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DELOS GUIDE TO ARBITRATION PLACES (GAP) – VOL. 2

DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

BRAZIL

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FOR FURTHER INFORMATION

GAP TABLE OF CONTENTS | GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS | FULL GAP ONLINE

EN DELOS MODEL CLAUSES
ES DELOS CLÁUSULAS MODELO
FR DELOS CLAUSES TYPES
PT DELOS CLÁUSULAS MODELO

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
   b. Adherence to international treaties
   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
5. Accessibility and safety
6. Ethics

Evolution of above compared to previous year =

7. Tech friendliness
8. Compatibility with the Delos Rules

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a consolidated dispute resolution mechanism in Brazil. The Brazilian Arbitration Law ("**BAL**", available here as an English translation) is well developed and was modified in 2015 to adapt it to some important demands, such as interim measures (Arts. 22-A and 22-B) and arbitrations with the public administration (Art. 1 §1), which were already accepted by the local case law. Courts in Brazil are friendly to arbitration. Brazil is one of the leading countries in Latin America to facilitate the development of arbitration.

Key places of arbitration in the jurisdiction?	São Paulo (State of São Paulo), Rio de Janeiro (State of Rio de Janeiro), Porto Alegre (State of Rio Grande do Sul), Curitiba (State of Paraná) and Belo Horizonte (State of Minas Gerais).
Civil law / Common law environment? (if mixed or other, specify)	Civil Law environment.
Confidentiality of arbitrations?	Although there is no general legal provision dealing with the topic, confidentiality can be agreed by the parties. The BAL eliminates confidentiality in cases in which public administration parties are involved, imposing the publicity of the procedure (Art. 2 § 3).
Requirement to retain (local) counsel?	The Brazilian Bar Association (*Ordem dos Advogados do Brasil*) imposes restrictions concerning the engagement of foreign law firms in issues related to national law. The Provision n. 91/2000 from the Federal Council of the Brazilian Bar Association prohibits foreign firms (even the ones with Brazilian lawyers hired) from "providing advice or consulting in Brazilian Law" (Article 1, First Paragraph, II). This provision, therefore, obliges at least a joint representation with national firms in cases involving Brazilian Law for actions such as signing documents, attending hearings, providing oral arguments.
Ability to present party employee witness testimony?	There is no restriction to present party employee witness testimony under the BAL.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	The BAL does not limit arbitral tribunals' powers or parties' choice to hold meetings and hearings outside of the seat or remotely. Parties can agree to different places in which the arbitral proceedings can occur (Art. 11, I, BAL) and these places can even be different from the seat. Parties can also agree to hold meetings and hearings remotely.
Availability of interest as a remedy?	It is possible to recover interest as a remedy in Brazil (Brazilian Civil Code, Art. 407; Brazilian Supreme Court jurisprudence).
Ability to claim for reasonable costs incurred for the arbitration?	The Arbitral Tribunal can freely decide on the costs allocation in its decision (Art. 27 of the BAL).
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions. However, the BAL is silent on agreements regarding contingency fees or third-party funding. The practice is to disclose the existence of a third-party funder for conflict-check purposes.

Party to the New York Convention?	Brazil is a party to the New York Convention since 2002 (see here).
Party to the ICSID Convention?	Brazil is not a party to the ICSID Convention.
Compatibility with the Delos Rules?	Delos Rules are compatible with Brazilian Law.
Default time-limitation period for civil actions (including contractual)?	Time-limitation periods are set forth by the Brazilian Civil Code (Articles 205 and 206). For contractual actions, the default time-limitation period is 10 (ten) years.
Other key points to note?	It is possible for an arbitrator to be criminally liable in Brazil. Arbitrators are treated as public officers when it comes to criminal liability (Art. 17 of the BAL). Arbitral awards rendered by an arbitrator who has been proven to be corrupt in a criminal procedure can be annulled on the grounds of the BAL (Art. 32, VI). When it comes to civil liability, arbitrators can also be condemned to pay damages as a consequence of the criminal offence. The duration of annulment proceedings may vary depending on whether a party appeals the decision on the validity of the award. A number of appeals can be submitted in an annulment proceeding, since it follows the regular procedure for civil actions. There are two ordinary degrees of jurisdiction in Brazil; thus, the decisions in annulment proceedings can always be appealed. There are also extraordinary appeals, which can be made both to the High Court of Justice ("Superior Tribunal de Justiça") and to the Supreme Court ("Supremo Tribunal Federal"), when there are violations of federal legislation or to the Federal Constitution respectively. As a general rule, annulment proceedings do not suspend the enforcement of awards, except if the State judge believes that the annulment application is likely to succeed and that there is a risk that the enforcement causes irreparable or serious injury, according to the standards set forth by the Brazilian Code of Civil Procedure (Art. 294 *et seq*.). The annulment can also be required by the defendant in an enforcement proceeding by way of a mean of defense (BAL, Art. 33 §3). Annulment proceedings may suspend enforcement proceedings if a State judge understands that specific requirements are met, such as the provision of a guarantee.
World Bank, Enforcing Contracts: *Doing Business* score for 2020, if available?	64.1 (62.0 for Rio de Janeiro and 65.4 for São Paulo).
World Justice Project, Rule of Law Index: *Civil Justice* score for 2023, if available?	0.49

ARBITRATION PRACTITIONER SUMMARY

Arbitration is a consolidated dispute resolution method in Brazil. Courts and scholars are informed on the subject, leading to uniform and safe decisions. High Courts and District Courts located in the key seats are friendly to arbitration.

Date of arbitration law?	23 September 1996, with its constitutionality declared by the Brazilian Supreme Court in 2001 (Supreme Court, Recognition Procedure n.º 5.206, Justice Sepúlveda Pertence, date: 12/12/2001) and lastly reviewed in 2015 (Law 13,129/2015).
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	The BAL's working group got inspiration from UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention, as well as the 1975 Panama Convention, without literally adopting their terms. While the UNCITRAL Model Law is one of the bases for the BAL, Brazil did not officially adhere to it and is not part of the official list of Model Law countries.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	All Brazilian key seats have arbitration-specialized first instance courts,[1] and São Paulo has a specialized business section at the appellate level to judge arbitration-related matters.[2]
Availability of *ex parte* pre-arbitration interim measures?	Parties to a future arbitration may seek interim measures from courts, such as a pre-arbitral procedure (Art. 22-A BAL). Such interim measures can be granted *ex parte* when the requirements set forth in the Code of Civil Procedure are fulfilled (Art. 300 §2, Code of Civil Procedure). The requirements are the likelihood of success of the main claim on the merits and the risk of irreparable or serious injury, if the measure sought is not granted (Art. 300, Code of Civil Procedure).
Courts' attitude towards the competence-competence principle?	The BAL (Art. 20) and Brazilian Courts recognize the competence-competence principle, therefore recognizing the competence of arbitral tribunals over national courts to decide on objections to their own jurisdiction (High Court of Justice, Competence Conflict no. 157099/RJ, Justice Marco Buzzi, date: 10/10/2018).
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes, according to Art. 23, Paragraph 1, arbitrators may render partial awards.
Grounds for annulment of awards additional to those based on the criteria for the recognition and	Art. 32 of the BAL provides for additional and more general grounds for the annulment of awards. These are the following: the nullity of the arbitral agreement (section I); an award rendered by

1 In 2015, the National Council of Justice ("*Conselho Nacional de Justiça*", "*CNJ*", the public entity that supervises the judiciary in Brazil) made available a list of specialized Brazilian Courts in almost every state capital: http://www.cnj.jus.br/noticias/cnj/80374-corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem.

2 Creation of the Reserved Section for Business Law ("*Câmara Reservada de Direito Empresarial*") for arbitration-related matters: https://api.tjsp.jus.br/Handlers/Handler/FileFetch.ashx?codigo=31267.

enforcement of awards under the New York Convention?	a person who had not the right to serve as an arbitrator (section II); an award which does not fulfill the formal requirements set forth by Art. 26 of the BAL (summary of the case, legal grounds, decision, date and place) (section III); an award that exceeds the limits of the arbitration agreement (section IV); the substantiated proof of unfaithfulness, extortion or corruption of the arbitrator (section VI); an award rendered after the time limit has expired (section VII); and an award that violates the principles set forth by Art. 21 §2 of the BAL (adversarial, equality, impartiality and free conviction principles) (section VIII). As far as the enforcement of foreign awards is concerned, Art. 38 of the BAL contains similar provisions to those of the New York Convention.
Do annulment proceedings typically suspend enforcement proceedings?	Annulment proceedings may suspend enforcement proceedings if a state judge understands that specific requirements are met, such as the provision of a guarantee, reasonable chance of success and risk of serious or irreparable harm.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	According to Art. 38, VI, of the BAL, an award which has been annulled at the seat of arbitration cannot be recognized or enforced in Brazil. The High Court rendered a leading case on this matter in 2015, denying enforcement to an award that had been rendered and annulled in Argentina (High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02/12/2015).
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	There is no judicial precedent so far dealing with such hypothesis, nor any legal provision regulating remote hearings and/or non-recognition or non-enforceability of awards derived from a non-respected party's objection.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	The BAL does not establish any distinction or specific rules regarding enforcement of awards against public bodies.
Is the validity of blockchain-based evidence recognised?	There are no mandatory rules in Brazil that preclude or impose using blockchain-based evidence.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	Yes. The BAL only requires the award to be signed by the arbitrators (Art. 26), and the arbitration agreement to be written (Art. 4, Paragraph 1; Art. 9, Paragraph 2). There are no mandatory laws or rules in Brazil that preclude an arbitration agreement and/or an award from being signed by and recorded on electronic means.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	Yes.

Other key points to note?	According to Art. 33 of the BAL, the 90-day time limit for the party to seek annulment of the final or partial award is triggered with the notification of the award. This time limit will start to run also for the annulment of partial awards. When there is a request for clarifications of the award, the time limit runs from the date on which the decision on the clarifications is notified to the parties. Partial and interim awards are enforceable according to Art. 23, §1 of the BAL.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 The Form of Brazilian Arbitration rules

Although without literally adopting their terms, the BAL's working group got inspiration from the UNCITRAL Model Law, the 1988 Spanish Arbitration Law, the 1958 New York Convention and the 1975 Panama Convention. It contains several provisions which are not set forth in those instruments, such as: validity of arbitral agreements inserted in adhesion contracts only if highlighted and specifically signed by the adhering party (Art. 4 §2); court intervention to solve pathological arbitration agreements (Art. 7); the standard of impartiality for arbitrators, applying the criteria set by the Brazilian Code of Civil Procedure (Art. 14); a time limit for rendering the award which is six months from the commencement of the arbitration, unless otherwise agreed by the parties (Art. 23); or a shorter time-limit of 5 days for the request for correction of the award to be presented (Art. 30).

The field for arbitration in Brazil was prepared by the works of professionals and scholars in what was called "Arbiter Operation", which was conceived by Professor Carlos Alberto Carmona, Professor Selma Lemes and Professor Pedro Batista Martins.[3] The BAL became effective in 1996, so it is now more than 20 years old.

1.2 Last major revision of the Brazilian arbitration rules

The BAL was last revised on 26 May 2015. In this reform, alterations were made on the arbitrability of public administration issues, strengthening its possibility and imposing the non-confidentiality of its proceedings (Art. 1 §§1 and 2; Art. 2 §3);[4] on the possibility to render partial awards (Art. 23 §1); on the interim measures provisions, allowing requests before and after the arbitral tribunal is constituted (Art. 22-A and 22-B); on the relations between arbitration and judiciary when a judge's decision to enforce an arbitral order is necessary (Art. 22-C); among other modifications.

2. The arbitration agreement

2.1 Determination of the law governing the arbitration agreement

According to Art. 2 §1 of the BAL, parties are free to agree on the law applicable to the merits of the dispute and to the arbitration agreement.

In international arbitral proceedings,[5] if the parties have chosen a specific legislation to govern the underlying contract, the arbitral tribunal will not determine the substantive law. However, if the Parties have not done so, the arbitral tribunal has the power to fill the contractual gap taking into account any implicit choice of law

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3 WALD, Arnoldo. Arbitragem: Passado, Presente e Futuro. *Revista de Arbitragem e Mediação*, vol. 50/2016, p. 59-78.

4 The ability of the public administration to be a party to an arbitral procedure was acknowledged by a series of judicial precedents at least since the "Case State of Minas Gerais versus Américo Werneck", of 1915. Also before the BAL's 2015 review, a significant number of sparse laws was published allowing State entities to choose arbitration as the dispute resolution method, e.g.: Law No. 8.987/95 (law regarding concessions and permissions of public services), Law No. 9.472/97 (National Telecommunications Agency – "ANATEL"), Law No. 9.478/97 (National Petroleum Agency – "ANP"), Law No. 10.233/2001 (National Roadway Transportation Agency – "ANTT"), Law No. 12.154/2009 (National Superintendence for Private Security – "PREVIC"), among others. It is also worth mentioning that the State of Rio de Janeiro enacted a Decree (no. 46,245/2018) allowing local State entities to participate in arbitral proceedings, but only if some requirements are complied with, e.g.: institutional arbitration only, the city of Rio de Janeiro as the seat, Brazilian law as the applicable one, Portuguese as the chosen language, among others. Lastly, ANTT enacted a recent Resolution (no. 5.845/2019) regulating mediation and arbitration procedures that have ANTT as a party.

5 Although the BAL does not establish any differentiation between domestic and international arbitration, Brazilian doctrine deems *international* the arbitral procedure that contains any foreign connecting elements, such as foreign parties, foreign law or a seat in a foreign country. A domestic procedure would be the one having only *national* connecting elements. The sole difference between domestic and international arbitration established by the BAL relates to the nationality of the award: any awards issued outside the Brazilian territory are considered foreign, needing recognition by the High Court of Justice to become enforceable in Brazil (Art. 34 of the BAL, Sole Paragraph).

that may arise from a group of circumstances to be assessed (*e.g.,* parties nationality, place in which the contract was executed, nature of the transaction, sporadic references in the contract to legislation or soft law, the general conflict of law rule set forth by the Introductory Law to the Brazilian Legal System if applicable,[6] among others[7]).

On the other hand, there is no legal provision in Brazil determining which law should govern the interpretation of arbitral agreements when parties have not expressly agreed to one. There is also no consensus among Brazilian authorities on what criteria shall be followed by arbitrators when filling this gap. Some of them point to the law of the seat[8] following Art. 38, II, of the BAL,[9] while others invoke the governing law of the underlying contract as the criterion to be considered.[10] One of the most paradigmatic disputes involving a Brazilian party relating to governing law was the "Jirau case", in which parties to an insurance contract disagreed on the law that should apply to the arbitral agreement. While one party argued before a Brazilian State Court the nullity of the arbitral agreement based on Art. 4 §2 of the BAL,[11] the other filed an anti-suit injunction before an English court arguing that the law of the seat should apply, which was English law because the place of arbitration was London. The Brazilian court deemed applicable the law of the underlying contract, while the English judiciary declared the law of the seat as applicable to interpret the arbitral agreement.[12]

2.2 In the absence of an express designation of a "seat" in the arbitration agreement, how do the courts deal with references therein to a "venue" or "place" of arbitration?

The BAL does not contain any reference to the "seat" of an arbitral procedure, giving importance only to the place where the arbitral award is rendered in order to determine its nationality. If an arbitral award is issued in Brazil, it is domestic and can be promptly executed; if issued in a foreign country, it is deemed foreign and must be recognized ("*homologado*") by the High Court of Justice first.

According to the BAL, it is not mandatory for an arbitration agreement to contain a reference to place, or places, where the arbitration shall be held (Art. 4, Paragraph 1; Art. 11, I). If there is such a gap in the arbitral agreement, the BAL refers the parties to State courts in order to complete and execute the arbitration agreement (Art. 7 of the BAL).

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6 The law which governs the contract will be the one of the place where the obligation was signed (Article 9, "*Lei de Introdução às Normas do Direito Brasileiro*", http://www.planalto.gov.br/ccivil_03/decreto-lei/Del4657.htm).

7 MARTINS-COSTA, Judith; NITSCHKE, Guilherme Carneiro Monteiro. Contratos duradouros lacunosos e poderes do árbitro: questões teóricas e práticas. *Revista Jurídica Luso-Brasileira*. Lisboa: Faculdade de Direito da Universidade de Lisboa, 2015, no. 1, p. 1284-1290. ZANETTI, Cristiano de Sousa. Filling the gaps: a Civil Law Tradition. In: VAN DEN BERG, Albert (ed.). *Legitimacy: Myths, Realities, Challenges (ICCA Congress Series no. 18)*. The Hague: Kluwer Law International, 2015, pp. 1014-1016.

8 BRAGHETTA, Adriana. A importância da sede da arbitragem. In: LEMES, Selma Ferreira; CARMONA, Carlos Alberto; MARTINS, Pedro Batista (coords.). *Arbitragem. Estudos em homenagem ao Prof. Guido Fernando da Silva Soares. In Memoriam*. São Paulo: Atlas, 2007, p. 25.

9 "Art. 38. Recognition or enforcement of the foreign arbitral award may be refused if the party against which it is invoked, furnishes proof that: [...] II. the arbitration agreement was not valid under the law to which the parties have subject it, or failing any indication thereon, under the law of the country where the award was made".

10 GREBLER, Eduardo. Artigo V (inciso 1 "A" e "B"). A recusa de reconhecimento à sentença arbitral estrangeira com base no artigo V, (1) alíneas "A" e "B" da Convenção de Nova Iorque. In: WALD, Arnoldo; LEMES, Selma Ferreira (coords.). *Arbitragem Comercial Internacional. A Convenção de Nova Iorque e o direito brasileiro*. São Paulo: Saraiva, 2011, p. 198.

11 "§2. In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause".

12 State Court of São Paulo, 6th Section of Private Law, Appeal nº 3049794920118260000, date: 19.04.2012; and London, High Court of Justice, Queen Bench's Division Commercial Court, Case No: 2011 FOLIO NP. 1519. [2012] EWHC 42 (Comm). The case had no final decision rendered because the parties have reached an agreement before that.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Art. 8 preserves the arbitration agreement from any nullity affecting the contract in which it is inserted. However, the same cause for annulment of a contract may also affect the arbitral agreement in an independent way (e.g., when both the underlying contract and the arbitral agreement were concluded under coercion). According to the principle of competence-competence, the tribunal will also decide this issue (Art. 8, Sole Paragraph, and 20 of the BAL). Exceptions to such principle are the compulsory arbitral clauses inserted in consumer contracts, which are null and void according to Art. 51, VII, of the Brazilian Code of Consumer Defence and Protection (Law No. 8.078 of September 11, 1990).[13] This provision enables the parties to circumvent the competence-competence principle and go straight to the Judiciary.

2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

There are some specific validity requirements for an arbitration agreement to be enforceable.

If the arbitration agreement is an arbitral clause in a contract ("*cláusula compromissória*"), the only requirement is that it must be stipulated in writing (Art. 4). If an arbitration clause is pathological, i.e., it does not provide sufficient indications for the initiation of the arbitral proceedings, the clause will not be considered void, since the BAL refers the parties to state courts to complete/execute the arbitration agreement (Art. 7 of the BAL).[14] An exception to this rule is the arbitral clause inserted in an adhesion contract, which will only be deemed valid if the adhering party takes the initiative to file arbitration proceedings or if it expressly agrees with its initiation in writing (Art. 4 §2 of the BAL).[15]

When it comes to a post-dispute agreement to arbitrate ("*compromisso arbitral*"), there are a few requirements which need to be complied with for the agreement to be valid. Such requirements are set forth in Art. 10 of the BAL: (i) the name, profession, civil status and address of the parties; (ii) the name, profession and address of the arbitrators, or the identification of the arbitration institution to whom the parties delegated their power of nomination; (iii) the matter of dispute that will be subject to arbitration; and (iv) the place of arbitration. If any of these requirements is not fulfilled, the arbitral tribunal may try to reach a supplemental agreement with the parties in order to fill the contractual gap (Art. 19 §1 of the BAL). Only as a last resort, the arbitration agreement will be deemed null and void. There is no need for a "*compromisso arbitral*" when there is already a binding "*cláusula compromissória*" inserted into the underlying contract.

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

There is no legal provision regulating the possibility that a third-party to a contract be bound by an arbitration agreement executed without its acceptance. However, according to the Brazilian jurisprudence, there are a few cases in which an extension of the arbitration agreement to non-signatories is admitted. For instance, in a case of a set of contracts, it was decided that the arbitration agreement in one of the contracts could be extended in order to bind the parties to all contracts, unless there was a specific restriction in one of the

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13 "Art. 51. Any clauses that impose any of the following situations, among others, will be nullified: [...] VII - determine the compulsory use of arbitration". English unofficial version available at: http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf.

14 APRIGLIANO, Ricardo de Carvalho. Cláusula compromissória: aspectos contratuais. *Revista do Advogado*. São Paulo: AASP, 2012, n. 116, p. 183. CARMONA, Carlos Alberto. *Arbitragem e Processo*. 3. ed. São Paulo: Atlas, 2009, p. 112. ZANETTI, Cristiano de Sousa. Filling the gaps: a Civil Law Tradition. In: VAN DEN BERG, Albert (ed.). *Legitimacy: Myths, Realities, Challenges (ICCA Congress Series no. 18)*. The Hague: Kluwer Law International, 2015, p. 1014-1015. And more recently, NITSCHKE, Guilherme Carneiro Monteiro. *Lacunas Contratuais e Interpretação: história, conceito e método*. São Paulo: Quartier Latin, 2019, p. 425-427.

15 The High Court of Justice deems this rule applicable even to consumer contracts, being valid an arbitral agreement only if the consumer specifically agrees with the initiation of the arbitral procedure in its very beginning (e.g.: High Court of Justice, Fourth Section, AgInt in Special Appeal no. 1192648/GO, j. 27/11/2018; High Court of Justice, Third Section, Special Appeal no. 1628819/MG, j. 27/02/2018).

agreements.[16] Also, in a recent case ruled by the Brazilian High Court of Justice, it was decided that an insurer can be bound, by force of subrogation, to an arbitral agreement entered into by the insured parties, when the insurance contract is accessory to the main contract.[17] There are, however, cases deciding the contrary.[18]

2.6 Are there restrictions to arbitrability? In the affirmative:

In Brazil, there are some restrictions as to which disputes can be settled by arbitration. These restrictions provide for limitations not only as to certain subject-matters but also as to specific persons.

2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

Art. 1 of the BAL reads: "Those who are capable of entering into contracts may make use of arbitration to resolve conflicts regarding freely transferable property rights". The expression "transferable property right" is considered to exclude, as a matter of specific domains, disputes relating to personal rights, family law, inheritance law, tax law, criminal law and bankruptcy procedures.

Nevertheless, when relating to specific subject-matters such as bankruptcy, it is argued that the patrimonial effects of those procedures can be submitted to arbitration. Moreover, there have been discussions about the arbitrability of tax disputes.[19]

2.6.2 Do these restrictions relate to specific persons (*i.e.,* State entities, consumers etc.)?

As a matter of specific persons, Art. 1 excludes disputes relating to consumers in which arbitration is imposed by the opposing party, employees and adhering parties in adhesion contracts not in compliance with Art. 4 §2 requirements. Recently, the labour law has been amended to allow arbitration in specific cases.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes.

3.1.1 If the place of the arbitration is inside of the jurisdiction?

State courts give protection to the principle of competence-competence and to the negative effect of the arbitration agreement by staying litigation and referring parties to arbitration. The existence of an arbitration agreement is cause for extinction of the legal process before state courts, either if the seat of arbitration is outside or inside the jurisdiction of courts (Art. 485, VII, Code of Civil Procedure). However, an arbitration agreement will be deemed to be waived if parties do not object to court proceedings before they present their argument on the merits (Art. 337, § 6, Code of Civil Procedure).

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Same as previous answer. Nor the BAL neither the Code of Civil Procedure distinguish domestic from international arbitrations.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There is no express provision in Brazilian Law on the stay of court proceedings as a result of an injunction granted by an arbitrator, except when a competence matter is under its analysis. In such situations, it is

16 High Court of Justice, Special Section, Recognition Procedure nº 1, j. 19/10/2011.

17 High Court of Justice, Special Section, Recognition Procedure nº 14930, date: 15/05/2019.

18 State Court of São Paulo, 10th Section of Private Law, Appeal nº 03698571720108260000, date: 22/03/2011.

19 Grupo de Estudos em Arbitragem Tributária do CBAr. Arbitragem tributária é um caminho a ser explorado.

implied from Art. 20 of the BAL that an arbitrator could grant an injunction to suspend the court proceedings until the decision is rendered. Courts usually respect the arbitrator's injunctions and admit suspension of the litigation proceedings.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

Also, for arbitrations seated outside of the jurisdiction, state courts give protection to the principle of competence-competence and to the negative effect of the arbitration agreement by staying litigation and referring parties to arbitration.

4. The conduct of proceedings

4.1 Can parties retain foreign counsel or be self-represented?

There is no restriction under the BAL when it comes to party representation. Lawyer representation is not even necessary (Art. 21 §3, BAL) and there is no need for a lawyer to be registered before the local bar to act as a party representative in an arbitral procedure.[20] However, the Brazilian Bar Association (*Ordem dos Advogados do Brasil*) imposes restrictions concerning the engagement of foreign law firms in issues related to national law. The Provision n. 91/2000 from the Federal Council of the Brazilian Bar Association prohibits foreign firms (even the ones with Brazilian lawyers hired) from "providing advice or consulting in Brazilian Law" (Article 1, First Paragraph, II). The provision, thus, obliges at least a joint action with national firms in cases that involve Brazilian Law – signing documents, attending hearings, providing oral arguments.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of a gravity such as to this outcome?

The BAL differs from the UNCITRAL Model Law on the impartiality and independence criteria of arbitrators. Instead of providing for the "justifiable doubts" standard, the BAL demands fulfilment of the same requirements set forth for the removal of national judges (Art. 14, BAL). The standard for disclosure is, however, identical to the one provided by the UNCITRAL Model Law. In this respect, a district court has held that non-disclosure per se is not a sufficient ground for removal,[21] since the object of disclosure must provide for grounds for partiality of the challenged arbitrator.

Articles 144 and 145 of the Brazilian Code of Civil Procedure provide for concrete standards of impartiality and independence,[22] some of which can be encountered in soft law, like the IBA Guidelines on Conflict of

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20 CARMONA, Carlos Alberto. *Arbitragem e Processo*. 3. ed. São Paulo: Atlas, 2009, p. 301.

21 State Court of Goiás, 3rd Section of Civil Law, Request for Clarifications nº 65345-40.2014.8.09.0051, date: 23/08/2016.

22 " Art. 144. A judge is disqualified, and therefore prevented from hearing a case: I – in which he or she intervened as an agent of the party, acted as an expert witness, worked as a member of the Public Prosecutor's Office or testified as a witness; II – that he or she heard at another instance of jurisdiction, having rendered a decision; III – when the judge's spouse or civil partner, or any other relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, is acting in the case as a public defender, lawyer or member of the Public Prosecutor's Office; IV – when the judge, his or her spouse or civil partner, or any other relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, is a party to the proceedings; V – when the judge is a member, officer or manager of a legal entity that is a party to the proceedings; VI – when the judge is the presumptive heir, donee or employer of any of the parties; VII – in which an educational institution with which the judge has an employment relationship or one arising from a services agreement is a party; VIII – in which one of the parties is a client of the law firm belonging to the judge's spouse, civil partner or relative, by blood or affinity, in direct line of descent or collateral, to the third degree, inclusive, even if represented by a lawyer from another law firm; IX – when the judge files an action against the party or the latter's lawyer. § 1 In the case presented in item III, the disqualification only occurs when the public defender, lawyer or member of the Public Prosecutor's office was already part of the proceedings before the start of the judge's judicial activity. § 2 The creation of a supervening fact that aims to characterise the disqualification of the judge is forbidden. § 3 The disqualification provided in item III also occurs in the case of agency granted to a member of a law firm that has on its staff a lawyer who individually fits the conditions set forth, even if said lawyer does not directly intervene in the proceedings. Art. 145. There is disqualification of a judge: I – who is a close friend or enemy of any of the parties or their lawyers; II – who receives gifts from people who have an interest in the action, either before or after the start of the

Interest (such as the need for removal of an arbitrator when the arbitrator is or was a party representative). There are, however, other provisions set in Articles 144 and 145 of the Brazilian Code of Civil Procedure which could be waived by the parties, as stated by respected doctrine.[23] Such a waiver would not lead to the annulment of the award or the removal of the arbitrator. This leads to the conclusion that Brazilian standards of impartiality and independence are potentially more flexible than the IBA Guidelines on Conflict of Interest, given that some of the circumstances that, under the IBA Guidelines, fall under the Non-Waivable Red List are waivable under Brazilian law. On top of that, parties are free to combine the standards set by the Code of Civil Procedure with any other established by arbitral institutions or soft law instruments, such as the IBA Guidelines.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Other than partiality issues, the constitution of an arbitral tribunal may lead to various disputes, such as whether the arbitration is *ad hoc* or not. If the arbitration agreement does not provide for means to constitute the arbitral tribunal, the clause is considered blank and incapable of being performed, but not void.[24] Under the BAL, these gaps can be filled by state courts if parties do not reach an agreement (Art. 7). In any case, even after a party files a lawsuit aiming at constituting the arbitral tribunal, the courts only interfere if the parties cannot reach an agreement on the terms of the arbitration. The court's authority is broad in order to preserve the initial intention to arbitrate the dispute, having the power to determine how the tribunal shall be constituted as well as to make any necessary appointments itself, always taking into consideration what the parties had already agreed on.[25]

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Also, under the umbrella of the court intervention, the BAL grants the possibility of judicial pre-arbitral measures (Art. 22-A, BAL) if the requirements of likelihood of success and risk of irreparable or serious injury previously mentioned.

4.4.1 If so, are they willing to consider *ex parte* requests?

Yes. Interim measures can be granted *ex parte* (Article 300 §2, Code of Civil Procedure). After an arbitral tribunal is constituted, interim measures can only be filed before the arbitrators themselves, making it inadmissible to resort to state court injunctions (Art. 22-A, BAL). Arbitrators have the power to issue interim measures (Art. 22-B, BAL), which may be enforced by the state courts if necessary, by means of an "arbitral letter" ("*carta arbitral*", Art. 22-C, BAL).

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Yes.

proceedings, who advises any of the parties regarding the subject matter of the action or who provides the means to cover the expenses of the lawsuit; III – when any of the parties is a creditor or debtor of the judge, the judge's spouse or civil partner, or their respective relatives, in direct line of descent to the third degree, inclusive; IV – who has an interest in the adjudication of the action in favour of any of the parties. § 1 A judge may recuse him or herself for reasons of conscience, without having to state said reasons. § 2 The allegation of disqualification shall be inadmissible when: I – when it was provoked by the one who alleges it; II – the party who makes the allegation has performed an act that implies the express acceptance of the accused".

23 CARMONA, Carlos Alberto. *Arbitragem e Processo*. 3. ed. São Paulo: Atlas, 2009, p. 253.

24 GUERRERO, Luis Fernando. *Convenção de Arbitragem e Processo Arbitral*. São Paulo: Atlas, 2009, p. 117.

25 AIMORÉ CARRETEIRO, Mateus, et al. *International Arbitration in Brazil: An Introductory Practitioner's Guide*. The Hague: Kluwer Law International, 2016, §3.02.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Although there is no general legal provision dealing with the topic, confidentiality can be agreed on by the parties. The BAL eliminates confidentiality in cases in which the public administration is involved, imposing the publicity of the procedure (Art. 2 §3). Some authors tend to temper this duty of publicity by restraining its application only to disputes in which an interested third-party asks for access to the case files, subject to the secrecy as a general rule in order to preserve parties' strategic information made available during the procedure.[26] Until now, there is no consensus among Brazilian authors on the range of this duty. Confidentiality is extended to court measures that are required by the arbitrator (Art. 22-C, Sole Paragraph, BAL).

There is an ongoing debate regarding the possible mitigation of confidentiality in cases involving companies in which shareholders' rights could be affected by decisions rendered in arbitral procedures, originated by a public notice issued by the Brazilian Securities and Exchange Commission ("*Comissão de Valores Mobiliários*", "CVM") on February 11, 2021 (N. 01/2021), announcing its intention to amend CVM Instruction N. 480, of December 7, 2019. No final decision from CVM was issued so far.

4.5.2 Does it regulate the length of arbitration proceedings?

If no timing has been established by the parties and/or the arbitral tribunal, the arbitral award shall be rendered within six months from the date of the commencement of the arbitration or from the date of the substitution of an arbitrator (Art. 23, BAL).

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

The BAL does not contain any specific provision on the hearings, so the parties and the arbitral tribunal are free to regulate this issue (Art. 21, BAL).

4.5.4 Does it allow for arbitrators to issue interim measures?

Yes. Prior to commencing the arbitration, the parties may seek provisional measures of protection and urgent relief from a judicial court (Art. 22-A). Once arbitration has been commenced, the arbitrators will have competence for maintaining, modifying or revoking the provisional or urgent measures granted by the Judicial Authority (Art. 22-B). If arbitration proceedings have already been commenced, the request for the injunctive and urgent relief will be directly addressed to the arbitrators (Art. 22-B, Sole paragraph).

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

When it comes to evidence, the BAL provides for a broad authority of arbitral tribunals to admit, exclude and order evidence production (Art. 22, BAL). There are no specific restrictions to the presentation of evidence. The exclusion of any evidence requested by the parties is possible and will not be a reason to annul the award if it is properly reasoned.[27] The BAL establishes that the Code of Civil Procedure applies to evidence issues in respect of which the former is silent. Evidence production rules in Brazil leaves limited possibilities

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26 GAMA, Lauro. Sinal Verde para a Arbitragem nas Parcerias Público-Privadas (A Construção de um Novo Paradigma para os Contratos entre o Estado e o Investidor Privado). *Revista Brasileira de Arbitragem*. São Paulo: Comitê Brasileiro de Arbitragem CBAr & IOB; Comitê Brasileiro de Arbitragem CBAr & IOB, 2005, v. 2, issue 8, p. 35; NUNES PINTO, José Emilio. A arbitrabilidade de controvérsias nos contratos com o Estado e empresas estatais. *Revista Brasileira de Arbitragem*. São Paulo: Comitê Brasileiro de Arbitragem CBAr & IOB; Comitê Brasileiro de Arbitragem CBAr & IOB, 2005, v. 1, issue 1, 2004, pp. 9-26; NUNES PINTO, José Emílio. Confidencialidade na Arbitragem. *Revista de Arbitragem e Mediação*. São Paulo: RT, 2005, v. 6, pp. 25-36; SOMBRA, Thiago Luís. Mitos, crenças e a mudança de paradigma da arbitragem com a administração pública. *Revista Brasileira de Arbitragem*. Comitê Brasileiro de Arbitragem CBAr & IOB; Kluwer Law International, 2017, v. 14, issue 54, p. 66.

27 High Court of Justice, 3rd Section, Special Appeal nº 1.500.667, Justice João Otávio de Noronha, date: 09/08/2016.

to request document production, because a party cannot be compelled to produce evidence against its own interests.[28]

As opposed to Brazilian Court proceedings, in which direct witness examination and cross-examination are precluded, these kinds of witness examination procedures have become a practice in arbitral proceedings in Brazil.

4.5.6 Does it make it mandatory to hold a hearing?

No. The BAL does not contain any specific provision on the hearings, so the parties are free to regulate this issue (Art. 21, BAL), including to dismiss this event.

4.5.7 Does it prescribe principles governing the awarding of interest?

Although there is no express provision in the BAL allowing or restraining the claim, interests are deemed to be a public policy matter under Brazilian substantive law (Civil Code, Art. 407).[29] The Supreme Court ("*Supremo Tribunal Federal*") already ruled the following: "Interest for late payment is included in liquidation, even if there is no claim thereof or order for payment thereof in the judgment".[30]

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Cost allocation is also not specifically regulated by the BAL, which provides for the Arbitral Tribunal's power to allocate the costs in the award in the manner that it considers reasonable (Art. 27 BAL). On the other hand, it may be decided that the losing party pays the costs, adopting the "costs follow the event" rule. As it is provided by the Brazilian Code of Civil Procedure for court proceedings, the rule of defeat lawyers' fees (which is similar to the costs follow the event rule) may also apply in arbitration.[31]

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

As an analogy with national judges, arbitrators can be liable for damages only if they incur in fraud or intentionally omit or delay any measures that must be taken by them (Art. 143, Code of Civil Procedure).

4.6.2 Criminal liability of arbitrators

Arbitrators are equalized to public officers when it comes to criminal liability (Art. 17, BAL).

4.6.3 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Arbitral awards rendered by an arbitral tribunal constituted by an arbitrator who has been proven to be

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28 SEREC, Fernando. *Evidence Production in Arbitration in Brazil*: What to Expect. Kluwer Arbitration Blog, 2008.

29 "Art. 407. Even if no losses are claimed, the debtor is required to pay interest for late payment which will be computed on money owed or performance of other nature, once its pecuniary value is established by judgment, arbitration, or agreement between the parties".

30 Entry nº 254 of the Prevailing Case Law ("*Súmula da Jurisprudência Dominante*"). There is a long list of precedents confirming such entry: Extraordinary Appeal nº 162890 ED, Justice Ilmar Galvão, 1st Section, date: 03/06/1997; Extraordinary Appeal nº 115123, Justice Sydney Sanches, 1st Section, date: 12/02/1988; Extraordinary Appeal nº 109462, Justice Rafael Mayer, 1st Section, date: 24/06/1986. This is also the position of the Brazilian High Court of Justice ("*Superior Tribunal de Justiça*"), e.g.: Appeal nº 1133023/PE, Justice Og Fernandes, 6ts Section, date: 17/09/2009; Appeal nº 979708/PE, Justice Og Fernandes, 6th Section, date: 02/09/2008; Special Appeal nº 464.234/PR, Justice João Otávio de Noronha, 2nd Section, date: 03/08/2006. . Regarding the debates on the inception date for the interests to be counted under the Brazilian Civil Law, see TEPEDINO, Gustavo; VIÉGAS, Francisco de Assis. O termo inicial da contagem de juros de mora na liquidação da sentença arbitral. In: BAPTISTA, Luiz Olavo; VISCONTE, Débora; ALVES, Mariana Cattel Gomes (orgs.). *Estudos de Direito: uma homenagem ao Prof. Dr. José Carlos de Magalhães*. São Paulo: Atelier Jurídico, 2018, p. 925 *et seq*.

31 Defeat lawyer's fees are established when the arbitral tribunal orders the losing party to pay fees for the lawyer of the winning party. State Court of São Paulo, 13th Section of Public Law, Appeal nº 1005627-81.2015.8.26.0053, date: 17/02/2016.

corrupt in a criminal procedure can be annulled on the grounds of the BAL (Art. 32, VI).

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

The parties cannot waive the requirement for an award to provide reasons. According to Art. 26, reasons are a mandatory requirement of the award, the lack thereof being a valid ground for its annulment.[32]

5.2 Can parties waive the right to seek the annulment of the award?

No, the parties cannot waive the right to seek the annulment of the award, since Arts. 32 and 33 are considered mandatory rules.[33]

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

The other mandatory requirements, beside the reasons, are the summary of the facts, the ruling and the date and place the award was rendered.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No. The arbitral award is final and cannot be submitted to any appeal (Art. 18, BAL). The only way to disregard an award is through an annulment proceeding, under the strict grounds set forth on Art. 32 of the BAL.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

As soon as an award is rendered, the winning party may start enforcement proceedings before the competent local court. Although local awards may be promptly executed, foreign awards must be firstly recognized ("*homologados*") by the High Court of Justice.

For the annulment of an award there is a specific time-limit, which is 90 days after the award is notified to the parties. This time limit also applies to partial awards.[34] When there is a request for clarifications, the time limit is initiated with the notification to the parties of the decision rendered. If the parties do not respect this time frame, the consequence is the impossibility of the court to rule on the merits of the annulment proceedings.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The annulment proceedings can or cannot suspend the effects on the enforcement of the award, depending on the decision of the court and the defences submitted by the parties. The defending party can also rely on the nullity of the award and provide a security and then ask for the suspension of the enforcement proceedings (Art. 525 §6 Brazilian Code of Civil Procedure). If deemed necessary according to the criteria to grant interim measures provided in the Brazilian Code of Civil Procedure, the judge will suspend it.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Yes, it precludes. Foreign awards must be recognized ("*homologados*") by the High Court of Justice first. Recognition and enforcement of a foreign arbitral award may only be denied when the defendant demonstrates that the arbitral award has been annulled (Art. 38, VI, BAL).

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32 State Court of São Paulo, 3rd Section of Private Law, Appeal nº 1125099-32.2015.8.26.0100, date: 03/10/2017.

33 CAHALI, Francisco José. *Curso de arbitragem*. São Paulo : Thompson Reuters, 2018, p. 387.

34 E.g. High Court of Justice, Special Appeal nº 1543564/SP, Justice Marco Aurelio Bellizze, date: 25/09/2018.

In 2015, the High Court rendered a leading case on this matter denying enforcement to an award that had been rendered and annulled in Argentina (High Court of Justice, Special Section, Recognition Procedure nº 5782, date: 02/12/2015).

5.8 Are foreign awards readily enforceable in practice?

A foreign award must be recognized by the High Court of Justice, which has exclusive jurisdiction to grant exequatur to the award after a preliminary analysis (Art. 35, BAL).[35] The duration of these proceedings may also vary from case to case, but the average time is between one to two years. However, the High Court of Justice may not analyze the merits of the dispute, as it can only determine whether the formal requirements set forth on Art. 38 of the BAL have been fulfilled.[36]

Brazil is a party to three of the most important multilateral treaties on the enforcement of arbitral awards: the New York Convention (endorsed by Brazil in 2002); the Inter-American Convention on International Commercial Arbitration adopted in Panama in 1975 (endorsed by Brazil in 1996); and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral awards adopted in Montevideo, Uruguay, in 1979 (endorsed by Brazil in 1995). Thus, the criteria for recognition and enforcement of foreign awards follow the principles set forth in these treaties, as well as the Code of Civil Procedure and the Court Rules of the High Court of Justice (Articles 216-A to 216-N).

6. Funding arrangements

6.1 Contingency or alternative fee arrangements

The BAL is silent on agreements regarding contingency fees or third-party funding, and there is no restriction regarding these topics. Although there has been criticism that this possibility of funding may be used for bad purposes (e.g., frivolous arbitrations, lending money at unlawful rate of interest, etc.),[37] the funding arrangements have been seen as good options for impecunious parties to be able to participate in arbitral proceedings.[38]

6.2 Third-party funding arrangements

Even though third-party funding is a brand-new possibility in Brazilian arbitration, investment funds and specialized companies already provide options of funding in their portfolios.[39] The funding can also be contracted or provided by any capable person, as there are no specific restrictions and it is not considered to be an activity exclusively allowed for financial institutions.[40]

The practice is to disclose the existence of a third-party funder, so that arbitrators can proceed with broad conflict checks.

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35 MELO, Leonardo de Campos. Recognition and Enforcement of Foreign Arbitral Awards in Brazil: A Practitioner's Guide. The Hague: Kluwer Law International, 2015, p. 23.

36 High Court of Justice, Special Section, Recognition Procedure nº 866, date: 17.05.2006.

37 FILHO, Napoleão Casado. Arbitragem comercial internacional e acesso à justiça: o novo paradigma do Third Party Funding. 2015. Tese (Doutorado em Direito) - Pontifícia Universidade Católica de São Paulo, São Paulo, 2015, p. 132 *et seq.*

38 WALD, Arnoldo. Some positive and negative aspects of arbitration financing. *Revista de Arbitragem e Mediação,* vol. 49/2016, p. 33 – 41.

39 GADOTTI, Thais Cristina. Advantages and disadvantages of third-party funding in arbitration. *Revista dos Tribunais*, vol. 981/2017. Brazil: Editora Revista dos Tribunais, 2017, p. 39-54.

40 FILHO, Napoleão Casado. Arbitragem comercial internacional e acesso à justiça: o novo paradigma do Third Party Funding. 2015. Tese (Doutorado em Direito) - Pontifícia Universidade Católica de São Paulo, São Paulo, 2015.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

Yes, but not explicitly. Although blockchain-based evidence is not regulated by the Brazilian Law, there are no mandatory rules precluding the use of blockchain-based evidence. Plus, the BAL grants broad authority for arbitrators to admit, exclude and order evidence production (Art. 22, BAL). There are no specific restrictions to the presentation of blockchain-based evidence.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

The BAL only requires the award to be signed by the arbitrators (Art. 26). Concerning the arbitration agreement, if it is an arbitration clause, the BAL establishes that it has to be written (Art. 4, Paragraph 1); if it is an extrajudicial post-dispute agreement to arbitrate, the BAL requires it to be written and signed by two witnesses (Art. 9, Paragraph 2). There are no mandatory rules precluding an arbitration agreement and/or an award from being signed by and recorded on electronic means.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purpose of recognition and enforcement?

Yes. Same as previous answer.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

In both hypotheses the award would be recognized as enforceable by state courts. Concerning electronically signed awards, although there are no mandatory laws or rules in Brazil precluding the recognition and enforcement of an arbitral award signed manually and then scanned and assembled into one electronic file, it would be considered a copy, not an original document. Courts do not usually require the original document to enforce it.

Regarding digitally signed awards, Brazilian Law deems them as original and enforceable (nowadays, most court proceedings are digital, governed by Federal Law N. 11.419/2006, with awards, interlocutory decisions and claims digitally signed by judges and lawyers). Digital signatures were originally governed by the "Medida Provisória" n. 2,200-2 ("MP 2,200-2"), establishing means to guarantee the authenticity of digital documents. In 2018, the High Court of Justice ("Superior Tribunal de Justiça") acknowledged the validity of digital agreements.[41] Recently, the Federal Law N. 14,063/2020 was enacted, converted from the "Medida Provisória" N. 983/2020, regulating the digital signatures involving public entities.

However, the recognition of a foreign arbitral award, according with the BAL, must contain "the original of the arbitral award or a duly certified copy, authenticated by the Brazilian consulate and accompanied by an official translation" (Article 37, I). Nevertheless, the Federal Decree n. 8,660/2016 establishes something different. This Decree internalized the Convention of Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague, 5 October 1961) and it has been cited in STJ's decisions. In at least two Articles, the Federal Decree mitigates formalities concerning the authentications of documents (Arts. 2 and 3). In light of this, several decisions of the STJ have dismissed this formality, applying the abovementioned Federal Decree n. 8,660/2016.

41 REsp 1495920/DF, Judge-Rapporteur PAULO DE TARSO SANSEVERINO, Third Panel, ruled on 15/05/2018, published on 07/06/2018.

8. Is there likely to be any significant reform of the arbitration law in the near future?

It is not likely for Brazil to have another reform of its Arbitration Law as it was last revised in 2015. However, there have been debates about whether arbitration should be allowed in tax disputes and insurance disputes.

In addition, there has been a recent reform in the labour legislation[42] to allow arbitration in some specific cases. In Brazil, Labour law cases are dealt with by a special jurisdiction, consisting of labour judges, Regional Labour Courts ("Tribunal Regional do Trabalho") and the High Court of Labour Justice ("Tribunal Superior do Trabalho"). However, considering the few cases decided after the reform, it seems that arbitration is not yet friendly-welcomed in the Labour sphere.[43]

9. Compatibility of the Delos Rules with local arbitration law

Delos Rules are compatible with the BAL.

10. Further reading

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WALD, Arnoldo; LEMES, Selma Ferreira (coords.). Arbitragem Comercial Internacional. A Convenção de Nova Iorque e o direito brasileiro. São Paulo: Saraiva, 2011

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42 Reforma Trabalhista de 2017, Lei nº 13.467/2017.

43 See High Court of Labour Justice, AI Recurso de Revista n° 128300-94.2007.5.02.0020, Justice Cláudio Brandão, date: 19.09.2018; Regional Labour Court of 2nd Region, Agravo de Petição n° 1000087-52.2018.5.02.0704, Justice Gustavo Kiyoshi Fujinohara, date: 18.10.2018. See also, VERÇOSA, Fabiane. Arbitragem para a resolução de dissídios individuais trabalhistas em tempos de, *Revista Brasileira de Arbitragem*, The Hague: Kluwer Law International, 2019, Volume XVI, Issue 61, pp. 7 – 35.

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e* with offices and a case team?	ICC, CAM/CCBC, CIESP/FIESP, CAMARB, CAF, CAMERS, ARBITAC
Main arbitration hearing facilities for in-person hearings?	ICC-CNI International Hearing Centre CAM/CCBC
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	ϕ
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	ϕ
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	Fidelity Translations, Traduzca
Other leading arbitral bodies with offices in the jurisdiction?	ϕ

DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

FINLAND

CHAPTER PREPARED BY

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FOR FURTHER INFORMATION

GAP TABLE OF CONTENTS | GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS | FULL GAP ONLINE

EN DELOS MODEL CLAUSES
ES DELOS CLÁUSULAS MODELO
FR DELOS CLAUSES TYPES
PT DELOS CLÁUSULAS MODELO

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
   b. Adherence to international treaties
   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
5. Accessibility and safety
6. Ethics

Evolution of above compared to previous year =

7. Tech friendliness
8. Compatibility with the Delos Rules

VERSION: 12 FEBRUARY 2024 (v01.03)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Finland is an arbitration friendly jurisdiction. Finland has a long history of arbitration, and in commercial disputes between business entities, arbitration is the rule rather than the exception. A majority of the arbitrations in Finland are institutional. Finland is a party to, *inter alia*, the New York Convention and the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States.

Key places of arbitration in the jurisdiction?	Helsinki.
Civil law / Common law environment? (if mixed or other, specify)	Civil law jurisdiction.
Confidentiality of arbitrations?	Arbitrations are not public, but also not automatically confidential. Confidentiality requires an agreement between the parties. Institutional rules may also provide for confidentiality.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel. In-house counsel may also act as legal representatives.
Ability to present party employee witness testimony?	There are no limitations as to who can act as a witness. Thus, for example, employee witness testimony is allowed. However, special legislation may prevent certain people such as doctors, priests and attorneys from giving testimony about issues that are confidential.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	The Finnish Arbitration Act (967/1992, "FAA") explicitly allows hearings to be held outside the seat. Meetings can also be held at any location without restrictions. In addition, parties can agree to hold remote hearings. Whether hearings can be held remotely without the consent of all parties depends on the circumstances of the case. However, unless particular circumstances demand the physical presence of witnesses, counsel and the tribunal, it should be considered to fall within the discretionary powers of the arbitrators to arrange remote hearings also without the consent of all parties.
Availability of interest as a remedy?	Interest can and normally is awarded. The parties can agree on the interest rate.
Ability to claim for reasonable costs incurred for the arbitration?	Generally, the losing party bears the costs of the arbitration. However, an arbitral tribunal is free to apportion the costs between the parties in such a manner as it considers appropriate having regard to the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The most common fee arrangement for counsel is based on hourly rates, but a party and its counsel may also agree on contingency fees and other alternative fee arrangements, as well as third party funding.
Party to the New York Convention?	Yes.

Party to the ICSID Convention?	Yes.
Compatibility with the Delos Rules?	Yes.
Default time-limitation period for civil actions (including contractual)?	As a main rule, the limitation period is three years and starts running from the due date or from when the claimant becomes or ought to have become aware of the damage, defect or breach. The limitation period can be extended by three years at a time by free-form interruptions of the period. The limitation period must be interrupted at the latest within ten years from the breach of contract or the event leading to the damages. Consequently, legal proceedings do not necessarily need to be instituted within the first three years period if the debtor extends the limitation period by interruptions of the periods. If the creditor is a private person, the maximum limitation period is 20 years and if also the debtor is a private person, 25 years.
Other key points to note?	ϕ
World Bank, Enforcing Contracts: *Doing Business* score for 2020?	66.4
World Justice Project, Rule of Law Index: *Civil Justice* score for 2023?	0.81

ARBITRATION PRACTITIONER SUMMARY

Arbitration in Finland is very common, especially in business-to-business disputes. Finnish courts grant deference to arbitration agreements, and are able and willing to provide swift assistance to arbitral proceedings, *inter alia*, by providing provisional relief in support of arbitration. Finland has an active arbitration community with internationally highly regarded arbitration experts.

Date of arbitration law?	The Finnish Arbitration Act (967/1992, "FAA") came into force in 1992.
UNCITRAL Model law? If so, any key changes thereto? 2006 version?	The FAA is based on the 1985 version of the UNCITRAL Model law, but like for example Sweden, Switzerland and France, Finland is not formally a model law country.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no special arbitration courts in Finland. All arbitration related matters are handled by the ordinary courts (District Courts, Courts of Appeal and the Supreme Court).
Availability of *ex parte* pre-arbitration interim measures?	Courts may and often do issue *ex parte* interim measures.
Courts' attitude towards the competence-competence principle?	The competence-competence principle is accepted and applied in Finland.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	There are no provisions in the FAA prohibiting such a ruling. Thus, there should be *prima facie* no hindrance to render such a ruling.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Foreign arbitral awards can be challenged on the grounds set out in the New York Convention. The only exception is that a foreign arbitral award cannot be challenged if the subject matter of the dispute is not capable of settlement by arbitration under Finnish law. The grounds for challenging a domestic arbitral award are similar to those set out in the New York Convention and the UNCITRAL Model law. A notable difference is that an arbitral award under limited circumstances can be considered null and void. One reason for an arbitral award to be declared null and void is if it is not signed by the arbitrator. An arbitrator's refusal to sign the award will not lead to it being null and void if the award is signed by the majority of arbitrators and contains a statement by them on why the non-signing arbitrator has refused to sign the award. Annulment proceedings can generally be handled quite rapidly, as there seldom is a need for extensive witness testimony in annulment proceedings. There are no official statistics, but recent case law suggests that annulment proceedings last approximately 12 – 18 months in the district courts. The district court decision may be appealed if a leave of appeal is granted, and proceedings in the Court of Appeal last approximately as long as in the district courts.

	If leave of appeal to the Supreme Court is granted it will generally take at least 18 months before the decision is rendered. Only final awards are enforceable in Finland. Thus, interim awards are not enforceable in Finland, whereas separate awards can be enforced.
Do annulment proceedings typically suspend enforcement proceedings?	Annulment proceedings do not automatically stay the enforcement of arbitral awards. However, the court before which an action for challenging an award is pending may order that enforcement shall be stayed. According to the Finnish Enforcement Code, the enforcement of an arbitral award can only be suspended, if there are cogent reasons to stay the enforcement.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	A foreign award which has been set aside in the state in which, or under the law of which, that award was made will as a rule not be recognised and enforced in Finland.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	There are no precedents assessing whether remote hearings can be held without the consent of the parties. However, unless particular circumstances demand the physical presence of witnesses, counsel and the tribunal, it should be considered unlikely that such a challenge would be successful as ordering remote hearings should fall within the broad discretionary powers of the arbitrators with respect to the conduct of the proceedings in the absence of an agreement between the parties.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	States can be parties to arbitration agreements in Finland. By doing so states are generally considered to have waived their right to invoke immunity. The Arbitration Act does not contain any special provisions on enforcement of awards against States or State entities.
Is the validity of blockchain-based evidence recognised?	Arbitrators have broad discretionary powers when it comes to evidentiary issues. The assessment of the evidentiary value is generally based on the principle of free evaluation of evidence. Thus, it is for the arbitrators to decide on the acceptability and evidentiary value of blockchain-based evidence. Consequently, there should be *prima facie* no hurdles for using blockchain-based evidence in Finnish arbitrations.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	The main formal requirement for both the arbitration agreement and the arbitral award is that they must be made in writing. In addition, the award must be signed by the arbitrators. Blockchains can be traced, they remain unchanged and offer the possibility for digital signatures. Thus, we consider it *prima facie* more likely than not that arbitration agreements and arbitral awards recorded in blockchains would meet the formal requirements of the FAA even if there are yet no Finnish precedents or scholar writings assessing the validity of such arbitration agreements and arbitral awards.

Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	If blockchain arbitration agreements and awards would be recognized as valid, it is likely that they would also be considered originals for recognition and enforcement purposes.
Other key points to note?	ϕ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Legislation

The current Finnish Arbitration Act (967/1992, "FAA") came into force on 1 December 1992, with no major revisions taking place ever since. The FAA contains both mandatory provisions, mainly relating to due process and annulment proceedings, as well as non-mandatory provisions, such as provisions concerning the appointment of arbitrators and to a limited extent the conduct of the arbitral proceedings.[1]

The FAA is largely compatible with the 1985 version of the UNCITRAL Model law, but like, e.g. Sweden, Switzerland and France, Finland is not formally a model law country. The most noticeable difference is that, in addition to the possibility for an award being set aside on certain specified grounds, an arbitral award according to the FAA can be considered null and void under certain conditions. There is no time limit for presenting a challenge on such grounds. The conditions which can lead to an award being declared null and void are 1) when the arbitral tribunal has decided a non-arbitrable issue, 2) when the award is contrary to Finnish *ordre public*, 3) if the award is so obscure or incomplete that it does not reveal how the dispute has been decided or 4) if the arbitral award has not been made in writing or is not signed by the arbitrators. An arbitrator's refusal to sign the award will not lead to it being null and void, if the award is signed by the majority of arbitrators and contains a statement by them on why the non-signing arbitrator has refused to sign the award.

1.2 Institutional rules

Although there are no statistics on the number of *ad hoc* arbitrations in Finland, it is generally held that the majority of arbitrations taking place in Finland are institutional arbitrations.

2. The arbitration agreement

Any dispute in a civil or commercial matter that can be settled by agreement between the parties may be referred to arbitration. Consequently, for example, criminal matters or matters concerning the legal capacity of natural persons, divorce, adoption or child custody cannot be decided by arbitration.

According to the FAA, an arbitration agreement must be made in writing in order to be valid. Normally an arbitration agreement is contained in a document duly signed by both parties, but an arbitration agreement is also regarded to be made in writing if it is agreed upon in an exchange of letters or electronic communication. An arbitration agreement is further considered to be made in writing if it is referred to in an agreement that fulfils the requirements mentioned above.

An arbitration agreement may also be binding on third parties. Arbitration agreements are generally binding for the successor in a situation where a valid assignment of rights and obligations has occurred. Thus, arbitration agreements are, for example, generally binding for the acquiring party in a general corporate succession or for a bankruptcy estate in insolvency situations. The Supreme Court of Finland has also considered a third-party beneficiary to be bound by an arbitration clause contained in a shareholders' agreement.

The separability doctrine is accepted in Finland. Thus, the arbitration agreement will be reviewed and interpreted separately from the contract in which it is set forth. There are no separate provisions in the FAA on how to determine the law governing the arbitration agreement. The parties may agree on the law applicable to the arbitration agreement, but in practice, this is rarely done. If the parties have not agreed on

[1] An unofficial English translation of the FAA is available at: HTTP://WWW.FINLEX.FI/FI/LAKI/KAANNOKSET/1992/EN19920967.PDF.

the law governing the arbitration agreement, it is up to the arbitral tribunal or the national court examining the arbitration agreement to determine the applicable law. In practice, a court or arbitral tribunal will often apply either the law applicable to the main agreement or the law of the seat of arbitration (*lex arbitri*).

When determining the seat of the arbitration, the court or arbitral tribunal aims to determine the seat intended by the parties in accordance with general principles of contractual interpretation. As a main rule, a specification of a certain "venue" or a "place" in the arbitration agreement should be interpreted as also a reference to the intended seat, if there are no strong indications to the opposite.

2.1 Intervention of state courts

Finnish state courts are considered "arbitration friendly". A valid arbitration agreement excludes the jurisdiction of the courts, regardless of the place of arbitration. If a dispute is covered by an arbitration agreement, the court cannot take the matter into consideration, but shall refer the matter to arbitration, provided that the opposing party invokes the arbitration agreement before stating its case on the merits in court. If the arbitration agreement is invoked in time, the court can only determine whether the arbitration agreement is valid, in force and applicable to the dispute. A party may also seek declaratory relief that an arbitration agreement is not valid, in force or applicable to a certain dispute.

The court cannot decline jurisdiction because of an arbitration agreement unless the arbitration agreement is invoked by a party. If a party does not object to the jurisdiction of the court in its first statement on the substance of the dispute, the party loses the right to invoke the arbitration agreement.

An arbitral tribunal can and shall determine its own jurisdiction. However, an arbitral tribunal's decision on its jurisdiction is not binding on the courts. Consequently, an arbitral tribunal does not have powers to enjoin courts to stay proceedings. If a matter is initiated in court despite arbitral proceedings already taking place, the court will independently review the validity of the arbitration agreement, and will do so only if the arbitration agreement is invoked by the opposing party before he states his case on the merits. If a court decision denying the arbitrators' jurisdiction has become final, the arbitrators should issue an order for the termination of the arbitral proceedings.

An arbitral tribunal can issue anti-suit injunctions against parties. However, according to the FAA an arbitral tribunal does not have the power to impose fines or order other coercive measures, and as mentioned such an injunction would not be binding on courts.

State courts have limited, if any, possibilities to intervene in arbitrations outside Finland, but can refuse recognition and enforcement under the conditions set out in the New York Convention as explained below.

3. Conduct of the proceedings

3.1 Parties and party representation

An arbitration agreement can be entered into between any persons with legal capacity. Thus, natural persons as well as businesses and state entities can be parties to arbitration agreements. However, consumers are not bound by arbitration agreements concluded before a dispute has arisen.

There are no limitations as to who can act as counsel for a party in arbitration. Parties may engage counsel from Finland or from other jurisdictions or they may be self-represented.

3.2 Court assistance in the arbitral proceedings

Firstly, state courts can intervene in arbitral proceedings by assisting in the appointment of arbitrators in *ad hoc* proceedings. According to the FAA, unless otherwise agreed, each party shall appoint one arbitrator and the party appointed arbitrators shall together appoint a third arbitrator to act as chairperson. The claimant shall appoint one arbitrator in the notice of arbitration and the respondent shall appoint one arbitrator within 30 days of receipt of the notice of arbitration.

If the party fails to appoint an arbitrator in time, the appointment shall be made by the court upon request of a party. The same applies if the party-appointed arbitrators cannot agree on a chairperson within 30 days of their appointment. If the dispute is to be decided by a sole arbitrator, the court shall, at the request of a party, appoint the arbitrator if the parties have not been able to agree on the arbitrator within 30 days of the commencement of the arbitral proceeding.

According to the FAA, an arbitrator must immediately disclose any circumstances likely to endanger his or her impartiality and independence as an arbitrator or to raise justifiable doubts related thereto. This obligation stays in force until the end of the proceedings. An arbitrator is obliged to disclose such information that could raise a party's doubts as to his or her impartiality or independence even if the circumstance would not ultimately lead to his or her disqualification. The Supreme Court has established that the threshold for disclosure should be relatively low.

Failure to disclose does not lead to disqualification unless it raises justifiable doubts as to the independence and impartiality of the arbitrator. Failure to disclose may, however, lead to liability for damages as described in section 4.4.

If a party challenges the appointment of an arbitrator, it is for the arbitral tribunal to decide the matter unless the other party accepts the challenge or the challenged arbitrator withdraws willingly. A court may review the impartiality and independence of an arbitrator only in set-aside proceedings.

An arbitrator may be disqualified if he or she would have been disqualified to handle the matter as a judge or if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. The Code of Judicial Procedure (4/1734) contains provisions on the disqualification of judges.[2]

Secondly, state courts may provide assistance with respect to the gathering of evidence and the hearing of witnesses under oath. A party may request court assistance if it wishes to have a witness heard under oath, a witness or an expert examined in court or a document or other evidence produced. The request is subject to the consent of the arbitrators. In other words, an arbitral tribunal cannot on its own motion request court assistance, nor can a party do so without the consent of the arbitral tribunal.

In practice parties rarely need to seek court assistance with respect to evidence, as the arbitral proceedings provide sufficient means to gather evidence and hear witnesses. An arbitral tribunal may, at the request of a party or on its own initiative, request that a party or any other person in possession of a document (or other object) produce the document (or object). Arbitrators may also request that a party, a witness or any other person appear to be heard in the matter. An arbitrator may not, however, impose sanctions in case a party disregards such a request, but may take this into consideration and draw all necessary inferences when determining what shall be deemed proven in the matter. Hence, arbitrators' requests to produce evidence are usually respected.

Thirdly, courts may provide assistance with respect to provisional relief. A party may at any time before or during the arbitral proceedings request that the court grant an interim measure. A request for interim measures is not regarded as a waiver of a party's right to submit a dispute to arbitration.

Finnish courts can and often do grant interim measures *ex parte*. In order for the court to be able to provide interim relief *ex parte* the party seeking the interim relief must show that it has a receivable or other enforceable right against the respondent and that there is a risk that this right will be endangered by the respondent if the interim relief is not immediately granted. After an *ex parte* interim relief is granted, the court will grant the respondent an opportunity to reply to the request and will then provide its final decision on the interim relief.

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[2] An unofficial English translation of the Code of Judicial Procedure can be found at HTTP://WWW.FINLEX.FI/FI/LAKI/KAANNOKSET/1734/EN17340004.PDF.

3.3 Provisions regarding the conduct of the proceedings

3.3.1 General overview

The FAA contains only limited provisions on the conduct of the proceedings. According to the FAA, the proceedings must be conducted in accordance with the parties' agreements. In the absence of such an agreement, the arbitral tribunal shall decide on the conduct of the proceedings, taking into consideration the requirements of impartiality and expediency and ensuring that each of the parties is given a sufficient opportunity to present its case.

In good arbitration practice, the arbitral tribunal as a rule shall arrange a preparatory conference with the parties at an early stage of the arbitration for the purpose of organising and scheduling the subsequent proceedings. The arbitral tribunal shall also typically prepare a procedural timetable. The arbitral tribunal shall also close the proceedings as soon as possible after the last hearing date and inform the parties of the date by which it expects to issue the final award.

3.3.2 Confidentiality

The FAA does not regulate confidentiality and *ad hoc* proceedings are not automatically confidential. *Ad hoc* proceedings are not public, but in order for the proceedings to be confidential, the parties must agree on confidentiality or must agree to apply institutional rules that provide for confidentiality.

3.3.3 Length of the proceedings

There are no specific provisions in the FAA with respect to the length of the proceedings. The FAA only states that the arbitral tribunal shall conduct the proceedings taking into consideration, inter alia, the requirement of expediency.

The median duration of institutional arbitration seated in Finland is approximately 8–12 months.

3.3.4 Oral hearings

The FAA does not impose an obligation on the arbitral tribunal to arrange oral hearings unless the parties have agreed that oral hearings shall be held. If oral witness testimony is to be heard, oral hearings must, of course, be held.

The FAA also does not contain specific provisions on the conduct of the oral hearings. The hearings shall be conducted in accordance with the parties' agreement and in the absence of such agreement, it is for the arbitrators to decide on the conduct of the hearings.

According to the FAA, the arbitral tribunal may also, where appropriate, hear parties, factual and expert witnesses and conduct inspections in other places than the seat of arbitration, including outside the territory of Finland.

There are no restrictions in the FAA as to where meetings can be held. In addition, parties can also agree to hold remote hearings.

The arbitral tribunal has broad discretionary powers when it comes to hearings, the taking of evidence and conducting the proceedings in general. Thus, unless particular circumstances demand the physical presence of witnesses, counsel and the tribunal, holding remote hearings without the consent of one of the parties should be considered to fall within the discretionary powers of the arbitral tribunal. However, to our understanding there are not yet any precedents assessing whether remote hearings can be held without the consent of one of the parties. Despite the lack of case law, we consider it unlikely that such a challenge would be successful since if conducted properly, remote hearings are unlikely to infringe the due process rights of the parties.

3.3.5 Interim measures

The FAA does not contain provisions on the arbitral tribunal's powers to order interim measures. Nevertheless, it is generally held that an arbitral tribunal may do so when the parties have so agreed.

Interim measures ordered by an arbitral tribunal are not enforceable in Finland and the FAA specifically prohibits the arbitral tribunal from imposing any penalty or using other means of constraint. Nevertheless, parties often comply voluntarily with interim measures ordered by the arbitral tribunal, as the arbitral tribunal may draw adverse inferences from a party's failure to comply with arbitrator-ordered interim measures. The right to draw adverse inferences is, however, debatable in respect of non-compliance with other than evidentiary-related orders.

As mentioned above, a party may at any time before or during the arbitral proceedings also request interim relief from a state court.

3.3.6 Admission of evidence

The FAA does not contain any specific provisions on the admissibility of evidence. It is for the arbitral tribunal to determine the admissibility, relevance, materiality and weight of evidence.

According to the FAA, an arbitral tribunal may, at the request of a party or on its own initiative, request that a party or any other person in possession of a document (or other object) produce the document (or object). Arbitrators may also request that a party, a witness or any other person appear to be heard in the matter. The arbitral tribunal may also appoint one or more experts on its own motion, taking into consideration the requirement of impartiality. However, it is not very common that arbitrators appoint experts in addition to experts appointed by the parties.

There are no limitations as to who can be heard as a witness. Thus, for example, employee witness testimony is allowed. However, a witness's position, for example, as a legal representative of a party, may be taken into account when evaluating the credibility of the testimony. Furthermore, special legislation may prevent certain people such as doctors, priests and attorneys from giving testimony about issues that are confidential.

3.4 Liability of arbitrators

3.4.1 Civil liability

The liability of arbitrators in *ad hoc* proceedings is not excluded or limited. However, the Supreme Court has established that an arbitrator can be liable for damages only under exceptional circumstances. In Supreme Court practice, failure to disclose relevant information which would have led to disqualification has been considered to constitute grounds for liability.

Institutional arbitration rules may limit the liability of the arbitrators. However, when Finnish law is applied, limitations of liability clauses are not applicable when the damage has been caused by gross negligence or wilful misconduct.

3.4.2 Criminal liability

Apart from the criminal provisions on bribery in business, there are no criminal provisions that explicitly concern arbitrators.

According to the provision on the taking of bribes in business, it is explicitly criminalised to take or receive a bribe when serving as an arbitrator (Criminal Code of Finland (39/1889), chapter 30 article 7)[3]. The provisions on bribery in business are applicable to foreign and Finnish nationals also when the FAA is not the *lex arbitri*.

[3] An unofficial English translation of the Criminal Code of Finland can be found at HTTPS://FINLEX.FI/FI/LAKI/KAANNOKSET/1889/EN18890039_20150766.PDF.

The two other criminal provisions that may, in practice, become applicable to arbitrators, concern money laundering (e.g., Criminal Code of Finland (39/1889), chapter 32) and fraud (e.g., Criminal Code of Finland (39/1889), chapter 36). Money laundering takes place, for example, when money acquired through illegal means is handled so that the criminal nature of the money is concealed. Fraud occurs, for example, when a person acquires unlawful gains for him or herself or for a third party through deception or other fraudulent behaviour.

The taking of bribes and fraud both require intent from the perpetrator. Money laundering can also come into question when the arbitrator has been grossly negligent. In practice, this means that the arbitrator should have known that money is being laundered through the arbitration in the circumstances.

To the knowledge of the authors of this chapter, no arbitrator has ever been tried in Finland for a criminal offence committed when serving as an arbitrator.

4. The award

4.1 Formal requirements for awards

The arbitral award shall be made in writing and signed by all of the arbitrators. However, the FAA provides that the absence of the signature of one or more arbitrators shall not make the award null and void if a majority of the arbitrators have signed the award and have stated the reason why an arbitrator who participated in the arbitration has not signed the award.

The arbitral award shall indicate its date and the place of arbitration as agreed or determined.

The FAA does not impose an obligation on the arbitrators to state the reasons of the award. However, good arbitration practice requires the arbitrators to state the reasons, unless the parties have agreed otherwise.

4.2 Awarding interest

The FAA does not regulate or prescribe any principles governing the awarding of interest. When Finnish law applies, the parties may agree how interest shall accrue on debts. Lacking such agreement, interest will accrue in accordance with the Finnish Interest Act (633/1982).

4.3 Cost allocation

Generally, the losing party is ordered to bear the costs of the arbitration. However, the arbitral tribunal may also allocate any of the costs of the arbitration between the parties, taking into consideration the circumstances of the case.

4.4 Challenging an award

An award cannot be appealed. An award can only be declared null and void or set aside. The grounds for declaring an award null and void or for setting aside an award are similar to those based on which the recognition and enforcement of an arbitral award may be refused under the New York Convention.

An award is null and void if: the arbitral tribunal has decided an issue not capable of settlement by arbitration under Finnish law; recognition of the award would be against Finnish *ordre public*; the arbitral award is so obscure or incomplete that it does not appear in it how the dispute has been decided; or the arbitral award has not been made in writing or signed by the arbitrators. There is no time limit to challenge an award as null and void.

A court may also set aside an award if: the arbitral tribunal exceeded its authority; an arbitrator had not been properly appointed; an arbitrator could have been disqualified but a challenge duly made by a party had not been accepted before the arbitral award was made; a party was not aware of the ground for disqualification and was not able to challenge the arbitrator before the arbitral award was made; or the arbitral tribunal did not give a party sufficient opportunity to present its case. Unlike a challenge against an award as null and

void, an action for setting aside an award must be brought within three months of the date on which the party received a copy of the award. As mentioned, the three-month time limit does not apply to request to declare an award null and void, for such challenges there are no time limits.

A party cannot waive its right to challenge an award before the award has been rendered. However, a party may through its actions be deemed to have waived its right to invoke certain grounds for setting aside an award. If a party for example has not invoked grounds for challenging an arbitrator of which it has been aware, a party can be deemed to have waived its right to challenge the award based on such grounds.

Annulment proceedings do not automatically stay the enforcement of arbitral awards. However, the court before which an action for challenging an award is pending may order that enforcement shall be stayed. According to the Finnish Enforcement Code, the enforcement can be suspended "*for a cogent reason*". According to the preparatory works, the prerequisite of "*a cogent reason*" was added to the Act to tackle the issue with courts ordering suspension orders too generously. Since the amendment is aimed at restricting the usage of suspension orders, courts will generally use their power to suspend enforcement proceedings with caution.

4.5 Recognition and enforcement of awards

A decision on enforcement (*exequatur*) is required for an award to be enforceable. Exequatur is granted by the court of first instance. The decision on enforcement may be appealed.

The procedure for obtaining an exequatur is practically the same regardless of whether the arbitral award is domestic or foreign. In either case, a party must file the original arbitration agreement and the original arbitral award, or certified copies thereof together with the application for the enforcement of an award. A document drawn up in any language other than Finnish or Swedish shall be accompanied by a certified translation into either of these languages, unless the court grants an exemption.

Before exequatur is granted, the court will give the party against whom enforcement is sought the opportunity to be heard, unless there is a special reason not to provide the party with such an opportunity. Unless a witness or another person is to be heard in person, the court of first instance shall deal with the matter in written proceedings in chambers.

A court may refuse an application for the enforcement of a domestic award only if it finds that the award is null and void, if the award has been set aside by a court on the grounds described above, or if a court has ordered that enforcement of the award shall be interrupted or suspended.

Foreign arbitral awards are readily enforceable in Finland. A foreign award will not be recognised in Finland only if the party against whom the award is being enforced can prove that (i) the arbitration agreement was not valid, (ii) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case, (iii) the arbitral tribunal has exceeded its authority, (iv) the composition of the arbitral tribunal or the arbitral proceedings substantially deviated from the agreement or the *lex arbitri*, or (v) the arbitral award has not yet become binding on the parties or it has been declared null and void or set aside or suspended in the state in which, or under the law of which, that award was made. A foreign arbitral award cannot be challenged if the subject matter of the dispute is not capable of settlement by arbitration under Finnish law, unless the award as a result would also be against Finnish *ordre public*.

A foreign award, which has been set aside in the state in which, or under the law of which, that award was made, will not as a rule be recognised and enforced in Finland.

5. Funding arrangements

A party may acquire external funding for an arbitration from third parties, including third-party funders, insurance companies, banks, etc. Special third-party funding companies are not very active in the Finnish

market, but it is quite common for Finnish parties to have insurance that covers the costs of disputes up to an agreed amount.

The most common fee arrangement is based on hourly rates, but a party and its counsel may also agree on contingency fees and other alternative fee arrangements.

6. Arbitration and technology

6.1 Arbitration and blockchain

In Finland the discussion concerning the usage of blockchain for arbitration purposes has recently begun. Thus, to which extent and for which purposes blockchain can assist and be used in arbitrations remains to be seen in the coming years.

Arbitrators have broad discretionary powers when it comes to evidentiary issues. The assessment of the evidentiary value is generally based on the principle of the free evaluation of evidence. Thus, it is for the arbitrators to decide on the acceptability and evidentiary value of blockchain-based evidence. Consequently, there should be *prima facie* no hurdles for using blockchain-based evidence in Finnish arbitrations.

When it comes to assessing arbitration agreements and arbitral awards recorded in a blockchain, the main formal requirement for both the arbitration agreement and the arbitral award is that they must be made in writing. In addition, the award must be signed by the arbitrators. Blockchains can be traced, they remain unchanged and offer the possibility for digital signatures. Thus, we consider it *prima facie* more likely than not that arbitration agreements and arbitral awards recorded in blockchains would meet the formal requirements of the FAA even if there are yet no Finnish precedents or scholar writings assessing the validity of such arbitration agreements and arbitral awards.

If blockchain arbitration agreements and arbitral awards were recognized as valid, it is likely that they would also be considered originals for recognition and enforcement purposes.

As Finland is both an arbitration and technology friendly jurisdiction, there should be no reason why blockchain and its benefits could not at least be used for facilitating arbitral proceedings in the future, especially as a tool for automating suitable parts of the arbitral proceeding to the extent the usage of blockchain does not endanger the procedural safeguards of the parties.

6.2 Arbitration and e-signatures

There are no precedents on whether an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) would be accepted for the purposes of recognition and enforcement. However, in legal doctrine, e-signatures have been considered as an acceptable means of signing an award and we consider it more likely than not that an electronically or digitally signed award would be accepted as an enforceable award.

7. Future reform

A revision of the FAA has in the recent years been discussed within the Finnish arbitration community and in 2018 the Ministry of Justice started the process of revising the FAA by requesting comments and feedback on the possible needs for reform and the functionality of the FAA. In the spring of 2019, the Ministry of Justice appointed an expert group to follow and assess the reform work. The Ministry will first prepare an international comparison of the arbitral legislation in certain European countries and the statute drafting will begin when the comparative report has been finalized. However, opinions differ on how the law should be amended and it remains to be seen when and to what extent the amendments will take place.

8. Compatibility of the Delos Rules with local arbitration law

The Delos Rules are compatible with the FAA.

9. Literature regarding arbitration in Finland

- Mika Savola, "*Guide to the Finnish Arbitration Rules*", Helsinki 2015.
- Tom Ehrström, Tuuli Timonen, Santtu Turunen et al., "*Arbitration in Finland*", Helsinki 2017.
- In 2004, the Finnish Arbitration Association published a booklet entitled, "*Law and Practice of Arbitration in Finland*".
- There are also articles in English in various journals which cover issues relating to arbitration in Finland, for example in volume 4-5/2011 of "*Tidskrift utgiven av Juridiska Föreningen i Finland*", which is a commemorative volume to justice Gustaf Möller on the theme of arbitration.

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.* with offices and a case team?	THE ARBITRATION INSTITUTE OF THE FINLAND CHAMBER OF COMMERCE ("FAI")
Main arbitration hearing facilities for in-person hearings?	FAI does not facilitate hearings and there are no businesses specialized in providing arbitration hearing facilities. Instead, hearings are usually held, for instance, in hotels, conference centres and premises of attorneys.
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	There are several reprographics facilities in the Helsinki area.
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	International providers providing court reporting services in Finland are for instance, PLANET DEPOS, INTERNATIONAL COURT REPORTERS and OPTIMA JURIS.
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	LIISA LAAKSO-TAMMISTO (Käännöstoimisto IDE Oy) HELENA KARUNEN KIRSI LAMMI
Other leading arbitral bodies with offices in the jurisdiction?	ICC FINLAND

DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

GERMANY

CHAPTER PREPARED BY

TILMAN NIEDERMAIER, AND MARCUS WEILER
OF CMS HASCHE SIGLE

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GAP TABLE OF CONTENTS | GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS | FULL GAP ONLINE

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
   b. Adherence to international treaties
   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
5. Accessibility and safety
6. Ethics

Evolution of above compared to previous year =

7. Tech friendliness
8. Compatibility with the Delos Rules

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Germany is an attractive option for domestic as well as international arbitration proceedings as it is known to provide an arbitration-friendly legal environment. The jurisprudence of German courts is consistent, and the German Civil Code of Procedure provides a functional and balanced arbitration law closely modelled on the UNCITRAL Model Law. The German Institute for Arbitration ("DIS") is a well-functioning arbitration institution with modern rules (including Supplementary Rules for Expedited Proceedings and for Corporate Law Disputes) and an increasing (international) caseload.

Key places of arbitration in the jurisdiction?	Frankfurt, Düsseldorf, Hamburg and Munich. Berlin, as capital city, has the potential to become an important seat for international arbitrations.
Civil law / Common law environment? (if mixed or other, specify)	Civil law; the German arbitration law is contained in the 10th book of the Civil Code of Procedure ("ZPO").
Confidentiality of arbitrations?	German arbitration law does not provide for express confidentiality obligations. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal's discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law. Compounded interest applied under foreign law does not violate German public policy ("*ordre public*").
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	German lawyers ("*Rechtsanwälte*") may only enter into contingency fee agreements under very limited conditions. Third party funding is not codified in German arbitration law, but it is accepted and increasingly used.
Party to the New York Convention?	Yes, with reservations with regard to reciprocity, commercial disputes and retroactive application. Germany is a Member State since 1961.
Party to the ICSID Convention?	Yes. Germany is a Member State since 1965.
Compatibility with the Delos Rules?	Yes.

Default time-limitation period for civil actions (including contractual)?	Pursuant to § 195 of the German Civil Code ("BGB"), the default time-limitation is three years. Pursuant to § 199 BGB, the period starts to run at the end of the year in which the claim arose and the claimant had or reasonably could have had knowledge of the claim.
Other key points to note	ϕ
World Bank, Enforcing Contracts: *Doing Business* score for 2020, if available?	Germany ranks 13th with a score of 74.1
World Justice Project, Rule of Law Index: *Civil Justice* score for 2023, if available?	Germany ranks 4th out of 142 countries with a score of 0.83.

ARBITRATION PRACTITIONER SUMMARY

The revision of the German arbitration law in 1998 has strengthened the focus on party autonomy, giving the parties considerable freedom in structuring the arbitration proceedings according to their needs. The German arbitration law is modeled closely on the 1985 UNCITRAL Model Law. It applies regardless of whether the arbitration is domestic or international. Furthermore, the dispute need not be of a commercial nature. Only very few mandatory statutory provisions limit the parties' freedom of contract. In 2016, the Ministry of Justice and Consumer Protection has installed a working group to review the German arbitration law in light of the 2006 amendments to the UNCITRAL Model Law.

All arbitration-related matters that require the assistance of state courts are handled by the German Higher Regional Courts. They do not act as a full court of appeal but limit their review potential grounds for annulment or refusal of recognition within a strictly limited scope (mainly questions of due process and public policy). The courts are considered to be efficient when they are requested to decide on arbitration matters. Germany has ratified the New York Convention ("NYC") without any reservations. Courts tend to adhere strictly to its provisions.

Date of arbitration law?	German arbitration law is found at §§ 1025 - 1066 ZPO and was last revised in 1998.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	The German arbitration law is based in large parts on an adoption of the 1985 UNCITRAL Model Law with only few minor amendments.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Ordinary courts (the Higher Regional Courts as first instance) handle jurisdictional challenges and the annulment and enforcement of awards. Within these courts, all arbitration-related cases are regularly assigned to one specific division ("*Kammer*") ensuring a certain level of knowledge and experience.
Availability of *ex parte* pre-arbitration interim measures?	The courts may grant *ex parte* interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction. If the arbitral tribunal rules on jurisdiction as a preliminary question, any party may seize the state courts (as envisaged by the UNCITRAL Model Law).
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Pursuant to § 1054(2) ZPO, the award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. Accordingly, a subsequent reasoning of the award would require the consent of the parties.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the New York Convention.
Do annulment proceedings typically suspend enforcement proceedings?	Yes. However, pursuant to § 1063(3) ZPO, upon application by the party requesting enforcement, a judge may issue, without prior hearing of the party opposing the application for enforcement, an

	order to the effect that, until a decision on the request for annulment has been made, the applicant may pursue enforcement of the award.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether German courts are bound by the foreign court's set-aside decision is not finally settled. In the past, they have regularly respected the foreign court's decision without reviewing the merits *de novo.*
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	Unless the parties have agreed on document-only proceedings, pursuant to § 1047 ZPO, the arbitral tribunal must hold a hearing at an appropriate stage of the proceedings, if so requested by a party. German arbitration law does not expressly provide that such hearing(s) must take place in person. Therefore, the decision of an arbitral tribunal to hold a hearing remotely would not be a basis for annulment or objection to enforcement *per se*. However, the arbitral tribunal must ensure that the parties' procedural rights, in particular the right to be heard and the right to equal treatment, are at all times observed.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	Subject to international law, the general rules apply. As a general principle, a state that made an agreement to arbitrate is considered to have thereby waived its defence of sovereign immunity.
Is the validity of blockchain-based evidence recognised?	Yes.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	Arbitration agreements recorded on a blockchain are recognized in b2b transactions. However, this is not the case if a consumer is party to the transaction. Arbitral awards need to be signed in person.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	A court would recognize an arbitral agreement recorded on a blockchain as original. A court would not recognize an arbitral award recorded on a blockchain as original.
Other key points to note?	• Partial awards are recognized and enforced in accordance with the NYC. • Duration of proceedings to obtain the enforcement of an award: usually between three months and one year (possibly longer when the German Supreme Court ("BGH") is seized). • Arbitration agreements are to be signed by all parties; there are stricter form requirements for particular groups of individuals (*e.g.,* consumers). • German courts have a long-standing tradition of respecting arbitration agreements and exercising restraint in interfering with decisions by arbitral tribunals.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? 1985 or 2006 version? If yes, what key modifications if any have been made to it? If no, what form does the arbitration law take?

The German arbitration law is closely modelled on the UNCITRAL Model law (1985 version). It is contained in the 10th book in §§ 1025-1066 of the Code of Civil Procedure ("ZPO") and applies not only to commercial cases but to any kind of arbitrations.[1]

Due to the broad scope of application, the legislator included some amendments and supplements to the UNCITRAL Model law, the most salient of which are outlined below:

- If the claimant or respondent is seated (or habitually resides) in Germany, German courts may be seized for assistance in the composition of the tribunal or the challenge of an arbitrator even when the seat of the arbitration is yet to be determined, *i.e.,* when it is unclear whether German arbitration law would indeed apply.[2]
- While German arbitration law permits a tacit acceptance to a document containing an arbitration agreement under specific conditions,[3] there are stricter form requirements for arbitration agreements involving a consumer.[4] The record or document containing the arbitration agreement must be hand-signed by the parties. The written form may be replaced by a qualified electronic form.[5] The record or (electronic) document may not contain agreements other than those making reference to the arbitration proceedings except if the agreement is recorded by a notary.
- An application may be made to the court to declare whether or not arbitration is admissible prior to the composition of the arbitral tribunal. Yet the arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the application is pending before the court.[6]
- If an arbitration agreement puts a party at a disadvantage regarding the number of arbitrators appointed by the other party/parties, the disadvantaged party may seize the court to remedy the imbalance.[7]
- If an arbitrator refuses to take part in a decision, the other arbitrators may decide without him unless the parties have agreed otherwise.[8]
- Other than the Model Law, the German arbitration law contains an express provision on the allocation of costs (see below).[9]

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1 English translations are available at www.gesetze-im-internet.de/englisch_zpo/index.html and http://www.disarb.org/de/51/materialien/german-arbitration-law-98-id3.

2 § 1025(3) ZPO.

3 § 1031(2) ZPO.

4 § 1031(5) ZPO.

5 § 126a German Civil Code (BGB).

6 § 1032(2) ZPO.

7 § 1034(2) ZPO.

8 § 1052(2) ZPO.

9 § 1057 ZPO.

- If an arbitral award is set aside, the arbitration agreement is regularly reinstated.[10] Upon request by a party, German courts may remit a matter to the arbitral tribunal after setting the award aside.[11]

1.2 When was the arbitration law last revised?

The German arbitration law was reformed in 1997. The new law entered into force on 1 January 1998.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The approach of the courts, when determining the law applicable to the arbitration agreement, is not always consistent.

In principle, two approaches exist:

1. Some courts and commentators have considered arbitration agreements to be contracts of a merely procedural nature that are not governed by the rules of private international law. According to this view, Art. V(1)(a) New York Convention (NYC) and § 1059(2) no. 1 lit. a ZPO contain a general principle applying beyond the recognition and enforcement, respectively annulment, of arbitral awards according to which arbitral agreements are governed by the law chosen by the parties and, in the absence of a choice of law, by the law of the place of arbitration.[12]

2. More often the courts apply by analogy the rules of private international law relating to contracts (this would now be the Rome I Regulation which expressly excludes arbitration agreements from its scope of application).[13] Following this approach, the arbitration agreement is governed by the law chosen by the parties in the first place.[14] To the extent that the law applicable to the contract has not been chosen, the arbitration agreement is then governed by the law of the country with which it is most closely connected.[15]

In practice, the courts often apply (without further justification) the law governing the contract in which the arbitration clause is contained, be it based on an implied choice of law or the close connection to the main contract.[16]

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

Pursuant to § 1043(1) ZPO, where the parties have not agreed on the seat of arbitration, the seat will be determined by the arbitral tribunal. In this respect, regard is to be had to the circumstances of the case, including the suitability of the place for the parties. However, before determining the seat of the arbitration based on objective circumstances, a court would look at whether an implied agreement between the parties exists. It is a matter of contract interpretation whether by referring to given "place" or "venue" the parties intended to also determine the seat of arbitration in the legal sense. In the absence of particular circumstances, this is generally considered to be the case.

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10 § 1059(5) ZPO.

11 § 1059(4) ZPO.

12 LG München I, SchiedsVZ 2014, 100, 105; *Geimer,* in: *Zöller* (ed.), Zivilprozessordnung, 31st ed. 2016, § 1029 para. 109.

13 Art. 1(2)(e) Rome I Regulation.

14 Art. 3(1) Rome I Regulation.

15 Art. 4(4) Rome I Regulation; see BGH SchiedsVZ 2011, 46, 48 (in respect of conflict of law rules preceding the Rome I Regulation); BGH NJW 1964, 591, 592; OLG Hamm, SchiedsVZ 2014, 38, 42.

16 BGH SchiedsVZ 2011, 46, 48; OLG Hamburg SchiedsVZ 2003, 284, 287.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes.

2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

The arbitration agreement must be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.[17] This form requirement is deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was timely raised – the contents of such document are considered to be part of the contract in accordance with common usage.[18]

A document fulfilling the above form requirements can incorporate an arbitration clause by reference to another document, *e.g.,* general terms and conditions.[19]

Special form requirements apply to arbitration agreements in which one party is a consumer. Such arbitration agreements must be contained in a record or document personally signed by the parties.[20]

In international cases, the form requirement may be governed by international conventions, in particular Art. II(2) NYC and Art. 1(2) lit. a of the 1961 Geneva Convention.

The BGH has interpreted Art. VII(1) NYC as to allow for the application of national law to the extent that its form requirements are more favourable to arbitration than the New York Convention.[21]

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In accordance with the principle of privity of contract, arbitration agreements only bind the persons which are party to it. In limited circumstances, third persons may become party to an arbitration agreement as a matter of law, rather than as a result of express consent.

The arbitration clause binds successors in title such as heirs or assignees, even if the successor does not formally accede to the arbitration agreement.[22] The assignment itself does not have to follow the form requirements of an arbitration agreement.[23] The arbitration clause of a civil law partnership ("GbR") and a general partnership ("oHG") are also binding on the partners liable for the partnership's liabilities.[24] If an arbitration clause is added to the articles of association, it will not bind the members that have not consented to this amendment.[25]

An insolvency administrator is bound by an arbitration agreement in which the insolvent entity has entered prior to the opening of insolvency proceedings.[26]

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17 § 1031(1) ZPO.

18 § 1031(2) ZPO.

19 § 1031(3) ZPO.

20 § 1031(5) ZPO.

21 BGH SchiedsVZ 2010, 332, 333.

22 BGH NJW 1998, 371; NJW 2000, 2346; BayObLGZ 1999, 255, 266 *et seq*.; *Wolf/Eslami*, in: *Vorwerk/Wolf*, BeckOK ZPO, 25th ed. 2017, § 1029 para. 16.

23 BGH NJW 1998, 371; BayObLG SchiedsVZ 2004, 45, 46 (in respect of a „Kommanditgesellschaft"); *Geimer,* in: *Zöller* (ed.), Zivilprozessordnung, 31st ed. 2016, § 1029 para. 68.

24 BGH NJW-RR 1991, 423, 424; *Saenger,* Zivilprozessordnung, 7th ed. 2017, § 1029 para. 23.

25 *Geimer,* in: *Zöller* (ed.), Zivilprozessordnung, 31st ed. 2016, § 1029 para. 74.

26 BGH SchiedsVZ 2004, 259, 261.

An extension of arbitration agreements to third parties pursuant to the "group of companies" doctrine has to date not been recognized by German courts. Although the BGH has held that the doctrine – when applied as part of a foreign law applicable according to the rules of private international law – does not necessarily violate German public policy,[27] it is very unlikely that the court will eventually accept the doctrine as part of German domestic law.

2.6 Are there restrictions to arbitrability?

Under German law, as a matter of principle, arbitration is allowed for all disputes over pecuniary matters.[28] Regarding non-pecuniary claims, an arbitration agreement is effective insofar as the parties to the dispute are entitled to conclude a settlement agreement in respect of the subject matter of the dispute.[29] Some limited exceptions apply to this principle (see below).

2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

Arbitration agreements relating to disputes over the existence of a lease of residential accommodations within Germany are null and void.[30]

Labour law disputes, safe for limited exceptions, cannot be referred to arbitration.[31]

In a series of three decisions (*Schiedsfähigkeit I-III*), the BGH has established specific limits to the arbitrability of certain types of intra-company disputes. When disputes arise between certain shareholders and a stock company with regard to the validity of shareholder resolutions, court rulings declaring shareholder resolutions invalid bind all shareholders (*erga omnes*) regardless of whether they have been a party to the court proceedings.[32] This is also applied to limited liability companies by way of analogy. In its first ruling on the matter *(Schiedsfähigkeit I)*, the BGH denied the arbitrability of disputes pertaining to the validity of resolutions adopted by the shareholders.[33] In *Schiedsfähigkeit II*,[34] the court developed a set of criteria that must be fulfilled for such disputes to be submitted to arbitration and for arbitral awards to bind all shareholders: (i) all shareholders have to consent to the arbitration agreement (be it as part of the articles of association or in a separate agreement), (ii) all shareholders need to be informed about the initiation and the progress of the arbitral proceedings so they can join the proceedings at least in the capacity of an intervening party, (iii) all shareholders must be able to participate in the appointment of the arbitral tribunal if it is not selected by a neutral third party and (iv) all disputes concerning the deficient resolution have to be submitted to and decided by the same arbitral tribunal. In *Schiedsfähigkeit III,*[35] the BGH expanded this jurisprudence to partnerships including limited commercial partnerships ("*Kommanditgesellschaft*").

German competition law originally considerably limited arbitration in this field. However, following the entry into force of the revised arbitration law in 1998, the respective provisions were repealed. Today, the arbitrability of competition law disputed is generally recognized.

There is still no settled view on the arbitrability of patent disputes. The BGH is yet to rule on this matter. It is argued that the exclusive competence of patent courts for the revocation of patents and the grant or revocation of a compulsory licence under § 81 PatG within the German court system is tantamount to the

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27 BGH SchiedsVZ 2014, 151.

28 § 1030(1)1 ZPO.

29 § 1030(1)2 ZPO.

30 § 1030(2) ZPO.

31 §§ 4, 101(3) of the Labour Court Act (ArbGG).

32 § 248(1)(1) AktG.

33 BGH, NJW 1996, 1753.

34 BGH, NJW 2009, 1962.

35 BGH, SchiedsVZ 2017, 194.

non-arbitrability of these disputes. Again, this is based on the reasoning that arbitral awards lack the required *erga omnes* effect of a court ruling.[36] According to a different view, patent disputes are arbitrable in the sense that, while the arbitral tribunal is unable to revoke a patent itself, it may still order the patent holder to apply for its deletion with the competent patent authorities (which would be an enforceable obligation).[37]

The opening of insolvency proceedings does not render a dispute non-arbitrable. Rather, the trustee is bound like a successor in title by an arbitration clause concluded by the debtor before entering insolvency proceedings. The defendant thus may invoke the arbitration clause where the trustee has brought a claim before state courts. Creditors must file their claims with the trustee, irrespective of whether they are covered by an arbitration agreement, as to allow for the orderly liquidation of debtor's assets. However, if the trustee disputes the claim the creditor may enforce it. In this case, if the claim is covered by an arbitration agreement, the creditor is referred to arbitration.

With regard to the arbitrability of disputes arising out of bilateral investment treaties between different EU member states ("Intra-EU BITs"), the BGH has submitted a question on the compatibility of Intra-EU BITs with EU law to the ECJ.[38] The ECJ's decision is still pending at the time of writing.[39]

2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

There are very few statutory limits to the capacity to conclude arbitration agreements.

Arbitration agreements on future legal disputes relating to investment services, ancillary services or financial futures and forward transactions are binding only if both parties to the agreement are merchants within the meaning of the Commercial Code (HGB) or legal persons under public law.[40]

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

A court seized in a matter which is the subject of an arbitration agreement must, if the respondent raises an objection prior to the beginning of the hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[41]

Where an action referred to above is pending, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.[42] The answer above applies to arbitrations inside or outside of the jurisdiction.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Germany does not have a tradition of anti-suit injunctions. According to the ECJ's *Gazprom* decision, the Brussels I Regulation does not prevent a member state from recognising anti-suit injunctions issued by arbitral tribunals.[43] However, it is highly unlikely that German courts would respect such injunctions, as this would run counter to the principle that German courts conduct a full review of the arbitration clause when they are asked to rule on the jurisdiction of an arbitral tribunal.

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36 *Seiler,* in: *Thomas/Putzo,* Zivilprozessordnung, 37th ed. 2016, § 1030 para. 6.

37 *Geimer,* in: *Zöller,* Zivilprozessordnung, 31st ed. 2016, § 1030 para. 15.

38 BGH, SchiedsVZ 2016, 328.

39 ECJ, pending case C-284/16 (Slovak Republic v Achmea).

40 § 37h of the Securities Trading Act (WpHG).

41 § 1031(1) ZPO.

42 § 1031(3) ZPO.

43 ECJ, Judgment of 13 May 2015, C-536/13 (Gazprom v Lithuania).

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

German courts will not issue anti-suit injunctions restraining proceedings brought in breach of arbitration clauses. They may grant interim measures in order to support arbitrations in foreign seats (such as freezing orders or orders to secure evidence) provided that German courts have international jurisdiction for interim relief.

4. The conduct of proceeding

4.1 Can parties retain outside foreign or be self-represented?

Both is possible. Lawyers ("*Rechtsanwälte*") may not be excluded from acting as authorised representatives.[44]

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of a gravity such as to justify this outcome?

An arbitrator may be challenged only if circumstances give rise to justified doubts as to his impartiality or independence, or if he does not meet the prerequisites established by the parties.[45] In practice, German courts tend to apply the same standards as for state court judges. The IBA Guidelines are not binding on the state courts[46] and not regularly referred to.

A failure to comply with the duty to disclose all relevant circumstances as to the arbitrator's impartiality and independence may (but need not) justify a challenge of the arbitrator.[47] Whether the failure to disclose alone is sufficient to give rise to justifiable doubts depends on the circumstances. In any case, the failure might be an exacerbating factor in the overall assessment of whether there are justifiable doubts.

The same threshold applies to experts appointed by the arbitral tribunal.[48] In a recent decision of May 2017, the BGH has held that an expert's failure to disclose all circumstances relevant to his impartiality and independence is a ground to set the award aside if (i) the award is based on the expert's testimony and (ii) the non-disclosed circumstances would have justified a challenge of the expert.[49]

4.3 On what grounds do courts intervene to assist in the Constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

A party may request the court to appoint an arbitrator if a party fails to act as required under an appointment procedure agreed upon by the parties, unless the procedure provides other means for securing the appointment. The court will intervene accordingly if the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or if a third party fails to perform any function entrusted to it under such procedure.[50]

When appointing an arbitrator, the court shall have due regard to any qualifications prescribed by the agreement of the parties and to other considerations necessary to secure the appointment of an independent and impartial arbitrator. In the case of appointment of a sole or third arbitrator, the court shall

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44 § 1042(2) ZPO.

45 § 1036(1), (2) ZPO.

46 OLG Frankfurt, decision of 13 February 2012, 26 SchH 15/11, juris, para. 33.

47 OLG Frankfurt, NJW 2008, 1325.

48 § 1049(3) ZPO.

49 BGH, decision of 02 May 2017, I ZB 1/16, juris relying on § 1059(2) no. 1 lit. d ZPO.

50 § 1035(4) ZPO.

also take into account whether appointing an arbitrator of a nationality other than those of the parties might be advisable.[51]

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, a provisional or conservatory measure of protection relating to the subject-matter of the arbitration upon request by a party.[52]

German courts may grant *ex parte* requests.[53] The courts will schedule a hearing unless this would endanger the object and purpose of the interim relief.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

§ 1042(1) ZPO enshrines the principle of equal treatment and the right of each party to an effective and fair legal hearing. Subject to the mandatory provisions of German arbitration law, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.[54] In the absence of an agreement by the parties and any stipulations in the German arbitration law, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate.[55]

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

While there is no express provision on confidentiality, neither the arbitral proceedings nor the hearings in the arbitration are public. Furthermore, arbitrators are barred from disclosing the tribunal's deliberations,[56] and the lawyers involved (be it as arbitrators or counsel) must comply with professional duties of confidentiality to which they are subject under German law.[57]

4.5.2 Does it regulate the length of arbitration proceedings?

There is neither an express provision on the duration of arbitration proceedings nor a remedy against excessively lengthy proceedings. There is no case law on the question whether the excessive length of arbitral proceedings can be an annulment ground (some commentators argue in favour of annulment in such case).[58]

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

The parties are free to agree on the place of arbitration. In the absence of such agreement, the place of arbitration shall be determined by the arbitral tribunal which shall pay regard to the circumstances of the case, including the suitability of the place for the parties.[59]

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51 § 1035(5) ZPO.

52 § 1033 ZPO.

53 §§ 936, 922(1) ZPO.

54 § 1042(3) ZPO.

55 § 1042(4) ZPO.

56 BGH, NJW 1957, 592.

57 § 43a(2) German Federal Lawyers' Act (BRAO).

58 Hartmann, in: Baumbach/Lauterbach/Albers/Hartmann, ZPO, 76th ed. 2018, § 1059, para. 14.

59 § 1043(1) ZPO.

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents.[60]

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such provisional or conservatory measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.[61]

There is no defined statutory threshold. German arbitration law does not include Articles 17A *et seq.* of the UNCITRAL Model Law. While some courts and commentators have held that the tribunal must apply the same threshold as state courts under German law,[62] others have argued that the arbitral tribunal is free to apply its own standard.[63] In practice, this will usually boil down to the balancing of (i) the *prima facie* case and (ii) any risk of harm that cannot be adequately repaired by monetary compensation.

The tribunal may grant interim measures *ex parte*. It may require any party to provide appropriate security in connection with such measure.

Interim measures by arbitral tribunals can be enforced by state courts. Upon application by a party, the court may permit the enforcement of an interim measure of an arbitral tribunal unless a corresponding measure of interim relief has already been petitioned with a court.[64] It may issue a differently worded order if this is required for the enforcement of the measure. Likewise, the court might reverse or modify the preliminary order of an arbitral tribunal upon application by one party.[65]

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The arbitral tribunal is empowered to determine the admissibility of evidence, to take evidence and to assess freely such evidence.[66]

There are no such restrictions on testimony by a party employee.

4.5.6 Does it make it mandatory to hold a hearing?

Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.[67] Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested by a party.

4.5.7 Does it prescribe principles governing the awarding of interest?

German arbitration law does not provide for any rules on the awarding of interest. If the main contract is governed by German substantive law, compounded interest may not be awarded.[68] If compounded interest

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60 § 1043(2) ZPO.

61 § 1041(1) ZPO.

62 OLG Saarbrücken SchiedsVZ 2007, 323, 326; *Schwab/Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, ch. 17a para. 20.

63 *Seiler,* in: *Thomas/Putzo,* Zivilprozessordnung, 37th ed. 2016, § 1041 para. 2.

64 § 1041(2) ZPO.

65 § 1041(3) ZPO.

66 § 1042(4)(2) ZPO.

67 § 1047(1) ZPO.

68 § 248(1) German Civil Code (BGB).

is awarded based on the applicable foreign substantive law, this does not amount to a violation of German public policy allowing for the setting aside of the award.[69]

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The arbitral tribunal shall allocate the costs of the arbitration between the parties unless the parties agree otherwise.[70] The cost decision is issued in the form of an arbitral award. The arbitration costs include necessary costs incurred by the parties for the proper pursuit of their claim or defence. The tribunal has discretion in its allocation but shall take the circumstances of the case, in particular the outcome of the proceedings, into consideration. Where it considers it to be appropriate an arbitral tribunal may also take into account the conduct of the parties.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

Arbitrators are not completely exempt from liability. As a matter of principle, they could be held liable for breach of contract under German contract law as any other service provider. The statutory provision limiting the state's liability for its own judges[71] does not apply to arbitrators. In practice, either the terms of reference or the arbitration rules (*e.g.,* § 44.2 DIS Arbitration Rules) will often contain an express limitation of liability. In the absence of such express provisions, the majority view (including the German Federal Supreme Court) assumes that the mandate of the arbitrators by the parties includes an implied liability limitation corresponding to the one of state court judges.[72] Consequently, arbitrators can only be held liable if their wrongful behaviour amounts to a criminal offence. The case law on this point, however, is not finally settled and does not extend to non-judicial duties of the arbitrator. This means that an arbitrator does not benefit from the limitation of liability when he wrongfully delays the proceedings,[73] fails to issue the award in its proper form,[74] breaches confidentiality, recuses himself without reason or fails to disclose circumstances relevant to his appointment.[75]

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are a number of offences that arbitrators could potentially commit, in particular intentional perversion of justice[76] and various bribery and corruption offences.[77] However, none of them give rise to any particular concerns. The threshold set by the BGH for intentional perversion of justice is extremely high so that, in practice, it is hardly ever met.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Parties can waive the requirement to provide reasons for an award.78 It is also possible for parties to agree on the wording of a (settlement) award.

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69 OLG Hamburg, decision of 26 January 1989, 6 U 71/88, juris.

70 § 1057(1) ZPO.

71 § 839(2) BGB.

72 BGH, NJW 1954, 176; see *Musielak/Voit*, Zivilprozessordnung, 14th ed. 2017, § 1035 para. 27 for further references.

73 See § 839(2)(2) BGB.

74 § 1054 ZPO.

75 *Münch,* in: MüKo, Zivilprozessordnung, 5th ed. 2017, § 1035 para. 30.

76 § 339 German Criminal Code (StGB).

77 §§ 331(2), 332(2) StGB.

78 § 1054(2) ZPO.

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

Only with respect to certain annulment grounds (see below).

More specifically, parties may not generally waive their right to seek annulment of the award. This is because some of the annulment grounds affect public policy and are thus not at the parties' disposal. Yet, pursuant to one view, it is possible for parties to waive their right to invoke individual annulment grounds that solely exist for the waiving party's protection and do not protect public interests (*e.g.,* a party may waive its right to seek annulment for the lack of an arbitration agreement or the wrongful constitution of the tribunal). In general, it can be said that the annulment grounds found in § 1059(2) no. 2 ZPO (*i.e.,* the subject matter is not arbitrable under German law or the recognition or enforcement of the award would violate the *ordre public*) may not be waived. [79] *Ordre public* also comprises certain procedural aspects such as the right to be heard; it is unclear whether the BGH would accept a waiver of the right to seek annulment in respect of such fundamental procedural violations.[80]

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

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5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No, there is no *révision au fond* within German arbitration law.[81]

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

In respect of enforcement, German arbitration law differentiates between arbitral awards rendered in Germany and arbitral awards rendered abroad.

Awards rendered in Germany need to be declared enforceable.[82] An application for a declaration of enforceability shall be refused and the award set aside if there is a ground for annulment. Yet the court may not consider such grounds for annulment that have already been subject of (unsuccessful) annulment proceedings or that have not been invoked within the time limits by the party opposing the declaration of enforceability.[83]

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention and other treaties on the recognition and enforcement of arbitral awards if they are applicable and provide more favorable terms.[84]

German arbitration law does not provide for any time limits for the recognition and enforcement of awards.

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79 *Geimer,* in: *Zöller* (ed.), Zivilprozessordnung, 31st ed. 2016, § 1059 paras. 79 *et seq*.

80 See BGH, decision of 02 May 2017, I ZB 1/16, juris, paras. 16, 25 in which the BGH held that the right to be heard is part of the German *ordre public* and thus not at the parties' disposal. The Court did not explicitly address the admissibility of a waiver in respect of the *ordre public.*

81 Cf. BGH NJW 1999, 2974, 2975.

82 § 1060(1) ZPO.

83 § 1059(3) ZPO.

84 § 1061(1) ZPO.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

While annulment proceedings are pending, German courts are entitled to suspend enforcement under Article VI NYC. They will only do so if the award is likely to be set aside.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

From a German viewpoint, an award that has been set aside by the courts at the seat of arbitration can no longer be enforced under Article V(1)(e) NYC. Accordingly, if the award is set aside abroad after having been declared enforceable in Germany, the declaration of enforceability may be set aside upon application by a party.[85]

The question of whether German courts are bound by the foreign court's decision to set the award aside is not finally settled. In the past, German courts have followed a relatively liberal approach by not reviewing the merits of a foreign set-aside decision[86] and by not requiring reciprocity for its recognition and enforcement (as required for other foreign court decisions).[87]

5.8 Are foreign awards readily enforceable in practice?

Germany is a member state of the New York Convention. Foreign arbitral awards are enforced unless there are grounds for refusal. The existence of a ground for refusal is not accepted lightly. In particular, the BGH has established a relatively high threshold for violations of public policy according to which not every breach of mandatory German law but only violations that run counter to fundamental value-based decisions of the German legislator infringe public policy.[88] Consequently, arbitral awards are hardly, if ever, set aside for violation of the German *ordre public.*

As in other EU member states, the German notion of public policy is influenced by EU law, in particular the jurisprudence of the ECJ.[89]

What is more, set-aside applications are limited to one instance in the vast majority of cases thus providing for a relatively speedy process. This is because the application to set an award aside must be made with the Higher Regional Court. The only higher instance, the BGH, may only be seized if the dispute is of fundamental importance or if the development of the law or the consistency of the jurisprudence require a decision by the highest court. In practice, this is the rare exception rather than the rule.

6. Funding arrangements

6.1 Are there laws or regulations relating to, or restrictions to, the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Yes.

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85 § 1061(4) ZPO.

86 OLG München, SchiedsVZ 2012, 339, 341 which only reviewed the set-aside decision with regard to (i) whether the foreign court was competent for the annulment of the arbitral award, and (ii) whether the annulment was based on one of the grounds provided in the international treaty requiring German courts to enforce (the 1961 Geneva Convention in the case at hand).

87 BGH, SchiedsVZ 2013, 229, 230.

88 See, most recently, BGH, decision of 14 January 2016, I ZB 8/15, juris with further references.

89 See, BGH SchiedsVZ 2016, 328, 333 *et seq*.; ECJ, Judgment of 1 June 1999, C-126/97 (Eco Swiss v Benetton) stating that a violation of EU competition law amounts to a failure to observe national rules of public policy.

6.2 If so, what is the practical and/or legal impact of such restrictions?

German lawyers ("*Rechtsanwälte*") subject to the Law on the Remuneration of Lawyers ("RVG") may only enter into contingency fee agreements under limited circumstances. A contingency fee may only be agreed upon if the client's economic circumstances would prevent him from asserting his rights in the absence of a success-related fee. Apart from that, German lawyers are barred from funding legal fees of their clients or other third parties.

These restrictions do not apply to foreign lawyers appearing before arbitral tribunals seated in Germany. Third-party funding by a person not subject to the RVG is permissible under German law and increasingly used in state court proceedings.

German arbitration law and jurisprudence are silent on the question of whether contingency fees can be recovered as part of the arbitration costs. Given that (i) German courts can only review a tribunal's cost decision within the setting aside or enforcement proceedings and that (ii) contingency fees are not unheard of in Germany, it is rather un-likely that a court would find a contingency fee (unless egregiously high) to be in breach of German public policy.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

Yes. Arbitrators are not bound by the technical rules of evidence applying before state courts.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

This is the case for b2b transaction. Pursuant to § 1031(1) ZPO, the arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement. The essential requirement is for the arbitration agreement to be recorded. Any form of record of the agreement suffices including blockchain which qualifies as other means of communication.

Pursuant to § 1031 (3) ZPO an arbitration agreement also complies with the formal requirements of § 1031 (1) ZPO if an agreement which complies with the form requirements under § 1031 (1) ZPO makes reference to a document which contains an arbitration clause. The document containing the arbitration clause is not subject to any form requirements; thus, it may be recorded on a blockchain. However, this is not the case for transactions involving a consumer. Pursuant to § 1031(5) ZPO, arbitration agreements to which a consumer is a party must be contained in a document which has been personally signed by the parties. The written form may be substituted by a specific electronic signature, however, generally not by recording on a blockchain.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

In b2b transactions, a court would consider an arbitration agreement recorded on a blockchain as original.

Pursuant to § 1054(1) ZPO, the award shall be made in writing and be signed by the arbitrator(s). Considering this formal requirement, a court would not consider an award recorded on a blockchain as original even though it serves the purpose of documenting the termination of the arbitral procedure and the authenticity of the arbitral award.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

It is disputed whether an electronically signed or digitally signed award is to be considered as an original for the purposes of recognition and enforcement under German law. Pursuant to the still prevailing view, neither form of an electronic signature meets the requirement of a signature made in writing pursuant § 1054 (1) ZPO. By contrast, some authors argue that an electronic signature using encrypted electronic keys authenticated by a third-party certificate which qualifies as qualified electronic signature pursuant to Article 25 (2) of the EU Regulation 910/2014, as it is the case for decisions by state courts, should be considered as complying with the form requirements of § 1054 (1) ZPO. However, a court would not consider an award that has been electronically signed by inserting the image of a signature or by using encrypted electronic keys authenticated by a third-party certificate as an original for the purposes of recognition and enforcement if the award has been rendered in Germany and therefore, the form requirement of § 1054 (1) ZPO applies.

If the award has been rendered in a country other than Germany, § 1054 ZPO does not apply. Pursuant to § 1061 (1) ZPO, the recognition and enforcement of foreign arbitral awards is governed by the New York Convention and other treaties on the recognition and enforcement of arbitral awards if they provide more favorable terms. The recognition of a foreign award that has been signed electronically is subject to the requirements of Art. IV NYC or national laws that provide more favorable terms, Art. IV NYC requires the submission of the duly authenticated original award or a duly certified copy thereof but makes no specific requirements regarding the form of the signature of an arbitral award. However, it should be noted that despite § 1061 (1) ZPO some German courts require foreign arbitral awards to meet the formal requirement of a signature made in writing pursuant to 1054 (1) ZPO. Therefore, it is advisable to ensure that the award is signed in writing and not electronically if the award is to be enforced in Germany.

8. Is there likely to be any significant reform of the arbitration law in the near future?

A taskforce has been installed by the Federal Ministry of Justice and Consumer Protection in order to investigate the necessity of reforming the German arbitration law.

9. Compatibility of the Delos Rules with local arbitration law

The Delos Rules are compatible with the German arbitration law with the following observations:

1. Waiver, Art. 10 Delos Rules:

Article 10 (1) of the Delos Rules is compatible with German arbitration law subject to the restrictions in § 1027 ZPO, which provides that insofar as a non-mandatory statutory or contractual provision in respect of the arbitration proceedings has not been met, a party having failed to object to this irregularity without undue delay may not assert this objection later unless the party was not aware of the irregularity.

Contrary to Article 10(2) Delos Rules, the right to a recourse of the award cannot be waived under German law.

2. Limitation of Liability, Article 11 Delos Rules

The parties and the arbitrators can contractually limit the liability of the arbitrators and the institution. However, liability for intent cannot be excluded in advance. Therefore, the limitation in Art. 11 Delos Rules cannot limit the liability for intentional behavior but is to be considered as limitation of liability for (gross) negligence.

Furthermore, under German law institutional rules like the Delos Rules are regarded as general terms and conditions. As such, the limitation of liability in Art. 11 Delos would be regarded invalid in b2c agreements transactions. By contrast, pursuant to the majority view, this restriction does not apply in b2b transactions.

10. Further reading

Balthasar in: Balthasar, International Commercial Arbitration, Part. 3, Section J, 2nd ed., Beck Hart Nomos, 2021; Böckstiegel/Kröll/Nacimiento (eds), *Arbitration in Germany – The Model Law in Practice*, 2nd ed., Wolters Kluwer Law & Business 2015; Boog/Wimalasena, The 2018 DIS Rules: New Rules for a Renewed Institution, (2018) 36 *ASA Bull*. 10–30; Hanefeld/Schmidt-Ahrends in: Weigand/Baumann (eds), *Practitioner's Handbook on International Arbitration*, 3rd ed., Oxford University Press 2019 ; Kröll, National Report for Germany (2007 through 2018), in: Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, Supplement No. 98, ICCA & Kluwer Law International, March 2018; Solomon, Interpretation and Application of the New York Convention in Germany, in: Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards*, Springer 2017; Weinacht, Enforcement of Annulled Foreign Arbitral Awards in Germany, (2002) *J. Int'l Arb.* 313–336.

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.* with offices and a case team?	The leading national and international arbitral institution is the *Deutsche Institution für Schiedsgerichtsbarkeit* (German Institute of Arbitration) DIS with main offices in Bonn and Berlin. The different regional *Industrie- und Handelskammern* (Chambers of Industry and Commerce) IHK provide arbitration services in cooperation with the DIS. The association of notaries public entertains the *Schlichtungs- und Schiedsgerichtshofs Deutscher Notare* (Mediation and Arbitration Court of German Notaries Public) SGH Various sector-specific institutions entertained by the respective business associations exist. A private initiative is the Court of Innovative Arbitration (COIA).
Main arbitration hearing facilities for in-person hearings?	The DIS and the IHK have their own hearing facilities and provide support in finding hearing facilities.
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	There is offering of reprographics facilities in reasonable proximity to the above main arbitration providers.
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	There is a broad offering of local providers of court reporting services.
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	There is a broad variety of local interpreters in all major cities.
Other leading arbitral bodies with offices in the jurisdiction?	ϕ

DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

REPUBLIC OF KOREA

CHAPTER PREPARED BY

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FOR FURTHER INFORMATION

GAP TABLE OF CONTENTS | GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS | FULL GAP ONLINE

EN DELOS MODEL CLAUSES
ES DELOS CLÁUSULAS MODELO
FR DELOS CLAUSES TYPES
PT DELOS CLÁUSULAS MODELO

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
   b. Adherence to international treaties
   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
5. Accessibility and safety
6. Ethics

Evolution of above compared to previous year

7. Tech friendliness
8. Compatibility with the Delos Rules

VERSION: 19 JANUARY 2024 (v01.00)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

South Korea ("Korea") has a well-established and efficient judicial system. Moreover, Korea is among several arbitration-friendly jurisdictions in Asia. The Korean government adopted a law promoting arbitration in Korea in the hope of making Seoul a new Asian hub for international arbitration. The Korean courts are also very supportive of arbitration when dealing with cases involving arbitration. The Korean Commercial Arbitration Board ("KCAB"), the main arbitral institution in Korea, has a consistent caseload of 400-plus cases, and is experienced in administering international arbitrations. Accordingly, Korea is a good option to consider as a seat of arbitration for international arbitrations.

Key places of arbitration in the jurisdiction?	Seoul.
Civil law/common law environment? (if mixed or other, specify)	Civil law.
Confidentiality of arbitrations?	The Korean Arbitration Act (the "KAA") does not provide for confidentiality. However, the arbitration rules of the KCAB provide for confidentiality obligations of arbitrators, parties, counsel, and KCAB staff members.
Requirement to retain (local) counsel?	Retaining counsel for arbitrations is common but not required. For domestic arbitrations, parties can participate in arbitration proceedings without retaining counsel, but if counsel is to be retained, only local counsel is allowed to appear. For international arbitrations, parties are not required to engage local counsel and may retain foreign counsel.
Ability to present party employee witness testimony?	Parties can submit witness statements of their employees.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Unless parties agree otherwise, meetings and/or hearings can be held outside the seat of arbitration. Due to COVID-19, hearings were frequently held remotely. However, it has not been established if hearings can be held remotely when either party objects.
Availability of interest as a remedy?	The KAA specifically provides that an arbitral tribunal has the power to award interest and to determine the applicable interest rate.
Ability to claim for reasonable costs incurred for the arbitration?	The KAA provides that unless the parties agree otherwise, the arbitral tribunal has discretion to determine the allocation of the costs of the arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee agreements are commonly used in Korea (except in criminal cases). Third-party funding is neither expressly prohibited nor expressly permitted in Korea, and there is currently no legislation proposed to clarify this issue.
Party to the New York Convention?	Yes, since 1973, with the reciprocity and commercial disputes reservations applying.

Party to the ICSID Convention?	Yes, since 1967.
Compatibility with the Delos Rules?	Compatible.
Default time-limitation period for civil actions (including contractual)?	Five (5) years for business (commercial) matters and ten (10) years for general civil (non-commercial) matters. Shorter periods apply for certain categories of claims.
Other key points to note?	The KAA was first enacted in 1966, and completely revised in 1999 to adopt the 1985 United Nations Commission on International Trade Law Model Law ("UNCITRAL Model Law"). Later, in 2016, further amendments were made to the KAA, in order to incorporate the 2006 amendments to the UNCITRAL Model Law.
World Bank, Enforcing Contracts: *Doing Business* score for 2020, if available?	Korea ranks 2nd with a score of 84.1 in 2020.
World Justice Project, Rule of Law Index: *Civil Justice* score for 2023, if available?	Korea ranks 13th with a score of 0.75 in 2023.

ARBITRATION PRACTITIONER SUMMARY

Korea adopted the UNCITRAL Model Law of 1985 by amending the Korean Arbitration Act ("KAA") in 1999. In 2016, the KAA was amended to be in line with the 2006 Amendments to the UNCITRAL Model Law including interim measures.

Most international arbitrations seated in Korea proceed in the same way as international arbitrations seated in other leading arbitration jurisdictions. It is generally easy and expeditious to enforce arbitration awards in Korea, and in terms of enforcement, there is no distinction between awards rendered in arbitrations seated in Korea and those seated outside of Korea. Korean courts are generally arbitration friendly. Korea ratified the New York Convention with the reciprocity reservation and the commercial dispute reservation.

Date of arbitration law?	Legislated in 1966 and last revised in 2016.
UNCITRAL Model Law? If so, any key changes thereto?	The KAA is based on the 1985 UNCITRAL Model Law as well as the 2006 Amendments to the Model Law. However preliminary orders under Articles 17 B and 17 C of the 2006 Amendments to the Model Law have not been introduced in the KAA. Also, Article 34(4) of the UNCITRAL Model Law, which allows a court to suspend its set-aside proceedings at the request of a party, is in included in the KAA.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Korea does not have specialised arbitration-related courts or judges.
Availability of *ex parte* pre-arbitration interim measures?	Pursuant to Article 10 of the KAA, a party to an arbitration agreement can apply to the Korean courts for an *ex parte* pre-arbitration interim measure even when there is an arbitration agreement. *Ex parte* interim measures can also be granted by courts before or after an arbitration begins.
Courts' attitude towards the competence-competence principle?	Korea recognizes the competence-competence principle. Article 17(1) of the KAA states that an arbitral tribunal may rule on its own jurisdiction and also on a party's objection to the existence or validity of the arbitration agreement. However, Article 17(6) of the KAA provides that upon a party's request, the Korean courts have the power to review an arbitral tribunal's decision on its jurisdiction whether positive (accepting jurisdiction) or negative (denying jurisdiction). The Korean court's review of an arbitral tribunal's decision on jurisdiction cannot be appealed. The Korean courts generally take an arbitration friendly approach in reviewing an arbitral tribunal's decision on jurisdiction.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes.
Grounds for annulment of awards additional to those based on the criteria for the recognition and	The KAA does not provide for any additional grounds for annulment of awards other than the grounds for annulment based

enforcement of awards under the New York Convention?	on the criteria for the recognition and enforcement of awards under the New York Convention.
Do annulment proceedings typically suspend enforcement proceedings?	The KAA does not have a provision suspending enforcement proceedings due to pending annulment proceedings. The court hearing the enforcement application may decide to stay the proceedings on a case-by-case basis.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	To date, there has been no Korean court decision on this issue.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	There is no established position on this issue in Korea. Neither the KAA nor the KCAB has a rule for holding hearings remotely when a party objects, and the Korean courts have yet to settle this issue.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	Apart from sovereign immunity, no special rules apply to arbitration with respect to the enforcement of awards against public bodies. Korea adopts the doctrine of restrictive immunity, and sovereign immunity is not granted to the activities of public bodies unless the activities fall within the scope of sovereign functions, or are closely related thereto so that enforcement will likely constitute undue interference with the public bodies' sovereign functions.
Is the validity of blockchain-based evidence recognised?	An arbitral tribunal has discretion on the admissibility of evidence, and will decide on the admissibility of blockchain-based evidence.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	Korean courts or laws do not have an established position on this issue.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	Korean courts or laws do not have an established position on this issue.
Other key points to note?	• A split (or optional or unilateral) arbitration agreement is not regarded as a valid arbitration agreement if contested by one of the parties. • The Korean Supreme Court explicitly dismissed an application for an anti-arbitration injunction (Supreme Court Decision rendered on 2 February 2018, Case no. 2017*Ma*6087). It is likely that Korean courts will not be bound by anti-suit injunctions issued by tribunals or foreign courts, whether seated in Korea or outside of Korea.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? 1985 or 2006 version? If yes, what key modifications if any have been made to it? If no, what form does the arbitration law take?

Yes. the arbitration law in Korea, the Korean Arbitration Act is based on the UNCITRAL Model Law, largely adopting the 2006 version, but with the following modifications:

- Article 17 (Ruling of Tribunal on Jurisdiction) – Where an arbitral tribunal rules on its jurisdiction or scope of authority at the preliminary stage, either party may file an application to a Korean court to review the arbitral tribunal's decision within 30 days from receipt of such decision.
- Article 18 (Interim Measures) – The KAA does not provide for ex parte preliminary orders (which do not exist in Korea). Furthermore, only interim measures issued in arbitrations seated in Korea can be enforced by Korean courts.
- Article 27 (Expert) – The parties can challenge the appointment of an expert by an arbitral tribunal.
- Article 34(2) (Allocation of Arbitration Costs) – The KAA specifically provides that unless otherwise agreed between the parties, an arbitral tribunal can decide on the allocation of costs considering all the circumstances.
- Article 34(3) (Interest) – The KAA specifically provides that unless otherwise agreed between the parties, an arbitral tribunal can order payment of interest taking into account all the circumstances.
- Article 35 (Effect of Arbitral Awards) – The KAA provides that an award has the same effect between the parties as a final and conclusive judgment of a court.
- The KAA does not incorporate Article 34(4) of the UNCITRAL Model Law, which allows a court to suspend its set-aside proceedings at the request of a party to give an arbitral tribunal an opportunity to resume the arbitration or to eliminate grounds for set-aside.

1.2 When was the arbitration law last revised?

The KAA was last revised on 29 May 2016 and came into force on 30 November 2016.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Both the KAA and Korean Private International Law are silent on the law applicable to the arbitration agreement. However, in light of Article V, Paragraph 1, Item (a) of the New York Convention, parties may agree on the law applicable to the arbitration agreement.

There are only a few Supreme Court cases that involve the determination of the law applicable to the arbitration agreement. However, these cases are of limited value since in all these cases, the governing law of the main contract and the seat of arbitration were identical.

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

Reference to a venue or place in an arbitration agreement, if not expressly designated as a seat, is most likely to be treated as a seat of arbitration.

If there is no reference to a venue or place of arbitration in an arbitration agreement, Article 21(2) of the KAA may apply, which provides that when there is no agreement between the parties on the seat of arbitration, an arbitral tribunal shall decide the seat having regard to all circumstances of the case, including the convenience of the parties.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Article 17(1) of the KAA provides that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other clauses of the contract. Furthermore, the invalidity of any of the other clauses in the contract will not affect the validity of the arbitration clause. In essence, the KAA adopts the principle of separability.

2.4 What are formal requirements (if any) for an enforceable arbitration agreement?

Article 8 of the KAA, in line with Article 7 of the UNCITRAL Model Law, requires an arbitration agreement to be in writing either as an arbitration clause included in a contract or as a submission agreement.

An arbitration agreement is considered to be "in writing" when:

- the terms and conditions of an arbitration agreement have been recorded, regardless of whether such agreement was made orally, by conduct, or by any other means;
- an arbitration agreement is evidenced by electronic communication; or
- an arbitration agreement is contained 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 the other.

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In principle, a third party who is a non-signatory to the arbitration agreement is not bound by the arbitration agreement, and thus an arbitral tribunal would not have jurisdiction over the third party. The KAA does not address whether an arbitral tribunal may exercise jurisdiction over a third party that is a non-signatory to the arbitration agreement.

However, a third party may be bound to an arbitration agreement as a successor, heir or assignee to a contracting party. There is one lower court decision[1] where the court held that the assignee of receivables under a contract containing an arbitration clause should be bound by the arbitration agreement, and that a debtor may raise a defence in a court proceeding that the same should be dismissed due to the existence of an arbitration agreement.

Furthermore, third parties may be bound to an arbitration agreement by their subsequent consent – whether by affirmative consent in writing at the request of a party or by failure to object to the jurisdiction of an arbitral tribunal. These rules apply equally to foreign third parties.

In addition, there are no court decisions on whether the "group of companies" or "piercing of the corporate veil" doctrines can be used to exercise jurisdiction over non-signatories.

2.6 Are there restrictions to arbitrability?

There is no specific provision in the KAA providing for restrictions to arbitrability. Article 3 of the KAA, which was amended in 2016, now defines arbitration as "a procedure to resolve disputes relating to (i) property rights or (ii) non-property rights that the parties can resolve through a settlement." Accordingly, as is the case in many other jurisdictions, matters of criminal law, family law (not related to the property) and administrative law, which cannot be resolved by parties' settlement, are not arbitrable in Korea. With the amendment of the KAA in 2016, commentators are of the view that disputes that arise in the public law sector are arbitrable as long as the nature of the dispute allows the parties to settle the dispute.

[1] Seoul Western District Court Judgment 2001GaHap6107 dated 5 July 2002

2.7 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

The restrictions in 2.6 do not relate to specific domains.

In relation to arbitrations involving antitrust, commentators are of the view that a claim for damages caused by a violation of antitrust law under Korean private law.

While disputes regarding the validity of IP rights are not arbitrable (as these would fall within the exclusive jurisdiction of national courts), commentators opine that disputes regarding the infringement of IP rights or disputes regarding any contract related to IP rights are arbitrable.

No specific provision in the KAA provides for special protection for consumers in consumer arbitrations and employees in employment law arbitrations.

2.8 Do these restrictions relate to specific persons (*i.e.,* State entities, consumers etc.)?

There are no restrictions relating to specific persons in the KAA.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Korean courts generally respect the parties' agreement to arbitrate. Pursuant to Article 9 of the KAA, if one party brings an action in court against another party even though there is a valid arbitration agreement between the parties, the other party can raise a defence based on the existence of the arbitration agreement. The court is then required to dismiss (rather than stay) the lawsuit unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

To date, there has been no Korean court decision addressing whether an anti-suit injunction issued by an arbitral tribunal seated in Korea is allowed under Korean law, or whether such anti-suit injunction issued by an arbitral tribunal can be enforced by a Korean court.

However, many commentators are of the view that an arbitral tribunal may issue an anti-suit injunction as an interim measure, considering that the amended Article 18(2) of the KAA provides that an arbitral tribunal may order a party to "take action that would prevent current or imminent harm or prejudice to the arbitral proceeding itself, or prohibiting action that may cause such harm or prejudice."

As for the enforcement of an anti-suit injunction issued by an arbitral tribunal, Article 18(7) of the KAA provides for the Korean courts' recognition and enforcement of interim measures issued by an arbitral tribunal. However, Article 18(7) would only apply to anti-suit injunctions issued by arbitral tribunals seated in Korea, and it is not clear how anti-suit injunctions issued by arbitral tribunals seated outside of Korea would be enforced.

By contrast, as a civil law jurisdiction, it is generally understood that Korean courts cannot issue anti-suit injunctions or anti-arbitration injunctions. In fact, the Korean Supreme Court once ruled that parties may not apply to a court to suspend an arbitral proceeding by means of an injunction, arguing that the arbitration agreement was absent, invalid, invalid, or impossible to implement.[2]

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

As discussed above, Korean courts cannot issue anti-suit injunctions to restrain foreign court proceedings brought in breach of an arbitration agreement. However, Korean courts may grant interim measures to

[2] Supreme Court Decision No. 2017Ma6087 dated 2 February 2018.

support arbitrations seated in or outside of Korea (such as freezing orders or orders to secure evidence). Article 10 of the KAA provides that a party to an arbitration agreement may file a request with the Korean court for interim relief either before the commencement of or during arbitral proceedings. This provision applies to arbitrations seated in Korea or outside of Korea or even in instances when the seat of arbitration has not been determined (see Article 2 of the KAA).

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

It is the parties' choice whether to retain outside counsel or to be self-represented. Retaining outside counsel is not mandatory, but it is quite rare for a party to be self-represented in an international arbitration seated in Korea.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

There are not many cases where Korean courts have examined an arbitrator's independence and impartiality or reviewed a party's challenge of an arbitrator.

However, Article 13 of the KAA provides that an arbitrator shall disclose without delay any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the parties, and failure to do so will be a ground to challenge an arbitrator. The Korean Supreme Court has ruled that Article 13 of the KAA is a mandatory provision which cannot be waived.[3]

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

If the parties agreed on the procedure for the constitution of the arbitral tribunal, including the designation of an appointing authority who will appoint member(s) of an arbitral tribunal, then the arbitral tribunal should be constituted pursuant to that procedure. Only if the parties fail to agree on such a procedure or the nomination of a sole or presiding arbitrator, or if a party who is to appoint an arbitrator fails to do so, can a party seek the court's assistance in constituting the tribunal.

In the absence of an appointment procedure agreed upon by the parties, Article 12(3) of the KAA will apply. In the case of a sole arbitrator, if the parties fail to reach an agreement within 30 days from the request of a party, the court or an arbitral institution designated by the court shall appoint an arbitrator at the request of a party. In case of a three (3)-member tribunal, each party appoints one arbitrator each, and the two party-appointed arbitrators shall appoint a presiding arbitrator. When the two party-appointed arbitrators fail to appoint a presiding arbitrator within 30 days from their appointments, the court or an arbitral institution designated by the court shall appoint the presiding arbitrator.

When there is an agreed appointment procedure between the parties, but (i) one party fails to appoint an arbitrator according to the agreed procedure, or (ii) both parties or the party-appointed arbitrators fail to appoint an arbitrator according to the agreed procedure, or (iii) an institution or any other party entrusted to appoint an arbitrator fails to do, Article 12(4) of the KAA will apply and a court or an arbitral institution designated by the court will appoint an arbitrator. The Korean courts usually seek a recommendation from the KCAB on suitable arbitrator candidates, especially in an international arbitration.

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[3] Korean Supreme Court Judgment Case No. 2004*Da*47901

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Under Article 10 of the KAA, Korean courts can issue an interim measure upon a party's request made before or during the arbitral proceedings. Although Article 10 is silent on the type of interim measures that Korean courts can grant, it is generally accepted that Korean courts can issue a conservatory measure to preserve the status quo or protect the subject matter of the arbitration. Article 10 of the KAA is applicable regardless of whether the arbitration is seated in or outside Korea.

Korean courts can and are willing to grant *ex parte* requests especially for orders freezing assets which are the subject matter in the arbitration.

4.5 Other than arbitrator's duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Article 19 of the KAA provides for equal treatment of the parties in the arbitral proceedings, and the right to be given a full opportunity to present one's case.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The KAA does not contain any provisions relating to the confidentiality of arbitral proceedings. In addition, there is no Korean Supreme Court decision addressing this issue. Thus, unless the parties agree otherwise – for instance, by entering into a separate confidentiality agreement or by adopting institutional rules which provide for the confidentiality of arbitral proceedings – arbitrations seated in Korea are not confidential. Despite the absence of a specific provision in the KAA, arbitral proceedings in Korea have generally been treated in strict confidence. The KCAB International Arbitration Rules have a provision on confidentiality (Article 75).

4.5.2 Does it regulate the length of arbitration proceedings?

The KAA does not have an express provision on the length or duration of arbitration proceedings.

The KCAB International Arbitration Rules provide that an arbitral tribunal shall make its award within 45 days from the date final submissions are made, or the hearings are closed, whichever is later, but this time limit can be extended if necessary (Article 38).

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

Pursuant to Article 21(1) and (2) of the KAA, the parties are free to agree on the place of arbitration, and in the absence of such agreement, the place of arbitration shall be determined by the arbitral tribunal after taking into account all the circumstances of the case.

Although many hearings and meetings have been held remotely (especially during the pandemic) with the consent of the parties, it has not been established whether hearings and/or meetings can be held remotely when a party objects to it.

An arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for consultation among the members of the tribunal, or for inspection of site, property or documents (Article 21(3) of the KAA).

4.5.4 Does it allow for arbitrator to issue interim measures? In the affirmative, under what conditions?

According to Article 18 of the KAA, an arbitral tribunal can, at the request of a party, order any interim measures that it considers necessary, and those interim measures are enforceable.

Article 18(2) of the amended KAA adopted all of the interim measures available under the Model Law except for preliminary orders. Furthermore, pursuant to Article 18(7) of the KAA, a party can request courts to recognise and enforce an interim measure issued by an arbitral tribunal seated in Korea.

In order to grant an interim measure, the following two conditions must be met (Article 18(2) of the KAA):

(i) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(ii) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of an arbitral tribunal in making any subsequent determination.

With regard to interim measures for the preservation of evidence, these requirements shall apply only to the extent an arbitral tribunal considers appropriate.

The above is identical to the conditions in Article 17A, Para 1 of the 2006 Amendments to the Model Law.

Since preliminary orders under the 2006 Amendments to the Model Law have not been incorporated into the 2016 amendment to the KAA, no *ex parte* interim measures can be granted by an arbitral tribunal.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Article 20(2) of the KAA provides that an arbitral tribunal has the authority to determine the admissibility of evidence (including the authenticity and/or genuineness of evidence), to take evidence and to assess the credibility of such evidence. There are no restrictions to the presentation of testimony by a party employee, and party employees can be treated as witnesses.

4.5.6 Does it make it mandatory to hold a hearing?

Article 25 of the KAA provides that subject to agreement by the parties, an arbitral tribunal can decide whether to hold oral hearings or whether the proceedings shall be conducted only on the basis of documents and other materials. Unless the parties have agreed that no oral hearings shall be held, an arbitral tribunal shall hold an oral hearing at an appropriate stage of the proceedings upon a party's request.

4.5.7 Does it prescribe principles governing the awarding of interest?

Pursuant to Article 34(3) of the KAA, the arbitral tribunal may order either party to pay pre- and/or post-award interest after considering all the circumstances of the arbitration and if deemed appropriate – unless the parties have agreed otherwise.

If the substantive law of the arbitration is Korean law, the relevant interest rate is six (6) percent per annum for commercial contracts and five (5) percent per annum for non-commercial contracts.[4]

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Article 34(2) of the KAA provides that unless the parties have agreed otherwise, an arbitral tribunal has explicit authority to allocate arbitration costs between the parties, taking into consideration all pertinent circumstances of the case. The "loser pays" rule generally applies to arbitrations in Korea, but an arbitral tribunal has discretion to decide otherwise in light of relevant factors. The decision on allocation of arbitration costs is included in the final award. Arbitration costs include necessary costs incurred by the parties for the proper pursuit of their claim or defence including attorney's fees.

[4] Article 379 of the Korean Civil Code; Article 54 of the Korean Commercial Code.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

The KAA does not have a provision explicitly exempting arbitrators from liability. However, the KCAB International Arbitration Rules has a provision (Article 56) exempting arbitrators from liability for any act or omission in connection with an arbitration conducted under the rules, unless the act or omission is intentional or grossly negligent.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Participants in arbitration proceedings may be criminally liable only when they commit a crime as defined under Korean criminal law during the arbitration proceeding. For instance, if a party falsifies evidence and submits such fraudulent evidence during arbitration proceeding and as a result obtains a monetary award, then that party may be punished for forgery and fraud.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Under Article 32(2) of the KAA, parties can agree to waive the requirement for an award to provide reasons.

Parties frequently agree to omit reasons in an award when the award is issued after the parties reach a settlement (i.e. consent award).

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

There is no statutory provision or court precedents on this issue in Korea. The scholarly view is that this right cannot be waived before an award is issued since the right of appeal from a court judgment cannot be waived before a judgment is issued.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements that apply to the rendering of a valid award in Korea.

However, it should be noted that the Korean Supreme Court has decided in multiple cases that split arbitration clauses (also known as optional or unilateral clauses), which give either party or both parties to a contract have the right to select between litigation and arbitration, are null and void if contested by either party. However, multi-tier dispute resolution clauses such as med-arb or arb-med-arb clauses or arbitration clauses requiring a dispute resolution board process prior to arbitration are considered valid.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

It is not possible to appeal an award.

5.5 What procedures exist for the recognition and enforcement of awards, what time limits apply and is there a distinction to be made between local and foreign awards?

Article 37 of the KAA provides for procedures for recognition and enforcement of both domestic and foreign arbitral awards. However, no specific time limits apply to the recognition and enforcement of awards under the KAA.

The legal regimes applicable to the enforcement of a Korean award (domestic award) and a foreign award are different. The requirements for the recognition and enforcement of a Korean award are provided for in Article 38 of the KAA. For a foreign award, Article 39 of the KAA provides that if the award was rendered in a

New York Convention jurisdiction, the New York Convention applies. If the award was rendered in a non-New York Convention jurisdiction, the provisions on the enforcement of a foreign judgment under the Korean Civil Procedure Act and the Civil Enforcement Act apply.[5]

While the grounds for enforcing a domestic award and a foreign award subject to the New York Convention are identical, the requirements for enforcing a foreign award which is not subject to the New York Convention are as follows: (i) the award is final and conclusive, (ii) the arbitral tribunal has jurisdiction under the relevant Korean laws and treaties to which Korea is a party, (iii) the losing party duly received the adequate notice of the arbitration and sufficient time to defend; (iv) the award is not in violation of Korean public policy, and (v) there is reciprocity between Korea and the country where the award was issued.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. The annulment proceedings would not automatically suspend the enforcement proceedings. Korean courts have discretion to stay the enforcement proceedings and await the result of the annulment proceedings, or to proceed with the enforcement proceedings despite the pending annulment proceedings.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

No Korean court has ruled on this issue yet.

However, it is unlikely that Korean courts will ignore the annulment judgment/decision made by a court at the seat of arbitration and enforce an annulled award, especially if it is subject to the New York Convention.

By contrast, Article 38 of the KAA clearly states that if a domestic award is set aside by the court, then the enforcement of such award should be denied.

5.8 Are foreign awards readily enforceable in practice?

In Korea, foreign (non-Korean) awards are readily and promptly enforceable in practice. Korea is a signatory to the New York Convention. Foreign arbitral awards are enforced unless there are grounds for refusal under the New York Convention. Korean courts tend to take a strict approach when reviewing the grounds for refusal of enforcement, which is also in line with the Korean courts' pro-arbitration approach. For instance, the threshold for violations of public policy is high, requiring that the relevant public policy be international or transnational. Accordingly, foreign awards are rarely set aside in Korea for violations of public policy.

With the amendment of the Act in 2016, Korea simplified the enforcement process in Korea, and this is expected to expedite the enforcement process for both domestic awards and foreign awards.

6. Funding arrangements

6.1 Are there laws or regulations relating to, or restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such laws, regulations or restrictions?

First of all, contingent fees (more commonly known as "success fees") are a widespread practice in Korea especially for commercial litigation and arbitration. In 2015, the Korean Supreme Court ruled that contingent fee arrangements for criminal cases were void as a matter of public policy. However, contingent fee arrangements are still frequently used for civil litigation and commercial arbitrations.

Partial contingency arrangements, such as the payment of a retainer at the beginning of an arbitration with a success fee arrangement, are common in Korea.

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5 Article 217 of the Civil Procedure Act; Article 26 of the Civil Execution Act.

As for third-party funding, there are no laws explicitly prohibiting or allowing third-party funding for arbitration. Whether and to what extent third-party funding is permitted in Korea is therefore unclear.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

An arbitral tribunal has discretion on the admissibility of evidence, and will decide on the admissibility of blockchain-based evidence.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

Korea does not have an established position on this issue.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

Korea does not have an established position on this issue.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

To date, there has been no court decision on this issue, and Korea does not have an established position on this issue.

8. Is there likely to be any significant reform of the arbitration law in the near future?

No, Korea does not have any immediate plans to significantly reform the KAA which was revised in 2016.

9. Compatibility of the Delos Rules with local arbitration law

The KAA is compatible with the Delos Rules.

10. Further reading

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ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.* with offices and a case team?	The leading arbitral institution in Korea is Korean Commercial Arbitration Board International, commonly referred to as KCAB INTERNATIONAL. KCAB INTERNATIONAL 43F Trade Tower, 511 Yeongdong-daero, Gangnam-gu, Seoul 06164 Korea
Main arbitration hearing facilities for in-person hearings?	The main arbitration hearing facility is Seoul IDRC which is located in the same building as KCAB INTERNATIONAL.
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	Many reprographics facilities are located in Gangnam area. The one we mainly use is Kinko's (Main Service | 킨코스코리아(주) (kinkos.co.kr))
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	There is no local provider for court reporting services which can transcribe in foreign languages such as English. Leading regional and international court reporting services do not have offices in Korea.
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	There are many qualified interpreters actively involved in international arbitrations.
Other leading arbitral bodies with offices in the jurisdiction?	The ICC, SIAC and HKIAC have offices in Korea.

DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

THE PHILIPPINES

CHAPTER PREPARED BY

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FOR FURTHER INFORMATION

GAP TABLE OF CONTENTS | GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS | FULL GAP ONLINE

EN DELOS MODEL CLAUSES
ES DELOS CLÁUSULAS MODELO
FR DELOS CLAUSES TYPES
PT DELOS CLÁUSULAS MODELO

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
   b. Adherence to international treaties
   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
5. Accessibility and safety
6. Ethics

Evolution of above compared to previous year =

7. Tech friendliness
8. Compatibility with the Delos Rules

VERSION: 12 APRIL 2024 (v01.02)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration in the Philippines is primarily governed by Republic Act No. 9285, also known as the Alternative Dispute Resolution Act of 2004 ("RA 9285"). RA 9285 primarily adopted (1) Republic Act No. 876, otherwise known as the Arbitration Law ("RA 876"), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the 1985 UNCITRAL Model Law ("Model Law") to govern international commercial arbitration.

RA 9285 was enacted pursuant to the State's policy to actively promote party autonomy in the resolution of disputes. Thus, parties are free to agree on, among other things: (a) the seat of arbitration, (b) the law governing the arbitration agreement, (c) the place where arbitration hearings shall be held, (d) the language of the arbitration, (e) the procedure for the appointment of arbitrators, and (f) the procedure for the arbitration proceedings. The Philippines is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Key places of arbitration in the jurisdiction?	Metro Manila, where the major business districts are located, is the key place of arbitration in the Philippines.
Civil law/Common law environment? (if mixed or other, specify).	Civil law.
Confidentiality of arbitrations?	Arbitration proceedings are generally confidential, subject to exceptions provided under RA 9285.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel in the arbitration proceedings.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	The parties are free to agree on the venue of the arbitration hearings, even if the venue is outside the seat of arbitration.
Availability of interest as a remedy?	Interest may be awarded. The present legal rate of interest is 6% *per annum*.
Ability to claim for reasonable costs incurred for the arbitration?	Generally, reasonable arbitration costs shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion such arbitration costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are presently no restrictions or regulations on the use of contingency or alternative fee arrangements or third-party funding for arbitration conducted in the Philippines.
Party to the New York Convention?	Yes.
Party to the ICSID Convention?	Yes.
Compatibility with the Delos Rules?	The Delos Rules are highly compatible with local arbitration laws.

Default time-limitation period for civil actions (including contractual)?	The petition to recognize and enforce an arbitral award may be filed anytime from receipt of the award, but it must be filed within 10 years from receipt of the award. However, if a timely petition to set aside an arbitral award is filed (which must be filed within three months from the receipt of the award), the opposing party must file therein and in opposition thereto the petition for recognition and enforcement of the same award within fifteen (15) days from receipt of the petition to set aside.
Other key points to note?	The principles of party autonomy, competence-competence, and separability of the arbitration agreement are recognized by Philippine law. Parties are not prohibited from waiving their right to seek the setting aside of an arbitral award.
World Bank, Enforcing Contracts: *Doing Business* score for 2020, if available?	46.0
World Justice Project, Rule of Law Index: *Civil Justice* score for 2023, if available?	0.45

ARBITRATION PRACTITIONER SUMMARY

Arbitration in the Philippines is primarily governed by Republic Act No. 9285, also known as the Alternative Dispute Resolution Act of 2004 ("ADR Act). The ADR Act primarily adopted (1) Republic Act No. 876, otherwise known as the Arbitration Law ("RA 876"), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the 1985 UNCITRAL Model Law ("Model Law") to govern international commercial arbitration.

Parties are free to agree on, among other things: (a) the seat of arbitration, (b) the law governing the arbitration agreement, (c) the place where arbitration hearings shall be held, (d) the language of the arbitration, and (e) the procedure for the appointment of arbitrators and the proceedings.

Philippine courts also provide support to parties to an arbitration agreement and arbitration proceedings. For example, Philippine courts have the power to (1) suspend court proceedings and refer the parties to arbitration once it is notified of the existence of an arbitration agreement between the parties, (2) issue interim measures of protection when necessary, and (3) provide assistance in the taking of evidence. An international commercial arbitral award may not be appealed and may only be refused enforcement in accordance with the grounds set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the Philippines is a party.

Date of arbitration law?	The ADR Act was enacted on February 4, 2004, and it has not yet been amended.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	The Philippines adopted the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985. It has not yet adopted the 2006 Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Arbitration-related petitions are ordinarily, but not exclusively, raffled to specialized commercial courts of the pertinent Regional Trial Court.
Availability of *ex parte* pre-arbitration interim measures?	The Philippine courts may grant interim measures *ex parte* in certain genuine urgent matters.
Courts' attitude towards the competence-competence principle?	The principle of competence-competence is recognized by Philippine law. Philippine courts will generally stay court proceedings if there is a valid arbitration agreement covering the dispute.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	For international commercial or foreign arbitral awards, the Philippines has adopted the grounds to refuse the recognition and enforcement of an arbitral award set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. For domestic arbitral awards, the Philippines has furnished specific grounds for annulment of awards under Section 24 of RA 876 (*i.e.*

	the award was procured by corruption, fraud, or other undue means; evident partiality or corruption in the arbitrators; arbitrators were guilty of misconduct or exceeded their powers; arbitrators were disqualified to act but willfully refrained from disclosing such disqualification; arbitral tribunal exceeded its powers or so imperfectly executed them that a complete, final and definite award was not made; arbitration agreement did not exist or was invalid; or party to arbitration was a minor or a person judicially declared to be incompetent).
Do annulment proceedings typically suspend enforcement proceedings?	If a petition for recognition and enforcement of an international commercial award (i.e., an arbitral award rendered in an arbitration seated in the Philippines) has been filed, a petition to set aside the arbitral award, if not yet time-barred, shall be made in the same proceedings. As such, these petitions are heard at the same time by the same court. In effect, the annulment proceedings do not suspend the enforcement proceedings. If a petition for recognition and enforcement of a foreign arbitral award (i.e., an arbitral award rendered in an arbitration seated outside the Philippines) has been filed, a Philippine court may defer action on the petition upon notice that an application for the setting aside of the award has been made with a competent authority in the country where the award was made.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Philippine courts have not yet ruled upon this issue.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	While a hearing conducted remotely despite a party's objection is not expressly stated as one of the grounds for setting aside an international commercial arbitral award, the losing party may try to argue that the non-participating party was unable to present one's case, or that the arbitral procedure was not conducted in accordance with the parties' agreement if the parties may be argued to have previously agreed that hearings shall be made in-person. Likewise, for domestic arbitral awards, the losing party may try to argue that the order of the arbitral tribunal to conduct the hearing remotely is a misconduct on the part of the arbitrators which materially prejudiced the rights of the objecting party. Whether or not the losing party will succeed will depend on the totality of facts and circumstances of the arbitration proceedings, and not solely on the remote hearings.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	The Special ADR Rules does not provide for state immunity as among the grounds to resist the enforcement of an award. In this connection, the Philippine Supreme Court ruled in *China National Machinery & Equipment Corp. v. Santamaria* (G.R. No. 185572, February 7, 2012) that (i) an agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit, and (ii) the doctrine of state immunity cannot be extended to commercial, private and proprietary acts.

	However, any money claims against the government are within the primary jurisdiction of the Commission on Audit ("COA"). In this respect, the Philippine Supreme Court ruled in *Department of Environment and Natural Resources v. United Planners Consultants, Inc.* (G.R. No. 212081, February 23, 2015) that the settlement of any money claim against the government is still subject to the primary jurisdiction of the COA despite the finality of the arbitral award confirmed by the Regional Trial Court pursuant to the Special ADR Rules. Accordingly, any money claims must still be approved by the COA through a petition filed before them. This requirement holds unless an appropriation law has already been enacted to cover the prevailing party's money claim against the government.
Is the validity of blockchain-based evidence recognised?	At present, there are no rules which expressly recognize blockchain-based evidence.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	While the Alternative Dispute Resolution Act of 2004 Implementing Rules and Regulations ("ADR Act IRR") requires that the arbitration agreement and award be in writing and signed, the blockchain may meet this requirement if the blockchain, may be argued as an electronic document under the E-Commerce Act.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	Yes, the court may consider a blockchain agreement and/or award as originals, provided that the governing law of the arbitration agreement recognizes the validity of an arbitration agreement and award recorded in a blockchain. This view is also consistent with the definition of an original of a document under the Revised Rules on Evidence.
Other key points to note?	Arbitrators have full discretion in the admission or exclusion of evidence. A domestic arbitral award or international commercial arbitral award may not be appealed. The petition to recognize and enforce an arbitral award may be filed anytime within 10 years from receipt of the award. However, if a timely petition to set aside an arbitral award is filed (which must be filed within three months from the receipt of the award), the opposing party must file therein and in opposition thereto the petition for recognition and enforcement of the same award within fifteen (15) days from receipt of the petition to set aside. A foreign arbitral award is presumed to have been made and released in due course of arbitration and is subject to enforcement by the court.

JURISDICTION DETAILED ANALYSIS

1 The legal framework of the jurisdiction

1.1 Law governing the arbitration agreement – if based on the UNCITRAL Model Law, what key modifications if any have been made to it? If not, what form does the arbitration law take?

Arbitration in the Philippines is governed principally by Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004 ("RA 9285" or the "ADR Act"). RA 9285 was enacted on February 4, 2004 and primarily adopted: (1) Republic Act No. 876, otherwise known as the Arbitration Law ("RA 876"), which was enacted on June 19, 1953 to govern domestic arbitration, and (2) the Model Law on International Commercial Arbitration ("Model Law") adopted by the United Nations Commission on International Trade Law on June 21, 1985 to govern international commercial arbitration. Some provisions of the Model Law were also made applicable to domestic arbitration. Department of Justice Circular No. 98, otherwise known as Alternative Dispute Resolution Act of 2004 Implementing Rules and Regulations ("ADR Act IRR") was issued to provide specific guidelines for the implementation of RA 9285.

Under RA 9285, an arbitration is considered an international commercial arbitration if (a) it involves any party whose place of business is outside the Philippines (RA 9285, Sec. 3(p)) or the place where a substantial part of the obligations is to be performed or the place with which the subject matter of the dispute is most closely connected is outside the Philippines, or the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country, and (b) it covers matters arising from all relationships of a commercial nature, whether contractual or not (*e.g.*, any trade transaction for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing; consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road) (RA 9285, Sec. 21).

Further, pursuant to Section 34 of RA 9285, disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines are governed by Executive Order No. 1008, otherwise known as the Construction Industry Arbitration Law ("EO 1008"), which was enacted on February 4, 1985. The discussion below will not consider the rules for construction arbitration under EO 1008.

1.2 When was the arbitration law last revised?

RA 9285 has not been amended to date.

2 The arbitration agreement

2.1 How do courts in the jurisdiction determine the law governing the arbitration agreement?

There is no express law setting out the rules on the law governing the arbitration agreement. However, it is the policy of the law to promote party autonomy in the resolution of disputes or the parties' freedom to make their own arrangements to resolve their disputes (RA 9285, Sec. 2). Thus, the law governing the arbitration agreement will depend on the choice-of-law provision of the parties in the arbitration agreement. Generally, Philippine courts shall apply the law agreed upon by the parties, provided that there is a substantive relationship between the choice of law and the arbitration agreement. In the absence of such agreement, Philippine courts shall apply the law which they determine to have the most substantive relationship with the arbitration agreement. In *Saudi Arabian Airlines v. Court of Appeals* (G.R. No. 122191, October 8, 1998), the Philippine Supreme Court lists the relevant factors to determine which law has the most substantive relationship. These factors could be any of the following among others: (1) the nationality of a person, his domicile, his residence, his place of sojourn, or his origin; (2) the seat of a legal or juridical person, such as a corporation; (3) the situs of a thing, that is, the place where a thing is, or is deemed to be situated; (4) the place where an act has been done; (5) the place where an act is intended to come into effect; (6) the intention

of the contracting parties as to the law that should govern their agreement; and (7) the place where judicial or administrative proceedings are instituted or done. In *Hasegawa and Nippon Engineering Consultants Co., Ltd. v. Kitamura*, (G.R. No. 149177, November 23, 2007) the Philippine Supreme Court held that for contract disputes, the "state of the most significant relationship rule" may also be applied by considering the following connecting factors: (i) place where the contract was made, (ii) place of negotiation, (ii) place of performance, and (iv) the domicile, place of business, or place of incorporation of the parties.

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

It should be noted that RA 9285 uses the word "place" to describe the legal seat of an arbitration.

If the arbitration agreement does not designate the place or seat of arbitration but includes a reference to a venue, the tribunal will first decide whether the parties intended the reference as the place or seat of arbitration, and if not, the seat will be in Metro Manila by default, unless the tribunal designates a seat otherwise, taking into account the circumstances of the case, including convenience of the parties (RA 9285, Sec. 30).

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, the arbitration agreement is considered to be independent from the rest of the contract in which it is set forth. A.M. No. 07-11-08-SC, otherwise known as the Special ADR Rules, recognizes the principle of separability of the arbitration clause, which means that such clause shall be treated as an agreement independent of the other terms of the contract of which it forms part. Accordingly, a decision that the contract is null and void shall not render the arbitration agreement invalid.

2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

Department of Justice Circular No. 98, otherwise known as Alternative Dispute Resolution Act of 2004 Implementing Rules and Regulations ("ADR Act IRR"), requires that the arbitration agreement 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 defense in which the existence of an agreement is alleged by one party and not denied by another. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. 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.

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Under Article 1311 of the Civil Code of the Philippines, contracts take effect only between the parties, their assigns and heirs. This is the principle of privity of contract. Thus, a third party who is not a party to the arbitration agreement shall not be bound by the arbitration agreement. Consequently, a third party cannot be impleaded in the arbitration proceedings and the arbitral tribunal cannot compel a third party to participate in the proceedings without that party's consent [See *Fruehauf Electronics Philippines Corporation v. Technology Electronics Assembly and Management Pacific Corporation*, G.R. No. 204197, November 23, 2016]. Known exceptions include: (1) doctrine of piercing the veil of corporate fiction if one or both of the parties involved are juridical entities where the individuals composing the juridical entity are the ones considered to be the party to the contract in certain instances (*e.g.* existence of fraud); and (2) when an agent signs the contract on behalf of the principal and in accordance with the orders of the principal. The Philippine Supreme Court, however, has not ruled on this issue in relation to an arbitration agreement.

2.6 Are there restrictions to arbitrability? In the affirmative: do these restrictions relate to specific domains (such as anti-trust, employment law etc.) and/or specific persons (i.e., State entities, consumers etc.)?

Yes, there are restrictions to arbitrability on the basis of the nature of the dispute. The following disputes may not be referred to arbitration under Philippine law: (a) labor disputes; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime (*i.e.*, inheritance); (g) criminal liability; (h) questions on the validity of legal separation; and (i) future support (*i.e.*, financial obligations of a parent to a child).

3 Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

The Philippines is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which provides, among others, that the "*court of a Contracting State, when seized of an action in a matter of respect of which the parties have made an agreement [to submit the dispute to arbitration], shall, at the request of one of the parties, refer the parties to arbitration…*" (New York Convention, Art. II(3)).

In this regard, Philippine courts will generally stay litigation if there is a valid arbitration agreement covering the dispute. RA 9285 sets forth as a policy of the State, the promotion of party autonomy in the resolution of disputes such that the State encourages the use of alternative dispute resolution to achieve speedy and impartial justice while declogging court dockets. Section 24 of the same law provides that a court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Court proceedings may be set aside if the proceedings continue despite the court having been notified of the existence of an arbitration agreement between the parties (see *Koppel, Inc. v. Makati Rotary Club Foundation, Inc.,* G.R. No. 198075, September 4, 2013).

The Special ADR Rules further provide that an order referring a dispute to arbitration is immediately executory and cannot be the subject of a motion for reconsideration, appeal or a petition for certiorari.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

The law makes no distinction between an arbitration agreement providing for arbitration inside or outside of the Philippines.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Philippine courts are not bound by any injunction issued by an arbitrator enjoining the conduct of litigation proceedings. Philippine courts, not being a party to the arbitration, are not bound by injunction orders that may be issued by the arbitrator. However, as mentioned above, a party may request a Philippine court, not later than the pre-trial conference, to refer the parties to arbitration. Moreover, pursuant to Rule 5.6 of the Special ADR Rules, Philippine courts may assist in the enforcement of interim measures of protection issued by arbitral tribunals, such as injunction orders, which the latter cannot enforce effectively.

3.3 On what grounds(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

As a rule, Philippine courts do not have the authority to directly intervene in arbitrations seated outside the Philippines. However, under the Special ADR Rules, a party to an arbitration agreement, without

distinguishing whether it provides for a foreign or domestic arbitration, may petition a Philippine court under the Special ADR Rules to issue an interim measure of protection before the arbitration is commenced, after the arbitration is commenced but before the constitution of the arbitral tribunal, or after the constitution of the arbitral tribunal but only to the extent that the arbitral tribunal has no power to act or unable to act effectively. This may include a preliminary injunction directed against a party to the arbitration from pursuing a court action to resolve an arbitrable dispute.

In addition, any party to an arbitration, whether domestic or foreign, may request a court to provide assistance in the taking of evidence. These include an order directing a person found in the Philippines to, among others, comply with a subpoena, appear as a witness before a deposition officer, allow a physical examination of a person or inspection of things or premises, allow the recording or documentation of the condition of persons, things, or premises, allow the examination and copying of documents, and perform any similar acts. Furthermore, a party, counsel or witness, who disclosed or was compelled to disclose confidential information in an arbitration, may file a petition for a protective order to prevent such information from further disclosure without express consent of the person who made the disclosure.

4 The conduct of the proceedings

4.1 Can parties retain foreign counsel or be self-represented?

There is no prohibition for a party to be self-represented or be represented by outside counsel in either a domestic or an international commercial arbitration. Outside counsel may either refer to a foreign or local counsel, or any other third-party, who is not exclusively employed by a party. Under Sections 22 and 33 of RA 9285, a party may be represented by any person of his choice in an arbitration conducted in the Philippines. However, should the party decide to retain outside counsel, such counsel shall not be authorized to appear as counsel in any Philippine court, or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears, unless admitted to the practice of law in the Philippines.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of a gravity such as to justify this outcome?

When a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstance 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 circumstance to the parties unless they have already been informed of them by him. The ADR Act IRR provides that 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 on which the parties have agreed. A party may challenge an arbitrator which it has appointed or in whose appointment it has participated, only for reasons which have arisen or of which it becomes aware after the appointment. Thus, the failure to disclose by itself, will not justify an acceptance of a challenge. It must be shown that there are justifiable doubts as to his impartiality or independence.

The challenge must first be referred to the arbitral tribunal for resolution. If the challenge is not successful, the aggrieved party may request the appointing authority to decide on the challenge. Should the appointing authority fail or refuse to act on the challenge within the relevant period, then the aggrieved party, pursuant to Rule 7.2 of the Special ADR Rules, may renew the challenge through a petition filed with a Regional Trial Court (a) where the principal place of business of any of the parties is located, (b) if any of the parties are individuals, where those individuals reside, or (c) in the National Capital Region. The petition shall state (a) the name/s of the arbitrator's challenged and his/their address, (b) grounds for the challenge, (c) facts showing that the ground for the challenge has been expressly or impliedly rejected by the challenged arbitrator/s; and (d) facts showing that the appointing authority failed or refused to act on the challenge.

However, for domestic arbitral awards, one of the grounds to vacate an arbitral award is the willful non-disclosure of the disqualification of one or more of the arbitrators. For international commercial arbitral

awards, the disqualification of one or more of the arbitrators may be argued as rendering the composition of the arbitral tribunal to be not in accordance with the agreement of the parties, which is a ground to set aside the enforcement of the arbitral award.

Additionally, in the case of *Global Medical Center of Laguna, Inc. v. Ross Systems International, Inc.* (G.R. Nos. 230112 and 230119, May 11, 2021), the Philippine Supreme Court set out certain guidelines regarding the judicial review of arbitral awards rendered by the Construction Industry Arbitration Commission ("**CIAC")** in construction disputes. Under these guidelines, the Philippine Court of Appeals may review the factual findings of a CIAC arbitral tribunal if there is sufficient and demonstrable showing that the integrity of the CIAC arbitral tribunal had been compromised (i.e., allegations of corruption, fraud, misconduct, evident partiality, incapacity or excess of powers within the tribunal). This was further reiterated and emphasized in the case of *ASEC Development and Construction Corp. vs. Toyota Alabang, Inc.* (G.R. Nos. 243477-78, April 27, 2022) wherein the Philippine Supreme Court stated that parties may appeal questions of fact to the Court of Appeals when they also challenge the integrity of the CIAC arbitral tribunal.

4.3 On what ground(s) do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

In general, should the appointing authority refuse to act within thirty (30) days from receipt of the request to appoint arbitrators, a party may submit an application to the court.

Rule 6.1 of the Special ADR Rules provides that a court shall act as appointing authority in all instances where arbitration is *ad hoc* and the parties fail to provide a method for appointing or replacing an arbitrator, or substitute arbitrator, or the method agreed upon is ineffective, and the National President of the Integrated Bar of the Philippines ("IBP") or his duly authorized representative fails or refuses to act within such period as may be allowed under the pertinent rules of the IBP or within such period as may be agreed upon by the parties, or in the absence thereof, within thirty (30) days from receipt of such request for appointment. It should be noted that in *ad hoc* arbitration, the default appointment of arbitrators is made by the National President of the IBP or his duly authorized representative.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider ex parte requests?

Yes, Philippine courts have the power to issue the following interim measures of protection relating to an arbitration: (a) preliminary injunction directed against a party to an arbitration, (b) preliminary attachment against property or garnishment of funds in the custody of a bank or third person, (c) appointment of a receiver, (d) detention, preservation, delivery, or inspection of property, or (e) assistance in the enforcement of an interim measure of protection granted by the arbitral tribunal, which the latter cannot enforce effectively. Any such interim measure of protection may be issued in order to: (i) prevent irreparable loss or injury; (ii) provide security for the performance of any obligation; (iii) produce or preserve any evidence; and (iv) compel any other appropriate act or omission.

These interim measures may even be issued by courts pending the constitution of the arbitral tribunal. Under Section 5.2 of the Special ADR Rules, a petition for an interim measure of protection may be made (a) before arbitration is commenced, (b) after arbitration is commenced, but before the constitution of the arbitral tribunal, or (c) after the constitution of the arbitral tribunal and at any time during arbitral proceedings but, at this stage, only to the extent that the arbitral tribunal has no power to act or is unable to act effectively.

In cases where the court finds that there is an urgent need to either (a) preserve property, (b) prevent the respondent from disposing of, or concealing, the property, or (c) prevent the relief sought from becoming illusory because of prior notice, the court may issue an immediately executory temporary order of protection *ex parte* and require the petitioner to post a bond to answer for any damage that respondent may suffer as a result of its order. The *ex parte* temporary order of protection shall be valid only for a period of twenty (20) days from the service on the party required to comply with the order.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The ADR Act IRR mandates the equal treatment of parties, i.e., the parties shall be treated with equality and each party shall be given full opportunity to present its case. In the absence of the parties' agreement on the procedure to be followed in the arbitration proceedings, the law allows the arbitral tribunal to conduct the arbitration in such manner as it deems appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence. The ADR Act IRR however provides that, unless the arbitral tribunal considers inappropriate, the 1976 UNCITRAL Arbitration Rules shall apply subject to the clarification that all references to the "Secretary-General of the Permanent Court of Arbitration" shall be deemed to refer to the appointing authority under the law.

4.6 Does it provide for the confidentiality of arbitration proceedings?

Yes, the law provides for the confidentiality of arbitration proceedings. Under Section 23 of RA 9285, the arbitration proceedings, including the records, evidence, and the arbitral award shall be considered confidential and shall not be generally published. Publication of the information obtained through the proceedings may be allowed: (1) where there is consent of the parties, or (2) for the limited purpose of disclosing to the court relevant documents in cases where resort to the court is allowed. However, these exceptions do not extend to information containing secret processes, developments, research, and other information (*i.e.*, business or trade secrets) where it is shown that the applicant shall be materially prejudiced by an unauthorized disclosure thereof.

According to the Philippine Supreme Court in *Fruehauf Electronics v. Technology Electronics* (G.R No. 204197, 23 November 2016), Philippine law highly regards the confidentiality of arbitration proceedings that it devised a judicial remedy to prevent the unauthorized disclosure of confidential information obtained from arbitration proceedings.

In this connection, pursuant to Rule 10 of the Special ADR Rules, a party, counsel or witness who disclosed or who was compelled to disclose information relative to the subject of the arbitration proceedings under circumstances that would create a reasonable expectation, on behalf of the source, that the information shall be kept confidential, may petition a Regional Trial Court to issue a protective order to prevent such information from being further disclosed without the express written consent of the source or the party who made the disclosure. The protective order may be granted upon showing that the applicant would be materially prejudiced by an unauthorized disclosure of the information obtained, or to be obtained, during an arbitration proceeding. Further, if there is a pending court proceeding in which the information obtained in an arbitration proceeding is required to be divulged or is being divulged, the party seeking to enforce the confidentiality of the information may file a motion to enjoin the confidential information from being divulged or to suppress confidential information.

4.7 Does it regulate the length of arbitration proceedings?

No, the law does not regulate the length of arbitration proceedings.

4.8 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

Section 30 of RA 9285 provides that the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for hearing witnesses, experts, or the parties.

RA 9285 does not prohibit the holding of hearings and/or meetings remotely. The Philippine Dispute Resolution Center, Inc., Philippine International Center for Conflict Resolution, Inc., and CIAC have also issued guidelines for the conduct of virtual hearings and/or meetings. However, in case of an objection from a party, the arbitral tribunal must determine whether such remote holding of hearings and/or meeting shall, among others, prevent a party from presenting its case.

4.9 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Yes, Section 28 of RA 9285 provides that arbitrators may issue interim measures of protection:

(a) After the constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection or modification thereof, may be made with the arbitral tribunal.
(b) The following rules on interim or provisional relief shall be observed:
    (i) Any party may request that provisional relief be granted against the adverse party;
    (ii) Such relief may be granted to prevent irreparable loss or injury, provide security for the performance of any obligation, produce or preserve any evidence, or compel any other appropriate act or omission;
    (iii) The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order;
    (iv) Interim or provisional relief is requested by written application transmitted by reasonable means to the arbitral tribunal and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and evidence supporting the request;
    (v) The order shall be binding between the parties;
    (vi) Either may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal; and
    (vii) A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

4.10 Does it regulate the arbitrator's right to admit/exclude evidence? For example, are there any restrictions on the presentation of testimony by a party employee?

The arbitrator has the full discretion in determining the admission or exclusion of evidence. In this regard, Article 19 of the Model Law, which applies to both international commercial arbitration and domestic arbitration, provides that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. Further, with respect to domestic arbitration, Section 15 of RA 876 provides that the arbitrators shall be the sole judge of the relevancy and materiality of the evidence offered or produced and shall not be bound to conform to the Rules of Court pertaining to evidence.

There are no restrictions on the presentation of the testimony of a party employee.

4.11 Does it make it mandatory to hold a hearing?

No. Article 4.24, Rule 5, Chapter 4, of the ADR Act IRR, which applies to international commercial arbitration and adopts the language of Article 24 of the Model Law, states that subject to any contrary agreement by the parties, the arbitral tribunal shall decide (1) whether to hold oral hearings for the presentation of evidence or for oral argument, or (2) 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.

In domestic arbitration, Section 12 of RA 876 provides that subject to the terms of the contract between the parties, the arbitrators selected shall, within the relevant periods set out in the law, set a time and place for the hearing of the matters submitted to them, and shall notify each of the parties of the same. The parties may resort to other processes in lieu of a hearing. In this regard, Section 18 of RA 876 recognizes the right of the parties to agree to submit their dispute to arbitration through the submission of agreed statement of facts and written arguments.

4.12 Does it prescribe the principles governing the awarding of interest?

No, the arbitration law does not prescribe principles governing the awarding of interest. Having said that, under Philippine law, interest may be awarded in cases involving breach of contract (Civil Code of the Philippines, Art. 2210). Further, if the obligation consists in the payment of a sum of money and the debtor incurs delay, interest shall be awarded based on the rate agreed upon or, in the absence of stipulation, the legal rate of 6% per annum (Civil Code of the Philippines, Art. 2209; See also BSP Circular No. 799 series of 2013).

4.13 Does it prescribe principles governing the allocation of arbitration costs?

Generally, arbitration costs in both international commercial arbitration and domestic arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. With respect to the costs of legal representation (the costs of expert advice and of other assistance required by the arbitral tribunal), the arbitral tribunal shall be free to determine which party shall bear such costs or it may apportion such costs between the parties if it determines that appointment is reasonable, taking into account the circumstances of the case (ADR Act IRR, Arts. 4.46(d) and 5.46(e)).

Further, in domestic arbitration, arbitrators have the power to assess the expenses of any party against another party, when such assessment is deemed necessary (RA 876, Sec. 20).

4.14 Liability

4.15 Do arbitrators benefit from immunity from civil liability?

Pursuant to Section 5 of RA 9285, in relation to Section 38(1), Chapter 9, Book I of the Administrative Code of 1987, arbitrators shall not be civilly liable for acts done in the performance of their duties, unless there is a clear showing of bad faith, malice, or gross negligence.

4.16 Are there any concerns arising from potential criminal liability for any of the participants in arbitration proceeding?

At present, there are no special rules which provide for potential criminal of any of the participants in the arbitration proceeding.

5 The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes, the parties can waive the requirement for an award to provide reasons. Under Article 31(2) of the Model Law (which, pursuant to RA 9285, applies to international commercial and domestic arbitrations), the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given (ADR Act IRR, Arts. 4.31(b) and 5.31(b)).

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The Philippine arbitration laws do not prohibit parties from waiving their right to seek the setting aside of an arbitral award. In this regard, Article 2044 of the Civil Code of the Philippines provides that any stipulation that the arbitrators' award or decision shall be final, is valid, except when there is, among others, mistake, fraud, violence, intimidation, undue influence, or falsity of documents. Nonetheless, it may be argued that the right to seek the annulment of the award, when its recognition or enforcement would be contrary to public policy, may not be waived by the parties. This issue, however, has not been resolved by the Philippine Supreme Court.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical or unusual requirements that must be complied with to ensure the validity of the arbitral award. Under Article 31(1) of the Model Law, which applies to both international commercial and domestic arbitrations, the award must be in writing and signed by the arbitrator or majority of all the members of the tribunal in case of arbitral proceedings with more than one arbitrator (ADR Act IRR, Arts. 4.31(a) and 5.31(a)).

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No, the law does not provide for an appeal of an award. A petition to vacate a domestic award, and a petition to set aside or refuse the recognition of the international commercial and foreign arbitral award, based on the grounds prescribed by law, are the exclusive recourse against the award. Thus, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award (Special ADR Rules, Rule 19.7), and, in this regard, Philippine courts are mandated: (a) not to disturb the arbitral tribunal's determination of facts and/or interpretation of law in a petition to vacate a domestic award (Special ADR Rules, Rule 11.9), and (b) to dismiss any other recourse from the arbitral award, such as by appeal or petition for review or petition for certiorari or otherwise, with respect to an international commercial award (Special ADR Rules, Rule 12.5).

5.5 What procedure exists for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Rule 11 of the Special ADR Rules sets out the procedure for the confirmation, correction or vacation of awards in domestic arbitration. The procedure is outlined below:

1. *Who may request confirmation, correction or vacation*. - Any party to a domestic arbitration may petition the court to confirm, correct or vacate a domestic arbitral award (Rule 11.1, Special ADR Rules);
2. *When to request confirmation, correction or vacation.* - A party may petition the court to confirm the arbitral award at any time after the lapse of thirty (30) days from receipt of the arbitral award (Rule 11.2 (A), Special ADR Rules) or at any time after the petition to vacate the arbitral award is filed (Rule 11.2 (E), Special ADR Rules). For correction or vacation, a party may make such petition before the court not later than thirty (30) days from receipt of the arbitral award (Rule 11.2(B) and (C), Special ADR Rules);
3. *Grounds to vacate an arbitral award.* - The arbitral award may be vacated on the following grounds: (a) the arbitral award was procured through corruption, fraud or other undue means; (b) there was evident partiality or corruption in the arbitral tribunal or any of its members; (c) the arbitral tribunal was guilty of misconduct or any form of misbehavior that has materially prejudiced the rights of any party such as refusing to postpone a hearing upon sufficient cause shown or to hear evidence pertinent and material to the controversy; (d) one or more of the arbitrators was disqualified to act as such under the law and willfully refrained from disclosing such disqualification; (e) the arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to them was not made; (f) the arbitration agreement did not exist, or is invalid for any ground for the revocation of a contract or is otherwise unenforceable; or (g) a party to arbitration is a minor or a person judicially declared to be incompetent (Rule 11.4(A), Special ADR Rules);
3. *Venue.* - The petition for confirmation, correction/modification or vacation of a domestic arbitral award may be filed with Regional Trial Court having jurisdiction over the place in which one of the parties is doing business, where any of the parties reside, or where arbitration proceedings were conducted (Rule 11.3, Special ADR Rules);
4. *Form*. - The petition to confirm, correct, or vacate the award shall be verified by a person who has knowledge of the jurisdictional facts (Rule 11.6, Special ADR Rules);

5. *Notice.* - Upon finding that the petition filed under this Rule is sufficient both in form and in substance, the Court shall cause notice and a copy of the petition to be delivered to the respondent allowing him to file a comment or opposition thereto within fifteen (15) days from receipt of the petition. In lieu of an opposition, the respondent may file a petition in opposition to the petition. The petitioner may within fifteen (15) days from receipt of the petition in opposition thereto file a reply (Rule 11.7, Special ADR Rules);
6. *Submission of documents.* - If the Court finds from the petition or petition in opposition thereto that there are issues of fact, it shall require the parties, within a period of not more than fifteen (15) days from receipt of the order, to simultaneously submit the affidavits of all of their witnesses and reply affidavits within ten (10) days from receipt of the affidavits to be replied to. Documents relied upon in support of the statements of fact shall be attached to such affidavits or reply affidavits. If the petition or the petition in opposition thereto is one for vacation of an arbitral award, the interested party in arbitration may file an opposition which shall be supported by a brief of legal arguments to show the existence of a sufficient legal basis for the opposition. (Rule 11.8, Special ADR Rules);
7. *Hearing.* - If on the basis of the petition, the opposition, the affidavits and reply affidavits of the parties, the court finds that there is a need to conduct an oral hearing, the court shall set the case for hearing. Such cases shall have preference over other cases before the court, except criminal cases. During the hearing, the affidavits of witnesses shall take the place of their direct testimonies and they shall immediately be subject to cross-examination thereon. The Court shall have full control over the proceedings in order to ensure that the case is heard without undue delay (Rule 11.8, Special ADR Rules);
8. *Judgment of the court.* - Unless a ground to vacate an arbitral award is fully established, the court shall confirm the award. In resolving the petition or petition in opposition thereto, the court shall either confirm or vacate the arbitral award. The court shall not disturb the arbitral tribunal's determination of facts and/or interpretation of law. In a petition to vacate an award or in petition to vacate an award in opposition to a petition to confirm the award, the petitioner may simultaneously apply with the Court to refer the case back to the same arbitral tribunal for the purpose of making a new or revised award or to direct a new hearing, or in the appropriate case, order the new hearing before a new arbitral tribunal, the members of which shall be chosen in the manner provided in the arbitration agreement or submission, or the law. In the latter case, any provision limiting the time in which the arbitral tribunal may make a decision shall be deemed applicable to the new arbitral tribunal (Rule 11.9, Special ADR Rules).

Rule 12 of the Special ADR Rules sets out the procedure for the recognition and enforcement of an international commercial arbitral award rendered by an arbitral tribunal seated in the Philippines. The procedure is outlined below:

1. *Who may request recognition and enforcement*. - Any party to an international commercial arbitration in the Philippines may petition the proper court to recognize and enforce an arbitral award (Rule 12.1, Special ADR Rules);
2. *When to file petition*. - The petition to recognize and enforce an arbitral award may be filed anytime within 10 years from receipt of the award (Civil Code of the Philippines, Art. 1144). However, if a petition to set aside an arbitral award is timely filed (*i.e.,* within three [3] months from the receipt of the award), the opposing party must file at the same court and in opposition thereto the petition for recognition and enforcement of the same award within fifteen (15) days from receipt of the petition to set aside (Rule 12.2, Special ADR Rules);
3. *Grounds to oppose a petition for recognition and enforcement*. – A party resisting the recognition and enforcement of an arbitral award must prove that: (a) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under Philippine law; (b) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (c) 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 only that part of the award which contains decisions on matters submitted to arbitration may be enforced; (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Philippine law from which the parties cannot derogate, or, failing such agreement, was not in accordance with Philippine law; (e) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines; or (f) the recognition or enforcement of the award would be contrary to public policy (Rule 12.4, Special ADR Rules). These grounds were drawn from Article V of the New York Convention;

4. *Venue*. - The petition may, at the option of the petitioner, be filed with the Regional Trial Court: (a) where arbitration proceedings were conducted; (b) where any of the assets to be attached or levied upon is located; (c) where the act to be enjoined will be or is being performed; (d) where any of the parties to arbitration resides or has its place of business; or (e) in the National Capital Judicial Region (Rule 12.3, Special ADR Rules);
5. *Form*. - The application to recognize and enforce (either through (a) a petition to recognize and enforce, or (b) an opposition to a petition to set aside the award), shall be verified by a person who has personal knowledge of the facts stated therein (Rule 12.6, Special ADR Rules);
6. *Notice*. - Upon finding that the petition filed is sufficient both in form and in substance, the court shall cause notice and a copy of the petition to be delivered to the respondent directing him to file an opposition thereto within fifteen (15) days from receipt of the petition. In lieu of an opposition, the respondent may file a petition to set aside in opposition to a petition to recognize and enforce, or a petition to recognize and enforce in opposition to a petition to set aside (Rule 12.8, Special ADR Rules);
7. *Submission of documents*. - If the court finds that the issue between the parties is mainly one of law, the parties may be required to submit briefs of legal arguments, not more than fifteen (15) days from receipt of the order. If the court finds that there are issues of fact relating to the grounds relied upon for the court to set aside, it shall require the parties within a period of not more than fifteen (15) days from receipt of the order simultaneously to submit the affidavits of all of their witnesses and reply affidavits within ten (10) days from receipt of the affidavits to be replied to. The parties shall attach to these affidavits all documents relied upon in support of their positions (Rule 12.9, Special ADR Rules);
8. *Hearing*. – If, on the basis of the submissions of the parties, the court finds that there is a need to conduct an oral hearing, the court shall set the case for hearing. During the hearing, the affidavits of witnesses shall take the place of their direct testimonies and they shall immediately be subject to cross-examination thereon. The court shall ensure that the case is heard without undue delay (Rule 12.10, Special ADR Rules);
9. *Judgment of the court*. – Unless a ground to set aside an arbitral award is fully established, the court shall grant the petition to recognize and enforce the arbitral award or dismiss the petition to set aside. If a petition to recognize and enforce the arbitral award is filed in opposition to the petition to set aside, the court shall recognize and enforce the award. In resolving the petition or petition in opposition thereto, the court shall either set aside or enforce the arbitral award. The court shall not disturb the arbitral tribunal's determination of facts and/or interpretation of law." (Rule 12.13, Special ADR Rules);

Rule 13 of the Special ADR Rules sets out the procedure for the recognition and enforcement of a foreign award, i.e., an arbitral award rendered by an arbitral tribunal seated outside the Philippines, which is similar to the procedure outlined above for the recognition and enforcement of an international commercial award. One difference though is that the Philippine court shall not set aside a foreign arbitral award but may only refuse to recognize and enforce the same.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

A petition to vacate a domestic award or set aside and refuse the recognition of an international commercial award (*i.e.*, arbitral award where the seat of arbitration is the Philippines), must first be resolved before the award is enforced. In this regard, if a petition to vacate a domestic award is filed within the relevant period before a petition to confirm the award is filed, then the petition to confirm must be filed in opposition to the petition to vacate (Special ADR Rules, Rule 11.2). If a petition to set aside an international commercial award is filed within the relevant period and ahead of a petition to recognize and enforce the award, the petition to recognize and enforce must be filed in opposition to the petition to set aside. If the petition to confirm a domestic award, or a petition to recognize and enforce an international commercial award, is filed before a petition to vacate or set aside is filed, then the petition vacate or set aside must be filed in opposition to the petition to confirm or petition to recognize and enforce. The decision confirming a domestic award, or recognizing and enforcing an international commercial award, may be appealed to the Court of Appeals, but the appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals directs otherwise upon such terms as it may deem just. For example, the Court of Appeals may, as a condition for the stay of the enforcement of the award, require the appellant to post a bond in an amount equivalent to the amount of the award to answer for all damages that may be suffered by the winning party as a result of the stay if the enforcement of the award is sustained on appeal. The failure of the appellant to post the bond, when required by the Court of Appeals, is a ground for the dismissal of the appeal (Special ADR Rules, Rule 19.25).

In a petition to recognize and enforce a foreign arbitral award (*i.e.*, arbitral award where the seat is not the Philippines), a court may adjourn or defer rendering a decision on the petition if, in the meantime, an application for the setting aside or suspension of the award has been made with a competent authority in the country where the award was made (Special ADR Rules, Rule 13.10). Upon application of the petitioner, the court may require the other party to give suitable security.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Under Article 4.36, Rule 6 of the ADR Act IRR, the enforcement of an arbitral award, made in a state that is a party to the New York Convention, may be refused if the party furnishes proof that the award has been set aside or suspended by a court at its seat. There are no known precedents of a request to recognize and enforce an award which has been annulled at the seat.

5.8 Are foreign awards readily enforceable in practice?

A foreign arbitral award is presumed to have been made and released in due course of arbitration and is subject to enforcement by the court. Thus, a Philippine court is therefore mandated to recognize and enforce a foreign arbitral award, unless a ground to refuse recognition or enforcement of the foreign arbitral award under this rule is fully established (Special ADR Rules, Rule 13.11).

6 Funding arrangements

6.1 Are there laws or regulations relating to, or restrictions to, the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

At present, there are no laws, regulations or restrictions on the use of contingency or alternative fee arrangements or third-party funding for arbitration conducted in the Philippines.

7 Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

At present, there are no rules that expressly recognize blockchain-based digital information as evidence. In any case, the tribunal has the power to determine the admissibility, relevance, materiality, and weight of any evidence. Further, with respect to domestic arbitration, Section 15 of RA 876 provides that the arbitrators shall not be bound to conform to the Rules of Court pertaining to evidence in determining the relevance and materiality of the evidence offered or produced at the hearing.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

Yes. Under the ADR Act IRR, the arbitration agreement and the award must both be in writing and respectively signed by the parties and the arbitrator/s in order to be valid. A blockchain may meet this requirement as it is considered as a written contract, which in turn may be considered as an electronic document under Republic Act No. 8792, the Electronic Commerce Act of 2000 ("E-Commerce Act"). An electronic document, as defined in Section 5(f) of the E-Commerce Act, refers to information or the representation of information, data, figures, symbols or other modes of written expression, described or however represented, by which a right is established or an obligation extinguished, or by which a fact may be prove and affirmed, which is received, recorded, transmitted, stored, processed, retrieved or produced electronically. It is expressly provided under RA 9285 that the provisions of the E-Commerce Act apply to arbitration proceedings. It should be noted that, at present, the Philippine Supreme Court has not yet ruled on the recognition of blockchain-recorded contracts as electronic documents.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

Yes, the court may consider a blockchain agreement and/or award as originals, provided that the governing law of the arbitration agreement recognizes the validity of an arbitration agreement and award recorded in a blockchain. Pursuant to Administrative Matter No. 19-08-15-SC, the 2019 Amendments to the 1989 Revised Rules on Evidence ("Revised Rules on Evidence"), an "original" of a document is the document itself or any counterpart intended to have the same effect by a person executing or issuing it. Further, if data is stored in a computer or similar device, any printout or other output readable by sight or other means, shown to reflect the data accurately, is an "original" (Revised Rules on Evidence, Rule 130, Sec. 4). It should be noted though that the Philippine Supreme Court has not yet ruled on this issue.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

Yes, the court may consider an award that has been electronically or digitally signed as an original. As mentioned, a document is considered original provided it is a printout or other output readable by sight or other means, shown to reflect the data accurately. In this connection, Rule 2, Section 1(j) of Administrative Matter No. 01-07-01-SC, the Rules on Electronic Evidence, considers a digital signature as an electronic signature. Thus, a court may consider an electronically or digitally signed award as an original for purposes of recognition and enforcement. It should be noted though that the Philippine Supreme Court has not yet ruled on this issue.

8 Is there likely to be any significant reform of the arbitration on the near future?

There are no pending bills before the Philippine Congress that seek to amend the current arbitration laws in the Philippines. Having said that, the Office of Alternative Dispute Resolution ("OADR"), an agency attached to the Department of Justice which was created under RA 9285 to, among others, "assist the government to monitor, study and evaluate the use by the public and the private sector of ADR, and recommend to Congress needful statutory changes to develop, strengthen and improve ADR practices in accordance with world

standards", has created a Technical Working Group on arbitration to recommend amendments to RA 9285. The OADR will be conducting public consultations on the proposed amendments, after which the proposed amendments will be submitted to the Philippine Congress for consideration.

Incidentally, a bill is currently pending before the Philippine Congress to provide a Modernization Funding for the OADR in the amount of Php 500,000,000 Philippine Pesos, in line with the Philippine public policy to promote, develop and expand the use of ADR in the Philippine public and private sectors.

9 Compatibility of the Delos Rules with local arbitration law

The Delos Rules are compatible with the ADR Act. In particular, the ADR Act promotes party autonomy in the resolution of disputes. This means that parties have the freedom to make their own arrangements to resolve their disputes, including the rules to be followed by the arbitral tribunal in conducing the arbitration proceedings, such as the Delos Rules. In the absence of any such agreement, the dispute shall be resolved in accordance with the procedure set out in the ADR Act and its IRR.

10 Further reading

In *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited* (G.R. No. 212734, December 5, 2018), the Philippine Supreme Court took into account the State's policy in favor of arbitration and enforcement of arbitral awards and adopted the narrow approach in determining whether the enforcement of an award would be contrary to public policy. According to the Supreme Court, mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against the State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society. Since it was not shown how the purported violation of the Philippine laws would violate the State's fundamental tenets of justice and morality, the Supreme Court affirmed the recognition and enforcement of the arbitral award.

In the more recent case of *Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining Co.,* (G.R. Nos. 244063 & G.R. No. 244216, June 21, 2022), however, the Philippine Supreme Court allowed the vacation of an arbitral award on the basis that the determination made by the arbitral tribunal in the subject arbitral award, that one of the parties is exempted from securing a specific government certification as required by law to be a pre-condition for the renewal of its contract with the Philippine government, did not relate merely to interpretation of law, or its application to established facts, but involved a violation of Philippine public policy. Here, the Supreme Court applied Rule 19.10 of the Special ADR Rules which allows courts to entertain a petition to vacate a domestic award on any ground other than those provided under the Special ADR Rules "only if the [domestic award] amounts to a violation of public policy." In justifying the application of *public policy* exception under Rule 19.10, the Supreme Court held that public policy involved (i.e., the protection of rights of indigenous peoples to their ancestral domains) is "clear, explicit, well-defined and dominant, i.e. it is directly ascertainable by reference to a statute, implementing administrative rules and court decisions and not merely from ambiguous and murky general considerations of supposed public interests."

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.,* with offices and a case team?	ϕ
Main arbitration hearing facilities for in-person hearings?	The arbitral bodies listed below have their own hearing room.
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	ϕ
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	ϕ
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	ϕ
Other leading arbitral bodies with offices in the jurisdiction?	Construction Industry Arbitration Commission, Philippine Dispute Resolution Center, Incorporated, and Philippine International Center for Conflict Resolution

DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

TAIWAN

CHAPTER PREPARED BY

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FOR FURTHER INFORMATION

GAP TABLE OF CONTENTS | GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS | FULL GAP ONLINE

EN DELOS MODEL CLAUSES
ES DELOS CLÁUSULAS MODELO
FR DELOS CLAUSES TYPES
PT DELOS CLÁUSULAS MODELO

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law
   a. Framework
   b. Adherence to international treaties
   c. Limited court intervention
   d. Arbitrator immunity from civil liability
2. Judiciary
3. Legal expertise
4. Rights of representation
5. Accessibility and safety
6. Ethics

Evolution of above compared to previous year =

7. Tech friendliness
8. Compatibility with the Delos Rules

VERSION: 2 FEBRUARY 2024 (v01.03)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Taiwan enacted its Arbitration Law in 1961, and since then has established a well-developed legal framework for arbitration through six amendments, including for international arbitrations, with the latest amendment completed in 2015.[1] Although Taiwan is not a member party of either the United Nations or New York Conventions, the spirit of the provisions of both UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**") and the New York Convention ("**NY Convention**") has been included and codified as part of the legal framework in Taiwan. The largest Taiwanese arbitration institution, the Chinese Arbitration Association (CAA), as well as its International Arbitration Center (CAAI), also provides well-established rules and is efficient and impartial in administrating cases. This highly regarded arbitration-friendly framework has made Taiwan an ideal jurisdiction for international arbitration.

Key places of arbitration in the jurisdiction?	Taipei, Taichung, Kaohsiung.
Civil law/common law environment?	Civil law.
Confidentiality of arbitrations?	Unless otherwise agreed to by the parties, all procedures and documents remain confidential.
Requirement to retain (local) counsel?	There is no requirement to retain local counsel. However, if the arbitration counsel does not have a Taiwan bar license, he/she may not merely use or indicate "attorney at law (lawyer)" in Taiwan without indicating the jurisdiction in which he/she has a bar license. We therefore suggest that arbitration counsel should identify the jurisdiction of his/her bar license so as to avoid disputes.
Ability to present party employee witness testimony?	Parties may present their employees as witnesses, provided that there is no history of an employment relationship between the witness and the arbitrator, and if there is, the arbitrator is required to disclose such relationship, and this relationship may constitute a conflict of interest for the arbitrator under Articles 15 and 16 of the Arbitration Law.
Ability to hold meetings and/or hearings outside of the seat?	If agreed by the parties, meetings and/or hearings may be held outside of the seat and/or remotely[2].
Availability of interest as a remedy?	Awards for the recovery of interest can be rendered as a remedy.
Ability to claim for reasonable costs incurred for the arbitration?	Fees charged by the arbitration institution, the arbitral tribunal and/or any expert witness for the arbitration may be determined and allocated by the arbitral tribunal. However, attorney fees may not be deemed part of the arbitration costs.

1 The Arbitration Law is available at https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=I0020001 (last accessed on 22 November 2020). A comparison of the law with the UNCITRAL Model Law and the NY Convention has been provided at Annexes 1 and 2 respectively of the chapter.

2 Ministry of Justice Administrative Interpretation Fa-Lui-Zih No. 10903512280 (2020).

Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no restriction against contingency legal fee arrangements for arbitration (family and criminal matters, which do not allow contingency fee arrangements, are not arbitrable). Third-party funding is permitted only if the funded client agrees thereto and such funding does not affect the impartial professional evaluation of the attorney under Article 30-2 of the Rules of Professional Attorney Ethics.
Party to the New York Convention?	Although Taiwan is not a member of the NY Convention, the contents of the NY Convention are adopted and codified in Taiwan's Arbitration Law (see the comparison note included in the chart in Question 5.8 below for more detail). The procedure for and requirements to recognize/enforce a foreign arbitral award in Taiwan are basically the same as those set forth in the NY Convention. The only difference is that the applicant shall submit the full text of the foreign arbitration law to the court for recognition per Article 48 I (3) of the Arbitration Law.
Party to the ICSID Convention?	Taiwan has not been a listed member since 1980.
Compatibility with the Delos Rules?	The Delos Rules are substantially compatible with the Arbitration Law. However, the Delos Rules provide the arbitral tribunal the power to grant any interim measures. Those measures issued under the Delos Rules may not be enforceable by the Taiwan courts. The party can only request the court to issue orders for interim measures per Article 39 of the Arbitration Law.
Default time-limitation period for civil actions (including contractual)?	The issue of time bars in Taiwan Law is complicated, and time bars vary in length from 1 to 15 years, depending on the facts and legal grounds. A claimant should consult a Taiwan attorney for proper advice on the time bar on a case-by-case basis. Please see our answer at 5.5 below for further details.
Other key points to note?	Article 21 of The Taiwan Arbitration Law requires an arbitral tribunal to render its award within 9 months (6 months plus a 3-month extension determined by the tribunal if necessary) from formation of the tribunal unless otherwise agreed by the parties. If the arbitral tribunal fails to render an award within the above timeframe, either party may file the subject matter of the arbitration to the court for adjudication unless such arbitration is required by law (see Question 2.6.2 for further details).
World Bank, Enforcing Contracts: *Doing Business* score for the current year, if available?	75.1[3]
WJP Civil Justice score (2019)	Not applicable as Taiwan was not evaluated by WJP.

[3] The most recent round of data collection was completed in May 2019.

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	Taiwan enacted the Commercial Arbitration Law in 1961, and since then the Law has been amended six times. The latest amendment was in 2015. The most significant change was the 3rd amendment, which also changed the name of the law to "**Arbitration Law**" in 1998.
UNCITRAL Model Law? If so, any key changes thereto?	1. Taiwan's Arbitration Law is based substantially on the 1985 version of the UNCITRAL Model Law. 2. Unlike the UNCITRAL Model Law, the Arbitration Law provides that interim measures are granted by the court, rather than by the arbitral tribunal.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No, there are no specialized courts or judges for arbitration-related matters. The ordinary civil courts handle arbitration-related matters: • The following courts handle annulment lawsuits to revoke the awards where the place of the arbitration is Taiwan District court / *judgment* — (appeal) → High court / judgment — (appeal) → Supreme court / judgment – for law review only.[4] • The following courts handle applications for recognition of foreign awards / enforcement of local awards District court / ruling — (appeal) → District court panel / ruling — (re-appeal) → High court / ruling-for review of manifest error in the application of the law only.[5]
Availability of *ex parte* pre-arbitration interim measures?	*Ex parte* pre-arbitration interim measures applied for by the claimant at the competent court is available by law and regulations for arbitration if the properties of the respondents or the subject matter of the claim are located / involved within the territory of Taiwan. Pre-arbitration interim measures are available for arbitrations seated in Taiwan as well as for arbitrations seated elsewhere.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction, and the competence-competence doctrine is in principle recognized by the courts.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes.[6]

4 Article 467 of the Code of Civil Procedure.

5 Article 486 IV of the Code of Civil Procedure.

6 Article 30 V of the Arbitration Law.

Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	In addition to the grounds set forth in the NY Convention, there are other grounds for annulment of awards under Articles 38 and 40 of the Arbitration Law (see Question 5.3). The court will refuse to recognize a foreign arbitral award / reject the application for recognition of a foreign arbitral award on certain grounds listed under Articles 48~51 of the Arbitration Law (see Question 5.5).
Do annulment proceedings typically suspend enforcement proceedings?	The annulment proceedings usually result in the suspension of the enforcement of an award upon the respondent's request and subject to providing a certain amount of security as determined by the court according to Article 42 I of the Arbitration Law.[7] (See Question 5.7 below for further details regarding the recognition / enforcement of a foreign arbitral award). If the arbitral award has been annulled, the court will simultaneously revoke any enforcement order with respect to the arbitral award.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Where a foreign arbitral award is annulled at the seat of the arbitration and such annulment cannot be appealed, the court shall refuse to recognise such foreign award upon the other party's motion. (Rather than state that a court "may" refuse enforcement in such a scenario, as Article V(1)(e) of the NY Convention provides, the Arbitration Law provides that the court "shall" refuse to recognize an ultimately annulled foreign award.) Where a foreign arbitral award is pending judicial review of an annulment or for suspension of enforceability at the seat of such foreign arbitration, the court may order the applicant in relation to said award to lodge a suitable and fixed security to suspend the local recognition or enforcement proceedings.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	Only if the arbitral tribunal orders the hearing to be conducted remotely despite the party's objection due to a lack of adequate technical equipment for participation in such remote hearing may such order constitute a reason to annul the award, and even so, only if the procedural flaws also affect the result of the award. Otherwise, we do not think such an order would affect the recognition or enforceability of an ensuing award if the objecting party has been properly equipped with the remote meeting mechanisms per Article 19 of the Arbitration Law.

[7] Article 42 I of the Arbitration Law: "In the event that a party applies for revocation of an arbitral award, the court may grant an application by said party to stay enforcement of the arbitral award once the applicant has paid a suitable and certain security [to the court]."

Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	In principle, disputes arising from government procurement and public-private collaboration agreements can be resolved by arbitration. However, the matters that are decided and ruled on at the discretion of the public bodies per the authorization of the law, e.g., such as administrative sanctions[8] and administrative subsidies, cannot be resolved by arbitration, as they are considered government behaviors; According to Article 122-3 of the Compulsory Enforcement Act[9], awards issued against public property for public use and which public property is necessary for the implementation or conduct of public affairs, or awards for the transfer of such property that are against the public interest cannot be enforced.
Is the validity of blockchain-based evidence recognised?	Where the parties agree, blockchain-based evidence will be recognised. However, in the absence of agreement, such evidence may be reviewed under the Code of Civil Procedure or the evidence rules that the arbitral tribunal considers proper to apply, per Article 19 of the Arbitration Law.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	As communication through electronic methods between the parties may be deemed to have created or established an arbitration agreement, the arbitration agreement recorded on a blockchain may also be deemed valid.[10] However, the arbitration agreement / award may need to be submitted in writing for the court's further recognition and enforcement per the law (see below).
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	A Taiwanese court is unlikely to consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement per Article 48 of the Arbitration Law and Article 6 of the Compulsory Enforcement Law.
Is the jurisdiction monist or dualist?	Dualist.
Other key points to note?	Although Taiwanese courts have ruled that domestic *ad hoc* arbitral awards cannot be enforced, they have recognized and enforced foreign *ad hoc* arbitral awards. Therefore, a domestic *ad hoc* award is less effective than a domestic institutional award, as the court may refuse to enforce a domestic *ad hoc* award, and as such, the enforcement of a domestic *ad hoc* award is based merely on the voluntary performance of the parties.

8 Supreme Court Civil Ruling 91 Tai-Shang-Zih No. 2367 (2002)

9 Article 122-3 of the Compulsory Enforcement Act: "Where the public property owned and administered by the debtor is necessary for the implementation of public affairs or the transfer of such property is against the public interest, the creditor may not compulsorily enforce it. In the circumstances prescribed in the preceding paragraph, the enforcement court shall consult the debtor's opinion or conduct other necessary investigationwhen in doubt."

10 Article 1 IV of the Arbitration Law.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model law? 1985 or 2006 version?

Taiwan's Arbitration Law is based on the 1985 UNCITRAL Model Law. The table at Annex 1 lists the provisions of the 1998 Arbitration Law that were made with reference to said UNCITRAL Model Law. (The 1998 Arbitration Law is substantially the same as the current Arbitration Law.)

1.1.1 If yes, what key modifications if any have been made to it?

The provisions regarding interim measures granted by the arbitral tribunal in the 2006 version Model Law are not adopted by the Arbitration Law, currently, but a party may still obtain interim measures (e.g., an injunction) from courts according to the Code of Civil Procedure per Article 39 of the Arbitration Law.

1.1.2 If no, what form does the arbitration law take?

N/A

1.2 When was the arbitration law last revised?

Taiwan enacted the Commercial Arbitration Law in 1961, and since then the Law has been amended six times. The latest amendment was in 2015. The most significant change occurred with the 3rd amendment, which included the change of the law title to the "Arbitration Law" in 1998.

In the 2015 amendment, the amended Article 47 of the Arbitration Law provides:

1. An arbitral award issued within the territory of Taiwan but based on foreign arbitration rules will be regarded as a foreign award, and
2. A foreign arbitral award shall have the same force as a final judgment of a court after being recognized by the court' (this was revised with reference to Article 3 aof the NY Convention).

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Although no law directly governs/addresses this issue, it can be interpreted per the notions as set forth in Article 50(2) (one of the grounds for the refusal of recognizing a foreign arbitral award) and by scholarly opinion, as explained below:

- If there is an agreement upon a particular law to govern the arbitration agreement *per se*, the court will adhere to such agreement.
- If there is no such agreement, the law governing the arbitration agreement shall be determined in the following order:

  (1) If there is an express or implied choice of law in the contract in which the arbitration agreement is set forth, this express or implied law shall govern the arbitration agreement;

  (2) If there is no choice of law indicated in the contract, the law where the arbitral award was issued shall govern the arbitration agreement.

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

According to Article 20 of the Arbitration Law[11], in the absence of an express designation of a 'seat' in the arbitration agreement, the arbitral tribunal has discretion to decide on the 'seat', which may generally be located where the 'place' or 'venue' is located, and the court will respect such decision.

According to Article 21 of the Arbitration Law[12], the tribunal may decide upon any venue that it deems appropriate in the absence of an agreement on the venue. If the parties have agreed on the place, instead of on a specific venue, the tribunal will generally determine a venue located in the agreed place. Also, the reference to a venue in the arbitration clause (which says nothing else about the place or seat of arbitration) may be considered by the Taiwanese authorities as a place or seat of arbitration.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, the arbitration agreement is considered to be independent as stipulated in the Arbitration Law. That is, even if the contract is deemed to be invalid, the arbitration agreement may still be ruled valid if it meets the requirements.[13]

2.4 What are formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement must be in writing. Any written documents, documentary instruments, correspondence, facsimiles, telegrams, or any other similar types of communications between the parties evincing *prima facie* the existence of the arbitration agreement shall suffice to satisfy such requirement.[14]

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Firstly, even in the absence of an agreement formally signed by the parties, any written documents, documentary instruments, correspondence, facsimiles, telegrams, or any other similar type of communications between the parties evincing the *prima facie* existence of an arbitration agreement will be deemed to establish the existence of an arbitration agreement.[15] Therefore, if there are such communications, a non-signatory may also be a party to an arbitration agreement.

Secondly, as explained at 2.6.2, in certain circumstances, a governmental entity may not object to a dispute arising in connection with a government procurement contract being sent to arbitration by its supplier, whether or not there is an arbitration agreement.[16]

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11 Article 20 of the Arbitration Law: "The place of arbitration, unless agreed upon by the parties, shall be determined by the arbitral tribunal."

12 Article 21 of the Arbitration Law: "In the absence of any stipulation in the arbitration agreement as to how the arbitration is to be conducted, the arbitral tribunal shall, within ten days upon receipt of notice of the [final arbitral] appointment, determine the place (note: it shall mean 'venue' in Chinese) of arbitration as well as the time and date for the hearing, and shall notify both parties thereof…"

13 Article 3 of the Arbitration Law.

14 Article 1 III and IV of the Arbitration Law.

15 Article 1 IV of the Arbitration Law; it should be similar to the 'implied consent' of the theory on extension of arbitration clause to non-signatories.

16 It should be similar to the 'state non-signatories' of the theory on extension of arbitration clause to non-signatories.

Furthermore, according to the relevant laws and regulations, a third party to an arbitration agreement is bound by and may assert the existence of such agreement in any one of the circumstances below:[17] (i) heirs;[18] (ii) the transferee to a contract containing an arbitration agreement or the obligations or rights thereof;[19] (iii) the beneficial third party to a contract;[20] (iv) a guarantor;[21] and (v) a creditor of a party to an arbitration agreement.[22]

2.6 Are there restrictions to arbitrability? In the affirmative:

First, disputes may be settled in which the right or legal relationship of property law in contention can be settled by the party/parties without restriction, and resolution by arbitration is precluded only for disputes involving family law, succession law, or criminal law.[23]

Second, arbitration must be related to certain legal relationships or disputes thereto.[24]

2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

Only disputes in connection with family law, succession law, and or criminal law are restricted from resolution by arbitration.[25] Disputes governed by anti-trust law or employment law are arbitrable.

2.6.2 Do these restrictions relate to specific persons (*i.e.,* State entities, consumers etc.)?

There is no restriction related to specific persons. Kindly note that there are some disputes for which arbitration is required by law to resolve, such as under Article 85-1 of the Government Procurement Act[26] and Article 166 of the Securities and Exchange Act.[27]

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17 As for other theories on the extension of an arbitration clause to non-signatories, *e.g.*, (1) piercing the corporate veil, (2) group of companies, (3) group of contracts, (4) extension to corporate officers and directors, (5) shareholder derivative rights, and (5) joint venture relations, are not explicitly applied as part of the regulations or by arbitral tribunals or courts in practice.

18 Article 1148 of the Civil Code: "An heir shall assume all rights and obligations pertaining to the estate of the decedent at the time of the commencement of the succession, including the status as a party to an arbitration agreement, and thus shall be bound by such agreement."

19 Articles 299 I, 301, and 303 of the Civil Code; Supreme Court Civil Ruling 87 Tai-Kang-Zih No. 630 (1998); Supreme Court Civil Judgment 97 Tai-Shang-Zih No. 793 (2008).

20 Article 270 of the Civil Code: "If the contract contains an agreement of a third-party beneficiary and an arbitration agreement, the beneficial third party to the contract shall be bound by the arbitration agreement contained therein, as well."

21 Article 742 of the Civil Code: "If the contract entered into between the creditor and debtor contains an arbitration agreement, the guarantor shall also be bound by such agreement." See also Supreme Court Civil Ruling 94 Tai-Kang-Zih No. 993 (2005).

22 Article 242 of the Civil Code: "As a creditor may, in order to preserve his right, exercise in his name, any right of the debtor that the debtor neglects to exercise, to exercise the right of the debtor in the contract, such a creditor will be bound by the arbitration agreement, if any." See also Taiwan High Court Civil Judgment 93 Jhong-Shang-Zih No. 59 (2004); Taiwan Taipei District Court Civil Judgment 84 Su-Zih No. 4416 (1995).

23 Article 1 I and II of the Arbitration Law. The Legislative Explanation of Article 1 of the Arbitration Law states as follows: "*That is, as the right or legal relationship of the property law in dispute can be resolved by the party/parties without restriction, such dispute is arbitrable, including but not limited to civil liability issues in connection with corporate law, labour, trademark, and unfair competition. However, if the dispute is related to family or succession under the Civil Code, it cannot be resolved by arbitration, even if there is dispute regarding property thereunder. Moreover, as disputes involving the application of the criminal law are related to the public interest, these also cannot be resolved by arbitration.*"

24 Article 2 of the Arbitration Law: "No arbitration agreement shall be valid unless it was entered into with respect to a specific legal relationship or a dispute related thereto or arising therefrom."

25 Legislative Explanation of Article 1 of the Arbitration Law.

26 Article 85-1 of the Government Procurement Act provides as follows: "Where mediation for construction works and technical services fails because the governmental entity party to a contract for public procurement does not agree to the proposal or resolution for mediation made by the Complaint Review Board for Government Procurement, the governmental entity may not object to the dispute being sent to arbitration by the supplier under the contract". See also Ministry of Justice Interpretation Fa-Lyu-Zih No. 0960038134 (2007).

27 Article 166 of the Securities and Exchange Act: "Any disputes between/among (1) the stock exchange and securities firms, or (2) securities firms in connection with transactions of securities (including government bonds, corporate stocks,

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes, irrespective of whether the place of arbitration is inside or outside of the jurisdiction.

According to Article 4 of the Arbitration Law, the court shall stay litigation procedures if the defendant raises an objection that there is a valid arbitration agreement for resolution of the dispute. To be precise, the court will suspend the litigation proceeding and order the plaintiff to submit the dispute to arbitration within a specified time (unless the defendant has proceeded to oral argument on the merits),[28] and such litigation shall be regarded as withdrawn when the arbitral award is made.[29] If the plaintiff does not bring the dispute to arbitration in time (after the plaintiff being ordered to submit the dispute to arbitration), the court shall dismiss such litigation action.[30]

However, if the parties only agree that the dispute "can" (instead of "shall") be brought to arbitration, without limiting the possibility of litigation in the courts, then the procedure adopted for resolving such dispute will depend on the time that the dispute is submitted to arbitration. If the dispute is submitted to arbitration before that dispute is brought to the court, Article 4 I of the Arbitration Law will apply, and the court shall suspend the litigation proceeding in favour of arbitration.[31] Conversely, if the litigation is brought before the arbitration, the court will not suspend the litigation proceeding or refer the parties to arbitration.[32]

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There is no law authorising anti-litigation injunction by arbitrators in Taiwan. However, Article 4 of the Arbitration Law provides that if a party to an arbitration agreement initiates a lawsuit violating the arbitration agreement, the court shall,[33] upon the request of the other party, suspend the litigation and order the plaintiff to submit the dispute to arbitration within a specified time.[34] The above law may have a similar effect as the anti-litigation injunction.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

There is neither a law authorising the anti-suit injunction, nor any mechanism by which to intervene in arbitrations seated outside of the jurisdiction in Taiwan.

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corporate bonds, and other securities approved by the Competent Authority) shall be resolved by arbitration whether or not there is an agreement between the parties to resolve such disputes by arbitration."

28 Article 4 I of the Arbitration Law: "In the event that one of the parties to an arbitration agreement commences a legal action contrary to the arbitration agreement, the court may, upon application by the adverse party, suspend the legal action and order the plaintiff to submit to arbitration within a specified time, unless the defendant proceeds to respond to the legal action."

29 Article 4 III of the Arbitration Law: "After the suspension referred to in the first paragraph of this Article, the legal action shall be deemed to have been withdrawn at the time an arbitral award is made."

30 Article 4 II of the Arbitration Law: "If a plaintiff fails to submit to arbitration within the specified time period as prescribed in the preceding paragraph, the court shall dismiss the legal action."

31 Supreme Court Civil Ruling 106 Tai-Kang-Zih No. 843 (2017)

32 Supreme Court Civil Ruling 96 Tai-Kang-Zih No. 300. (2007)

33 Please note that the official English translation of the Arbitration Law uses the word "*may*", while it should read as "*shall*" per the original Chinese Law text.

34 Article 4 I of the Arbitration Law.

With respect to anti-suit injunctions requested to restrain the Taiwan court's ability to hear a case, we believe that an anti-suit injunction will be contrary to Taiwan's public policy. If one requests the Taiwan court to recognize an anti-suit injunction issued by a foreign court, the Taiwan court will likely refuse the request according to Article 49 of the Non-Contentious Matters Law.

4. The conduct of the proceedings

4.1 Can parties retain foreign counsel or be self-represented?

Parties may either retain outside counsel or be self-represented.[35] However, if arbitration counsel does not have a Taiwan bar license, he/she may not merely use or indicate "attorney at law (lawyer)" in Taiwan without indicating the jurisdiction in which he/she has a bar license. We therefore suggest that arbitration counsel identify the jurisdiction of his/her bar license, so as to avoid disputes.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The court's attitude towards an application to challenge an arbitrator

This will depend upon the circumstances the arbitrator failed to disclose. If it is any of the specific circumstances set forth in Article 15 II (1)~(3) of the Arbitration Law, an arbitrator's failure to disclose may suffice for the court to accept a challenge. As for other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator set forth in Article 15 II(4) of the Arbitration Law, the court will require the challenging party to submit proof showing the arbitrator's lack of impartiality or independence (see explanation below). An arbitrator must be independent and impartial. In the event that any of the following circumstances exist with respect to an arbitrator, such arbitrator must immediately disclose the details thereof:

A. any of the causes under which, in the event of judicial proceedings, a judge will be required to withdraw from the proceeding per Article 32 of the Code of Civil Procedure;[36] (Article 15 II (1) of the Arbitration Law)
B. the existence or history of an employment or agency relationship between the arbitrator and either party; (Article 15 II (2) of the Arbitration Law)
C. the existence or history of an employment or agency relationship between the arbitrator and an agent of either party or between the arbitrator and any of the key witnesses; and (Article 15 II (3) of the Arbitration Law)
D. the existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator. (Article 15 II (4) of the Arbitration Law)

Either party may apply to have an arbitrator withdraw in any one of the above circumstances, or where an arbitrator is unqualified in accordance with the arbitration agreement between the parties.[37]

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35 Article 24 of the Arbitration Law.

36 Article 32 of the Code of Civil Procedure provides as follows: "Any judge shall voluntarily disqualify himself/herself in the following circumstances: 1. When the judge, or the judge's spouse, former spouse, or unmarried spouse is a party to the proceeding; 2. When the judge is or was either a blood relative within the eighth degree or a relative by marriage within the fifth degree, to a party to the proceeding; 3. When the judge, or the judge's spouse, former spouse, or unmarried spouse is a co-obligee, co-obligor with, or an indemnitor to, a party to the proceeding; 4. When the judge is or was the statutory agent of a party to the proceeding, or the head or member of the party's household; 5. When the judge is acting or did act as the advocate or assistant of a party to the proceeding; 6. When the judge is likely to be a witness or expert witness in the proceeding; 7. When the judge participated in making either the prior court decision or the arbitration award regarding the same dispute in the proceeding."

37 Article 16 of the Arbitration Law.

The court's attitude towards failure to disclose in an annulment lawsuit filed due to the challenged arbitrator's continuing participation in making the award

If an arbitrator fails to disclose either of the above four types of conflict of interest as set forth at Article 15 II of the Arbitration Law and appears to be partial or has been requested to withdraw but continues to participate, and the request for withdrawal has not been dismissed by the court, the party may apply to a court to set aside the arbitral award.[38] However, the court's granting of such annulment motion is only limited to situations where the challenged arbitrator's participation would likely have influenced the result of the arbitral award.[39]

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

There are four situations in which the courts may be called up on to assist with the constitution of a tribunal:

(1) In an *ad hoc* arbitration, in the absence of appointment of an arbitrator or of a method of appointment stipulated in an arbitration agreement, each party shall appoint an arbitrator for itself. The two so-appointed arbitrators shall then jointly select and designate a third arbitrator to be the chair, and the arbitral tribunal shall notify the parties, in writing, of the final appointment. However, if the arbitrators fail to agree on a chair within 30 days of their appointment, the court shall make the final (third) appointment upon the application of any party. Moreover, where an arbitration is to be conducted by a sole arbitrator and the parties fail to agree on such arbitrator within 30 days of receipt of the written request to make such appointment by either party, the appointment shall be made by a court pursuant to the application of either of the parties.[40]

(2) Where a party has already appointed its own arbitrator, it may issue a written request to the other party urging the appointment of its arbitrator within 14 days of receipt of the request.[41] If no arbitrator has been appointed within the specified time period, the requesting party may apply to a court to make the appointment.[42]

(3) Where the parties have appointed an arbitrator under an arbitration agreement, and subsequently fail to agree upon a replacement in the event that said arbitrator becomes unable to perform, either party may apply to a court[43] for appointment of the replacement. If an arbitrator appointed by either party becomes unable to perform, the other party may request the former party to appoint a replacement within 14 days of receipt of the request, and the requesting party may apply to the court to make the appointment if the other party fails to make the appointment within the specified time period.[44]

(4) Where the arbitrator appointed by the court is unable to perform, the court may appoint a replacement arbitrator at its own discretion or upon a request by the party. In contrast, the arbitral tribunal does not have the power to do the same. Moreover, if an interim order is issued by the court before the commencement of arbitration, the court shall, upon a petition by the other party, order the party requesting the interim order to submit to arbitration within a prescribed period, or the interim measure granted may be invalidated upon the petition by the other party.[45]

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38 Article 40 I (5) of the Arbitration Law.

39 Article 40 III of the Arbitration Law; Supreme Court Civil Judgment 105 Tai-Shang-Zih No. 1886 Civil Judgment (2016); Supreme Court Civil Judgment 98 Tai-Shang-Zih No. 64 (2009)

40 Article 9 of the Arbitration Law.

41 Article 11 I of the Arbitration Law.

42 Article 12 I of the Arbitration Law.

43 Article 12 I of the Arbitration Law.

44 Article 13 I~III of the Arbitration Law.

45 Article 39 of the Arbitration Law. Three types of interim measures are provided at Articles 522 ~ 538-4 of the Code of Civil Procedure, as discussed below under Question 4.4.

In principle, the appointment of arbitrators by the court as indicated above cannot be challenged by the parties, unless such challenge is based upon the grounds relating to conflicts of interest set forth in the Arbitration Law.[46]

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Yes. The courts are empowered to issue three types of interim measures including: provisional attachment orders, provisional injunctions, and injunctions to maintain a legal status quo, for subject matters in connection with arbitrations. In contrast, the arbitral tribunal does not have the power to do the same.

If an interim order is issued by the court before the commencement of arbitration, the court shall, upon a petition by the other party, order the party requesting the interim order to submit to arbitration within a prescribed period, or the interim measure granted may be invalidated upon the petition by the other party.[47]

The court may issue a provisional attachment order upon receipt of an *ex parte* request from either party. However, the court may not be permitted to issue a provisional injunction or injunction maintaining a legal status quo without notifying the counterparties or interested parties and requesting them to provide their opinions on such request. Generally, it may be difficult to fulfil the requirements, and the applicant will be required to provide a security bond or bank guarantee per the court's ruling so as to enforce those interim measures.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

If there is no agreement on the procedural rules governing the arbitration, the arbitral tribunal shall apply the Arbitration Law, and where the Arbitration Law is silent as to such procedural rules, the arbitral tribunal may at its own discretion adopt the Code of Civil Procedure *mutatis mutandis* or other rules of procedure, as it deems proper.[48]

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The arbitral proceedings and the deliberations with respect to an arbitral award shall not be made public per the Arbitration Law.[49] Although the confidentiality of arbitral awards is not explicitly stipulated, the arbitral awards are generally confidential, while parties may include a confidentiality clause in the arbitration agreement or reject to give consent or express their disapproval of disclosure in the consent forms provided by the arbitration institution.[50]

4.5.2 Does it regulate the length of arbitration proceedings?

In the absence of any stipulation in the arbitration agreement as to how the arbitration is to be conducted, the arbitral tribunal shall, within ten days upon receipt of notice of the final arbitral appointment, determine the place of arbitration as well as the time and date for the hearing/s, and shall notify both parties thereof; the arbitral tribunal shall then render an arbitral award within six months after commencement of the arbitration, and the arbitral tribunal may extend the decision period by an additional three months if the circumstances so require. If the arbitral tribunal fails to render an award within the above timeframe, either

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46 Article 14 of the Arbitration Law.

47 Article 39 of the Arbitration Law. The 3 types of interim are stipulated in Articles 522 ~ 538-4 of the Code of Civil Procedure.

48 Article 19 of the Arbitration Law. In the case of Taiwanese arbitral institutions, Article 22 of the Regulations Governing the Organization, Mediation Procedures, and Fees of Arbitration Institutions stipulates that local arbitration institutions shall establish rules of ethics. As such, CAA has issued the CAA Code of Ethics for Arbitrators, and CAAI has issued the CAAI Code of Ethics for Arbitrators and Parties.

49 Article 23 II, Article 32 I of the Arbitration Law.

50 Ministry of Justice Interpretation Fa-Lyu-Zih No. 0960005036 (2007).

party may file the subject matter of the arbitration to the court for adjudication unless such arbitration is required by law.[51]

Finally, please note that the above may be varied if the parties' arbitration agreement designates arbitration rules that provide for different timeframes: such an indirect agreement is deemed valid, especially if the arbitral rules are those of a non-Taiwanese arbitral institution.

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

The venue of the arbitration hearing, unless agreed by the parties, shall be determined by the arbitral tribunal.[52] In practice, the arbitral tribunal will generally not decide to hold the hearing in a location different / away from the seat / place of the arbitration, as the Taiwanese authorities consider that the venue should basically be located in the place of the arbitration agreed upon by the parties, unless otherwise agreed to by the parties or considered appropriate by the arbitral tribunal in special occasion.

The parties may agree to conduct a hearing remotely[53]. Even in the absence of such agreement to conduct a remote hearing, if a party objects to a remote hearing, the arbitral tribunal may nonetheless, according to Article 19 of the Arbitration Law, order that the hearing be conducted remotely, provided that proper technical equipment has been provided to the party that raised the objection, and the costs of said remote hearing will be included as part of the arbitration fees.

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

The Arbitration Law does not allow arbitrators to issue interim measures, and only authorizes the court to do so under Article 39.[54]

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The arbitral tribunal shall conduct the necessary investigation of the claims brought by the parties,[55] and the tribunal may adopt the Code of Civil Procedure *mutatis mutandis* or other rules of procedure that the tribunal deems proper,[56] including the general provisions for evidence.[57] The arbitral tribunal may determine whether to accept evidence in accordance with the above-said rules of procedure.

The arbitral tribunal may summon witnesses or expert witnesses to appear before the tribunal for questioning. However, the tribunal may not compel any witness/expert witness to enter into any undertaking. In the event that a witness fails to appear without a sufficiently valid reason upon the summons of the tribunal, the tribunal may seek a court order to compel the witness to appear.[58]

For evidence investigation, the arbitral tribunal may request assistance from a court or other agencies in the conduct of the arbitral proceedings, and the requested court may exercise its investigative powers in the same manner and to the same extent as is permitted in legal actions. [59]

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51 Article 21 I of the Arbitration Law.

52 Article 21 I of the Arbitration Law.

53 Ministry of Justice Administrative Interpretation Fa-Lui-Zih No. 10903512280 (2020).

54 Article 39 of the Arbitration Law.

55 Article 23 I of the Arbitration Law.

56 Article 19 of the Arbitration Law.

57 For general principles of evidence taking in the Code of Civil Procedure, please refer to Articles 277 ~ 297 thereof.

58 Article 26 of the Arbitration Law.

59 Article 28 of the Arbitration Law.

Other than as indicated above, there is no restriction on the presentation of testimony by a party employee under the laws and regulations governing arbitration, unless there is the existence or history of an employment relationship between the arbitrator and such witness.

Moreover, a witness may refuse to testify where the witness is to be examined with regard to a matter that he/she is obligated to keep confidential in the course of performing his/her official duties or conducting business, or where the witness cannot testify without divulging his/her technical or professional secrets.[60]

4.5.6 Does it make it mandatory to hold a hearing?

Unless the parties agree (1) to apply the "Expedited Procedure",[61] or (2) not to hold any hearing and that the award may be rendered on the basis of written submissions and documentary evidence,[62] a hearing is required under the Arbitration Law, as failing to hold a hearing may constitute the deprival of the parties' right to be heard and their right to present the case, and may also constitute legal grounds on which to annul the arbitration award so-rendered.[63]

In addition, in the absence of any provision in the arbitration agreement as to how the arbitration is to be conducted, the arbitral tribunal shall, within ten days after receipt of notice of the final arbitral appointment, determine the place of arbitration as well as the time/s and date/s for the hearing/s.[64]

4.5.7 Does it prescribe principles governing the awarding of interest?

The awarding of interest is not specially prescribed under the Taiwan laws and regulations governing arbitration. Therefore, the Civil Code and Law of Bills will typically apply with respect to the awarding of interest if the governing law of the subject dispute is the Taiwan law.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The arbitration costs are the relevant costs charged by the arbitration institution, the arbitrators and/or expert witnesses for the arbitration. Conversely, attorney fees spent by the parties will not be deemed part of the arbitration cost per Taiwan arbitration practice. Where, however, such attorney fees are included in the arbitration claim by the parties in accordance with the arbitration agreement, the arbitral tribunal will decide on the claim for recovery of such fees to be awarded, as those are part of the arbitration claim, rather than part of the arbitration costs. Finally, if the parties' arbitration agreement designates arbitration rules that provide for the recovery of attorney fees, such an indirect agreement should be sufficient to enable the arbitrator to adjudicate in this regard, especially where non-Taiwanese arbitral institutions are concerned.

As for arbitration costs, except for the rule stipulating that the party withdrawing an arbitration application shall bear the arbitration costs,[65] the related laws and regulations merely stipulate that the sharing of arbitration costs shall be ordered in the decision set out in an arbitration award,[66] and no specific method for allocation of the costs is provided or stipulated. In practice, the arbitrators may adopt the relevant law and regulations governing the allocation of court costs as used in civil litigations, where generally the losing party bears the costs on a *pro rata* basis.

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60 Article 307 I (4) and (5) of the Code of Civil Procedure.

61 Article 36 of the Arbitration Law.

62 Article 19 of the Arbitration Law.

63 Articles 40 I (3) of the Arbitration Law.

64 Article 21 I of the Arbitration Law.

65 Article 35 I of the Regulations Governing the Organization, Mediation Procedures, and Fees of Arbitration Institutions.

66 Article 34 of the Regulations Governing the Organization, Mediation Procedures, and Fees of Arbitration Institutions.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators enjoy immunity from civil liability, subject to the following law:

1. Per the Civil Code:

   Articles 529 and 535 explicitly state that, under any agreement concerning the performance of services for remuneration, the party dealing with the subject affairs shall do so with the care of a good administrator (fiduciary duty).[67] Therefore, only those who fail to exercise their fiduciary duty will be liable for a breach of contract. Accordingly, an arbitrator who provides services for remuneration in the arbitration will not be liable for his/her award issued in good faith, even if said award is subsequently revoked by the court. Per the prevailing opinions of legal scholars and legal practice, a mandate contract or quasi-mandate contractual relationship exists between and among the parties and the arbitrators.[68]

2. Per court decisions:

   In litigation involving claims against arbitrators (or arbitral institutions), the courts would respect the arbitrators' as authority to make determinations of fact and law, and deny claims filed against an arbitrator/arbitration institution under torts/default,[69] unless the arbitrators intentionally acted in a manner against the rules of morals, such as by accepting a bribe.[70]

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The offenses that an arbitrator or a participant in an arbitration proceeding may commit are as below:

- Arbitrators: the offenses of demanding, agreeing to accept, or accepting a bribe or other improper benefits even when before he/she has been appointed as an arbitrator,[71] and the offense of rendering a manifestly unlawful arbitral award. There do not appear to be any court decisions finding such guilty judgment conduct.[72]
- Parties: the offense of offering to give a bribe to the arbitrator for his/her breach of duty.[73]
- Expert witnesses: the offense of breach of trust.[74]

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67 Article 529 of the Civil Code: "With regarding to the provisions of Mandate shall apply to any contract concerning the performance of services which does not belong to any kind of other contracts provided for by the act."; Article 535 of the Civil Code, "The mandatory who deals with the affair commissioned, shall be in accordance with the instructions of the principal and with the same care as he would deal with his own affairs. If he has received the remuneration, he shall do so with the care of a good administrator (fiduciary duty)."

68 The MOJ Legal Explanations (88) Fa-Lyu-Zih No. 014034 issued in 1999and (94) Fa-Lyu-Jyue-Zih No. 0940016194 issued in 2005; the Taiwan High Court Civil Ruling 84 Zai-Kang-Geng-Yi-Zih No. 1 rendered in 1995.

69 1) Default claim against the arbitration institute arising from the arbitrator's determination of the arbitration cost denied, Taiwan High Court Civil Judgment 102 Shang-Geng-Yi-Zih No. 99 (2013), which is maintained by the Supreme Court Civil Judgment 104 Tai-Shang-Zih No. 1145 (2015) and become final; 2) Torts claim against the arbitrator denied by Taiwan High Court Civil Judgment 97 Shang-Zih No. 714 (2008) (final judgment); and 3) Torts claim against the arbitrator denied by Taiwan Taipei District Court Civil Judgment 107 Su-Zih No. 4031(2020) (pending).

70 Taiwan High Court Civil Judgment 107 Jhong-Su-Zih No. 10 (2018) (pending).

71 Articles 121~123 of the Criminal Code.

72 Article 124 of the Criminal Code (enacted in 1935) stipulates the criminal penalty for the judge/arbitrator who issues a manifestly illegal judgment/arbitral award. However, we have so far found no guilty judgment from our search of the Judicial Yuan (Taiwan judiciary) database. According to Supreme Court Criminal Judgment 29 Shang-Zih No. 1474, only where a judge / arbitrator intentionally disregards the law and renders a manifestly unlawful arbitral award will such an offense be deemed to have been committed. If the arbitral tribunal issues an award in good faith, even if the court subsequently revokes the same, such revoked award will not result in a finding of this offense.

73 Article 122 II of the Criminal Code.

74 Article 342 of the Criminal Code.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes. According to Article 33 II (5) of the Arbitration Law, the parties can agree to waive the requirement for an award to provide reasons.[75]

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

No. The right to seek the annulment of an arbitral award is a statutory inherent right provided to the parties and cannot be deprived merely by mutual agreement.

In addition, there is a practitioner's opinion stating that the condition of the annulment set forth at Article 40 of the Arbitration Law shall be regarded as mandatory provisions, and thus, there is no way for the parties to exclude/waive such provisions by agreement.

5.3 What atypical mandatory requirements apply to the rendering of a valid award at a seat in the jurisdiction?

In addition to the conditions set forth in Article 34 (2) (a) of UNCITRAL Model Law and Article 5 of the NY Convention, the relevant provisions on annulment of arbitral awards in the Arbitration Law are as follows, which differ in some respects from the provisions of the UNCITRAL Model Law:

- Article 38 of the Arbitration Law

  1. "*The arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the questioned portion of the award may be severed and such severance will not affect the remainder of the award; [This condition has the same meaning/purpose as Article 34 (2) (a) (iii) of the UNCITRAL Model Law.]*
  2. *The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal;*
  3. *The arbitral award directs a party to act in a way that is contrary to the law.*"

- Article 40 of the Arbitration Law[76]

  "*A party may apply to a court to set aside the arbitral award in any of the following circumstances:*
  1. *The existence of any circumstances stated at Article 38.*
  2. *The arbitration agreement is nullified, invalid, has yet to come into effect, or has become invalid prior to the conclusion of the arbitral proceedings. [This condition has the same meaning/purpose as Article 34 (2) (a) (i) of the UNCITRAL Model Law.]*

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[75] Article 33 II (5) of the Arbitration Law: "An arbitral award shall contain the following items: 5. The relevant facts and reasons for the arbitral award, unless the parties have agreed that no reasons shall be stated."

[76] A controversial 2021 Supreme Court judgment (Judgement) held that Taiwan's Arbitration Act only authorizes Taiwanese courts to issue rulings on whether to recognize a foreign arbitral award or not. The Judgment holds that Taiwanese courts do not have jurisdiction to make judgments that annul a foreign arbitral award governed by foreign arbitration rules (ICC arbitration in the instant case) even though the place of arbitration is in Taiwan. According to the Judgment, the Taiwan Arbitration Act's annulment remedy is available only in a lawsuit that seeks to revoke local arbitral awards. This remedy is not available for foreign arbitral awards under article 47 of the Act, including those governed by foreign arbitration rules but where the place of arbitration is Taiwan.

In other words, the Supreme Court opined that the foreign awards should be judicially reviewed not by Taiwanese courts but rather by foreign competent courts to decide whether to annul the same. It should be noted though that this Judgment does not have precedential value and has no binding force on other cases.

Although we cannot deny that this Judgment may have some degree of reference value in practice, scholars in Taiwan have recently published critical papers on this Supreme Court judgment (See Arbitration (publish by CAA), vol. 115, Dec. 2022). They argue that this Judgment misinterprets the Act and wrongfully limits the jurisdiction of the Taiwan courts. We share their views.

Nevertheless, any entities choosing to arbitrate under ICC rules and or other foreign arbitration rules in Taiwan should be aware of the above Judgement that a losing party may not bring an annulment lawsuit in Taiwan. It is possible that such a party would only have recourse to the court's recognition procedure stipulated in articles 49 and 50 of the Act.

3. *The arbitral tribunal fails to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or any party is not lawfully represented in the arbitral proceedings. [This condition has a broader meaning/purpose than that of Article 34 (2) (a) (ii) of the UNCITRAL Model Law.]*
4. *The composition of the arbitral tribunal or the arbitral proceedings is contradictory to the arbitration agreement or the law. [This condition has the same meaning/purpose as Article 34 (2) (a) (iv) of the UNCITRAL Model Law.]*
5. *An arbitrator fails to fulfil the duty of disclosure as prescribed at paragraph 2 of Article 15 herein and appears to be partial or has been requested to withdraw but continues to participate, provided that the request for withdrawal has not been dismissed by the court.*
6. *An arbitrator violates any duty in the entrusted arbitration, and such violation results in criminal liability.*
7. *A party or any representative has committed a criminal offense in relation to the arbitration.*[77]
8. *If any evidence or content of any translation upon which the arbitration award relies has been forged or fraudulently altered or contains any other misrepresentations.*
9. *If a judgment in a criminal or civil matter, or an administrative ruling upon which the arbitration award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.*

The foregoing items 6 to 8 are limited to instances where a final conviction has been rendered or the criminal proceeding may not be commenced or continue for reasons other than insufficient evidence.

The foregoing item 4 concerning circumstances contravening the arbitration agreement and items 5 to 9 referred to at paragraph 1 of this Article are limited to the extent sufficient to affect the arbitral award."

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

Except in the event of an annulment lawsuit, an arbitral award is the final decision. There is no appeal proceeding for arbitral awards in Taiwan.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

A distinction must be drawn between local and foreign arbitral awards; additional considerations apply to awards in *ad hoc* arbitrations. We finally discuss below the applicable time-limits for seeking the recognition or enforcement of an award in Taiwan.

(a) Distinction between local and foreign awards with respect to recognition and enforcement

Local award (an award issued in the territory of Taiwan where foreign arbitration rules did not apply) – court enforcement order is required

According to Article 37 I of the Arbitration Law,[78] a local arbitral award is binding on the parties and has the same force as a final judgment of a court. While such award is unenforceable before the court grants an enforcement order upon the party's application, however, if the parties have agreed in writing, arbitral awards regarding the following matters may be enforced without obtaining a court's enforcement order:[79]

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77 There does not appear to be any court precedent on this issue. However, we may refer to Article 496 I (8) of the Code of Civil Procedure, which provides for the following grounds for retrial: "*Where a party's agent, or the opposing party, or the opposing party's agent engaged in criminally punishable acts of any kind concerning the case which may affect the result of the original judgment*." According to Supreme Court Civil Judgment 88 Tai-Zai -Zih No. 6 (1999), said 'criminal punishable acts' include "*instigating a witness to commit perjury, or coercing the other party to make statements detrimental to his/her interest*".

78 Article 37 I of the Arbitration Law: "The award shall, insofar as relevant, be binding on the parties and have the same force as a final judgment of a court."

79 Article 37 II of the Arbitration Law: "An award may not be enforced unless a competent court has, on application of a concerned party, granted an enforcement order. However, the arbitral award may be enforced without having an enforcement order granted by a competent court if the contending parties so agree in writing and the arbitral award concerns any of the following subject-matters: 1. Payment of a specified sum of money or certain amount of fungible things or valuable securities; 2. Delivery of a specified movable property."

1. Payment of a specified sum of money, certain amount of fungible objects, or securities;
2. Delivery of a specified movable property.

Foreign award – court recognition order is required

According to Article 47 II of the Arbitration Law,[80] a foreign arbitral award shall have the same force as a final judgment of a court after such foreign award is recognized by the court, and such foreign award shall also be enforceable. The application for recognition of a foreign award must be submitted to the court with the following documents with Chinese translation/s:[81] (1) the arbitral award; (2) the arbitration agreement; and (3) the full text of the foreign arbitration law and regulations, the rules of the foreign arbitration institution or the rules of the international arbitration institution that were applied in the grant of the foreign arbitral award.[82]

However, pursuant to Article 50 of the Arbitration Law, if any of the following circumstances apply, the respondent may request the court to dismiss the application within twenty days from the date of receipt of the notice of the application:

1. The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.
2. The arbitration agreement is null and void according to the law chosen to govern said agreement or, in the absence of a choice of law, the law of the country where the arbitral award was made.
3. A party was not given proper notice whether of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations that resulted in a lack of due process.
4. The arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or the award exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and not affect the remainder of the arbitral award.
5. The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration.
6. The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

Ad hoc arbitral awards

The court may refuse to enforce a local *ad hoc* arbitral award issued in the territory of Taiwan. The court's reasoning is that: 1) arbitration institutions are established per the approval of relevant governmental authorities and are supervised by such authorities, and 2) the fairness and correctness of an arbitral award must be ensured if such arbitral award is rendered per the rules promulgated by such arbitration institutions,[83] while an *ad hoc* arbitral tribunal award is not, and thus, the court may refuse to enforce a local *ad hoc* arbitral award.[84] Nevertheless, the court will recognize a foreign *ad hoc* arbitral award made outside of the territory of Taiwan if such *ad hoc* foreign award is submitted to the court for recognition per the abovesaid statutory requirements under Articles 47 to 50.[85]

(b) No special time limitation will be applied to the application for recognition of foreign awards or the enforcement of local arbitral awards in Taiwan

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80 Article 47 II of the Arbitration Law: "A foreign arbitral award, after an application for recognition has been granted by the court, shall be binding on the parties and shall have the same force as a final judgment of a court, and is enforceable."

81 Article 48 II of the Arbitration Law.

82 Article 48 I of the Arbitration Law.

83 Taiwan High Court Civil Ruling 99 Tai-Kang-Zih No. 122 (2010).

84 *Id*.

85 Taiwan Taipei District Court Civil Ruling 87 Jhong-Sheng-Zih No. 4 (1998); Taiwan Taichung District Court Civil Ruling 98 Jhong-Sheng-Zih No. 1 (2009).

When faced with an application for recognition or enforcement of an award, the courts will only examine the award formally[86] and not review its merits and, therefore, whether the claims may have been time-barred.

Ordinary principles of time-limitation apply for an award creditor to seek the recognition and enforcement of their award in Taiwan, and these principles are complicated.[87] If the approved claim set forth in the award has been extinguished due to expiry of the time limitation, the award debtor may file a debtor's objection lawsuit against the enforcement of the award.[88]

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The introduction of annulment proceedings does not automatically suspend the exercise of the right to enforce an award. Proceedings are suspended only upon the respondent's request. Specifically, according to Article 42 I of the Arbitration Law,[89] if a party applies for annulment of a local arbitral award (see Question 5.7 below where a party applies for recognition/enforcement of a foreign arbitral award), the court may suspend enforcement of the arbitral award upon such party's request, subject to the applicant providing a certain security. Only if the arbitral award has been annulled shall the court simultaneously revoke any enforcement order with respect to the arbitral award.[90]

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

If a party desires to enforce a foreign award in Taiwan, such foreign award must first be recognized by the court.[91] If a foreign award has been annulled at its seat, the respondent may request the court to dismiss the claimant's application for recognition of the foreign award within 20 days from receipt of the court's notice of such recognition application.[92] In addition, (1) before the court has issued any order for recognition or completed of the enforcement of the foreign arbitral award and (2) if the respondent has introduced an annulment lawsuit or requested suspension of the effect of a foreign arbitral award, the court may suspend the recognition or enforcement proceedings upon the request of the respondent if the respondent provides

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86 A formality examination refers to an examination as to whether the documents required by Article 48 I of the Arbitration Law have been provided to the court, and a review to determine the authenticity of these documents. In no event is the court to review the facts and legal holdings in the award.

87 Regulations regarding time bars at Taiwan Law are complicated, and time bars vary in length from 1 to 15 years, depending on the facts and legal grounds. However, if a claimant wins an arbitral award or a court judgment, and if the original time bar was less than five years, the time bar is deemed to have re-commenced after the judgment has become final (or the award has been recognized/granted to be recognized) and shall be five (5) years according to Article 137 of the Civil Code. We suggest that the claimant consult a Taiwan attorney for proper advice on the time bar on a case-by-case basis.

Article 137 III of the Civil Code: "If the claim is ascertained by a final judgment on the merits or a grounds of execution having the same effect as a final judgment on the merits, and if the original prescription was less than five years, the prescription is deemed to have re-commenced after interruption and the new time bar period is five (5) years."

88 Supreme Court Civil Judgment 103 Tai-Shang-Zih No. 1954 (2014); Taiwan Kaohsiung District Court Civil Judgment 90 Su-Zih No. 3139 (2001).

89 Article 42 I of the Arbitration Law: "In the event that a party applies for revocation of an arbitral award, the court may grant an application by said party to stay enforcement of the arbitral award once the applicant has paid a suitable and certain security [to the court]."

90 Article 42 II of the Arbitration Law: "When setting aside an arbitral award, the court shall, under the same authority, simultaneously revoke any enforcement order that has been issued with respect to the arbitral award."

91 Article 47 II of the Arbitration Law.

92 Article 50 I (6) of the Arbitration Law: "If a party applies to the court for recognition of a foreign arbitral award which concerns any of the following circumstances, the respondent may request the court to dismiss the application within twenty days from the date of receipt of the notice of the application: (6) If a party applies to the court for recognition of a foreign arbitral award which concerns any of the following circumstances, the respondent may request the court to dismiss the application within twenty days from the date of receipt of the notice of the application: The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court." This provision is substantially the same as Article 5 II of the New York Convention

a certain guarantee.[93] If the foreign award has been annulled and such annulment cannot be appealed, the court shall dismiss the application for recognition, or revoke the recognition of such foreign award upon request.[94]

5.8 Are foreign awards readily enforceable in practice?

Yes. Foreign awards are readily enforceable in practice in Taiwan. Although Taiwan is precluded from membership in the relevant international conventions, the Arbitration Law adopts and follows the international treaties and agreements governing and impacting the ready recognition and enforcement of awards issued according to foreign arbitration legislation and conventions, such as the UNCITRAL Model Law and the NY Convention: see the tables at Annexes I and II of this chapter.

Taiwan Courts refuse to recognize foreign awards only on the grounds set out at Articles 49 and 50 of the Arbitration Law,[95] which are substantially the same as Article 5 of the NY Convention and Article 36 of UNCITRAL Model Law (see Annexes 1 and 2 to this chapter).

Moreover, Taiwan's Judicial Yuan (the Judicial branch of Taiwan's central government), has long been promoting alternative dispute resolution, and thus it is common for foreign arbitral awards to be recognized and enforced in Taiwan, including but not limited to those issued by arbitration institutions of the ICC, the United States, Singapore, Hong Kong, Japan, Korea, Vietnam, Finland, Russia, and the Czech Republic, and also those awarded by foreign *ad hoc* arbitrations as of 2020.

According to the statistics for the period of 2011 to 2019, Taiwanese courts only refused the recognition of foreign arbitration awards in five out of 52 cases.[96] The reason these foreign arbitral awards were not recognized in Taiwan is that they obviously failed to satisfy at least one of the basic requirements under the law, such as: (1) the applicant is not the claimant party of the award; or (2) the applicant did not submit all of the required documents (see Question 5.5(a) above). From 2011 to 2019, except for applications not satisfying the basic requirements, we did not find any foreign arbitral awards that were not recognized.

If the recognition or enforcement of an arbitral award is contrary to the public order or good morals of Taiwan, the court will refuse to recognize the foreign arbitral award according to Article 49 of the Arbitration Law. However, if the court regards the dispute in the arbitral award as an ordinary commercial dispute, there is a high possibility that the court will rule that the award is not contrary to the public order or good morals of Taiwan.[97]

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93 Article 51 I of the Arbitration Law: "Where a party to an arbitration applies for a judicial revocation of a foreign arbitral award or for suspension of the effect thereof, the court at the request of the respondent may order the same to deposit a suitable and certain security to suspend the recognition or enforcement proceedings prior to issuing any order for recognition or completion of enforcement of the foreign arbitral award." This provision is substantially the same as Article 6 of the New York Convention.

94 Article 51 II of the Arbitration Law: "If the foreign arbitral award referred to in the preceding paragraph has been revoked and such revocation cannot be appealed according to the law, the court shall dismiss any application for recognition or upon request, revoke any recognition of the arbitral award."

95 Supreme Court Civil Judgment 89 Tai-Kang-Zih No. 496 (2000).

96 Ministry of Justice, 3rd meeting of panel 4 of the National Conference on Judicial Reform, Doc. No. 4-3-討 2, p.4 (2017); Yearbooks of 2016 to 2019, available at: https://www.judicial.gov.tw/en/np-1806-2.html; the precise statistics of 2020 to 2021 are not yet available.

97 Taiwan High Court Tainan Branch Court Civil Ruling 107 Fei-Kang-Zih No. 16 (2018).

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

As disputes for which contingency or alternative fee arrangements are prohibited are non-arbitrable matters (family, succession, and criminal cases) in Taiwan, contingency or alternative fee arrangements are allowed in disputes that can be resolved by arbitration.[98]

Third party funding is permitted in Taiwan, save that where an attorney is involved, per Article 30-2 of the Code of Professional Attorney Ethics, attorneys may not accept attorney's fee through third party funding unless such arrangement is agreed upon by the funded parties and such third party funding does not affect the impartial professional evaluation of the attorney involved in the matter.[99]

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

Per Article 19 of the Arbitration Law, where the parties agree, blockchain-based evidence will be recognised. However, in the absence of such agreement, such evidence may be reviewed under the Code of Civil Procedure or any evidence rules that the arbitral tribunal considers proper. The evidence rules set forth in the Code of Civil Procedure stipulate that the authenticity and the content of the evidence must be proved by the presenting party.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

As communications through electronic methods between the parties may be deemed as having created or otherwise constitute an arbitration agreement, the arbitration agreement recorded on a blockchain may also be deemed valid.[100] However, it may be required that the blockchain arbitration agreement/award be submitted in writing for the court's recognition and enforcement per Article 48 of the Arbitration Law and Article 6 of the Compulsory Enforcement Act.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

The court may not consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement. A blockchain-based arbitration agreement may be recognized as valid. However, in practice, for both blockchain-based arbitration agreements/awards, the parties may be required to submit the same in writing for recognition or enforcement per Article 48 of the Arbitration Law and Article 6 of the Compulsory Enforcement Act.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement? (Please consider both hypotheses separately.)

Articles 4 II and III of the Electronic Signatures Act apply to the Arbitration Law, and therefore an arbitral award may be rendered in an electronic form with secure digital signatures.

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98 Article 35 II of the Rules of Professional Attorney Ethics.

99 Article 30-2 of the Rules of Professional Attorney Ethics.

100 Article 1 IV of the Arbitration Law.

However, in practice, an arbitral award is usually submitted in writing for the purposes of recognition and enforcement. The authenticity of an award in digital form might be challenged as it is it is not something courts are familiar with. Therefore, the rendering of an arbitral award in writing is recommended for avoidance of further disputes in enforcement proceedings.

8. Is there likely to be any significant reform of the arbitration law in the near future?

The CAA issued a draft bill to amend the Arbitration Law in 2021. Also, a proposed amendment was issued by several legislators from the Chinese Nationalist Party in October 2021 that is similar to the CAA's draft amendment.

The amendment contains the following important amendments:

1. Foreign investment disputes that occur between states and foreign investors under certain treaties are included and eligible for arbitration in the draft amendment.
2. The amendments introduce a right to apply for interim measures and preliminary orders issued by the arbitral tribunal, as well as a procedure for an emergency arbitrator to issue interim measures and preliminary orders before the constitution of the arbitral tribunal. Meanwhile, after the issuance of interim measures by arbitral tribunals, the parties may apply to the court for enforcement accordingly.
3. Ad hoc arbitration is explicitly included in the draft amendment and awards therefrom will be eligible for compulsory enforcement.
4. The proposed amendments redefine local and foreign awards. In the proposed amendment, the only benchmark for local awards or foreign awards will be whether the award is issued in the territory of Taiwan. That is, whether foreign arbitration rules are applied to arbitration will no longer be considered.

Progress toward making these key changes to the Arbitration Law in 2023 was as follows:

1. From February to July 2023, the Ministry of Justice solicited comments from multiple sectors in a wide-ranging effort to obtain views from diverse stakeholders.
2. Beginning in November 2023, the Ministry held in-person meetings where the draft bill was discussed clause by clause. Participants included representatives from the judicial branch, the Ministry of Economic Affairs, the Public Construction Commission, the Office of Trade Negotiations, practitioners, and arbitration institutions. The last meeting was held on January 24, 2024 to discuss arbirtator disclosure obligations.
3. While the exact wording of the Arbitration Law amendments remains under discussion, the Ministry of Justice has in principle agreed to include the four proposals highlighted above.

Despite real progress in 2023, the Ministry will need time to evaluate the feedback it has received and draft the final text of the bill. The draft bill must then be reviewed and approved by the Executive Yuan before it can be sent to the Legislature in which no party currently has a majority. It is thus quite uncertain when the Legislature might enact the proposed reforms and when they would ultimately take effect.

9. Compatibility of the Delos Rules with local arbitration law

The Delos Rules are substantially compatible with the Arbitration Law.

However, the Delos Rules provide the arbitral tribunal the power to render any interim measures. Those measures issued under the Delos Rules may not be enforceable by the Taiwan courts. The party can only apply the court to issue orders for interim measures, before and or after the constitution of the arbitral tribunal, per Article 39 of the Arbitration Law.

Besides, per Article 17 of the Arbitration Law, any application to withdraw the arbitrator of the tribunal shall be determined by the tribunal itself, and the applicant has a chance to ask the court to review the withdrawal decision made by the tribunal. And any application to withdraw a sole arbitrator shall be submitted to the court for determination directly. That means the process and Delos' decisions stipulated in Article 11.11 of the Delos Rules will probably have no binding force.

10. Further Reading

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ARBITRATION INFRASTRUCTURE IN THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.* with offices and a case team?	Chinese Arbitration Association International Arbitration Centre (CAAI)
Main arbitration hearing facilities for in-person hearings?	CAA provides meeting rooms and other hearing facilities for in-person hearings.
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	CAA provides reprographics facilities in its office, which is the same place where the above-indicated meeting rooms are located.
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	CAA arranges, upon request, the court reporting services, including Chinese and English.
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	CAA arranges, upon request, interpreters for simultaneous interpretation between foreign languages and Chinese.
Other leading arbitral bodies with offices in the jurisdiction?	1. Taiwan Arbitration Association 2. Chinese Construction Industry Arbitration Association 3. Chinese Real Estate Arbitration Association