to Art 16 of the 1993 Law that it has jurisdiction, Art 16(3) of the 1993 Law gives the parties the right to request the competent court to rule on the issue of jurisdiction. However, the arbitral tribunal may continue the proceedings and make an award pending the request to the court.

Furthermore, as has been pointed out above, the court will determine the issue of jurisdiction pursuant to Art 8(1) of the 1993 Law if court proceedings are commenced and the other party invokes an arbitration agreement regarding the subject matter of the court proceedings.

Interim protective measures

While the arbitral tribunal has power pursuant to Art 17 of the 1993 Law to order interim measures unless otherwise agreed by the parties, Art 9 of the 1993 Law clarifies that it is not incompatible with an arbitration agreement for a party to request a court, before or during arbitral proceedings, to order interim measures of protection or for a court to grant such measures. The court will decide in accordance with the general principles of Russian procedural law whether to grant interim protective measures to resolve a claim.

Paragraph 1(6) of the ICAC Rules provides that if a party has requested a competent court to order interim protective measures in a matter which is the subject of

ICAC arbitration, and the court has granted such measures, that party shall immediately inform the ICAC thereof.

Obtaining evidence and other court assistance

An arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the competent court to provide assistance in obtaining evidence for use in the arbitration proceedings pursuant to Art 27 of the 1993 Law. The court may execute such request on the basis of the general Russian procedural rules on taking and securing evidence.

Challenging the award before the courts

Arbitration awards are not subject to appeal under the 1993 Law. Art 34(1) of the 1993 Law clarifies that recourse to a court against an arbitral award may be made only by an application for setting the award aside in accordance with Art 34(2) and (3) of the 1993 Law.

Pursuant to Art 34(2) of the 1993 Law, an arbitral award may only be set aside if the party making the application establishes that:

- one of the parties to the arbitration agreement was under some legal incapacity, or the arbitration agreement was invalid under the law chosen by the parties as the governing law of the agreement, or, in the absence of such choice, under the laws of the Russian Federation;
- a party was not given proper notice of the appointment of an arbitrator, or of the arbitration proceedings, or was for some other reasons unable to present its case;
- the award was made with respect to a dispute which was not covered by the arbitration agreement, or does not fall within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

- the constitution of the arbitral tribunal or the arbitration procedure was inconsistent with the arbitration agreement between the parties, unless such agreement was in conflict with a mandatory provision of the 1993 Law, or in the absence of an agreement, was not in accordance with the provisions of the 1993 Law; or
- if the court finds that:
  - the subject matter of the dispute was not capable of settlement by arbitration proceedings under the laws of the Russian Federation; or
  - the arbitral award is inconsistent with the public policy of the Russian Federation.

Art 40 of the Russian Arbitration Law provides that an arbitration award may be challenged within three months of the party receiving its award as long as the arbitration agreement does not state that the award is final. As with the 1993 Law, the Russian Arbitration Law sets out an exhaustive list of grounds for setting aside an arbitral award.

Art 34(3) of the 1993 Law provides that an application for setting aside an arbitral award must be made within three months of the date of receipt of the award by the party making the application; if a request for correction or interpretation of the award, or for an additional award, has been made to the arbitral tribunal, that 3 month time period commences from the date on which that request has been disposed of by the arbitral tribunal (by rejecting the request or by making the correction, interpretation, or additional award).

Art 34(4) of the 1993 Law gives the court discretion to suspend the setting aside proceedings in appropriate circumstances at the request of a party for a specified period of time in order to provide the arbitral tribunal with an opportunity to resume the arbitration proceedings or to take such other steps as may remove the grounds for setting aside the award.

The procedures for challenging and enforcing arbitration awards were updated as the new procedural codes took

effect. On 1 September 2002, the new Arbitrazh Procedural Code became effective followed by the the new Civil Procedural Code on 1 February 2003. The Arbitrazh Procedural Code governs proceedings at the arbitrazh courts which generally hear business related disputes whereas the Civil Procedural Code regulates proceedings at the common courts which are mostly in charge of disputes concerning individuals. Common courts also have jurisdiction over certain economic disputes providing they do not fall within the jurisdiction of the arbitrazh courts.

The new codes now contain detailed regulations for challenging and enforcing domestically rendered arbitral awards, and recognition and enforcement of foreign arbitral awards.

Under Art 232 of the Arbitrazh Procedural Code, a foreign arbitration award may be challenged on the grounds set out by an international treaty and the 1993 Law.

Recognition and enforcement of awards

The 1993 Law does not draw a distinction between the recognition and enforcement of domestic and foreign arbitral awards, or the grounds on which they may be refused. Art 35(1) of the 1993 Law provides that, regardless of the country in which it was made, an arbitral award shall be recognised as binding and, upon application in writing to the competent court, shall be enforced in Russia.

Art 35(2) of the 1993 Law requires the application to be supported by the authenticated original award and arbitration agreement, or by certified copies thereof. If either of these documents is made in a foreign language, certified translations into the Russian language must also be provided.

Recognition and enforcement of an arbitral award may only be refused on the grounds set out in Art 36(1) of the 1993 Law, which correspond to the grounds on which an award may be set aside, namely:

- one of the parties to the arbitration agreement was under some legal incapacity, or the arbitration agreement was invalid under the law chosen by the parties as the governing law of the agreement, or, in the absence of such choice, under the laws of the country where the award was made;
- the party against whom the award was made was not given proper notice of the appointment of an arbitrator, or of the arbitration proceedings, or was for some other reasons unable to present its case;
- the award was made with respect to a dispute which was not covered by the arbitration agreement, or does not fall within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the constitution of the arbitral tribunal or the arbitration procedure was inconsistent with the arbitration agreement between the parties, or in the absence of an agreement, was not in accordance with the laws of the country where the arbitration took place;
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which (or under the laws of which) that award was made; or
- if the court finds that:
  - the subject matter of the dispute was not capable of settlement by arbitration proceedings under the laws of the Russian Federation; or
  - the arbitral award is inconsistent with the public policy of the Russian Federation.

Prior to the enactment of the new 2002 Arbitrazh Procedural Code, the 1988 USSR Regulations on Recognition and Enforcement of Foreign Court Decisions and Arbitral Awards governed the procedural aspects

concerning the recognition and enforcement of foreign judgments and awards. Provisions of the 1988 Regulations will now apply only to the extent that they are in compliance with the new codes. The new Arbitrazh Procedural Code contains a rule that foreign court decisions and arbitration awards are to be recognized and enforced in Russia if one of Russia's international treaties or federal laws requires it. Russia is a signatory to the 1958 New York Convention. Recognition of foreign arbitral awards in Russia is conducted in accordance with the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards. Due to the fact that Russia has still not ratified or entered into bilateral treaties for enforcement of foreign commercial judgments with some of its leading business partners (e.g., Great Britain, the U.S.A., Canada, etc.), it is practically impossible to gain recognition and enforcement for a foreign court decision in Russia. This is yet another reason for referring disputes to international arbitration rather than to the courts of the relevant foreign state.

Art 36(2) provides that, if in the country in which an award is granted, a local court application has been made to set aside or suspend that award, then the court where recognition or enforcement is sought may, if it considers it appropriate, adjourn its decision until the challenge has been heard. Alternatively, it may also order the other party to provide security upon application by the party seeking recognition or enforcement of the award.

Court proceedings

Pursuant to Art 6(2) of the 1993 Law, preliminary rulings on jurisdiction and applications for setting aside arbitral awards are dealt with by the Supreme Courts of the Russian Republics, the territorial, regional, or city court, or the court of the autonomous region or area where the arbitration proceedings take place. Other court assistance, including taking evidence for use in arbitral proceedings, interim protective measures, or the recognition and enforcement of arbitral awards, are performed by the competent courts identified in the 2002 Arbitrazh

Procedural Code . Since 1 December 2001, Russia has been a signatory to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Russia is also a party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

Arbitration applications must be made in accordance with the general provisions of the procedural Laws of the Russian Federation.

Conclusion

There is a long tradition in Russia of resolving international commercial disputes by arbitration. In the form of the 1993 Law, Russia has adopted a modern framework for such arbitrations which follows the internationally recognised standard set by the UNCITRAL Model Law. The law relating to domestic arbitrations has also been updated and Russian arbitration institutions have been modernised. Today most commercial disputes involving foreign parities or concerning foreign direct investment in Russia are dealt with by way of private arbitration rather than through the Russian court system. This may be an indication that arbitration in Russia is increasingly accepted as meeting the demands of the modern business world.

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Arbitration in Scotland

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Historical background

The law of arbitration in Scotland is principally based on common law. It has been under consideration for some time, with the intention of introducing a new Act to both consolidate and update the current position.

The Dervaird Committee was set up with this aim in mind and its comments resulted in a draft Arbitration (Scotland) Bill in January 1997 and a second draft in December 2002. Despite being supported by the Scottish Courts Administration, this Bill has not been enacted to date.

Should new legislation be enacted, the draft Bill currently in existence indicates that the new law will not significantly alter the current law of Scotland regarding arbitrations. At present parties are free to choose the procedures and rules that will govern their arbitration. Importantly, the Model Law on International Commercial Arbitration promulgated by the United Nations Commission on International Trade Law ("the UNCITRAL Model Law") has the force of law in Scotland, through the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, ("the 1990 Act"). In Schedule 7, the UNCITRAL Model Law is set out essentially in its original form. Parties to international arbitration proceedings in Scotland are therefore at liberty to adopt the UNCITRAL Model Law.

In accordance with Schedule 7 to the 1990 Act, an arbitration is considered to be international if:

- the parties to an arbitration agreement have, at the time

of the conclusion of that agreement, their places of business in different states;

- the seat of arbitration specified in the arbitration agreement is situated outside the state in which the parties have their places of business; or
- the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the state in which the parties have their places of business.

The preliminary working group documents of the United Nations Commission on International Trade Law may be considered in ascertaining the meaning or effect of any provision of the UNCITRAL Model Law as set out in Schedule 7 to the 1990 Act.

Of particular importance is the fact that the UNCITRAL Model Law applies to international commercial arbitrations in Scotland, subject to any agreement in force between the United Kingdom and any other State or States which applies in Scotland. Furthermore, the UNCITRAL Model Law shall not affect any other enactment or rule of law in force in Scotland whereby certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of the UNCITRAL Model Law (for example, statutory arbitration under the Agricultural Holdings (Scotland) Act 1950).

Current law

The UNCITRAL Model Law forms only a small part of the current law of arbitration in Scotland which was known to Scotland even before the establishment of public courts, and its introduction has been described as coeval with the foundation of our law.[1]

The law of arbitration in Scotland is based almost entirely on the common law. Over time it has only been marginally modified by statute:

[1] McCallum v Lawrie 26 June 1810 FC pre Lord President Blair

- The 25th Act of the Articles of Regulation of 1695 - regulates the grounds for reduction of an arbitrator's[2] decision[3].
- Arbitration (Scotland) Act 1894 - expands the common law rules governing the naming and selection of arbitrators and, in particular, states that a reference to arbitration is not to be ineffective by reason only that an arbitrator is not named. This Act opened the door for the common practice of naming an arbitrator by reference to a particular society, group or firm (for example, the President for the time being of the Chartered Institute of Surveyors (Scottish Branch)), and also gave power to the court to nominate an arbitrator should the parties fail to reach agreement.
- Arbitration Act 1950 - gives effect to the Geneva Convention.
- Arbitration Act 1975 - gives effect to the 1958 New York Convention. The court must sist (i.e., stay) proceedings where there is an arbitration agreement in place between the subjects of different countries in respect of the matter in dispute.
- Administration of Justice (Scotland) Act 1972 (Section 3) - enables parties to an arbitration to request an arbitrator to state a case on a point of law for determination by the Court of Session. Therefore, should the parties decide that the arbitrator requires guidance on a legal (as opposed to a factual) issue, they can require that the arbitrator asks the court for an authoritative decision on that point only. The Court will not decide the outcome of the arbitration itself.
- Law Reform Miscellaneous Provisions (Scotland) Act 1990 (Section 66 and Schedule 7) - subsumes the UNCITRAL Model Law into the law of Scotland.

[2] The more usual term, historically, is arbiter, although the latest version of the Scottish Arbitration Code uses arbitrator and the terms are now interchangeable
[3] Reduction could not be "upon any cause or reason whatsoever, unless that of corruption, bribery or falsehood, to be alleged against the judges-arbitrators who alleged the same"

- Sections 89, 90 and 91 of the Arbitration Act 1996 (which extend the Unfair Terms in Consumer Contracts Regulations 1994 to arbitration agreements) also apply to Scotland.

Historical background

Private arbitration in Scotland can be traced back to the twelfth century; but in spite of this long tradition of non-judicial dispute resolution, there has been little statutory codification of the rules governing arbitration in Scotland. This means that the rules of arbitration in Scotland are not easily discovered.

Even after courts of law had been established in Scotland, recourse to arbitration continued to be frequent, particularly in mercantile matters. Arbitration also remained the preferred method of resolving disputes in cases which required the special skills or experience of particular arbitrators. It was also employed in cases where the questions at issue were best suited for determination by a person of skill or experience, rather than a judge, to avoid the delay, expense and publicity of court proceedings.

For a period of time in the course of the development of arbitration in Scotland the arbitration award was subject to review on its merits at the discretion of the Court. This deficiency was eliminated as early as 1695 by the 25th Act of the Articles of Regulation which renewed arbitration's "natural force and vigour"[4] and secured an element of finality to the arbitrator's award.

Reforms

The law of arbitration in Scotland was recently considered and reform proposed by way of a draft Arbitration Bill which was circulated in January 1997 by the Scottish Courts Administration following recommendations made by the Dervaird Committee. A second draft was produced in December 2002 by the Arbitration (Scotland) Bill

[4] JM Bell The Law of Arbitration in Scotland p14.

Working group, in association with the Scottish Council for International Arbitration ("SCIA") and the Chartered Institute of Arbitrators (Scottish Branch) ("CIArb (SB)"). The Bill was drafted to provide a comprehensive statutory framework for arbitration with an emphasis on the expediency of arbitral proceedings.

The Bill has not been laid before the Scottish Parliament and as time passes its wholesale acceptance appears to be more and more unlikely.

In the light of the lack of progress wih the draft Bill, the SCIA and CIArb (SB) produced the Scottish Arbitration Code in 1999. The code seeks to set out the general framework of arbitration and the rules under which arbitration in Scotland should be conducted. While the code has been widely welcomed, it is only a voluntary code. Its adoption requires agreement by all parties to an arbitration. As such, legislative reform is still desirable.

The arbitration agreement

Principles

The law on arbitration is based on the fundamental principles of Scots Law in relation to the formation of contracts and natural justice.

Anyone who has legal capacity to bind himself to a contract can enter into an arbitration agreement to resolve disputes relating to his affairs in Scotland. The purpose of an arbitration agreement is to exclude the courts from the resolution of the dispute.

Formal requirements

Where arbitration relates to an interest in land, an arbitration agreement must be in writing to be valid in Scotland.

A reference to arbitration can be in one of two forms: either by an ad hoc submission of a particular dispute to arbitration, or by an agreement to submit all future disputes to arbitration.

An ancillary submission (i.e., an arbitration clause contained in a contract which is principally drafted for another purpose) will terminate if the contract is terminated by, e.g., a material breach or frustration resulting in termination, unless the dispute to be submitted to arbitration has already arisen or a matter which is specifically provided for in the contract, in the events which have occurred.

Mandatory/non-mandatory provisions

The parties are free to decide upon the terms of the arbitration. The parties may agree bespoke rules or may agree to apply a standard set of rules as the Scottish Arbitration Code. Their instructions must be included in the submission itself, particularly in relation to interest, damages and expenses. The main exception is that the power under the Administration of Justice (Scotland) Act 1972 Section 3 to state a case to the Court of Session must expressly be excluded by the parties for it not to apply.

Composition of the arbitral tribunal

The constitution of the arbitral tribunal

The parties can agree to choose one or more arbitrators and may specify the identity of the arbitrators.

Provided that there is no direct interest or bias, anyone may act as an arbitrator, and a waiver from the parties may even cure the problem of an arbitrator's interest. A reference may be made to a society consisting of a changing body of members, or to a firm but care must be taken to avoid terms which are too general to effect an appointment[5]. A judge may continue to act as an arbitrator if the proceedings commenced before his or her appointment to the bench.

Oversmen

If a tribunal of two is appointed, it is also possible to nominate an oversman, who, in the event of two arbitrators failing to agree, will take over the determination of the dispute.

[5] 1 Bruce v Kordula 2001 SLT 983 OH.

If the arbitration agreement does not expressly provide for, nor expressly prohibit the appointment of an oversman, Section 4 of the Arbitration (Scotland) Act 1894 provides that the arbitrators may appoint an oversman if they fail to reach a consensus on the arbitral award.

Where the arbitrators have made a partial award only the remainder of the dispute not covered by the partial award must be wholly devolved to the oversman.

Where the arbitrators return the dispute to the oversman they become functus officio (i.e., they are discharged from the duties of office), in relation to the whole or part of the divested submission.

The challenge of arbitrators

Bias

If the arbitrator has a substantial interest in the outcome of a dispute, and this was not known to the parties when the arbitrator was selected, he or she will be disqualified, unless the interest was disclosed to the parties and acknowledged and the parties agreed to the arbitrator's acting prior to the arbitrator accepting his or her appointment.

An arbitrator may be disqualified for showing bias in favour of one of the parties.

Jurisdiction

If doubts arise in relation to the arbitrator's jurisdiction in the course of the arbitration, it is the duty of the arbitrator to first form his own judgment on the matter but ultimately it will be for the court to say if the arbitrator has exceeded his jurisdiction. Thus, although the tribunal can rule upon whether it has jurisdiction to act, its decision on this point can be over-turned although they are generally reluctant to interfere.

The appointment of substitute arbitrators

It may be necessary to appoint a substitute arbitrator should an arbitrator decline the appointment or be unable to act.

In such a case, the parties are free to agree on the appointment of a new arbitrator, failing which the Court

has power to make an appointment under the Arbitration (Scotland) Act 1894 Sections 2 and 3.

Arbitrators' fees and expenses

The arbitrator has an implied power to apportion the expenses of the proceedings between the parties, including his own fees and the expenses of conducting the arbitration.[6] This discretion may be limited by the agreement of the parties.

The award of expenses should provide a clear formula for their determination and calculation or be fixed, so that any action for their recovery will not be impeded. Expenses may be taxed in the normal manner.

Arbitrators' immunity

Negligence

It is thought that an arbitrator has immunity against negligence claims but this has not been tested in Scotland.

Corruption

If an award is appealed on the grounds of corruption of the arbitrator, he will be liable to the parties for damages. An arbitrator will be deprived of the immunity normally available to him as a person carrying out a judicial function where he is found to have acted in bad faith.

Jurisdiction of arbitral tribunal

Competence to rule on its own jurisdiction

An arbitral tribunal has jurisdiction to rule upon its own jurisdiction (the principle of Kompetenz-Kompetenz). The arbitrator can make a ruling on his jurisdiction to deal with the dispute.

At common law the decision of the arbitral tribunal regarding its jurisdiction may be challenged in court at the behest of one of the parties, although the courts are generally reluctant to interfere.

[6] Macintyre Bros. v Smith 1913 SC 129

Power to order interim measures

The arbitrator has the power to make an interim award if the parties have expressly provided for this in their arbitration agreement.[7]

The interim award subsists for temporary purposes until it is recalled or replaced by another interim award or by the final award, which can be entirely different from the interim award.

Partial awards

The power to issue partial awards must be expressly conferred upon the arbitrator in the arbitration agreement.

A partial award is a final determination on a particular issue of the submission and is final and binding with regard to that issue.

Conduct of arbitral proceedings

Commencement of arbitration

Arbitration is commenced by notice to the arbitrator(s), who should then accept office and appoint a clerk and oversman, if necessary. If one or more decline to accept the office, the parties may agree a new arbitrator or arbitrators, failing which the court can make an appointment.[8]

The arbitrator then invites the parties to state specifically the matters in dispute between them.

General procedural principles

Equity and natural justice are the overriding principles governing arbitration procedures in Scotland.

The arbitrator has a great deal of discretion in regulating the form of procedure which is to be followed by the parties and his decision on incidental procedural points cannot be challenged except on grounds of bias.

[7] Lyle v Falconer (1842) 5 D 236
[8] Arbitration (Scotland) Act 1894 ss 2 and 3.

Bell, the Scottish Institutional Writer[9], summarised the procedure as follows:

"Now, it is an evident pre-requisite to the discharge of this judicial function, that an arbiter shall adequately inform his own mind regarding the nature and merits of the subject in dispute. This is the indispensable pre-requisite to the faithful performance of the judicial function, whether by a public or a private judge. And, in both cases alike, the necessary means of informing any judge's mind may be regarded as mainly resolving into three great classes, viz.:

- the obtaining of a clear and distinct statement from the parties, of the precise question which he has got to decide, and of their mutual averments and admissions relative thereto;
- the ascertainment of the truth of disputed facts, by subjecting them to the test of a proof; and
- the hearing of parties in support of their respective views and interests."[10]

Procedural powers of the tribunal

Unless the parties prescribe in the arbitration agreement that the arbitrator will conduct the proceedings in a particular way, the arbitrator is free to adopt his or her own approach to procedure provided that he or she observes the rules of natural justice.

At common law certain powers of the arbitrator are implied - those which are "manifestly essential to the execution of the office of arbitrator"[11].

The arbitrator is basically a privately appointed judge and a number of the implied powers are those necessary for the proper exercise of any judicial function, for example:

- appointing a clerk;
- requiring the parties to specify the nature of the dispute;
- receiving evidence from the parties concerning the dispute;
- hearing the parties' submissions about that evidence and any point of law; and

[9] An Institutional Writer is a legal theorist whose writings have force of law in Scotland.
[10] JM Bell The law of Arbitration in Scotland paras 251-322.
[11] JM Bell The law of Arbitration in Scotland paras 251-322.

- testing issues of fact according to a standard of proof.

The arbitrator may rely on his own specialist knowledge provided the parties are aware of such reliance and have an opportunity to make submissions on the relevant points.

Place and language of arbitration

The parties are free to agree the place and language of the arbitration.

Submissions

These do not have to be in the form of written pleadings. A letter, for example, will suffice.[12]

A submission must contain the instructions of the parties in relation to procedure and the award itself. In particular, it should grant the arbitrator the power to award interest and damages and should record any agreement the parties may have come to on expenses.

Oral hearings and written proceedings, default by parties

Generally, the arbitrator is bound to hear the parties before making his award and to allow a proof (i.e., a full hearing of evidence) if there are issues of fact to be resolved. An arbitrator with particular expertise in the subject matter of the arbitration may resolve issues of fact without a hearing on evidence.

The arbitrator may not hear one party and refuse to hear the other unless he is to decide wholly in the latter's favour.

The parties may waive their right to be heard, either in the arbitration agreement itself, or by making such a direction in the course of the arbitration or otherwise making it clear during the arbitration by their actions (for example, by refusing to participate).

[12] ERDC Construction v Love & co (No2) 1997 SLT 175.

If a party defaults on procedural directions made by the arbitrator (for example, by failing to attend a hearing) then that party cannot challenge an award made in the other party's favour on grounds of bias.

Evidence

The arbitrator has no power to force a witness to attend and give evidence, or a haver[13] to produce documents. If necessary, an application can be made to the Court of Session or the relevant Sheriff Court to secure the attendance of a witness or haver.

Making of the award and termination of proceedings

Choice of law

There is a presumption that Scots law will govern the dispute unless the parties have expressly or impliedly chosen a different system of law. In the absence of an express or implied choice of law, the Contracts (Applicable Law) Act 1990 or common law will determine the choice of law depending on the nature of the dispute.

Procedural law

In the absence of an express choice of the parties, the lex fori (law of the forum) will usually apply in relation to procedural issues. Thus, Scots law will normally apply to arbitrations taking place in Scotland.

The law governing the substance of the dispute and the law of the procedure do not have to be the same.

Remedies

The arbitrator has no power to decide on liability for, or to assess and award, damages unless that is expressly provided for in the arbitration submission.[14]

Interest

The arbitrator has an implied power to award interest to run from the date of any award of a financial nature, but

[13] A person in possession or control of evidence.
[14] Aberdeen Railway Co Blaikie Bros. (1853) 15D (HL) 20.

not to award interest from an earlier date unless this is expressly provided for in the arbitration agreement.[15]

If there is an agreement between the parties which provides for the payment of interest, the arbitrator has no implied power to override it by awarding interest on different terms.

Decision making by the tribunal

If the arbitral tribunal consists of an even number of arbitrators and a unanimous decision cannot be reached, the arbitrators may appoint an oversman to make a ruling on the particular issue.

Form, contents and effect of the award

The award must be in writing and signed. Where there is more than one arbitrator, the award must be signed by all the arbitrators.

Where there is a formal submission to arbitration the award must be in a similar form, and should begin with a narrative clause setting out the name(s) and designation(s) of the arbitrator(s) and the details of the submission. The award should then outline the procedure, an adjudication clause containing the decision, and any award of expenses and directions for the implementation of the award, and finally a testing clause (i.e., a formal execution clause).

It is not necessary for the arbitrator to give reasons for his decision in the final award although a side note is useful.

The arbitrator cannot order the enforcement of the award. A court may be asked to grant a decree in terms of the arbitrator's award, or the award may contain a clause stating that the parties consent to its registration in the Books of Council and Session or the Sheriff Court Books for preservation and execution. This will render the award enforceable.

[15] John G McGregor (Contractors) Ltd v Grampian Regional Council 1991 SLT 136.

An award cannot be appealed on its merits or on a point of law in the courts.

Settlement

In so far as the jurisdictional basis for arbitration is the contract between the parties, the parties are free to agree on the termination of the arbitral proceedings and request the arbitrator to record a settlement in lieu of an award.

Costs

The arbitrator is entitled to a reasonable fee which should ideally be stipulated by the arbitrator upon acceptance of office.

In this case, the arbitrator can validly withhold the award until payment of his fees is forthcoming.

The parties' obligation to pay the arbitrator's fee is joint and several, unless the arbitrator is given power in the submission to determine that one of the parties should be solely liable for the whole or part of the fee.

The arbitrator's clerk and any expert witnesses are also entitled to a reasonable fee. Again the parties are jointly and severally liable. The award need not contain any express directions to this effect.

The arbitrator is the parties' agent for the purposes of employing the clerk and the experts and so the current view is that he does not incur any personal liability for the payment of their fees.

The arbitrator can apportion the parties' legal fees, costs of renting the premises and other costs, subject to any provisions in the arbitral agreement.

Correction and interpretation of the award

A final award has the effect of rendering the arbitrator functus officio and thus unable to amend the award or to revise any point made in that award.

It is common practice for the arbitrator to provide a draft of his award to the parties for examination and comment before the award is issued, so that any omissions,

misconceptions or ambiguities can be identified and, subject to the limits of the arbitrator's overall jurisdiction, dealt with before the award is issued. This may also prompt a party to request an arbitrator to state a case (i.e., raise a legal point for determination) to the Court of Session, since a stated case cannot be referred after the award is issued.

The parties can expressly provide in the arbitration agreement that the arbitrator is bound to submit his award for the preliminary consideration of the parties. In the absence of such a stipulation the arbitration is under no duty to do so.

The arbitration award is not open to review or appeal.

A party may apply to the Court to have the award set aside at common law or under the 25th Act of the Articles of Regulation 1695.

At common law the grounds relate to breach of the submission to the arbitrator. They include instances where the arbitrator has failed to address the issues raised in the submission or where the arbitrator has exceeded the jurisdiction conferred by the submission. They also include situations in which a party has materially misled the arbitrator or the arbitrator has acted improperly and this has affected the award.

Under the Articles of Regulation of 1695 an arbitral award may be challenged on the basis of the arbitrator's impropriety; i.e., on the grounds of corruption, bribery or falsehood.

If the award exceeds the terms of the arbitrator's reference the Court can set aside an award in part and preserve such parts of the award that are within the arbitrator's jurisdiction.

The role of the courts

The jurisdiction of the courts

Court of Session

It has long been considered a strength of arbitration in Scotland that an arbitration agreement effectively and conclusively replaces the jurisdiction of the Court. However, case law has undermined this proposition to some extent.[16]

Civil courts have an inherent jurisdiction to adjudicate upon commercial disputes and parties to a commercial transaction have an inherent right to take any dispute to litigation. However, the parties are free to agree to submit the dispute to arbitration and to agree upon all other aspects of the conduct of arbitration.

Where a valid contract to arbitrate exists, the Court has no jurisdiction to hear the case until the arbitration has been completed, unless the Court is satisfied that the arbitration agreement is void or does not apply to the issue under dispute.[17]

The Court will not stay proceedings in favour of arbitration if the defender is personally barred by their actings from insisting upon the arbitration clause. For instance, the defender may be barred[18] where he fails to enter a preliminary plea of no jurisdiction, or, having stated such a plea, he fails to make submissions in this regard while the litigation continues and generally acts in a manner inconsistent with an intention to exercise the right to refer the dispute to arbitration.[19]

If litigation is commenced after the arbitration has taken place, a party to the original arbitration may enter a plea

[16] Mendok BV v Cumberland Maritime corporation 1989 SLT 192.
[17] A Sanderson & Son v Armour & Co. Ltd 1922 SC (HL) per Lord Dunedin.
[18] Dundee provident property Investment Co v Macdonald (1884) 11R 537.
[19] Inverclyde (Mearns) Housing Society Ltd v lawrence Construction Co Ltd 1989 SLT 815.

of res judicata.[20] Any issues falling outside the scope of the arbitrator's remit can be litigated.

The Administration of Justice (Scotland) Act 1972 Section 3 allows a case to be stated to the Court of Session on a point of law. This section applies only if the parties have not expressly agreed otherwise in the arbitration submission.

The arbitrator or oversman may apply for the opinion of the court on a question of law. A party can request that the arbitrator apply on legal questions proposed by the party. The arbitrator can refuse, but the party then has the power to ask the Court of Session to order that the arbitrator states the case for the Court's opinion.

The Rules of the Court of Session must be observed, particularly in relation to time limits for preparation and adjustment (i.e., amendment) of pleadings.

The opinion of the Court on the stated case is not open to appeal and the arbitrator is obliged to follow that opinion in making the award.

An opinion of the Court of Session may be sought at any time in the arbitration process prior to the issue of the final award, since at that point the arbitrator is functus officio and has no jurisdiction to state a case.

Stay of court proceedings

The Court must sist (i.e., stay) a case pending a reference to arbitration.[21] Upon completion of the arbitration the parties may have the case dismissed or seek a decree from the court in the same terms as the arbitrator's award.[22]

Preliminary rulings on points of jurisdiction

The arbitrator can state a case to the Court for an opinion on a point of jurisdiction, but he is under no duty to do so.

[20] if the litigation concerns the same parties, or their successors in title, the same cause of action and the same remedy, decree of absolviter (a declaration of non-liability) will be awarded in favour of the defebder and the proceedings closed.
[21] Hamlyn & Co v Talisker Distillery (1894) 21R (HL) 21.
[22] Svenska Petroleum AB v HOR Ltd 1986 SLT 513.

One of the parties may refuse to accept the arbitrator's decision on jurisdiction and challenge the arbitrator's finding in court after an award is made.

Interim protective measures

The Court has jurisdiction to grant or refuse orders to facilitate the conduct of litigation and to preserve the interests of the parties (such as granting an arrestment to freeze assets).

Where the arbitrator has been requested to exercise powers that he does not possess, the Court may intervene by granting an interdict (i.e., an injunction) to prevent the arbitrator taking this action.

Obtaining evidence and other court assistance

If there is civil litigation in the Court of Session or the Sheriff Court, which has been suspended until the completion of arbitration, an application for arrestment on the dependence, preservation of documents or property (i.e., the documents and/or property are made over to the safekeeping of the Court, if it is likely that they will be required as evidence but there is reasonable cause to believe that the party in possession will destroy them) under Section 1 of the Administration of Justice (Scotland) Act 1972, or commission and diligence (a procedure for the recovery of evidence) can be made in those proceedings. Otherwise such orders can be sought by separate application to the Court of Session or the Sheriff Court.

Challenging and appealing the award before the courts

Once the award has been issued, the arbitrator cannot alter it in any way. The only remedy available, therefore, is to prevent the award from being enforced.

This remedy takes the form of having the award set aside by the Court in an action for reduction by judicial review, defending the action to enforce the award, or in urgent cases, by asking the Court for interim interdict (i.e., an interim injunction). The most common and effective method is to petition for judicial review.

The grounds for challenge of an award can be statutory or can arise from the common law as follows:

Articles of Regulation 1695

The grounds of reduction are limited to the corruption, bribery or falsehood of the arbitrator.

Common law

Any reduction at common law is based on the contractual nature of a submission to arbitration. Thus, the arbitrator must observe the conditions contained in the submission and any implied conditions.

These common law grounds for reduction are separate from those set out in the 1695 Regulations and are as follows:

- the arbitrator exceeded his powers;
- the award does not exhaust the submission;
- the award is ambiguous or uncertain;
- the arbitrator has acted improperly or contrary to natural justice (e.g. by refusing to hear evidence on a dispute of fact between the parties; or
- the award has not been sufficient.

Recognition and enforcement of awards

Domestic awards

An arbitrator possesses no jurisdiction to enforce his award.

If either party refuses to fulfill his obligations under the award then two options are available:

- if a clause consenting to registration and execution of the award and submission[23] is included in the submission, then the award can be enforced by summary diligence;[24] or

[23] Registration is in either the Books of Council and Session or those of the appropriate Sheriff Court.
[24] Summary diligence is the method by which the award, if not honoured, may be enforced without the necessity of first obtaining a court decree.

- otherwise the other party may apply to the Court for a decree for enforcement. Unless there is some objection to the award the court will grant a decree for enforcement provided that the terms of the arbitration award conform to the decree which the Court is being asked to pronounce.

Foreign awards

Where an award was made outside the United Kingdom and has become final in that jurisdiction, a party may enforce the award in Scotland pursuant to the Arbitration Act 1950 (which incorporates the Geneva Convention into Scots law).

Where an award made in another part of the United Kingdom has become final in that legal jurisdiction, enforcement may be possible under the Civil Jurisdiction and Judgments Act 1982.

Court proceedings

The Court of Session has jurisdiction to hear a stated case from an arbitration tribunal under the Administration of Justice (Scotland) Act 1972.

Any action for reduction will also be before the Court of Session.

Conclusion

It remains to be seen whether the draft Arbitration (Scotland) Bill will become law. Although the law of arbitration in Scotland is comprehensively dealt with under common law, it is widely recognised that a consolidating Act of Parliament is required to clarify this body of law.

In particular, default provisions are required for cases where the parties cannot agree on, or do not provide for, the awarding of interest and damages.

Also, the Administration of Justice (Scotland) Act 1972, Section 3, should be repealed, as it was only brought into existence to provide a provision similar to that in place in England at the time. The provision for stating a case has since been repealed in England, and it seems ironic that it remains in force in Scotland as a potential bar to speedy arbitrations.

For detailed comments on the report of the Dervaird Committee and the potential changes to the law see the Scottish Courts Administration's "Consultation Paper on Legislation for Domestic Arbitrators in Scotland"(1997).

The Law Society of Scotland and the Scottish Branch of the Chartered Institute of Arbitrators have both produced a set of Arbitration Rules and style clauses and agreements, which are useful for any Scottish arbitration.[25]

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[25] The Scottish Arbitration Code

Arbitration in Spain

CMS Albiñana & Suárez de Lezo

The Arbitration Act 2003

The new Spanish Arbitration Act 60/2003 (hereinafter, "the Act") was officially published in the Official Gazette of the Spanish State (*Boletín Oficial del Estado*) on 26 December, 2003, and came into force on 26 March, 2004. The reform responds to demands from international commercial parties choosing arbitration to resolve disputes.

Recent years have set the stage for a notable expansion of domestic and international arbitration in Spain. With the Act, the Spanish legislator makes a firm commitment to fostering domestic arbitration and making Spain a centre for international arbitration, in particular between Spanish-speaking parties.

The Act is based on the UNCITRAL Model Law.

Below are some of the key features of the new Act:

- The Act opts for a unitary regulation of domestic arbitration and international arbitration.
- The Act is governed by non-formalistic criteria.
- The Act allows that the arbitration will be an arbitration in law (as opposed to an arbitration in equity) in the absence of an express agreement between the parties as to the type of arbitration.
- The parties are free to decide the number of the arbitrators, although they must be an odd number.

Historical background

Before the 2003 Act came into force, Spanish arbitration law was scattered over the Arbitration Acts 1953 and 1988.

On 7 December 1988, the Official State Gazette published Law 36/1988, of 5 December, concerning arbitration. This legislative text closed a long period of unsuccessful attempts to modify the Arbitration Act of 22 December 1953. That Act was the product of such a specific set of political and economic circumstances that it was out of place in a democratic legal system.

The Spain of 1953 was inspired by political principles radically different from those of a democratic country. At that time, law-makers viewed arbitration unfavourably, inasmuch as it was contrary to the judicial monopoly of the State, in its exclusivity, through its public officials, to decide conflicts. From an economic standpoint, 1953 was a period of autocracy and foreign isolation, thus there was little or no activity within Spain with respect to international arbitration. The 1988 Arbitration Act intended to be not a limitation on arbitration, but rather a regulatory channel for promoting it: it regulated both domestic and international arbitration.

The events leading to the 1988 Arbitration Act can be summarised in the following steps. In 1975, Spain ratified the European Convention on International Commercial Arbitration, and in 1977 it ratified the New York Convention. At this time, the idea began to take hold in Spanish legal doctrine that, due to the publication of these international treaties concerning international commercial arbitration, their provisions had become rules of domestic law, thus as binding as the provisions of the 1953 Arbitration Act. Therefore, ratification of these conventions had introduced a double and differentiated legal framework for domestic arbitration (1953 Arbitration Act) and for international arbitration (provisions contained in the international treaties ratified Spain).

Scope of application and general provisions of the Arbitration Act 60/2003

Scope of application

The Act applies to any arbitration where the place of arbitration is in Spanish territory, whether of domestic or international character.

Certain provisions of the Act apply even if the place of the arbitration is outside Spain. These include:

- Article 8, Paragraph 3, 4 and 6: Competent Courts for assistance and supervision of arbitration.
- Article 9 (except Paragraph 2): Form and content of the arbitral agreement.
- Articles 11: Arbitration agreement and substantive claim before a Court.
- Articles 23: Power of the arbitrators to order interim measures.
- Title VIII: The enforcement of awards.
- Title IX: The recognition ("exequatur") of foreign awards.

The Act is of supplementary application to any arbitration proceedings provided for in other legislation.

Employment arbitration is excluded from the scope of the Act.

Transitional provisions

The Act applies to all arbitration agreements unless the respondent has received the request to submit a dispute to arbitration or the arbitral proceedings have been initiated before the entry into force of the Act. Nevertheless, the provisions of the Act still apply in respect of the arbitration agreement and its effect.

Otherwise, the provisions of the Act relating to applications to set aside and revision apply to awards made after the entry into force of the Act.

The arbitration agreement and its effects

Formal requirements

Article 9.3 stipulates that the arbitration agreement must be made in writing, in a document signed by the parties

or in an exchange of letters, telegrams or any other means of telecommunications that provides a record of the agreement. This requirement is satisfied when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or any other format.

Article 9.1 clarifies that the arbitration agreement, which may be in the form of a clause in a contract or in the form of a separate agreement, shall express the will of the parties to submit to arbitration all or some disputes which have arisen or which may arise between them in respect of a determined legal relationship, whether contractual or non-contractual. Article 9.2 states that if the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to these contracts.

According to Article 9.4 the arbitration agreement appearing in a document to which the parties have expressly referred in any of the forms specified in Article 9.3, shall be deemed incorporated into the contract. And Article 9.5 clarifies that there is an arbitration agreement when in an exchange of statements of claim and defence the existence of an arbitration agreement is alleged by one party and not denied by the other.

Effects

The arbitration agreement obliges the parties to comply with the agreement and prevents the courts from hearing disputes submitted to arbitration, provided that an interested party raises an objection to jurisdiction.

Composition of the arbitral tribunal

The constitution of the arbitral tribunal

Pursuant to Article 12 of the Act the parties are free to determine the number of arbitrators, provided that there is an odd number. In the absence of any agreement between the parties only one arbitrator shall be appointed.

According to Article 13, all natural people in full possession of their civil rights may act as arbitrator,

provided that they are not restricted by the legislation applicable to them in the exercise of their profession. Unless otherwise agreed by the parties, no person shall be prevented by reason of their nationality from acting as an arbitrator.

The parties are able to freely agree on the procedure for the appointment of the arbitrators, provided that there is no violation of the principle of equal treatment. If it is not possible to appoint the arbitrators by the procedure agreed upon by the parties any of them may apply to the competent court for the nomination of the arbitrators or, if appropriate, the adoption of the necessary measures for this purpose. In this case, the court shall only refuse the request filed when it considers that the existence of an arbitration agreement is not established.

Unless the parties have otherwise agreed, each arbitrator, within fifteen days from communication of the nomination, should communicate their acceptance to whoever nominated him. If within the period established an acceptance is not communicated, the arbitrator is deemed to have not accepted his nomination.

The challenge of arbitrators

Pursuant to Article 17.3, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

The parties are free to agree on a procedure for challenging an arbitrator. If a challenge by a party is a challenge in accordance with the procedure agreed upon by the parties, the challenging party may in due course rely upon the challenge in applying to set aside the award.

According to Article 19, if an arbitrator becomes *de jure or de facto* unable to perform his functions or for other reasons fails to act without undue delay, if he withdraws from his office or if the parties agree on the termination

his mandate terminates. If there is no agreement of the parties on the termination of the mandate and there is no agreed procedure to overcome such disagreement, the following rules shall apply:

- The application for termination shall take the form of oral proceedings before the Court. This application may be joined with the request for the nomination of arbitrators, as set out in Article 15, in case the application for termination is granted.
- In an arbitration with more than one arbitrator, this question shall first be decided by remaining arbitrators. If they are unable to reach a decision, the procedure set out in the previous subparagraph shall apply.

The withdrawal of an arbitrator from his office or the agreement by one party to his termination, does not imply acceptance of the validity of any grounds referred to in these provisions.

The appointment of substitute arbitrators

Article 20 provides that irrespective of the reason for the appointment of a new arbitrator, he shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Once the substitute arbitrator is appointed, the arbitrators, after hearing the parties, shall decide if it is appropriate to repeat any prior proceedings.

Responsibility of the arbitrators

Article 21 provides that Acceptance obliges the arbitrators and, where applicable, the arbitral institution to comply faithfully with their responsibility. If they do not do so, by reason of bad faith, recklessness or fraud, they will be liable for the damage and losses they cause. Where the arbitration is entrusted to an arbitral institution, the injured party shall have a direct action against the institution, regardless of any actions for compensation available against the arbitrators.

Provision of funds

Unless otherwise agreed, both the arbitrators and the arbitral institution may require from the parties the provision of funds that they consider necessary to meet the fees and expenses of the arbitrators and those that may be incurred in the administration of the arbitration. Should the parties fail to provide the funds, the arbitrators may suspend or terminate the arbitral proceedings. If one of the parties has not made its provision within the time fixed, the arbitrators, before deciding to terminate or suspend the proceedings, shall inform the remaining parties, so that they may provide the funds within a further period fixed by the arbitrators, should they wish to do so.

Jurisdiction of the arbitral tribunal

Competence to rule on jurisdiction

Article 22 of the Act stipulates that arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any other objection the acceptance of which would prevent the arbitrators from entering into the merits of the dispute. For this purpose, an arbitration agreement which forms part of a contract shall be treated as severable from the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not invalidate the arbitration agreement.

Any objection referred to in the previous paragraph must be raised no later than the submission of the statement of defence, and the fact that a party has appointed or participated in the appointment of the arbitrators shall not preclude that party from raising such an objection. The objection that the arbitrators are exceeding the scope of their jurisdiction shall be made as soon as the matter alleged to be beyond the scope of their jurisdiction is raised during the arbitral proceedings.

Power to order interim measures

In accordance with Article 23, unless otherwise agreed by the parties, the arbitrators may, at the request of any party, order such interim measures as they consider necessary

in respect of the subject of the dispute. The arbitrators may require appropriate security from the applicant.

The provisions relating to the setting aside and enforcement of awards apply to the arbitral decisions in respect of interim measures, regardless of the form of those measures.

Conduct of arbitral proceedings

Commencement of arbitration

Unless otherwise agreed by the parties, Section 27 provides that the arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

General procedural principles

According to Article 24, the parties shall be treated with equality and each party shall be given the opportunity to fully present his case. Also, the arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain the confidentiality of information coming to their knowledge in the course of the arbitral proceedings.

Article 25 states that the parties may freely agree on the procedure to be followed by the arbitrators in the conduct of the proceedings. Failing such agreement, the arbitrators may, subject to the provisions of this Act, conduct the arbitration in such manner as they consider appropriate. The powers conferred upon the arbitrators include the power to determine the admissibility, relevance and usefulness of any evidence, the manner of taking evidence, including on the arbitrators´ own motion, and its weight.

Place and language of arbitration

Pursuant to Article 26, the parties are free to agree on the place of arbitration. In case there is no agreement, the place of arbitration shall be determined by the arbitrators having regard to the circumstances of the case and the convenience of the parties. Notwithstanding, the provisions of the previous paragraph, the arbitrators may, after consulting the parties, meet at any place they consider appropriate for hearing witnesses, experts or the parties, or to inspect objects, documents or persons. The arbitrators may deliberate at any place they consider appropriate.

In respect to the language of the arbitration, Article 28 states that the parties are free to agree on the language to be used in the arbitration. Failing such agreement, the arbitrators shall determine the language, having regard to the circumstances of the case.

Oral hearings and written proceedings

Unless otherwise agreed by the parties, the arbitrators shall decide whether to hold oral hearings for the presentation of oral argument, the taking of evidence and the submission of conclusions, or whether the proceedings shall be conducted solely in writing. Unless the parties have agreed that no hearings shall be held, the arbitrators shall hold hearings at an appropriate stage of the proceedings, if so requested by a party.

Court assistance in taking evidence

The arbitrators, or any party with their approval, may request from the competent court assistance in taking evidence, in accordance with the applicable Spanish rules on taking of evidence. This assistance may comprise of the taking of evidence before the competent court or the adoption by the competent court of specific measures necessary in order that the evidence may be taken before the administrators. If it is so requested, the court shall take evidence under its exclusive supervision. However, the court shall limit itself to ordering only those measures necessary. In both cases, the court shall deliver to the applicant a certified copy of the proceedings to use in the arbitral proceedings.

The making of the award and the termination of the proceedings

Rules applicable to substance of dispute

According to Article 34.1, the arbitrators shall decide in equity only if the parties have expressly authorized them to do so.

When the arbitration is international, the arbitrators have to decide the dispute in accordance with the rules of law chosen by the parties. Any designation of the law or legal system of a given State shall be construed, unless otherwise stated, as referring to the substantive law of

that State and not to its conflict of laws rules. Failing any designation by the parties, the arbitrators shall apply the law that they consider appropriate.

In all cases, the arbitrators shall decide in accordance with the terms of the contract and shall take into account the applicable usages.

Award by agreement of the parties

If, during arbitral proceedings, the parties wholly or partially settle the dispute, the arbitrators shall terminate the proceedings in respect of the points agreed and, if requested by both parties and not objected to by the arbitrators, record the settlement in the form of an arbitral award on agreed terms.

Time, form, contents and notification of the award.

Unless otherwise agreed by the parties, the arbitrators shall decide the dispute in a single award or in as many partial awards as they deem necessary.

The arbitrators must decide the dispute within six months from the date of the submission of the statement of defence or from the expiry of the period to submit it. Unless otherwise agreed by the parties, this period of time may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision.

The expiry of the period to issue the final award without the issue of the final award shall mean the termination of the arbitral proceedings and the termination of the office of the arbitrators. Nevertheless, it shall not affect the efficacy of the agreement, without prejudice to any liability the arbitrators may have incurred. Accordingly, if a party wished to pursue its claim further it would be required to commence new arbitration proceedings.

The award shall be made in writing and shall be signed by the arbitrators, who may add any dissenting opinions. Where there is more than one arbitrator, the signatures of the majority of all members of the arbitral panel or that of

its presiding arbitrator alone shall suffice, provided that the reason for any omitted signature is stated.

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

The arbitrators shall notify the award to the parties in the form and time agreed by the parties or, failing such agreement, by means of the delivery to each party of a copy signed by the arbitrators.

Costs

Subject to the agreement of the parties, the arbitrators shall decide in the award on the costs of the arbitration. This will include the fees and expenses of the arbitrators and, where applicable, the fees and expenses of counsel or representatives of the parties, the cost of the services provided by the institution administering the arbitration and the other expenses of the arbitral proceeding.

Termination of the proceeding

The arbitral proceedings and the mandate of the arbitrators terminate with the final award.

The arbitrators shall also issue an order for the termination of the arbitral proceedings when:

- the claimant withdraws his claims, unless the respondent objects thereto and the arbitrators recognise a legitimate interest on his part in obtaining a final settlement of the dispute;
- the parties agree on the termination of the proceedings; or
- the arbitrators find that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Correction, clarification and the issue of a supplement to the award

According to Article 39, within ten days of receipt of the award, unless another period of time has been agreed

upon by the parties, any party, with notice to the other party, may request the arbitrators:

- to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
- to clarify a point or a specific part of the award; and
- to supplement the award as to claims presented in the arbitral proceedings and not resolved in the award.

In this sense, the Act avoids the reference in Article 33 of the UNCITRAL Model Law to an "additional award" to address omissions. The practical difference is that a successful application under Article 33.3 of the UNCITRAL Model Law results in two separate awards (the original award and the additional award), while the procedure contemplated by the Spanish Arbitration Act may result in a single (though supplemented) award.

After hearing the other parties, the arbitrators shall decide on applications for the correction of errors and for clarification within ten days, and for the issue of a supplement to the award within twenty days.

Within ten days of the date from the date of the award, of their own motion, the arbitrators, may correct any typographical errors or any errors of similar nature.

When the arbitration is international, the terms of ten and twenty days provided for shall be one and two months, respectively.

The role of the courts

The jurisdiction of the courts

The Arbitration Act follows the scheme of the UNCITRAL Model Law in this regard. According to Article 7, in matters governed by the Act, no court shall intervene except where so provided in the Act.

Judicial appointment of arbitrators

The First Instance Court at the seat of the arbitration shall have jurisdiction in respect of the judicial appointment of arbitrators; if the seat has not yet been determined, then jurisdiction shall reside with the First Instance Court at the domicile or habitual place of residence of any of the

respondents; if none of the respondents have their domicile or habitual place of residence in Spain, the courts of the domicile or habitual place of residence of the claimant shall have jurisdiction, and if the claimant has not the domicile or habitual place of residence in Spain, then the First Instance Court shall be any of the claimant´s choice.

Interim protective measures

The First Instance Court at the place where any award has to be enforced shall have jurisdiction in respect of interim measures and, in default of such court, at the place where the measures have to be implemented, in accordance with Article 724 of the Civil Procedure Act.

Judicial assistance in the taking of evidence

The First Instance Court at the seat of the arbitration or that of the place where the assistance is required has jurisdiction in respect of judicial assistance in the taking of evidence.

The enforcement of award

The First Instance Court at the place where the award was issued shall have jurisdiction to enforce the award, in accordance with Article 545.2 of the Civil Procedure Act and, where applicable, Article 958 of the Civil Procedure Act of 1881.

Challenging and appealing the award before the courts

The application to set aside and revision of the award

Pursuant to Articles 40 and 41 of the Act, an arbitral award may be set aside only if the party making the application alleges and proves:

- that the arbitration agreement does not exist or is not valid;
- that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

- that the arbitrators have decided questions not submitted to their decision;
- that the appointment of the arbitrators or the arbitral procedure was not in accordance with the provisions of the Act nor with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties can not derogate;
- that the arbitrators have decided questions not capable of settlement by arbitration; or
- that the award is in conflict with public policy.

According to Article 8.5 the Provincial Court of Appeal at the place where the award has been made shall have jurisdiction in an application to set aside an award.

An application for setting aside shall be made within two months from the date on which the party making that application had received the award or, if a request for correction, clarification or to supplement the award has been made, from the date on which the party making that application had received the decision on the request, or from the date on which the term for making that decision expired.

Pursuant to Article 42, the application to set aside an award shall follow the procedure for oral proceedings. The statement of claim shall be accompanied by documentation proving the arbitral agreement and the award, and if applicable, shall contain a proposal of the evidence upon which the applicant intends to rely.

There is no appeal from a judgment in respect of application to set aside.

Res judicata and revision of final awards

The final award has the effect of res judicata and shall only be subject to an application for revision in accordance with the procedure established in the Civil Procedure Act for final judgments.

Recognition and enforcement of awards

Enforcement of awards

Pursuant to Article 45 an award is enforceable even though an application to set aside has been made. Nevertheless, in that event the party against whom enforcement is sought may apply to the competent court for the suspension of enforcement, provided that he offers security for the amount awarded, plus the damages and losses that might arise from the delay in the enforcement of the award.

The suspension shall be lifted and the enforcement continue when the court is satisfied that the application to set aside has been disallowed, without prejudice to the right of the party seeking enforcement to demand, if applicable, indemnification for the damages and losses caused by the delay in the enforcement, by means of the procedure set out in Article 712 and subsequent articles of the Civil Procedure Act.

The enforcement shall be revoked when the court is satisfied that the application to set aside has been allowed.

Recognition of foreign awards

The recognition of foreign awards (any award which has been issued outside of Spanish territory) is governed by the New York Convention (without prejudice to the provisions of other more favourable international conventions) and take place in accordance with the procedure set out in the civil procedure rules for judgments issued by foreign courts.

Conclusion

In conclusion, the characteristics of the Act mean a qualitative step forward in the Spanish regulation of arbitration, which, doubtlessly, will encourage its greater use.

The Act has made Spain into an attractive centre of arbitration. The quality of Spain´s legal services and its

traditional hospitality are now joined by modern legislation which protects and promotes arbitration as a means of resolving civil and commercial disputes, at both national and international level.

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Arbitration in Switzerland

CMS von Erlach Henrici

The Swiss Code on Private International Law

With effect from 1st January 1989, Switzerland for the first time codified its rules on international arbitration at a federal level by including a chapter on international arbitration ("Chapter 12") in its newly enacted Federal Code on Private International Law of 1987 ("CPIL"[1]).

With the introduction of Chapter 12 (Art. 176-194 CPIL), the applicability of the cantonal laws and the Inter-cantonal Arbitration Convention was limited to purely domestic arbitration. This overview will address the rules of Chapter 12 as the source of rules governing international arbitration.

Chapter 12 is tailored to the needs of the international business community and affirms Switzerland's long-standing tradition as a leading location for international commercial arbitration.

In particular, the law emphasizes party autonomy by allowing the parties to determine the applicable procedural rules. This includes the parties' right to create their own procedural rules or contractually to refer to the procedural rules of a chosen arbitral institution, such as the Swiss Rules of International Arbitration, the Rules of Arbitration of the International Chamber of Commerce (ICC) or the UNCITRAL Arbitration Rules.

[1] Different English translations and abbreviations exist for this Code. Beside Code of Private International Law ("CPIL"), there are also translations such as Private International Law Statute ("PILS"), Federal Act on Private International Law ("FAIPL") or Private International Law Act ("PILA").

Swiss Rules of International Arbitration

The Swiss Rules of International Arbitration being the applicable procedural rules if referred to by the parties, are the result of harmonisation efforts undertaken by the Chambers of Commerce of Zurich (ZCC), Geneva, Basle, Berne, Lausanne and Lugano. As of January 1, 2004, the Swiss Rules of International Arbitration have replaced the arbitration rules of each Chamber, among them the previous International Arbitration Rules of the Zurich Chamber of Commerce.

The Swiss Rules of International Arbitration ("the Rules") are based on the UNCITRAL Arbitration Rules ("the UNCITRAL rules"), to which two types of changes and additions have been made:

- One part of the changes and additions were necessary in order to adapt the UNCITRAL Arbitration Rules to institutional arbitration. They include:
  - Creation of the "Arbitration Committee" for administration of the proceedings (Introduction of the Rules).
  - The remuneration is left to the arbitral tribunal only within a stipulated range, varying on the amount in dispute. The Arbitration Committee supervises the compensation system and any exceedance of the maximum amount requires its prior approval (Art. 39, Appendix B).
- The other changes and additions to the UNCITRAL rules reflect modern practice and comparative law in the field of international arbitration:
  - Article 3 of the Rules requires Respondent to file an answer to the notice of arbitration. The answer has to be submitted within 30 days and shall address jurisdiction issues, the claims made in the request for arbitration and the relief requested by Respondent. In addition, counter-claims and set-off defences shall be brought with the answer.

– Claimant and Respondent are supposed to annex all documents they deem relevant to the request for arbitration, respectively the statement of defense (Art. 18-19).
– Subject to an explicit party agreement to the contrary, any dispute with less than CHF 1 Million at stake (including counterclaims) shall be conducted by a Single Arbitrator under an expedited procedure. The expedited procedure, unknown in the UNCITRAL rules, can also be agreed among the parties for other disputes. Under the expedited procedure, time limits for appointment of arbitrators are reduced, the number of written submissions is limited and an award shall be made after a single hearing or upon documents alone. The award has to be filed within six months after the file was transmitted to the arbitral tribunal and the award may contain only summary reasons or, if agreed by the parties, no reasons at all (Art. 42).
– A new case may be consolidated with already pending arbitral proceedings, even if the parties are not identical (Art. 4).
– Article 8 of the Rules governs the constitution of multi-party proceedings. Each group shall designate one arbitrator; the two arbitrators will then determine the chairman. Where a group fails to agree on one arbitrator, the Arbitration Committee appoints all arbitrators, including the chairman.
– In case of replacement of an arbitrator, repetition of proceedings is no longer the rule but the exception (Art. 14).
– The arbitral tribunal has jurisdiction to hear set-off defences (but not counter claims), even if such defence arises from a relationship not covered by the arbitration clause (Art. 21).
– Any person may be a witness, including parties and officers of legal entities. Article 25 expressly states that it is proper to interview (potential) witnesses.

– Unlike the restrictive UNCITRAL rules, Article 26 provides that the Arbitral Tribunal may order any interim measures it deems necessary or appropriate.
– Subject to an agreement to the contrary, the parties are bound to keep confidential awards and material submitted by other parties (Art. 43).
– Liability of the arbitral tribunal is excluded save where the act or omission is shown to constitute deliberate wrongdoing or extremely serious negligence (Art. 44).

The Rules came into force on January 1, 2004. Unless agreed otherwise by the parties, the new rules apply to all arbitral proceedings in which the parties referred to the procedural rules of one the participating Chambers of Commerce if the notice of arbitration is submitted on or after January 1, 2004.

Scope of application and general provisions of Chapter 12

Scope of application

The scope of application of Chapter 12 is very broad. Unless the parties provide otherwise, Article 176 et seq. CPIL will apply to arbitral proceedings with an arbitral tribunal having its seat in Switzerland if, at the time the arbitration agreement was concluded, at least one of the parties was domiciled or had its ordinary residence outside Switzerland (Article 176 para. 1 CPIL). Only in purely domestic disputes, the Inter-cantonal Arbitration Convention continues to apply.

Whether the seat of the arbitral tribunal is in Switzerland is determined by the parties themselves (in the arbitration agreement or at a later point of time) or by the arbitral institution designated by them, or, failing both, by the arbitrators (Article 176 para. 3 CPIL).

General principles

The Swiss law on international arbitration reflects the major judicial and legislative developments in the area of international arbitration during the past decades. It is based on the following general principles:

- Wide scope of application.
- Broad concept of arbitrability and favourable approach towards the validity of arbitration agreements.
- Emphasis on party autonomy by allowing the parties to determine the applicable procedural and substantive law.
- The equal treatment of the parties and the right to be heard.
- Recognition of the finality of the award.
- Significant restrictions on intervention by state courts and grounds to challenge an award with the state courts.
- Option to exclude actions for setting aside the award.

Transitional provisions

Chapter 12 does not contain separate transitional provisions. The Federal Supreme Court has ruled that the validity of an arbitration agreement, which was concluded before the entering into force of the Swiss Code on Private International Law on January 1, 1989, must meet the requirements of the old law on international arbitration (Inter-cantonal Convention). In contrast, the consequences arising out of a valid arbitration agreement - for example the conducting of arbitral proceedings started after January 1, 1989 - are governed by Chapter 12 (decision of the Federal Supreme Court No. ("BGE") 119 II 179).

The arbitration agreement

Formal requirements

In relation to the formal requirements of an arbitration agreement, Swiss law avoids any reference to domestic or foreign legislation and, instead, establishes an independent substantive rule. Under Article 178 para. 1 CPIL, which is inspired by the UNCITRAL Model Law, in order to be formally valid, an arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means

of communication which permits the agreement to be evidenced by a written text. Nowadays, an e-mail printout should suffice too. In other words, a document actually signed by both parties is no longer necessary and an exchange of documents is no prerequisite for a valid arbitration agreement, regardless of Article II (2) of the 1958 New York Convention (BGE 121 III 43).

Substantive validity

With regard to substantive validity - for example, whether there was a consensus between the parties on the agreement to arbitrate - Article 178 para. 2 CPIL is based on the principle of favor validitatis. The arbitration agreement is valid if it conforms either to (i) the law chosen by the parties; (ii) the law governing the subject matter of the dispute, in particular, the law governing the main contract; or (iii) Swiss law.

Separability

The validity of an arbitration agreement cannot be contested on the ground that the main contract is not valid or that the arbitration agreement concerns a dispute which has not yet arisen (Article 178 para. 3 CPIL; BGE 119 II 384). The validity of the arbitration clause has to be determined separately.

Arbitrability

Pursuant to Article 177 para. 1 CPIL, any economic interest can be the subject matter of arbitration proceedings, regardless of whether the substantive law governing the underlying contractual relationship relies on a narrower definition of "objective arbitrability" (BGE 118 II 356). In other words, the arbitral tribunal no longer has to inquire into the substance of the applicable substantive law in order to determine whether a claim is arbitrable (BGE 118 II 355). In this context, Chapter 12 introduced a novel provision regarding objections raised by states and state-controlled organisations against the arbitrability of disputes into Swiss arbitration law: if a state or a state-controlled organisation or enterprise is a party to an arbitration agreement, it cannot invoke its own national law in order

to contest either its capacity to be a party to arbitration proceedings or the arbitrability of a dispute covered by the arbitration agreement (Article 177 para. 2 CPIL).

Composition of the arbitral tribunal

The constitution of the arbitral tribunal

Pursuant to Article 179 para. 1 CPIL, arbitrators will be appointed, removed, or replaced in accordance with the agreement of the parties. The parties may also refer to the procedural rules of a chosen arbitral institution, such as the Swiss Rules of International Arbitration.

If there is no agreement between the parties, or if the rules of the chosen arbitral institution are silent, the assistance of the ordinary state court at the seat of the arbitral tribunal may be requested, which will then apply the relevant provisions of cantonal law accordingly. Where the parties agreed that a state court shall appoint the arbitrator, the judge must make the appointment unless a summary assessment shows that there is no valid arbitration agreement between the parties (Article 179 para. 2 and 3 CPIL; BGE 118 Ia 26).

In case the state court refuses to appoint an arbitrator, the ruling can be brought before the Federal Supreme Court by way of an appeal (BGE 121 I 81 and 118 Ia 23). In contrast, no appeal is available against the appointment of the arbitrator by a state court; only a preliminary or final award issued later by the arbitral tribunal might be challenged in case there was an improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal (Article 190 para. 2 lit. a CPIL; BGE 115 II 296).

The challenge of arbitrators

Pursuant to Article 180 para. 1 CPIL, there are three grounds for challenging an arbitrator:

- the arbitrator does not meet the qualifications agreed upon by the parties;
- there is a ground for challenge under the rules of arbitration agreed upon by the parties; or

- the circumstances give rise to reasonable doubts as to the arbitrator's independence (e.g., BGE 118 II 361).

A party may challenge its own arbitrator only based on reasons of which the party became aware after the appointment was made. The grounds for the challenge must be notified to the arbitral tribunal and to the other party without delay (Article 180 para. 2 CPIL).

Where the parties have not agreed on the procedure for challenging an arbitrator, the state court at the seat of the arbitral tribunal will decide on the challenge. The decision of the state court is final and may not be appealed to the Federal Supreme Court by means of a public law appeal (BGE 122 I 370). Further, it cannot be appealed with the final award of the arbitral tribunal (BGE 128 III 330).

In case the parties have agreed on a procedure for challenging the arbitrator without involvement of a state court, the decision of the private institution cannot be the subject of a separate appeal to the Federal Supreme Court (BGE 118 II 361). However, it is possible to submit the reasons for challenging the arbitrator, which were not accepted by the private institution, to the Federal Supreme Court for review when filing an appeal against a preliminary or final award of the arbitral tribunal. Such review is based on Article 190 para. 2 lit. a CPIL which allows an appeal in case of improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal - including the lack of independence of an arbitrator (BGE 128 III 332; 118 II 361).

The appointment of substitute arbitrators

With respect to the appointment of substitute arbitrators, the same rules apply as to the appointment of the original arbitrators, unless the parties have agreed otherwise.

Arbitrators' fees, expenses and immunity

Chapter 12 does not contain any particular provisions dealing with the issue of arbitrators' fees and expenses. The advance and final allocation of fees and expenses is, therefore, subject to the parties' discretion in the context

of their arbitration agreement. If the arbitration is conducted under the rules of an arbitral institution, such rules will generally make detailed provision in relation to the arbitrators' (and the institution's) fees and expenses.

There are no specific rules exempting arbitrators from liability claims by the parties. Therefore, an arbitrator's liability for wrongful performance of his duties must be determined in accordance with the general legal rules governing liability under Swiss law.

Jurisdiction of the arbitral tribunal

Competence to rule on jurisdiction

Article 186 para. 1 CPIL provides that the arbitral tribunal is authorised to decide whether it has jurisdiction over the matters brought before it. The objection of lack of jurisdiction must be raised prior to any defence on the merits (Article 186 para. 2 CPIL). A party may also, at the same time, contest jurisdiction and, subject to those objections, present its first defence on the merits.

Generally, the arbitral tribunal will render its decision on jurisdiction in the form of a preliminary award (Article 186 para. 3 CPIL).

Power to order interim measures

Unless the parties have agreed otherwise, the arbitral tribunal is empowered to order interim or protective measures upon the request of a party (Article 183 para. 1 CPIL).

The arbitral tribunal is not entitled to impose sanctions in case of non-fulfillment of its interim decision. For this reason, if the party concerned does not comply voluntarily with the preliminary award, the arbitral tribunal may request the assistance of the judge at the place where the interim measure shall be enforced. The judge applies his own law (Article 183 para. 2 CPIL).

Both the arbitral tribunal and the judge may make the granting of interim or protective measures conditional upon the provision of appropriate security (Article 183 para. 3 CPIL).

Conduct of arbitral proceedings

Commencement of arbitration

Pursuant to Article 181 CPIL, arbitration proceedings are pending as soon as one party submits its claim to the arbitral tribunal designated in the arbitration agreement or, if the arbitration agreement does not designate a particular arbitrator, as soon as one party initiates the procedure to appoint the arbitral tribunal.

General procedural principles

Swiss Law grants the parties the widest possible autonomy to choose and determine the arbitral procedure and to tailor the procedural rules to their specific needs. Accordingly, Chapter 12 does not contain specific or detailed default rules regarding the arbitral procedure. Article 182 para. 1 CPIL states that the parties may:

- create their own arbitration procedure;
- refer to existing rules of arbitration such as the Swiss Rules of International Arbitration, the ICC Arbitration Rules or the UNCITRAL Arbitration Rules; or
- select a pre-existing body of procedural law, for example the Civil Procedure Code of the Canton of Zurich.

Despite extensive autonomy of the parties with regard to procedural issues, the minimum requirements of Article 182 para. 3 have to be observed (BGE 119 II 388). The arbitral tribunal must:

- ensure equal treatment of the parties; and
- respect the right of both parties to be heard in adversarial proceedings.

If these minimum requirements are violated, the final award may be challenged before the state court (Article 190 para. 2 lit. d CPIL).

Procedural powers of the tribunal

Where the parties have failed to set forth the applicable procedure, the arbitral tribunal is free to determine the procedure, either directly or by reference to a body of law or existing rules of arbitration (Art 182 para. 2 CPIL).

The arbitral tribunal will often consult with the parties at a very early stage of the arbitration proceedings in order to agree on the procedural framework of the proceedings.

Evidence

Article 184 CPIL gives the arbitral tribunal power to take evidence itself. Subject to rules set forth by the parties respectively in the arbitration rules applicable according to the arbitration agreement, the arbitral tribunal will determine evidential matters.

Where legal assistance by a state court is necessary (for example, if a witness refuses to appear voluntarily before the arbitral tribunal), the arbitral tribunal may request the assistance of the judge at the arbitral tribunal's seat. The judge will apply his own law.

Making of the award and termination of proceedings

Choice of law

The substantive law to be applied by the arbitral tribunal when assessing the merits of the case may be freely determined by the parties. In the absence of a choice of law clause in the underlying contract between the parties, the arbitral tribunal will apply the law most closely connected with the subject matter of the dispute (Article 187 para. 1 CPIL). The arbitral tribunal does not have to apply a specific set of conflict of laws rules, but it may apply an independent "closest connection" test in order to determine the applicable law. In practice, experience suggests that arbitral tribunals are rather reluctant simply to refer to a national code or similar settled body of law, but will prefer instead to resolve the dispute by interpreting the underlying contract between the parties.

Article 187 para. 2 CPIL gives to the parties the possibility of authorising the arbitral tribunal to base its decision purely on equitable considerations, i.e., to decide ex aequo et bono.

Decision making by the tribunal

According to Article 189 para. 1 CPIL, the arbitral award will be rendered in conformity with the rules of procedure agreed upon by the parties. This provision

again reflects the overriding importance of party autonomy in Chapter 12. In the absence of an agreement by the parties, the arbitral award will be made by a majority of the arbitrators, or, in default of a majority, by the chairman alone (Article 189 para. 2 CPIL).

Form, contents and effect of the award

The parties may freely determine the form of the arbitral award. Unless agreed otherwise, the award must be in writing, accompanied by reasons for the decision, dated and signed, whereby the signature of the chairman of the tribunal is sufficient (Article 189 CPIL).

Unless agreed otherwise between the parties, the arbitral tribunal may also render partial awards (Article 188 CPIL).

Upon due notification of the decision to the parties, the arbitral award becomes final (Article 190 para. 1 CPIL). An action for annulment of the award before the Federal Supreme Court does not affect the enforceability of the award, unless the Federal Supreme Court grants a motion to suspend enforcement of the award, which is fairly rare.

Settlement and termination of proceedings

The parties may settle their dispute at any time. Upon their request, the arbitral tribunal may record the settlement in a consent award. Pursuant to Article 190 para. 1 CPIL, proceedings terminate with notification of the final award to the parties.

Costs

Chapter 12 does not contain any provisions as to party compensation and allocation of the costs of the arbitration between the parties. It is left to the parties to determine compensation and allocation of costs in their arbitration agreement, or to refer to arbitration rules providing for such rules. If the arbitration agreement does not contain any provision as to costs and compensation, the arbitrators will decide on these issues.

Correction, interpretation and revision of the award

While Chapter 12 is silent on this issue, the Federal Supreme Court affirmed that correction and interpretation

of an arbitral award is admissible in appropriate circumstances as a matter of general legal principle and established doctrine (BGE 126 III 527).

In BGE 122 III 492, the Federal Supreme Court also acknowledged the availability of the remedy of "revision" of an arbitral award in case a party discovers important facts which could have been brought before the arbitral tribunal but were not known to such party despite all due diligence at that time. The revision proceedings must be initiated before the Federal Supreme Court within 30 days after discovering the facts. The Federal Supreme Court examines whether the new facts would have probably lead to a different decision of the arbitral tribunal and, if so, refers the case back to the arbitral tribunal to reconsider the arbitral award (BGE 118 II 204; Unpublished decision of the Federal Supreme Court dated May 5, 1999).

The role of the courts

The jurisdiction of the courts

Pursuant to Article 7 CPIL, a Swiss court will refuse to exercise jurisdiction over a particular dispute if the subject matter of the dispute is arbitrable and if the parties have concluded an arbitration agreement, unless:

- the defendant has implicitly accepted the jurisdiction of the court by participating in the proceedings without raising any objection; or
- the court determines that the arbitration agreement is prima facie (BGE 122 III 143) null and void, inoperative or incapable of being performed. In BGE 121 III 495, the arbitration clause in the original contract was replaced by a forum selection clause in a subsequent settlement agreement; or
- the arbitral tribunal cannot be constituted for reasons which are obviously attributable to defendant's behaviour in the arbitration proceedings.

Preliminary rulings on points of jurisdiction

Lack of jurisdiction must be asserted at the very beginning of the proceedings. The arbitral tribunal is competent to decide for itself whether it has jurisdiction over the matters brought before it. The arbitral tribunal will render its decision on jurisdiction in the form of a preliminary award (Article 186 para. 1 and 3 CPIL).

The arbitral tribunal's preliminary decision on jurisdiction can be challenged directly before the Federal Supreme Court, which will review de novo whether the arbitral tribunal has properly accepted or declined jurisdiction over the matters in dispute (Article 190 para. 2 lit. b CPIL; BGE 118 II 355). Only the interim award on jurisdiction and not the final decision may be challenged on the ground that the tribunal lacks jurisdiction (BGE 130 III 76).

According to the Federal Supreme Court, even if the arbitral tribunal issues an interim or partial award without specifically addressing the question of jurisdiction, a party which has timely contested jurisdiction of the arbitral tribunal is requested to file its challenge against such first preliminary ruling and must not wait for the final award. The Federal Supreme Court has found that, by filing a preliminary or partial decision, the arbitral tribunal implicitly affirms its jurisdiction (BGE 130 III 80; unpublished decision dated February 17, 2000, case no. 4P 168/1999).

Interim protective measures

As long as the arbitral tribunal is not constituted, an application for interim measures may be filed with the state court. There is no unanimous doctrine as to whether there is still alternative jurisdiction of the competent state court after constitution of the arbitral tribunal. According to one opinion supported by certain Swiss scholars, the state courts and arbitral tribunal have alternative jurisdiction, unless the parties have explicitly agreed to the contrary.

Where the arbitral tribunal orders injunctive relief, but the party concerned does not voluntarily comply with such interim measure, the arbitral tribunal may request the assistance of the competent state court, which will apply

its own procedural law (Article 183 para. 2 CPIL).

The arbitral tribunal as well as state court may make the granting of interim or protective measures conditional upon provision of appropriate security (Article 183 para. 3 CPIL).

Obtaining evidence and other court assistance

If court assistance is necessary in order to take evidence for use in the arbitral proceedings, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may ask the state court at the seat of the arbitral tribunal for assistance. The state court will apply its own procedural law (Article 184 CPIL). The arbitral tribunal may also ask the state court to issue letters of request to the judicial authorities of other countries according to international conventions, in particular the Hague Convention on Taking Evidence Abroad of 1970.

The judge at the seat of the arbitral tribunal has also jurisdiction where further assistance of the judicial or administrative bodies is necessary (Article 185 CPIL).

Challenging the arbitral award before the courts

The rules on challenging arbitral awards of Chapter 12 are precisely tailored to the requirements of the international business community:

- First, the Federal Supreme Court is designated as the only judicial authority competent to hear actions for the annulment of arbitral awards (Article 191 para. 1 CPIL). The procedure before the Federal Supreme Court has proven to be extremely speedy. In most cases, the final decision of the Federal Supreme Court is issued no later than 3-4 months after the filing of the appeal.
- Second, the grounds for annulment are very restricted (Article 190 para. 2 CPIL). Even with regards to the grounds for annulment of Article 190 para. 2 CPIL, case law shows that the Federal Supreme Court is very reluctant to quash arbitral awards and the rate of success of appeals filed with the Federal Supreme Court is low.

- Third, if both parties are not resident in Switzerland, it is possible to waive the right to bring any action for annulment of the arbitral award with the Federal Supreme Court (Article 192 CPIL).

The action for annulment of an arbitral award has to be brought before the Federal Supreme Court in the form of a constitutional complaint (Article 191 para. 1 CPIL in connection with Article 84 et seq. of the Federal Statute on the Organization of the Federal Judiciary ("OG")). The complaint must be presented to the Federal Supreme Court within 30 days of service of the arbitral award (Art. 89 OG). The parties may also agree that - in lieu of the Federal Supreme Court - the cantonal court at the arbitral tribunal's seat shall decide the complaint. Each canton has designated a cantonal court for this purpose (Article 191 para. 2 CPIL).

Chapter 12 contains significant limitations on the possibility of challenging an arbitral award in the state courts. Article 190 para. 2 lit. a-e CPIL provides that an arbitral award can only be challenged based on the following five grounds:

a) improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal (including the appointment of an arbitrator who is not independent (BGE 118 II 361));
b) erroneous acceptance or denial of jurisdiction by the arbitral tribunal;
c) failure to decide all claims brought by the parties or decision on matters beyond the claims submitted to the arbitral tribunal;
d) violation of the principle of equal treatment of the parties or the right to be heard; or
e) non-compliance of the award with Swiss substantive or procedural public policy (BGE 126 III 252).

While under the old law, it was possible to challenge the award on the merits by claiming that the award was arbitrary and capricious, the fact that the award may be arbitrary no longer qualifies as a reason for annulment under Article 190 CPIL (BGE 121 III 333).

With regard to the grounds mentioned in Article 190 para. 2 lit. a and b CPIL (constitution and jurisdiction of the arbitral tribunal), an interim or partial award can be submitted to the Federal Supreme Court (Article 190 para. 3). As explained above, the parties must not await the final decision before filing their appeal (BGE 118 II 355 and 130 III 76). In contrast, with regard to the grounds mentioned in Article 190 para. 2 lit. c, d and e CPIL, only the final award can be challenged. According to BGE 130 III 76, this is even the case where an interim or partial decision causes a disadvantageous, not easily reparable situation for a party to the proceedings.

In case the challenge is well founded, the Federal Supreme Court may issue a new decision replacing the arbitral award only where the arbitral tribunal erroneously denied or affirmed jurisdiction (Article 190 para. 2 lit. b CPIL). In all other cases, the Federal Supreme Court will remit the matters in question to the arbitral tribunal for reconsideration (BGE 117 II 94).

According to Article 192 CPIL, the parties may either waive the right to have the award set aside or they may limit this right to one or several of the five aforementioned grounds for annulment, provided that two requirements are met: first, none of the parties has its domicile, habitual residence or business establishment in Switzerland and, secondly, the waiver must be an express term of the arbitration agreement or be contained in a subsequent written agreement. Due to the requirement for an "express term", the mere reference to a set of procedural rules excluding the right of appeal would probably not be sufficient. However, an explicit reference to Article 192 CPIL is not necessary. The Federal Supreme Court held in BGE 131 III 173 that the right to challenge was validly waived by an arbitration agreement in which the parties referred to the UNCITRAL Arbitration Rules and added that the decision of the arbitral tribunal "shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made."

Where the parties exclude all grounds for annulment, enforcement of the arbitral award in Switzerland will be governed by the New York Convention (Art. 192 para. 2 CPIL). Thus there will be a judicial review by the court enforcing the award in accordance with Article IV and V of the New York Convention.

Recognition and enforcement of awards

Domestic awards

Each party may, at its own expense, deposit a copy of the arbitral award with the state court at the seat of the arbitral tribunal. Upon request by a party, the state court will issue a declaration of enforceability. Alternatively, at the request of a party, the arbitral tribunal will certify that the arbitral award was made in accordance with the provisions of Chapter 12. Such a certificate has the same effect as depositing the arbitral award with the state court (Article 193 CPIL).

Subject to the aforementioned Article 192 para. 2 CPIL, any arbitral award issued by an arbitral tribunal having its seat in Switzerland will be enforced anywhere in Switzerland (Article 122 para. 3 of the Swiss Constitution).

Foreign awards

Pursuant to Article 194 CPIL, the 1958 New York Convention governs the recognition and enforcement of all foreign arbitral awards in Switzerland. By including an express reference to the New York Convention in Article 194 CPIL, the Swiss legislature broadened the applicability of the Convention unilaterally, in that it now applies regardless of whether the country of origin of the award is a signatory of the Convention; any and all foreign arbitral awards will therefore be recognised and enforced in Switzerland pursuant to the provisions of the New York Convention.

If a foreign state court exercises jurisdiction over a particular dispute despite the existence of a valid arbitration agreement in accordance with Article II of the 1958 New York Convention, the foreign state court's decision will not be recognised in Switzerland by virtue of Article 25 lit. a CPIL (BGE 124 III 83).

Conclusion

With its rules on international arbitration in Chapter 12 of the Swiss Code of Private International Law and the new Swiss Rules of International Arbitration (www.swissarbitration.ch), Switzerland affirms its position as a leading location for international commercial arbitration.

Switzerland's arbitration law combined with its neutrality, political stability, geographical position, arbitration institutions and the expertise of its legal profession make it uniquely suitable for resolving international arbitration disputes.

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CMS transnational legal and tax services

Focus on excellence

Market leaders

The demand for high quality, integrated multi-jurisdictional legal and tax services has never been greater: as the barriers to multi-national business continue to fall and more and more businesses seek to exploit the opportunities presented by international markets.

Our response has been the creation of CMS - one of the world's largest groups of legal and tax service organisations, with over 1,700 lawyers operating throughout Europe and beyond.

CMS is more than international in focus. Our aim is to be truly transnational; operating strong local law practices in key business centres world-wide. Each of the CMS member firms is a leading firm in its own jurisdiction. They are:

- CMS Adonnino Ascoli & Cavasola Scamoni - (Italy)
- CMS Albinana Suarez de Lezo (Spain)
- CMS Bureau Francis Lefebvre - (France)
- CMS Cameron McKenna LLP - (UK)
- CMS DeBacker (Belgium)
- CMS Derks Star Busmann - (Netherlands)
- CMS von Erlach Henrici - (Switzerland)
- CMS Hasche Sigle - (Germany)
- CMS Reich-Rohrwig Hainz - (Austria)

The member firms of CMS have the resources and experience to provide clients with access to a wide range of integrated pan-European legal and tax services, managed by a single point of contact and with common high calibre service standards. We are building seamless transnational services for the benefit of our clients.

Building upon core strengths

Whilst each CMS member firm continues to develop its national strength, CMS is focused on achieving excellence in a number of key practice areas, reflecting our core strengths. Pan-European practice area groups have the express aim of integrating our services and developing leading edge capability.

The practice area groups are:

- corporate (mergers and acquisitions; joint ventures; strategic alliances; corporate finance; privatisations; private equity and MBOs)
- banking and insolvency (including capital markets)
- tax
- real estate, construction and environment
- technology (IT, telecoms, biotechnology, pharmaceuticals)
- utilities and projects
- competition and European law
- employment and pensions
- entertainment and intellectual property
- financial services
- insurance and reinsurance
- litigation and arbitration
- product liability

Within these practice areas we are developing a number of specialist industry subgroups, combining lawyers with first-hand knowledge of key industry sectors.

Focus on client needs

Satisfying our clients' demands is our overriding objective. Our clients benefit from:

- expert legal advice through our focus on building core strengths on a Pan-European basis
- commercial advice based upon our experience of having worked in a diverse range of industries
- consistency in service through common service standards, providing a seamless service, irrespective of location or jurisdiction and with the minimum of disruption
- single points of contact who have the power to commit CMS resources anywhere in the world
- growing international coverage through the recruitment of additional law firms
- cutting edge know-how through common training and development programmes for our staff
- working with talented international lawyers as a result of our enhanced ability to recruit and retain the very best

Integration

We fully recognise that our clients expect us to provide solutions to their problems, to alert them to issues in advance and to work with them on the successful achievement of their objectives - with the minimum of disruption and with true value for money.

We also understand that our clients expect us to provide seamless services, irrespective of wherever they may be doing business. They do not want a series of offices only linked by a common name.

In order to achieve all this, we have invested resources to integrate our practices. We have a number of programmes underway to ensure that integration is smooth and swift. Our actions reflect our client's needs and our drive to offer seamless integrated services.

Communication: integrated e-mail, document exchange, telephone and video-conferencing facilities will help to speed our communications with our clients.

Knowledge management: next to its people, a law firm's know-how is one of its strongest assets. Sharing that know-how and developing a common CMS knowledge base upon which all lawyers can draw, is a key priority.

Quality: the development of common working practices and standards of service coupled with shared training and development programmes, will help to build a strong culture for CMS based upon common values.

Strong domestic practices, extensive international reach

CMS is not a loose association or referral group of national law firms. CMS firms have a long history of co-operation; they know each other well and have a track record of working together for the benefit of clients. Above all they share a common commitment to the full integration of their practices.

CMS firms have a deep understanding of their home markets - Austria, Belgium, France, Germany, Italy, the Netherlands, Spain, Switzerland and the United Kingdom. Each has an extensive network of contacts with fellow professionals and institutions. Each is accustomed to making deals happen both at home and abroad. Each has adopted a commercial approach to advising clients and an entrepreneurial approach to the development of their business.

Together, CMS firms are a formidable force within the world's market for professional services.

Outside traditional home markets, CMS is a major force in Central Europe and the CIS with offices in Poland, Hungary, the Czech Republic, Romania, Serbia, Slovakia and the Russian Federation, and has a strong presence in Asia.

CMS offices and associated offices world-wide

Aberdeen
Amsterdam
Antwerp
Arnhem
Beijing
Belgrade
Berlin
Bratislava
Bristol
Brussels
Bucharest
Budapest
Buenos Aires
Casablanca
Chemnitz
Cologne
Dresden
Düsseldorf
Edinburgh
Frankfurt
Hamburg
Hilversum
Hong Kong
Leipzig
London
Lyon
Madrid
Marbella
Milan
Montevideo
Moscow
Munich
New York
Paris
Prague
Rome
Sao Paulo
Seville
Shanghai
Sofia
Strasbourg
Stuttgart
Utrecht
Vienna
Warsaw
Zagreb
Zurich

Our philosophy: practical solutions to commercial problems

We are committed to providing the highest quality professional advice and building enduring relationships with our clients. We place great emphasis on the training and development of our partners and staff in both current legal and business issues. Our investment in know-how and information systems allows us to share our knowledge and experience throughout the CMS member firms, helping to ensure that all our lawyers add value to the services they provide. We work with our clients to identify their business needs and recognise that clients bring their disputes to us so that we can apply our experience and expertise to assist them with achieving comprehensive and practical solutions to commercial problems as quickly, efficiently and as cost effectively as possible.

We pride ourselves on aiming to find the speediest and most cost effective way to resolve our clients' disputes, whether by negotiation, mediation (as well as other Alternative Dispute Resolution methods) or legal proceedings. It is our job to assimilate the facts and issues leading to the dispute or potential dispute and to consider with our client the tactics and strategy for bringing the dispute to an end successfully and at an appropriate time. It is our task to help clients develop and improve their bargaining positions. Most importantly, it is for us to use our resources, expertise, experience and skills to help clients to handle their disputes constructively, practically and effectively in the wider context of their ongoing businesses, business needs and strategy.

We are committed to resolving disputes without recourse to legal proceedings wherever possible. But where proceedings are unavoidable we will give you the advice, support and resources needed to bring them to a successful conclusion.

We are committed to the use of ADR to complement conventional litigation and arbitration procedures and have been at the forefront of its development.

Properly handled arbitration can provide a radically different and highly effective method of resolving international commercial disputes.

A proven track record in international commercial dispute resolution

The CMS member firms have litigation, arbitration, and ADR experience in all areas of commercial dispute resolution (domestic, European, and other foreign jurisdictions, including arbitrations under international institutional and ad hoc arbitration rules, such as the ICC, LCIA, UNCITRAL, and other national and international rules).

CMS member firms have advised and acted for a wide cross-section of the global business community in all matters of domestic and international trade and industry, including aviation, banking and financial services, commodities, corporate, construction and infrastructure projects, building, engineering, insurance/re-insurance, information technology, intellectual property, transport, motor industry, oil and gas, public works, chemical industry, telecommunications, pharmaceuticals, rent review, and other commercial areas.

Specialist expertise

The CMS Dispute Resolution Practice Area Group comprises lawyers specialising in particular industries or types of dispute, bringing in-depth business understanding to the circumstances in which disputes may arise. The CMS member firms have a wealth of experience and the depth of resources to conduct all types of dispute, whether by litigation, arbitration or alternative dispute resolution. CMS approaches disputes as commercial problem solvers determined to make things happen, giving a business lead, not just a legal opinion.

Arbitration: a wide range of advisory services

Drafting the dispute resolution clause

A well drafted dispute resolution clause maximises the chance that any problems will be resolved with the minimum of delay and cost. As well as advising on straightforward arbitration clauses, we are often called on instantly to provide dispute resolution clauses suitable for every variety of contractual arrangement, including clauses involving multi-party disputes and consolidation of arbitrations, for good faith negotiations, and provisions requiring the use of Alternative Dispute Resolution methods.

Choosing the arbitration rules

A wide range of arbitration rules exist for incorporation in arbitration agreements. CMS has the expertise and experience to advise you on the most appropriate choice of procedural rules to meet your requirements.

Selecting your arbitrator

The selection and appointment of the arbitrator is crucial to the effectiveness of the arbitration proceedings. We can advise you on the issues to consider, taking into account the type of dispute which has arisen, the points likely to be in issue between the parties, the place and language of the arbitration, the chosen procedural rules of arbitration, the appropriate expertise required of the tribunal, and other relevant matters.

Supporting arbitration proceedings in other jurisdictions

Through its network of offices and connections in other countries, CMS can provide resources and local advice in relation to protective measures available world-wide before or after the commencement of proceedings.

Enforcing arbitral awards

Through our experience and international contacts we can assist with the enforcement of arbitral awards in any jurisdiction.

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Appendix 1

Sample arbitration clauses [1, 2]

Principal international arbitration institutions

International Chamber of Commerce (ICC) Court of Arbitration[3]

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

London Court of International Arbitration (LCIA)

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

- The number of arbitrators shall be [one/three].
- The seat or legal place of the arbitration shall be [city and/or country].
- The language to be used in the arbitral proceedings shall be [language].
- The governing law of the contract shall be the substantive law of [jurisdiction]."

1 The institutional sample clauses are basic standard clauses recommended by the individual institutions. The ad hoc arbitration clause under the UNCITRAL Arbitration Rules is in the form recommended by CMS. The combined negotiation, mediation and arbitration clause is in the form recommended by the Centre for Dispute Resolution (CEDR).
2 The sample clauses set out in this Appendix are basic standard sample clauses only. Specialist legal advice should always be sought to ensure that the particular arbitration clause used meets the circumstances of the parties' main contract.
3 The parties are free to choose the substantive law governing the contract, the place and language of the arbitration and the number of arbitrators and their choice is not limited by the ICC Rules of Arbitration. We would always recommend that express provisions on these points be included in the arbitration clause itself.

World Intellectual Property Organisation (WIPO)

Recommended WIPO Arbitration Clause:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [city and/or country] The language to be used in the arbitral proceedings shall be [language] The dispute, controversy or claim shall be decided in accordance with the law of [jurisdiction]"

Recommended WIPO Expedited Arbitration Clause:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. The place of arbitration shall be [city and/or country] The language to be used in the arbitral proceedings shall be [language] The dispute, controversy or claim shall be decided in accordance with the law of [jurisdiction]"

International Centre for Settlement of Investment Disputes (ICSID)

"The [Government]/[name of constituent subdivision or agency] of [name of Contracting State] (hereinafter the "Host State") and [name of investor] (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of

Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").

Principal European arbitration institutions

Austria

International Arbitral Centre of the Austrian Federal Economic Chamber

"All disputes arising out of this contract or related to its violation, termination or nullity shall be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or more arbitrators appointed in accordance with these rules."

Appropriate supplementary provisions:

- the number of arbitrators shall be [one or three];
- the substantive law of [jurisdiction] shall be applicable;[4]
- the language to be used in the arbitral proceedings shall be [language]."

Parties having concluded the arbitration agreement as businessmen may waive their right to have recourse against an award in Austria on those grounds on which recourse may be had against a court judgment by way of an application for reopening the case. If this is desired, it is recommended that the following be added:

"Pursuant to para 598 (2) of the Austrian Code of Civil Procedure (ZPO), the parties expressly waive the application of para 595 (1) figure 7 of the said Code."

Belguim

Belgian Centre for Arbitration and Mediation (CEPANI)

"Any dispute arising out of or in relation with this agreement shall be finally settled under the CEPANI Rules of Arbitration by one or more arbitrators appointed in accordance with those rules".

[4] In this context, consideration should be given to the possible application of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

Czech Republic

Court of Arbitration Attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic

"All disputes arising from the present contract and in connection with it shall be finally decided with the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic by [one/three] artbitrator[s] in accordance with the rules of that Arbitration Court."

England and Wales

Chartered Institute of Arbitrators

"Any dispute or difference arising out of or in connection with this contract shall be determined by the appointment of a single arbitrator to be agreed between the parties, or failing agreement within fourteen days, after either party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the President or a Vice President of the Chartered Institute of Arbitrators."

London Maritime Arbitrators Association

"This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and give

notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US $50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced."

France

Association Française d'Arbitrage (AFA)

"Any dispute or difference arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Arbitration Rules of the Association Française d'Arbitrage which the parties declare to have accepted."

Germany

Deutsche Institution Für Schiedsgerichtsbarkeit e.V. (DIS)

"All disputes arising in connection with the contract (... description of the contract ...) or its validity shall be finally settled in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS) without recourse to the ordinary courts of law.

- The place of arbitration is ...;
- The arbitral tribunal consists of ... (number of) arbitrators;
- The substantive law of ... is applicable to the dispute;
- The language of the arbitral proceedings is ... ."

Hungary

Court of Arbitration Attached to the Hungarian Chamber of Commerce and Industry

"The parties agree that all disputes arising from or in connection with the present contract, its breach, termination, validity or interpretation, shall be exclusively decided by the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (Budapest) in accordance with its own Rules of Proceedings."

Parties may wish to consider adding:

- "The number of arbitrators shall be _____ .
- The applicable law shall be _____ .
- The language(s) to be used in the arbitral proceedings shall be _____ ."

The Netherlands

Netherlands Arbitration Institute (NAI)

"All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Arbitration rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut).

- The arbitral tribunal shall be composed of one arbitrator/three arbitrators.
- The place of arbitration shall be ... (city).
- The arbitral procedure shall be conducted in the ... language.
- Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in art. 1046 of the Netherlands Code of Civil Procedure, is excluded."

Poland

The Court of Arbitration at the Polish Chamber of Commerce in Warsaw

Recommended arbitration clause for submission of disputes to the Court of Arbitration:

"All disputes arising out of the present contract or in connection therewith shall be finally settled by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw according to the Rules of that Court."

In addition to resolving disputes according to its own Arbitration Rules, the Court of Arbitration at the Polish Chamber of Commerce administers arbitrations according to the UNCITRAL Arbitration Rules of 1976. Such administration is performed under a separate set of the Court Rules if the parties so agree in their arbitration agreement. The recommended wording for such an arbitration clause is follows:

"All disputes arising out of the present contract or in connection therewith shall be finally settled under the Rules of the Court of Arbitration at the Polish Chamber of Commerce on administering arbitrations according to the UNCITRAL Arbitration Rules."

Romania

International Court of Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania

"All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in accordance with the Rules of Arbitration of this Court. The arbitral award shall be final and binding."

The parties may also choose to provide for the following:

1 "The arbitral tribunal shall be composed of a sole arbitrator, appointed upon joint agreement of the parties or by the president of the Court of International Arbitration attached to the Chamber of Commerce and Industry of Romania, where parties fail to reach such an agreement."
or
"The arbitral tribunal shall be composed of two arbitrators, each of them appointed by one of the parties and no consent of the other party is necessary thereto."
(Where such specifications are not made, the arbitral tribunal shall be composed of three arbitrators in

accordance with the Rules of Arbitration; one arbitrator appointed by each party and a presiding arbitrator designated by the arbitrators.)

2 "The arbitral tribunal shall settle the dispute in law, and the Romanian law shall be applicable."
or
"The arbitral tribunal shall judge the dispute ex aequo et bono."

3 "The place of arbitration is at … (where a different place than the head office of the Court of Arbitration is established)."

4 "The arbitral tribunal shall render the award within … months (where the parties agree to establish a longer or shorter interval than five months, as provided by the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania."

Russian Federation

The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC)

"Any dispute, controversy or claim which may arise out of or in connection with the present contract (agreement), or the execution, breach, termination or invalidity thereof, shall be settled by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in accordance with its Rules."

The Arbitration Court at the St Petersburg Chamber of Commerce and Industry

"All disputes arising out of or in connection with this agreement (contract) or following from it shall be submitted for final resolution by the Arbitration Court at the Saint-Petersburg Chamber of Commerce and Industry in accordance with the Regulations of the said Court."

Switzerland

Swiss Rules of International Arbitration

Any dispute, controversy or claim arising out of or in relation to this contract, uncluding the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these rules.

- The number of arbitrators shall be [one/three];
- The seat of the arbitration shall be [city in Switzerland, unless the parties agree on a city abroad];
- The arbitral proceedings shall be conducted in [lanuage].

Ad Hoc arbitration

Ad Hoc Arbitration under UNCITRAL Arbitration Rules

"All and any disputes or differences arising out of or in connection with this Agreement, or the breach, termination, or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules [as at present in force/ as in force at the time when arbitration proceedings are commenced] ("the UNCITRAL Rules").

The Notice of Arbitration shall be served in accordance with Art 3 of the UNCITRAL Rules.

"The number of arbitrators shall be [one/three] and they shall be appointed in accordance with the UNCITRAL Rules. The appointing authority for the purposes of the UNCITRAL Rules shall be [institution].

The place and the seat of the arbitration shall be [city and/ or country] and the language of the arbitration shall be [language].

All and any awards of the arbitrators shall be made in writing and shall be final and binding on the parties [who expressly exclude all and any rights of appeal from

or challenge of all and any awards to the extent that such exclusion may be validly made]. All and any awards of the arbitrators shall be given by majority decision but if there be no majority, the award shall be made by the presiding arbitrator alone.

The final award shall be made within six months from the appointment of the tribunal, but insofar as this is impractical, it shall be made as soon as possible thereafter.

The parties agree to keep confidential to themselves and to their legal and other professional advisers the existence and details of any proceedings pursuant to this clause, including the parties' submissions and evidence, all and any awards (their content, reasons and result) - save to the extent that such documents or information are in the public domain or their disclosure is required by a statutory duty or is reasonably necessary to protect or pursue a legal right or remedy arising out of or in connection with any award or this agreement.

This agreement shall be governed by and construed in accordance with the substantive law of [jurisdiction]."

Combined med/arb clause

Combined Negotiation, Mediation and Arbitration Clause

"If any dispute arises out of this agreement the parties will attempt to settle it by negotiation.

If the parties are unable to settle any dispute by negotiation [within [21] days], the parties will attempt to settle it by mediation in accordance with the Centre for Dispute Resolution (CEDR) Model Mediation Procedure ("the Model Procedure").

To initiate a mediation a party [by its managing director] must give notice in writing ("ADR notice") to the other party(ies) to the dispute [addressed to its/their respective managing director] requesting a mediation in accordance with clause 2.

If their is any point on the conduct of the mediation (including as to the nomination of the mediator) upon

which the parties cannot agree within [14] days from the date of the ADR notice, CEDR will, at the request of any party, decide that point for the parties, having consulted with them.

The mediation will start not later than [28] days after the date of the ADR notice.

sNo party may commence any court proceedings/ arbitration in relation to any dispute arising out of this agreement until they have attempted to settle it by mediation and that mediation has terminated.

Neither party may terminate the mediation until each party has made its opening presentation and the mediator has met each party separately for at least [one hour]. Thereafter paragraph 14 of the Model procedure will apply.

If the parties have not settled the dispute by the mediation within [42] days from the date of the ADR Notice, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

- The number of arbitrators shall be [one/three].
- The seat or legal place of the arbitration shall be [city and/or country].
- The language to be used in the arbitral proceedings shall be [language].
- The governing law of the contract shall be the substantive law of [jurisdiction]."

Appendix 2

Comparative table

General

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Legislation	Code of Civil Procedure (Zivilprozessordnung – ZPO) 1895, Chapter 4, sectt. 577 to 599	articles 1676 to 1723 of the Code Judiciaire/ Gerechtlijk Wetboek 1972 as amended by the Act of 19th May 1998	Arbitration Act 1994 (Act No 216/1994 Coll); 1963 Civil Procedure Code	Arbitration Act 1996	Section IV of the Nouveau Code de Procédure Civile ("NCPC") (Decree No 80-354 of 14th May 1980 and Decree No 81-500 of 12th May 1981); articles 2059 to 2061 Code Civil	Arbitration Act 1998 (10th Book of the Code of Civil Procedure (Zivilprozeßordnung "ZPO"), §§1025 to 1066)	Act LXXI of 1994 on Arbitration (In cases concerning money and capital markets, deviations are set out in Act CXX of 2001 On the Capital Markets)	Italian Code of Civil Procedure (Book IV, title VIII of the Codice di Procedura Civile) and, Legislative Decree n. 5/2003 for company arbitration.
Based on UNCITRAL Model Law	no	no, but many provisions are based on the UNCITRAL Model Law	no	no, but as far as possible the 1996 Act has sought to follow the Model Law	no	yes	yes	yes
Signatory State New York Convention	yes	yes	yes	yes	yes	yes	yes	yes

General

Country/ Aspect of Arbitration	The Netherlands	Poland	Romania	Russia	Scotland	Spain	Switzerland
Legislation	Arbitration Act 1986 (Book IV of the Code of Civil Procedure)	Code of Civil Procedure 1964, Book III, articles 695 to 715	Civil Procedure Code, fourth book, articles 340 to 371, section 4 of Law No 105/1992 on the Settlement of Private International Law Relations	1993 Law on International Commercial Arbitration; 2002 Law on Arbitration Tribunals in the Russian Federation	based on common law; relevant statutes are: Articles of Regulation 1695; Arbitration (Scotland) Act 1894; Arbitration Act 1950; Arbitration Act 1975; Administration of Justice (Scotland) Act 1972; Law Reform Miscellaneous Provisions (Scotland) Act 1990; Arbitration Act 1996 (sections 89, 90 and 91 only)	Arbitration Act 60/2003	Chapter 12 of the Federal Code on Private International Law of 1987 Inter-cantonal Arbitration Convention continues to apply to domestic arbitrations
Based on UNCITRAL Model Law	no, but many provisions are based on the UNCITRAL Model Law	no	no, but many provisions are based on the UNCITRAL Model Law	yes	yes, though the Law Reform Miscellaneous Provisions (Scotland) Act 1990	yes	no
Signatory State New York Convention	yes	yes	yes	yes	yes	yes	yes

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
General								
Form requirements	only for conclusion: in writing or be contained in telegrams, telexes or in electronic representations exchanged by the parties	in writing	in writing	in writing or evidenced in writing	in writing for domestic arbitration; no strict form requirement for international arbitration	in writing	in writing	in writing including written acceptance
Composition of arbitral tribunal								
Number of arbitrators if not agreed by parties	three	three	three	one	one	three	three	three

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
General							
Form requirements	in writing	in writing, signed by both parties	in writing	in writing	in writing	in writing	in writing
Composition of arbitral tribunal							
Number of arbitrators if not agreed by parties	uneven number determined by President of District Court	three	three	three	one (under Law Reform Miscellaneous Provisions (Scotland) Act 1990)	one	appointed by court at seat of arbitral tribunal pursuant to relevant rules of cantonal law

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Composition of arbitral tribunal (cont)								
Provision for payment of arbitrators' fees and expenses	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; no express provision in Code of Civil Procedure	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; otherwise arbitrator has implied power to apportion fees and expenses in his award; no express provision in Code Judiciaire	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; no express provision in Arbitration Act	pursuant to agreement between parties and arbitrator, or reasonable fees and expenses pursuant to Section 28 of the Arbitration Act 1996; in institutional arbitrations determined by institution	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; no express provision in NCPC	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; no express provision in Arbitration Act 1998	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by fee-schedules of institution; no express statutory provision	procedure expressly recognises the arbitrators' entitlement to fees and to reimbursement of their expenses, unless waived upon acceptance of post or by subsequent written notice
Jurisdiction of arbitral tribunal								
Power to determine own jurisdiction	yes	yes	yes	yes	yes	yes	yes	yes

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Composition of arbitral tribunal (cont)							
Provision for payment of arbitrators' fees and expenses	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; no express provision in Arbitration Act 1986	pursuant to agreement between parties and arbitrator; in the absence of agreement determined by the district court; in institutional arbitrations determined by institution	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by institution; statutory provisions for assessment and payment of arbitrators' fees and expenses in articles 359 to 3596 CPC	pursuant to agreement between parties and arbitrator; in institutional arbitration determined by fee schedules of institution; no express statutory provision	pursuant to agreement between parties and arbitrator; otherwise arbitrator has implied power to apportion fees and expenses in his award	pursuant to agreement between parties and arbitrator; in institutional arbitrations determinated by institution; no express provision in Arbitration Act	pursuant to agreement between parties and arbitrator; in institutional arbitrations determined by fee-schedules of institution; no express statutory provision
Jurisdiction of arbitral tribunal							
Power to determine own jurisdiction	yes	yes	yes	yes	yes	yes	yes

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Jurisdiction of arbitral tribunal (cont)								
Power to order interim and protective measures	no	yes (except attachment of goods); court applications for interim measures pursuant to article 1679.2 Code Judiciaire	no	yes, if power conferred in arbitration agreement; court applications for interim measures pursuant to Section 44 of the Arbitration Act 1996	no specific provision but the tribunal has power to order measures to protect evidence but cannot enforce these measures; court applications for interim measures to Tribunal de Grande Instance or Tribunal de Commerce; this is possible but exceptional	yes, unless otherwise agreed by the parties; interim measure ordered by arbitral tribunal enforceable upon application to court; court applications for interim measures pursuant to §1033 of the ZPO	yes, unless otherwise agreed by the parties; court applications for interim measures to the local courts	no; court applications for interim measures
Conduct of arbitral proceedings								
Commencement of arbitration	no particular statutory provision; unless otherwise agreed by the parties, when the statement of claims (with the notice to appoint arbitrator) is served on the other party	when written notice of dispute referring to arbitration agreement served on other party; notice must also appoint arbitrator or be copied to appointing authority	when statement of claim lodged with arbitral tribunal in ad hoc proceedings or with permanent arbitration court in institutional proceedings	unless otherwise agreed by the parties, when written notice requiring appointment of arbitrator served on other party	when a party informs the other party of his intent to arbitrate and summons the other to appoint the arbitral tribunal; there are no formal requirements	unless otherwise agreed by the parties, when request to refer dispute to arbitration is received by the respondent	unless otherwise agreed by the parties, when the other party receives the request to refer the dispute to arbitration	deemed commenced when one of the parties serves on the other party a notice of the appointment of an arbitrator and requests the other party to appoint their arbitrator

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Composition of arbitral tribunal (cont)							
Power to order interim and protective measures	yes; court applications for interim measures to the President of the District Court	yes; court applications for interim measures to the court which would have jurisdiction in the absence of the arbitration agreement	yes, but execution must be ordered by competent court; court applications for interim measures pursuant to article 3588 CPC	yes, unless otherwise agreed by the parties; court applications for interim measures to relevant local courts	at common law only if power conferred in arbitration agreement; under Law Reform Miscellaneous Provisions (Scotland) Act 1990 unless otherwise agreed by the parties; court applications for interim measures possible	yes	yes, unless otherwise agreed by the parties; arbitral tribunal can apply for court assistance if interim measure not complied with by party
Conduct of arbitral proceedings							
Commencement of arbitration	unless otherwise agreed by the parties, when written notice is served informing other party that arbitration commenced and setting out the matters submitted to arbitration	in ad hoc arbitration when written notice of arbitration served on other party; in institutional arbitration through filing statement of claim	when the claimant serves on the respondent and on each of the arbitrators a copy of the written statement of claim together with copies of the documents relied upon	unless otherwise agreed by the parties, when the other party receives the request to refer the dispute to arbitration	at common law when notice to arbitrator is served; under Law Reform Miscellaneous Provisions (Scotland) Act 1990 on the date on which a request to refer a particular dispute to arbitration received by respondent	on the date on which a request for that dispute to be referred to arbitration is received by the respondent	when claim submitted to arbitral tribunal designated in arbitration agreement; if no tribunal designated, when one party initiates procedure to appoint tribunal

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Conduct of arbitral proceedings (cont)								
Oral hearing required	no statutory requirement, but statutory right to a hearing in accordance with the law (even if only in writing)	unless otherwise agreed by the parties, tribunal decides after oral hearing	unless otherwise agreed by the parties, tribunal decides after oral hearing	unless otherwise agreed by the parties, tribunal decides whether there should be an oral hearing	no statutory requirement, tribunal holds oral hearing on own initiative or at request of a party	at the request of a party unless excluded by agreement; otherwise tribunal decides whether there should be an oral hearing	unless otherwise agreed by the parties, tribunal decides after oral hearing	subject to agreement of the parties or decision of the arbitral tribunal; final oral hearings are common practice
Making of the award								
Choice of law	Austrian substantive law or conflict of laws rules, unless chosen by parties and not contravening Austrian ordre public	substantive law chosen by parties or determined by tribunal	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or rules of law determined by arbitral tribunal as appropriate	substantive law chosen by parties or law of state with which subject matter of proceedings most closely connected	substantive law chosen by parties or determined by tribunal	substantive law chosen by parties or determined by tribunal

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Conduct of arbitral proceedings (cont)							
Oral hearing required	at the request of a party or on arbitral tribunal's own initiative; tribunal generally decides after oral hearing	subject to agreement of the parties or decision of the arbitral tribunal	tribunal generally decides after oral hearing but parties may request tribunal to settle dispute in their absence on the basis of the documents in the file	unless otherwise agreed by the parties, tribunal shall decide after oral hearing	at common law subject to agreement by the parties; under Law Reform Miscellaneous Provisions (Scotland) Act 1990, hearing to be held at request of a party unless parties have agreed that no hearing to be held	the arbitrators decide whether to hold oral hearings for the presentation of oral argument or whether the proceeding is conducted solely in writing	tribunal generally decides after oral hearing
Making of the award							
Choice of law	substantive law chosen by parties or determined by tribunal	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or determined by tribunal on basis of conflict of law rules	substantive law chosen by parties or (absent a choice of law) law most closely connected with subject matter of dispute

Making of the award (cont)

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Award of interest	contractual interest only	upon application of a party, contractual or legal interest	upon application of a party, contractual or legal interest	contractual interest; otherwise award of (simple or compound) interest in the discretion of the arbitrators	upon application of a party, contractual or legal interest	contractual interest only	upon application of a party, statutory default interest or contractual interest	Contractual or statutorily defined interest only.
Decision making of tribunal if more than two arbitrators	by majority unless otherwise agreed by the parties	by majority unless otherwise agreed by the parties; parties may agree to give chairman casting vote if no majority	by majority	depending on whether there is a chairman or umpire, but generally by majority unless otherwise agreed by the parties	by majority; arbitrators must make procedural orders jointly unless arbitration agreement authorises delegation to one of the arbitrators	by majority unless otherwise agreed by the parties	by majority unless otherwise agreed by parties	by majority unless otherwise agreed by the parties

Making of the award (cont)

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Award of interest	upon application of a party, legal or contractual interest	contractual interest or interest specified in Polish substantive law	upon application of a party, contractual interest or default interest at official rate of National Bank of Romania	upon application of a party, contractual interest or statutory interest if applicable	contractual interest; at common law arbitrator has implied power to award interest only from the date of the award	upon application of a party contractual or legal interest	upon application of a party, contractual interest or statutory default interest
Decision making of tribunal if more than two arbitrators	by majority unless otherwise agreed by the parties	by majority unless otherwise agreed by the parties	if tribunal composed of uneven number of arbitrators, by majority; if composed of even number, article 3603 CPC provides for appointment of umpire if arbitrators do not agree on award	by majority unless otherwise agreed by the parties	by majority unless otherwise agreed by the parties; at common law 'oversman' may be appointed to make a ruling if even number of arbitrators and failure to agree	by majority	by majority unless otherwise agreed by parties, or (absent a majority) by the chairman alone

Making of the award (cont)

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Form and contents of award	in writing, dated and signed by the arbitrators	in writing, signed by the arbitrators, stating names and addresses of the arbitrators and parties, subject of the dispute, date of award, seat of arbitration and place where award made	in writing, signed by at least a majority of the arbitrators, unambiguous	in writing, signed by arbitrators, stating seat of arbitration and date of award	in writing, signed by arbitrators, stating arbitrators' names, the date and place of the award, names and addresses of parties, summary of their arguments and submissions, and names of any attorneys or party representatives	in writing, signed by arbitrators, stating seat of arbitration and date of award	in writing and signed by arbitrators, stating date of award and place of arbitration	in writing and including the signature of all the arbitrators, the identity of parties and reference to arbitration agreement

Making of the award (cont)

Country/ Aspect of Arbitration	The Netherlands	Poland	Romania	Russia	Scotland	Spain	Switzerland
Form and contents of award	in writing, signed by the arbitrators, stating names and addresses of the arbitrators and parties, and date of award and place where award made	in writing, signed by the arbitrators, stating reference to the arbitration agreement, date and place of the award, names of the parties and of the arbitrators, decision on the claims of the parties, reasons for the award, signatures of the arbitrators	in writing, stating the names of the arbitrators, place and date of award, the names and addresses of parties, names of parties' representatives and any other persons who participated, reference to the arbitration agreement, subject matter of the dispute and summary of the parties' cases; the de facto and de jure reasons for the award or, for awards made ex aequo et bono, the grounds on which the decision is based, the decisions and orders of the tribunal and the signatures of all arbitrators	in writing and signed by arbitrators, stating date of award, place of arbitration, whether claim is allowed or rejected, amount of arbitration fees and costs, and their allocation as between the parties	in writing, signed by arbitrators (and oversman where applicable), stating names of arbitrators and details of submission	in writing and signed by the arbitrators who may add any dissenting opinion	in writing, accompanied by reasons for the decision, dated and signed (signature of chairman sufficient)

Making of the award (cont)

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Reasons required	no legal requirement, but customary to provide reasons	yes	yes, unless parties have agreed to dispense with reasons	yes, unless parties have agreed to dispense with reasons or agreed award	yes, required only in domestic arbitration; in international arbitration it is presumed unless stated otherwise	yes, unless parties have agreed to dispense with reasons or agreed award	yes, unless award on agreed terms	yes
Costs	arbitrators may apportion costs at their discretion; no express provision in Code of Civil Procedure	unless otherwise agreed by the parties, award of costs in the discretion of the arbitrators; no express provision in Code Judiciaire	no express provision in Arbitration Act; arbitrators may make cost award in ad hoc arbitration if agreed by parties; in institutional arbitrations pursuant to applicable rules	unless otherwise agreed by the parties, award of costs in the discretion of the arbitrators	no express provision in NCPC; unless otherwise agreed by the parties, award of costs at the discretion of the arbitrators; in institutional arbitrations pursuant to applicable rules	unless otherwise agreed by the parties, award of costs in the discretion of the arbitrators	arbitral tribunal required to make provision for costs of the proceedings (including remuneration of the arbitral tribunal) in its final award and to allocate costs as between the parties	the costs of administered arbitration are set out in official tables. For non-administered arbitration, reference should be made to the "schedule of fees" for arbitrations.

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Making of the award (cont)							
Reasons required	yes, unless award concerns quality and condition of goods or records settlement	yes	yes	yes	not at common law, unless parties specifically request reasons in the submission; under Law Reform Miscellaneous Provisions (Scotland) Act 1990 yes, unless otherwise agreed by parties or agreed award	yes	yes, unless otherwise agreed by parties
Costs	unless otherwise agreed by the parties, award of costs in the discretion of the arbitrators; no express provision in Arbitration Act 1986	arbitrators may apportion costs at their discretion; no express provision in CCP	arbitration expenses to be paid in accordance with parties' agreement; in the absence of any agreement, to be paid by the party indicated by the tribunal	unless otherwise agreed by the parties, tribunal required to make provision for costs of the proceedings (including remuneration of the arbitral tribunal) in its final award and to allocate costs as between the parties	unless otherwise agreed by the parties, award of costs in the discretion of the arbitrators	no express provision in arbitration act; arbitrators decide in the award on the cost of the arbitration	unless otherwise agreed by the parties, award of costs in the discretion of the arbitrators; no express statutory provision

Making of the award (cont)

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Arbitrators' power to correct and interpret award or make additional award	tribunal may on own initiative or at request of a party correct clerical, computation, typographical errors	tribunal may on own initiative or at request of a party correct clerical, computation, typographical, or other similar errors, or, at the request of a party, give an interpretation of specific parts of the award	tribunal may upon application of a party correct clerical errors, errors of calculation, or other obvious errors in the award by issuing a decree of correction	unless otherwise agreed by parties, tribunal may on own initiative or at request of a party correct clerical mistakes or errors arising from accidental slip or omission or clarify, or remove ambiguity in the award, or make an additional award in respect of any claim presented to the tribunal but not covered in the award	in ad hoc arbitration, the tribunal may, at the request of a party, correct errors or material omissions in the award, or give an interpretation of the award, or make an additional award in respect of any claim presented to the tribunal but not covered in the award; if the arbitral tribunal is no longer able to be constituted, this power belongs to the State court which would have been competent in the absence of arbitration	unless otherwise agreed by parties, tribunal may on own initiative or at request of a party correct computation, clerical, typographical, or other similar errors, or give an interpretation of specific parts of the award, or make an additional award in respect of any claim presented to the tribunal but not covered in the award	tribunal may on own initiative or at request of a party correct any spelling mistakes, errors in names, numbers or computation, or any typographical errors of a similar nature, or make an additional award in respect of any claim submitted to but not decided by the tribunal, or, at the request of a party, interpret a specific part of the award	Article 826 CPC: the parties may require the same arbitrators who decided the case to rectify the award when it includes formal omissions, errors and miscalculations

Making of the award (cont)

Country/ Aspect of Arbitration	The Netherlands	Poland	Romania	Russia	Scotland	Spain	Switzerland
Arbitrators' power to correct and interpret award or make additional award	tribunal may on own initiative or at request of a party correct manifest computation or clerical errors or mistakes, or omissions as to the form of the award or the details of the parties, arbitrators, date and place of the award, or make an additional award in respect of any matter submitted to but not decided by the tribunal; if appeal to second arbitral tribunal has been agreed, award can only be supplemented on appeal	tribunal may on own initiative or at request of a party correct errors and interpret the award if tribunal able to act in same composition as made the award	tribunal may on own initiative or at request of a party correct material calculation or typographical errors or other obvious errors which do not change the substance of the award or make an additional award in respect of any claim submitted to but not decided by the tribunal; no express statutory provision for interpretation of award by tribunal	tribunal may on own initiative or at request of a party correct any errors in computation, any clerical or typographical errors, or any errors of a similar nature, or, if so agreed by the parties, make an additional award in respect of any claim submitted to but not decided by the tribunal, or, at the request of a party, interpret a specific part of the award	at common law, tribunal may provide draft award to parties for review; once final award has been made, tribunal no longer has authority to amend the award; under Law Reform Miscellaneous Provisions (Scotland) Act 1990, unless otherwise agreed by parties, tribunal may on own initiative or at request of a party correct computation, clerical, typographical, or other similar errors, or give an interpretation of specific parts of the award, or make an additional award in respect of any claim presented in the arbitration but omitted from the award	tribunal may on own initiative or at request of a party correct clerical, computation, typographical errors	no express statutory provision but permissible as a matter of general legal principle and established doctrine

Role of the courts

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Stay of court proceedings	no statutory provisions on stay of court proceedings; court may rule on jurisdiction	court proceedings must be rejected as inadmissible if arbitration agreement valid and dispute within scope of agreement	stay must be granted if arbitration agreement valid and dispute within scope of agreement and arbitrable	stay must be granted if arbitration agreement valid and dispute within scope of agreement	court must decline jurisdiction if proceedings brought in respect of matter which has been referred to arbitration; if arbitral tribunal has not yet been seized, court declines jurisdiction unless arbitration agreement manifestly null and void	court proceedings must be rejected as inadmissible if arbitration agreement valid and dispute within scope of agreement	court must reject claim or terminate the action upon request of a party unless arbitration agreement null and void, inoperable or incapable of being performed	stay shall be granted if arbitration agreement is foreseeable for the dispute.

Role of the courts

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Stay of court proceedings	stay must be granted if arbitration agreement valid and dispute within scope of agreement; but arbitration agreement does not preclude a party from requesting court to grant decision in summary proceedings	court proceedings must be rejected as inadmissible if objection based on arbitration agreement is raised, agreement is valid and dispute within the scope of agreement	court must declare at the request of one of the parties that it lacks jurisdiction and refer the parties to arbitration, unless arbitration agreement is null and void, inoperative or incapable of being performed, respondent has already submitted defence on merits, or arbitral tribunal cannot be constituted for reasons which are imputable to the respondent	court must stay proceedings upon request of a party unless arbitration agreement null and void, inoperable or incapable of being performed	stay must be granted if arbitration agreement valid and dispute within scope of agreement	court proceedings must be rejected as inadmissible if arbitration agreement valid and dispute within scope of agreement	court must decline jurisdiction if dispute arbitrable and within scope of arbitration agreement, unless defendant participated in proceedings without invoking arbitration agreement, arbitration agreement is invalid or incapable of being performed, or if arbitral tribunal cannot be constituted for reasons for which the defendant is obviously responsible

Role of the courts (cont)

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Preliminary rulings on jurisdiction	upon application of a party	no	no	upon application of a party with agreement of other party or permission of tribunal	no	upon application of a party if arbitral tribunal not yet properly constituted Interim protective measures	at the request of a party within 30 days of notice of ruling by tribunal that it has jurisdiction	upon application by a party
Interim protective measure	upon application by the arbitrators	upon application of a party	upon application of a party	only if tribunal or institution has no power or unable to act; in case of urgency upon application of a party; otherwise only upon application of a party with agreement of other party or permission of tribunal	upon application of a party or of the arbitral tribunal, provided the provisional measures do not affect the merits of the dispute	upon application of a party	upon application of a party	upon application of a party

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Role of the courts (cont)							
Preliminary rulings on jurisdiction	no	upon application of a party	no express statutory provision, but if party commences court proceedings and other party invokes arbitration agreement, court will determine its jurisdiction	at the request of a party after arbitral tribunal made preliminary ruling on jurisdiction	not at common law; under Law Reform Miscellaneous Provisions (Scotland) Act 1990, courts can review tribunal's decision on jurisdiction at the request of a party	no	no
Interim protective measure	upon application of a party	upon application of a party or arbitrators	upon application of a party	upon application of a party	upon application of a party; interim measures include arrestment and interdict	upon application of a party	upon request for assistance by arbitral tribunal

Role of the courts (cont)

Country/ Aspect of Arbitration	Austria	Belgium	Czech Republic	England/Wales	France	Germany	Hungary	Italy
Challenging and appealing the award	challenge possible on grounds of: invalid arbitration agreement; inability to present case; breach of contractual or statutory provisions on composition of arbitral tribunal and decision making process; award not signed; tribunal wrongly rejected challenge of arbitrator; lack of jurisdiction; violation of basic principles or mandatory provisions of Austrian law; statutory grounds exist on which an application to set aside a court (cont)	challenge possible on grounds of: public policy; non-arbitrability of the dispute; invalid arbitration agreement; lack of jurisdiction; failure of the tribunal to rule on issues in dispute; irregularity in the constitution of the tribunal; failure to observe mandatory procedural rules; failure to comply with formalities relating to the form and content of the award; right to challenge award can be excluded in international (cont)	challenge possible on grounds of: non-arbitrability of subject matter of the dispute; arbitration agreement void for other reasons, or has been terminated, or does not cover the subject matter of the dispute; an arbitrator taking part in the decision who has not been named in the arbitration agreement or otherwise duly appointed to decide the dispute or who lacks the capacity to be and to act as arbitrator; arbitral award has not been (cont)	challenge possible on grounds of: lack of jurisdiction; serious irregularity affecting tribunal, proceedings or award; appeal on point of law only with agreement of other party or leave of the court	contrary to awards rendered in domestic arbitration, international arbitration awards cannot be appealed but a recourse for annulment is possible on the following grounds: absence of valid arbitration agreement; irregularities in the constitution of the arbitral tribunal or the appointment of the sole arbitrator; lack of jurisdiction by the tribunal; failure to comply with requirements of due process or international (cont)	challenge possible on grounds of: incapacity of party; invalid arbitration agreement; lack of proper notice or other inability to present case; lack of jurisdiction; defect in constitution of tribunal or arbitral procedure affecting award; or conflict with public policy	challenge possible on grounds of: parties lacked legal capacity to enter into arbitration agreement; arbitration agreement invalid under applicable law or Hungarian law; lack of proper notice of appointment of arbitrator or of proceedings or other inability to present case; lack or excess of jurisdiction; dispute not within terms of arbitration agreement; irregularity in appointment of arbitrators or arbitral (cont)	challenge possible on grounds of: invalid arbitration agreement; incorrect appointment of arbitrators; award rendered by an arbitrator who could not be appointed; award given in relation to matters beyond the jurisdiction of the arbitral tribunal; the tribunal has not given judgment on one or several matters or is contradictory; non-inclusion of substantial formal requirements; non-compliance (cont)

Role of the courts (cont)

Country/ Aspect of Arbitration	The Netherlands	Poland	Romania	Russia	Scotland	Spain	Switzerland
Challenging and appealing the award	challenge possible on grounds of: absence of valid arbitration agreement; incorrect constitution of tribunal; lack of jurisdiction; award not signed or does not contain reasons; conflict with public policy; award can be revoked in case of fraud, forgery or new documents	challenge possible on grounds of: absence of valid arbitration agreement; party's inability to defend its rights; applicable procedural rules were not observed; award unintelligible, contains contradictions or infringes legality or principles of social co-existence; grounds exist for re-opening the proceedings	challenge possible on grounds of: dispute not arbitrable; absence of valid arbitration agreement; arbitral tribunal not constituted in accordance with requirements of arbitration agreement; a party was not present when the proceedings took place and legal requirements of the summoning procedure were not complied with; award rendered after expiry of the five month arbitration term for making the award; tribunal decided claims not submitted to arbitration or failed to decide claim submitted to arbitration, or (cont)	challenge possible on grounds of: parties lacked legal capacity to enter into arbitration agreement; arbitration agreement invalid under applicable law or Russian law; lack of proper notice of appointment of arbitrator or of proceedings or other inability to present case; lack or excess of jurisdiction; dispute not within terms of arbitration agreement; irregularity in appointment of arbitrators or arbitral procedure; dispute not arbitrable; conflict with public policy	challenge on statutory basis or at common law possible on grounds of: corruption, bribery or falsehood of the arbitrator; arbitrator exceeded his jurisdiction; award is ambiguous or uncertain; breach of natural justice; under Law Reform Miscellaneous Provisions (Scotland) Act 1990 on grounds of: incapacity of party; invalid arbitration agreement; lack of proper notice or other inability to present case; lack of jurisdiction; defect in constitution of tribunal or arbitral procedure affecting award; or conflict with public policy	challenge possible on grounds of: public policy; non-arbitrability of the dispute; question not submitted to the decision of the arbitrators; non-existence or invalidity of the arbitration agreement; the arbitral procedure was not in accordance with the agreement of the parties	challenge possible on grounds of: improper constitution of arbitral tribunal; erroneous assumption or denial of jurisdiction by arbitral tribunal; failure by arbitral tribunal to decide all claims submitted or deciding claims not submitted to arbitration; violation of principle of equal treatment of parties or of right to be heard; or non-compliance of award with Swiss substantive or procedural public policy

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Role of the courts (cont)								
Challenging and appealing the award (cont)	judgment could be founded; appeal to second-tier arbitral body possible by agreement of the parties	arbitrations not involving Belgian parties or parties without connection to Belgium; appeal only by agreement of the parties	adopted by a majority of arbitrators; parties have not been given the opportunity duly to present their case; award contains an order against the losing party for relief not claimed by the winning party, or the performance of which is impossible or illegal; the court is satisfied that there are grounds on which it would be possible to apply for a new trial in civil proceedings		public policy; in domestic arbitration, the award may be challenged through judicial recourse for annulment on the same grounds; in addition, the parties have the right to appeal unless they expressly waived their right; if the arbitrator decides as amiable compositeur the appeal will not be possible unless the parties have expressly agreed otherwise;		procedure; conflict with public policy	with time limits; non-compliance with the applicable Italian statutory rules; conflict with a previous final award between the parties; award rendered in conflict with the rules on fair proceedings or as agreed between the parties

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Role of the courts (cont)							
Challenging and appealing the award (cont)			awarded more than requested; award does not include tribunal's decision or does not give reasons, does not state the date and place where it was made, or is not signed by the arbitrators; award includes decisions which cannot be enforced; conflict with public order, good morals or mandatory provisions of the law				

Recognition and enforcement of awards

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Domestic awards	no leave for enforcement required	with leave of President of Court of First Instance	no leave for enforcement required	with leave of court in the same manner as court judgments	with leave for enforcement (exequatur)	if declared enforceable by court	in the same manner as court judgments	by application to the Court where the arbitration has its seat
Foreign awards	with leave of Court of First Instance; pursuant to Geneva or New York Conventions; other conventions may apply	with leave of President of Court of First Instance; in addition, New York Convention applies to Convention awards	pursuant to New York Convention; non-Convention awards in same way as local awards if country of origin grants reciprocity	pursuant to New York Convention; Part II of Arbitration Act 1950 and Geneva Convention continue to apply to awards not covered by New York Convention; non-Convention awards may be enforceable at common law	pursuant to New York Convention or articles 1498 to 1500 NCPC, they are recognised and declared to be enforceable if their existence is proved by the person who relies on them, and if it is not manifestly contrary to international public policy	pursuant to New York Convention; other treaties on recognition and enforcement of arbitral awards unaffected	pursuant to applicable treaties and conventions	by application to the President of the Court of Appeal where the other party is resident and if the other party is not resident in Italy by application to the Court of Appeal in Rome; as per the New York Convention and UNCITRAL Model Law

Recognition and enforcement of awards

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Domestic awards	with leave of the President of the District Court	if declared enforceable by court and obtained exequatur	with leave for enforcement (exequatur) in the same manner as court judgments	chapter 30 of the 2002 Arbitrazh Procedural Code	by court decree or by summary diligence	no leave for enforcement required	if deposited with the court at the seat of the arbitral tribunal and declared enforceable; certificate of arbitral tribunal has same effect as deposit of award with court
Foreign awards	pursuant to applicable treaties and conventions; where no applicable treaty or convention, award may be enforceable pursuant to article 1076 Rv	with leave of a Regional Court; pursuant to New York Convention and other applicable conventions; non-convention awards pursuant to articles 1150 to 1153 CCP	pursuant to applicable treaties and conventions; where no applicable treaty or convention, award may be enforced pursuant to articles 370 to 3703 CPC and articles 167 to 177 of Law No 105/1992	pursuant to New York Convention and other applicable treaties; articles 35 and 36 of the 1993 Law; articles 241–246 of the 2002 Arbitrazh Procedural Code	pursuant to York Convention; Arbitration Act 1950 and Geneva Convention continue to apply to awards not covered by New York Convention	pursuant to New York Convention; other conventions may apply	pursuant to New York Convention, regardless of whether country of origin of award is signatory

Court proceedings

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Applicable court rules	Code of Civil Procedure §§ 577 to 599	Articles 1676 to 1723 of the Code Judiciaire/ Gerechtlijk Wetboek 1972	Sections 41 to 44 of the Arbitration Act; 1963 Code of Civil Procedure	Arbitration Act 1996; Civil Procedure Rules Part 62 and Practice Direction	general procedural rules of the NCPC	§§1025 to 1066 ZPO	Sections 37, 51 to 53 of Act LXXI of 1994 on Arbitration and Code of Civil Procedure	Art. 825 CPC
Jurisdiction for arbitration applications	court which would have jurisdiction in absence of arbitration agreement	court chosen in arbitration agreement; in absence of agreement, court at seat of arbitration; if seat not determined in arbitration agreement court which would have jurisdiction in absence of arbitration agreement	depending on circumstances, court at place of arbitration; court which would have jurisdiction in the absence of arbitration agreement; court at place where procedural step in support of arbitral proceedings to be taken; or court at seat or residence of applicant or respondent	Commercial Court or the Technology and Construction Court	Tribunal de Grande Instance or Tribunal de Commerce identified in arbitration agreement; otherwise at seat of arbitration; in international arbitration Tribunal de Grande Instance de Paris is competent unless otherwise agreed by parties; recourse for annulment of the award before competent Court of Appeal	Oberlandesgericht ("OLG") (Higher Regional Courts); appeals on points of law to Bundesgerichtshof ("BGH"); Amtsgerichte (Local Courts) provide assistance in taking of evidence	county courts (with the exception of interim or conservatory measures pursuant to section 37, which fall in competence of local courts)	court which would have jurisdiction in absence of arbitration agreement

Court proceedings

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Applicable court rules	articles 1020 to 1076 Rv	articles 695 to 715 CCP	Civil Procedure Code, Law No 105/1992	chapters 43 to 45 of the 2002 Civil Procedural Code; chapters 32 and 33 of the 2002 Arbitrazh Procedural Code	Rules of the Court of Session Sheriff Court Ordinary Cause Rules 1993	Civil Procedure Act.	procedural rules applicable at location of court
Jurisdiction for arbitration applications	competent District Court	court which would have jurisdiction in absence of arbitration agreement	applications for measures in support of arbitral proceedings to court which would have had jurisdiction to determine merits of dispute in the absence of arbitration agreement; applications for setting aside arbitral award to court immediately superior; applications for recognition and enforcement of foreign arbitral awards to county court at respondent's domicile or seat, or where award to be enforced	as a general rule, local courts at seat of arbitral tribunal	court of Session	court at the seat of the arbitration.	local court at seat of arbitral tribunal; challenge of awards falls within exclusive jurisdiction of Federal Supreme Court

Country/ Aspect of Arbitration	 Austria	 Belgium	 Czech Republic	 England/Wales	 France	 Germany	 Hungary	 Italy
Miscellaneous								
Multi-party disputes	subject to arbitration agreement; no statutory provision	article 1696bis makes express provision for intervention or joinder of third parties but requires arbitration agreement between third party and original parties and unanimous consent of arbitrators	subject to arbitration agreement; no statutory provision, but Rules of Arbitration Court contain provisions in relation to certain multi-party issues	subject to arbitration agreement; some institutional arbitration rules make provision; no statutory provision	subject to arbitration agreement; some institutional arbitration rules make provision; no statutory provision	subject to arbitration agreement; some institutional arbitration rules make provision; no statutory provision	Rules of Procedure of the Court of Arbitration make provision for interpleader by interested third parties	subject to arbitration agreement; no statutory provision
Privacy and confidentiality	no statutory provision	no statutory provision	arbitration hearings not public; arbitrators subject to statutory duty of confidentiality	unless express provision in arbitration agreement, considered to be implied term of arbitration agreement	no statutory provision	no statutory provision	no specific statutory provision, but article 15 of the Rules of Procedure of the Court of Arbitration provides for confidential treatment of the decisions of the court	arbitration is confidential

Court proceedings

Country/ Aspect of Arbitration	 The Netherlands	 Poland	 Romania	 Russia	 Scotland	 Spain	 Switzerland
Multi-party disputes	no specific statutory provision, but articles 1045 and 1046 Rv make provision in relation to certain specific aspects (intervention and consolidation)	subject to arbitration agreement; no statutory provision	article 345(3) CPC makes provision for appointment of arbitrators in multi-party disputes	subject to arbitration agreement	subject to arbitration agreement	subject to arbitration agreement; no statutory provision	subject to arbitration agreement
Privacy and confidentiality	publication of arbitration awards general practice but names of parties not disclosed	no specific statutory provision	arbitrators bound by statutory confidentiality obligation, hearings generally not public	article 6 of the ICAC Rules contains confidentiality provision	subject to agreement of the parties, proceedings are held in private and are confidential	no statutory provision	no specific statutory provision but parties' legal advisers bound by professional duty to preserve confidentiality

Appendix 3

Multilateral international arbitration conventions – ratifications, accessions and successions

1958 New York Convention on the recognition and enforcement of foreign arbitral awards

The following is a list of the countries which have ratified, acceded or succeeded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (based on information provided by UNCITRAL as at 10th July 2001; up-to-date information can be obtained from the UNCITRAL web-site at http://www.uncitral.org/en-index.htm).

Pursuant to Art 1 of the New York Convention, when signing, ratifying or acceding to the New York Convention, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state (the "Reciprocity Reservation") and may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration (the "Commercial Dispute Reservation"). The list indicates whether a State has made either or both of these declarations. A number of states have declared further reservations to the application of the Convention.

	Reciprocity Reservation	Commercial Dispute Reservation	Notes
Albania			
Algeria	✓	✓	
Antigua and Barbuda	✓	✓	
Argentina	✓	✓	further reservations apply
Armenia	✓	✓	
Australia			application extended to all external territories for the international relations of which Australia is responsible
Austria			
Azerbaijan			
Bahrain	✓	✓	
Bangladesh			
Barbados	✓	✓	
Belarus	✓		further reservations apply
Belgium	✓		
Benin			
Bolivia			
Bosnia & Herzegovina	✓	✓	further reservations apply
Botswana	✓	✓	

Brunei	✓		
Darussalam			
Bulgaria	✓		further reservations apply
Burkina Faso			
Cambodia			
Cameroon			
Canada		✓ (not Quebec)	
Central African Republic	✓	✓	
Chile			
China	✓	✓	
Colombia			
Costa Rica			
Côte d'Ivoire			
Croatia	✓	✓	further reservations apply
Cuba	✓	✓	further reservations apply
Cyprus	✓	✓	
Czech Republic			
Denmark	✓	✓	application extended to Faeroe Islands and Greenland

Djibouti			
Dominica			
Ecuador	✓	✓	
Egypt			
El Salvador			
Estonia			
Finland			
France	✓		application extended to all territories
Georgia			
Germany			
Ghana			
Greece	✓	✓	
Guatemala	✓	✓	
Guinea			
Haiti			
Holy See (Vatican City)	✓	✓	
Honduras			
Hungary	✓	✓	
India	✓	✓	
Indonesia	✓	✓	

Ireland	✓		
Israel	see notes		
Italy			
Japan	✓		
Jordan			
Kazakhstan			
Kenya	✓		
Korea (Republic of)	✓	✓	
Kuwait	✓		
Kyrgyzstan			
Lao People's Demoncratic Republic			
Latvia			
Lebanon	✓		
Lesotho			
Lithuania	✓		further reservations apply
Luxembourg	✓		
Madagascar	✓	✓	
Malaysia	✓	✓	
Mali			
Malta	✓		further reservations apply

Mauritania			
Mauritius	✓		application extended to all territories
Mexico			
Monaco	✓	✓	
Mongolia	✓	✓	
Morocco	✓		
Mozambique	✓		
Nepal	✓	✓	
Netherlands	✓		application extended to Netherlands Antilles and Surinam
New Zealand	✓		does not apply to the Cook Islands and Niue
Niger			
Nigeria	✓	✓	
Norway	✓		does not apply where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property
Oman			

Pakistan			
Panama			
Paraguay			
Peru			
Philippines	✓	✓	
Poland	✓	✓	
Portugal	✓		
Republic of Moldova	✓		further reservations apply
Romania	✓	✓	further reservations apply
Russian Federation	✓		The 1958 New York Convention is a multilateral treaty deposited with the UN and as such the Russian Federation, as successor to the USSR, has become a member of the UN and a member of this treaty. Therefore the Russian Federation has full responsibility for all the rights and obligations of the USSR under the 1958 New York Convention.
Saint Vincent and the Grenadines	✓	✓	
San Marino			
Saudi Arabia	✓		

Senegal			
Serbia and Montenegro	✓	✓	further reservations apply
Singapore	✓		
Slovakia			
Slovenia	✓	✓	further reservations apply
South Africa			
Spain			
Sri Lanka			
Sweden			
Switzerland			
Syrian Arab Republic			
Thailand			
The former Yugoslav	✓	✓	further reservations apply
Republic of Macedonia			
Trinidad and Tobago	✓	✓	
Tunisia	✓	✓	
Turkey	✓	✓	
Uganda	✓		
Ukraine	✓		further reservations apply

United Kingdom	✓		application extended to Belize, Bermuda, Cayman Islands, Gibraltar, Guernsey, Hong Kong (application extended to Special Administrative Region of Hong Kong by declaration of China) and the Isle of Man
United Republic of Tanzania	✓		
United States of America	✓	✓	application extended to all territories
Uruguay			
Uzbekistan			
Venezuela	✓	✓	
Vietnam	✓	✓	further reservations apply
Zimbabwe			

1927 Geneva Convention on the execution of foreign arbitral awards

The following is a list of the territories to which the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards applies (however, certain countries no longer apply this Convention in circumstances were the 1958 New York Convention or the 1961 Geneva European Convention apply, or apply the Convention subject to reservations; application should therefore be checked on a case by case basis): Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Falkland Islands Dependencies, Gibraltar, Montserrat, Turks and Caicos Islands, Antigua and Barbuda, Austria, Bahamas, Bangladesh, Belgium, Belize, Czechoslovakia*, Denmark, Dominica, Finland, France, Germany, Great Britain and Northern Ireland, Greece, Grenada, Guyana, India, Republic of Ireland, Israel, Italy, Japan, Kenya, Luxemburg, Malta, Mauritius, Netherlands (including Curacao), New Zealand, Pakistan, Portugal, Romania, Saint Christopher and Nevis, St Lucia, Spain, Sweden, Switzerland, Tanzania, Thailand, Western Samoa, Yugoslavia*, and Zambia.

1961 Geneva European Convention on international commercial arbitration

The following is a list of the territories to which the 1961 Geneva European Convention on International Commercial Arbitration applies (however, certain countries no longer apply this Convention in circumstances were the 1958 New York Convention applies, or apply the Convention subject to reservations; application should therefore be checked on a case by case basis): Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Croatia, Cuba, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Kazakhstan, Latvia, Luxemburg, Poland, Romania, Russian Federation, Slovakia, Slovenia, Spain, the former Yugoslav Republic of Macedonia, Republic of Moldova, Serbia and Montenegro, Turkey, Ukraine, and Yugoslavia.

* The position of Yugoslavia, Czechoslovakia and their former constituent states in relation to this constituent states in relation to this convention is uncertain.

Appendix 4

UNCITRAL Model Law on International Commercial Arbitration

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

Chapter 1. General provisions

Article 1. Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provision of this Law, except articles 8, 9, 35 and 36, apply only of the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence, to such counter-claim.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received it if is sent to the addressee's last-known place of business, habitual residence or mailing address by registered

letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay, or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so proved in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

Chapter II. Arbitration agreement

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contractor in the form of a separate agreement.

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

Article 8. Arbitration agreement and substantive claim before court

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

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

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

Chapter III. Composition of arbitral tribunal

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, unless to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator, if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6.

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution fails to perform any function entrusted to it under such procedure any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to n o appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedures

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of

the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning nay of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Chapter IV. Jurisdiction of arbitral tribunal

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

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

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in article 6 to decide the matter, which decision shall be subject to no appeal, while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17. Power of arbitral tribunal to order interim measures

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

Chapter V. Conduct of arbitral proceedings

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

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

Article 22. Language

(1) The parties are free to agree on the language to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by the party.

(2) The parties shall be given sufficient advance notice of any hearings and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by the arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it

necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions on him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Chapter VI. Making of award and termination of proceedings

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall sate that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

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

2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on the agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral

tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of article 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, which notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction,

interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

Chapter VII. Recourse against award

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

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

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Chapter VIII. Recognition and enforcement of awards

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duty certified translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Appendix 5

Useful addresses

Principal international arbitration organisations

International Chamber of Commerce (ICC)
International Court of Arbitration and International Maritime Arbitration Organisation (CMI)
38 Cours Albert 1er
75008 Paris, France
T +33 1 49 53 28 28
F +33 1 49 53 28 59
www.iccarbitration.org
E arb@iccwbo.org

London Court of International Arbitration (LCIA)
70 Fleet Street
London
EC4Y 1EU
United Kingdom
T +44 20 7936 7007
F +44 20 7936 7008
www.lcia-arbitration.com
E lcia@lcia-arbitration.com

World Intellectual Property Organisation (WIPO)
Arbitration and Mediation Center
34 Chemin des Colombettes
PO Box 18
1211 Geneva 20
Switzerland
T +41 22 338 8247 or 0800 888 549
F +41 22 740 3700 or 0800 888 550
www.arbiter.wipo.int
e-mail: arbiter.mail@wipo.int

International Centre for Settlement of Investment Disputes (ICSID)
1818 H Street NW
Washington DC 20433
USA
T +1 202 458 1534
F +1 202 522 2615
www.worldbank.org/icsid/

Principal European arbitration organisations

Austria

International Arbitral Centre of the Austrian Federal Economic Chamber
PO Box 319
Wiedner Hauptstraße 63
1045 Vienna, Austria
T +43 (0)5 90 900 ext 4397, 4398, 4399
F +43 (0)5 90 900 ext 216
www.wko.at/arbitration
E arb@wko.at

Belgium

Belgian Centre for Mediation and Arbitration (CEPANI)
Rue des Sols 8/Stuiversstraat 8
1000 Brussels, Belgium
T +32 2 515 0835
F +32 2 515 0875
www.cepina.be
E info@cepina-cepani.be

Czech Republic

Arbitration Court Attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
Dlouha 13
110 00 Prague 1
Czech Republic
T +420 222 320 104
F +420 222 333 341
www.arbcourt.cz
E praha@arbcourt.cz

England and Wales

Chartered Institute of Arbitrators
International Arbitration Centre
12 Bloomsbury Square
London WC1A 2LP
United Kingdom
T +44 20 7421 7444
F +44 20 7404 4023
www.arbitrators.org
E info@arbitrators.org

London Maritime Arbitrators Association
124 Aldersgate Street
London EC1A 4JQ
T +44 (0)20 7490 7334
F +44 (0)20 7490 4383.
www.lmaa.org.uk
E enquiries@lmaa.org.uk

The Grain and Feed Trade Association (GAFTA)
GAFTA House
6 Chapel Place
Rivington Street
London EC2A 3SH
United Kingdom
T +44 20 7814 9666
F +44 20 7814 8383
www.gafta.com
E post@gafta.com

The Federation of Oils Seeds & Fats Associations Ltd
(FOSFA International)
20 St Dunstan's Hill
London EC3R 8NQ
United Kingdom
T +44 20 7283 5511
F +44 20 7623 1310
www.fosfa.org
E contact@fosfa.org

The London Metal Exchange (LME)
56 Leadenhall Street
London EC3A 2DX
United Kingdom
T +44 20 7264 5555
F +44 20 7680 0505
www.lme.co.uk
E info@lme.co.uk

France

Association Française d'Arbitrage (AFA)
8 avenue Bertie Albrecht
75008 Paris, France
T +33 1 53 77 24 31
F +33 1 45 63 93 92
www.afa-arbitrage.com
E info@afa-arbitrage.com

Germany

Deutsche Institution für Schiedgerichtsbarkeit e.V. (DIS)
Beethovenstraße 5 - 13
D-50674 Köln
Germany
T +49 221 28 55 20
F +49 221 28 55 2-222
www.dis-arb.de/
E dis@dis-arb.de

Hungary

Court of Arbitration Attached to the Hungarian Chamber of Commerce and Industry
Kossuth Lajos tér 6-8
1055 Budapest
Hungary
T +36 1 474 5100
F +36 1 474 5105
www.mkik.hu/valasztott-birosag.htm
E mkik@mkik.hu

The Netherlands

Netherlands Arbitration Institute (NAI)
Aert Van Nesstraat 25 J/K
3012 CA Rotterdam
The Netherlands
T +31 10 281 6969
F +31 10 281 6968
www.nai-nl.org
E secretariaat@nai-nl.org

Poland

The Court of Arbitration at the Polish Chamber of Commerce in Warsaw
ul Trêbacka 4
00-074 Warsaw, Poland
T +48 22 827 47 54
F +48 22 827 94 01
www.kig.pl

Romania

International Court of Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania
2 Octavian Goga Blvd
Sector 3, Bucharest
Romania
T +40 21 319 27 47
F +40 21 319 01 26
www.ccir.ro
E arbitration@ccir.ro

Russian Federation

The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC)
Ilyinka 6, Moscow
109012, Russian Federation
T (+7 095) 929 00 07/929 01 41
F (+7 095) 929 01 53
www.eng.tpprf.ru/main/icac

The Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC)
Ilyinka 6, Moscow
109012, Russian Federation
T (+7 095) 929 01 77/929 01 78
F (+7 095) 929 01 53

The Arbitration Court at the St Petersburg Chamber of Commerce and Industry
ul Tchaikovskogo 46-48
191123 St Petersburg
Russia
T +7 812 719 6644
F +7 812 272 9713
www.spbcci.ru/english/arbcourt.htm
E spbcci@sbpcci.ru

Scotland

Scottish Council for International Arbitration
Albany House
58 Albany Street
Edinburgh EH1 3QR
United Kingdom
T +44 131 557 1545
F +44 131 525 8651
www.scia.co.uk

Scottish Branch of the Chartered Institute of Arbitrators
Whittinghame House
1099 Great Western Road
Glasgow, G12 0AA
United Kingdom
www.scottish-arbitrators.org

Switzerland

The Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne and Zurich have combined their efforts in International Arbitration, see www.swissartbitration.ch

Zurich Chamber of Commerce
Bleicherweg 5
PO Box 3058
8022 Zurich, Switzerland
T +41 1 217 40 50
F +41 1 217 40 51
www.zurichcci.ch
E direktion@zurichcci.ch

Principal ADR Institutions[1]

Centre for Effective Dispute Resolution (CEDR)
The International Dispute Resolution Centre
70 Fleet Street
London EC4Y 1EU
United Kingdom
T +44 20 7536 6000
F +44 20 7536 6001
www.cedr.co.uk
E info@cedr.co.uk

adr Group
Grove House
Grove Road, Redland
Bristol BS6 6UN
United Kingdom
T +44 117 946 7180
F +44 117 946 7181
www.adrgroup.co.uk
E info@adrgroup.co.uk

[1] Arbitration institutions also offering ADR schemes are not separately listed.

Netherlands Mediation Institute (NMI)
PO Box 30137
3001 DC Rotterdam
The Netherlands
T +31 10 405 6989
F +31 10 405 5345
www.nmi-mediation.nl
E info@nmi-mediation.nl

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