INTERNATIONAL COMMERCIAL DISPUTES

A GUIDE TO ARBITRATION AND DISPUTE RESOLUTION IN APEC MEMBER ECONOMIES

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INTRODUCTION

The second half of the twentieth century has seen an enormous expansion in global trade. The economies of Asia and the Pacific basin have been among the most dynamic in generating new business, both within the region among themselves and also intra-regionally with other trading entities and nations. APEC economies have recognised that while trade is generated at the individual level between one business and another, it is the responsibility of governments to create conditions that encourage and foster these interchanges.

It is an enduring feature of international trade for disputes to arise. This book does not deal with disputes between governments over trade policy issues, tariff and non-tariff barriers or technical barriers to trade. However, disputes also arise frequently between traders and sometimes between traders and government authorities in the entities with which they trade. There is a very long history behind international trade dispute resolution, particularly in the development of arbitration in the civil and common law jurisdictions as a popular method between traders to settle disputes in a way that largely avoids recourse to local courts.

Modern business relationships have become immensely complex, particularly as a consequence of growth in trade in services as well as goods, electronic data interchange, information technology and multi-national commercial structures. The amounts at stake can be huge. In sectors where information technology is developing rapidly, speed in resolving disputes can be critical. Not only are there far more players in the international market-place but they operate against a rich backdrop of diverse legal systems with differing policy frameworks and political systems.

Arbitration is certainly a dispute resolution technique that is in use in the Asia Pacific region. It would appear, however, mainly from anecdotal evidence, that resort to arbitration to settle disputes has not grown as rapidly as would be expected given the growth in the number of transactions that make up the present trade flows in the region. A number of reasons are given for this. Some of these reasons are structural. For example arbitration only functions well in legal systems that permit the parties to commercial disputes to reach final settlements through arbitration without much intervention from their courts. The rules for conducting arbitration differ in the countries of the region and in international transactions. These differences create uncertainty and diminish confidence in the process. There are also differences in the region in the willingness of courts to enforce arbitral awards in international commercial disputes. These disincentives to the use of this well tried form of dispute resolution provide scope for further inter-governmental action in harmonising business law and practice in the Asia Pacific region.

Other reasons given for the lower popularity of arbitration in Asia are more culturally intrinsic. Arbitration, like litigation is adversarial in character and tends to produce winners and losers. Decisions are normally based on the legal rights and obligations of the parties rather than their interests or intentions. Control of the process belongs more to the arbitral

tribunal rather than the parties. Like litigation, arbitration in its more rigid forms has the capacity to destroy viable business relationships.

Traditionally there has been a cultural preference in many Asian societies to resolve disputes privately through negotiation, mediation and conciliation. In some jurisdictions there are legal structures to facilitate this kind of dispute resolution. The principles that make these forms of dispute resolution preferable in Asian societies remain persuasive, and indeed the many variations under the generic name of alternative dispute resolution or ADR, are becoming popular in many Western legal cultures. Nevertheless, there is a counter-trend emerging as a result of a growing number of transactions where ADR solutions will not be seen as an appropriate option.

The reasons for this are several. Many international transactions involve parties from diverse legal and geographical backgrounds who do not have a sufficiently shared understanding of each other's values to create confidence and trust that an ADR process will yield a fair or reasonable outcome. This is fundamental in any form of dispute resolution based on consent. Moreover, the emergence of standard international models for contracts, financial paper, insurance, trade documentation and so forth have created a body of international jurisprudence, which while far from complete, makes the forms of dispute resolution based on rights and power a more feasible option than was the situation historically. The New York Convention has made the enforcement of foreign arbitral awards a more straightforward process in many countries than enforcement of a foreign, or even a local judgement.

Governments have responded to pressure for greater consistency of business laws for sound economic reasons. In a more open global economy, businesses and investors frequently have options for their next transaction. They will tend to make decisions that balance risk against return. The transparency and certainty of the legal system that will be applicable to the transaction will be one of the factors on the risk side of the equation. What is the force of a written contract? What forms of dispute resolution for international transactions are available? Will the courts enforce a negotiated or mediated agreement, an arbitral award or a foreign judgement?

A number of economies in the Asia and Pacific region have now passed laws introducing the UNCITRAL model law for commercial arbitration, the Washington Convention or ICSID for the settlement of investment disputes between states, and the International Sale of Goods Convention to give more certainty to contracts.

The work of the Dispute Mediation Experts' Group of APEC is aimed at reducing the risks and costs of doing business within the region. Through making the existing rules and procedures for dispute resolution more transparent, through encouraging APEC Member Economies to accede to the key international treaties and through promoting a wider range of dispute resolution techniques with well understood rules and procedures the risks and uncertainties of trade and investment will be minimised.

The purpose of this book is to provide practical information to business people and to professional advisors such as lawyers. It is not a definitive legal authority but rather a summary of key points with references to sources of information.

The authorities in each economy provided the information on the legal systems of the member economies of APEC. This data will change over time. While APEC may for a time update this information, it is expected that commercial publications will fulfill the need for this kind of information reasonably quickly. Moreover, governments, when presenting and publishing their laws, do so in terms of purposes. Legal practitioners and business people are more concerned about discovering how laws and the institutions of state that implement them function in practice. At the present stage of evolution of business law in the region, there is seen to be value to both public and private sectors in preparing comparative surveys such as this.

Member economies were asked a number of questions about their dispute resolution laws and services as follows and their responses were then reformulated as member economy statements.

QUESTIONNAIRE

1. General Overview

a. What are the primary sources of law [legislation, case law, decree etc.]?

b. In general, where will the law be found for commercial dispute resolution outside the court system?

c. Names and contact details for institutions for international commercial dispute resolution outside of the court system.

d. Is the jurisdiction committed to enforce awards by adherence to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (**New York Convention)** [any reservations] or through other international agreements (list them)? Name the domestic law that implements these commitments where appropriate.

e. Is the jurisdiction a party to the *International Convention on the Settlement of Investment Disputes between States and National of other States; Washington 18 March 1965* (**Washington Convention**) or bilateral investment agreements? If so, list them. Name the domestic law that implements these agreements where appropriate.

f. Are any trade laws which could relate to international commercial dispute resolution, currently under review?

2. Arbitration

a. What is the name of the arbitration law in your jurisdiction applicable to international disputes?

b. Is the law based on the UNCITRAL Model Law? Does it have significantly different rules for domestic and international arbitration?

c. Are there limitations on the types of disputes that may be arbitrated?

d. Where are the rules for arbitration found?

e. Are the rules of procedure compulsory or do the parties have wide flexibility or autonomy to modify the rules.

f. To what extent can the courts intervene before or during an arbitration?

g. To what extent can the courts grant interim relief pending the outcome of an arbitration?

h. May arbitration be conducted in another language? May members of an arbitral tribunal be non-citizens and are there any restrictions on representation by foreign attorneys or lawyers?

i. If an arbitration is held in your economy, is it permissible for foreign laws to govern the substance of the dispute or the rules of an international arbitration institution to be substituted for local legislated rules?

j. Does the arbitration law prescribe rules for the way decisions are made and the form of an award?

k. Is the confidentiality of arbitral proceedings and awards protected by law?

l. On what grounds will the courts set aside or decline to enforce an award?

m. What is the procedure for the enforcement of an award?

3. Alternative forms of Dispute Resolution

a. Is alternative dispute resolution (**ADR**) recognised within this jurisdiction?

b. What forms of ADR are available for commercial disputes?

c. Is there any legislation or are there court rules making ADR mandatory or optional in commercial disputes?

d. What legal implication flow from choices between the various procedures?

e. What rules, if any, define the role and procedures of mediator, conciliator, facilitator, expert, etc.?

f. May one or both of the parties interrupt ADR and resort to arbitration or court procedure?

g. What rules govern confidentiality and admissibility of evidence in other proceedings?

h. Are there provisions for the recognition and enforceability of settlements?

i. What limitations are there on the choice of ADR and jurisdiction of the mediator in commercial disputes?

j. Are there any restrictions on foreign legal representation in ADR proceedings or on the nationality of mediator.

4. Legal Sources and References

In addition to the references above is there an authoritative Internet site containing up-to-date information on dispute resolution facilities available in this jurisdiction?

5. Bibliography

Please list respected reference works relating to arbitration and ADR in your jurisdiction.

ABBREVIATIONS

AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
ADR	Alternative Dispute Resolution techniques based on consent such as mediation and conciliation
APEC	Asia Pacific Economic Cooperation organisation
ASEAN	Association of South East Asian Nations
CIETAC	China International Economic and Trade Arbitration Commission
CMAC	China Maritime Arbitration Commission
Code of Bustamante	Code on private international law contained in the Final Act of the Havana Conference 1928 and 1934
DR	Dispute Resolution techniques, other litigation through the court system including arbitration, med-arb, mediation, etc.
HKIAC	Hong Kong International Arbitration Centre
ICSID	International Convention on the Settlement of Investment Disputes (see Washington Convention below), or International Centre for the Settlement of Investment Disputes
IGA	Investment Guarantee Agreement (see also IPPA)
KCAB	Korea Commercial Arbitration Board
Model Law	Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and approved by the General Assembly of the United Nations on 11 December 1985 (GA Resolution 40/72)
Montevideo Convention	Inter-American Convention for Extraterritorial Validity of Foreign Judgements and Arbitral Awards
NAFTA	The North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted at New York by the United Nations Conference on International Commercial Arbitration on 10 June 1958
Panama Convention	Inter-American Convention on International Commercial Arbitration, 1975
SIAC	Singapore International Arbitration Centre
TAI	Thai Arbitration Institute
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vietnam International Arbitration Centre
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States; Washington 18 March 1965
WTO	World Trade Organisation

Australia

GENERAL OVERVIEW

Primary sources of law:

- Common Law (or case law)
- Legislation (Federal, State, Territory)
- International Arbitration Act 1974 (Cth)
- UNCITRAL Model Law on International Commercial Arbitration (the Model Law)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)
- 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention)
- Family Law Act 1975 (Cth)
- Federal Court of Australia Act 1976 (Cth)
- Commercial Arbitration Acts (enacted by individual States and Territories)

The primary sources of law in Australia are common law (or case law) and legislation. The common law is composed of the decisions of the courts and tribunals of the Federal Government, as well as the decisions of the courts and tribunals of the State and Territory Governments. Legislation is also composed of the statutes, rules and regulations of the Federal, State and Territory Governments.

Sources of law for commercial dispute resolution outside of the court system:

At the Commonwealth level, the International Arbitration Act 1974 governs the procedures for international arbitration. This Act provides that the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) applies to all international commercial arbitration conducted in Australia, unless otherwise agreed by the parties. The International Arbitration Act 1974 allows the parties to opt-out of the Model Law.[i]

The International Arbitration Act 1974 also adopts the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention).

The Act sets out the institutions and procedures that are available for the conduct of international arbitration. It does not deal with other alternative dispute resolution processes for resolving private international commercial disputes.

Recently, a review of the International Arbitration Act 1974 was undertaken by the Commonwealth Attorney-General's Department. The review concluded that the Act be retained without amendment. A full copy of the report is posted on the Internet (www.law.gov.au:80/publications/Review_of_IAA.htm).

Both the Federal Court of Australia, under s. 53A of the Federal Court of Australia Act 1976 (Cth), and the Family Court, under ss. 19B and 19D of the Family Law Act 1975 (Cth), subject to their rules and with the consent of the parties to proceedings in the Court, may refer proceedings, or any part of them or any matters arising out of them, to mediation or arbitration. These provisions also enable the Court to make such orders as are necessary to determine the procedure to be followed in any mediation or arbitration.

At the State and Territory level, each State has enacted uniform Commercial Arbitration Acts which deal with domestic arbitration. Whilst the Acts distinguish between domestic and non-domestic arbitration, the definition of "arbitration agreement" in the Acts is not limited to domestic arbitration. However, it is probable that the International Arbitration Act 1974 would apply to an international arbitration to the exclusion of the Commercial Arbitration Acts, unless the parties elect that the Model Law should not apply.

The relevant State and Territory Commercial Arbitration Acts are:

- New South Wales: Commercial Arbitration Act 1984;
- Victoria: Commercial Arbitration Act 1984;
- Queensland: Commercial Arbitration Act 1990;
- South Australia: Commercial Arbitration Act 1986;
- Western Australia: Commercial Arbitration Act 1985;
- Tasmania: Commercial Arbitration Act 1986;
- Australian Capital Territory: Commercial Arbitration Act 1986; and
- Northern Territory: Commercial Arbitration Act 1985.

In addition, most Australian States have legislated to allow the courts the discretion to refer disputes (or parts of a dispute) before them to arbitration for settlement - in some cases without requiring the consent of the parties (see below for a list of State Acts which allow for the referral of a matter to arbitration).

Institutions for international commercial dispute resolution outside of the courts:

- The Australian Centre for International Commercial Arbitration (ACICA)
- The Australian Commercial Disputes Centre (ACDC)
- LEADR (Lawyers Engaged In Alternative Dispute Resolution)
- Australasian Dispute Centre (ADC)

There are a number of dispute resolution services in Australia for disputes between private parties. These are as listed:

The Australian Centre for International Commercial Arbitration (ACICA)
Level 1, 22 William Street
Melbourne VIC 3000
AUSTRALIA
Tel: (61 3) 9629 6799
Fax: (61 3) 9629 5250
Email: acica@werple.net.au

The Australian Centre for International Commercial Arbitration (ACICA) maintains a presence in all mainland States and the Northern Territory through local branches of the Institute of Arbitrators & Mediators Australia. ACICA deals primarily with the arbitration of international trade disputes, but also provides arbitration and alternative dispute resolution for domestic commercial disputes. It has negotiated and has in place some 30 bilateral Trade Arbitration Agreements with overseas arbitration associations and institutions.

The Australian Commercial Disputes Centre (ACDC)
Level 6, 50 Park Street
Sydney NSW 2000
AUSTRALIA
Tel: (61 2) 9267 1000
Fax: (61 2) 9267 3125
Email: acdcltd@msn.com
Internet: www.austlii.edu.au/other/acdc/

ACDC was established in 1986 and aims to assist parties involved in a commercial dispute to resolve their disputes outside the court system. Its services include negotiation, conciliation, independent expert appraisal, moderation or facilitation, mini-trial, mediation and arbitration.

ACDC, which has offices in New South Wales, Western Australia and Queensland, has been appointed the Asia Pacific Registry of the London Court of International Arbitration.

LEADR (Lawyers Engaged In Alternative Dispute Resolution)
National Disputes Centre
Level 4, 233 Macquarie Street
Sydney NSW 2000
AUSTRALIA
Tel: (61 2) 9233 2255
Fax: (61 2) 9232 3024
Email: leadr@fl.asn.au

LEADR promotes and provides facilities for ADR services including negotiation, mediation and conciliation training. The organisation trains mediators from all professions and maintains three panels of mediators throughout Australia and New Zealand.

Australasian Dispute Centre (ADC)
9th Floor
101 Wickham Terrace
Brisbane QLD 4000
AUSTRALIA

PO BOX 917
SPRING HILL QLD 4004
Tel.: 61+7+3832 4344
Fax: 61+7+3839 4221

The ADC is a peak body of ADR provider/user organisations and has as its governing members the Australian Institute of Family Law Arbitrators and Mediators, Australian Institute of Quantity Surveyors, Bar Association of Queensland, Law Society of NSW, LEADR, NSW Bar Association, NSW Government construction Policy Steering Committee, QLD Law Society, the Chartered Institute of Arbitrators, the Institution of Engineers, QLD, the Law Council of Australia, The Royal Australian Institute of Architects and the Victorian Bar Association. Through its member organisations the ADC has access to highly qualified arbitrators, conciliators, mediators, expert appraisers etc throughout Australia and internationally.

Recognition and enforcement of foreign arbitral awards:

Australia has implemented the UNCITRAL Model Law, without reservation, via the International Arbitration Act 1974. The Act provides that the Model Law applies to all international commercial arbitration conducted in Australia, unless otherwise agreed by the parties.

Australia has also acceded to the New York Convention without reservation. Part II of the International Arbitration Act 1974 gives effect to the Convention. The Act guarantees the recognition and enforcement of foreign arbitration agreements and foreign awards in Australia and prescribes the procedure for such recognition and enforcement. The Act also provides that any court in Australia, including a court of a State or Territory, may perform the functions set out in the New York Convention. (Recourse against an award may only be made if a case can be made out to satisfy one of the grounds listed in Article 34(2) of the New York Convention).

Settlement of disputes through ICSID or bilateral investment agreements:

Australia has ratified the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and, pursuant to the International Arbitration Act 1974, the ICSID has the force of law in Australia.

Australia has also signed investment promotion and protection agreements (IPPAs) with a number of APEC member economies namely:

People's Republic of China	(1988)
Papua New Guinea	(1991)
Indonesia	(1993)
Hong Kong, China	(1993)
The Republic of the Philippines	(1996)
Vietnam	(1991)
Poland	(1992)
Hungary	(1992)
Czech Republic	(1994)
Romania	(1994)
Laos	(1995)
Argentina	(1997)
Peru	(1997)

* An agreement was signed with Chile on 9 July 1996, and with the Ukraine on 17 March 1998, but neither had entered into force at time of publication.

Laws relating to commercial dispute resolution currently under review:

The report of a review of the International Arbitration Act 1974 under the Commonwealths' Competition Principles Agreement released in June 1997, recommended that the Act be retained, and that it not be subject to further review under the Competition Principles Agreement.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- International Arbitration Act 1974
- UNCITRAL Model Law
- Washington Convention
- Commercial Arbitration Acts (enacted by individual Australian States and Territories)

At the Commonwealth level, the International Arbitration Act 1974, which is based on the UNCITRAL Model Law, governs the procedures for international arbitration. The New York Convention has force of law in Australia.[ii] The Model Law has force of law with respect to international commercial arbitration conducted in Australia, unless parties choose to opt-out via section 21.[iii] The Washington Convention has the force of law in Australia with respect to disputes between states and nationals of other states.[iv]

Differences in the application of arbitration law to international and domestic arbitration:

The International Arbitration Act 1974 provides that the UNCITRAL Model Law applies to all international commercial arbitration. The Act does not provide for domestic arbitration. Domestic arbitration is covered by the various State and Territory Commercial Arbitration Acts which are detailed above.

Limitations on types of dispute that may be arbitrated:

If parties to an international commercial dispute choose not to opt-out of the Model Law, then the International Arbitration Act 1974 provides that the Act (hence the Model Law) applies to all arbitration conducted in Australia.[v]

The Model Law is, in turn, limited in its application to the extent that it applies to "international commercial" arbitration within the meaning of Article 1(3).

The International Arbitration Act 1974, which gives force to the Model Law, also provides for certain limitations with regard to the application of the Model Law to maritime disputes.

Extent of party autonomy to define procedure:

Parties are free to adopt whatever rules they may choose. The only limitation placed upon the degree of flexibility or autonomy parties may have to modify the rules are those limits which the rules themselves impose or to which the parties agree.

Scope of court intervention and availability of courts for interim relief:

The adoption of the Model Law in Australia limits court intervention in the arbitral process by providing the arbitral tribunal with wide authority to determine its own jurisdiction. In addition, Article 5 also provides that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law."

However, the State Commercial Arbitration Acts and the Model Law both allow the court to intervene in relation to some issues. The grounds for judicial intervention roughly correspond to the grounds for not recognising an award under the New York Convention.[vi] Judicial intervention is permitted in certain circumstances to resolve disputes with respect to the appointment of arbitrators,[vii] the challenge of arbitrators[viii] and the termination of the mandate of the tribunal.[ix]

On the whole however, the State Commercial Arbitration Acts allow the courts broader power to overturn awards. Article 34 of the Model Law sets out the relatively narrow grounds upon which a court may set aside an arbitral award. In contrast, the State Commercial Arbitration Acts provide that an appeal may lie to the Supreme Court on any question of law arising out of an award.[x]

Such an appeal may only be brought by a party to an arbitration agreement with the consent of all the other parties to the arbitration agreement, or with the leave of the Supreme Court.[xi] The Supreme Court may only grant leave where it considers that:

(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is:

(i) a manifest error of law on the face of the award; or

(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or be likely to add, substantially to the certainty of commercial law.

With respect to arbitration conducted under the Model Law, Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such a measure.

In other words, the right to seek arbitration is not waived by an application to a court for the granting of "interim measures of protection". Equally, a court is not precluded from granting "interim measures of protection" once arbitration proceedings have commenced. "Interim measures" are not defined by the International Arbitration Act 1974. However, such measures traditionally have been used by the courts insofar as they are necessary to conserve the subject matter of the dispute.[xii]

The New York Convention contains no express provisions allowing or excluding court intervention.

With regard to domestic commercial arbitration, the Commercial Arbitration Acts[xiii] provide that the court has the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the court.

Source and scope of procedural rules:

The "rules" for international commercial arbitration may be whatever rules the contracting parties agree to adopt. The International Arbitration Act 1974, which gives effect to the Model Law, is designed to provide contracting parties with a uniform law of arbitral proceedings which meets the specific needs of international commercial practice, should parties choose to adopt it.

Examples of rules used in Australia are the UNCITRAL Rules and the rules of the Institute of Arbitrators & Mediators Australia.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

With regard to international commercial arbitration, Australia has not modified the provisions of the Model Law. Article 22 allows parties to choose the language of arbitral proceedings. Article 11 precludes the exclusion of a member of an arbitral tribunal on the basis of nationality, unless otherwise agreed by the parties.

The International Arbitration Act 1974 provides[xiv] that a party to a proceeding under the Model Law may be represented before an arbitral tribunal "by a duly qualified legal practitioner from any legal jurisdiction of that party's choice".

With regard to the nationality of legal representatives appearing in arbitral proceedings, section 37(1) of the International Arbitration Act provides that:

A party appearing in conciliation or arbitration proceedings may appear in person and may be represented by him or herself, or by a duly qualified legal practitioner from any legal jurisdiction of the party's choice; or by any other person of the party's choice.

With regard to arbitration between domestic parties, the Commercial Arbitration Acts provide that, subject to the arbitration agreement, the arbitrator may conduct proceedings under the agreement in such a manner as the arbitrator thinks fit. Therefore, there appears to be no prohibition against parties choosing to conduct an arbitration in a language other than English.

The nationality of an arbitrator is limited only by agreement between the parties and the arbitration rules the parties agree to adopt. The Commercial Arbitration Acts do not refer to the nationality of members of an arbitral tribunal.

Similarly, the Commercial Arbitration Acts impose no restrictions upon representation by foreign lawyers or attorneys. The Acts allow representation by a legal practitioner which is defined as including a practitioner admitted to practice in Australia or in any other place, whether within or outside Australia.

Law applicable to substance of dispute:

Parties may choose whatever rules and hence whatever law (either domestic or foreign) they wish to govern the substance of an international arbitration.

Decision making by arbitral tribunal and form of award:

The conduct of arbitral proceeding is in accordance with the arbitral law chosen by the parties and applicable to the proceedings. If the parties to an arbitral proceeding choose either the Model Law or the rules of the Washington Convention, then the International Arbitration Act brings into force the rules of each which prescribe the way decisions are made and the form of the award.

With regard to the way domestic arbitration decisions are made, the Commercial Arbitration Acts provide that, subject to the arbitration agreement, the arbitrator may conduct proceedings in such a manner as the arbitrator thinks fit.

The Commercial Arbitration Acts[xv] provide the following guidelines with regard to the form of the award:

- Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall:

  (a) make the award in writing;

  (b) sign the award; and

  (c) include in the award a statement of the reasons for making the award.

- Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or

umpire of the date, the terms of the award and the reasons for making the award.

Confidentiality:

In 1995 the High Court of Australia in *Esso Australia Resources Ltd & Ors v The Honourable Sidney James Plowman (The Minister For Energy & Minerals)*[xvi] *(Esso v Plowman)* distinguished between privacy and confidentiality as they apply to arbitral proceedings. The majority decision of the High Court confirmed that arbitral proceedings were private, but that there was no support in the decided cases in Australia or the United States for the existence of an obligation of confidentiality.

The majority noted that "for various reasons, complete confidentiality of the proceedings in an arbitration cannot be achieved."[xvii] Among these reasons were that:

- an obligation of confidentiality would not apply to witnesses;
- an award made in an arbitration may come before a court, inter alia, for judicial review or enforcement; and
- a party may need to disclose to a third party details of the arbitration, for example under a contract of insurance.

An obligation of confidentiality was found to attach to documents which are produced in arbitral proceedings, where the documents are produced by a party compulsorily pursuant to a direction by the arbitrator or tribunal. This narrow obligation of confidentiality in arbitral proceedings is subject to "the public's legitimate interest in obtaining information about the affairs of public authorities."[xviii]

Following the High Court decision there were calls to amend the International Arbitration Act 1974 to provide a limited statutory obligation of confidentiality subject to well established exceptions. In response, the Commonwealth took the view that the laws prevailing in most leading commercial nations do not provide that an arbitration is confidential and noted that there would be considerable difficulties in drafting exceptions to a general obligation of confidentiality for arbitral proceedings if one were to be enacted. On this basis, the Commonwealth concluded that no action needed to be taken to amend the Act but that the situation in other countries would continue to be monitored.

Recourse against an award and admissible grounds:

Under the State and Territory Commercial Arbitration Acts an appeal lies to the Supreme Court of any State or Territory on any question of law arising out of an award, but the Court does not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

Recognition and enforcement:

All arbitral awards are enforceable in Australia by a court of competent jurisdiction. The Commercial Arbitration Acts[xix] provide that an award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

With respect to foreign awards, the International Arbitration Act 1974 provides[xx] that where an award is made in a country which is a party to the New York Convention, and the conditions of the Convention have been met, then the award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the laws of that State or Territory.

Australia's adoption of the Model Law also provides that an award made under the Model Law, irrespective of where it was made, is also enforceable by a competent Australian court pursuant to Article 31(1).

The operation of the International Arbitration Act 1974 and the Commercial Arbitration Acts has the effect of bringing an award under the enforcement procedures of the State and Territory Supreme Courts.

Therefore, the actual procedure for the enforcement of an arbitral award is based upon the procedural requirements of the State and Territory Supreme Courts. Generally speaking, to enforce an arbitration award, an applicant would have to make an application in writing to a competent court that the award is to be enforced in accordance with section 33 of the Commercial Arbitration Acts and in compliance with the relevant requirements of the International Arbitration Act 1974, such as Article 4 of the New York Convention.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Alternative dispute resolution (ADR) is a widely recognised and well promoted form of dispute resolution within Australia. ADR is also a significant feature of the Australian justice system. As noted above, State courts are increasingly referring matters, in some cases compulsorily, to ADR.

In addition, a number of internationally recognised ADR centres are located in Australia, including ACICA, ACDC and LEADR. There are also a number of other organisations that promote various forms of ADR such as the Institute of Arbitrators & Mediators Australia and the Australasian Dispute Centre.

In a response to the growing use of ADR in Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995. NADRAC provides

independent policy advice to the Federal Attorney-General on the development of high quality, economic and efficient ways of resolving disputes before they come before Federal Courts.

Certain jurisdictions in Australia also actively promote ADR. The Law Society of NSW's Civil Litigation Guide to Good Practice states that a solicitor should advise clients of the various ADR options, the processes involved and the advantages of using ADR.

Forms of ADR available for commercial disputes:

Parties are able to choose from a large range of procedures to resolve commercial disputes. The types and structure of alternative dispute resolution procedures is unlimited, but the most commonly used procedures fall into five categories:

- negotiation;
- mediation and conciliation;
- expert determination and expert appraisal;
- arbitration; and
- a combination of processes.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Private contacting parties may choose between themselves how they wish to resolve a dispute. However, in some Australian States and in certain circumstances, the courts may order parties to engage in arbitration to resolve entire matters, parts of matters or questions of law. The relevant Acts are as detailed below.

- New South Wales: Section 76B of the Supreme Court Act 1970 provides for the referral of disputes to arbitration as prescribed by the NSW Arbitration (Civil Actions) Act 1983.
- Queensland: Order 97, Rule 1 of the Rules of the Supreme Court provides for the referral of a matter to arbitration as the court or judge sees fit.
- South Australia: Section 66 of the Supreme Court Act 1935 allows for the trial of a civil matter before an arbitrator.
- Tasmania: Section 37A of the Supreme Court Civil Procedure Act 1923 allows for the referral of certain actions to arbitration.
- Victoria: Chapter 1, Rule 50.08(1) of the Rules of the Supreme Court allows for the referral of a matter to arbitration with the consent of all parties.

Legal implications flowing from choices between the various procedures:

The legal implications which flow from the choices between various procedures is dependent upon what is agreed between the parties. However, generally the results of negotiation, mediation and conciliation are not binding on the parties, whilst the results of arbitration are. Nevertheless, the results of each form of ADR are only binding to the extent to which the parties contractually agree.

Rules, if any, defining the role and procedures of mediator:

The rules that define the role and procedures of mediator, conciliator, facilitator, expert, etc., are those that the parties contractually agree to adopt.

Resort to arbitration or courts during ADR:

The procedures for resolving disputes are not necessarily mutually exclusive. If parties both agree, they may interrupt ADR proceedings and proceed directly to arbitration. However, each form of dispute resolution is only available by agreement between the parties. In other words, parties may also exclude the option of arbitration.

With respect to judicial intervention during ADR, this remains open to parties at all stages. It is doubtful that a contract could exclude the jurisdiction of the court.

Confidentiality and admissibility of evidence in other proceedings:

The rules governing confidentiality and admissibility of evidence in ADR proceeding are those rules agreed to by the parties.

Recognition and enforceability of settlements:

There are no general legislative provisions for the recognition and enforceability of non-arbitration ADR settlements. Such settlements may only be enforced contractually.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no legislative limitations on the choice of ADR or jurisdiction of mediator. However, LEADR and the Institute of Arbitrators & Mediators Australia are examples of Australian organisations that provide training and accreditation of mediators and arbitrators. Nevertheless, parties involved in a dispute are not compelled by legislation to use an accredited mediator or arbitrator.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There are no general legislative restrictions on foreign legal representation in ADR proceedings. However, there may be some restrictions on representation where, for example, ADR proceedings are directed by the courts or are held pursuant to a statutory provision.

LEGAL SOURCES AND REFERENCES

There is no single Internet site which contains an authoritative set of information on dispute resolution facilities. However, the sites listed should provide a comprehensive account of most dispute resolution facilities in Australia.

www.law.gov.au

www.law.gov.au:80/publications/Review_of_IAA.htm

www.austliii.edu.au/other/acdc/

BIBLIOGRAPHY

Attorney-General's Department International Commercial Dispute Resolution Handbook, Attorney-General's Department, Australia, 1997.

Jacobs, Marcus, *International Commercial Arbitration in Australia*, The Law Book Company, Australia, 1992.

Halsbury's Laws of Australia, Butterworths Pty Ltd, Australia, 1991.

Report on the Review of the International Arbitration Act 1974 at www.law.gov.au: 80/publications/Review of IAA.html

ENDNOTES

[i] s.21, International Arbitration Act 1974
[ii] *ibid.;* s.4
[iii] *ibid.;* s.16(1)
[iv] *ibid.;* s.32
[v] *ibid.;* s.21
[vi] Art. 5, Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (See also Art. ss.34-36 UNCITRAL Model Law on International Commercial Arbitration).
[vii] Sub-articles 11(4) and (5), Model Law.
[viii] Art. 13(3), Model Law.
[ix] Art. 14(1), Model Law.
[x] s.38(2), Commercial Arbitration Act
[xi] s.38(5), Commercial Arbitration Act

[xii] M. Jacobs, *International Commercial Arbitration in Australia*, The Law Book Company, 1992, p.2316.
[xiii] s.34, Commercial Arbitration Act
[xiv] s.29(2)(b)
[xv] s.29
[xvi] (1995) 183 CLR 10. In *Commonwealth of Australia v Cockatoo Dockyard P/L* (No. CA 40713 of 1994, No. CL 55049 of 1994) the Court of Appeal of the Supreme Court of New South Wales applied the decision in *Esso v Plowman* and held that the Supreme Court has power under the Courtís inherent power, or the *Supreme Court Act 1970* (NSW), to intervene in interlocutory orders of a procedural character which go outside the arbitration. The directions given by the arbitrator providing for confidentiality of Commonwealth documents produced for inspection had the effect of preventing the Commonwealth from using the documents for inter-agency cooperation allegedly for the protection of the environment and public health. The Court held that the orders made by the arbitrator were outside the power of the arbitrator to conduct the proceedings as he thought fit under s.14 *Commercial Arbitration Act 1984* (NSW).
[xvii](1995) 183 CLR 10 at 28 per Mason CJ.
[xviii](1995) 183 CLR 10 at 33 per Mason CJ.
[xix] s.33
[xx] s.8(2)

Brunei Darussalam

GENERAL OVERVIEW

Primary sources of law:

- Common law (or case law)
- Binding precedents
- Emergency (Arbitration) Order 1994

Brunei Darussalam shares the common law heritage of the English legal system wherein the primary sources of law are in the form of legislation and judicial interpretation in the form of case law. The doctrine of *stare decisis* or binding precedents is adopted by the courts of Brunei Darussalam.

Sources of law for dispute resolution outside of the courts:

The principal legislation for commercial dispute resolution outside the court system is to be found in the Emergency (Arbitration) Order 1994.

Institutions for international commercial dispute resolution outside of the courts:

At present there are no institutions for resolving international commercial disputes outside of the courts.

Recognition and enforcement of foreign arbitral awards:

Brunei Darussalam is committed to recognise and enforce foreign arbitral awards as it is a party to the New York Convention. The Emergency (Arbitration) Order introduces the provisions of the New York Convention into law in Brunei Darussalam.

Settlement of disputes through ICSID or bilateral investment agreements:

Brunei Darussalam is not a party to the Washington Convention (and has not entered into any bilateral investment agreements).

Laws relating to commercial dispute resolution currently under review:

No such laws are currently under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- Emergency (Arbitration) Order

The Emergency (Arbitration) Order is not based on the UNCITRAL Model Law. The use of arbitration to settle disputes is relatively new in Brunei Darussalam. As yet, there is not a great deal of experience or jurisprudence available on the application of the Emergency (Arbitration) Order in practice.

Differences in the application of arbitration law to international and domestic arbitration:

The Emergency (Arbitration) Order draws a distinction between "domestic" and other arbitration. An arbitration is not domestic if the arbitration agreement expressly or by implication provides for arbitration in a state or territory other than Brunei Darussalam and to which neither:

- an individual who is a national of, or habitually resident in any state or territory other than Brunei Darussalam; nor
- a body corporate which is incorporated in, or whose central management and control is exercised in any state or territory other than Brunei Darussalam,

is a party at the time the proceedings are commenced.[1]

Where the arbitration is not domestic, there are different provisions relating to an application for stay of proceedings in court; the effect of agreements excluding recourse to the courts; and enforcement of awards.

Limitations on types of dispute that may be arbitrated:

The Emergency (Arbitration) Order is silent on the question of arbitrability of disputes. However, if a court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, the award may be set aside and will be unenforceable.

An arbitrator may make any order for specific performance that may be made by a court other than a contract relating to land or an interest in land.

Extent of party autonomy to define procedure:

The Emergency (Arbitration) Order places no limitations on the parties with regard to the rules they choose to apply to the conduct of the arbitration. The Emergency (Arbitration) Order[2] contains various deeming provisions giving powers to the arbitrator in default of the parties having not made specific provision to the contrary.

Scope of court intervention and availability of courts for interim relief:

The courts have powers to appoint an arbitrator (or conciliator) if the parties fail to agree and to fill a vacancy should one occur. The appointment of an arbitrator is irrevocable except by leave of the court.
The courts have power to stay proceedings if there is an earlier submission to arbitration.
Generally there is no appeal to courts on the ground of errors of fact or law on the face of the award, unless on a question of law arising out of an award and all parties consent, or with leave of the court if the court considers, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties.
The courts also have powers to issue various interlocutory orders that could be made by a court in the normal course of litigation. These orders include *subpoenae ad testificandum* and *duces tecum* and the writ of *habeas corpus ad testificandum.*
Other orders may be made for:

- security for costs;
- discovery of documents;
- the giving of evidence by affidavit;
- examination on oath of any witness including a witness outside the jurisdiction;
- the preservation, interim custody or sale of any goods which are the subject matter of the dispute;
- the protection of property;
- interim injunctions or the appointment of a receiver.

Source and scope of procedural rules:

The Emergency (Arbitration) Order contains some procedural rules but it gives the parties autonomy to modify these and to introduce their own procedural rules. It would seem that the parties could apply the rules of an arbitration institution if desired or UNCITRAL rules for an *ad hoc* arbitration.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

There is no legal stipulation regarding use of language in arbitration but it is customary to use English in court and legal proceedings. There are no provisions restricting who can be

appointed as an arbitrator except that judges and magistrates cannot be appointed arbitrators without the consent of the Chief Justice. For any public servant, acceptance as to his appointment as an arbitrator is subject to the consent of the Minister of Law (Chairman for the Public Service Commission).
The Legal Profession Act[3] (which deals with privileges and rights of solicitors and advocates allowed to practice in Brunei Darussalam) does not apply to arbitration proceedings, the giving of advice and the preparation of documents for the purpose of arbitration proceedings, except if it is done in connection with court proceedings resulting from arbitration proceedings.

Law applicable to substance of dispute:

The parties may choose the substantive law in their agreement to arbitrate.

Decision making by arbitral tribunal and form of award:

The Emergency (Arbitration) Order provides that unless provided to the contrary, a reference to arbitration shall be deemed to be before a sole arbitrator. If the agreement specifies two arbitrators it is deemed that they may, in the event of disagreement, appoint an umpire who shall make the final decision. In the event that there are three arbitrators, the decision of any two will be binding. In the event that the three cannot agree, then the one chosen as chairman shall make the decision.
The Emergency (Arbitration) Order contains no provisions specifying the form of the award.

Confidentiality:

The Emergency (Arbitration) Order is silent on the question of confidentiality.

Recourse against an award and admissible grounds:

A court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law, except that:

- an appeal is allowed on a question of law where all parties have consented; or
- with the leave of the court, if the court considers that, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties.

The parties can preclude this right of appeal with an "exclusion agreement".[4]

Recognition and enforcement:

An award on an arbitration agreement may be enforced in the same manner as a court judgement.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Part II of the Emergency (Arbitration) Order recognises conciliation and makes certain provisions relating to the appointment of conciliators. However, Part II only applies in circumstances where the parties to an arbitration agreement have included a provision in their agreement to arbitrate that they should first attempt to settle their dispute by conciliation. There is no definition of conciliation but it has been taken to include a process whereby parties to a dispute submit their differences to a neutral third party that assists them in reaching a mutually acceptable solution.

Forms of ADR available for commercial disputes:

The law of Brunei Darussalam recognises consensual and contractual arrangements.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Part II of the Emergency (Arbitration) Order contains provisions under which a court may appoint a conciliator if the parties have agreed to conciliation in an arbitration agreement.

Legal implications flowing from choices between the various procedures:

A conciliated settlement made within the framework of an arbitration agreement must be in writing and signed by the parties. It will be regarded as an arbitration award and will be enforceable in the same way as an arbitration award.[5]

Rules, if any, defining the role and procedures of mediator:

There are no rules.

Resort to arbitration or courts during ADR:

If conciliation proceedings initiated as part of an arbitration agreement fail to lead to a settlement within three months, the proceedings shall terminate.[6]

Confidentiality and admissibility of evidence in other proceedings:

There are no provisions for confidentiality of conciliated disputes. In the event that an agreement to arbitrate contains a provision for conciliation, and for the conciliator to act as

arbitrator in the event that conciliation fails to lead to a settlement, no objection may be taken to appointment of the conciliator as arbitrator solely on the ground that they had acted as a conciliator.

Recognition and enforceability of settlements:

A settlement agreement following conciliation under Part II of the Emergency (Arbitration) Order, if it is in writing and signed by the parties, shall be treated as an arbitration award and is enforceable as such.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no such provisions.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

Reference should be made to the Legal Profession Act, and to the Emergency (Arbitration) Order.[7]

LEGAL SOURCES AND REFERENCES

BIBLIOGRAPHY

Kasmirhan, PG., *Settlement of Disputes in Brunei Darussalam*, 1997 (leaflet).

ENDNOTES

[1] Emergency (Arbitration) Order; s.8(3)
[2] *ibid*.; s.17
[3] s. 17, 18 and 19
[4] Emergency (Arbitration) Order; s.28,29,30
[5] *ibid*.; s.3
[6] *ibid.;* s.3(3)
[7] s. 18

Canada

GENERAL OVERVIEW

Primary sources of law:

- Federal, Provincial and Territorial Legislation
- Commercial Arbitration Act
- Commercial Arbitration Code
- Case law

The primary sources of law in Canada are legislation and case law. Legislation comprises the statutes and regulations enacted pursuant to such statutes of the Governments of Canada, its ten Provinces and two Territories. Case law includes the decisions of the Federal as well as Provincial and Territorial courts and tribunals.

Sources of law for commercial dispute resolution outside of the court system:

There are approximately 50 federal statutes that contain provisions relating to some form of dispute resolution (DR). The Department of Justice also has an initiative underway to screen proposed new legislation and legislative amendments for inclusion of DR provisions in appropriate circumstances.

There is only one federal statute, the Commercial Arbitration Act**,** R.S.C. 1985, c.17 (2nd Supp.), (the Act), that is focused exclusively on a particular DR process, in this case, arbitration. The Act essentially serves to introduce the Commercial Arbitration Code (the Code), which is based on the UNCITRAL Model Law.

In addition, each province and territory has enacted international commercial arbitration legislation based on the UNCITRAL Model Law. Each province has also enacted domestic arbitration legislation based either on the UNCITRAL Model Law or the United Kingdom Arbitration Act of 1899.

In addition to the federal statutes noted above, the Rules of the Federal Court of Canada contain specific provisions regarding recourse to the Court pursuant to the Commercial Arbitration Act. There are also a number of federal government policies that provide guidance and direction respecting the use of dispute resolution processes by the federal government.

Institutions for dispute resolution outside of the courts:

- British Columbia International Commercial Arbitration Centre

- Quebec National and International Commercial Arbitration Centre

Two international commercial arbitration centres exist in Canada. Both are partially funded by the federal government:

British Columbia International Commercial Arbitration Centre
670-999 Canada Place
Vancouver, British Columbia
CANADA V6C 2E2

Quebec National and International Commercial Arbitration Centre
Édifice La Fabrique
295 Charest Blvd. E.
Québec, Québec
CANADA G1K 3G8

Recognition and enforcement of foreign arbitral awards:

Canada acceded to the New York Convention on 12 May, 1986. The federal legislation implementing this is the United Nations Foreign Arbitral Awards Convention Act R.S., 1985. The provinces and territories have also implemented the convention with their own legislation.

Settlement of investment disputes through ICSID or bilateral investment agreements:

Canada is not party to the ICSID Convention. Consultation with the provincial governments regarding adoption of the convention is, however, currently underway.

Laws relating to commercial dispute resolution currently under review:

Other than the consideration that is being given to adoption of ICSID, no laws at the Federal level relating to private international disute resolution are currently under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

Canada's international arbitration laws at federal, provincial and territorial levels are all based on the UNCITRAL Model Law. References to the federal and provincial legislation and a matrix containing the principal variations to the UNCITRAL text in the federal and provincial legislation may be found in the annex to this Chapter.

Differences in the application of arbitration law to international and domestic arbitration:

The Act applies to both domestic and international arbitration. The word "international", which appears in paragraph (1) of the Model Law, has been deleted from the corresponding paragraph in the Code. Paragraphs (3) and (4) of the Model Law, which describe when arbitration is international, have also been deleted from the Code. Article 1(2) of the Code provides that the Code, except articles 8 (arbitration agreement and substantive claim before the court), 9 (arbitration and interim measures by court), 35 (recognition and enforcement) and 36 (grounds for refusing recognition and enforcement), apply only if the place of arbitration is Canada.

Provincial and territorial legislation for domestic arbitration is not consistent. Some jurisdictions have laws for domestic arbitration based on the UNCITRAL Model Law. Others have laws based on the United Kingodom Arbitration Act 1899.

Limitations on the types of disputes that might be arbitrated:

The Code applies to commercial arbitration, subject to any agreement in force between Canada and any other State or States.[1] The Act provides that the Code applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters.[2]

Extent of party autonomy to define procedure:

The Code functions as a set of rules governing commercial arbitration. The Code provides that rules of procedure are left to the parties to agree upon, failing which, the arbitral tribunal

may, subject to the provisions of the Code, conduct the arbitration in such manner as it considers appropriate.[3]

Scope of court intervention and availability of courts for interim relief:

The Code provides that in matters governed by it, no court shall intervene except where so provided in the Code.[4] The provisions of the Code with respect to court intervention are consistent with the Model Law. Article 6 of the code specifies that the functions referred in Articles 11(3) and (4) (court appointment of arbitral tribunal); 13(3) (challenge of an arbitrator); 14 (termination of mandate); 16(3) (ruling on jurisdiction of arbitral tribunal); and 34(2) (recourse against an award) shall be performed by the Federal Court or any superior, county or district court.

The Code provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.[5]

Source and scope of procedural rules:

The parties to an international arbitration have autonomy to adopt their own rules or in default the Code will apply.[6]

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The Code provides that the parties are free to agree on the language or languages to be used in the arbitral proceedings; failing such agreement, the arbitral tribunal shall determine the language or languages to be used.[7] It provides further, that no person shall be precluded by reason of nationality from acting as an arbitrator, unless otherwise agreed by the parties.[8]

The Code does not address the issue of representation by foreign lawyers or attorneys.

Law applicable to substance of dispute:

The Code provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute and that any designation of the law of legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.[9]

This Article also provides that failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Decision making by arbitral tribunal and form of award:

Articles relevant to the manner in which decisions are made include:

- Article 18 of the Code, which provides: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.";
- Article 28(3), which provides that the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so;
- Article 28(4), which provides that in all cases, the tribunal shall decide in accordance with the terms of the contract and shall take into account the uses of the trade applicable to the transaction; and
- Article 29, which provides that in proceedings with more than one arbitrator, any decision shall be made, unless otherwise agreed by the parties, by a majority of all members of the arbitral tribunal, and that questions of procedure may be decided by a presiding arbitrator if so authorised by the parties or all members of arbitral tribunal.

As regards form, the award is required to be made in writing and signed by the arbitrator or arbitrators. It should state the reasons upon which it is based (unless the parties have agreed that no reasons are to be given), its date and the place of arbitration. After the award is made, a signed copy shall be delivered to each party.[10]

Confidentiality:

Confidentiality is not specifically protected by the Act or Code. In cases involving the federal government or federal bodies to which the Access to Information Act and Privacy Act apply, those statutes may function to allow or deny access to any or all of the contents of an award.

Recourse against an award and admissible grounds:

The grounds for refusing recognition or enforcement of an arbitral award are set out in Article 36. This Article is identical to the corresponding provision in the Model Law, with the exception of Article 36(1)(b)(i) and (ii) in which specific reference to the law and public policy of Canada are made; more specifically, grounds for refusal include cases where the subject-matter of the dispute is not capable of settlement by arbitration under the law of Canada, or the recognition or enforcement of the award would be contrary to the public policy of Canada.

Recognition and enforcement:

An application may be made to the competent court for enforcement of an award. The party making application shall supply the authenticated original award or a certified copy, as well as the original arbitration agreement or a certified copy. If the award or agreement is not made in an official language of Canada, the party shall supply a certified translation into an official language.[11]

The court may adjourn its decision to enforce an order and require appropriate security to be provided if an application for setting aside or suspension of that award has been made.[12]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

The federal Department of Justice has issued a corporate policy on the use of Dispute Resolution (DR)[13] and has established an office, the DR Project, to provide guidance and assistance in the increased and informed use of non-litigious DR processes in disputes to which the federal government is a party in order to prevent the courts becoming the only recourse.

Similar efforts have been made in some provincial jurisdictions. In addition, many of the provincial courts are developing and implementing DR programs and pilot projects within their jurisdictions to address concerns concerning the costs of litigation, the backlogs facing many of the courts, access to justice and long-term satisfaction among parties with the outcome of court adjudication.

It should be noted that DR is a rapidly developing but unregulated field of activity in Canada. There are no uniform or widely accepted standards of practice or qualifications, nor is there a singly entity or organisation which serves to administer or oversee the practice of DR.

Forms of ADR available for commercial disputes:

In addition to the court-annexed programs noted above and the two international commercial arbitration centres noted above, a variety of private-sector DR services are available across the country, ranging from individuals offering third-party neutral services to organisations such as the Arbitration and Mediation Institute of Canada, which has developed its own rules of procedure and maintains a membership roster of third-party neutrals.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Refer to "Sources of law for commercial dispute resolution outside of the court system" above to the application of the Act and Code as well as provincial and territorial legislation. Rules and practice directions issued and amended from time to time by the various jurisdictions across the country should also be referenced. At the federal level, there are currently no rules or practice directions issued by the Federal Court of Canada making DR mandatory.

Legal implications flowing from choices between the various procedures:

Rules and practice directions are issued and amended from time to time by the various jurisdictions across the country. Reference should be made to these. As a result of reforms to the rules of the Federal Court of Canada in 1992, a full case management regime, including alternative forms of dispute resolution, entered into force for the Federal Court, Trial Division. No case will be fixed for trial in the Federal Court unless the lawyers certify that they have been offered ADR and it has failed or the client has refused ADR. In Ontario for example, a mediation pilot project is underway in which certain cases must be referred to mediation before further procedural steps may be taken.

Rules, if any, defining the role and procedures of mediator:

Rules and guidelines that may be issued by individual DR service providers determine the roles of third party neutrals and procedures followed for processes that proceed under the auspices of that particular service provider. In the case of court-annexed DR programs, rules and practice directions may provide specific information concerning roles of third party neutrals associated with such programs and the procedures they are expected to follow. Both the Quebec and British Columbia International Commercial Arbitration Centres for example, have issued arbitration and mediation rules to be followed when those processes are engaged in under their auspices.

Resort to arbitration or courts during ADR:

Interruption of a DR process for the purposes of having recourse to the courts will be determined by applicable legislation, relevant case law, court rules and any agreement between the parties in this regard.

Confidentiality and admissibility of evidence in other proceedings:

In matters under federal jurisdiction, reference should be made to the Access to Information Act and Privacy Act. Provincial information legislation should be referred to in those situations in which it applies. Also, access to the terms of any agreement between the parties regarding confidentiality are relevant, as are applicable court rules and practice directions, as well as any rules developed by private sector DR service providers to which the parties may subscribe.

Recognition and enforceability of settlements:

See above.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

Except where any applicable laws, court rules and practice directions provide otherwise, the parties are free to construct their mediation or other DR process as they see fit.

Restrictions on foreign legal representation in ADR proceedings or on nationality of arbitrator:

See above.

LEGAL SOURCES AND REFERENCES

There is no designated authoritative Internet site regarding DR services in Canada. However, individual sites, including that of the Department of Justice's DR Project, do exist and contain useful information; eg:

- Department of Justice of Canada: www.canada.justice.gc.ca
- DR Project:www.canada.justice.gc.ca/Orientations/Methodes/index-en.html

BIBLIOGRAPHY

Department of Justice (Dispute Resolution Project), *Dispute Resolution Reference Guide*, 1995.

McLaren, Richard H. and Sanderson (QC), John P., *Innovative Dispute Resolution: The Alternative,* 1994.

Alternative Dispute Resolution Practice Manual, CCH Canadian Limited, 1996.

Casey, Brian J.,*International and Domestic Commercial Arbitration,* 1993.

ACKNOWLEDGEMENTS

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ANNEX

Canada (Federal):

- Commercial Arbitration Act R.S., 1985, c. 17 (2nd Supp.)
- United Nations Foreign Arbitral Awards Convention Act R.S., 1985, c. 16 (2nd Supp.)

Alberta:

- Arbitration Act S.A. 1991, c. A-43.1
- International Commercial Arbitration Act S.A. 1986, c. 1-6.6

British Columbia:

- Commercial Arbitration Act S.B.C. 1986, c. 3
- Foreign Arbitral Awards Act S.B.C. 1985, c. 74
- International Commercial Arbitration Act S.B.C. 1986, c. 14

Manitoba:

- Arbitration Act R.S.M. 1987, c. A120
- International Commercial Arbitration Act S.M. 1986-87, c. 32, C.C.S.M. 151

New Brunswick:

- Arbitration Act S.N.B. 1992, c. A. 10. 1
- International Commercial Arbitration S.N.B. 1986, c. 1-12.2

Newfoundland:

- Arbitration Act R. S. N. 1990, c. A- 14
- International Commercial Arbitration Act R. S. N. 1990, c. I- 15

Northwest Territories:

- Arbitration Act R.S.N.W.T. 1988, c. A-5
- International Commercial Arbitration Act R.S.N.W.T. 1988, c. I-6

Nova Scotia:

- Arbitration Act R.S.N.S. 1989, c. 19
- International Commercial Arbitration Act R. S. N. S. 1989, c. 234

Ontario:

- Arbitration Act S.O. 1991, c. 17
- International Commercial Arbitration Act R. S. O. 1990, c. I. 9

Prince Edward Island:

- Arbitration Act Stats. P.E.I. 1996, c. 4
- International Commercial Arbitration Act R.S.P.E.I. 1988, c. I-5

Quebec:

- Arts. 2638-2643 C.C.Q.
- Arts. 940-952; 1926 C.C.P.
- Municipal Code of Qudbep, R.S.Q., c. C-27.1
- Cities and Towns Act, R. S. Q., c. C- 19

Saskatchewan:

- Arbitration Act R.S.S. 1992, c. A-24.1
- International Commercial Arbitration Act S.S. 1988-89, c. I-10.2
- Enforcement of Foreign Arbitral Awards Act S. S. c. E-9. 1 1

Yukon Territory:

- Arbitration Act R.S.Y. 1986, c. 7
- Foreign Arbitral Awards Act R. S. Y. 1986, c. 70
- International Commercial Arbitration Act R. S. Y. 1986, SUPPLEMENT, c. 14 (enacted as S.Y. 1987, c. 14)

Jurisdiction	Preamble	Scope of Application S. 1(5)
Model Law	None	This law shall not affect any other law of this State by virtue which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.
Canada	None	The Act is not limited to international arbitrations, therefore the word "international" is eliminated from Article 1(1) of the Model Law. "Commercial Arbitration" includes a claim under Article 1116 of 1117 of the NAFTA Agreement, s5(4)
Alberta	None	Model Law applies to international arbitration agreements and awards whether made before or after the coming into force of the Act.
British Columbia	Preamble recognises need for change from previous inhospitable legal environment for international commercial arbitration based upon UNCITRAL Model Law.	For the purposes of determining whether an arbitration is international the provinces and territories of Canada shall be considered one State. s1(5). "Commercial" defined by not exhaustively. s1(6).
Manitoba	None	No change from the Model Law. Adds that it applies to international commercial arbitration agreements and awards made before or after the coming into force of the Act.
New Brunswick	None	No change from the Model Law. Adds that it applies to international commercial arbitration agreements and awards made before or after the coming into force of the Act.
Nova Scotia	None	No change from the Model Law. Adds that it applies to international commercial arbitration agreements and awards whether made before or after 10 August 1986.
Ontario	None	Article 1(1) of the Model Law "agreements in force between this State and any other State or States" means an agreement between Canada and any other country or countries that is in force in Ontario. In Article 1(2) and (5) of the Model Law "this State" means Ontario. In Article 1(3) "different States" means different countries, and "these States" means the country. s.1(7).
Prince Edward Island	None	Applies to international agreement and awards whether made before or after the coming into force of the Act.
Quebec	None	Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of the enactment where applicable, shall take into consideration the Model Law and the report and commentary of UNCITRAL, June 1985, Art. 940.6.
Saskatchewan	None	This law shall not affect any other law of this State by virtue which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.
Newfoundland	None	Model law applies to international commercial arbitration agreements and awards whether made before or after February 1988.
Northwest Territories	None	Model Law applies to international commercial arbitration agreements and awards whether made on or before 10 August 1986.
Yukon Territory	None	This law shall not affect any other law of this State by virtue which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Jurisdiction	Scope of Application S. 1(3)	Extent of Court Intervention
Model Law	An arbitration is international if: (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Canada	The act applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in Right of Canada, a departmental corporation, a Crown corporation, or in relation to maritime or admiralty matters. S 5(2) Applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Act. S5(3).	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Alberta	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
British Columbia	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law, also: no arbitration proceedings shall be questioned by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act. S5(a) & (b).
Manitoba	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
News Brunswick	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Nova Scotia	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Ontario	An arbitration conducted in Ontario between parties that all have their places of business in Ontario is not international only because the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Prince Edward Island	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Quebec	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Saskatchewan	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Newfoundland	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.
Northwest Territories	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.

Yukon Territory	None	Article 5. In matters governed by this Law, no court shall intervene except where so provided in this Law.

Jurisdiction	Aids to Interpretation
Model Law	No provision.
Canada	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s4.
Alberta	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s12(2).
British Columbia	In construing a provision of this Act, a Court or Arbitral Tribunal may refer to the UNCITRAL document and its working group respecting the preparation of the Model Law and shall give those documents the weight that is appropriate in the circumstances. s6.
Manitoba	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s12(2).
New Brunswick	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s12(2).
Nova Scotia	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s13.
Ontario	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s13.
Prince Edward Island	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s12.
Quebec	Where matters of extra provincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration: (1) the Model Law on International Commercial Arbitration as adopted by the United Nationals Commission on International Trade Law on 21 June 1985; (2) the Report of the United Nations on International Trade Law on the work of its 18th Session in Vienna from the 3rd to 21st day of June 1985; (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained the Report of the Secretary-General to the 18th Session of the United Nations Commission on International Trade Law. Art. 940.6.
Saskatchewan	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s11.
Newfoundland	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s13.
Northwest Territories	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s2.
Yukon Territory	Recourse may be had to the UNCITRAL Report of session held 3-21 June 1985 and the Analytical Commentary contained in the Report of the Secretary-General to the Session. s10.

Jurisdiction	Stay of Legal Proceedings
Model Law	8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless if finds that the agreement is null and void, inoperative or incapable of being performed. (2)Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
Canada	8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless if finds that the agreement is null and void, inoperative or incapable of being performed. (2)Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
Alberta	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s10.
British Columbia	Generally the same as Model Law, plus: before or after entering an appearance and before delivery of any pleadings or taking any other steps in the proceeding a party may apply to stay the proceedings. s8(1).
Manitoba	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s10.
New Brunswick	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s10.
Nova Scotia	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s11.
Ontario	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s8.
Prince Edward Island	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s10.
Quebec	Where an arbitration is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or the court finds the agreement to be null 940.1
Saskatchewan	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s9.
Newfoundland	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s11.
Northwest Territories	Same as Model Law plus: where a court refers the parties to arbitration, the proceedings of the Court are stayed with respect to the matters to which the arbitration relates. s11.

Yukon Territory	8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless if finds that the agreement is null and void, inoperative or incapable of being performed. (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Jurisdiction	Nationality of Arbitrators
Model Law	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Canada	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Alberta	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
British Columbia	A person of any nationality may be an arbitrator. s11(1). Unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, the Chief Justice shall not appoint a sole or third arbitrator who is of the same nationality as that of any of the parties. s11(9).
Manitoba	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
New Brunswick	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Nova Scotia	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Ontario	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Prince Edward Island	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Quebec	No specific Provision
Saskatchewan	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Newfoundland	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Northwest Territories	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
Yukon Territory	11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

Jurisdiction	Appointment of Arbitrators
	11 2)The parties are free to agree on a procedure of appointing the arbitrator or arbitrators subject to the provisions of paragraphs (4) and (5) of this article. (3) Failing such agreement (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in Article 6; (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6. (4) Where, under an appointment procedure agreed upon by the parties: (a) a party fails to act as required under such procedure, or (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or (c) a third party, including an institution fails to perform any function entrusted to it under such procedure any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appoint. (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.
Canada	Same as Model Law.
Alberta	Same as Model Law.
British Columbia	11(2) Subject to subsections (6) and (7), the parties are free to agree on a procedure for appointing the arbitral tribunal. (3) Failing any agreement referred to in subsection (2), in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 appointed arbitrators shall appoint the third arbitrator. (4)If the appointment procedure in subsection (3) applies and (a) a party fails to appoint an arbitrator within 30 days after receipt of a request to do so from the other party, or (b)the 2 appointed arbitrators fail to agree on the third arbitrator within 30 days after their appointment, the appointment shall be made, upon request of a party, by the Chief Justice. (5) Failing any agreement referred to in subsection (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator, the appointment shall be made, upon request of a party, by the Chief Justice. (6) Where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as required under that procedure, (b) the parties, or 2 appointed arbitrators, fail to reach an agreement expected of them under that procedure, or (c) a third party, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice to take the necessary measure, unless the agreement on the appoint procedure provides other means for securing the appointment. (7) A decision on a matter entrusted by subsection (4), (5) or (6) to the Chief Justice is final and is not subject to appeal.

Manitoba	Same as Model Law.
New Brunswick	Same as Model Law.
Nova Scotia	Same as Model Law.
Ontario	Same as Model Law.
Prince Edward Island	Same as Model Law.
Quebec	If the procedure of appointment contained in the arbitration agreement proves difficult to put into practice a judge may on the motion of one of the parties take any necessary measure to bring about the appointment. Art. 941.2.
Saskatchewan	Same as Model Law.
Newfoundland	Same as Model Law.
Northwest Territory	Same as Model Law.
Yukon Territory	Same as Model Law.

Jurisdiction	Termination of Mandate and Substitution of Arbitrators
Model Law	15. Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
Canada	15. Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
Alberta	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s6.
British Columbia	Arbitration must be repeated only where sole or presiding arbitrator is replaced, otherwise in the discretion of the arbitral tribunal. Also, unless otherwise agreed by parties orders or rulings made prior to replacement are not invalidated solely because of a change of composition in the tribunal. s15(3), (4).
Manitoba	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s6.
New Brunswick	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s6.
Nova Scotia	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s7.
Ontario	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s4.
Prince Edward Island	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s6.
Quebec	The arbitrators, including the arbitrator whose recusation is proposed, may continue the arbitration proceedings and make the award while such a case is pending. Art.942.4.

Saskatchewan	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s6.
Newfoundland	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s7.
Northwest Territories	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s8.
Yukon Territory	Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated. With respect to Art.15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award regardless of how the arbitrator was appointed. s4.

Jurisdiction	Arbitral award	In-Camera Hearings	Production by Expert
Model Law	Not defined	No provision	No provision
Canada	Not defined	No provision	No provision
Alberta	Not defined	No provision	No provision
British Columbia	Means any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes an interim arbitral award. s2(1). The arbitral tribunal may, at any time during the arbitral proceedings, make an interim award on any matter with respect to which it may make a final arbitral award. s31(6).	Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings are to be held in-camera. s24(5).	Unless otherwise agreed by the parties, the experts shall on the request of a party, make available to that party for examination all documents, goods or other property in the expert's possession with which he was provided in order to prepare his report. s26(3).
Manitoba	Not defined	No provision	No provision
New Brunswick	Not defined	No provision	No provision
Nova Scotia	Not defined	No provision	No provision
Ontario	An order of the arbitral tribunal under Art.17 of the model Law for an interim measure of protection and the provision of security in connection which is subject to the provision of the Model Law as if it were an award. s9.	No provision	No provision
Prince Edward Island	Not defined	No provision	No provision
Quebec	Not defined	No provision	Every expert's report or other documents which the arbitrators may invoke in support of their decision must be transmitted to the parties. Art.944.2
Saskatchewan	Not defined	No provision	No provision
Newfoundland	Not defined	No provision	No provision

Northwest Territories	Not defined	No provision	No provision
Yukon Territory	Not defined	No provision	No provision

Jurisdiction	Consolidation
Model Law	No provision
Canada	No provision
Alberta	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s8.
British Columbia	Where the parties to 2 or more arbitration agreements agree to consolidate the arbitrations arising out of their different agreement the Court can do one or more of the following: (a) order the arbitrations to be consolidated on such terms as the Court considers just and necessary; (b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal; (c) where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary. s27(2).
Manitoba	Same as Alberta.
New Brunswick	Same as Alberta.
Nova Scotia	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s9.
Ontario	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s7.

Prince Edward Island	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s8.
Quebec	No provision.
Saskatchewan	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s7.
Newfoundland	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s9.
Northwest Territories	Where the parties to 2 or more arbitration agreements agree to consolidate their respective arbitral proceedings and cannot agree on a matter necessary to conduct a consolidated arbitral proceeding the Court may on the application of one party with the consent of all the other parties make such order in respect of that matter as it considers necessary for the consolidation of the arbitral proceedings. s10.
Yukon Territory	On application of the parties to 2 or more arbitration proceedings the court may order: (a) the arbitration proceedings to be consolidated, on terms it considers just; (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or (c) any of the arbitration proceedings to be stayed until after the determination of any one of them. If the parties cannot agree upon the choice of the arbitral tribunal the court may appoint. s6.

Jurisdiction	Applicable Rules to Substance of Dispute, Failing Agreement	Use of Other ADR Procedures
Model Law	The law determined by the conflict of law rules the arbitral tribunal considers applicable. Art.28(2)	No provision
Canada	The law determined by the conflict of law rules the arbitral tribunal considers applicable. s7.	No provision
Alberta	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s7.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s5.
British Columbia	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s28(3)	It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage a settlement. s30(1)
Manitoba	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s7.	No provision
New Brunswick	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s7.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s5.
Nova Scotia	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s8.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s6.
Ontario	The law determined by the conflict of law rules the arbitral tribunal considers applicable. s7.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s3.
Prince Edward Island	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s8.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s5
Quebec	According to the rules of law considered appropriate. Art.944.10	No provision

Saskatchewan	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s6.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s4.
Newfoundland	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s8.	For the purposes of encouraging settlement of a dispute an arbitral tribunal may with the agreement of the parties employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure. s6.
Northwest Territories	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s9.	No provision
Yukon Territory	The rules of law the arbitral tribunal considers to be appropriate given all the circumstances surrounding the dispute. s5.	No provision

Jurisdiction	Recognition and Enforcement of Foreign Arbitral Awards
Model Law	35 (1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language. 36 (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it was invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b)if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State. (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.
Canada	Same as Model Law
Alberta	Same as Model Law

British Columbia	Same as Model Law
Manitoba	Same as Model Law
New Brunswick	Same as Model Law
Nova Scotia	Same as Model Law
Ontario	Same as Model Law, but also: for the purpose Articles 35 & 36 of the Model Law an arbitral award includes a commercial award made outside Canada, even if the arbitration to which it relates is not international as defined in Article 1(3) of the Model Law. s10.
Prince Edward Island	Same as Model Law
Quebec	A court examining an application for recognition and execution of an arbitral award cannot inquire into the merits of the dispute. Art.951.1
Saskatchewan	Same as Model Law
Newfoundland	Same as Model Law
Northwest Territories	Same as Model Law
Yukon Territory	Same as Model Law

Jurisdiction	Changes to award	Interest and Costs
Model Law	No provision	No Provision
Canada	No provision	No provision
Alberta	No provision	No provision
British Columbia	No provision	Unless otherwise agreed by the parties, the arbitral tribunal may award interest, and costs which shall be in its discretion and may include fees and expenses of arbitrators and expert witnesses, legal fees and expenses, any other expenses incurred in connection with the arbitral proceedings, and specify the party entitled to costs, the party who shall pay the costs, the amount of costs or method of determining the award, and the manner in which the costs shall be paid. s31(7)(8).
Manitoba	No provision	No provision
New Brunswick	No provision	No provision
Nova Scotia	No provision	No provision
Ontario	No provision	No provision
Prince Edward Island	No provision	No provision
Quebec	The arbitrators may, on the application of a party made within 30 days after receiving the arbitration award correct any error in writing or calculation or any other clerical error in the award, interpret a specific part of the award with the agreement of the parties; render a supplementary award on a part of the application omitted in the award. Art. 945.6.	No provision
Saskatchewan	No provision	No provision
Newfoundland	No provision	No provision
Northwest Territories	No provision	No provision
Yukon Territory	No provision	No provision

ENDNOTES

[1] Art. 1(1)
[2] Subsection 5(2)
[3] Art. 19
[4] Art. 5
[5] Art. 9
[6] Art. 19
[7] Art. 22
[8] Art. 11(1)
[9] Art. 28
[10] Art. 31
[11] Art. 35
[12] Art. 36(2)
[13] In Canada, the federal Department of Justice prefers the term “Dispute Resolution” rather than the term “Alternative Dispute Resolution”. A number of international organisations and institutions have similarly begun referring to “DR”. The Department of Justice uses this term to refer to the range of options available to resolve disputes, from the consensual to the adjudicative from negotiation to litigation, Arbitration is included in this definition of DR. For the purposes of this section, references to DR *excludes* arbitration and litigation.

Chile

GENERAL OVERVIEW

Primary sources of law:

Chile follows the continental or civil law system. Legislation is the primary source of law as opposed to case law or jurisprudence. The Civil Code of Chile[1] establishes that the force of a court decision is limited to that particular case.

The hierarchy of laws is as follows:

- The Political Constitution of 1980: The Constitution must be respected above all laws, rules and regulations.
- Organic Constitutional Laws, Qualified Quorum Laws and Interpretative Laws: These laws require higher quorums in Congress than ordinary laws and are established in the Constitution for certain relevant issues, and for the interpretation of the Constitution.
- Other laws, including:
    - ◊ Ordinary laws: those approved by the legislature through the process established in the Constitution;
    - ◊ Decrees with the Force of Law:[2] The Constitution[3] provides that Congress can grant to the President, the power, during no more than one year, to enact rules on specific technical issues;
    - ◊ Law Decrees: enacted during emergency periods or "*de facto*" governments under which Congress was not functioning (1925, 1931 and 1973-81); and
    - ◊ International Treaties published in the *Official Gazette of Chile*.
- Administrative provisions: or the rules and regulations[4] enacted by the Executive power to implement the laws.
- Contracts: According to the Civil Code, contracts are the equivalent of a law to the parties.

Sources of law for dispute resolution outside of the courts:

No specific text, code or law exists on international commercial dispute resolution mechanisms. Mainly, the law is found in international treaties ratified by Chile, such as the New York Convention, the Washington Convention, and the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention). The Chilean Constitution provides that international treaties must be approved by Congress.[5] Once the treaty is approved, a decree with its text is published in the *Official Gazette of Chile*, and the treaty becomes law of the Republic, and its validity is equivalent to an ordinary law passed by Congress, with the exception of treaties on essential human rights that are considered superior to ordinary law and equivalent to the constitutional principles.

Chile participated at the Havana Conference of 1928, and in 1934 its Final Act was adopted by Chile as the Code of Private International Law (Code of Bustamante). The same Code was also adopted in several Latin American countries. In the Code some provisions are found on international dispute resolution. The Code of Bustamante was adopted by Chile with the reservation that in case of conflicts between foreign legislation and the Chilean Law, the latter will prevail.

Chile is a party to several Bilateral Investment Promotion and Protection Agreements (IPPAs), which incorporate provisions on dispute resolution between an investor and a government and between governments.

The Foreign Investment Statute (Law-Decree 600) provides[6] procedures for dealing with complaints of discrimination against foreign investors. The complaints may be dealt with by the Foreign Investment Committee or by the Chilean courts. The rights granted in the Foreign Investment Statute are applicable only to those investors and investments that come under this Statute.

The Code of Civil Procedure and the Code of Organisation of Tribunals contain specific chapters on domestic arbitration rules, that may be applicable to international commercial arbitration. Additionally, in the Code of Civil Procedure, rules are found on the recognition and execution of foreign decisions and awards.

Law-Decree No 2349 of the year 1978 establishes rules for arbitration with regard to the International Financial and Economic Contracts of the Public Sector: The law permits the choice of jurisdiction and the submission of disputes to foreign laws and foreign jurisdictions comprising ordinary or arbitral courts for financial and economic contracts of the public sector. However, it is forbidden for the State to stipulate in foreign investment contracts which are governed by the Law-Decree 600 that differences shall be submitted to foreign arbitral or ordinary courts.

The Canada-Chile Free Trade Agreement contains provisions on dispute resolution including references to mediation and arbitration.

Institutions for international commercial dispute resolution outside of the courts:

Ministry of Justice
Address: Morande 107
Santiago
CHILE
Tel: (56 2) 674 3100
Fax: (56 2) 696 6952

Foreign Investment Committee
Address: Teatinos 120, piso 10
Santiago
CHILE
Tel: (56 2) 698 4254
Fax: (56 2) 698 9476

The Chamber of Commerce of Santiago has established an Arbitration and Mediation Centre. The Centre has its own statutes on mediation and arbitration procedures, offers mediation and arbitration services and has a roster of qualified arbitrators and mediators. The parties are free to choose other rules, as for example the rules of the International Chamber of Commerce, Paris. The services of the Centre are open to any juridical or natural person whether or not they are members of the Chamber of Commerce.

Santiago Arbitration and Mediation Centre
Chamber of Commerce of Santiago
Address: Santa Lucia 302, piso 3
Santiago
CHILE

Tel: (56 2) 360 7015
Fax: (56 2) 633 6395
Web site: www.camaracomercio.cl

The Chilean American Chamber of Commerce in collaboration with the American Arbitration Association has recently set up an Arbitration and Mediation Centre for the resolution of international commercial disputes arising between private parties.

Amcham Chile Arbitration and Mediation Center
Chilean American Chamber of Commerce
Address: Av.Americo Bespucio Sur 80 piso 9
Santiago
CHILE

Phone: (56 2) 290 9768 - 290 9700
Facsimile: (56 2) 206 0911

Web site: www.amcham.cl

Recognition and enforcement of foreign arbitral awards:

Chile is a party to the New York Convention without reservation. The Convention was published in the *Official Gazette of Chile* on 30 October 1975 by Decree of the Ministry of Foreign Affairs No 664, in 1975.

Chile is also signatory and has ratified the Panama Convention which also includes provisions on the enforcement of arbitral awards. This convention was also adopted by Chile without reservations by Law-Decree No 1.376 published in the *Official Gazette of Chile* on 12 July 1976.

The Chilean Constitution provides that international treaties must be approved by Congress. Once the treaty is approved, a decree with its text is published in the *Official Gazette of Chile* and the treaty becomes law of the Republic. Its validity is equivalent to an ordinary law passed by Congress, with the exception of treaties on human rights that are considered superior to ordinary law and equivalent to the special laws of higher quorum established in the Constitution.

Settlement of disputes through ICSID or bilateral investment agreements:

Chile has been a party to the Washington Convention since 1992. The text of the Treaty, Decree of the Ministry of Foreign Affairs No 1304, was published in the *Official Gazette of Chile* on 9 January 1992.

In addition, Chile has entered into the following bilateral Investment Promotion and Protection Agreements. These have been published in the *Official Gazette of Chile* and have the force equivalent to ordinary laws.

Country	**Decree No**	**Publication Date**
Argentina	1,822	27 February 1995
Czech Republic	1,401	2 December 1996
Croatia	698	31 July 1996
China	920	14 October 1995
Denmark	11,345	30 November 1995
Ecuador	1,624	21 February 1996
Spain	291	27 April 1994

France	1,164	5 December 1994
Italy	412	23 June 1995
Sweden	1,717	13 February 1995
Malaysia	605	4 August 1995
Finland	463	13 February 1996
Norway	1,119	4 November 1994
Venezuela	166	17 May 1994
United Kingdom	563	23 June 1997
Paraguay	986	16 September 1997
Philippines	1,237	6 November 1997
Portugal	35	24 February 1998
Rumania	1,055	27 August 1997
Ukraine	987	29 August 1997

The policy followed by Chile concerning dispute resolution in IPPAs is to provide a single and final option of tribunal for resolving disputes. The alternatives are either the courts or arbitration. Once the forum is chosen, the investor cannot change it. The general content of dispute resolution clauses of the IPPAs is that disputes between contracting parties should be solved through diplomatic channels whenever possible. If a solution is not reached, any of the parties may request that the dispute be submitted to an *ad-hoc* Arbitral Court.

In situations where nationals of another contracting party claim that Chile has not complied with its obligations or when rights of the investor are violated, the parties should first attempt to solve the dispute amicably through consultation and negotiation. If after a reasonable time (3 to 6 months) an agreement is not reached, the investor may either request that the dispute be submitted to international arbitration or to competent Chilean courts or administrative authorities. If the investor chooses arbitration and their country is a member of the Washington Convention, the mechanisms stipulated by the Convention are available. Alternatively, countries that have not yet adopted the Convention but have IPPAs with Chile may apply for arbitration under UNCITRAL rules.

Laws relating to commercial dispute resolution currently under review:

Currently there is a bill of law on arbitration pending before congress. It is proposing, in general terms, to widen the scope and importance of arbitration in Chile. For example it proposes to increase the range of matters that should be resolved through mandatory arbitration. Although the pending bill of law refers mainly to domestic arbitration, it has provisions on commercial arbitration. Some international aspects may also be included.

An agreement on international commercial arbitration was signed by Chile and Mercosur countries ("Acuerdo Sobre Arbitraje Comercial Internacional entre Mercosur, la Republica de Bolivia y la Republica de Chile") and its ratification is pending before Congress. Also, Chile signed a free trade agreement with Mexico ("Tratado de Libre Comercio entre la Republica de Chile y los Estados Unidos Mexicanos") which contains provisions on dispute resolution and its ratification is pending before Congress.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

There is no separate arbitration law or code applicable to international disputes but several international treaties are applicable and a bill is currently before Congress (see above).

With respect to domestic rules, the fundamental principle is autonomy of the parties. Rules for arbitration contained in the Code of Civil Procedure and in the Code of Organisation of Tribunals are applicable in default of the parties not determining different rules.

Differences in the application of arbitration law to international and domestic arbitration:

With respect to commercial matters, there is freedom to submit any type of dispute to arbitration. Currently, the Code of Organisation of Tribunals already identifies certain commercial matters that must be resolved through arbitration, for example matters relating to Maritime Commerce. All matters concerning maritime commerce are subject to mandatory arbitration when the amount in dispute exceeds 5000 special drawing rights (SDRs) of the International Monetary Fund[7].

Limitations on types of dispute that may be arbitrated:

Matters that can not be submitted to arbitration are the exception, such as criminal and family matters.

Extent of party autonomy to define procedure:

The domestic rules for arbitration procedures are found in the Code of Civil Procedure[8]. A further set of rules regulating the jurisdiction and conduct of arbiters and arbitrators in their judicial capacity, are found at The Code of Organisation of Tribunals[9]. In this regard, the Constitution[10] states that the organisation and attributes of tribunals must be regulated through a special law with higher quorum[11]. This may also include arbitrators and arbiters because they are classified as judges when acting in a judicial capacity.

The above-mentioned rules are mainly designed for domestic arbitration with the exception of those rules relating to decisions rendered by Foreign Tribunals[12], where the proceedings for the recognition of a foreign decision or award in Chile are regulated. Moreover, the parties may establish their own rules. In the absence of party designated rules, these Codes

will apply. It is possible therefore, for the parties to adopt, for example, the UNCITRAL rules or any other rules of their preference. The arbitration would have to be conducted accordingly.

There is wide flexibility or autonomy for the parties to establish their own rules or to modify the rules of prescribed codes which will apply in the absence of the parties' agreement on a different set of applicable rules. Minimal standards must be respected.

The Code of Organisation of Tribunals[13] has established a classification of arbiters and arbitrators in three types:

- Arbitrators *ex aequo et bono* are not bound to follow statutes or legal provisions regarding the proceedings or with regard to the issuance of the award. The award is to be granted in accordance with fairness and equity. Consequently, the parties may establish a set of rules that the arbitrator must apply, but minimal standards must always be respected.
- Arbitrators who are not bound to follow the legal requirements with regard to the conduct of proceedings (such as the strict rules of evidence), but have to issue their award in strict conformity with the law.
- Arbiters who are bound by law, as the case of ordinary courts, both as regards the procedure and the issuance of the award.

In domestic arbitration, if the parties do not specify the kind of arbiter or arbitrator, they are deemed to have chosen an arbiter. An exception is an arbitration pursued according to the Law on Corporations[14], where in the absence of the parties' declaration, they are deemed to have chosen an arbitrator *ex aequo et bono*.

In international disputes, arbitrators *ex aequo et bono* are commonly used. Thus, the parties are given the freedom to choose the applicable rules.

Scope of Court intervention:

One of the basic principles with regard to arbitration in Chile is that arbiters and arbitrators are invested with *jurisdiction* but not *imperium*. Although they can make an award, they cannot themselves apply public sanctions for its enforcement. Where the use of a public sanction is required, courts must intervene. For example, in arbitration, witness depositions are on voluntary basis and they can only be forced to appear through the intervention of courts. Court intervention can also occur in relation to making some procedural orders, provided that the parties have not precluded this option.

However, while the parties are empowered to exclude access to the courts for procedural orders, they may not exclude orders relating to the conduct of arbiters or arbitrators (complaint resource).

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

There is no prohibition on conducting arbitration in a foreign language in Chile as the parties have freedom to choose the procedure and rules of the arbitration. Consequently they may also choose the language. Arbitration on international commercial matters is often conducted in English and this fact has been always accepted. However, if the award is to be recognised and enforced in Chile its translation into Spanish is required.

With respect to the nationality, there is no prohibition or impediment to foreigners being nominated arbitrators in Chile. They must comply however with the requirements established in the Code of Organisation of Tribunals[15] with regard to age, legal capacity, and ability to write and read.

The Panama Convention expressly recognises that foreigners are entitled to be nominated as arbitrators.

However, in order to be nominated as arbiter the Code of Organisation of Tribunals requires the person to be a lawyer, because the arbiter has to apply the law, both in the proceedings and with regard to the substance of the award. With respect to nationality, pursuant to the Code of Organisation of Tribunals[16], only Chilean citizens can practice as lawyers, unless otherwise provided in international treaties (Chile has signed agreements with Colombia, Ecuador, Uruguay and Spain). This means in practice that because arbiters must be lawyers, they will be Chilean. This differs from arbitrators *ex aequo et bono*, generally nominated in international disputes, who do not need to be a lawyer nor Chilean.

Note that as most commercial domestic and international disputes are entrusted to arbitrators, the restrictions to being nominated as arbiter are not considered to be a significant impediment to the use of arbitration as a mechanism for international dispute resolution.

Law applicable to substance of dispute:

The parties may choose foreign laws to govern the substance of the dispute, unless incompatible with any international treaties signed by Chile or incompatible with the fundamental principles of the national legal order.

It is also possible to use the rules of an international arbitration institution.

Decision making by arbitral tribunal and form of award:

The degree of regulation of the award in domestic arbitration depends on whether an arbiter or arbitrator is chosen. Arbiters must render the decision with the same requirements as a judge, while arbitrators have much wider flexibility. However the law sets minimal

standards. In international arbitration, the award must comply with the requirements of the New York Convention or Inter-American Convention if it is to be recognised and enforced in Chile.

Confidentiality:

Arbitral procedure is handled by a private judge (the arbitrator or arbiter). Thus the matter is taken out of the public courts. It is also possible for the parties to sign a confidentiality agreement. However, pursuant to the Code of Civil Procedure[17], once the case is finished the award must be filed in the office of the authority where a case resolved by an ordinary judge is filed. Consequently, confidentiality is not total.

Recourse against an award and admissible grounds:

Chile is a party to the New York Convention and Inter-American Convention. The only reasons for declining to enforce a foreign award are those established in these conventions. It is necessary to bear in mind that an award must not be in contravention of public legal order to be enforceable.

With regard to domestic awards, the measures available depend on whether or not the parties have renounced their right to seek procedural orders.

Recognition and enforcement:

The Code of Civil Procedure establishes the *exequator* procedure for the recognition of foreign judgements and foreign arbitral awards.[18] A foreign arbitral award can not be recognised without the *exequator*.

The *exequator* proceeding before the Supreme Court is consistent with the New York Convention. In this regard, the Code of Civil Procedure requires that a certified copy of the foreign award be filed with the Supreme Court of Chile.[19]

According to Chilean law, the execution of domestic arbitral awards and foreign awards recognised in Chile through the *exequator* procedure are directly enforceable in Chile and no recognition or further procedure is necessary. Awards are enforceable in the same way as decisions rendered by courts.

Arbitral awards may be formally executed before the arbitrator or arbiter or before ordinary courts. The election between these two alternatives for execution of an award belongs to the requesting party. If, for the execution of an award the use of the public sanctions or compulsory measures are necessary or rights of third parties are involved, the courts must intervene.

For the execution of a foreign award, the court will notify the other party of the request for enforcement of the decision and the party will be given a term equivalent to the term granted to defendants in ordinary procedures to file a statement of defence. The court may proceed whether or not the respondent has filed arguments and may take into account the public interest[20].

The competent court for the execution of the foreign decision or award is the court where the matter would have been filed in Chile.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

There is a long tradition and recognition of arbitration in Chile dating from the early days of the independence. Arbitration is widely used as an alternative dispute resolution for commercial matters.

ADR however, is increasingly gaining popularity. The Chamber of Commerce of Santiago has inaugurated a mediation service and the Ministry of Justice is proposing to introduce a national mediation system, to be mandatory for family matters.

Forms of ADR available for commercial disputes:

Outside of the court system and apart from arbitration which is dealt with above, conciliation and mediation are available. Both of these procedures normally require the consent of both parties before they can be initiated. If there is a mutually accepted outcome, the result will be a transaction contract.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Once a lawsuit is filed, conciliation is established as a mandatory step for the most civil cases (with a few exceptions). The new law on consumer protection, recently enacted, establishes a mandatory kind of mediation or conciliation.

Arbitration is available and widely used. Administered arbitration is also gaining popularity. Although there is no law on mandatory mediation, this alternative form of dispute resolution is available at the Arbitration and Mediation Centre of the Chamber of Commerce of Santiago on voluntary basis.

Legal implications flowing from choices between the various procedures:

In general terms, the parties have freedom of choice. The exception is conciliation, which in most civil cases must be conducted by the judge. On the other hand, a limited number of issues are subject to mandatory arbitration, such as maritime disputes.

Rules, if any, defining the role and procedures of mediator:

In situations where conciliation is mandatory it must be carried out by the judge according to the Code of Civil Procedure[21]. With regard to mediation, there are no rules. However, if a mediation is carried out at the Chamber of Commerce of Santiago Arbitration and Mediation Centre, they have their own statute and code of ethics for mediators.

Resort to arbitration or courts during ADR:

Mediation is always carried out on a voluntary basis. Any of the parties may resort to courts or arbitration during mediation without suffering any legal consequences.

Mediation is based only on the will of the parties without any legal mandated rules. Thus, any of the parties may withdraw from mediation at any moment and initiate a court procedure. At the same time, if a court procedure is already initiated, there is no obstacle in using mediation that may be also terminated at any time by any of the parties to continue or initiate a lawsuit before courts.

Confidentiality and admissibility of evidence in other proceedings:

In mediation, confidentiality could be a matter of professional privilege that exists, for example, between a lawyer and client. In practice, confidentiality would generally be protected by signing a confidentiality agreement, including a penal clause should the agreement be broken.

Recognition and enforceability of settlements:

The agreement reached between the parties outside the court is legally a transaction contract and can be recognised by the court as a judicial decision for its execution. The transaction contract is regulated in the Civil Code of Chile[22]. An agreement reached in a conciliation at court has the force of a decision rendered by the judge and it is enforceable according to the Code of Civil Procedure.[23] Exceptionally, some agreements reached before administrative authorities, as for example agreements reached before Labour administrative authorities, may also be valid as judicial decisions.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

Basically, limitations on the choice of ADR and the jurisdiction of the mediator in commercial disputes apply to disputes involving the public sector or the State of Chile. With a few exceptions (Law on Public Concessions and Economic and Law Decree 2349 of 1978) the State's capacity for being a party in ADR is limited or forbidden.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

As mediation is a consensual process, there is no restriction on the nationality of mediators. As long as it is accepted by the parties, the mediator may be of any nationality. The same is valid for legal representation.

LEGAL SOURCES AND REFERENCES

There is no Internet site on dispute resolution in Chile.

BIBLIOGRAPHY

Eyzaguirre, Rafael Echeverria, "El Arbitraje Comercial en la Legislacion Chilena y su Regulacion Internacional", *Editorial Juridica de Chile*.

Aylwin, Patricio Azocar, "El Juicio Arbitral", *Editorial Juridica de Chile*.

Casarino, Mario Viterbo, "Manual de Derecho Procesal (Tomo II)", *Editorial Juridica de Chile.*

ENDNOTES

[1] Art. III
[22] Decretos con Fuerza de Ley
[3] Art. 61
[4] Reglamentos, decretos and decretos dupremos
[5] Art. 50
[6] Art. 10
[7] Code of Commerce
[8] Title VIII "The Arbitral Procedures", Art. 628 - 644
[9] Title IX on "Arbiters and Arbitrators", Art. 222 - 243
[10] Art. 74
[11] Ley Organica Constitucional
[12] Title II of the Code of Civil Procedure*:* Art. 242 -51
[13] Art. 223
[14] Art. 4, No 10
[15] Art. 225
[16] Art. 526
[17] Art. 644
[18] Art. 242 - 251
[19] Art. 247
[20] "Ministerio publico"
[21] Art. 262 - 268
[22] Art. 2446 - 2494
[23] Art. 267

People's Republic of China

GENERAL OVERVIEW

Primary sources of law:

- Statute law

The primary source of law in the People's Republic of China (PRC) is legislation.

Sources of law for commercial dispute resolution outside of the court system:

In general, laws for commercial dispute resolution outside the court system are to be found in the following publications (not exhaustive but illustrative):

- Gazette of the Standing Committee of the National People's Congress of the People's Republic of China
- Gazette of the State Council of the People's Republic of China
- Gazette of the Ministry of Foreign Trade and Economic Co-operation (MOFTEC)
- Jurisprudence Annual
- International Law Annual
- Compilation of Laws and Administrative Regulations by the Bureau of Legislative Affairs of the State Council, PRC.

Institutions for international commercial dispute resolution outside of the courts:

- China International Economic And Trade Arbitration Commission (CIETAC)
- China Maritime Arbitration Commission (CMAC)
- Beijing Mediation Centre
- CIETAC Sub-commissions
- Other Regional Mediation Centres

The first three bodies are subordinate sections of the China Council for the Promotion of the International Trade (CCPIC). The Foreign Trade Arbitration Commission was established in 1954, renamed the "Foreign Economic and Trade Arbitration Commission" in 1980, and then renamed again as CIETAC in 1998. CIETAC handles cases covering all disputes arising from international economic and trade transactions.

CMAC, set up as "Maritime Arbitration Commission" in 1958 and renamed CMAC, resolves contractual or non-contractual maritime disputes by means of arbitration.

The Beijing Mediation Centre, established in 1987, is responsible for settling disputes concerning international trade, finance, investment, technology transfer, project contracting, transportation, insurance and other commercial transactions.

The principal address of these three Commissions is:

6/F Golden Land Building
32 Liang Ma Qiao Road
Chaoyang District
Beijing 100016
PEOPLE'S REPUBLIC OF CHINA
Tel: (86 10) 6464 3520
Fax: (86 10) 6463 3500; 6464 3520

In line with an increase of caseload, CIETAC has set up two sub-commissions in Shenzhen and Shanghai. The two sub-commissions are an integral part of CIETAC.

Shenzhen Commission
17/F,59 Shennan Zhong Road
Shenzhen 518031
PEOPLE'S REPUBLIC OF CHINA
Tel: (86 755) 336 5877; 336 5885
Fax: (86 755) 336 4776

Shanghai Commission
33, Zhongshan Road (E.1)
Shanghai
PEOPLE'S REPUBLIC OF CHINA
Tel: (86 21) 6329 5443; 6323 3710
Fax: (86 21) 6329 1442; 6329 5332

If maritime arbitration increases, it is foreseeable that CMAC will also set up sub-commissions in other places in China.

A recent amendment to CIETAC rules permits CIETAC arbitration to be held in places other than Beijing, Shanghai and Shenzen which was previously the position. The new rule[1] provides that where the parties have agreed the place of arbitration the hearing will be conducted in that place. Where there has been no such agreement, the arbitration will be conducted in Beijing, Shenzen or Shanghai.

Besides CIETAC and CMAC, other legally established arbitration commissions may be set up under the Central Government in the municipalities where the People's Governments of provinces and autonomous regions are located or, if necessary, in other cities. The People's Governments of the specified municipalities and cities are responsible for organising the relevant departments and the commissions. These arbitration commissions are mainly responsible for resolving disputes between Chinese citizens. However, upon the application by the parties they can accept and deal with foreign related cases.

In addition to the Beijing Mediation Centre, CCPIC has established other mediation centres in 34 cities. They are:

Capital Mediation Centre Tel: (86 10) 6523 7783; 6512 5180 Fax: (86 10) 6512 5165	Sanxi Mediation Centre Tel: (86 29) 729 2732 Fax: (86 29) 729 1461
Dalian Mediation Centre Tel: (86 411) 281 5733; 280 6905 Fax: (86 411) 282 2287	Fujian Mediation Centre Tel: (86 591) 784 2749 Fax: (86 591) 784 2827
Jiangsu and Nanjing Mediation Centre Tel: (86 25) 771 3432; 440 1714; 440 1525 Fax: (86 25) 771 3048; 440 1937	Tianjin Mediation Centre Tel: (86 22) 2231 1891 Fax: (86 22) 2230 1344
Guandong Mediation Centre Tel: (86 20) 8657 8331 Fax: (86 20) 8658 1343	Liaoling and Shengyang Mediation Centre Tel: (86 24) 686 4832 Fax: (86 294 686 4791
Guangxi Mediation Centre Tel: (86 771) 585 3246; 282 9845 Fax: (86 771) 282 9845	Ha'erbin Mediation Centre Tel: (86 451) 233 3748 Fax: (86 451) 233 3772
Shanghai Mediation Centre Tel: (86 21) 6323 3710;6323 0351 Fax: (86 21) 6329 1442	Sichuan Mediation Centre Tel: (86 28) 334 7437 Fax: (86 28) 332 6884
Pudong Mediation Centre Tel: (86 21) 5877 0967; 5888 2626 Fax: (86 21) 5840 5423	Shandong Mediation Centre Tel: (86 532) 287 0011; 286 2400 Fax: (86 532) 287 9938
Hebei Mediation Centre Tel: (86 311) 708 3040 Fax: (86 311) 704 4103	Shanxi Mediation Centre Tel: (86 351) 202 4102 Fax: (86 351) 404 6433
Henan Mediation Centre Tel: (86 371) 381 5785; 394 3388 Fax: (86 371) 393 6504	Nibo Mediation Centre Tel: (86 574) 730 6027 Fax: (86 574) 729 2596
Hunan Mediation Centre Tel: (86 731) 229 1402 Fax: (86 731) 228 6994	Zhejiang Mediation Centre Tel: (86 571) 517 8452; 515 7532 Fax: (86 571) 515 0098
Wuhan Mediation Centre Tel: (86 27) 575 9545 Fax: (86 27) 579 7464	Hubei Mediation Centre Tel: (86 27) 577 3941 Fax: (86 27) 577 5174
Sanxi Mediation Centre Tel: (86 29) 729 2732 Fax: (86 29) 729 1461	Hainan Mediation Centre Tel: (86 898) 677 7401 Fax: (86 898) 675 0030

Xiamen Mediation Centre Tel: (86 592) 602 2027; 602 1666; Fax: (86 592) 602 2377	Gansu Mediation Centre Tel: (86 931) 861 8486 Fax: (86 931) 861 8083
Zhuhai Mediation Centre Tel: (86 756) 225 3532; 225 3524 Fax: (86 756) 222 8640	Anbui Mediation Centre Tel: (86 551) 282 2294 Fax: (86 551) 282 2950
Neimenggu Mediation Centre Tel: (86 471) 696 5404; 696 2766 Fax: (86 471) 696 2138	Yunnan Mediation Centre Tel: (86 871) 316 9684; 313 6758 Fax: (86 871) 313 6574
Chongqing Mediation Centre Tel: (86 23) 6381 7749; 6384 9209 Fax: (86 23) 6384 1115	Xinjiang Mediation Centre Tel: (86 991) 288 2784 Fax: (86 991) 286 0456
Jilin Mediation Centre Tel: (86 431) 562 5201; 562 7011 Fax: (86 431) 271 6259	Heibe Mediation Centre Tel: (86 456) 822 4105 Fax: (86 456) 822 3110
Heilongjiang Mediation Centre Tel: (86 451) 260 1073 Fax: (86 451) 260 1075	

Recognition and enforcement of foreign arbitral awards:

China acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1987 with two reservations;

- China will apply the Convention only on the basis of reciprocity; and
- China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered as commercial under the national law of China.

China is a member state to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters. China has also recently acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. In respect of the former, China has made reservations relating to Articles 8 and 9, Article 10, sub-paragraph a, Article 10, sub-paragraph b and c, Article 11 and Articles 24 and 25.

In China, the commitments created by the New York and Hague Conventions are implemented mainly through the Civil Procedure Law of the PRC. Actions to enforce foreign awards and judgements are taken in the Intermediate People's Courts.

Settlement of disputes through ICSID or bilateral investment agreements:

China became a party to the Washington Convention (ICSID) in 1990.

China has also concluded 82 bilateral investment agreements with other jurisdictions up to May 1997, including: Sweden, Germany, France, the Belgian-Luxembourg Economic Union, Finland, Norway, Italy, Thailand, Denmark, Netherlands, Austria, Singapore, Kuwait, Sri Lanka, Britain, Switzerland, Poland, Australia, Japan, Malaysia, New Zealand, Pakistan, Bulgaria, Ghana, Turkey, Papua-New Guinea, Hungary, Mongolia, the Czech and Slovak Federal Republics, Portugal, Spain, Bolivia, Philippines, Korea, Argentina, Vietnam, Laos, Albania, Georgia, Croatia, United Arab Emirates, Estonia, Slovenia, Lithuania, Uruguay, Azerbaijan, Ecuador, Chile, Iceland, Egypt, Peru, Romania, Jamaica, Indonesia, Sultance of Oman, Israel, Cuba, Yugoslavia, Saudi Arabia, Mauritius, Zimbabwe, Lebanon, Zambia, Cambodia, Bangladesh, Algeria, Syria. USSR, Uzebekistan, Kazakhstan, Kirghiszstan, Greece, Armenia, Ukraine, Moldovia, Turkmenistan, Tadzhikistan, Morocco, Gabon, Cameroon, Nigeria.

Laws relating to commercial dispute resolution currently under review:

No laws relating to international commercial dispute resolution are currently under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- Arbitration Law
- Special Provisions on Foreign Related Arbitration
- UNCITRAL Model Law
- Arbitration Rules

The Arbitration Law of the People's Republic of China (Arbitration Law) is based on the UNCITRAL Model Law. It was promulgated on 31 August 1994 and came into force on 1 September 1995. In the event that provisions on arbitration made before 1 September 1995 conflict with the Arbitration Law, the Arbitration Law prevails.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Law consists of 8 chapters, Chapter VII of which is titled "Special Provisions on Foreign-Related Arbitration". The provisions of Chapter VII apply to the arbitration of all disputes arising from foreign economic, trade, transportation or maritime matters. In the absence of specific provisions in Chapter VII, other relevant provisions of the Arbitration Law apply.

Limitations on types of dispute that may be arbitrated:

According to the Arbitration Law, disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organisations as equal subjects of law may be submitted to arbitration.

The following types of dispute can not be resolved by way of arbitration.

- Disputes over marriage, adoption, guardianship, child maintenance and inheritance.
- Administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.

Extent of party autonomy to define procedure:

The Arbitration Law provides that rules for foreign-related arbitration may be made by the China Council for the Promotion of International Trade (which acts as the China

International Chamber of Commerce) in line with the relevant provisions of the Arbitration Law and the Civil Procedure Law. The current Arbitration Rules, adopted by the China International Chamber of Commerce for CIETAC and CMAC respectively, have been in effect since 1 October 1995. A number of important changes were made to these rules that came into effect on 10 May 1998. The recent amendments apply to arbitration commenced after 10 May 1998 and to arbitration proceedings commenced before that date if the parties agree. Whereas previously, parties submitting a dispute to CIETAC were deemed to be accepting the CIETAC rules[2], the amendment provides that if the parties have agreed otherwise, and subject to the approval of CIETAC, the parties can include other rules in their arbitration agreement.

Most noteworthy of the new rules is an amendment to the rule requiring that disputes referred to CIETAC must be "international or foreign related"[3]. Under the amended article, CIETAC now has jurisdiction over disputes "arising from contractual or non-contractual economic and trade transactions".[4] The types of dispute that may be determined by CIETAC include:

- international or foreign related disputes;
- disputes relating to the Hong Kong SAR, Macau, or Taiwan;
- disputes between foreign investment enterprises (wholly owned foreign enterprises; equity joint ventures; and contractual joint ventures) and disputes between foreign investment enterprises and another Chinese legal person and/or economic organisation;
- disputes arising from project financing, invitations for tender bidding, construction, and other activities conducted by Chinese legal persons, physical persons and/or other economic organisations by using the capital, technology or service from foreign countries, international organisations or from the Hong Kong SAR, Macau and Taiwan; and
- disputes that may be recognised by CIETAC in accordance with the special provisions of, or upon special authorisation from, the law or administrative regulations of the People's Republic of China.[5]

Scope of court intervention and availability of courts for interim relief:

The Arbitration Law provides that every arbitration shall be legally conducted independently of any intervention of administrative organs, social organisations and individuals. However, when the validity of the arbitration agreement is in dispute a People's Court may accept a case.

If one of the parties objects to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a People's Court for a ruling. Where one

party applies to the arbitration commission while the other to a People's Court, the ruling given by the People's Court will prevail.

Where one of the parties initiates an action before a People's Court without stating the existence of a valid arbitration agreement, the People's Court shall reject the action provided that the other party submits the agreement to the Court before the first hearing of the case. The Court shall deem the arbitration agreement to have been waived by the other party and proceed with the hearing if the latter fails to submit the agreement to the Court before the first hearing of the case.

China applies a single ruling system to arbitration. Once an arbitration award has been made, neither an arbitration commission may rehear the matter, nor shall a People's Court accept an action submitted by any party in respect of the same matter. On the other hand, where a People's Court has ruled to cancel an arbitration award or to disallow its enforcement, the parties may re-apply for arbitration based on a new agreement between them or initiate legal proceedings with a People's Court in respect of the same matter.

If one of the parties applies for property preservation, the arbitration commission shall submit the application to a Local People's Court in the place where the party against whom the application is filed or the said property is located. This is a change from the previous provision which required the application to be made to an Intermediate People's Court.[6]

Source and scope of procedural rules:

According to the Arbitration Law, foreign arbitration rules are formulated by the China International Chamber of Commerce in accordance with the Arbitration Law and the relevant provisions of the Civil Procedure Law.

Procedural rules made by CCPIC for CIETAC and CMAC cover matters of application for arbitration, defence and counter-claim, formation of the arbitral tribunal, hearing and award etc. Once the parties agree to submit their dispute to CIETAC or CMAC, they are not able to make changes to their arbitration rules.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The Chinese language is the official language of CIETAC and CMAC. However, if the parties have agreed otherwise, their agreement shall prevail. Non-citizens may be engaged by the CCPIC as members of an arbitral tribunal and can also be authorised by the parties to act as arbitration agents.

Law applicable to substance of dispute:

When arbitrations are held in China, it is permissible for foreign laws to govern the substance of the dispute. According to the Foreign Economic Contract Law of the PRC, parties to a contract may choose the law to be applied to the settlement of the disputes arising from the contract. In the absence of such a choice by the parties, the law of the country that has the closest connection with the contract applies. However, contracts for Chinese-foreign equity joint ventures, Chinese-foreign co-operative joint ventures and Chinese-foreign co-operative exploitation and development of natural resources to be performed within the territory of the PRC shall be governed by laws of the PRC. International usage may apply in the event that no relevant provisions stipulated by laws of the PRC exist.

Decision-making by arbitral tribunal and form of award:

According to the Arbitration Law, an award shall be based on the opinion of the majority of the arbitrators. The opinion of the minority shall be part of the written record. If the tribunal is unable to reach a majority decision, the matter shall be decided by the presiding arbitrator.

The claims of the parties, the matters in dispute, the legal grounds upon which an award is given, the results of the judgement, the responsibility for the arbitration fees and the date of the award given shall be set forth in the award. The parties may agree that the matters in dispute and its the legal grounds need not be stated in the award. The award shall be signed by the arbitrators and sealed by the arbitration commission. An arbitrator who disagrees with the award may elect either to sign or not to sign it.

The parties may, within 30 days of the receipt of the award, request the arbitration tribunal to correct any typographical, calculation errors or matters which had been awarded but omitted in the award.

Confidentiality:

The confidentiality of arbitral proceedings and awards is protected by law. According to the Arbitration Law and Arbitration Rules for CIETAC and CMAC, an arbitration shall not be conducted in public. When a case is heard in closed session, neither the substantive nor the procedural matters of the case shall be disclosed to outsiders. If parties agree to a public hearing, the arbitration may proceed in public, except in cases concerning state secrets. When parties agree, the matters in dispute and the legal grounds need not be stated in the award.

Recourse against an award and admissible grounds:

A People's Court shall, after examination and verification by collegiate bench, rule to set aside or decline to enforce an arbitration award if a party provides evidence proving that the arbitration award involves one of the following circumstances:[7]

- the contract which is the subject of dispute does not contain a valid arbitration clause nor is there a subsequent arbitration agreement in writing;
- the party against whom the application is filed was not duly notified as to the appointment of the arbitrator or the arbitration proceedings, or they were unable to state their case due to reasons beyond their control;
- the composition of the arbitral tribunal or the procedure for arbitration was not in conformity with rules of arbitration; or
- matters decided, exceeded the scope of the arbitration agreement or the limits of authority of the arbitration tribunal.

The People's Court is required to render its decision for cancellation of the award or for rejection of the application within two months after the receipt of the application for setting aside an arbitration award. If the court decides that the case should be re-arbitrated by the arbitration tribunal, the court shall prescribe time limits for re-arbitrating the case and suspend the procedure to cancel or set aside the award. If the arbitration tribunal declines to re-hear the arbitration, the court shall rule to resume its hearing of the application.

Recognition and enforcement:

When one party fails to comply with an arbitration award, the other party may apply to the intermediate People's Court in the place where the party against whom the application is made or the said property is located for enforcement of it. The Court shall enforce the award.

If a party applies for enforcement of an award, while the other applies for it to be set aside or not enforced, the People's Court, upon receiving such applications, shall suspend the enforcement process to allow both claims to be heard. If the court rules to set aside an award, it then shall rule to terminate enforcement. However, when a court rejects an application for setting aside an award, then the enforcement procedure is resumed.

A People's Court shall, after examination and verification by collegiate bench, rule not to enforce an award if the party against whom an application is made provides evidence that the arbitration award involves one of the circumstances prescribed in Clause 1, Article 260 in the Civil Procedure Law.

In a situation where enforcement of an arbitration award is disallowed, the parties may re-apply for arbitration based on a written arbitration agreement or file a lawsuit with a People's Court.

When one party seeks enforcement of a legally valid arbitration award and the other party or his property subject to enforcement is located outside of the territory of the PRC, the applicant may apply directly to the foreign court with jurisdiction for recognition and enforcement of the award.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised within the jurisdiction of China.

Forms of ADR available for commercial disputes:

Conciliation and mediation are the main forms of ADR for commercial disputes in China.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

The Mediation Rules for the Beijing Mediation Centre require that the Centre shall accept a case only after the parties have reached a mediation agreement or consented to mediation. The Centre will not commence mediation without the confirmation of the respondent to the mediation agreement within the specified time limit.

The parties may choose to settle their dispute through conciliation or mediation after the commencement of arbitration at any time before an award is given. If, after conciliation, an agreement is reached, the parties may either apply to the arbitration tribunal for an award based on the conciliation agreement or withdraw the arbitration application.

The Civil Procedure Law, contains provision for the parties to an arbitration to voluntarily resort to mediation by a People's Court before the matter is arbitrated. If mediation is unsuccessful, the arbitration should proceed and an award should be made promptly. If a settlement agreement is reached by mediation, the arbitration tribunal will prepare the mediation statement or the award on basis of the settlement agreement. The mediation statement has the same effect as an award.

Legal implications flowing from choices between the various procedures:

If a party re-submits a dismissed application to the Arbitration Commission, the Chairman of the Commission shall decide the appropriate manner of dealing with the dispute. If it is agreed that the parties should proceed by way of mediation rather than arbitration, the arbitration tribunal shall mediate between them in a manner it considers appropriate. Where the parties reach a settlement in the course of mediation by the tribunal, such settlement shall be deemed to have been reached through the tribunal's mediation. When the mediation is

successful, the tribunal shall make a mediation statement or award based on the mediation settlement, either of which has the same effect.

In the course of arbitration, the arbitration tribunal may conduct mediation upon the consensus of the parties to a dispute. The parties may also attempt conciliation during the arbitration or mediation. Where a settlement is reached, the conciliation settlement may be regarded as one reached through the tribunal's mediation and can be legally enforced. Moreover, any mediation settlement reached in the process of arbitration is subject to the compulsory enforcement by the People's Courts.

A mediation settlement reached through the mediation of a People's Court before a case is tried has the same legal effect as an award (see above).

Based on their free will, the parties to a dispute may resort to conciliation between themselves. A conciliation settlement is legally binding between them as a contract.

Rules, if any, defining the role and procedures of mediator:

The Mediation Rules for the Beijing Mediation Centre, provide for the Centre to maintain a panel of mediators. They are selected and appointed by CCPIC. When applying for mediation, the parties should appoint or authorise the Centre to appoint one or two mediators from the Centre's panel. The mediators will conduct the mediation in the way they consider appropriate.

If the mediation fails, the mediators may, with the consent of the parties, be appointed as arbitrators in the subsequent arbitration proceedings.

The Arbitration Rules for CIETAC and CMAC provide that the parties should separately appoint or authorise the Chairman of the Arbitration Commission to appoint an arbitrator from the Arbitrators Panel of the Arbitration Commission. The third arbitrator, who acts as the presiding arbitrator, shall be jointly appointed by the parties or appointed by the Chairman upon the parties' joint authorisation. In the absence of such joint appointment or the joint authorisation to make the appointment within the specified time limit, the Chairman has the power to appoint the presiding arbitrator. The presiding arbitrator and the two appointed arbitrators jointly form an arbitration tribunal to hear the case.

The parties may also jointly appoint or jointly authorise the Chairman to appoint a sole arbitrator to form an arbitration tribunal to hear the case alone.

In respect of conciliation, the Arbitration Law provides that after the commencement of an arbitration, the parties may settle the dispute through conciliation. They may either apply to the arbitration tribunal for a consent award based on the conciliation agreement reached between them or withdraw the arbitration application.

If a settlement fails after the conclusion of a conciliation agreement and the withdrawal of the arbitration application, the parties may re-apply for arbitration based on their original

arbitration agreement. In respect of mediation, the Arbitration Law provides that the arbitration tribunal may first mediate before giving an award. Where the parties voluntarily submit to mediation, the tribunal should proceed accordingly. If mediation fails, an award shall be made promptly.

Resort to arbitration or courts during ADR:

The Civil Procedure Law provides that when hearing a case, the People's Court shall conduct mediation based on the will of the parties and clarification of facts. Either one judge or the collegial bench may be mediators. Mediation is conducted in the same place where the court is located and simple procedures are adopted to notify the parties and witnesses to appear in court. The court may ask relevant individuals and units to assist the mediation. The mediation agreement should be reached with the consent of the parties and without duress. When an agreement is reached, the court makes a mediation statement that becomes valid once the parties sign and accept it.

When no agreement can be reached or one of the parties falls back on their word before the completion of the agreement, the court shall judge the case in the normal manner.

Confidentiality and admissibility of evidence in other proceedings:

Mediators may meet or communicate with the parties together or separately. When the mediators receive information from a party, they may disclose it to the other party. However, when required to keep the information confidential, the mediators shall not reveal it to the other party.

No special rules have been given to govern confidentiality and admissibility of evidence in other proceedings.

Recognition and enforceability of settlements:

See above.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

ADR is completely up to the choice of the parties in dispute and no limitation has been made to the jurisdiction of the mediator in commercial disputes.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

In respect of mediation before the arbitration commission, there are no restrictions on the nationality of mediators. By contrast, in respect of mediation in the court system, foreigners must have Chinese legal representation.

LEGAL SOURCES AND REFERENCES

Although no official internet site has been established yet, some business organisations have established sites containing up-to-date information on dispute resolution facilities available in China. See for example:

- State Information Centre: http//www.ceilaw.co.cn
- Email: ceilaw@mxceigo.cn

BIBLIOGRAPHY

Wang, Shenchang. "Resolving Disputes in the PRC" *FT Law and Tax*, 1996.

Cheng Dejung, Moser and Wang Shenchang, *International Arbitration in the PRC: Commentary, Cases and Materials*, Butterworths, 1995.

Han, Jian. *Theory and Practice of the Modern International Commercial Arbitration Law*, Law Publishing House, 1993.

ENDNOTES

[1] Article 35

[2] Article 7

[3] Article 2

[4] ibid

[5] ibid

[6] Article 23

[7] *Civil Procedure Law*. Clause 1, Article 260

Hong Kong, China

GENERAL OVERVIEW

Primary sources of law:

- Basic Law
- Statute law
- Arbitration Ordinance
- Common law (or case law)
- Equity and customary law

Hong Kong, China practises common law, which relies heavily on case law. Statute law is also a very important source of law in Hong Kong, China. The most prominent statute is the *Basic Law*. It is enacted by the National People's Congress of China and it provides for, among other things, the basic systems for Hong Kong, China. It also implements the 1984 *Sino-British Joint Declaration on the Question of Hong Kong*. With the exception of the Basic Law and a small number of national laws of China that are stipulated in the Basic Law as applying to Hong Kong, China, all other legislation is passed and enacted by the legislative body of Hong Kong, China and promulgated by the Chief Executive of Hong Kong, China. Other sources of law include the rules of equity and customary law.

Sources of law for commercial dispute resolution outside of the courts:

The Arbitration Ordinance[1] establishes the framework for domestic and international arbitration and other means of alternative dispute settlement. It contains among other things provisions relating to the judicial treatment of arbitration procedures, enforcement of arbitration agreements and arbitral awards. As a matter of policy, the Government of Hong Kong, China actively encourages the settlement of commercial disputes by alternative means of dispute resolution. In many Government contracts, provisions are included obliging parties to the contracts to resolve any dispute by means of arbitration, conciliation or mediation. The Government has also encouraged and contributed to the establishment of the Hong Kong International Arbitration Centre (HKIAC).

Institutions for international commercial dispute resolution outside of the courts:

- Hong Kong International Arbitration Centre (HKIAC)
- Chartered Institute of Arbitrators
- Hong Kong General Chamber of Commerce
- Office of the Ombudsman
- Administrative Appeals Board

The HKIAC provides a full range of services and facilities in arbitration, mediation and conciliation. Its services are available to any parties in a commercial dispute, irrespective of their nationalities, who have agreed to submit their dispute to the Centre. The HKIAC also deals with disputes between government of Hong Kong, China and private parties. It maintains a panel of available arbitrators who specialise in various technical fields. It also accepts arbitrators requested by parties to undertake an arbitration.

The Secretary-General,
The Hong Kong International Arbitration Centre,
38th Floor, Two Exchange Square,
8 Connaught Place,
HONG KONG, CHINA
Tel: (852) 2525 2381
Email address: adr@hkiac.org

The Hong Kong Branch of the Chartered Institute of Arbitrators also maintains arbitral panels specialising in shipping, construction, insurance and other fields and will appoint arbitrators at the request of parties to arbitration proceedings. Its address and telephone number are the same as the HKIAC.

The Hong Kong General Chamber of Commerce has an arbitration committee which will appoint arbitrators at the request of parties to an arbitral agreement regardless of whether the parties are members of the Chamber.

The Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway
HONG KONG, CHINA
Tel: (852) 2529 9229

The Office of the Ombudsman has been set up to deal with administrative complaints. Where appropriate, the Ombudsman attempts to resolve disputes between private parties and for Government or other public bodies by means of conciliation or mediation. Private parties aggrieved by an administrative act of Hong Kong, China Government may also lodge a complaint with the Office of the Ombudsman, who may investigate allegations and may recommend redress measures. In addition, there are statutory provisions for complaints, appeals and petitions against government administrative decisions in specific areas.

Office of the Ombudsman
31/F, Gateway Tower 1,
25 Canton Road, Tsim Sha Tsui,
Kowloon,
HONG KONG, CHINA
Tel: (852) 2629 0555

The Administrative Appeals Board was established in 1994 by the Administrative Appeals Board Ordinance[2] to hear appeals by private parties when they feel aggrieved by any

administrative decisions taken by the Government or certain public bodies. The Board is not part of the judiciary system in Hong Kong, China.

Recognition and enforcement of foreign arbitral awards:

The New York Convention is applied to Hong Kong, China by the Government of the People's Republic of China. With respect to the application of this Convention, China has declared[3] that the Convention would only apply to the recognition and enforcement of awards made in the territory of another Contracting State.

From 1 July 1997, an international arbitral award made in Hong Kong, China cannot be recognised and enforced as a New York Convention award in mainland China; likewise an international arbitral award made in mainland China cannot be recognised and enforced as a New York Convention award in Hong Kong, China. This is because the New York Convention does not apply as between territories of the same state.

Special arrangements are being worked out and will be put in place in due course to facilitate the recognition and enforcement of Hong Kong, China and mainland China awards respectively in mainland China and Hong Kong, China.

The Arbitration Ordinance[4] introduces the provisions of the New York Convention into the domestic law of Hong Kong, China.

Settlement of disputes through ICSID or bilateral investment agreements:

The Washington Convention (ICSID) is applied to Hong Kong, China by its sovereign Government, China. China has not made any declaration or reservation with respect to the application of the Convention to Hong Kong, China. Hong Kong, China has also entered into bilateral investment promotion and protection agreements with the following countries:

Countries	**Date of Conclusion**
Netherlands	19 November 1992
Australia	15 September 1993
Denmark	2 February 1994
Sweden	27 May 1994
Switzerland	22 September 1994
New Zealand	6 July 1995
Italy	28 November 1995
France	30 November 1995
Germany	31 January 1996
Belgium*	7 October 1996
Austria	11 October 1996
Japan	15 May 1997
Korea	30 June 1997

United Kingdom	30 July 1998

* As at September 1998, these arrangements had not entered into force.

These bilateral agreements entered into by Hong Kong, China and its partners remain in force after the resumption of sovereignty by China.

The Washington Convention is implemented in Hong Kong, China through China. Legislation giving effect to arbitration awards made under the Convention is being considered by the Government. Bilateral investment treaties to which Hong Kong, China is a party are implemented through other general trade and investment legislation and administrative measures.

Laws relating to commercial dispute resolution currently under review:

Trade laws, as well as other laws in Hong Kong, China, are constantly reviewed with the aim of providing the best environment for trade and commerce consistent with the policy goal of achieving an open and competitive economy. As at June 1997 the Arbitration Ordinance[5] has been amended to give the arbitration tribunal more power and discretion. The HKIAC will also take over some of the functions of the courts which will simplify certain procedures and lower the legal costs, making it even more attractive to use arbitration in Hong Kong, China. There are at present no substantial proposals for changing the law relating to international commercial dispute resolution.

ARBITRATION

- Arbitration ordinance
- UNCITRAL Model Law
- HKIAC Rules

Is arbitration law based on the UNCITRAL Model Law?

The relevant arbitration law applicable to international commercial disputes in Hong Kong, China is the Arbitration Ordinance[6]. The Arbitration Ordinance comprises two distinct regimes: one applicable to international arbitration, and one applicable to domestic arbitration.

The international regime is closely based on the UNCITRAL Model Law which has been incorporated into the Arbitration Ordinance as the Fifth Schedule. The Ordinance provides that the Model Law governs arbitration conducted under international arbitration agreements. The definition of international arbitration is that contained in Article 1(3) of the UNCITRAL Model Law.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Ordinance contains certain statutory provisions for domestic arbitration. The UNCITRAL Model Law is incorporated as the Fifth Schedule to the Ordinance and applies to arbitration conducted under an international arbitration agreement or domestic arbitration where parties have elected to adopt the UNCITRAL Model Law.

The HKIAC commends the UNCITRAL Model Law for international arbitration and has its own set of arbitration rules for domestic arbitration.

The Government has published its own set of arbitration rules for use in contracts relating to the Airport Core Projects. These rules are based on the HKIAC Domestic Arbitration Rules.

Limitations on types of dispute that may be arbitrated:

Under the Arbitration Ordinance, there is no restriction on the types of disputes that may be arbitrated in Hong Kong, China.

Extent of party autonomy to define procedure:

Parties to an arbitration have wide flexibility in deciding on the arbitration procedure that would apply to their arbitration. The parties in a dispute may opt to adopt the UNCITRAL Model Law by agreement where a dispute has arisen even if the contract itself provides for settlement of disputes by domestic arbitration. Conversely, the provisions for domestic arbitration under the Arbitration Ordinance may, for example, apply to international arbitration agreement if the agreement provides, or if the parties to a reference agree in writing that the agreement is to be treated as a domestic arbitration agreement. The parties to a contract are also free to stipulate the rules of arbitration of their choice such as the rules of the International Chamber of Commerce, the American Arbitration Association or the London Court of International Arbitration.

Scope of court intervention and availability of courts for interim relief:

The role of the courts in arbitration in Hong Kong, China is diminishing and proposals are in the pipeline to give more power to the arbitration tribunal. The courts have certain powers, under both domestic and international arbitration, to facilitate the arbitral procedures. The situations in which the courts may be invited to intervene include the following:

- Stay of court proceedings when one party has initiated court proceedings despite a contract provision requiring any disputes to be settled by arbitration;
- appointment of arbitrators if the parties to an arbitration failed to agree on the appointment of arbitrators. Where an arbitrator is appointed by default by one party to the arbitration, the courts may also set aside such an appointment;
- granting of interim compulsive measures such as injunctions, e.g. a Mareva injunction to prevent the dissipation of assets which may be required to satisfy an award; and
- enforcement of arbitral awards.

The HKIAC has been empowered by amendments made to the Arbitration Ordinance to perform the role of appointing authority for arbitrators in place of the High Court.

Source and scope of procedural rules:

The Arbitration Ordinance empowers the courts and in some instances, the arbitrator(s) or the arbitration tribunal, to grant relief or make orders either before or during the course of the arbitration proceedings. In many instances, the courts and the arbitrators may exercise these powers in either domestic arbitration or international arbitration under the UNCITRAL rules. These include:

- Security for costs;

- discovery of documents and interrogatories;
- the preservation, interim custody or sale of any goods which are the subject matter of the arbitration;
- securing the amount of the dispute;
- the detention, preservation or inspection of any property; and
- interim injunctions or the appointment of a receiver.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The Arbitration Ordinance does not place any restrictions on the languages which may be used in the conduct of arbitration in Hong Kong, China, although it is common for parties to choose to use English. There are also no restrictions on the nationalities of arbitrators who may preside over arbitration proceedings in Hong Kong, China. The Arbitration Ordinance[7] expressly provides that the restrictions on foreign legal practitioners in respect of rendering of legal services do not apply to arbitration proceedings, the giving of advice and preparation of documents for the purpose of arbitration proceedings, or any other thing done in relation to arbitration proceedings except where it is done in connection with court proceedings arising out of an arbitration agreement or arising from arbitration proceedings.

Law applicable to substance of dispute:

Parties to a contract are free to choose the applicable law that will govern the contract. An arbitration tribunal or an arbitrator will apply the law chosen by the parties in the dispute which is referred to it for arbitration. If the parties fail to agree in the choice of applicable law, the choice of law will be determined in accordance with the conflict of law rules. It is also permissible for rules of an international arbitration institution such as the International Chamber of Commerce or American Arbitration Association to be adopted. There are a few mandatory provisions in this Arbitration Ordinance that serve primarily as a safety net to provide the basic framework for the conduct of arbitration in the absence of agreement between the parties.

Decision making by arbitral tribunal and form of award:

Subject to the UNCITRAL Model Law which contains basic provisions on the form and content of awards, the Arbitration Ordinance does not contain specific provisions relating to the form of an award or the way in which decisions should be made. It does, however, contain provisions generally on, for example, the power of the arbitration tribunal to make interim awards, the power to order specific performance and the power to correct any clerical error.

Confidentiality:

Unlike court proceedings, arbitration proceedings in Hong Kong, China are not open to or held before the public. Parties to an arbitration can be assured of the privacy of the proceedings and awards made by the tribunal. In addition, the Arbitration Ordinance provides that proceedings taken by the parties in Hong Kong, China courts shall not be heard in open court if any party makes such an application. However the question of confidentiality is complex and it would be a good practice for both parties to stipulate in the arbitration agreement that the proceedings should be confidential for the avoidance of doubt.

Recourse against an award and admissible grounds:

Under the international arbitration regime using the UNCITRAL Model Law, there is no power for the court to review an award. The decision of the Arbitral Tribunal is final. The Arbitration Ordinance does not have any provision allowing a party to appeal to the Court on the ground of error, either in fact or in law.

The UNCITRAL Model Law contains provisions for setting aside of an award by the courts. The grounds for setting aside an arbitral award include:

- The party making the application furnishes proof that:
    - ◊ a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it;
    - ◊ the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
    - ◊ the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
    - ◊ the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.
- The court finds that :
    - ◊ the subject-matter of the dispute is not capable of settlement by arbitration under the law of Hong Kong, China; or
    - ◊ the award is in conflict with the public policy of Hong Kong, China.

Similar grounds for refusing to enforce foreign arbitral awards can be found in the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. These grounds have been incorporated in the laws of Hong Kong, China.

Recognition and enforcement:

An arbitral award made in Hong Kong, China under domestic arbitration or international arbitration may, with the permission of the court, be enforced in the same manner as a judgement of the domestic courts. Alternatively, a party may apply to the court to enter a judgement in terms of the arbitration award. As an arbitration award may be enforced in the same manner as if it is a domestic judgement, the usual means of execution may be used to enforce such an award if a party failed to follow or satisfy the award made by the arbitration tribunal. They include the writ of *fieri facias*, attachment and charging orders. Lawyers may have to be instructed if any of these means of execution is contemplated.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised in Hong Kong, China as a useful and effective means of resolving commercial disputes without resorting to legal proceedings. Although it is not compulsory, the government and the HKIAC have actively encouraged its use. Many of the contracts entered into by the Government of Hong Kong, China contain provisions requiring the parties in a dispute to undergo compulsory conciliation/mediation before resorting to legal actions. There are provisions in the Arbitration Ordinance which allow the courts to facilitate ADR where the agreement to which the dispute relates provides for such alternative means of dispute resolution. These include the appointment of conciliator where both parties have failed to do so. The HKIAC also provides facilities for mediation and conciliation and it has published its own rules for mediation.

Those conducting business in Hong Kong, China and their legal advisors have become increasingly aware of the advantages of ADR and many have sought to build in some provisions in their commercial agreements providing for resolution of disputes by ADR.

Forms of ADR available for commercial disputes:

The most common forms of ADR practised in Hong Kong, China are mediation, conciliation and arbitration. The use of any form of ADR may be specified in the agreement. In addition, *ad hoc* requests for assistance in conducting ADR proceedings made to the HKIAC will usually be entertained.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

There is no legislation mandating ADR but the parties to a commercial dispute may always resolve their dispute by means of ADR. The parties to a contract may also make provisions in the contract for the resolution of disputes by ADR. Furthermore, the Construction List Practice Direction issued by the Court of First Instance in Hong Kong, China requires parties to consider mediation before a hearing is listed.

Legal implications flowing from choices between the various procedures:

Parties to a commercial dispute may choose to resolve their differences by any means of ADR without prejudice to their rights to bring the matter to arbitration or to the court. The Arbitration Ordinance in fact contemplates that an arbitration agreement may contain provisions for conciliation and appointment of conciliator. The conciliator may also act as the arbitrator should the dispute be subsequently referred to arbitration. If there is in place an arbitration agreement between the parties, the courts will not interfere in the arbitration proceedings or entertain any requests to hear the case unless all the parties to the dispute have made such a request.

Rules, if any, defining the role and procedures of mediator:

The legislation of Hong Kong, China does not stipulate any rules for different forms of ADR or the role and procedures of mediator, conciliator, facilitator or expert. The parties to a dispute may decide to adopt a certain set of rules either in the agreement or when a dispute has arisen. They may also define the role and procedures for the mediator or conciliator. The HKIAC has published its own mediation rules and arbitration rules but also has available a wide variety of other rules that may be adopted for particular disputes. The Government of Hong Kong, China has published its own mediation rules that are applicable to some government contracts.

Resort to arbitration or courts during ADR:

The principal element in any form of ADR is that it is undertaken with the consent of all parties in the disputes. Hence, if this important element is missing in the ADR process a party may bring the matter to arbitration or the court as appropriate. The rules adopted by parties in commercial disputes usually provide that any party may interrupt ADR by going directly to arbitration or to the court.

Confidentiality and admissibility of evidence in other proceedings:

The legislation of Hong Kong, China does not expressly deal with the confidentiality and admissibility of evidence disclosed in the ADR process. However, the Arbitration Ordinance provides that where confidential information is obtained by an arbitrator from a party during any prior unsuccessful conciliation proceedings, he shall disclose to all other parties to the arbitration as much of that information as he considers is material to the arbitration proceedings. The Ordinance further provides that in such arbitration the arbitrator or umpire may receive any evidence that he considers relevant and shall not be bound by the rules of evidence.

For international arbitration under the UNCITRAL Model Law, the parties are free to agree on the procedure to be followed by the arbitration tribunal, including the rules of evidence and the admissibility of confidential information disclosed during the ADR proceedings. Failing such an agreement, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate.

The rules adopted for the ADR proceedings may also have bearing on the admissibility of confidential information in subsequent arbitration or court proceedings. For example, the Hong Kong Government Airport Core Projects Mediation Rules describe mediation as a private and confidential matter between the parties to the contract. Nothing that transpires during the course of the mediation is intended to or shall in any way affect the rights or prejudice the position of the parties to the dispute in any subsequent adjudication, arbitration or litigation and any report or opinion of the mediator shall not be disclosed. The rules also provides that any information of whatsoever nature made available to the mediator does not mean that the privilege or confidentiality is waived for any subsequent arbitration or court proceedings.

Recognition and enforceability of settlements:

If the parties to an arbitration agreement reached a settlement agreement in writing containing the terms of settlement, the agreement shall be treated as an award on an arbitration agreement. It may be enforced in the same manner as a judgement or order to the same effect. Judgement may be entered in terms of the settlement. Settlement agreements reached in respect of other forms of ADR other than arbitration do not enjoy the same status and protection. It is advisable that before any other form of ADR is undertaken by the parties, they should enter into an arbitration agreement so that any subsequent settlement agreement may enjoy the same status as provided for in the Arbitration Ordinance.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no limitations on the choice of ADR in Hong Kong, China. Where a mediator is requested to provide an opinion or recommendation, the opinion or recommendation of the mediator is not binding. It is quite common for parties to stipulate in their agreement or contract that arbitration should follow if mediation fails to resolve a dispute.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

None.

LEGAL SOURCES AND REFERENCES

The Internet address for the Hong Kong International Arbitration Centre is "http://www.hkiac.org". The Department of Justice in Hong Kong, China has put on the Internet the entire statute law of Hong Kong, China. The Internet address for this data base is http://www.info.gov.hk/justic/laws/index.htm.

BIBLIOGRAPHY

Kaplan, Spruce and Cheng, *Hong Kong Arbitration Cases and Materials*, Butterworths Asia, 1994.

Kaplan, Spruce and Moser, *Hong Kong and China Arbitration Cases and Materials* Butterworths Asia, 1994.

Greig and Kaplan, "Arbitration in Hong Kong" in Sanders, *International Handbook of Commercial Arbitration*, 1985.

Rhodes, P., "Judicial Review of Commercial Arbitration in Hong Kong", *Hong Kong Law Journal*, 14, 159, 1984.

Hong Kong International Arbitration Centre, *Hong Kong Dispute Solutions* (booklet).

The Law Reform Commission of Hong Kong, *Report on the Adoption of the UNICITRAL Model Law of Arbitration*, Government Printer, 1987.

ENDNOTES

[1] Chapter 341 of the Laws of Hong Kong
[2] Chapter 442 *ibid*.
[3] Art. 1(3)
[4] Chapter 341
[5] Chapter 341
[6] Chapter 341
[7] s. 2F

Indonesia

GENERAL OVERVIEW

Primary sources of law:

- Pancasila
- Indonesian Constitution 1945
- Code of Civil Procedure
- Legislation
- Government decrees
- Adat law

Indonesia is a civil law jurisdiction having adopted Dutch laws and practice at independence. Pancasila is an overriding national philosophy illuminating the legal system which calls for confrontation to be avoided and for disputes to be resolved through deliberation and consensus. The Indonesian Constitution of 1945 provided that old Dutch laws not in conflict with the new Constitution would remain valid, if not fully binding - at least as guidelines, unless and until they were superseded by new laws of the Republic. A number of new laws have been passed and others are under consideration but parts of the Dutch Civil and Commercial Codes remain including the *Reglement van de Burgelijke Rechtsvordering*, (RV) which contains the legal basis for arbitration.[1]

Other sources of law include decrees and legislation. Adat law is applied for some disputes in some areas. Case law has no legal effect in subsequent court proceedings although courts may sometimes refer to jurisprudence. The reported case law is rather limited.

Sources of law for dispute resolution outside of the courts:

- Pancasila
- Code of Civil Procedure (Title I; Third Book) - the RV
- Indonesian Civil Code

To date, Indonesia has not passed a formal law for arbitration. The relevant provisions of the RV provide the legal basis for arbitration procedures. Equally there are no formal laws for other forms of dispute resolution such as mediation outside of the courts although the national philosophy pancasila which promotes the settlement of disputes in a non-confrontational and consensual manner is consistent with all contemporary forms of alternative dispute resolution. Dispute resolution in Indonesia recognises the principle of *ex aequo et bono*.

Institutions for international commercial dispute resolution outside of the courts:

Indonesian Board of Arbitration (BANI)
C/o Indonesian Chamber of Commerce and Industry
Menara Kadin Indonesia 29th floor
Jalan H R Rasuna Said, X5, Kav2-3
Jakarta 12950
INDONESIA

Tel: (62) 21 916 6408
Fax: (62) 21 527 4485, 527 4486

Indonesian Board of Arbitration
Pondok Pinang Centre Block A24
Jalan Ciputat Raya
Pondok Pinang
Jakarta 12310
INDONESIA

Tel: (62) 21 750 7373
Fax: (62) 21 751 1068

Indonesian Muamalah Board of Arbitration
Arthaloka Building 9th Floor
Jalal jenderal Sudirman N2
Jakarta 10220
INDONESIA

Tel: (62) 21 251 2564

Indonesian Alternative Dispute Resolution Centre (IADRC)
Jalan Sisingamangaraja No 33-35 Kebayoran Baru
Jakarta 12120
INDONESIA

Tel: (62) 21 723 5275
Fax: (62) 21 724 6838

The Indonesian National Board of Arbitration (*Badan Arbitrasi Nasional Indonesia*) known as BANI was set up in 1977 under the auspices of the Indonesian Chamber of Commerce (KADIN). BANI however, is fully independent of government or of any non-governmental organisation. The Head Office is in Jakarta and there is a branch office in Surabaya.

BANI handles both domestic and international disputes. A reference of a dispute to it must originate in writing, either in an arbitration clause, in the underlying contract or by subsequent agreement by all parties. BANI, as well as *ad hoc* and ICC administered tribunals, hear maritime and construction cases, there being no separate tribunal for these specialised disputes.

The Indonesian Muamalah Board of Arbitration (*Badan Arbitrasi Muamalat Indonesia*) known as BAMUI, was set up in 1993 at the initiative of the Indonesian Council of Religious Scholars to provide a forum for the settlement of disputes arising from business transactions primarily among Islamic parties. Applying the Islamic principle of *ishlah* or forgiveness, BAMUI's decisions are intended to be final and binding on the parties.

Recognition and enforcement of foreign arbitral awards:

The RV provides[2] that except for general average awards, judgements of foreign courts cannot be enforced in Indonesia. Foreign judgements have been interpreted in the past as including foreign arbitral awards. Indonesia is a party to the New York Convention which was ratified by Indonesia in 1981 subject to two reservations.[3]

- Arbitration awards that can be executed in Indonesia must relate to commercial disputes;
- Recognition of awards must be on the basis of reciprocity, i.e. rendered in an economy which together with Indonesia, is a party to an international convention regarding implementation of foreign arbitral awards.

However, implementing regulations were not promulgated by the Supreme Court until March 1991.[4] The procedure prescribed in the regulations require that registration of foreign awards first be made at the District Court of Central Jakarta (*Pengadilan Negeri Jakarta Pusat*). The Chairman of the District Court must then transmit the execution request file to the Supreme Court within 14 days of receipt attaching:

- the original award or certified copy with an official translation;
- the original or certified copy of the arbitration agreement with an official translation;
- a statement from the Indonesian diplomatic mission in the jurisdiction in which the aware was made, to the effect that such economy has diplomatic relations with Indonesia and that both countries are contracting states to an international convention regarding implementation of foreign arbitral awards.

The Supreme Court reviews the file and then decides upon the issuance of an order to execute the award (*exequatur*). If granted, the *exequatur* is sent down to the Chairman of the District Court of Central Jakarta for implementation. The Chairman may transfer it to a more suitable District Court for execution in accordance with the provisions of the RV.[5]

Settlement of disputes through ICSID or bilateral investment agreements:

Indonesia is a party to the Washington Convention. The provisions of the Convention were brought into law in 1968.[6] The passing of this law followed the passing of the Foreign Investment Law of 1967.[7]

Laws relating to commercial dispute resolution currently under review:

National trade laws including arbitration and ADR laws are currently under review. Various drafts have been developed including one based on the UNCITRAL Model Law however, the matter is still under consideration and no approved draft has been agreed.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

No

Differences in the application of arbitration law to international and domestic arbitration:

The arbitration provisions in the RV draw no distinction between international and domestic disputes. Any dispute could be settled by arbitration under rules agreed between the parties provided these are not in contravention of existing laws (for examples see below). Arbitration agreements that call for BANI administered arbitration may designate international rules e.g. UNCITRAL or other internationally accepted rules. It should be noted however, that Regulation No 1/90 of the Indonesian Supreme Court is applicable only to the execution of foreign arbitral awards. Other rules apply to the execution of awards made in Indonesia.

Limitations on types of dispute that may be arbitrated:

"Anyone involved in a dispute concerning rights over which they have disposition may submit such dispute to arbitrators for decision".[8] However, any arbitration agreement referring disputes involving testamentary promises, housing, family law matters including the legal status persons or other disputes that the law does not permit to be settled by compromise, shall be null and void.[9]

Extent of party autonomy to define procedure:

The RV contains mandatory requirements relating to the arbitration agreement. It must for example be in writing and signed by the parties and contain the subject of the dispute, the names and domiciles of the parties and the arbitral tribunal. There are also mandatory provisions relating to the form of the award. If no time limit for the arbitration is set in the arbitration agreement, the arbitrators mandate expires in six months. There are no compulsory rules relating to the conduct of the hearing and the parties have scope to define their own procedural rules under the law. However, the parties do not have extensive flexibility and there is limited authority to modify the rules set out in the RV.

Scope of court intervention and availability of courts for interim relief:

There is no possibility for the courts to intervene before or during and arbitration. There is no special provision for the courts to grant interim relief pending the outcome of an arbitration.

Source and scope of procedural rules:

The RV sets the general framework for procedural rules. Within this framework, BANI has promulgated its own rules. These are simple straightforward. Procedures which combine mediation and arbitration and other contemporary techniques may be used if the parties agree. In line with the principle of Pancasila, a BANI tribunal requires the parties first to try to reach an amicable settlement before commencement of actual hearings. The BANI rules cover such essential elements as:

- form and content of agreement to arbitrate;
- appointment of arbitrator or arbitral tribunal;
- exchange of statements of claim and defence;
- hearings
- evidence;
- the award including timetable (one month after closing of the hearing);
- costs.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The arbitration hearing may be conducted in any language provided the availability of translators. Non-citizens may be appointed as arbitrators. There are no restrictions on representation by foreign lawyers or attorneys in arbitration proceedings.

Law applicable to substance of dispute:

It is permissible for foreign laws to govern the substance of a dispute being determined by arbitration in Indonesia. This will be determined by the arbitration agreement or the underlying contract. There are no provisions in the RV relating to conflict of laws ("the arbitrators shall render their award in accordance with the applicable law…..")[10].

Decision making by arbitral tribunal and form of award:

An arbitral tribunal is always an uneven number.[11] Decisions may be made by a majority of the arbitral tribunal[12] Decisions shall be in accordance with the applicable law unless the parties have agreed that it be determined *ex aequo et bono*. Reasons must be included in the award. It must be signed by the tribunal, dated and state the location in which it was rendered.

Confidentiality:

There are no specific provisions in the RV relating to confidentiality but in practice arbitrations are conducted in private.

Recourse against an award and admissible grounds:

There are no provisions for the setting aside or non-enforcement of a foreign award except on the grounds that it is not a commercial matter, did not pass the reciprocity test or against public order. In the case of a domestic arbitration award, a court could set it aside or decline to enforce it if the award:

- is outside the scope of the arbitration agreement or the agreement itself is void;
- if the mandate of the arbitrators has expired or if there is some other defect in the composition of the arbitral tribunal;
- if the award is contradictory or incomplete;
- if there were procedural flaws in due process;
- if the award was based on fraud or deceit or decisive information was withheld by a party.

Recognition and enforcement:

The procedure for recognition and enforcement of foreign arbitral awards is set out above. In the case of domestic arbitration, the application for execution should be submitted to the court where the arbitration award is deposited.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised in Indonesia and is consistent with the national philosophy of pancasila.

Forms of ADR available for commercial disputes:

Forms of ADR available for settlement of commercial disputes include dialogue, negotiation mediation, conciliation, dispute prevention, binding opinion, valuation, expert appraisal, expert determination, special master, ombudsmen, mini-trial, private judges, summary trial, deliberation (*musyawarah untuk mufakat*) *runggun adat, begundem*.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

There are no laws or rules making ADR mandatory in commercial disputes.

Legal implications flowing from choices between the various procedures:

Legal implications are that disputed parties must agree to appoint negotiators, mediators or conciliators and the agreement of the parties is final and binding. In the case of arbitration, which is a last resort, the award is also final and binding.

Rules, if any, defining the role and procedures of mediator:

There are no fixed rules defining the roles of negotiators mediators and conciliators. The negotiators conduct the discussion and deliberation of the disputed issue in order to reach a consensus; mediators attempt to find a middle ground between the disputing parties and conciliators attempt to set aside the opposing parties' differences to reach an amicable settlement.

Resort to arbitration or courts during ADR:

Both parties can interrupt ADR and resort to arbitration or court procedures. The ADR concept is based on the freedom of the parties to bind themselves to ADR procedures.

Confidentiality:

The IADRC has rules regarding confidentiality and the admissibility of evidence in other proceedings.

Recognition and enforceability:

The parties may prepare an agreement relating to the settlement reached by compromise or consensus which will then be subject to the law regarding freedom of contract and can be enforced accordingly.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

The only limitations on the choice of ADR and the jurisdiction of mediators are:

- That the process remains consensual e.g. the parties must agree on the mediator/conciliator as the case might be and the form and purpose of the process.
- In circumstances where *adat* law will apply, there could be limitations on the jurisdiction of the mediator.

Any restrictions on foreign legal representation in ADR proceedings or on nationality of arbitrator:

In principle, there are no restrictions on foreign legal representation in ADR proceedings or on the nationality of the mediators. However, foreign lawyers would need a license from the government to practice in that capacity in Indonesia.

LEGAL SOURCES AND REFERENCES

There is no internet site.

BIBLIOGRAPHY

Indonesian National Board of Arbitration, *Statute and Rules of Procedure of the Board of Indonesian National Board of Arbitration* 1985 (Leaflet).

Priyatna Abdurrasyid, *Future Development of Arbitration and Alternative Dispute Resolution Practice in Indonesia (Privatisation of the Judicial System)* Jakarta, 3 April 1998.

Priyatna Abdurrasyid, *Alternative Dispute Resolution - ADR/Arbitrase* KADIN.

Prof. Mr. DR, Sudargo Gautama, *Aneka Huum Arbitase (kearah Hukum Arbitrase yang Baru).*

Prof. Mr. DR, Sudargo Gautama, *Arbitrase Dagang Internasional.*

ENDNOTES

[1] RV. Arts.615-651

[2] RV, Art.463

[3] Presidential Decree No 34 published in the State Gazette (*Berita Negara*) No 40, 5 August 1981

[4] Supreme Court Regulations No 1 of 1990

[5] RV Art.634

[6] Law No 5/1968

[7] Law No 1/1967

[8] RV Art.615

[9] RV Art.616

[10] RV Art.631

[11] RV. Art.618

[12] RV. Art.633

Japan

GENERAL OVERVIEW

Primary sources of law:

- Constitution of Japan
- Legislation
- Case law

The primary sources of law in Japan are the Constitution of Japan and legislation. Case law plays a role in the interpretation of written law.

Sources of law for commercial dispute resolution outside of the court system:

Law Concerning Procedure for General Pressing Notice and Arbitration Procedure (1890 and amended).

Under the Chamber of Commerce and Industry Act (1953)[1] the Chamber has power to arbitrate disputes arising in connection with international and domestic commercial transactions. This power has been delegated to the Japan Commercial Arbitration Association.

Institutions for international commercial dispute resolution outside of the courts:

- The Japan Commercial Arbitration Association (JCAA)
- Japan Shipping Exchange Incorporated (JSE)
- Office of Trade and Investment Ombudsman (OTO)

Addresses:

Japan Commercial Arbitration Association
Taisho Seimei Hibiya Bldg. 4F
9-1, Yurakucho 1-chome
Chiyoda-ku
Tokyo 100 - 0006
JAPAN
Tel: (81 3) 3287 3061
Fax. (81 3) 3287 3064
Web site: http://www.jcaa.or.jp

Japan Shipping Exchange Incorporated (JSE)
Wajun Building
22-2 Koishikawa 2-chome
Bunkyo-ku
Tokyo 112 - 0002
JAPAN

The Office of Trade and Investment Ombudsman (OTO) was established in 1982 for the purpose of improving market access to Japan; receiving and processing complaints concerning market access problems (including import procedures for goods and services); procedures for direct investment into Japan; and government procurement. The OTO may be contacted through the Coordination Bureau of the Economic Planning Agency, other relevant government agencies, overseas missions and Japan External Trade Organisation (JETRO).

Recognition and enforcement of foreign arbitral awards:

Japan is committed to the recognition and enforcement of arbitral awards made in a foreign country in accordance with the New York Convention. Japan deposited its instrument of accession to this convention on 20 June 1961. Japan declared in accordance with Article 1, paragraph 3 of the Convention that Japan would apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State on the basis of reciprocity only.

Japan is also a party to the Convention on the Execution of Foreign Arbitral Awards. Japan deposited its instrument of ratification of this convention on 11 July 1952. Japan has also concluded bilateral treaties with some APEC member economies which contain provisions for the reciprocal recognition and enforcement of arbitral awards. These commitments are implemented by the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure and the Code of Civil Execution.

Settlement of disputes through ICSID or bilateral investment agreements:

The Washington Convention is in force for Japan. Japan deposited its instrument of ratification of this Convention on 17 August 1967 and has since utilised the International Centre for Settlement of Investment Disputes (ICSID) established under this convention.

Japan has also concluded two bilateral investment agreements with APEC member economies:

- Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment.
- Agreement between the Government of Japan and the Government of Hong Kong for the Promotion and Protection of Investment.

Laws relating to commercial dispute resolution currently under review:

The provisions about arbitration in the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure are now under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- Law Concerning Procedure for General Pressing Notice and Arbitration Procedure

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure is not based on the UNCITRAL Model Law, since the Law was enacted well before the development of the Model Law.

General arbitration rules are set out in Articles 786 - 805 of Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure. Book VIII stipulates the major points that constitute the foundation for arbitration, including the requirements to legally establish the arbitration process and the effect of an award. Although some provisions are mandatory, many are not. As a result, parties have wide scope for framing their own rules or adopting institutional rules (such as ICC or UNCITRAL), or the rules of the arbitration institutions in Japan.

The Japan Commercial Arbitration Association has a set of rules for arbitration under the UNCITRAL Rules that may be utilised in the following circumstances:

- Where the parties have agreed in advance to have the Association provide administrative services for arbitration under the UNCITRAL Rules; or
- Where the parties have agreed, with respect to a matter in which a request for arbitration has been submitted to the Association under its Commercial Arbitration Rules, to conduct the arbitral proceedings under the UNCITRAL Arbitration Rules.

Differences in the application of arbitration law to international and domestic arbitration:

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure does not make a distinction between domestic and international arbitration. However, this part of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure has been interpreted over many years as being applicable to international as well as domestic disputes. *Ad hoc*, institutional and special arbitration are all practised in Japan.

Limitations on types of dispute that may be arbitrated:

There are no limitations on the types of disputes that may be arbitrated. However, Article 786 of Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure stipulates that an agreement for submission of controversy to one or more arbitrators shall be valid insofar as the parties are entitled to effect a compromise regarding the subject matter in dispute. In effect, rights under private law are arbitrable but not family matters, including rights of succession or matters of public law which cannot be settled by the parties. An agreement to arbitrate a future dispute is not arbitrable unless it relates to a specific legal relationship and a dispute arising therefrom.[2]

Extent of party autonomy to define procedure:

The rules for arbitration are found in Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure. As these rules are comparatively short and general, the parties have wide flexibility regarding the rules they wish to govern the arbitration proceedings. In situations where the parties do not come to an agreement in respect of arbitration procedures, the arbitrators shall prescribe the rules according to their discretion.[3]

Scope of court intervention and availability of courts for interim relief:

The court can exercise jurisdiction over matters regarding the appointment of arbitrators, challenge of the arbitrator, lapse of the arbitration agreement, inadmissible arbitration procedure, revocation of arbitral awards, or enforcement judgement of arbitral awards.

The Law Concerning Procedure for General Pressing Notice and Arbitration Procedure does not contain provisions for interim relief in relation to arbitration. However, the claimant in an arbitration procedure may request the competent court to order a provisional measure or provisional attachment. Such a request should follow the procedure for ordinary civil actions.

Source and scope of procedural rules:

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure contains the rules for arbitration in Japan. They cover such matters as the validity of the arbitration agreement including agreements to arbitrate future disputes[4]; the nomination and appointment of arbitrator(s)[5]; challenge to an arbitrator[6]; jurisdictional issues arising from the validity of an arbitration agreement[7]; evidence and the co-operation of the courts in obtaining evidence[8]; decision making; the form of the award;[9] and cancellation.[10]

Other and more detailed rules are provided by the Japan Commercial Arbitration Association and other arbitration institutions offering arbitration services in Japan.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure has no provisions regarding the languages to be used in arbitration. The parties may designate by agreement any languages to be used in arbitral proceedings.

The parties may agree on any of the following official languages for arbitration proceedings managed by the Japan Commercial Arbitration Association: Japanese, English or Japanese and English. If the parties fail to agree on any of the above languages, the arbitration tribunal will decide at its discretion.

Documentation submitted to a Japanese court for enforcement of an award will need to be in Japanese.

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure stipulates no restriction on nationality of an arbitrator.

There is substantially no restriction for foreign attorneys or lawyers to represent a party in international arbitral proceedings. The Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers authorises *gaikokuho-jimu-bengoshi* (foreign lawyers qualified by Japanese law) to represent parties in international arbitration proceedings regardless of the applicable law. The Law also allows foreign lawyers (excluding *gaikokuho-jimu-bengoshi*) engaged in legal business in a foreign country to represent parties in international arbitration proceedings which they were requested to undertake, or undertook in that country, regardless of the applicable law.

Law applicable to the substance of the dispute:

The parties may designate any foreign law as the governing law of the dispute. In general, the parties enjoy a wide flexibility regarding the matters related to the arbitral proceedings and they may designate the rules of one of the international arbitral bodies.

According to the Law Concerning the Application of Laws in General (*Horei*), the applicable law with respect to the formation and effect of an action intended to have legal effect is determined by the intention of the parties. If this is not clear, the law of the place where the act is done shall govern. [11]

Decision making by arbitral tribunal and form of award:

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure stipulates that the arbitrators shall, prior to making an award, examine the parties as well as investigate the relevant matters that are the cause of controversy insofar as it is

necessary.[12] The arbitrators may examine witnesses and experts who voluntarily appear before them.[13] When the award is to be made by several arbitrators, it shall be decided by a majority vote of the arbitrators, unless otherwise provided in the arbitration agreement[14]. Concerning the form of an award, Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure also provides that an award must contain an entry of the day, month, and year when it was drawn up and the arbitrators shall sign and seal thereon.[15]

Confidentiality:

Book VIII of the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure is silent on confidentiality of arbitral proceedings and the award. In practice, most arbitration takes place in private.

Recourse against an award and admissible grounds:

Arbitral awards will be set aside or declined to be enforced when the competent court finds that the arbitral proceedings are inadmissible; that the award instructs a party to perform any act against law; or that the party is not represented in arbitral proceedings in accordance with the provisions of law. An award may also be set aside or be unenforceable in circumstances where a party is not examined in arbitral proceedings or that reasons are not attached to the award, provided that the parties had not waived these requirements.[16]

Recognition and enforcement:

The award, which has the same effect as a final judgement by a court, may be enforced according to the provisions of the Civil Execution Law[17] after obtaining an execution judgement by a competent court.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Various forms of alternative dispute resolution are recognised in Japan and there is recognition of this in the Civil Code and the Code of Civil Procedure.

Forms of ADR available for commercial disputes:

- Amicable settlement[18]
- Conciliation (the Civil Conciliation Law; Law 222, 9 June 1951)
- Grievance resolution system

Legislation or court rules making ADR mandatory or optional in commercial disputes:

There is no legislation nor court rules making ADR mandatory in commercial disputes.

Legal implications flowing from choices between the various procedures:

Amicable settlement conducted under the Code of Civil Procedure and conciliation proceedings conducted under the Civil Conciliation Rules give rise to legal consequences as set out in these rules. Other forms of informal mediation are by consent of the parties.

Rules, if any, defining the role and procedures of mediator:

The Civil Conciliation Law defines the mediator's role and procedures.

A Cabinet decision on the reinforcement of the Office of Market Access on 1 February 1994 and other decisions related to the Office of Trade and Investment Ombudsman contain procedures for resolving trade disputes.

Resort to arbitration or courts during ADR:

Resort to arbitration or the court system during ADR is permissible.

Confidentiality and admissibility of evidence in other proceedings:

The Civil Conciliation Rules[19] stipulate that the proceedings of civil conciliation should not be open to the public. There is no particular provision on admissibility of evidence.

Recognition and enforceability of settlements:

Conciliation in court or an agreement of both parties by conciliation proceedings, if it is entered into a protocol, has the same effect as the final decision of the court and can be forcibly executed according to the Civil Execution Law.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

The Civil Conciliation Law[20] stipulates that conciliation cases shall be under the jurisdiction of the Summary Court that has jurisdiction over the party's domicile, place of residence, business place or office; or the District Court or the Summary Court which is determined by the agreement of both parties.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

Legal representation by foreign lawyers in ADR matters may be in violation of Article 72 of the Lawyers Law.

LEGAL SOURCES AND REFERENCES

The Japan Commercial Arbitration has its own website on the Internet at http://www.jcaa.or.jp

BIBLIOGRAPHY

OTO Responds to Complaints Regarding Import Procedures and Other Issues which Concern Opening of the Japanese Market - Guide to OTO.

Proposals of the Market Access Ombudsman Council on Market Access Issues as Concerns Standards Certifications and Others and Policy Actions on Market Access Issues as Concerns Standards, Certifications and others.

International Handbook on Commercial Arbitration Vol ll., Kluwer, 1995.

Davis, Joseph W.S., *Dispute Resolution in Japan*, Kluwer, 1996.

ENDNOTES

[1] Art. 9; Chamber of Commerce and Industry Act (1953)
[2] Art 787 Law Concerning Procedure for General Pressing Notice and Arbitration Procedure
[3] Art. 794.2
[4] Art. 786-787
[5] Art. 788-791
[6] Art. 792
[7] Art. 793
[8] Art. 795-796
[9] Art. 794, 798, 799
[10] Art. 800-805
[11] Art. 7 Paras 1 and 2
[12] Art. 794.1
[13] Art. 795.1
[14] Art. 798
[15] Art. 799
[16] Art. 801
[17] Art. 22 and 25 Civil Execution Law
[18] Art. 695,696; Civil Code, Art. 89 275 Law Concerning Procedure for General Pressing Notice and Arbitration Procedure
[19] Art. 10

[20] Art. 3

Republic of Korea

GENERAL OVERVIEW

Primary sources of law:

The primary source of law in Korea is legislation.

Sources of law for commercial dispute resolution outside of the court system:

- Arbitration Law of Korea
- Commercial Arbitration Rules of the Korean Commercial Arbitration Board
- Foreign Trade Law
- Civil Mediation Law

The Arbitration Law of Korea (Law No 1767 promulgated 16 March 1966 and Law 2537 as amended on 17 February 1973) (Arbitration Law) and Commercial Arbitration Rules of the Korean Commercial Arbitration Board are the main laws for commercial dispute resolution.

The Foreign Trade Law has a provision for mediation. The Civil Mediation Law was promulgated in 1990 for court-annexed mediation.

Institutions for international commercial dispute resolution outside of the courts:

- Korean Commercial Arbitration Board (KCAB)

The Korean Commercial Arbitration Board (KCAB) is the only officially recognised arbitration and mediation body in the Republic of Korea.

Korean Commercial Arbitration Board (KCAB)
Lee, Soonwoo, Ph. D.
President
Tel: (82 2) 551 2000 - 19
Fax: (82 2) 551 2020

Recognition and enforcement of foreign arbitral awards:

The Republic of Korea acceded to the New York Convention on 9 May 1973. In acceding to the Convention, Korea made two reservations:

- By virtue of Article I(3) of the Convention, the Government of the Republic of Korea declared that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of other Contracting States; and

- Korea further declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Korean Law.

As a result, only awards rendered under commercial arbitration involving a country that grants reciprocity to Korea can be enforced in Korea.

Korea does not need a domestic law to implement international commitments because the Constitution of the Republic of Korea states that treaties duly concluded and promulgated under the Constitution and the generally recognised rules of international law shall have the same effect as the domestic laws of the Republic of Korea.[1]

Settlement of disputes through ICSID or bilateral investment agreements:

Korea is a contracting party to the Washington Convention of 1965, which entered into force in Korea in April, 1967.

Korea has concluded bilateral investment protection treaties with the following APEC economies.

APEC Economies	Signature Date (Effective Date)
People's Republic of China	30 September 1992 (4 December 1992)
Hong Kong, China	30 June 1997 (30 July 1997)
Indonesia	16 February 1991 (10 March 1994)
Malaysia	11 April 1988 (31 September 1989)
Philippines	7 April 1994 (25 September 1996)
Thailand	24 March 1989 (29 September 1989)
USA	19 February 1960 (19 February 1960)
Chile	6 September 1996 (not in effect)

Laws relating to commercial dispute resolution currently under review:

No trade laws are currently under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

The Arbitration Law applies to international commercial disputes in Korea.

The Commercial Arbitration Rules (KCAR), as amended in 1989, 1993 and 1996 by the Supreme Court of Korea, provides for procedures by the Korean Commercial Arbitration Board to expedite fair commercial arbitration under the Arbitration Law. Article 2 of the KCAR provides that:

- Domestic Arbitration means arbitration in which the parties have their principal offices or permanent residences in the Republic of Korea.
- International Arbitration means all arbitration other than domestic arbitration.

The law, promulgated on 16 March 1966 and amended on 17 February 1973, is not based on the UNCITRAL Model Law. However, the KCAR provides[2] that the KCAB's Administrative Rules for Arbitration under the UNCITRAL Arbitration Rules shall apply when the parties have agreed to follow the UNCITRAL Arbitration Rules adopted by the United Nations Commission on International Trade Law on 28 April 1976, as specified in an arbitration clause in a contract or by an agreement to submit the existing disputes to the KCAB.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Law does not have significantly different rules for domestic and international arbitration. Time limits for complying with procedural steps are more generous for international arbitration.

Limitations on the types of disputes that may be arbitrated:

Only civil and commercial disputes in private law may be arbitrated under Arbitration Law. Legal resolution of other disputes by public authorities is separately addressed in other laws, including the Patent Law, Anti-Trust Law, Trademark Law, and Bankruptcy Law.

Extent of party autonomy to define procedure:

The Arbitration Law provides for party autonomy as follows:[3]

- Arbitration procedures may be decided in an arbitration agreement.
- In case no agreement has been reached between the parties, the procedures prescribed in this law shall be followed, and matters not provided for by this law shall be decided by the arbitrator.
- In case of commercial arbitration, if no agreement as to procedures has been reached between the parties or the intention of the parties is not known, such procedures shall be presumed to be conducted in accordance with the KCAR.

Scope of court intervention and availability of courts for interim relief:

The parties to an arbitration agreement shall abide by the arbitral award. A suit may be filed in a court of law only where the arbitration agreement is invalid or incapable of execution.[4] When an arbitrator is incapable of performing an act which is deemed to be essential to an arbitral award, the court shall perform such an act at the request of the arbitrator or the parties. In such cases, the provisions of the Civil Procedure Code shall apply *mutatis mutandis*.[5]

Provisional measures such as provisional attachment or provisional injunction are generally possible before or during an arbitration.

Source and scope of procedural rules:

The rules for arbitration may be found in KCAR as well as KCAB's Administrative Rules under the UNCITRAL Arbitration Rules. The former rules will be deemed to be intended by the parties when there is a reference to them or for an arbitration by the KCAB. There is a presumption that the rules will also apply if there is no specific reference to any other rules. This presumption can be contested by a party on production of appropriate proof that the parties stipulated otherwise if such an objection is entered before an award under the KCAR is entered.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

Arbitration may be conducted in another language. However, the KCAR provides[6] that the award shall be written in the Korean language. However, if a party or an arbitrator requires it, the award may also be written in English with both versions being authentic. In case of discrepancy between the two versions, the Korean language version prevails.

Members of an arbitral tribunal may be non-citizens. The KCAB maintains a list of arbitrators including foreign arbitrators. There are no restrictions on representation by foreign attorneys or lawyers.

Law applicable to the substance of the dispute:

It is permissible for foreign laws to govern the substance of the dispute. It is also permissible for the rules of an international arbitration institution to be substituted for local legislated rules.

Decision making by arbitral tribunal and form of award:

Except as otherwise stipulated in an arbitration agreement, an arbitral award shall be made by majority decision in case there are several arbitrators.[7]

An arbitration award shall be in writing, shall carry the hand and seal of the arbitrators, and shall state the text, the brief grounds for the award and the date of execution.

The KCAR also provides the form of an award in a commercial arbitration. Essential elements are the names and addresses of the parties or their agents, the principle of the award, reasons and date.[8]

Confidentiality:

The KCAR provides that the proceedings of the arbitration shall be closed to the public. However, the complete confidentiality of arbitration proceedings and awards is not protected by law because:

- the parties may have decided otherwise; and
- the true copy of an award shall be forwarded to the parties, and original thereof, together with the deed of delivery, shall be kept in custody at the competent court.[9]

Recourse against an award and admissible grounds:

The Arbitration Law provides five grounds for cancellation of an arbitration award by a court:[10]

- When the appointment of the arbitrator or the arbitration procedures are not in accordance with the provisions of this law or with the stipulations of the arbitration agreement;

- When in the appointment of an arbitrator or in arbitration procedures, a party is incompetent or has not been represented in accordance with the provisions of law;
- When an arbitral award provides for performance of an act prohibited by law;
- Where the parties have not been heard without due cause or no grounds for the award have been given; and
- When there are grounds for a lawsuit under Items 4 - 9 Para (1) Article 422, Civil Procedure Code.

Recognition and enforcement:

If a losing party does not or will not comply with an award duly rendered, the prevailing party may file a suit with a court of competent jurisdiction for compulsory execution of the award.

The Arbitration Law provides that:[11]

- Compulsory execution of an arbitral award may be made only when its lawfulness has been declared in a judgement of execution by a court.
- A judgement of execution under the preceding Paragraph may not be made when there exists a ground for requesting cancellation of the arbitral award.
- A judgement of execution under Paragraph (1) shall contain a declaration that provisional execution may be made with or without the deposit of a sufficient bond.

The Arbitration Law provides that when a judgement of execution has been made, cancellation of an arbitral award may be requested only on the grounds prescribed in Article 13 and only when a party has produced a *prima facie* evidence of his inability to assert the grounds for requesting cancellation under foregoing procedures without faulting himself.[12]

The KCAB may, when a party fails to abide by the decision and the award of the Tribunal without good reason, make a recommendation to the competent authorities of the Government to take necessary administrative measures in respect of such party.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Korea recognises different types of ADR to solve disputes instead of through litigation in court.

Forms of ADR available for commercial disputes:

Mediation and conciliation are both available for resolving commercial disputes in Korea.

Korea has introduced what it believes to be an effective and successful system of court-annexed mediation. Korea enacted the Civil Mediation Law for court-annexed mediation in 1990 and revised it in 1992 and 1995. In recent years, Korean judges have played an active role in court-annexed mediation committees as well as in the judge-hosted settlement conferences through all stages of pending cases. It should be emphasised that judges do not prevail over or impose settlements on the parties when they are involved in mediation. They respect the position and interest of each party and encourage the voluntary resolution of their dispute.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

The principal law for mandated ADR is the Civil Mediation Law. This law contains some provisions making mediation optional. Under this law, at any stage before or during the trial, the judge to whom the case is assigned can refer the case to mediation. Objections to the judge's decision of referral are not allowed. Judges exercise the power to refer cases to mediation after due consideration. The average referral rate to mediation among all cases assigned to judges is below 20%.

Legal implications flowing from choices between the various procedures:

For the commercial dispute resolution purposes, the meaning of the terms "conciliation" and "mediation" are clearly distinct in Korea.

- "Conciliation" is a process to settle disputes where the parties have an arbitration agreement which is governed by arbitration law. Hence, conciliation is a preliminary step to arbitration.

- "Mediation" is a dispute settlement mechanism which does not necessarily involve an arbitration agreement. Mediation (other than court-annexed mediation) is initiated by a party or parties referring their dispute to the KCAB. In these circumstances, KCAB staff may intervene or otherwise become involved in the issue in question in order to solve the dispute amicably.

Mediation is a consensual procedure and settlement agreements are not binding and enforceable as in arbitration. The KCAB does not have any rules covering mediation.

Rules, if any, defining the role and procedures of mediator:

Mediation is an entirely voluntary, no-risk process in which a neutral staff member of KCAB helps the parties in dispute to negotiate their own settlement. The mediator is unbiased and cannot make judgements, but encourages open communication, helps identify the specific areas of dispute and agreement, and then seeks to bring the parties to a settlement which has actually been defined and reached by the parties themselves.

Conciliation is provided for as an optional process as a preliminary step to arbitration in the Commercial Arbitration Rules of the KCAB.[13] At the request of both parties, the Secretariat of the KCAB shall conduct conciliation proceedings before the dispute is presented for arbitration. One or three conciliators are appointed by the Secretariat from among those in the Panel of Arbitrators. The conciliator has complete freedom on how to conduct the conciliation procedure. If the conciliation succeeds, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties and the settlement reached shall be treated as an award on agreed terms. If conciliation fails, arbitration, including the appointment of arbitrator, follows immediately.

Court-annexed mediation can bind the parties. In this form of mediation, the judge or the mediation committee can declare the final mediation clause binding and enforceable by law based on the agreements of all the parties involved. In addition, the mediation judge or committee can recommend a mediation award without the consent of all the parties involved. The award decided by the mediation host is not immediately binding on the parties. But if there is no objection from either party within 14 calendar days, the mediation award becomes binding and enforceable.

Resort to arbitration or courts during ADR:

In the situation where there is an existing arbitration agreement between parties, one or both of the parties can refer the case to arbitration procedures during mediation. If mediation fails in a court-annexed mediation procedure, one or both of the parties can refer the case to court procedure.

Confidentiality and admissibility of evidence in other proceedings:

There are no rules for confidentiality and admissibility of evidence derived from mediation or conciliation.

Parties to the mediation may not use statements of opposing parties or interested persons made during the proceedings as evidence in subsequent civil litigation in court-annexed mediation. Furthermore, a mediation commissioner will be severely punished for disclosure, without good cause, of information obtained during the process.

Recognition and enforceability of settlements:

Court-annexed mediation contains provisions for the recognition and enforceability of settlement agreements.

Mediation is a consensual process between the parties even if they reach a settlement.

The KCAR has provision for the recognition and enforcement of conciliated settlements.[14]

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no limitations on the choice of ADR. While jurisdiction of court-annexed mediation is basically allocated according to the Civil Procedure Act, the other methods of ADR have no restriction involving jurisdiction of the mediator except for the term of reference assigned by the parties.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

Any foreign arbitrator listed in the roster of KCAB, may be selected as an arbitrator in arbitration procedure.

However, since mediation is generally performed by the staff of the KCAB, only Koreans can mediate disputes before them. This is also the same for court-annexed-mediation.

LEGAL SOURCES AND REFERENCES

There is no Internet site on arbitration and ADR in Korea.

BIBLIOGRAPHY

The *Commercial Arbitration Rules* as amended by the Supreme Court: 1989, 1993, 1996.

The *Arbitration Law of Korea* as amended in 1973.

ENDNOTES

[1] Art. 6(1)
[2] Art. 9(3)
[3] Art. 7
[4] Arbitration Law; Art.3
[5] *ibid;* Art. 9
[6] Art. 50
[7] Arbitration Law; Art. 11(1)
[8] Art. 49(1)
[9] *ibid;* Art. 7(1)
[10] *ibid;* Art. 13(1)
[11] *ibid;* Art. 14
[12] *ibid;* Art. 15
[13] Art. 18
[14] Art. 18(3)

Malaysia

GENERAL OVERVIEW

Primary sources of law:

- The Federal Constitution
- Statutes : Acts and subsidiary legislation such as regulations
- Case law
- Syriah law
- Native law
- Custom

Sources of law for dispute resolution outside of the court system:

- Arbitration Act 1952

The only law relating to commercial dispute resolution outside Malaysian court system is the Arbitration Act 1952.[1]

Institutions for international commercial dispute resolution outside of the courts:

Kuala Lumpur Regional Centre for Arbitration
No. 12 Jalan Conlay
50450 **Kuala Lumpur**
MALAYSIA
Tel: (603) 242 0103
Fax: (603) 242 4513
Email: klrca@putra.net.my
http://www.klrca.org

The Kuala Lumpur Regional Centre for Arbitration ("the Centre") was established on 17 October 1978, by the Asian-African Legal Consultative Committee (AALCC) with the co-operation and assistance of the Government of Malaysia. The facilities of the Centre can be used by parties seeking to settle disputes whether government bodies corporate or individuals. The Centre has been in operation since 1978 and has handled international arbitrations from India, United Kingdom, Norway, France, Australia, Japan and the United States. The Centre was set up to assist Asian countries in the region, which were not well served with facilities for the conduct of international arbitration.

The Agreement between the Government of Malaysia and AALCC relating to the Centre was last renewed on 29 February 1996. With the renewal of the Agreement, the Centre continued to enjoy the privileges and immunities as are necessary for executing its functions,

including immunity from suit and legal process. These provisions are incorporated in a *Gazette Notification*, confirming the status of the Centre as an international organisation. Under the Agreements, the Government of Malaysia guarantees the independent functioning of the Centre and this should enable the Centre to fully and efficiently discharge its duties and fulfill its purposes and functions as a neutral and independent arbitral institution of an international character.

The member countries of AALCC are as follows:

Arab Republic of Egypt	Republic of Korea	Sierra Leone
Bangladesh	Kuwait	Singapore
Bahrain	Libya	Somalia
China	Malaysia	Sri Lanka
Cyprus	Mauritius	State of Palestine
Gambia	Mongolia	Sudan
Ghana	Myanmar	Syria
India	Nepal	Tanzania
Indonesia	Nigeria	Thailand
Iran	Oman	Turkey
Iraq	Pakistan	Uganda
Japan	Philippines	United Arab Emirates
Jordan	Qatar	Republic of Yemen
Kenya	Saudi Arabia	Botswana (assoc.
DPR Korea	Senegal	member)

Recognition and enforcement of foreign arbitral awards:

Malaysia amended its Arbitration Act 1952[2] to provide for a special regime for international arbitration held under the Washington Convention or the Rules of the Centre (which are the UNCITRAL Rules as modified by the Rules of the Centre), would be enforceable in accordance with the provisions of the Washington Convention or the New York Convention respectively.

Malaysia acceded to both the Washington Convention on 8 August 1966 and New York Convention on 5 November 1985. Accession to the New York Convention was subject to two conditions:

- The Government of Malaysia will apply the Convention on the basis of reciprocity only to the recognition and enforcement of awards made in another Contracting State.
- It will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Malaysian law.

Malaysia has enacted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985[3] so as to give effect to the provisions of the New York Convention.

The Centre shall, at the request of a party, render all assistance in the enforcement of awards which may be made in the arbitration proceedings held under the auspices of the Centre.

Settlement of disputes through ICSID or bilateral investment agreements:

Disputes between private parties and governments:

Malaysia has signed 65 bilateral Investment Guarantee Agreements (IGAs). Under the IGA, an investment dispute is resolved through diplomatic channels. Failing this, the parties, namely the national of the Contracting Party on one hand and the Government of the other Contracting Party on the other, may institute conciliation or arbitration proceedings before the International Centre for the Settlement of Investment Disputes (ICSID). This administrative body has been accorded recognition by Malaysia by virtue of it becoming a party to the Washington Convention on 8 August 1966. Malaysia has enacted the Convention on the Settlement of Investment Disputes Act 1966[4] so as to give effect to the Washington Convention.

The list of Investment Guarantee Agreements Malaysia had signed follows:

No.	COUNTRY	DATE SIGNED
1.	USA	21.4.1959 (Rev. in 1965)
2.	Federal Republic of Germany	22.12.1960
3.	Canada	1.10.1971
4.	Netherlands	15.6.1971
5.	France	24.4.1975
6.	Switzerland	1.3.1978
7.	Sweden	3.3.1979
8.	Belgium-Luxembourg	22.11.1979
9.	United Kingdom	21.5.1981
10.	Sri Lanka	16,4.1982
11.	Romania	26.11.1982 (Rev. 25.6.1996)
12.	Norway	6.11.1982
13.	Austria	12.4.1985
14.	Finland	15.4.1985
15.	Kuwait	21.11.1987
16.	OIC	30.9.1987
17.	ASEAN	15.12.1987
18.	Italy	4.1.1988
19.	Republic of Korea	11.4.1988
20.	People's Republic of China	21.11.1988

Mexico

21.	United Arab Emirates	11.10.1991
22.	Denmark	6.1.1992
23.	Vietnam	21.1.1992
24.	Papua New Guinea	27.10.1992
25.	Chile	11.11.1992
26.	Lao People's Democratic Republic	8.12.1992
27.	Chinese Taipei	18.2.1993
28.	Republic of Hungary	19.2.1993
29.	Republic of Poland	21.4.1993
30.	Republic of Indonesia	22.1.1994
31.	Republic of Albania	24.1.1994
32.	Republic of Zimbabwe	28.4.1994
33.	Turkmenistan	30.5.1994
34.	Republic of Namibia	12.8.1994
35.	Kingdom of Cambodia	17.8.1994
36.	Republic of Argentine	6.9.1994
37.	Jordan	2.10.1994
38.	Republic of Bangladesh	12.10.1994
39.	Republic of Croatia	16.12.1994
40.	Bosnia Herzegovina	16.12.1994
41.	Spain	4.4.1995
42.	Islamic Republic of Pakistan	7.7.1995
43.	Kyrgyz Republic	20.7.1995
44.	Mongolia	27.7.1995
45.	Republic of India	3.8.1995
46.	Republic of Uruguay	9.8.1995
47.	Republic of Peru	13.10.1995
48.	Republic of Kazakstan	27.5.1996
49.	Republic of Malawi	5.9.1996
50.	Czech Republic	9.9.1996
51·	Republic of Guinea	7.11.1996
52.	Republic of Ghana	11.11.1996
53.	Republic of Egypt	14.4.1997
54.	Republic of Botswana	31.7.1997
55.	Cuba	26.91997
56.	Uzbekistan	6.10.1997
57.	Macedonia	11.11.1997
58.	North Korea	4.2.1998
59.	Yemen	11.2.1998
60.	Turkey	25.2.1998
61.	Lebanon	26.2.1998
62.	Burkina Faso	23.4 1998
63.	Republic of Sudan	14.5.1998
64.	Republic of Djibouti	3.8.1998
65.	Republic of Ethiopia	22.10.1998

Parties wishing to arbitrate or conciliate a dispute may do so in accordance with the Arbitration Rules or Conciliation Rules under Articles 44 or.33 of the Washington Convention, as appropriate.

Disputes between private parties:

Where parties have entered into a commercial contract or an international trade agreement which provides for the resolution of disputes by way of arbitration proceedings, the law governing the conduct of such proceedings is the Arbitration Act 1952 (the same applies to disputes between private parties and the government).[5]

Where parties to a commercial contract have agreed in writing that disputes in relation to that contract are to be settled by arbitration in accordance with the Rules for the Centre, then such disputes must be settled in accordance with the UNCITRAL Rules subject to the modifications as set forth in the Rules for the Centre.

However, where parties have agreed to settle disputes by arbitration under the auspices of the Centre, the Centre has arrangements with certain institutions such as the World Bank's International Centre for Settlement of Investment Disputes under which the arbitration proceedings can be held at the seat of the Centre. The Arbitration Act 1952 provides that the Act does not apply to such arbitration.[6]

The Centre has cooperation arrangements with many arbitral institutions such as the World Bank's International Centre for Settlement of Investment Disputes under which the arbitration proceedings can be held at the Centre and the facilities provided by the Centre.

Laws relating to commercial dispute resolution currently under review:

The Arbitration Act 1952 vis-a-vis the UNCITRAL Model law on International Commercial Arbitration.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

No.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Act 1952 applies to domestic and international arbitrations. For international arbitrations held under the rules of Washington Convention or the Rules of the Centre, s34 of the Arbitration Act applies. These arbitrations are excluded from the ambit of the Arbitration Act 1952 by virtue of s34.

Limitations on types of dispute that may be arbitrated:

Only commercial disputes can be arbitrated. There is no definition of "commercial" in the Arbitration Act. The Limitation Act 1953 applies to the commencement of arbitration as it does to actions. The Act prescribes the periods of limitation from the date of accrual of the cause of action. An arbitration commences with notice from one party to another requiring a particular dispute to be arbitrated. The UNCITRAL Rules prescribe a limitation period of six years for the enforcement of an award.

Extent of party autonomy to define procedure:

The parties are at liberty to define the procedure which they wish to adopt for any arbitration proceedings. They could adopt for example, the Rules of the Centre, Rules of Institute of Engineers, the Architects Association Rules, or arbitrate ad hoc under rules of their choice..

The Malaysian Evidence Act 1950 (Rev. 1971)[7] does not apply to arbitrations held in Malaysia.

Scope of court intervention and availability of courts for interim relief:

The court cannot intervene in international arbitrations held under the Rules of the Centre. In *Klockner Industries Anlagen GmbH v Kien Tat Sdn Bhd & Anor*[8], the court refused to exercise supervisory functions or to admit any other intervention of municipal courts over the proceedings. A request for interim measures to a judicial authority appears to be permitted under Art 26(3) of the UNCITRAL Rules as applied by the Centre. However, under arbitrations not held under the Rules of the Centre, the Arbitration Act applies and the assistance of municipal courts is available for obtaining documentary evidence, compelling witnesses to appear and deposit testimonies, protection of third parties, etc. The Arbitration Act also provides[9] in such arbitrations for interim custody, an interim injunction or the appointment of receiver by the High Court in relation to an action or matter before the High Court.[10]

Source and scope of procedural rules:

The following instruments are the sources of the procedural rules that govern international arbitration in Malaysia:

- Arbitration Act 1952;
- The Kuala Lumpur Regional Centre has published a revised set of Rules for Arbitration and Conciliation/Mediation which came into force on 1 January 1998;
- Washington Convention 1965; and
- New York Convention 1958.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The UNCITRAL Rules[11] as applied by the Centre provide that the language used shall be determined by the arbitral tribunal.

The right to counsel exists independently of the Arbitration Act 1952. Representation is not confined to local counsel. Foreign lawyers or non-qualified persons may represent the parties in arbitration (see *Zublin Muhibbah Joint Venture* v. *Govt. of Malaysia*[12]). Article 4 of the UNCITRAL Rules as applied by the Centre provides that the parties may be represented by persons of their choice.

The parties are free to choose their own arbitrators in the manner indicated in the UNCITRAL Rules but where they have failed to agree on the choice of a sole arbitrator or the presiding arbitrator in the case of a three member tribunal, the appointment shall be made by an "appointing authority" chosen by the parties.

If the parties appoint the Centre as the appointing authority or where the parties fail to nominate an appointing authority, the sole arbitrator or the presiding arbitrator will be appointed by the Centre out of the international panel maintained by the Centre in accordance with the procedure indicated in the Rules.[13]

Law applicable to substance of dispute:

The parties have autonomy to choose the applicable substantive law. Article 33 of the UNCITRAL Rules as applied by the Centre provides that the arbitral tribunal is to apply the law designated by the parties as applicable to the substance of the dispute. Failing this, the arbitral tribunal is to apply the law determined by the conflict of laws rules.

Decision making by arbitral tribunal and form of award:

The UNCITRAL Rules as applied by the Centre prescribe the process for decision-making by an arbitral tribunal as well as the form and effect of the award.[14]

Confidentiality:

Confidentiality is not referred to in the legislation. In the Rules of the Centre there is provision for confidentiality in matters relating to arbitration proceedings. There is a similar provision in the Centre's Mediation and Conciliation Rules.

Recourse against an award and admissible grounds:

In arbitrations to which the Arbitration Act applies, the courts will set aside or decline to enforce an award where there is:

- misconduct by the arbitrator or impartiality;[15] or
- the dispute involves questions of fraud.[16]

In international arbitrations held under the Rules of the Centre, there are no setting aside procedures but enforcement of the Centre's award may be refused on grounds similar to those laid down in Article V of the New York Convention.

Recognition and enforcement:

The procedure for enforcement of a Centre's award is prescribed in the Arbitration Act[17] and Article V of the New York Convention. The Arbitration Act[18] provides that a judgement or order may be entered in terms of the award. Where the award is made under the rules of the Washington Convention, the enforcement of the award is in conformity with

it. Where the award is made under the Centre's Rules, the enforcement proceedings shall be in accordance with the provisions of the New York Convention.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Commercial parties are encouraged to resort to ADR in the event of dispute. The Courts have yet to encourage the commercial parties to resort to ADR. But mediation is provided for in the banking and insurance sectors of industry, and also in the Centre's Conciliation/Mediation Rules.

Parties to a dispute arising from an international trade transaction sometimes refer the matter to the Ministry of Trade and Industry, either for advice on how best to resolve the dispute or for negotiation. Besides the Ministry, the various Chambers of Commerce in Malaysia also could assist in the dispute resolution process.

Forms of ADR available for commercial disputes:

Apart from arbitration, mediation and conciliation are also recognised.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

There is no legislation making ADR mandatory. However, the Centre has a set of Conciliation/Mediation Rules and these rules can be applied by mutual consent.

Legal implications flowing from choices between the various procedures:

Mediation and conciliation agreements are enforceable as contractual agreements, not as awards.

Rules, if any, defining the role and procedures of mediator:

The Centre's Conciliation/Mediation Rules which are based on the UNCITRAL Conciliation Rules and rules of other bodies.

Resort to arbitration or courts during ADR:

Parties can interrupt ADR and resort to arbitration only by mutual consent of the parties. However, any party to a mediation or conciliation procedure may terminate that procedure unilaterally and resort to court action if there is no arbitration agreement.

Confidentiality and admissibility of evidence in other proceedings:

Rules governing confidentiality and admissibility of evidence in other proceedings are provided for and are contained in the Arbitration, Conciliation/Mediation Rules of the Centre.

Recognition and enforceability of settlements:

There are no provisions for the recognition and enforceability of settlements. These are enforceable as contracts between the parties. The terms of a settlement may be incorporated in the form of a consent award if arbitration proceedings follow.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no limitations on the choice of ADR. Also, the jurisdiction of the mediator in commercial disputes is usually provided for in the rules for mediation of the institution concerned.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There are no restrictions in Malaysia on foreign legal representation in ADR or the nationality of the mediator.

Legal Sources and References

The Kuala Lumpur Regional Centre web site is at http://www.klrca.org.

Bibliography

Redfern, Alan & Hunter, Martin: *Law & Practice of International Commercial Arbitration,* Sweet & Maxwell, 1986.

Papers of Regional Seminar on International Commercial Arbitration, (Joint auspices of AALCC, UNCITRAL & ICA), New Delhi, 1984.

Nijhoff, Martinus, *Arbitration & Conciliation under UNCITRAL Rules: a Textual Analysis*, Boston, 1986.

Lew, *Contemporary Problems in International Arbitration*, Queen Mary College, London, 1986.

Law & Practice of Commercial Arbitration (2nd ed.), Butterworths, London, 1989.

Mustill & Boyd, *The Law of Arbitration,* 20th ed., 1982.

P G Lim "Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration" *Malayan Law Journal* p. lxxiii; Vol 2, 1997.

P G Lim *Institutional Arbitration in Asia - The Experience of the Kuala Lumpur Regional Centre for Arbitration - Singapore Journal of Legal Studies*, p. 656; December 1993.

P G Lim *International Handbook on Commercial Arbitration,* Report on Malaysia; Kluwer. 14 April 1993.

P G Lim "Kuala Lumpur Regional Arbitration Centre", *Foreign Investment Law Journal*, ICSID, Vol 3 No.1, Spring 1988.

Paulsson, Jan, "Contracts in Asia: Kuala Lumpur as a Venue for Arbitration" *International Business Law Journal* (Forum European de la Communication), No. 2, 1994.

Brown, Henry J. and Marriott, Arthur L., *ADR Principles and Practice,* (Sweet & Maxwell), London, 1993.

Dr. Zakaria bin Mohd Yatim, "Settlement of Commercial Disputes in Malaysia" *Malayan Law Journal*, 1, p.cxviii; 1983.

ENDNOTES

[1] Art. 93
[2] s. 34
[3] Art. 320
[4] Art. 392 (Rev. 1989)
[5] Art. 93
[6] s.34
[7] s. 2,3 (Art56)
[8] [1990] 3 NEJ 183
[9] s13(6)(e)
[10] s13(6)(h)
[11] Art.17(1)
[12] [1990] 3 MLJ 125
[13] Rule 3 of the Rules of the Centre
[14] Art. 31 and 32
[15] s. 24 Arbitration Act 1952
[16] *ibid*.; s. 25
[17] *ibid*.; s. 34(2)
[18] *ibid*.; s. 27

GENERAL OVERVIEW

Primary sources of law:

- Legislation
- Jurisprudence
- Doctrine
- Custom, as evidence of a general practice accepted as law
- General principles of law

Sources of law for commercial dispute resolution outside of the court system:

- Commerce Code: Title IV of Book V
- International Treaties

The primary recognised method for resolving commercial disputes outside the courts in Mexico is arbitration. Both domestic and international commercial arbitration is governed by the provisions contained in Title IV of Book V of the Commerce Code (CoC) (Articles 1415-1463).

In addition, Mexico has acceded to the following international treaties governing or related to international commercial arbitration:

- Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention);
- Inter-American Convention on International Commercial Arbitration (Panama Convention);
- Inter-American Convention for Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention); and
- The North American Free Trade Agreement (NAFTA), Article 2022 (ADR).

Institutions for international commercial dispute resolution outside of the courts:

Institutions that administer international commercial arbitration in Mexico are:

The Mexican Chapter of the International Chamber of Commerce
Av. Insurgentes Sur 950, Piso 6
C.P. 03100
MEXICO

Tel: (525) 687 28 29
Fax: (525) 687 36 88

The Mexico City Chamber of Commerce
Paseo de la Reforma 42
C.P. 06048
MEXICO

Tel: (525) 703 28 62
Fax: (525) 705 74 12

Comisión para la Protección del Comercio Exterior de México
(COMPROMEX-BANCOMEXT).
Periferico Sur # 4333, Colonia Jardines de la Montana
C.P. 14210
MEXICO

Tel: (525) 227 91 44
Fax: (525) 227 90 82

Centro de Arbitraje de México (CAM).
World Trade Center (WTC)
Montecito 38, Floor 14th, Office 38
Col. Napoles
C.P. 03810
MEXICO

Tel: (525) 488 04 36
Fax: (525) 488 04 37
E-mail: camex@data.net.mx

Recognition and enforcement of foreign arbitral awards:

Mexico is a party to the New York Convention, as well as the Panama Convention and the Montevideo Convention. Each of these Conventions is committed to enforcing awards.

The CoC adopts the principles of these Conventions. The general principle is that regardless of the country where arbitral awards have been issued, awards shall be legally recognised as binding and, following a written petition in accordance with the relevant provisions of the CoC, shall be enforced[1] (see section below)

Settlement of disputes through ICSID or bilateral investment agreements:

Mexico is not a party to the Washington Convention (ICSID). However, Mexico has signed Bilateral Investment Treaties with Spain (22 June 1995), Switzerland (10 July 1995) and Argentina (13 November 1996).

Mexico is currently negotiating similar treaties with Austria, France, Germany, Italy, Uruguay, the Netherlands and the United Kingdom. These treaties, as well as the NAFTA and the free trade agreements that Mexico has concluded with Bolivia, Costa Rica, Colombia and Venezuela, provide for dispute settlement mechanisms between investors and the state.

Laws relating to commercial dispute resolution currently under review:

None.

ARBITRATION

Is arbitration law based on UNCITRAL Model Law.

The Mexican Commerce Code, which governs commercial arbitration, is based on UNCITRAL Model Law.

Differences in the application of arbitration law to international and domestic arbitration:

The provisions of the Commerce Code governing commercial arbitration apply to both domestic and international commercial arbitration.[2]

Limitations on types of dispute that may be arbitrated:

Although the Commerce Code provides that the recognition and enforcement of an arbitral award may be denied, *inter alia*, when the matter of the dispute was not arbitrable according to Mexican legislation,[3] the Commerce Code contains no specific provision regarding the limitations on types of disputes that might be arbitrated. However, certain limitations arise from other legislation.

As a general rule, private rights might be subject to arbitration unless otherwise provided by law. The law usually prohibits matters from being arbitrated where the State or society has a direct interest (public interest), unless there is an express authorization to do so. For instance, the Civil Code provides that private parties can only compromise their private rights as long as such compromises do not affect the public interest or the rights of third parties.[4] The Federal Code for Civil Procedures provides that the following matters shall not be arbitrated:[5]

- the right to alimony.
- divorces, except for monetary aspects.
- nullity of marriage.
- those concerning civil status, except for pecuniary rights of legally acquired filiation.
- those that are specifically prohibited by law.

Extent of party autonomy to define procedure:

In principle, the parties have complete autonomy to define the procedure to be followed by the arbitral tribunal, subject to the provisions of the Commerce Code on commercial arbitration.[6] The parties' autonomy to define procedural rules, as with all matters left to the autonomy of the parties (except for choice of law), involves the power of authorising a third party, including an institution, to decide the matter.

Scope of court intervention and availability of courts for interim relief:

As a general rule, judicial intervention in matters concerning commercial arbitration will not be required unless otherwise provided.[7] However, whenever judicial intervention is required, the competent judicial authority will be the ordinary judge (either local or federal) of the place of arbitration.[8] Additionally, the parties may request the competent judicial authority to take provisional measures prior to or during an arbitration.[9]

Courts may also be involved in the recognition and enforcement of an arbitral award, or in determining the nullity of an award[10] (see sections below). Finally, the arbitral tribunal or any of the parties with the tribunal's authorisation may request judicial assistance for the production of evidence.[11]

Source and scope of procedural rules:

The primary source of procedural rules is the parties' autonomy. Failing agreement between the parties, the arbitral tribunal shall conduct the arbitration in such manner as it deems appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance and weight of any evidence.[12] However, the parties and the arbitral tribunal are subject to the relevant provisions of the Commerce Code, which sets out several procedural rules concerning, for instance, the place of arbitration, initiation of the arbitration, legal terms for written submissions, oral arguments and evidence.[13]

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The provisions of the Commerce Code governing commercial arbitration apply to both domestic and international arbitrations.

The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. The arbitral tribunal may order that any documentary evidence be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[14]

No person shall be precluded by reason of nationality from acting as an arbitrator unless otherwise agreed by the parties.[15] Only lawyers (either nationals or foreigners) that are licensed to practice in Mexico have the rights of representation and may render advice on Mexican law. However, there are no limitations to prevent foreign attorneys from rendering legal advice on the law of the jurisdiction where they are licensed to practice.

Law applicable to the substance of the dispute:

The Commercial Code provides that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as referring to the substantive law of that State and not to its conflict of laws rules. Failing any designation by the parties of the law applicable to the merits of the dispute the arbitral tribunal, taking into regard to the characteristics and connections of each case, shall determine the applicable law.[16]

Decision making by arbitral tribunal and form of award:

The rules for decision making by an arbitral tribunal are established in the Commerce Code.[17] The arbitral tribunal shall decide commercial disputes according to the following:

- the applicable law;
- the provisions of the arbitral agreement or arbitral clause;
- the commercial practice, as applicable to the case.

Decisions will be made by a majority of the arbitral tribunal, unless otherwise provided by the parties. If during the conduct of the arbitration proceedings the parties reach an agreement, such a transaction agreement will terminate the proceedings and, if so requested, may take the form of an arbitral award in the terms agreed by the parties.

The arbitral award shall be in written form and signed by the arbitrator(s), including the date of issuance and the place of arbitration (that will be the place of issuance). The parties shall be notified once the award is issued, and provided with a copy signed by the arbitrator(s).

In certain cases, the arbitral tribunal may also order the termination of the proceedings or may decide on the modification, interpretation or addition of the arbitral award within 30 days after its issuance.

Confidentiality:

Confidentiality in arbitral proceedings is protected by the general rules on confidentiality contained in Mexican criminal legislation.

Recourse against an award and admissible grounds:

The parties may apply to a competent judicial authority for the nullification of an arbitral award. However, arbitral awards can only be set aside by a competent court when the party making the request provides evidence to the court's satisfaction on one or more of the following:

- A party to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subject it or, failing any indication thereof, under the Mexican law.
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to exercise its rights.
- 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. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law from which the parties cannot derogate or, failing such agreement, was not in accordance with the law.

The court may also declare the nullity of an award if it finds that under Mexican legislation the subject-matter of the dispute cannot be arbitrated or that the award is contrary to the public order.

As a general rule, the request shall be formulated within three months from the date of notification of the award.[18] There is no further appeal against a declaration of nullity of an arbitral award.[19]

Recognition and enforcement:

An arbitral award shall be recognised as binding and, upon request in writing to the competent court, shall be enforced. The party invoking an award or applying for its enforcement shall submit the authenticated original award or a duly certified copy and the original arbitration agreement or a duly certified copy. If the award or agreement is not made in Spanish, the party shall additionally supply a certified Spanish translation.[20]

It is also important to note that the causes for the denial of recognition and enforcement of an arbitral award are the same than those provided as causes for the annulment of an award. The only additional cause for the denial of recognition and enforcement is when the award is not yet binding upon the parties, or has been declared null or suspended by a court of the country whose law served as a basis for the award.[21]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

In Mexico, the most commonly used method for resolving commercial disputes between private parties besides court litigation is arbitration. Mediation and conciliation, although available as ADR, is less well recognised. However, it should be noted that in addition to arbitration, the NAFTA encourages the parties to use other means of ADR for the settlement of international commercial disputes.

Forms of ADR available for commercial disputes:

Besides arbitration, mediation and conciliation may be available for the resolution of commercial disputes. Although not very commonly used, both mediation and conciliation are consensual processes that provide a forum in which an impartial person (the mediator or conciliator) facilitates communication between the parties in the hope of achieving a mutually acceptable settlement of the dispute. The mediator or conciliator seeks to focus on the interests of each party and may propose settlement options for the parties to consider. However, the proposed settlements are not binding on the parties unless accepted by them.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Apart from arbitration, Mexican legislation is almost silent about other forms of ADR. However, there are certain instances where the exhaustion of a conciliation procedure is made mandatory as a pre-requisite to access to the national courts such as the Comisión Nacional de Seguros y Fianzas (National Insurance and Bonds Commission). Also as mentioned previously, the NAFTA encourages and facilitates the optional use of arbitration and other means of ADR for the settlement of international commercial disputes between private parties.

Legal implications flowing from choices between the various procedures:

Unlike arbitration, which is an adversarial process that results in an award that is legally binding on the parties, the parties choosing mediation or conciliation are not bound by the settlements proposed by the mediator or conciliator. However, it should be noted that even when commercial and civil legislation are not specific about these means of ADR, a

settlement reached by the parties as a result of mediation or conciliation may be legally recognised.

The parties involved in a mediation or conciliation process may seek the legal recognition of the settlement reached through a transaction agreement. Such an agreement is considered a definitive act by means of which the parties give to each other mutual or reciprocal concessions in order to settle a present or future dispute.[22] A transaction agreement can be formalised before a public notary or before a judicial authority. However, the enforcement of the obligations thereby contained can only be requested to the competent judicial authority.

Rules, if any, defining the role and procedures of mediator:

The are no rules governing the role and procedures to be followed by the mediator. However, the parties may define the role and procedures to be followed by the mediator in the ADR clause.

Resort to arbitration or courts during ADR:

The non-binding nature of the ADR does not compel any of the parties to conclude an ADR procedure before resorting to arbitration or courts. If the parties to a dispute do not accept the proposed settlement, they can further establish a judicial or arbitral process.

Confidentiality and admissibility of evidence in other proceedings:

There are no rules on confidentiality except for the general rules contained in criminal legislation. Neither are there any rules governing the admissibility of evidence. This may be governed however by the agreement of the parties.

Recognition and enforceability of settlements:

The settlement reached by means of ADR and reflected in a transaction agreement may be legally recognised and enforced upon submitting a request in writing to the competent judicial authority.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

The only limitations that might exist on the choice and jurisdiction of ADR are the general limitations concerning the public order and the rights of third parties. Cases involving matters

where the State or society has a direct interest may not be subject to ADR. As a general rule, private rights might be subject to ADR unless otherwise stipulated by law.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

Mediation is often conducted without involvement of counsel representing the parties. However, although only lawyers (either nationals or foreigners) that are licensed to practice in Mexico have the right of representation and may render advice on Mexican law, there are no limitations to prevent foreign attorneys from rendering legal advice on the law of the jurisdiction where they are licensed to practice. There are no legal constraints as to the nationality of the mediator. Any limits on the nationality of mediator would depend on the agreement of the parties.

LEGAL SOURCES AND REFERENCES

- Commerce Code (Art. 1425-1463)
- Civil Code (Art. 6 and 2944)
- Federal Code of Civil Procedures (Art. 615)
- Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)
- Inter-American Convention on International Commercial Arbitration (Panama Convention)
- Inter-American Convention for Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention)
- The North American Free Trade Agreement (NAFTA), Art. 2022 (ADR)

BIBLIOGRAPHY

Alcala Zamora y Castillo, Niceto, *Proceso, Autocomposición y Autodefensa*; UNAM, 2nd. ed; México, 1970.

Arbitraje en el derecho privado. Situación internacional, Imprenta Universitaria, UNAM, 1963.

Cremades, Bernardo María, "Ventajas del arbitraje en el comercio internacional" *en Panorama del arbitraje comercial internacional. Selección de lecturas,* Instituto Mexicano de Comercio Exterior, Academia de Arbitraje y Comercio Internacional, UNAM (coeds.), México, 1983.

Diaz, Luis Miguel, *El arbitraje: privatización de la justicia,* Themis, México, 1991.

Diaz, Luis Miguel, *México y las Comisiones Mexicanas de Reclamaciones,* UNAM; México, 1983.

El arbitraje comercial documentado y legislado, Textos Universitarios; Limusa, México, 1988.

García Moreno, Víctor Carlos, *El arbitraje como medio de solución de controversias en materia de inversiones en el TLC,* Universidad Autónoma de Baja California, Tijuana, B.C., México, 1993.

Holtzmann, Howard M., "El arbitraje y los tribunales socios en sistemas de derecho internacional" in *Panorama del arbitraje comercial internacional*. *Selección de lecturas*, Instituto Mexicano de Comercio Exterior, Academia de Arbitraje y Comercio Internacional, UNAM (coeds.), México, 1983.

Panorama del arbitraje comercial internacional. *Selección de lecturas*, Instituto Mexicano de Comercio Exterior, Academia de Arbitraje y Comercio Internacional, UNAM (coeds.), México, 1983.

Pereznieto, Leonel, "Arbitraje privado en México" in *El arbitraje en el derecho latinoamericano y español*, Ed. Cuzco, S.A., Lima, 1989.

Silva, Jorge Alberto, *Arbitraje comercial internacional en México*, Pereznieto editores, México, 1994.

Siqueiros, José Luis, *El arbitraje en los negocios internacionales de naturaleza privada*, M.A. Porrúa, Escuela Libre de Derecho, México, 1992.

Siqueiros, José Luis, "Panorama actual del arbitraje comercial internacional" in *Panorama del arbitraje comercial internacional. Selección de lecturas*, Instituto Mexicano de comercio Exterior, Academia de Arbitraje y Comercio Intternacional, UNAM (coeds.), México, 1983.

Vazquez Castro, Luis Martínez, *La cláusula compromisoria en el arbitraje civil*, Civitas, 2a. ed., Madrid, 1991.

Zamora-Sanchez, Pedro, *Arbitraje comercial internacional*, Humanitas, México, 1988.

ENDNOTES

[1] Art. 1461 CoC
[2] Art. 1415
[3] Art. 1462
[4] Art. 6
[5] Art. 615 Federal Code of Civil Procedure
[6] Art.1435 CoC
[7] Art. 1421 CoC
[8] Art. 1422 CoC
[9] Art. 1425 CoC
[10] Art. 1457-1463 CoC
[11] Art. 1444 CoC
[12] Art. 1435 CoC
[13] Art. 1434-1444, 1449
[14] Art. 1438 CoC
[15] Art. 1427 f. I CoC
[16] Art. 1445 CoC

[17] Art. 1445-1451
[18] Art. 1458 CoC
[19] Art. 1460 CoC
[20] Art. 1461 CoC
[21] Art. 1462 CoC
[22] Art. 2944 of the Civil Code

New Zealand

GENERAL OVERVIEW

Primary sources of law:

- Legislation (statutes and regulations)
- Case law

Sources of law for dispute resolution outside of the courts:

- Arbitration Act 1996
- Arbitration Act 1908 (and amendments)
- Employment Contracts Act 1991
- Companies Act 1993
- Securities Act 1976
- Contractual Remedies Act 1979
- Contracts Enforcement Act 1982
- Contracts (Privacy) Act 1982
- Consumer Guarantees Act 1993
- Commerce Act 1986
- Fair Trading Act 1986
- Sale of Goods Act 1908

Institutions for international commercial dispute resolution outside of the courts:

There are a growing number of private, professional dispute resolution institutions/services in New Zealand that have experience in international dispute resolution. The non-profit Arbitrators' and Mediators' Institute of New Zealand maintains panel lists of arbitrators and mediators. It is the only dispute resolution body in New Zealand that demands specific qualifications, has a Code of Ethics, and maintains an Investigation and Ethics Committee to ensure that those involved meet a particular criteria. In addition, LEADR (Lawyers Engaged in Alternative Dispute Resolution) is a private, non-profit Australasian company which promotes the use of mediation. Contact details for the Institute and LEADR are as follows:

The Arbitrators' and Mediators' Institute of New Zealand Inc.
16 Palmer Street
Box 1477
Wellington,
NEW ZEALAND

Tel: (64 4) 385 4178
Fax: (64 4) 385 7224

LEADR New Zealand Chapter Office
Box 4329
Shortland Street
Auckland
NEW ZEALAND

Tel: (64 4) 357 9019
Fax: (64 4) 357 9099

Recognition and enforcement of foreign arbitral awards:

New Zealand is committed to enforcing awards by adherence to the New York Convention (1958). This treaty was implemented by the Arbitration (Foreign Agreements and Awards) Act 1982, which was recently superseded by the Arbitration Act 1996. New Zealand is also a party to two earlier treaties, covering the same kind of subject matter as the New York Convention, which now only apply to a minority of States that have not yet become parties to the New York Convention. These are the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927). These treaties were implemented by the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933, which was also recently superseded by the Arbitration Act 1996.

Under other legislation, the Reciprocal Enforcement of Judgments Act 1934, final judgments of superior courts in countries that provide reciprocal treatment to the judgments of the High Court of New Zealand may be enforced summarily.

Settlement of disputes through ICSID or bilateral investment agreements:

New Zealand is a party to the Washington Convention (ICSID). The Convention was given effect in New Zealand law by the Arbitration (International Investment Disputes) Act 1979. New Zealand has bilateral investment protection and promotion agreements (IPPA) with China (1988) and Hong Kong, China (1995).

Laws relating to commercial dispute resolution currently under review:

Trade laws which could relate to international commercial dispute resolution are regularly reviewed by Government.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

The law in New Zealand applicable to international disputes is the Arbitration Act 1996 ("Arbitration Act"), which came into force on 1 July 1997. This Act applies to every arbitration agreement, whether made before or after 1 July 1997. However, if the arbitration proceedings were commenced before 1 July 1997, or if the arbitration agreement was made before that date and provides for the appointment of two arbitrators, then the Arbitration Act 1908 will continue to apply.[1]

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Act 1996 is based on the UNCITRAL Model Law. The UNCITRAL Model Law is incorporated as the First Schedule to the Act, subject to minor amendments. The three most significant modifications from the UNCITRAL Model Law are that: the provisions are not limited to commercial matters but apply to disputes of all kinds (subject to other laws and to public policy); that the provisions are not restricted to international arbitration but in principle also apply to domestic arbitration; and that the arbitration agreement need not be in writing.

The Arbitration Act 1996 is divided into two schedules. The First Schedule applies to all arbitration in New Zealand. Parties to an intentional arbitration[2] may agree to include as terms of their arbitration agreement provisions from the Second Schedule. The provisions of the Second Schedule apply to domestic arbitration unless the parties agree otherwise.

Limitations on types of dispute that may be arbitrated:

The Arbitration Act 1996[3] provides that parties can agree to submit any dispute to arbitration so long as it is not contrary to public policy or, under any other law, the dispute is not capable of determination by arbitration. It should also be noted that the fact that an enactment confers jurisdiction in respect of any matter on the High Court or District Court but does not refer to the determination of that matter by arbitration, does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

Extent of party autonomy to define procedure:

Under the Arbitration Act 1996, and consistent with the UNCITRAL Model Law, the parties to any arbitration in New Zealand have a high degree of autonomy to modify the rules as they consider appropriate. In particular, parties involved in an international dispute have the flexibility to include articles from the Second Schedule of the Arbitration Act 1996.

Scope of court intervention and availability of courts for interim relief:

It is not incompatible with an arbitration agreement for a party to request an interim measure of protection from a court before or during arbitral proceedings. The High Court or District Court can make the following orders:[4]

- Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute;
- An order securing the amount in dispute;
- An order appointing a receiver;
- Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; and
- An interim injunction or another interim order.

The extent to which a court can intervene before or during an arbitration is confined to those situations outlined in the First Schedule of the Arbitration Act 1996 (or the First and Second Schedules in those cases where parties have decided to make use of provisions within the Second Schedule).

When a matter is brought before the court that is also the subject of an arbitration agreement, the court must refer the parties to arbitration unless the agreement is null and void, inoperative, or incapable of being performed, or there is no dispute between the parties with regards to the matter in question.[5]

In certain circumstances, such as when parties fail to do so, the court has the power to appoint an arbitrator(s).[6]

If necessary, the court can decide the outcome of a party's challenge of an arbitrator. In addition, the court will decide whether an arbitrator has become *de jure* or *defacto* (in law or in fact) unable to perform the functions of the office.[7]

Where an arbitral tribunal has ruled on a plea from a party that it does not have jurisdiction, any party may, within 30 days of having received notice of that ruling, request the High Court to decide the matter. The High Court's decision shall not be subject to appeal[8].

The arbitral tribunal or a party with the approval of the arbitral tribunal may request the court to assist in the taking of evidence.[9]

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request the High Court or District Court's assistance in the exercise of any power conferred upon the tribunal. These powers are listed in Clause 3 of the Second Schedule. These include:

- Ordering the provision of further particulars in a statement of claim or statement of defense;
- Ordering the giving of security for costs;
- Fixing and amending time limits within which various steps in the arbitral proceedings must be completed;
- Ordering the discovery and production of documents or materials within the possession or power of a party;
- Ordering the answering of interrogatories;
- Ordering that any evidence by given orally or by affidavit or otherwise;
- Ordering that any evidence be given on oath or affirmation; and
- Ordering any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently.

Upon application to the High Court by any party (with the consent of the arbitral tribunal or with the consent of every other party), the High Court shall have jurisdiction to determine any question of law arising in the course of the arbitration. Within one month of the High Court's decision, and with its leave or with special leave from the Court of Appeal, a party may appeal from the High Court's determination to the Court of Appeal.[10]

If it feels that undue hardship might be caused to the parties, the High Court or District Court can extend the time specified within an arbitration agreement by which arbitration proceedings should commence.[11]

Source and scope of procedural rules:

The rules for arbitration in New Zealand are found within the Arbitration Act 1996, primarily within the First and Second Schedules of the Act. The following points about the Arbitration Act 1996 should be noted:

The Act contains two provisions which do not appear in the UNCITRAL Model Law:

- no action can be brought against an arbitrator for negligence when acting as an arbitrator;[12] and
- unless they decide otherwise, the parties are bound by confidentiality.[13]

Documents relating to the UNCITRAL Model Law and originating from the United Nations Commission on International Law, or its working group for the preparation of the Model Law, may be used for the purposes of interpretation of the Arbitration Act 1996.[14]

The Third Schedule lists three additional treaties relating to arbitration which New Zealand has enacted. These are:

- Protocol on Arbitration Clauses (1923);
- Convention on the Execution of Foreign Arbitral Awards (1927); and
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

In addition to legislated rules, the following codes of conduct exist:

- Members of the Arbitrators' and Mediators' Institute of New Zealand Inc. are bound by a code of conduct when acting as arbitrator or mediator. Any breach of the code may be referred to the disciplinary committee of the Institute.
- All practising lawyers are bound by the code of conduct of the Law Society of New Zealand and complaints may be brought to the attention of the disciplinary committee of the Society.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The parties to the arbitration are free to decide that it will be conducted in a foreign language. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings.[15] No person shall be precluded by reason of that person's nationality from acting as an arbitrator unless otherwise agreed by the parties.[16]

There is no restriction on representation in arbitration by foreign attorneys or lawyers. However, in the event that an application were to be made to a court in connection with an arbitration, the lawyer who appears in Court would need to have been admitted to the bar in New Zealand.[17]

Law applicable to substance of dispute:

If an arbitration is held in New Zealand, it is permissible for foreign laws to govern the substance of the dispute. Unless the parties agree otherwise, the provisions of the Arbitration Act 1996 shall govern the conduct of the arbitration.[18]

Decision making by arbitral tribunal and form of award:

The Arbitration Act 1996 provides rules for the way decisions are to be made by an arbitral tribunal. In arbitral proceedings with more than one arbitrator, any decision of substance shall be made, unless otherwise agreed by the parties, by a majority of all its members. With regards to questions of procedure, these may be decided by a presiding arbitrator, if so authorised by the parties, or by all members of the arbitral tribunal.[19]

Awards must be made in writing and should be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.[20]

Confidentiality:

An arbitration agreement is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. However, some exceptions to confidentiality exist:

- Parties can agree otherwise;
- If the publication, disclosure, or communication is contemplated by the Arbitration Act 1996; or
- If the disclosure of information is made to a professional or other advisor of any of the parties.[21]

Recourse against an award and admissible grounds:

The courts can set aside an award on any of the following grounds:[22]

- If a party to the arbitration agreement was under some incapacity;
- The agreement is not valid under the law to which the parties subjected it to, or failing an indication on that question, the law of New Zealand;
- The party making the application to have the award set aside was not given proper notice of the appointment of the arbitrator/arbitral proceedings or was otherwise unable to present its case;
- If the award deals with disputes not contemplated by the arbitration agreement, then the award can be set aside. (Except if only part of the award is affected in this way and it can be separated from the rest of the award. In such a case, only the affected part will be set aside);

- If 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 the First Schedule to the Arbitration Act 1996); or
- If the High Court finds the dispute is not capable of arbitration under the law of New Zealand or that it is in conflict with the public policy of New Zealand.

Where the provisions of the Second Schedule apply, on the determination of an appeal on a question of law arising out of an award the High Court may confirm, vary or set aside an award.[23]

Recognition and enforcement:

The recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused if any of the circumstances outlined above exist or in the following additional circumstances:[24]

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the law of the country where the arbitration took place, in a case where the procedure was not agreed between the parties; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

The procedure for enforcement of an award is that upon application to the High Court, an arbitral award shall be enforced by entry as a judgment in terms of the award or by action. Parties must supply an authenticated original award or a duly certified copy and, if recorded in writing, the original arbitration agreement or a duly certified copy. Authenticated translations must be provided if the originals are not in the English language.[25]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised within New Zealand. Arbitration is covered by the Arbitration Act 1996, which is based on the UNCITRAL Model Law. Mediation and conciliation have a well-established history in New Zealand in labour and employment relations, family disputes and tenancy arrangements. There are legislative provisions for the uses of these procedures including the appointment of an independent third party by a court.

More recently, ADR has become more popular for the settlement of commercial and civil disputes because of its perceived advantages of efficiency, cost, choice of mediator, privacy, party autonomy, and the flexibility to reach decisions based on the interests of the parties rather than their legal rights and obligations.

In these situations, it is the responsibility of an independent third party to facilitate a clear understanding of the issues, clarify the causes of the dispute and explore options for resolving it.

Forms of ADR available for commercial disputes:

If the parties to a commercial dispute agree to settle their dispute privately using ADR, there are no limitations on types of technique that they may agree on. An important factor in choosing ADR over litigation is frequently the desire of the parties to maintain a viable commercial relationship.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

The situation where mediation or conciliation of disputes may be prescribed by the law are limited. The Family Proceedings Act 1980, the Residential Tenancies Act 1986, the Port Companies Act 1988, the Crown Minerals Act 1991, the Employment Contracts Act 1990, and the Companies Act 1993 contain such provisions.

In addition, the Resource Management Act 1991 makes provision for an independent third party to be engaged to facilitate settlement of a dispute by consent of the parties. It should also be noted that where the monetary value of the commercial claim is under $3000 (or $5000 with the agreement of both parties) parties can take their dispute to the Disputes Tribunal. The Tribunal was set up under the Disputes Tribunal Act 1998. It encourages

alternative dispute resolution, where referees attempt to bring the parties to an agreed settlement.

Currently there are no formal procedures for the courts to require parties to attempt settlement by ADR, but this possibility is under consideration. Court rules enable a Judge to ask parties whether they have considered attempting a settlement and grant time for such negotiations to take place.

Legal implications flowing from choices between the various procedures:

Legal implications for enforcement do flow from the choice between ADR proceedings sanctioned by legislation and private ADR proceedings. In the case of mediation or conciliation sanctioned by legislation, an agreement may be registered and enforced by the court. An agreement following a successful private ADR process cannot be registered and enforced by the court, but if it is reduced to a formal agreement between the parties, it would be subject to the normal laws of contract.

Rules, if any, defining the role and procedures of mediator:

There are no officially promulgated rules which define the role and procedures of mediator, conciliator, facilitator, expert, etc, other than those prescribed in the voluntary code of the various professional bodies, such as the Arbitrators' and Mediators' Institute of New Zealand Inc., that promote ADR.

Resort to arbitration or courts during ADR:

Providing that the ADR process is private there is nothing to prevent one or both of the parties interrupting ADR and resorting to arbitration or court procedure.

Confidentiality and admissibility of evidence in other proceedings:

There are no rules governing confidentiality and admissibility of evidence in other proceedings.

Recognition and enforceability of settlements:

There are no provisions for the recognition and enforceability of settlements.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There are no restrictions on foreign legal representation in ADR proceedings or on the nationality of mediator.

LEGAL SOURCES AND REFERENCES

- Arbitration Act 1996
- Disputes Tribunal Act 1988
- Employment Contracts Act 1990
- Resource Management Act 1991

BIBLIOGRAPHY

Green, Philip and Hunt, Barbara, *Arbitration Law and Practice*, Brooker's (loose-leaf - current to 1997).

Kennedy-Grant, Tomas, *National Report on New Zealand Arbitration Law in I.C.C.A International Handbook on Commercial Arbitration*, (awaiting publishing late 1997/early 1998).

Kennedy-Grant, Tomas, *A South Pacific Perspective on International Arbitration and Dispute Resolution Since 1961*, 1 NZBLQ 195 (1995).

Kennedy-Grant, Tomas, *Alternative Dispute Resolution in New Zealand*, Published in Rao and Sheffield.

Thorp and Williams, *Commentary on Arbitration Act 1996*, Law Society,1997.

Arbitration, New Zealand Law Commission Report Number 20, 1991.

ENDNOTES

[1] Arbitration Act 1996, s.19
[2] For definition, see s.6
[3] s.10
[4] First Schedule; Art.9
[5] First Schedule; Art. 8
[6] First Schedule; Art.11
[7] First Schedule; Art.14
[8] First Schedule; Art.16
[9] First Schedule; Art.10
[10] Second Schedule; CL 4.
[11] Second Schedule; CL 7

[12] s.13
[13] s.14
[14] s.3
[15] First Schedule; Art.22
[16] First Schedule; Art.11
[17] Law Practitioners Act 1982
[18] First Schedule; Art.28
[19] First Schedule; Art.29
[20] First Schedule; Art. 31
[21] s.14
[22] First Schedule; Art.34
[23] Second Schedule; cl.5
[24] First Schedule; Art.36
[25] First Schedule; Art.35

Papua New Guinea

GENERAL OVERVIEW

Primary sources of law:

- National Constitution of Papua New Guinea
- Organic Laws
- Acts of Parliament and subordinate legislation including Emergency Regulations
- Provincial Laws

Constitutional Amendment No 1 - Provincial Government, s2 added the following sources of law:

- Law made under or adopted by or under the Constitution or any of these laws, including subordinate legislative enactments made under the Constitution or any of the Organic Laws or Acts of Parliament
- The underlying law and pre-independence statutes
- Common law
- Customary Law.

The Constitution of Papua New Guinea which was adopted on Independence Day 16 September 1975 refers to all the above sources of law.[1] Laws such as the underlying law, the common law and customary law are effective only so long as they do not conflict with the Constitution or superior laws such as organic laws or Acts of Parliament.

Papua New Guinea follows the Common Law system in which decisions by the courts (case law) may have the effect of binding precedent.

Sources of law for dispute resolution outside of the courts:

The principal legislation for commercial dispute resolution outside the court system is to be found in the Arbitration Act Chapter 46. The Arbitration Act was passed in 1951 and has its origins in the British Arbitration Acts of the turn of the century with some subsequent amendments. The Papua New Guinea arbitration Act has not been amended since 1951.

Moves have been initiated whereby larger commercial disputes may be resolved through a body or panel of mediators but as yet there is no law in place to the administer the proper functions of this body.

As regards differences between the National Government and Provincial Governments over commercial projects, there is a consultation mechanism provided for within the Organic Law on Provincial and Local Level Governments. Consultation may take place prior to the commencement of a project or in other circumstances where there are common policy differences between a Provincial Government and the State.

The Provinces do not have individual arbitration laws but apply the Arbitration Act Chapter 46.

Institutions for international commercial dispute resolution outside of the courts:

At present there is no national organisation or panel for resolving international commercial disputes outside of the courts. There are National Court Rules making provision for Courts to refer certain matters to arbitration. In practice where disputes are referred to arbitration, they are generally heard under the auspices of Australian bodies:

- The Australian Centre for International Commercial Arbitration (ACICA);
- The Australian Commercial Disputes Centre (ACDC).

A new body has recently been established;

PNG Commercial Disputes Centre Inc.
P O Box 850
Port Moresby
PAPUA NEW GUINEA

Tel: 675 321 7233

Recognition and enforcement of foreign arbitral awards:

Papua New Guinea is not a party to the New York Convention as it was under colonial administration of Australia at the time the Convention was adopted and its external trade relations did not provide sufficient justification. It does nevertheless respect and enforce foreign arbitral awards. In view of Papua New Guinea's membership of the WTO and APEC, consideration is being given to adherence to the New York Convention.

Settlement of disputes through ICSID or bilateral investment agreements:

Papua New Guinea became a party to the Washington Convention on 19 November 1978. It has notified the depositary that it will only consider submitting disputes to the jurisdiction of the Centre which are fundamental to the dispute itself. The National Court of Papua New Guinea is designated as the appropriate authority for the recognition and enforcement of awards of the Centre.

Papua New Guinea has also entered into the following bilateral Investment Promotion and Protection Agreements:

Australia
China
Malaysia
Philippines
United Kingdom

Laws relating to commercial dispute resolution currently under review:

Papua New Guinea is aware that its laws relating to international commercial dispute resolution should be reviewed following its membership of the WTO and APEC. Papua New Guinea wishes to play a full part in these groupings on a basis of equality and reciprocity and to maintain a legal environment that is conducive to foreign direct investment. What will be needed is a comprehensive package that includes the promotion of education and awareness among policy makers, as well as guidance on appropriate policy and legislative reform.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- Arbitration Law Chapter 46

The Arbitration Law is not based on the UNCITRAL Model Law. It was adopted in 1951 and was based on United Kingdom arbitration laws of that period. It has not been amended in line with United Kingdom arbitration laws as it has been found to generally effective for local purposes. However, it is common practice in Papua New Guinea for international contracts to specify that disputes will be settled in conformity with UNCITRAL Rules and Procedures for Arbitration. Such provisions are frequently found in contracts relating to engineering and construction contracts and to maritime agreements including charter parties and salvage agreements.

Differences in the application of arbitration law to international and domestic arbitration:

Domestic arbitration is subject to the Arbitration Act. International disputes may be resolved under other rules if the contract so specifies. It is normal for engineering and construction contracts, maritime contracts and contracts for sale of land, shares, businesses and assets to include arbitration clauses.

Limitations on types of dispute that may be arbitrated:

The Arbitration Act is silent on the question of arbitrability of disputes except to the extent that a submission to arbitration must be in writing. The only ground contained in the Arbitration Act for setting aside an awards is misconduct by the arbitrator.[2] However, as Papua New Guinea is a common law jurisdiction, Commonwealth case law and jurisprudence on the subject of arbitrability and jurisdiction would be likely to be relevant.

Extent of party autonomy to define procedure:

A number of rules of procedure are set out in the Arbitration Act and Schedule 1 to Act contains further provisions to be implied into a submission unless the parties express a contrary intention.[3]

Scope of court intervention and availability of courts for interim relief:

Under the Arbitration Act the courts have the following powers:

- To stay proceedings if there is an earlier submission to arbitration and the applicant is willing to do all things necessary for the proper conduct of the arbitration.[4]

- To appoint an arbitrator, umpire or third arbitrator if the parties fail to agree to such an appointment and to fill a vacancy should one occur. The person appointed has the same powers to act on the reference as if they had been appointed by consent of the parties.[5]

- To issue various interlocutory including *subpoenae ad testificandum* and *duces tecum*[6] and also to order a writ of *habeus corpus ad testificandum.*[7]

- To extend the time for making an award.[8]

- To remit or set aside an award.[9]

The Arbitration Act states that an award is "final and makes no provision for appeal to the courts. However, as Papua New Guinea is a common law jurisdiction, it is likely that the Courts would apply the jurisprudence relating to appeals on the ground of errors of fact or law on the face of the award as it was developed under similar legislation in Britain and other Commonwealth countries.

An arbitrator may at any time and shall if directed by a court state a case for the opinion of the court on any question of law arising in the course of the reference. The opinion of the court is subject to appeal.

Under the Arbitration Act the courts have power to refer certain civil matters before them to decision by an arbitrator or referee. Court referred arbitration may take place by consent of the parties or where the matter requires prolonged examination of documents, scientific or local evidence or matters of account.

Source and scope of procedural rules:

Unless the parties agree to the contrary in their submission to arbitration, the following provisions are implied in their submission:[10]

- the reference is to a sole arbitrator;

- if the reference is to two arbitrators they may appoint an umpire;

- award is to be made in writing within three months of entering the reference or later if agreed by the parties;

- if the arbitrators default on the timetable or are unable to agree the umpire may enter on the reference in place of the arbitrators;
- the umpire shall make the award within one month;
- arbitrators may examine witnesses on oath; order discovery and fix costs;
- the award is to be final and binding on the parties.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

There are no specific rules relating to international arbitration and the Arbitration Act contains no provisions relating to language or representation.

Law applicable to substance of dispute:

Common law jurisprudence will apply.

Decision-making by arbitral tribunal and form of award:

The provisions in the Schedule to the Arbitration Act set out the requirements for the arbitrator to make an award in writing within a specified timetable. It should be noted however, that the parties have discretion to make different provisions to those in the Schedule.

Confidentiality:

The Arbitration Act is silent on the question of confidentiality.

Recourse against an award and admissible grounds:

The only ground in the Arbitration Act permitting a court to set aside an award is misconduct by the arbitrator.[11] Common law jurisprudence would however, provide additional grounds.

Recognition and enforcement:

An award on an arbitration agreement may be enforced in the same manner as a court judgement.[12]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Mediation and other forms of ADR are recognised and practised in Papua New Guinea. The preamble to the National Constitution provides:

> "that we reject violence and seek consensus as means of solving our common problems"

However, there are no specific legislative or administrative provisions requiring parties to attempt to resolve their disputes outside of the court system. Any mediation or other form of ADR would take place by the consent of the parties and according to whatever rules they determined.

LEGAL SOURCES AND REFERENCES

There is no internet site relating to dispute resolution in Papua New Guinea.

Cases relevant to arbitration include:

> Mauga Logging Company Pty. Ltd. v.Okura Trading Co. Ltd.; Waigani: J. Kearney; 21 July 1978; PNGLR.
>
> Kramer Consultants Ltd. and Cameron McNamara Pty. Ltd. (Trading as Cameron McNamara Kramer and Associates) v. The Independent State of Papua New Guinea; Waigani: J. Cory; 11,29 July 1985; O.S. Number 65 of 1983.

BIBLIOGRAPHY

Kenneth R Simmonds and Brian H W Hill: *International Commercial Arbitration; Commercial Arbitration Law in Asia and the Pacific*, Country Commentaries, Papua New Guinea,1990.

ENDNOTES

[1] s.9 of National Constitution
[2] s.11(2) Arbitration Act 1951, Chapter 46
[3] *ibid* s.2
[4] *ibid* s.4
[5] *ibid* s.5
[6] *ibid* s.8
[7] *ibid* s.16
[8] *ibid* s.9
[9] *ibid* s.10,11
[10] *ibid* Schedule
[11] *ibid* s.11
[12] *ibid* s.12

PERU

GENERAL OVERVIEW

Primary sources of law:

The primary source of law in Peru is legislation.

Sources of law for commercial dispute resolution outside of the court system:

Ley 26572, the General Law of Arbitration (Ley General de Arbitraje) was promulgated on 3 January 1996 and published in the Official Gazette *El Peruano* on 5 January 1996.

Laws relating to extra-judicial conciliation are found in Ley 26872, the Law of Conciliation promulgated on 29 October 1997 (published in the Official Gazette *El Peruano* 13 November 1997) and in Supreme Decree 001-98-JUS Regulations on the law of Conciliation (published on 14 January 1998) and its modification by Supreme Decree 003-98-JUS (promulgated on 15 April 1998 and published on 17 April 1998)

Institutions for international commercial dispute resolution outside of the courts:

- National and International Conciliation and Arbitration Centre, Chamber of Commerce, Lima
- Conciliation and Arbitration Centre, Bar Association, Lima
- National Institution of Mining and Oil Law

Addresses:

Centro de Conciliacion y Arbitraje Nacional e Internacional
Camara de Cormercio de Lima
Gregorio Escobedo 396, tercer piso
Lima 11 Jesus Maria
PERU

Tel: (51 1) 261 5417

Centro de Conciliacion y Arbitraje
Colegio de Abogados de Lima
Avenida Santa Cruz 255
Lima 18 Miraflores
PERU

Tel: (51 1) 421 6018 / 421 7437 / 221 0669

Instituto Nacional de Derecho de Mineria y Petroleo
Miguel Aljovin 530
Lima 18 Miraflores
PERU

(51 1) 447 3011

Recognition and enforcement of foreign arbitral awards:

Peru is a party to the New York Convention. It was ratified without reservations by Legislative Resolution 24810 and entered into force on 5 October 1988. Peru is also a party to the following conventions:

- Inter-American Convention on International Commercial Arbitration (Panama Convention 1975) ratified by Legislative Resolution 24924 which entered into force on 25 October 1988;
- Inter-American Convention on Extraterritorial Efficacy of Foreign Sentences and Arbitral Awards (Montevideo Convention 1979) ratified by Decree Law 22953, 26 March 1980 which entered into force on 14 June 1980.

Settlement of disputes through ICSID or bilateral investment agreements:

Peru is party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) ratified by Legislative Resolution 26210 on 2 July 1993 and which entered into force, 8 August 1993.

Peru is a party to the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) 1985, ratified by Legislative Resolution 25312 of 2 April 1991 and which entered into force 5 June 1991.

Peru is a party to the following bilateral investment agreements.

Country	**Entry into Force**
Thailand	9 July 1993
Switzerland	23 November 1993
Republic of Korea	20 April 1994
United Kingdom	21 April 1994
Norway	5 May 1995
Sweden	1 August 1994
Peoples Republic of China	1 February 1995
El Salvador	15 December 1996
Argentina	24 October 1996
France	30 May 1996
Spain	17 February 1996
Finland	14 June 1996

The Netherlands	1 February 1996
Venezuela	18 September 1997

Laws relating to commercial dispute resolution currently under review:

No laws relating to international dispute resolution are currently under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- The General Law of Arbitration

The General Law of Arbitration (Ley General de Arbitraje; Ley 26572) was promulgated on 3 January 1996 and published in the Official Gazette *El Peruano* on 5 January 1996. The General Law of Arbitration is based on the UNCITRAL Model Law.

Differences in the application of arbitration law to international and domestic arbitration:

There are no significant differences between the laws applicable to international and domestic arbitration.

Limitations on types of dispute that may be arbitrated:

Disputes may not be arbitrated if they pertain to matters that are of exclusive competence of the tribunals of the Republic or matters that violate international public order.[1]

Extent of party autonomy to define procedure:

The parties have broad freedom to establish their own rules of arbitration.[2]

Scope of court intervention and availability of courts for interim relief:

Before and during arbitration, the Courts may intervene in the following manner.

- The arbitration tribunal or any of the parties with approval of the arbitral tribunal, can request judicial assistance from a judge to order the establishment of proof. The specialist Judge in Civil Cases whom the parties have previously accepted as having jurisdiction, has competence to hear the application. If there is no prior acceptance of jurisdiction, a District Court Judge where the arbitration is being held will have competence.[3]
- A Judicial Court may grant interim relief on application of one of the parties.[4]

Source and scope of procedural rules:

The General Law of Arbitration (Ley General de Arbitraje, Ley 26572,) promulgated on 3 January 1996 and published in the Official Gazette *El Peruano* on 5 January 1996 contains rules for arbitration in Peru.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

Arbitration may be conducted in another language.[5] Members of an arbitral tribunal may be non-citizens of Peru.[6] There are no restrictions on representation by foreign lawyers in an arbitration.[7]

Law applicable to the substance of the dispute:

The parties may designate any foreign law as the governing law of the dispute. In general, the parties have flexibility regarding the matters related to the arbitral proceedings and they may designate the rules of the international arbitral body.

Decision-making by arbitral tribunal and form of award:

If there is no agreement between the parties, the General Law of Arbitration prescribes rules for both proceedings and awards.[8]

Confidentiality:

The General Law of Arbitration establishes confidentiality of the arbitration tribunal deliberations[9] but it does not regulate the confidentiality of the proceeding itself.

Recourse against an award and admissible grounds:

The Courts may nullify an award when there are faults and defects: for example:

- when one of the parties suffers some kind of incapacity or disability;
- when the award is against. the rules established by the parties;
- when the award deals with an unrelated dispute; or
- when the award goes beyond the terms of the arbitration agreement.[10]

Recognition and enforcement:

The procedure to recognise a foreign award is a *non litis* process according to the Civil Procedural Code[11]. Once the award is recognised (totally or partially) an application for its enforcement should be made to the specialist Judge in Civil Cases who has jurisdiction over the address of the defendant on the date of the submission of the application or, if the defendant does not have a domestic address, the application should be presented to the Judge where the defendant resides. The application for the enforcement of the award should be accompanied by the following documents;

- the original award or a copy; and
- the original arbitration agreement or a copy (if necessary they should be accompanied by translation into Spanish); together with
- a copy of the judicial resolution that accepted the petition for recognition of the award .The award, has the same effect as a final judgement by a court.[12]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised and practised in Peru.

Forms of ADR available for commercial disputes:

Extra-judicial conciliation is provided for in the following legislation:

- Law 26872, Law of Conciliation (promulgated on 29 October 1997) published in the Official Gazette *El Peruano* on 13 November 1997).
- Regulations of the Law of Conciliation, Supreme Decree 001-98-JUS**,** (published on 14 January 1998) and its modification by Supreme Decree 003-98-JUS, (promulgated on 15 April 1998**,** published on 17 April 1998).

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Currently, it is optional. From January 13, 2000, it will be mandatory and prior to judicial process when dealing with patrimonial issues.[13]

Legal implications flowing from choices between the various procedures:

Awards are mandatory either in arbitration or conciliation.

Rules, if any, defining the role and procedures of mediator:

The conciliator is an individual with an ethical and moral standing, well versed in negotiation techniques and in alternative means for conflict resolution. The conciliator enjoys freedom of action and facilitates the communication process between the parties and proposes, eventually, solutions for conciliation which are not mandatory.[14]

There are no legislative provisions for appointment of a mediator, facilitator or expert.

Resort to arbitration or courts during ADR:

It is permissible to resort to the Courts during conciliation.

Confidentiality and admissibility of evidence in other proceedings:

Anything that has been said or proposed in conciliation remains privileged between the parties and the Conciliator and has no legal value.[15]

Recognition and enforceability of settlements:

The act of conciliation (settlement) is executable and its enforcement can be demanded through the process of execution of judicial resolutions.[16]

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There are no provisions.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There are no provisions.

LEGAL SOURCES AND REFERENCES

There is no Internet address.

BIBLIOGRAPHY

Comision de- Trabajo ALCA/Peru. *Vision Empresarial hacia un Mercado Hemisferico* 2, Taller 7: *Solucion de Controversias*. Lima, 1998.

Cantuarias Salaverry, Femando y Aramburu Yzaga, Manuel. *El Arbitraje en cl Desarrollo actual y perspectivas futuras*.- Lima- Fundacion Bustamante De La Fuente, 1994.

Camara de Comercio de Lima. *Posicion lnstitucional sobre el Arbitraje Comercial*. Lima, 1992.

Lohmann Luca De Tena, Juan. *El Arbitraje. Para leer el Codigo Civil*, vol. V. Pontificia Universidad Cato1ica del Peru. Lima, 1988.

ENDNOTES

[1] Law 26572 Art 99
[2] *ibid*; Art 108
[3] *ibid*: Art 116
[4] *ibid*; Art 100
[5] *ibid*; Art 111
[6] *ibid*; Art 101
[7] *ibid*; Art 108
[8] *ibid*; Arts 119,120
[9] *ibid*; Art 119
[10] Law 26572, Art 123
[11] Law 26572, Art130
[12] *ibid* Art131
[13] Art. 6 and Third Complementary, transitory and final article of law 26872)
[14] Arts 20 - 22 Law 26872 and arts. 30 - 33 Supreme Decree 001-98-JUS.
[15] .Art. 8 Law 26872 and art. 2.4 Supreme Decree 001 -98 JUS.
[16] Art. 18 Law 26872 and art. 27 Supreme Decree 001- 98-JUS).

The Republic of the Philippines

GENERAL OVERVIEW

Primary sources of law:

- Constitution
- Legislative acts
- Presidential decrees
- Executive orders
- Proclamations
- Judicial decisions

Sources of law for dispute resolution outside of the court system:

- Republic Act no. 876

Institutions for international dispute resolution outside the courts:

International arbitration proceedings in the Philippines are generally referred to such arbitration institutions as the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA).

Recognition and enforcement of foreign arbitral awards:

The Philippines is committed to enforce awards as result of its adherence to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The convention may be implemented through the judicial system with the use of the Rules of Court.

Settlement of disputes through ICSID or bilateral investment agreements:

The Philippines signed the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) on 26 September 1978; and deposited its ratification on 17 November 1978. The Convention entered into force on 17 December 1978. The Philippines has also entered into bilateral investment agreements.

Laws relating to commercial dispute resolution currently under review:

There are presently several legislative bills being considered for enactment. At least one of them is based on the UNCITRAL Model Law.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

The Republic Act no. 876 is known as the "Arbitration Law". The arbitration law was approved on 19 June 1953 and therefore antedates the UNCITRAL Model Law. Reference should also be made to the Civil Code of the Philippines (Republic Act 386, Articles 2028 - 2046). Presidential Decree No 1746 and Executive Order No 1008 contain provisions for arbitration in the construction industry.

Differences in the application of arbitration law to international and domestic arbitration:

Under Philippine law, an arbitration agreement is valid, enforceable and irrevocable on the same basis as any other contract. The law applies to both domestic and international arbitration, and the rules apply equally to both of them. In the Philippines, an “international” arbitration is one conducted outside of the Philippines and an “international award” is one made outside of the Philippines. Domestic arbitration is arbitration conducted in the Philippines.

Limitations on types of disputes that might be arbitrated:

The arbitration law applies to all normal commercial disputes but does not apply to labour disputes which are governed by a different set of rules. Nor may the parties arbitrate questions which, by reason of public policy, cannot be the subject of compromise.[1] Examples of such matters are family matters relating to the status of individuals or the jurisdiction of the courts.

Extent of party autonomy to define procedure:

The rules for arbitration are found in the arbitration law itself. The rules of procedure are compulsory but the parties are given flexibility in applying the rules.

Scope of court intervention and availability of courts for interim relief:

There are many instances when the courts may intervene during the arbitration.

The arbitration law allows recourse to the court to take measures to safeguard or conserve any matter which is the subject of the dispute in arbitration. The extent of the relief is not defined.

Source and scope of procedural rules:

As arbitration in the Philippines derives from a contractual relationship between the parties and is subject to the law of contract, the expression of the parties' will with reference to rules and the choice of arbitrator will be respected. The rules of permanent arbitration institutions may be applied.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

Arbitration proceedings may be conducted in English or Tagalog. There is no prohibition on the use of any other language. There is likewise no prohibition on the appointment of non-citizens as arbitrators. The arbitration law has no prohibitions on representation by foreign lawyers.

Law applicable to substance of dispute:

There is no prohibition on the applications of foreign law to govern the substance of the dispute. There is likewise no prohibition for the application of the rules of an international arbitration institution.

Decision making by arbitral tribunal and form of award:

An award by a majority of arbitrators is valid unless the concurrence of all of them is required by the terms of the arbitration agreement.[2] The form of the award is prescribed in the arbitration law in that it must be in writing and signed and acknowledged by a majority of the arbitrators, if more than one, and by the sole arbitrator if there is only one.[3]

Confidentiality:

Since there are many instances when resort to the courts may be made during an arbitration proceeding, the law contains no provision on confidentiality.

Recourse against an award and admissible grounds:

In any one of the following cases, the court must make an order vacating the award upon the petition of any party to the dispute when such a party proves affirmatively that in the arbitration proceedings:[4]

- The award was procured by corruption, fraud, or other inadmissible means;
- There was evident partiality or corruption in the arbitrators;
- The arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown;
- Refusing to hear evidence pertinent and material to the dispute;
- One or more of the arbitrators was disqualified to act and willfully refrained from disclosing such disqualification;
- Any misbehavior by which the rights of any party have been materially prejudiced; or
- The arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

Where an award is vacated, the court, at its discretion, may direct a new hearing either before the same arbitrators or before a new arbitrator or arbitrators. These will be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators. Any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

Where the court vacates an award, costs not exceeding fifty pesos and disbursements may be awarded to the prevailing party. The payment thereof may be enforced in like manner as the payment of costs upon the motion in an action.

Recognition and enforcement:

At any time within one month after the award is made, any party to the dispute may apply to the court having jurisdiction, for an order confirming the award. The court must grant such order unless the award is vacated, modified or corrected. Notice of such motion must be served upon the party adversely affected or its attorney as prescribed by law for the service of such notice upon an attorney in action in the same court.[5]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Various forms of ADR are recognised in the Philippines.

Forms of ADR available for commercial disputes:

Commercial disputes may be settled through negotiation, mediation/conciliation and arbitration.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

ADR is optional under the law.

Legal implications flowing from choices between the various procedures:

The arbitration law is silent on this point. The arbitration agreement may provide the legal implication.

Rules, if any, defining the role and procedures of mediator:

There are no rules that define the role of, or procedures for, mediator, conciliator, facilitator or expert.

Resort to arbitration or courts during ADR:

The arbitration law is silent on this point. Resort to arbitration or court procedure may be made if the agreement between the parties allows it.

Confidentiality and admissibility of evidence in other proceedings:

There are no rules on confidentiality. ADR is a voluntary procedure and the parties have freedom to make whatever rules relating to confidentiality or evidence that they so determine.

The arbitration law provides for the following:

- With respect to the admissibility of evidence, the arbitration law provides for the parties to a submission or contract to arbitrate to submit their dispute by arbitration by other than oral hearing (with the written agreement of each party).
- The parties may submit an agreed statement of facts. They may also submit their respective contentions to the duly appointed arbitrators in writing. This shall include a statement of facts, together with all documentary proof. Parties may also submit a written agreement.

Each party shall provide all other parties to the dispute with a copy of all statements and documents submitted to the arbitrators. Each party shall have an opportunity to reply in writing to any other party's statements and proofs; but if such party fails to do so within seven days after receipt of such statements and proofs, they shall be deemed to have waived the right to reply. Upon the delivery to the arbitrators of all statements and documents together with any reply statements, the arbitrators shall declare the proceedings in lieu of hearing closed.

Recognition and enforceability of settlements:

The parties may reach a settlement that conforms with the law of contract. If so, the settlement will have the legal force of a contract. The arbitration law contains no provisions for the recognition and enforceability of settlements. However, the rules of procedure for settlements in judicial proceedings may be applied by analogy.

Limitations on the choice of ADR and jurisdiction of mediator in commercial disputes:

There are no provisions in the arbitration law regarding limitations on the choice of ADR and jurisdiction of the mediator in commercial dispute. ADR is a private procedure arrived at by consent between the parties.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There are no provisions restricting foreign legal representation in ADR proceedings or on the nationality of the mediator.

LEGAL SOURCES AND REFERENCES

There is no authoritative Internet site on dispute resolution in the Philippines.

BIBLIOGRAPHY

Santos, Jr, Ph., Dean Gonzalo D., "Arbitration in the Philippines a Broad Perspective", *Symposium on Arbitration*, Rex Book Store.

Dean Gonzalo T Santos, Jr, Ph. D., "The advantages of Arbitration in Construction Contracts", *Tire a part de la Revue Suisse Du Droit International DeLa Concurrence*, Geneve, Numero 17, Fevrier 1983

Santos, Jr, Ph., Dean Gonzalo D.,"International Arbitration", *International Financial Management* (Chapter 8), Probus Publishing Company, Chicago, Illinois, 1991.

ENDNOTES

[1] *Civil Code;* Art. 2043 and 2035
[2] Republic Act 876; s. 14 and 20
[3] *ibid*; s. 20
[4] *ibid;* s. 24
[5] *ibid*; s. 23

THE RUSSIAN FEDERATION

GENERAL OVERVIEW

Primary sources of law:

- Constitution of the Federation of Russia
- Russian laws
- Soviet laws
- Presidential Decrees
- Normative acts (Resolutions, Decisions, Instructions, Orders)

The current Russian Constitution was completed following the attempted civil insurrection in October 1993. There has been significant progress in the reform of civil legislation in the Federation of Russia. The first part of the Civil Code was adopted in 1994 and the second part adopted in 1995. The new Civil Code builds on previous Soviet Civil Law. There is no separate Commercial Code but it is significant in the extent to which the new Civil Code promotes free enterprise and regulates contractual and other commercial relations in a market oriented economy. The new Code prevails over inconsistent provisions of other laws, Presidential decrees or other normative acts by Parliament.

Presidential decrees have the force of law unless they contravene the Constitution or Federal Laws. The Russian Constitutional Court is empowered to decide questions relating to the interpretation of the Constitution. The Constitutional Court began to operate in its current form in 1995.

The Government is empowered to pass so-called "normative acts" (Resolutions, Decisions, Instructions, Orders etc.) which are subsidiary legislation. Such normative acts are the day-to-day instruments for the implementation of the laws passed by the Russian Parliament and the decrees issued by the President. Soviet legislation remains in force, unless there is Russian law which deals with the same issue, in which case the Russian law will prevail in the case of conflict. In fact, virtually all legal areas have seen large scale replacement of pre-existing Soviet law with new Russian legislation.

The Russian courts have jurisdiction over any civil dispute in which at least one of the parties is a private citizen. This includes disputes involving a foreign legal entity or Russian enterprise with foreign investment unless, as discussed below, the parties have agreed to employ either the Arbitrazh system or arbitration tribunals. As a practical matter however, the civil courts will often decline to assume jurisdiction over commercial matters involving foreign investment, preferring to leave such issues for the Arbitrazh or international arbitration proceedings.

Civil court proceedings follow the Continental European rather than the common-law model with judges assuming an active inquisitorial role in the dispute. There is no system of

precedent as in the common-law system and the courts may reach different conclusions in different cases on the basis of similar factual situations

Sources of law for dispute resolution outside of the courts:

- Law of the Supreme Arbitrazh Court
- Arbitration Procedural Code (entered into force 1 July 1995)
- Law of the Federation of Russia No 5338-1 of 7 July 1993 on International Commercial Arbitration.

There are two main systems of arbitration available in Russia. The first is through the Arbitrazh court system which is regulated by the Arbitration Procedural Code and the second is either institutional or ad hoc arbitration under the International Commercial Arbitration Law. It is also possible for parties entering into international contracts to specify institutional or *ad hoc* arbitration outside of Russia.

Institutions for international commercial dispute resolution outside of the courts:

The Law on International Commercial Arbitration in Appendix 1 establishes regulations for the International Commercial Arbitration Court under the Chamber of Commerce and Industry of the Federation of Russia. Appendix 2 of the same law provides regulations for the Maritime Arbitration Commission of the Chamber of Commerce and Industry.

International Commercial Arbitration Court
Chamber of Commerce and Industry
Ilyinka Str., 6
103684, **Moscow**
RUSSIA

Tel: (7-095) 929 0159/0588.

Recognition and enforcement of foreign arbitral awards:

The Federation of Russia is a party to the New York Convention. Awards issued in Convention countries are subject to enforcement through the Civil Courts.

Settlement of disputes through ICSID or bilateral investment agreements:

The Federation of Russia is a party to various international agreements related to foreign investment. Provisions in the international agreements take precedence over conflicting domestic legislation,

The Federation of Russia signed the Washington Convention on 16 June 1992 but has yet to deposit its instrument of ratification.

Relations between Russia and the United States are regulated by the Bilateral Investment Protection Treaty of 17 June 1992 and the treaty on Promotion of Investment of 3 April 1992.

Russia is also a party to a number of bilateral investment treaties.

Treaties concluded by the former Soviet Union

Austria	1990	Italy	1989
Belgium	1989	Korea	1990
Canada	1989	Luxembourg	1989
China	1990	Netherlands	1989
Finland	1989	Spain	1990
France	1989	Switzerland	1990
Great Britain	1989	Turkey	1990
Germany	1989		

Treaties concluded by Russia

Bulgaria	1993	Poland	1992
Greece	1993	Romania	1993
Norway	1994	Slovenia	1993

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

- Law of the Federation of Russia No 5338-1 of 7 July 1993 on International Commercial Arbitration.

The Law on International Commercial Arbitration is based on the UNCITRAL Model Law.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitrazh system has jurisdiction if:

- all parties to the dispute are entities or registered entrepreneurs; or
- the parties are the Russia Federation or a subdivision of the Federation of Russia.

Arbitrazh courts are permanent state courts with a mandate to resolve civil disputes between commercial enterprises. The Arbitrazh system was originally devised to ensure the effective fulfillment by enterprises of the Soviet Five Year Plans and did not, until recently, entertain cases involving foreigners. Previously, only disputes between Russian enterprises were automatically heard in Arbitrazh courts while disputes involving Western parties were heard in the civil courts of common jurisdiction, unless all parties to the dispute agreed otherwise.

A new Arbitration Procedural Code entered into force on July 1, 1995. The Code sets out the procedures under which the Arbitrazh courts settle disputes. Under the new law, foreign legal entities and Russian enterprises with foreign investment have the right to have cases heard in Russia's Arbitrazh courts.

The Code states that Arbitrazh courts have automatic jurisdiction over disputes of commercial and administrative nature if one of the parties to the dispute is a foreign legal entity or a Russian entity with foreign investment.[1] Foreign legal entities or Russian enterprises with foreign investment will, most likely, have to resolve their disputes in the Arbitrazh court system as long as none of the parties to the dispute are private persons.

The Law on International Commercial Arbitration is for international disputes only. The UNCITRAL standard definition of an international dispute is embodied in the law.

Limitations on types of dispute that may be arbitrated:

The Law on International Commercial Arbitration provides that disputes arising out of a specific legal relationship (which need not be contractual) may be arbitrated.[2] However, this does not extend to criminal matters which are within the exclusive jurisdiction of the Courts.

The legislation of the Federation of Russia contains provisions which grant to enterprises with foreign investment the right to sue state administrative bodies when the rights of such enterprises are violated by the actions of such bodies or their officials. For instance, disputes involving tax inspectorates, as well as claims in respect of the invalidity of specific decisions of an organ of state administration, disputes concerning the illegal seizure of funds executed by such body and issues of compensation for damages, are classified as administrative disputes. In accordance with the new Arbitration Code, such administrative disputes, where foreign investors or enterprises with foreign investment are involved are now to be heard by the Arbitrazh courts.

Extent of party autonomy to define procedure:

Under the Law on International Commercial Arbitration, the parties are free to agree on the procedure to be followed by an arbitral tribunal.[3]

The procedure in the Arbitrazh system possesses certain characteristics of the ordinary courts as well as those of an arbitration tribunal. The proceedings are governed by the Code of Arbitration Procedure adopted in 1995. The advantages of Arbitrazh courts over the civil courts include simplified procedural rules and greater expertise in commercial disputes. The new Arbitration Code also establishes a right of appeal from a decision by an Arbitrazh court.

Scope of court intervention and availability of courts for interim relief:

The Law on International Commercial Arbitration contains the standard UNCITRAL Model Law provision that no court shall intervene except as provided by that law.[4]

The courts have the powers that are consistent with the UNCITRAL Model Law.

Source and scope of procedural rules:

The Law on International Commercial Arbitration contains the UNCITRAL Model Law procedural rules.

Appendix 1 of the Law on International Commercial Arbitration establishes regulations for the International Commercial Arbitration Court.

Appendix 2 of the Law on International Commercial Arbitration establishes regulations for the Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Federation of Russia.
Arbitration through the Arbitrazh system is conducted according the Code of Arbitration Procedure.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The Law on International Commercial Arbitration provides that the parties are free to agree on the language or languages to be used in the arbitration and failing agreement, the arbitral tribunal may determine the language.[5] No person shall be precluded by reason of that person's nationality from acting as an arbitrator unless otherwise agreed by the parties.

According to the new Code of Arbitration Procedure, parties to a dispute can be represented by a person (including an employee), not necessarily a Russian lawyer or "advokat", on the basis of a Power of Attorney.

Law applicable to substance of dispute:

The Law on International Commercial Arbitration provides that the parties may choose the substantive law in their agreement to arbitrate. Failing agreement by the parties, the arbitral tribunal may determine the substantive law.[6]

The Arbitrazh courts apply foreign laws in the following cases:

- Where contemplated by the Russian Law on Conflict of Laws (Foundations of Civil Legislation, 1991) or international agreements to which Russia is a party;
- Where required to do so by agreement of the parties to a dispute which does not contradict law or international agreements;
- Where international custom so prescribes and is recognised in Russia.

Decision making by arbitral tribunal and form of award:

The Law on International Commercial Arbitration provides that if there are more than one arbitrator, the decision shall be made by a majority except that the tribunal may decide that on procedural questions, the presiding arbitrator shall make the decision.[7]

Recourse against an award and admissible grounds:

The courts can set aside an award on any of the following grounds:[8]

- If a party to the arbitration agreement was under some incapacity;
- The agreement is not valid under the law to which the parties subjected it to, or failing an indication on that question, the law of Russia;

- The party making the application to have the award set aside was not given proper notice of the appointment of the arbitrator/arbitral proceedings or was otherwise unable to present its case;
- If the award deals with disputes not contemplated by the arbitration agreement, then the award can be set aside. (Except if only part of the award is affected in this way and it can be separated from the rest of the award. In such a case, only the affected part will be set aside);
- If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
- If the appeal court finds the dispute is not capable of arbitration under the law of Russia or that it is in conflict with public policy.

Decisions by the local Arbitrazh court may be appealed to another local Arbitrazh court, a Federal District Arbitrazh court and in some cases a further appeal to the Supreme Arbitrazh court is provided for.

Recognition and enforcement:

The Civil courts are responsible for the enforcement of foreign arbitral awards. Generally, the Arbitrazh courts enforce domestic arbitral awards dealing with commercial disputes. The civil courts and Arbitrazh courts may, by law, refuse to enforce an arbitral award on a number of statutory grounds, including lack of jurisdiction, lack of proper notification and public policy. However, the privatization of state enterprises has widened the scope for enforcement of awards as such property no longer enjoys immunity from execution as it did in Soviet times. Enforcement measures can include seizure of movable or immovable property, injunctions or the posting of a bond by the defending party.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

Alternative means of resolving commercial disputes based on private agreements not to use the court system have been well known in Russia. There is no provision in the civil court system for mandatory reference to ADR prior to a hearing but historically it has not been usual for commercial disputes to be referred to the civil courts as they have been automatically referred to the jurisdiction of the Arbitrazh courts.

Until recently, one of the main characteristics of the Arbitrazh system was that cases were accepted for hearing by the Arbitrazh only when the parties had failed, through bona fide negotiations, to settle the dispute by themselves. However, in accordance with the new Arbitration Code, the Arbitrazh court will hear such disputes only if the parties agreed to this forum through contractual agreement or if otherwise provided by federal law. The parties are also encouraged, during the proceedings, to settle the issue by themselves. The sessions are usually conducted by an adjudicator and representatives of the opposing parties.

LEGAL SOURCES AND REFERENCES

BIBLIOGRAPHY

O'Donnell, N., *Dispute Resolution in the Commercial Law Tribunals of the Federation of Russia* (1997) 22 North Carolina J. of
Int'l Law & Comm. Reg. 795.

Hendrix, G., *Business Litigation and Arbitration in Russia* (1997) 31 International Lawyer 1075.

I.S. Zykin, I.S. *The UNCITRAL model law on international commercial arbitration: the Russian experience* (1997)

Halverson, K., *Resolving economic disputes in Russia's market economy* (1996) 18 Michigan J. of International Law 59.

Yakovlev, A., *International commercial arbitration proceedings and Russian courts* (1996) 13 J. of Int'l Arbitration 37.

Kamarov, A.S. *International Commercial Arbitration in Russia as a means of resolving international economic disputes* (1996) 22 Review of Central and Eastern European Law 19. [this article includes the Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Federation of Russia].

P.A. Habegger, *The 1995 rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Federation of Russia* (1995) 4 Journal of International Arbitration 65.

ENDNOTES

[1] Art. 22.4
[2] Art.7
[3] Art.19
[4] Art.5
[5] Art.22
[6] Art.28
[7] Art.29

[8] Art.34

Singapore

GENERAL OVERVIEW

Primary sources of law:

- Legislation
- Case law

Singapore is a common law jurisdiction. Primary sources of law are legislation, known as the Statutes of the Republic of Singapore, and case law. The statutes are divided into Chapters (Caps). These are published by the Singapore National Printers (SNP) Corporation Ltd. Case law, both local and other jurisdictions, notably the Commonwealth jurisdictions, cover areas in which there is no legislation. Case law interpreting legislation has the force of law in Singapore.

Sources of law for dispute resolution outside of the courts:

- International Arbitration Act 1995
- Arbitration (International Investment Disputes) Act 1968
- Arbitration Act 1953
- Rules of Court 1996

The International Arbitration Act (Cap 143A) entered into force on 27 January 1995. It provides for the conduct of international commercial arbitration, conciliation proceedings and gives effect to the New York Convention.

The Arbitration (International Investment Disputes) Act (Cap 11) entered into force on 10 September 1968. It provides for the adoption of the Washington Convention.

The Arbitration Act (Cap 10) came into force on 4 May 1953. It governs domestic arbitration in Singapore. If parties to an international arbitration opt out of the International Arbitration Act, their proceedings would by default be governed by the Arbitration Act.

The Rules of Court 1996 lay down procedural rules that concern arbitration. The rules provide for other mechanisms of dispute resolution, such as pre-trial conferences and Court Dispute Resolution.

In addition, Court circulars such as The Registrar's Circular No 1 of 1997 of the Subordinate Courts and The Registrar's Circular No 4 of 1997 of the Supreme Court provide for a partial rebate of mediation fees if cases proceed to trial after mediation at the Singapore Mediation Centre.

Institutions for international commercial dispute resolution outside of the courts:

Singapore International Arbitration Centre (SIAC)
1 Coleman Street
#05-07/08 The Adelphi
SINGAPORE 179803

Tel: (65) 334 1277
Fax: (65) 334 2942
Email: sinarb@singnet.com.sg
http://siac.tdb.gov.sg
(for arbitration, mediation and conciliation)

Singapore Mediation Centre
Third Level
City Hall Building
St Andrew's Road

SINGAPORE 178957
Tel: (65) 332 4388
Fax: (65) 334 4940
http://www.medition.com.sg
(a full range of ADR services including mediation and conciliation)

Recognition and enforcement of foreign arbitral awards:

Singapore is committed to enforce the New York Convention[1]. Singapore has entered the following reservations:

- Awards have to be made in a country (other than Singapore) which is a Contracting State to the New York Convention.[2]
- Enforcement of awards will only apply to arbitration agreements made before 27 January 1995 if the award was made on or after 19 November 1986.[3]

Settlement of disputes through ICSID or bilateral investment agreements:

Singapore is a party to the Washington Convention. The Arbitration (International Investment Disputes) Act (Chapter 11) provides for the adoption of the Washington Convention into the domestic law of Singapore.

Singapore has entered into bilateral investment guarantee agreements with the following countries:

United States	1966
Pakistan	1995
Poland	1993
United Kingdom	1975
Switzerland	1978
China	1985
France	1975
Vietnam	1992
Sri Lanka	1980
ASEAN (6)	1987
Laos	1997
Cambodia	1996
Mongolia	1995
Czech Republic	1995
Chinese Taipei	1990
Netherlands	1972
Canada	1971
Indonesia	1990
Germany	1973
ASEAN Promotion Centre	1980
Brunei Darussalam	1987
ASEAN - US	1990

Laws relating to commercial dispute resolution currently under review:

There are no such laws under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

The International Arbitration Act is the arbitration law applicable to international disputes. Parties to an international dispute may opt out of the International Arbitration Act. The Arbitration Act would then apply to the resolution of such disputes.

Part II of the International Arbitration Act gives the UNCITRAL Model Law, with the exception of Chapter VIII, the force of law in Singapore.[4] However, the Model Law is still subject to the provisions of the International Arbitration Act itself.

Differences in the application of arbitration law to international and domestic arbitration:

Domestic arbitration is governed by the Arbitration Act. Important differences between the International Arbitration Act and the Arbitration Act are as follows :

- The inquisitorial process may be used in arbitration under the International Arbitration Act;[5]
- There are limited provisions for the courts' intervention in arbitration under the International Arbitration Act. Courts assist the arbitrator in the conduct of the arbitration;[6]
- The arbitrator has the power to determine own jurisdiction under the International Arbitration Act; and
- The arbitrator is given immunity against suits for negligence and mistakes committed under the International Arbitration Act.

Limitations on types of dispute that may be arbitrated:

The International Arbitration Act and the UNCITRAL Model Law only apply to international arbitration as defined by s.5(2) of the International Arbitration Act. Parties to a non-international arbitration can agree in writing that the International Arbitration Act and the Model Law shall apply to the said arbitration.

Extent of party autonomy to define procedure:

The law relating to arbitration is found in the UNCITRAL Model Law, as subject to the relevant provisions of the International Arbitration Act.

The SIAC has its own set of Arbitration Rules which are largely based on the UNCITRAL Arbitration Rules and Rules of the London Court of International Arbitration. If parties agree to use SIAC Rules, they can modify them to suit their preferences. They need not agree to use the Rules *in toto* even if they choose to use the facilities of the SIAC. The Rules are available on the homepage of the SIAC (http://siac.TDB.gov.sg). However, the Rules do not have force of law in Singapore and parties must specify that these Rules are to apply to the arbitration.

For parties who opt out of international arbitration, the applicable rules are found in the Arbitration Act. These are the rules governing domestic arbitration:

◊ *International Arbitration Act and the Model Law:*

The International Arbitration Act allows the parties to an arbitration agreement to agree that any dispute is to be resolved otherwise than in accordance with the Model Law and the International Arbitration Act.[7] The Model Law itself provides the parties with wide flexibility to modify the rules. Various sections of the International Arbitration Act also allow the parties to modify procedural rules of the arbitration conducted.

◊ *Arbitration Act:*

The Arbitration Act has less flexibility than the above two Acts. Most of the sections have to be complied with, and there is no general provision that allows parties to conduct their arbitration other than in accordance with the Arbitration Act.

The provisions in the First Schedule are implied into an arbitration agreement, and parties must comply with them unless there is an intention to the contrary expressed in the arbitration agreement.[8]

The parties may agree in writing to exclude the right of appeal allowed under s.28 and 29.[9]

Scope of court intervention and availability of courts for interim relief:

◊ *International Arbitration Act:*

The extent of court intervention is set out in s.6, 7 and 14 of the International Arbitration Act. Note that all orders made by the arbitral tribunal in the course of the arbitration are enforceable as if made by a court, provided that the party wishing to do so has applied to the High Court for leave to enforce the orders.[10]

Where one party to an arbitration agreement institutes legal proceedings in any court in Singapore against the other party in relation to the subject matter of the arbitration agreement, the other party can apply to the court for a stay of proceedings. The court must grant the stay of proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed. Where the court makes such an order, it can make interim or supplementary orders in relation to any property which is the subject of the dispute in order to preserve the rights of the parties pending the arbitration.[11]

The court can, when staying Admiralty proceedings, order that any property previously arrested be retained as security for the satisfaction of any award made by the arbitrator.[12]

The High Court can order subpoenas to compel the attendance of witnesses before the arbitral tribunal.[13]

◊ *Arbitration Act:*

The court generally has more discretion to make orders and intervene under the Arbitration Act than the International Arbitration Act. For example, both s.7 of the Arbitration Act and s.6 of the International Arbitration Act grant the courts power to stay proceedings, but the difference is that the courts have more discretion under s.7 of the Arbitration Act. They can choose to stay the proceedings if they are satisfied that there is no reason why the matter should not be referred to arbitration.

Under the Arbitration Act, the courts also have, among other powers, the power to appoint an arbitrator or umpire in certain circumstances; to enlarge the time for making an award; to remit or set aside an award; and to remove an arbitrator or umpire on the grounds of misconduct.

The Second Schedule of the Arbitration Act provides for matters in respect of which the court may make orders such as interim injunctions, the interim custody of goods that are the subject matter of the arbitration, and securing the amount in dispute in the arbitration.

Source and scope of procedural rules:

The parties have autonomy to set their own rules; in default the rules that will apply will be under the law of Singapore.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

◊ *International Arbitration Act:*

Parties are free to agree on the language or languages to be used in arbitral proceedings. Members of the arbitral tribunal may be non-citizens and may be of any nationality unless otherwise agreed by the parties.[14]

If the law applicable to the dispute is not the law of Singapore, the parties may be represented by foreign lawyers at the arbitration.[15] The law applicable is designated by the parties or otherwise determined by the rules of conflict of laws. If the law applicable is the law of Singapore, the foreign lawyer has to appear jointly with a local lawyer who is on the roll of advocates and solicitors, and has in force a practising certificate.

Parties will also have to engage local lawyers if they wish to go to court for any reason, such as enforcement of award.

◊ *Arbitration Act:*

The Arbitration Act is silent on these questions, but the parties are allowed to appoint their own arbitrators. This would mean that non-citizens can be arbitrators. However, the Legal Profession Act (Chapter 61) s.34A applies to all arbitration in Singapore.

Law applicable to substance of dispute:

◊ *International Arbitration Act:*

The arbitral tribunal decides the dispute in accordance with the rules of law as chosen by the parties. Hence, the parties are free to choose whichever rules of law they wish to govern the substance of the dispute.[16]

Note that the SIAC does not require users of its facilities to use the SIAC Arbitration Rules.

◊ *Arbitration Act:*

This Act governs domestic arbitration, hence the substantive law that would govern the dispute would be Singapore law. Parties would have to comply with the rules as laid down in the Act.

Decision making by arbitral tribunal and form of award:

◊ *International Arbitration Act:*

Chapter VI of the Model Law, which has the force of law in Singapore, prescribes the appropriate rules for the way decisions have to be made for international arbitration and the form of the award.

◊ *Arbitration Act:*

The Act is silent as to how decisions are made and the form of an award. Presumably, the arbitrators have free rein to make decisions in whichever way they think fit. However, the Act does provide for instances in which the arbitrator has to furnish the court with reasons for the decisions.

Confidentiality:

◊ *International Arbitration Act:*

As there is nothing in the Model Law that says that proceedings must be held in public, parties can agree to keep proceedings before the arbitral tribunal confidential.

Court proceedings in connection with an international arbitration may be held *in camera* (not in open court) on the application of any party to the proceedings. A court hearing such proceedings may give directions as to what information may be published, provided that the parties agree to it, or that the court is satisfied that the information published would not reveal any matter that a party wishes to keep confidential. Judgements of major legal interest may be published, with safeguards to protect confidentiality[17]

The Arbitration Act is silent on the matter of confidentiality.

Recourse against an award and admissible grounds:

◊ *International Arbitration Act*

The High Court of Singapore will not enforce awards if the arbitration agreement is "contrary to public policy". Nor will the courts enforce awards that were induced or affected by fraud or corruption or if there was a breach of the rules of natural justice, thus prejudicing the rights of a party.[18]

There are other grounds for setting aside an award in the Model Law.

◊ *Arbitration Act*

Under the Arbitration Act, the court may set aside the award on the grounds of misconduct or the proceedings, or if the arbitration or award was improperly procured.[19]

Recognition and enforcement:

◊ *International Arbitration Act*

By leave of the High Court, an award may be enforced in the same way as a court order or judgement.[20] The actual procedure is laid down in the Rules of Court.[21]

Every application for leave to enforce an award has to be made to a Judge in Chambers or the Registrar of the Supreme Court by summons. The application must be accompanied by an affidavit, the contents of which are specified in Order 69A, rule 6.

Parties who require legal representation must engage Singapore lawyers.

Essentially the same procedure is followed for enforcement of awards under the Arbitration Act.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised in Singapore. The forms of ADR available in Singapore other than arbitration, are generally mediation (conciliation). There is no distinction drawn between mediation and conciliation in the Singapore context.

Forms of ADR available for commercial disputes:

The International Arbitration Act has provisions dealing with conciliation. For example, a conciliator is to be appointed by the Chairman of the SIAC. Where the arbitration agreement provides for a conciliator to as act as arbitrator in the event of a failed conciliation, there can be no objection by the parties. The arbitrator may act as conciliator if all parties agree in writing.[22] In this context, the International Arbitration Act has given statutory recognition to the concept of mediation-arbitration in the area of international arbitration.

The SIAC provides a set of Mediation Rules as well as facilities for conducting the mediations. However, the SIAC's primary focus is on arbitration rather than mediation.

On 16 August 1997 the Chief Justice of Singapore launched the Singapore Mediation Centre (SMC), a company limited by guarantee of the Singapore Academy of Law. This is a flagship mediation centre which will promote mediation and provide a full range of ADR services. The Centre has absorbed the functions of the Commercial Mediation Service previously provided by the Singapore Academy of Law.

The SMC provides professional mediation services by trained mediators who have been accredited and appointed to its Panel of Mediators. The SMC provides full logistic, administrative and secretarial support for mediation services based on the facilitative, interests-based model of mediation at any stage of a dispute. It also provides advice and assistance to clients as to how they can best look after their interests in using ADR processes such as mediation. The SMC has a set of rules (Mediation Procedure) and other information which is available from the Director.

The SMC is dedicated to promoting the amicable and fair resolution of disputes. It aims to create and environment where people can work together to find enduring solutions to conflicts by broadening awareness of, and providing access to constructive means of dispute resolution. It is engaged in:

- providing mediation and other alternative dispute resolution services;

- providing training on negotiation, mediation and other ADR mechanisms;
- accrediting an maintaining a panel of mediators to ensure quality;
- engaging in consultancy services for dispute avoidance, dispute management and ADR mechanisms; and
- educating the next generation of methods of conflict avoidance and resolution.

Unless specifically requested by the parties, an interest based approach will be taken to mediation in the SMC. The mediator's role is to facilitate the negotiation process and add value to it by helping the parties to have open discussions about their concerns rather than digging deeper into their respective positions. The result is often the generation of a range of options that can help the parties solve their problems in a practical fashion. This approach to mediation can be contrasted to settlement mediation and evaluative mediation.

The procedure is initiated by a request to the SMC which contacts the remaining parties to the dispute to persuade them to participate in the mediation process. If they agree all parties enter into a mediation agreement requiring them to abide by the rules of the SMC and, if a settlement is reached to abide by it. The parties exchange before the mediation a concise summary of the dispute including any documentation that might be necessary.

Attendance is generally in person but with representation if desired. The mediator determines the steps to be followed in the mediation and may meet separately with the parties if this seems desirable. The process is private and any information disclosed and views expressed are on a strictly "no prejudice" basis and cannot be used in other proceedings. Any of the parties may withdraw on giving written notice to the mediator and other parties. If a settlement is reached it is normal to reduce it in writing as a settlement agreement which may be enforceable in contract or, if the dispute is already before the courts, might be filed as a consent order.

The SMC also provides a "Neg-Med" service in which facilities for negotiation are provided to be followed by mediation if the initial negotiation is unsuccessful.

An Advisory Committee on Construction Mediation (ACCOM) was formed on 22 November 1997. ACCOM comprises the major professional bodies and institutions in the construction industry. Its main functions are to promote the use of mediation and mediation training in the construction industry. It also provides the SMC with expert knowledge of and connections with the construction industry.

The Singapore Information Technology Dispute Resolution Advisory Committee (SIDRAC) formerly known as the Singapore Information Technology Mediation Centre was formed on 16 August. Its functions are to refer information technology disputes to the SMC and provide it with its expert knowledge of the industry.

Singapore Institute of Architects (SIA)
72B Tras Street
SINGAPORE 079011

Tel: (65) 226 2668
Fax: (65) 226 2663

The SIA Form of Contracts has arbitration and mediation clauses. The SIA provides facilities and rules for the conduct of mediation of disputes arising from the Form of Contracts, and from building and construction disputes. The set of rules governing such mediations are called the Mediation Rules,

The Court Mediation Centre in Singapore was established by the Subordinate Courts of Singapore in 1995 to deal with a wide range of cases where mediation was considered appropriate. These include all civil cases begun in the Subordinate Courts of Singapore. The general function of the Court Mediation Centre is to assist parties to come to a negotiated settlement of their disputes without the need for trial, thereby saving time and costs for the litigants and for the courts.

Forms of ADR may be found in the Singapore Bunkering Procedure, the Singapore Timber Trade Procedure and the Procedure of Renovation and Decoration Advisory Centre. The latter has agreed to refer the more significant cases to the Singapore Mediation Centre.

The Small Claims Tribunal is a forum whereby contractual and tortious claims of S$10,000 and below can be resolved through ADR. Mediation is usually carried out before a judge.

The Singapore Trade Development Board provides mediation between foreign parties and Singapore companies relating to trade complaints or disputes.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

The Rules of Court require all parties to civil cases to attend Court Dispute Resolution (CDR) sessions and Pre-Trial Conferences (PTC), with a view to settling disputes without going to trial. These are part of the abovementioned Court Mediation Centre. Matters raised pursuant to these sessions are confidential and cannot be used by either party should the matter proceed for trial.

Legal implications flowing from choices between the various procedures:

There is no mechanism of enforcement for parties that choose mediation as an ADR method. A mediation settlement is not recognised by the New York Convention and is thus

unenforceable. Such a settlement can be enforced as a contract between the two parties if signed.

Alternatively, parties may opt to have the settlement terms recorded as a consent judgement if the subject matter of dispute is pending in Court. Another option is to have the terms recorded as an Arbitral Award.

Rules, if any, defining the role and procedures of mediator:

These institutions have their own rules for the conduct of mediation:

- The SIAC has a set of Mediation Rules which, *inter alia* , outline the role of a mediator in a mediation. These rules can be found at the SIAC's homepage on the Internet (at http://siac.tdb.gov.sg).
- The Singapore Mediation Centre has defined the mediation procedures in the Mediation Procedure and prescribed the mediator's conduct in the Code of Conduct for mediators.
- SIA has a set of rules which govern the role of a mediator, how a mediation is conducted, as well as confidentiality of the proceedings.
- CDR sessions and PTCs are conducted by the judiciary according to the Rules of Court and other Practice Directions which may be issued from time to time.
- The Small Claims Tribunal has procedures governed by subsidiary legislation passed under the Small Claims Tribunal Act.

Resort to arbitration or courts during ADR:

The rules of the various institutions provide for the parties to have resort to the courts.

Under the Mediation rules of the SIAC, mediation can be terminated by any or one of the parties by a written declaration.

Under the Singapore Mediation Centre's Mediation Procedure,[23] any of the parties may withdraw from the mediation at any time by giving notice of withdrawal in writing to the Mediator and the other parties. It should also be noted that under the Mediation Procedure of the Singapore Mediation Centre, mediation will not prevent the commencement of any suit or arbitration nor will it act as a stay of such proceedings unless the parties otherwise agree. Hence, mediation is consensual.

Under the SIA's Mediation Rules, mediation is consensual and may be terminated at any time when either party submits a written notice to the mediator that the mediation proceedings be terminated.

Confidentiality:

The SIAC Mediation Rules[24] govern confidentiality. There is no specific provision for the admissibility of evidence.

The Singapore Mediation Centre's Mediation Procedure[25] provides for confidentiality of information (including the fact that mediation is to take place or has taken place and the views, suggestion sand proposals of any party or the Mediator). The mediation itself must be conducted in confidence and no transcript or formal record is permitted.[26]

The SIA's Mediation Rules provides for confidentiality.[27] The parties are also precluded from admitting any information as evidence in subsequent court or arbitral proceedings.

Recognition and enforceability:

Under the International Arbitration Act,[28] where there is an arbitration agreement but the parties reach an agreement in settlement of their dispute other than through arbitration, and the arbitral tribunal records the terms of the settlement in the form of an arbitral award, this award must be treated as an award on an arbitration agreement. It may, by leave of the High Court, be enforced in the same manner as a judgement or order to the same effect.

The Mediation Procedure of the Singapore Mediation Centre and the SIA's Mediation Rules do not provide for the recognition and enforceability of settlements. However, the mediation settlement agreement, once signed by the parties, can be enforced as a contract. It must be noted that under the Mediation Procedure of the Singapore Mediation Centre, mediation will not prevent the commencement of any suitor arbitration nor will it act as a stay of such proceedings unless the parties otherwise agree.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

The choice of ADR and the jurisdiction of the Mediator in commercial disputes is limited by the agreement of the parties and any Rule adopted by the parties.

Any restrictions on foreign legal representation in ADR proceedings or on nationality of arbitrator:

There are no restrictions on foreign legal representation in ADR (unlike in arbitration) or on the nationality of the Mediator.

LEGAL SOURCES AND REFERENCES

The SIAC has its own homepage:

http://siac.tdb.gov.sg

BIBLIOGRAPHY

Yuan, Professor Lim Lan *Court Mediation in Singapore,* National University of Singapore.

Yuan, Professor Lim Lan, *Theory and Practice of Mediation,* National University of Singapore.

ENDNOTES

[1] International Arbitration Act; Pt. ll
[2] *ibid*; s.27 and 28
[3] *ibid*.; s.28
[4] *ibid.;* s.3
[5] *ibid.;* s.12(3)
[6] *ibid.;* s.12
[7] *ibid*; s.15
[8] Arbitration Act; s. 6
[9] *ibid*; s.30
[10] *ibid;* s.12(5)
[11] *ibid;* s.6
[12] *ibid;* s.7
[13] *ibid;* s.14
[14] UNCITRAL Model Law provisions
[15] Legal Profession Act; Chapter 61; s. 34A
[16] UNCITRAL Model Law Art.28
[17] International Arbitration Act; s. 22,23,24
[18] *ibid;* s11, s24
[19] Arbitration Act; s17
[20] International Arbitration Act; s19
[21] Order 69A, rule 3
[22] International Arbitration Act; s. 16,17
[23] Mediation Procedure; paragraph 9
[24] SIAC Mediation Rules; 14, 16
[25] Mediation Procedure; paragraph 11
[26] *ibid;* paragraph 7
[27] Clause 6
[28] s.18

Chinese Taipei

GENERAL OVERVIEW

Primary sources of law:

- Statutes

Sources of law for commercial dispute resolution outside of the court system:

- The Arbitration Act
- Law Governing Disputes Reconciliation in Cities and Towns

These Acts contain the main laws for resolving international commercial disputes. Copies of the Arbitration Act and Law Governing Disputes Resolution in Cities and Towns are available from the Commercial Arbitration Association and the Ministry of Justice. In addition, they can be easily found in official publications and law reference books.

Institutions for international commercial dispute resolution outside of the courts:

At present, the Commercial Arbitration Association is the only non-governmental organisation dealing with international commercial disputes. The Association's addresses and other contact details are:

- Principal office:
  No. 136, 8F (Rm 803)
  Sec. 3 Jen-Ai Rd.
  Taipei
  TAIWAN
  Tel: (02) 2707 8672
  Fax: (02) 2707 8462

- Branch office
  No 6 Floor 18-3
  Min-Chuan 2nd Road
  Chien-Jen District
  Kaohsiung
  TAIWAN
  Tel: (07)335 9523
  Fax: (07)335 9525

Recognition and enforcement of foreign arbitral awards:

To date, Chinese Taipei is not a contracting party to the New York Convention. However, the Ministry of Justice, with reference to the UNCITRAL Model Law, related foreign arbitration codes and the New York Convention, submitted an amendment to the Commercial Arbitration Act to the Legislature for review. Subsequently, the Arbitration Act was promulgated on 24 June 1998 and entered into force on 24 December 1998.

Settlement of disputes through ICSID or bilateral investment agreements:

For the time being, Chinese Taipei is not a member of the Washington Convention. However, Chinese Taipei has signed investment protection agreements with seven APEC member economies namely Indonesia, Malaysia, the Philippines, Singapore, Thailand, the United States and Vietnam.

Laws relating to commercial dispute resolution currently under review:

Currently there are no laws relating to dispute resolution under review.

ARBITRATION

Is arbitration law based on the UNCITRAL Model Law?

In Chinese Taipei, the Arbitration Act is the law dealing with international commercial disputes in Chinese Taipei. The original Commercial Arbitration Act was promulgated in 1961 and was slightly revised in 1982 and 1986. The Arbitration Act, mainly based on the UNCITRAL Model Law, took effect on 24 December 1998.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Act does not have significantly different rules for domestic and international arbitration.

Limitations on types of dispute that may be arbitrated:

The Commercial Arbitration Act provided that parties to a dispute arising out of business transactions, whether at present or in the future, may enter into an agreement of arbitration to solve their dispute.[1] The Arbitration Act has expanded the scope of applicable arbitration beyond commercial disputes. The Arbitration Act is applicable to any legal disputes arising out of civil cases which can be compromised according to relevant laws. These civil cases include disputes in public construction, transactions on real estate, intellectual property rights, maritime cases, rights of consumers, and medications. However, legal disputes which involve family, succession and criminal cases, are not governed by the Arbitration Act.

Extent of party autonomy to define procedure:

The provisions of arbitration procedures are not compulsory. The parties involved may modify the arbitration procedures set out in the Arbitration Act. If no such procedural modification is agreed upon, the parties should follow the procedures prescribed in the Arbitration Act.

Scope of court intervention and availability of courts for interim relief:

The courts cannot intervene before or during an arbitration. However, the courts may exercise their power to assist or supervise the arbitration in the following situations:[2]

- if the parties involved cannot reach an agreement on choosing an arbitrator;
- there are some specific matters subject to the exclusive jurisdiction of the courts;
- there are matters relating to the implementation of arbitral awards or recognition of foreign arbitral awards.

A party to an arbitration agreement can apply for provisional seizure or execution in accordance with the Precautionary Proceeding of the Code of Civil Procedure.[3]

Source and scope of procedural rules:

- Commercial Arbitration Act
- Foreign Trade Law
- Securities and Exchange Law
- Futures Trading Law Futures Trading Law
- Technical Co-operation Act

With regard to laws related to arbitration, besides the Arbitration Act, the Foreign Trade Law (promulgated on 5 February 1993) states, "Importers and exporters should follow in good faith, the procedures on arbitration, reconciliation or settlement to deal with trade disputes. The competent authority should actively help facilitate implementation of the arbitration system on international trade disputes."[4]

Chapter 6 of the Securities and Exchange Law, Chapter 7 of the Futures Trading Law (promulgated on 1 June 1997), and Article 8 of the Technical Co-operation Act all contain dispute resolution provisions. As for the relevant rules and regulation of arbitration procedures, there are the Rules Governing the Organisation of Commercial Arbitration Associations and Arbitration Fees, the Rules Governing the Procedure for Conciliation of Foreign Trade Disputes by Commercial Arbitration Association and Conciliation Fees, and the Enforcement Rules for the Arbitration Procedure of the Commercial Arbitration Association. These provisions are being revised following the entry into force of the Arbitration Act.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

Based on agreements between the parties concerned, arbitration may be conducted in foreign languages and by foreigners. The Arbitration Act does not impose any discriminatory restrictions on representation by foreign attorneys or lawyers in comparison with representation by domestic lawyers.[5]

Law applicable to substance of dispute:

In arbitrations held in Chinese Taipei, the parties concerned may reach an agreement to apply foreign laws to the substance of the dispute. Likewise, they may choose the rules of an international arbitration institution to govern the arbitration procedure.[6]

Decision making by arbitral tribunal and form of award:

The Arbitration Act explicitly stipulates the way decisions are made and the form of the award.[7] The time limit for decision making by an arbitral tribunal is six months after the date when both parties are notified of the place of arbitration as well as the time of hearing. However, the time limit may be extended to nine months if the circumstances so demand. With regard to the form of the award, the award shall contain the substance of the award, facts of the dispute, reasons behind the decision and other items prescribed by the Act.

Confidentiality:

An arbitrator shall keep secret all confidential information disclosed to him or her. Unless both parties consent, or laws explicitly authorise otherwise, eg, Surveillance and Criminal Proceedings Laws[8] an arbitral tribunal or an arbitration association is prohibited from disclosing the arbitral award and the relevant materials to the public. Disclosure of the discussions forming a decision by an arbitral tribunal is prohibited.[9]

Recourse against an award and admissible grounds:

The Arbitration Act lists the following circumstances under which a court will not issue an order to enforce an arbitral award:[10]

- the award is irrelevant to the dispute as set out in the arbitration agreement or beyond the scope of the agreement to arbitrate (except that if a portion of the award is not in dispute and can stand independently, that portion can be accepted by the court;
- no reasons are stated in an arbitral award (unless subsequently amended by the arbitral tribunal);
- the award requires a party to do an act prohibited by law.

In limited circumstances a party may bring a suit in court to annul an arbitral award.[11]

Recognition and enforcement:

In principle, an arbitral award can be compulsorily executed after one party petitions a court to issue an order to do so. However, if the said award consists of the payment of a specified sum of money or other fungible things or securities, or if the said award consists of the delivery of a specified movable property, based on the written agreement of the related parties, the arbitral award can be compulsorily executed without a court order. As for foreign arbitral awards, their compulsory execution must be based on the recognition by a court.[12]

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

There are several alternative forms of dispute resolution practised in Chinese Taipei besides lawsuits and arbitration. Reconciliation, as set out by the Law Governing Disputes Reconciliation in Cities and Towns, provides procedures for resolving disputes.

Forms of ADR available for commercial disputes:

Besides commercial arbitration based on an agreement of arbitration, any legal disputes, including civil cases and criminal cases prosecuted upon complaint, can also be handled through reconciliation.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Reconciliation applied in commercial disputes is an alternative method for solving disputes but is not a compulsory procedure.

Legal implications flowing from choices between the various procedures:

After a reconciliation has been made and subsequently approved by a court for the same dispute, the parties concerned are not allowed to bring a lawsuit, file a legal complaint, or make a criminal lawsuit on their own. A reconciliation for a civil case has the same legal force and effect as an affirmed decision by a court.

Rules, if any defining the role and procedures of mediator:

The Law Governing Disputes Reconciliation in Cities and Towns specifies the qualifications and selection process for reconcilers and the procedures of reconciliations.

Resort to arbitration or courts during ADR:

A reconciliation procedure cannot proceed without the agreement of both parties in a dispute. If a reconciliation cannot be made or the parties to the dispute disagree about seeking reconciliation, then one or both parties can resort to the courts. Moreover, if the parties involved have reached an arbitration agreement, they can seek to resolve their disputes by arbitration.

Confidentiality and admissibility of evidence in other proceedings:

The Law Governing Disputes Reconciliation in Cities and Towns provides that reconciliation procedures may be kept confidential and that all persons involved with these procedures must not disclose any confidential information.[13] The same law stipulates that in the event of a breach of confidentiality, the relevant authorities may be asked to provide assistance and may launch necessary investigations.[14]

Recognition and enforceability of settlements:

The Law Governing Disputes Reconciliation in Cities and Towns states:

> "The reconciliation of a civil law case approved by a court has the same legal force and effect as an affirmed judgement of a court; the reconciliation of a criminal law case approved by a court can be compulsorily implemented if the subject matter of the reconciliation is the payment of a specified sum of money or fungible things or securities."[15]

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

The Law Governing Disputes Reconciliation in Cities and Towns states:

> "The quorum of reconcilers is three as a committee of reconciliation conducts the resolution of a dispute. However, a reconciliation may be conducted by only one reconciler if there is an agreement by the concerned parties."[16]

The jurisdiction over cases of reconciliation is as follows:

- If parties to a dispute live in the same town or city, their dispute is reconciled by the committee in the said town or city.
- If parties to a dispute live in different towns or cities, their dispute in a civil law case, when asked by one party to be resolved, is resolved by the committee in the town or city where the adversary party has a domicile, a residence or a

> business office; their dispute in a criminal law case, when asked by one party to be resolved, is reconciled by the committee in the town or city where the adversary party has a domicile or a residence; or in the town or city where the crime has been committed.[17]

If the parties to a dispute agree, and the committee in the city or town in which these parties filed an application of reconciliation approves, this dispute may be conducted by this committee and shall not be subject to the two foregoing paragraphs."

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

Legal representation is allowed in a conciliation proceeding, and there are no restrictions on the nationality of a representative. A foreign representative should obey the same rules as a domestic representative. According to the Law Governing Disputes Reconciliation in Cities and Towns, however, reconcilers should be chosen from residents of the city or town where a committee of reconciliation is established.[18]

LEGAL SOURCES AND REFERENCES

All laws and regulations related to arbitration in Chinese Taipei are published in the relevant official gazettes. They are available at the web site of the Judicial Yuan and the Justice Ministry respectively at:

www.judicial.gov.tw

www.moj.gov.tw

The Arbitration Act including rules governing the organisation of arbitration associations and arbitration fees as well as other relevant regulations are available on the Justice Ministry web site. In addition, the Arbitration Act has been promulgated in the weekly gazette published by the Presidential Office and is available on the Presidential Office web site:

www.oop.gov.tw

BIBLIOGRAPHY

Arbitration Act

A Compilation of laws and Regulations of Commercial Arbitration.

The Law Governing Disputes Reconciliation in Cities and Towns.

An Introduction to Disputes Reconciliation in Cities and Towns.

ENDNOTES

[1] Art. 1

[2] Arbitration Act Articles 4,9,12,13,16,28,34,37,39,40 and 47

[3] Art. 39

[4] Art. 26

[5] Arts. 6,25

[6] Arts 19,47

[7] Arts. 21,33

[8] Surveillance Law Art.128, Criminal Proceedings Law Art.136

[9] Arbitration Act Arts 15,32

[10] Art.33

[11] Art.40

[12] Arts.37,47

[13] Art.16

[14] Art. 18

[15] Section 2, Art.24

[16] Art. 6

[17] Art. 11

[18] Art. 3

Thailand

GENERAL OVERVIEW

Primary sources of law:

- Legislation, comprising:
  - ◊ Codes
  - ◊ Statutes
  - ◊ Decrees

Thailand's legal system is fundamentally based on the civil law system.

Sources of law for commercial dispute resolution outside of the court system:

The only statute governing commercial dispute resolution conducted in Thailand so far is the Arbitration Act B.E. 2530 (1987).

Institutions for dispute resolution outside of the court system:

The Arbitration Institute
Ministry of Justice
Ratchadaphisek Road
Bangkok 10900
THAILAND

Telephone: (662) 541 2298-9
Facsimile: (662) 541 2298-9
Email: voravuth@mozart.inet.co.th

Recognition and enforcement of foreign arbitral awards:

Thailand acceded to the New York Convention 1958 on 21 December 1959 and is accordingly bound to recognise and enforce foreign arbitral awards under the terms and conditions stated in the Convention. To implement its obligations, Thailand has promulgated the Arbitration Act B.E. 2530 (1987) which in effect incorporates the principles and obligations of the Convention into domestic laws. Although at the time that Thailand acceded to the New York Convention it did not make any reservation regarding enforcement of foreign arbitral awards, there is nevertheless a provision in the Arbitration Act requiring that the State where the foreign award originated recognise and enforce Thailand awards on a reciprocal basis. Thailand is also a party to the Geneva Convention.

Settlement of investment disputes through ICSID or bilateral investment agreements:

Although Thailand has not acceded to the Washington Convention yet, it intends to do so in very near future.

Laws relating to commercial dispute resolution currently under review:

The draft of a new Arbitration Act is under consideration by the Thai Cabinet. The draft act is based on the UNCITRAL Model Law. Under the new scheme set forth in the draft, domestic and international arbitration will be governed by the same set of rules.

Another draft law currently under review is a law implementing the Washington Convention, which will be submitted to the Cabinet for its approval once Thailand accedes to the Convention.

ARBITRATION

Is arbitration law based on the UNCITRAL Model?

Arbitration as an alternative method resolving disputes has long been recognised and accepted in the Thai legal regime. Prior to the passing of the Arbitration Act in 1987, the Civil Procedure Code contained provisions for arbitration in court and arbitration out of court. The provisions governing arbitration in court[1] are still in effect and aim to supplement the regular court trial procedure.

In a practice suggestion issued in 1996, the ex-President of the Thai Supreme Court recommended that the Thai Court of First Instance should use court-annexed arbitration or in court arbitration to a greater extent, particularly for cases that require special expertise.

Currently, international commercial arbitration in Thailand is governed by the Arbitration Act 1987, which governs domestic arbitration as well. The Arbitration Act 1987 is not based on the UNCITRAL Model Law, but, as indicated, the draft of Thailand's new arbitration legislation will be mainly based on the UNCITRAL Model Law.

Differences in the application of arbitration law to international and domestic arbitration:

The Arbitration Act 1987 governs domestic arbitration as well as international arbitration. Under the scheme set forth in the draft act currently before Cabinet, domestic arbitration will be governed by the same set of rules as its international counterpart.

Limitations on types of dispute that may be arbitrated:

The Arbitration Act[2] defines an arbitration agreement as an agreement or a clause in a contract whereby the parties agree to submit present or future disputes to arbitration. Note that only civil disputes are arbitrable. The term "civil" is not defined in the Arbitration Act. In the Thai legal system, civil signifies any matter which is not a criminal offence but legal opinion is that other matters under the exclusive jurisdiction of the courts are not arbitrable also. Examples include the civil status of persons, validity of marriages or family matters. Matters related to bankruptcy law are not able to be arbitrated.

Intellectual property matters including copyrights, trademarks and patents as well as transfer of technology agreements may be the subject of arbitration.[3]

Extent of party autonomy to define procedure:

Under the Thai legislation, the parties are free to frame the rules as they think most suitable to their particular dispute. The Rules of Arbitration of the Thai Arbitration Institute also allow the parties, either before or during the arbitral proceedings, to modify its rules as they think fit.

Scope of court intervention and availability of courts for interim relief:

Before an arbitral proceeding commences, the court may assist the parties in appointing an arbitrator in a case where a party fails to discharge an obligation in appointing an arbitrator, or where the parties fail to reach an agreement on the presiding arbitrator.[4] While an arbitral proceeding is going on, the court, upon a request of an arbitrator, may help the arbitral tribunal to gather evidence by ordering a person to submit documents or materials for evidentiary purpose, or may summon a witness to testify before the tribunal or decide a question of law for the tribunal.[5]

The 1987 Arbitration Act allows the court to grant an interim measure of protection to the parties if it is requested to do so by an arbitrator sitting in the proceeding concerned. In considering the request, the court will apply the rules governing interim measures of protection as prescribed in the Civil Procedure Code by analogy to the request; hence, all types of measures available for parties in litigation under the Code will also be available for parties in arbitration, and the criteria for granting the measures are also the same as those in litigation.

Source and scope of procedural rules:

The rules of arbitration conducted in Thailand can be any rule of parties' choice. Parties may choose from institutional rules such as Rules of Arbitration of the Thai Arbitration Institute, The Thai Commercial Arbitration Rules promulgated by the Office of the Arbitration Tribunal, Board of Trade, or those of the International Chamber of Commerce, AAA etc., or from *ad hoc* arbitration rules such as the UNCITRAL arbitration rules.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The parties and the arbitral tribunal are free to decide in which language their proceeding will be conducted. At the Thai Arbitration Institute (TAI), arbitral proceedings are conducted in English from time to time.

Parties may also choose the arbitrators of their choice regardless of whether the person is a Thai national. In some arbitral proceedings under the auspices of the TAI the parties have appointed foreign arbitrators. Moreover, parties can be represented in arbitral proceedings by foreign lawyers if they so wish.

Law applicable to the substance of dispute:

Parties may agree upon the applicable law of their dispute, or, in the absence of such agreement, the arbitral tribunal may decide the dispute according to the law they think applicable to the dispute concerned. The applicable laws may be Thai legislation or foreign laws. As above-mentioned, the arbitration rules applicable to a particular arbitration may be domestic institutional rules or those of an international arbitration body, depending on the agreement of the parties. The Arbitration Act 1987 has no prohibition on the choice of rules.

Decision making by arbitral tribunal and form of award:

An arbitral award, according to the 1987 Arbitration Act,[6] must be in writing, signed by the arbitrators sitting in the proceeding, and must contain reasons. The award must be entered within 180 days from the date of appointment of the last arbitrator unless the parties agree otherwise or the court extends to time for making the award.

Confidentiality:

Currently, there is no legislation dealing with the issue of confidentiality of arbitral proceedings and awards. However, it is a long-standing practice of the TAI that all arbitral proceedings and awards under its auspices will be kept strictly confidential.

Recourse against an award and admissible grounds:

Under the Arbitration Act 1987, there is no provision for setting aside an award, but the court may decline to enforce a domestic award if it is of the opinion that the award is contrary to the law governing the dispute; is the result of any unjustified act or procedure; or is outside the scope of the binding arbitration agreement or relief sought by the party. With

regard to foreign arbitral awards, the court may refuse recognition and enforcement only if there is a cause prescribed by Article V of the New York Convention.

Under the regime of the draft arbitration law, which is going to be promulgated in the near future, parties may request the court to set aside or refuse enforcement of an award on exactly the same grounds as those of the UNCITRAL Model Law. Domestic and foreign awards will be treated alike.

Recognition and enforcement:

The Arbitration Act provides[7] that when the losing party refuses to voluntarily comply with the arbitral award, the other party may file a request with a competent court for a judgement confirming the award within one year after the date on which a copy of the award is delivered to the parties concerned. Once the court receives the request, it shall hold an inquiry and give judgement without delay. In the case of foreign awards, the request for enforcement shall be accompanied by a certified copy of the award and the arbitration agreement, and translation in Thai of the awards and the agreement. The translation shall be certified by a sworn translator, an officer of the Ministry of Foreign Affairs, a diplomatic delegate or a Thai consul.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) recognised:

ADR is recognised in Thailand, and is adopted as a standard practice for many situations requiring a dispute resolution system.

Forms of ADR available for commercial disputes:

ADR is voluntary, hence parties may use any ADR techniques of their choice. The most popular ADR mechanisms are mediation and conciliation. Mediation-arbitration and facilitated negotiation have also been practised quite often.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

There is no legislation providing for ADR in commercial disputes yet. The Civil Court however, has prescribed an internal rule facilitating and encouraging mediation as an alternative means for dispute settlement. The practice is now being increasingly adopted by other courts.

Legal implications flowing from choices between the various procedures:

There are no significant legal implications flowing from the choices of ADR.

Rules, if any, defining the role and procedures of mediator:

Generally, there is no set of rules governing the conduct of ADR, unless it is done under the auspices of TAI which has a specific set of rules for conciliation.

Resort to arbitration or courts during ADR:

Unless otherwise agreed upon by the parties, a party is at liberty to resort to court procedure, or arbitration (provided that there is an arbitration agreement between the parties).

Confidentiality and admissibility of evidence in other proceedings:

In a conciliation conducted under the TAI Rules of Conciliation, the parties concerned are bound to keep confidential all matters relating to the conciliation process. For other ADR processes, parties normally rely on a confidentiality obligation agreed upon by the parties beforehand.

Recognition and enforceability of settlements:

If the parties concerned can reach an agreement to settle their dispute, the agreement will be deemed the so-called "compromise" contract under the Civil and Commercial Code. It is enforceable provided that the contract is evidenced in writing.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

Currently, there is no limitation on the choice of ADR and jurisdiction of the mediator in commercial disputes.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There is no restriction on foreign legal representation in ADR proceedings or on the nationality of mediator in Thailand.

LEGAL SOURCES AND REFERENCES

The World Wide Web site of the TAI is now under construction and is expected to open to the public soon.

BIBLIOGRAPHY

Cases And Materials On Arbitration Vol. 1&2, The Arbitration Office, Ministry of Justice (1st Ed),1992.

Anand Jantaraopakorn; *Law On Dispute Settlement By Arbitration Out Of Court*, 1993.

Pichaisak Horayangkura; *Dictionary Of Arbitration*, 1993.

Anand Jantaraopakorn; *Law On International Arbitration*, 1995.

ENDNOTES

[1] Civil Procedure Code; s. 210-220
[2] Arbitration Act; s.5
[3] Establishment of Intellectual Property and International Trade Courts Act 1996; s.9
[4] Arbitration Act; s.2
[5] *ibid*; s.18
[6] *ibid*; s.20 -26
[7] *ibid;* s.23

United States

GENERAL OVERVIEW

Primary sources of law:

- Statutes
- Regulations
- Case law

The United States is a common law jurisdiction. Sources of law include statutes, implementing regulations, and judicial decisions interpreting the statutes and regulations at the Federal and State levels.

Sources of law for commercial dispute resolution outside of the court system:

The law applied in commercial dispute resolution is the same law applied in the judicial system. US laws, regulations, judicial and administrative decisions of general application are published and available from many sources. Laws relating to dispute resolution are cited below.

Institutions for international commercial dispute resolution outside of the courts:

A short list of major US arbitration institutions is set out below.[1] Given the hundreds of alternative dispute settlement services available in the United States, providing an exhaustive list is not possible.

- American Arbitration Association
- Inter-American Commercial Arbitration Commission
- International Centre for Settlement of Investment Disputes
- Society of Maritime Arbitrators
- CPR Institute for Dispute Resolution
- National Association of Securities Dealers (NASD)
- New York Stock Exchange Inc.
- American Stock Exchange (AMEX)

Recognition and enforcement of foreign arbitral awards:

The New York Convention entered into force for the United States on 29 December 1970, and is implemented by the Federal Arbitration Act.

The US reservations to the Convention are:

- The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.
- The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.

The Inter-American Convention on International Commercial Arbitration (Panama Convention) entered into force for the United States on 15 August 1990, and is implemented by the Federal Arbitration Act. The US reservations to the Convention are:

- Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.
- The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits its instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.
- The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

Settlement of investment disputes through ICSID or bilateral investment agreements:

The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) entered into force for the United States on 14 October 1966, based on Public Law 89-532. The United States is also a party to 38 bilateral investment treaties containing provisions on arbitration of certain investment disputes. A list as of March 1997 follows.

COUNTRY	SIGNATURE DATE	STATUS/ENTRY INTO FORCE
Albania	10 January 1995	Ratified-awaiting exchange of instruments
Argentina	14 November 1991	20 October 1994
Armenia	23 September 1992	29 March 1996
Azerbaijan	1 August 1997	Not ratified by the US
Bangladesh	12 March 1986	25 July 1989
Belarus	15 January 1994	Ratified-awaiting exchange of instruments
Bosnia	17 April 1998	Not ratified by either party
Bulgaria	23 September 1992	2 June 1994
Cameroon	26 February 1986	6 April 1989
Congo, Democratic Republic of the	3 August 1984	July 28 1989
Congo, Republic of the	12 February 1990	13 August 1994
Croatia	13 July 1996	Not ratified by either party
Czech Republic	22 October 1991	9 December 1992
Ecuador	27 August 1993	Ratified-awaiting exchange of instruments
Egypt	11 March 1986 (modified)	27 June 1992
Estonia	19 April 1994	16 February 1997
Georgia	7 March 1994	Ratified-awaiting exchange of instruments
Grenada	2 May 1986	3 March 1989
Haiti	13 December 1983	Not ratified in the United States
Honduras	1 July 1995	27 February 1997
Jamaica	4 February 1994	27 February 1997
Jordan	2 July 1997	Not ratified by either party
Kazakhstan	19 May 1992	12 January 1994
Kyrghyzstan	19 January 1993	12 January 1994
Latvia	13 January 1995	26 December 1996
Lithuania	14 January 1998	Not ratified by either party

Moldova	21 April 1993	25 November 1994
Mongolia	6 October 1994	1 January 1997
Morocco	22 July 1985	29 May 1991
Nicaragua	1 July 1995	Not ratified in the United States
Panama	27 October 1982	30 May 1991
Poland	21 March 1993	7 August 1994
Romania	28 May 1992	15 January 1994
Russian Fed.	17 June 1992	Not ratified in the Russian Federation
Senegal	6 December 1983	25 October 1990
Slovakia	22 October 1991	26 December 1996
Sri Lanka	20 September 1991	1 May 1993
Trinidad and Tobago	26 September 1994	26 December 1996
Tunisia	15 May 1990	7 February 1993
Turkey	3 December 1985	8 May 1990
Ukraine	4 March 1994	16 November 1996
Uzbekistan	16 December 1994	Not ratified in either party

Laws relating to commercial dispute resolution currently under review:

International trade laws, including those laws relating to international commercial dispute resolution, are regularly reviewed in the Congress and the Executive Branch. The review process is highly public and transparent. Amendments are published and made available to the public.

ARBITRATION

Is arbitration law based on UNCITRAL Model Law?

The Federal Arbitration Act, 9 US C., §§1 *et seq.*, is the arbitration law applicable to international disputes in the United States. The Federal Arbitration Act predates the UNCITRAL Model Law.

In addition, States have enacted separate, but similar, legislation. (See the attached list of laws from the States and other sub-central jurisdictions.) Many of the States have based their laws on the Uniform Arbitration Act, which was adopted in 1955 as a model provision. The Federal Arbitration Act applies to any arbitration clause in a written contract involving interstate commerce. Thus, State arbitral law governs only to the extent that it does not conflict with the Federal law. Where it does conflict, State law is pre-empted by the Federal law.

Differences in the application of arbitration law to international and domestic arbitration:

The Federal Arbitration Act does not contain different rules for international and domestic arbitration, except to the extent that the dispute results in a foreign arbitral award. In such a case, it must be enforced pursuant to the New York Convention or the Inter-American Convention.

Limitations on the types of disputes that may be arbitrated:

US courts have strongly favoured the use of arbitration in the resolution of international commercial disputes. They have held that nearly all civil disputes are arbitrable and have denied arbitrability only where Congress expressly stated that rights provided by a particular statute can be enforced only in court.

In a 1995 case,[2] the US Supreme Court held that one must look to the intent of the parties and the language of the arbitration clause in determining whether or not the parties intended to exclude any type of claim from the scope of the arbitration clause. The Court noted that any such interpretation must be made in light of the Federal policy requiring that disputes regarding the scope of arbitrable issues be resolved in favour of arbitration.

Extent of party autonomy to define procedure:

The extent of party autonomy depends upon the specific rules of the arbitration institution. In general, the parties are free to determine the procedures to be applied to their dispute.

Scope of court intervention and availability of courts for interim relief:

The Federal Arbitration Act ensures that agreements to arbitrate are enforced by requiring courts to compel arbitration if a party to an arbitration agreement refuses to arbitrate, and to stay court proceedings where a valid arbitration agreement exists.

US courts typically enforce interim awards made by arbitrators. The Federal Arbitration Act does not expressly provide authority for courts to award provisional remedies pending the outcome of an arbitration. US courts are divided on the issue of whether provisional remedies by courts may be applied to arbitration cases which are under the New York Convention. There is significant case authority stating that courts do not have power to grant interim relief in such cases. However, a more recent trend is to permit interim relief that aids rather than evades arbitration.

Source and scope of procedural rules:

Each arbitration institution has its own rules.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The Federal Arbitration Act does not include provisions related to the language used in an arbitration or to the nationality of arbitrators or representatives in arbitration. As there are no restrictions on who may serve as arbitrator, nationals and non-nationals, lawyers, business persons and others may be appointed to arbitral tribunals. With regard to whom may represent a party in an arbitration, by and large it is customary that the parties may choose their representatives.

Law applicable to the substance of the dispute:

The Federal Arbitration Act does not expressly address the choice of law issue. However, it is well settled in US law that parties can choose the substantive law under which their dispute will be decided. Generally, arbitrators are expected to follow the wishes of the parties with regard to the choice of law applicable to the substance of the dispute. Choice of law may also be addressed in the rules of arbitration institutions.

Decision making by arbitral tribunal and form of award:

US arbitration law only requires that an award be in writing, signed by the arbitrator or majority of arbitrators. There is no requirement in the Federal law to state the reason underlying awards. However, arbitration institution rules may specify that the award state the reasons upon which it is based.

Confidentiality:

The Federal Arbitration Act does not address the confidentiality of arbitral proceedings or awards. However, the rules of arbitral institutions may include provisions regarding confidentiality.

Recourse against an award and admissible grounds:

US courts are granted broad authority to confirm or enforce arbitral awards. Generally, courts can only vacate the award on grounds of fraud, partiality or corruption of the arbitrators, arbitrator misconduct or lack of jurisdiction. Moreover, courts can modify or correct an arbitral award if they find a miscalculation or mistake in description, if the arbitrators have made an award on a matter not submitted to them, or if the form of the award is incorrect.

Recognition and enforcement:

The procedures for enforcement of an award are set out in the Federal Arbitration Act and the Federal Rules of Civil Procedure, which govern procedure in the US Federal district courts.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) is recognised:

ADR is recognised within the United States and actively encouraged. The use of ADR in private international commercial and other disputes is promoted in the United States by a variety of means, including the efforts of the Executive Branch, Congress, private organisations, bar associations, and law schools.

Forms of ADR that are available for commercial disputes:

A wide variety of methods are available, including conciliation, mediation and mini-trials.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

There are no Federal laws that pertain directly to mediation or conciliation of international commercial disputes. However, under certain circumstances, a Federal statute directed primarily at mediation of domestic disputes might be applicable to a cross-border conflict.

While no Federal law mandates ADR, Congress has encouraged its use in a growing number of statutes, including the Civil Rights Act of 1991 and the Americans with Disabilities Act. A growing number of administrative agencies, such as the Federal Equal Employment Opportunities Commission and State-level workers' compensation boards, are encouraging the use of ADR to resolve complaints that would otherwise need to be handled by the agency itself.

In addition, on 6 February 1996, President Clinton issued Executive Order 12988 concerning Civil Justice Reform, which orders US Federal agencies and litigation counsel that conduct or participate in civil litigation on behalf of the US government in Federal court to follow a set of guidelines which, *inter alia*, require litigation counsel to resolve claims through informal discussions, negotiations and settlements rather than through utilisation of any formal court proceeding. It provides that:

> "Where the benefits of Alternative Dispute Resolution (ADR) may be derived ... litigation counsel should suggest the use of an appropriate ADR technique to the parties."

Furthermore, the Executive Order provides that litigation counsel should be trained in ADR techniques. Implementation of this Order should significantly affect use of ADR in the United States and the exposure of government and private counsel to ADR techniques.

Issuance of this Executive Order is the latest in a series of steps the United States has taken to encourage use of ADR by or within the US government. US District Courts and the United States Court of Federal Claims have Rules of Civil Procedure,[3] which provide for discussion of alternative means of dispute resolution at the initial conference with the Court, once the matter has been placed at issue. In addition, the General Services Board of Contract Appeals has promulgated a set of rules that specifically provides for ADR (Rule 10(d)). This Board has jurisdiction over the contract disputes of many executive agencies in the US Government.

In 1984, Congress created the State Justice Institute to encourage and provide financial assistance for projects to improve the administration of justice in State courts, including alternative dispute resolution. Congress also established a court annexed arbitration program in the 1988 Judicial Improvements and Access to Justice Act, allowing designated US district courts to refer pending civil actions to non-binding arbitration with the parties consent. This program originated as an experiment to be phased out after five years, but due to its overall success, it was made permanent in 1994.

Another example is the Dispute Resolution Act, 28 U.S.C. app. (1982), which was enacted to assist the States and interested parties in providing convenient access to dispute resolution mechanisms which are effective, fair, inexpensive and expeditious. In addition, the Judicial Improvements Act of 1990, 28 U.S.C.§§ 471-482, mandates that all Federal District courts implement a "civil justice expense and delay reduction plan" in order to reduce the expenses and delays incurred in litigation. Guidelines for the plans include the use of mediation as one option. Also, many States have enacted mediation or ADR statutes that require parties to attempt mediation before litigating their dispute.

Legal implications flowing from choices between the various procedures:

The legal implications would vary with the procedure used.

Rules, if any, defining the role and procedures of mediator:

There are no Federal statutes or rules that define the roles and procedures of mediators, conciliators, facilitators, experts, etc. Rather, mediation is largely under the control of the parties to a dispute. They may be assisted by rules developed by mediation and other ADR centres.

Resort to arbitration or courts during ADR:

Although US courts have ample statutory authority to enforce agreements to submit disputes to binding arbitration, they do not have the same ability to enforce agreements to engage in non-binding ADR. Some courts have enforced these mediation agreements by analogy to the Federal and State arbitration laws. Others have conceded that the Federal Arbitration Act in particular does not include such agreements, and have enforced them as a matter of contract law.

The courts have been willing to enforce provisions in contracts that call for mediation or other non-binding ADR as a condition precedent to pursuing other remedies, including litigation.

Some States such as California and Texas have enacted statutes pertaining to mediation of domestic disputes, that might under certain circumstances affect cross-border conflict resolution. Both California and Texas have adopted State statutes that pertain to the arbitration and conciliation of international commercial disputes. Neither statute requires the use of conciliation, but provides rules that do apply if the parties choose conciliation and the place of conciliation is located in the relevant State.

Confidentiality and admissibility of evidence in other proceedings:

There is no Federal law that governs the confidentiality and admissibility of evidence in ADR proceedings. Absent specific statutory treatment, protection of communications in mediation would have to rely on either the contract or the rules governing admission of evidence regarding settlement negotiations.

Recognition and enforceability of settlements:

The results of non-binding ADR are by definition, subject to acceptance by the parties to the dispute. If the matter is settled, i.e., the parties agree to the ADR result, that acceptance would likely be enforceable as a matter of contract law.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes

Such choices are at the discretion of the parties to the dispute, and are by and large not addressed in statutes or rules, other than perhaps those of ADR centres.

Restrictions on foreign legal representation in ADR proceedings or on nationality of the mediator:

There are no legal restrictions on the nationality of mediators or legal representatives in mediations.

LEGAL SOURCES AND REFERENCES

Although there is no official site containing information on dispute resolution facilities, several private organisations and the US Department of Commerce maintain Internet sites with information on dispute resolution facilities.

A sample of ADR Internet Sites:

- American Arbitration Association: www.adr.org
- CPR Institute for Dispute Resolution: www.cpradr.org
- American Stock Exchange (AMEX): www.AMEX.com
- NAFTA Home page: www.itaiep.doc.gov/nafta/nafta2.htm
- Section of Dispute Resolution/American Bar Association: www.abanet.org/dispute/home.htm
- Technical Arbitration & Conflict Resolution (TACR): www.batnet.com/oikoumene/tacr.html
- International Chamber of Commerce (ICC):www.iccwbo.org/arb/index.htm
- World Intellectual Property Organization: www.wipo.org/eng/index.htm

BIBLIOGRAPHY

The following is neither a complete nor exhaustive list. Citation of a title should not be considered endorsement of the views of the author. Internet resources include sites listing recently authored literature on commercial dispute resolution. The American Arbitration Association, for example, maintains such a site at: http://204.182.114.18/adrlit.html.

Aksen, Gerald, *International Arbitration and Dispute Resolution: Model Clauses and Choice of Forum*, ABA, National Institute on Negotiating and Drafting International Commercial Contracts 597, October, 1986.

Aksen, Gerald & Dorman, Wendy, "Application of the New York Convention by United States Courts: A Twenty Year Review (1979-1990)", 2 *Amer. Rev. Int'l Arb*. 65, 1991.

Baldwin, Charles, "Protecting Confidential and Proprietary Commercial Information in International Arbitration", 31 *Tex. Int'l L.J*. 451, Summer, 1996.

Carter, James, "The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?", *21* 15 *Mich. J. Int'l Law* 785, 1994.

De Ly, Filip, "Current Issues in International Commercial Arbitration: The Place of arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning" 12 *J. Int'l Bus*. 48, 1991.

Delaume, Georges, "Choice of Forum and Arbitration Clauses in the United States --A Judicial Crusade", 13 *J. Int'l Arb*. 81, March, 1996.

De Vries, Henry, "International Commercial Arbitration: A Contractual Substitute for National Courts", 57 *Tul. L. Rev*. 42, November, 1982.

Dress, Tobi, "International Commercial Mediation and Conciliation", 10 Loy., *L.A. Int'l & Comp. L.J*., 1988.

Hoellering, Michael, "Arbitrability", In Richard J. Medalie, ed., *Commercial Arbitration for the 1990s*, pp. 1-16. Chicago: Section of Litigation, American Bar Association, 1991.

Hoellering, Michael, "How to Draft an AAA Arbitration Clause", *ICSID Review*, vol. 7, no. 1, pp. 141-152, Spring, 1992.

Hoellering, Michael, *International Arbitration Under U.S. Law and AAA Rules*, International Council for Commercial Arbitration, Xllth International Arbitration Congress, 1994.

Hoellering, Michael, "Interim Measures and Arbitration: The Situation in the United States" *Arbitration Journal*, vol. 46, no. 2, pp. 22-27, June, 1991.

Hoellering, Michael, "Managing International Commercial Arbitration: The Institution's Role", *Dispute Resolution Journal* 12 , June, 1994.

McCormack, Howard, "Recent US Legal Decisions on Arbitration Law", 11 *J. Int'l Arb*. 73, 1994.

Miller, Jonathan, "Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement", 21 Pepp. *L. Rev*. 1313, 1994.

Perirman & Nelson, "New Approaches to the Resolution of International Commercial Disputes", 17 *Int'l Law* 215, 1983.

"Protecting Confidentiality in Mediation", 98 *Harv. L. Rev*. 441, 1984.

Resnik, Judith, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication", 10 *Ohio St. J. Disp. Resol.* 211, 1995.

Rivkin, David, "Peaceful Solutions: An International Guide to Commercial Arbitration" *International Financial Law Review* (May 1993 Supplement).

Slate, Williani K., "International Arbitration: Do Institutions Make a Difference?", 31 *Wake Forest L. Rev*. 41, 1996.

Smit, Hans, "Substance and Procedure in International Arbitration: The Development of a New Legal Order", 65 *Tul. L. Rev*. 1309, 1991.

Wallace, Richard, "Consolidated Arbitration in the United States - Recent Authority Requires Consent of the Parties", 10 *J. Int'l Arb.* 5, 1993.

Wright, Walter, "Mediation of private US-Mexico Commercial Disputes: Will It Work?", 26 *N.M. Law. Rev*. 57, 1996.

Zicherman, David, "The Use of Pre-Judgement Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches", 50 *U. Pitt. L. Rev* 667, 1989.

ARBITRATION STATUTES IN THE UNITED STATES

1 The Federal Arbitration Act, 9 USC., §§1 *et seq.*,
2 Alabama Code ANN., §§ 6-6-1 *et seq.* (1993).
3 Alaska Stat. ANN., §§ 09.43.010 *et seq.** (1994).
4 Arizona Rev. Stat. ANN., §§ 12-1501 *et seq.* * (1962).
5 Arkansas Code ANN., §§ 16-108-101 *et seq.** (1987).
6 California Code Civ. Proc. ANN., §§ 1280 *et seq.* (1961).
7 Colorado Rev. Stat., §§ 13-22-201 *et seq.** (1987).
8 Connecticut Gen. Stat. ANN., §§ 52-408 *et seq.* (1958).
9 Delaware Code ANN., Title 10, §§ 5701 *et seq.** (1975).
10 District of Columbia Code ANN., Title 16, §§ 16-4301 *et seq.** (1989).
11 Florida Stat. ANN., §§ 682.01 *et seq.** (1967).
12 Georgia Code ANN., §§ 9-9-1 *et seq.* + (1982).
13 Hawaii Rev. Stat., §§ 658-1 *et seq.* (1985).
14 Idaho Gen. Laws ANN., §§ 7-901 *et seq.** (1975).
15 Illinois Comp. Stat. ANN., Chapter 710, §§ 511 *et seq.* * (1993).
16 Indiana Code ANN., §§ 34-4-2-1 *et seq.**
17 Iowa Code ANN., §§ 679A.1 *et seq.* (1981).
18 Kansas Stat. ANN., §§ 5-401 *et seq.* * (1991).
19 Kentucky Rev. Stat. ANN., §§ 417.045 *et seq.* * (1992).
20 Louisiana Rev. Stat. ANN., §§ 9:4201 *et seq.*
21 Maine Rev. Stat. ANN., Title 14, §§ 5927 *et seq.* * (1964).
22 Maryland Cts. and Jud. Proc. ANN., §§ 3-201 *et seq.** (1989).
23 Massachusetts Gen. Laws ANN., Chapter 251, §§ 1 *et seq.* (1960).
24 Michigan Comp. Laws ANN., §§ 600.5001 *et seq.**
25 Minnesota Stat. ANN., §§ 572.08 *et seq.* *
26 Mississippi Code ANN., §§ 11-15-1 *et seq.* + (1972).
27 Missouri ANN. Stat., §§ 435.350 *et seq.** (1984).
28 Montana Code ANN., §§ 27-5-111 *et seq.* * (1985).
29 Nebraska Rev. Stat., §§ 25-2601 *et seq.* * (1989).
30 Nevada Rev. Stat. ANN., §§ 38.015 *et seq.* * (1986).
31 New Hampshire Rev. Stat. ANN., §§ 542:1 *et seq.* (1974).

32 New Jersey Stat. ANN., §§ 2A:24-1 *et seq.*
33 New Mexico Stat. ANN., §§ 44-7-1 *et seq.** (1994).
34 New York Civ. Prac. Laws ANN., §§ 7501 *et seq.*
35 North Carolina Gen. Stat., §§ 1-567.1 *et seq.** (1983).
36 North Dakota Cent. Code, §§ 32-29.2-01 *et seq.* * (1993).
37 Ohio Rev. Code ANN., §§ 2711.01 *et seq.* (1992).
38 Oklahoma Stat. ANN., Title 15, §§ 801 *et seq.** (1978).
39 Oregon Rev. Stat., §§ 36.300 *et seq.* (1993).
40 Pennsylvania Stat. ANN., Title 42, §§ 7301 *et seq.** (1980).
41 Rhode Island Gen. Laws, §§ 10-3-1 *et seq.* (1985).
42 South Carolina Common Laws, §§ 15-48-10 *et seq.** (1976).
43 South Dakota Codified Laws, §§ 21-25A-1 *et seq.** (1987).
44 Tennessee Code ANN., §§ 29-5-301 *et seq.** (1980).
45 Texas Rev. Civ. Stat. ANN., Art 10, §§ 224 *et seq.* * (1965).
46 Utah Code ANN., §§ 78-31a-1 *et seq.* (1992).
47 Vermont Stat. ANN., Title 12, §§ 5651 *et seq.** (1994).
48 Virginia Code ANN., §§ 8.01-577 *et seq.** (1992).
49 Washington Rev. Code ANN., §§ 7.04.010 *et seq.* (1947).
50 West Virginia Code ANN., §§ 55-10-1 *et seq.* (1994).
51 Wisconsin Stat. ANN., §§ 788.01 *et seq.* (1979).
52 Wyoming Stat., §§ 1-36-101 *et seq.** (1988).
53 Puerto Rico Laws ANN., Title 32, §§ 3201 *et seq.* (1990).

* Incorporating the Uniform Arbitration Act.

+ Applicable to construction disputes only.

ENDNOTES

[1] This list is limited to not-for-profit institutions. Many other arbitration and alternative dispute resolution organizations are located in the United States
[2] *Mastrobuono v. Shearson Lehman Hutton*, 115 S.Ct. 1212 (1995)
[3] Rules of Civil Procedure, Rule 16(c)(7)

VIETNAM

GENERAL OVERVIEW

Primary sources of law:

The primary sources of law in the statutory sense are legal documents enacted by the Vietnamese authorities pursuant to the:

- Constitution of the Socialist Republic of Vietnam 1992;
- Law on Promulgation of Legal Documents 1996.
- Resolutions of the Justice Council of the Supreme People's Court; and
- Decisions, Directives and Circulars of the Chairman of the Supreme People's Procuracy.

The Civil Code of Vietnam 1996[i] makes provision for the application of customary law or generally accepted principles in circumstances not covered by statutory law and in civil relationships in which there is no agreement stipulating the applied law.

The Commercial Law 1997 provides for the application of international treaties, foreign laws and international trade customs in trade relations with foreign countries. A contract or agreement between private parties may specify that the substantive law governing it shall be a foreign law or customary practice in international trade provided always that this is not contrary to Vietnamese law[ii].

Sources of law for commercial dispute resolution outside of the court system:

Laws relating to commercial dispute resolution are set out in the legal documents relating to economic contracts, arbitration, maritime and investment matters.

Institutions for dispute resolution outside of the court system:

The Vietnam International Arbitration Centre was established in 1993 to provide institutional facilities for resolving international commercial disputes.

Vietnam International Arbitration Centre
Chamber of Commerce and Industry of Vietnam
33 Ba Trieu Street
Hanoi

VIETNAM

Telephone: 84 4 825 0875
Facsimile: 84 4 825 6446; 824 4617

Recognition and enforcement of foreign arbitral awards:

The President of Vietnam signed the decision to accede to the New York Convention 1958 on 28 July 1995 subject to the following reservations:

- The Convention shall only be applied to recognition and enforcement in Vietnam of foreign arbitral awards rendered in the territory of countries that are Members of the Convention. If the foreign award is rendered in the territory of a country that has not signed or joined the Convention, the principle of reciprocity will apply.
- The Convention shall only be applied to disputes arising from commercial legal relationships.
- Interpretation of the Convention in a Court or other competent body in Vietnam shall be consistent with the Constitution and laws of Vietnam.

Vietnam's commitment to apply the New York Convention is contained in the Ordinance on Recognition and Enforcement of Foreign Arbitral Awards adopted by the Standing Committee of the National Assembly. The Ordinance came into effect on 1 January 1996.

Settlement of investment disputes through ICSID or bilateral investment agreements:

Vietnam is not yet a party to the Washington Convention. Vietnam has, however, signed a number of bilateral agreements with countries for the protection and promotion of foreign investment which include provisions for dispute resolution.

Laws relating to commercial dispute resolution currently under review:

The legislative programme of the tenth National Assembly has before it drafts of a Civil Procedure Code, an Ordinance on Economic (Commercial) Arbitration and an Ordinance on Economic Contracts (amended). These drafts are under earnest consideration and, if passed, will regulate the principles, authority and procedures for economic and commercial dispute resolution. It should be noted that the Draft Ordinance on Arbitration lists certain types of disputes that are not subject to arbitration, ie, those arising from administrative, labour, marriage, family and inheritance relationships.

ARBITRATION

Is arbitration law based on the UNCITRAL Model?

To date, Vietnam has had no legislation governing international commercial arbitration. As indicated above, the National Assembly is considering a draft Ordinance on Economic (Commercial) Arbitration. The draft Ordinance is based on the UNCITRAL Model Law with the objective of harmonising Vietnam's arbitration laws with those of the international community.

Differences in the application of arbitration law to international and domestic arbitration:

Currently Economic Arbitration Centres settle domestic economic disputes. The rules of these Centres promulgated by Decree116/CP dated 5 September, 1995 are largely identical to the Rules of Procedure of VIAC.

Limitations on types of disputes that may be arbitrated:

Pursuant to Decree 116/CP[iii], domestic Economic Arbitration Centres have jurisdiction to resolve disputes:

- arising out of commercial contracts
- between a company and its members or between its members relating to the company's establishment, operations or dissolution, or
- relating to the sale of stocks, shares and bonds.

VIAC has jurisdiction to resolve disputes:

- Arising from domestic business relations (Decision 114/TTg)[iv]. Business relations are those defined in the Law on Companies (Art. 3) as including any part or parts or the whole of the investment process from production to consumption or supplying a service to the market for profit.
- Arising from international economic relations such as contracts for sale and purchase, investment, travel, transportation, insurance, technology transfers, credit and financial settlements.[v]

Extent of party autonomy to define procedure:

In the absence of any legislation relating to international commercial arbitration the parties to a dispute could refer the dispute to *ad hoc* arbitration or to an arbitration institution for resolution using whatever rules they consider to be appropriate. In the event that the parties choose the Vietnam International Arbitration Centre (VIAC), may be conducted under the Rules of the Centre. These Rules were enacted by the Regulation on Organisation of the Vietnam International Arbitration Centre issued in conjunction with Decision No:204/TTg dated 28 April 1993 of the Prime Minister of Vietnam.

A number of laws specifically provide for arbitration such as:

- Law on Investment
- Maritime Code of Vietnam
- Law on Civil Aviation of Vietnam, and the
- Commercial Law.

These laws allow the parties to choose an appropriate arbitration centre for resolving commercial disputes between foreign organisations, individuals and Vietnamese enterprises.

Scope of court intervention and availability of courts for interim relief:

Currently a court will not accept a petition which would have the effect of pre-empting arbitration if the parties have agreed that disputes are to be resolved first by arbitration.[vi]

There are no rules which permit a court to make an interim injunction which would halt arbitration while arbitration is in progress. However, the Rules on Domestic Arbitration in VIAC do permit a party to seek an order from a court in the area where the other party has property to preserve or protect property in dispute.

Source and scope of procedural rules:

The rules for arbitrations conducted in Vietnam can be found in Decree No 116/CP of 5 September 1995. These include rules for domestic economic arbitration and rules for resolving disputes at VIAC arising out of an international economic relationship.

Rules relating to international arbitration including language and rights of representation by foreign attorneys:

The decision on the Status of the Vietnam International Arbitration Centre issued in conjunction with Decision No 204/TTg provides that foreign experts may be invited to act as arbitrators of the VIAC. Currently, VIAC is considering whether to request the Government to permit the Centre to invite foreign arbitrators to serve on its panel of approved arbitrators and to participate in international arbitrations. In practice, all arbitration at the domestic arbitration centres and at VIAC are carried out in Vietnam and the arbitrators must be Vietnamese citizens.

The Rules of VIAC provide that the parties may attend the hearing either personally or through their authorised representatives with power of attorney issued in due form. Such representatives may be Vietnamese citizens or foreigners.[vii] If necessary, the parties may require the Centre to provide interpreters at their own expense.[viii]

Law applicable to the substance of dispute:

The parties may agree upon the applicable law of their dispute, or, in the absence of such agreement, the arbitral tribunal may decide the dispute according to the law they think applicable to the dispute concerned.

Decision making by arbitral tribunal and form of award:

Decree 116/CP[ix] and the Rules of VIAC[x] prescribe the procedure for arbitration and form of award.

The parties have freedom to specify the applicable laws at the time the arbitration agreement is signed.

If the parties have not agreed on the applicable law and the arbitration takes place in Vietnam, the arbitral tribunal or sole arbitrator may decide that the applicable law shall be Vietnamese law or the foreign law that is most closely related to the dispute, for example:

- place of implementation of the contract
- place of sale/purchase, or
- place of hearing.

An overriding principle is that the applicable law must not be contrary to the public policy of Vietnam.

The Rules of VIAC provide that an arbitral tribunal or sole arbitrator shall settle the dispute according to the terms and conditions of the original contract, if the dispute arises from relations thereunder in accordance with the law applicable to it and with any related international treaties, taking into account customs of the trade and international practice.

Confidentiality:

The Rules of VIAC provide that all disputes shall be held in private[xi] and also that the arbitrator and other personnel of the Centre are responsible for the confidentiality of the matters involved in the dispute[xii].

Recourse against an award and admissible grounds:

The Ordinance on Recognition and Enforcement of Foreign Arbitral Awards provides that courts in Vietnam can set aside an award on any of the following grounds:[xiii]

- If a party to the arbitration agreement was under some incapacity;
- The agreement is not valid under the law to which the parties subjected it to the law of Vietnam;
- The party making the application to have the award set aside was not given proper notice of the appointment of the arbitrator/arbitral proceedings or was otherwise unable to present its case;
- If the award deals with disputes exceeding the arbitration agreement, then the award can be set aside.;
- If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, the law of the country that was the site of the arbitration.
- If the award has for any reason not become legally binding.
- If the award has been set aside, nullified by a competent authority in the country where the award was made or in the country of the applicable law.
- If the dispute is not subject to arbitration under the law of Vietnam.
- If recognition and enforcement of the award would be contrary to the public policy of Vietnam.

Recognition and enforcement:

The Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards provides the following procedure:[xiv]

- Within 15 days of a court decision recognising an award taking effect, the court will forward a copy of the decision and the award to the Civil Judgements Enforcement body of Vietnam.

- The enforcement of a foreign arbitral award must be in conformity with the Vietnamese laws on enforcement of civil judgements.

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Extent to which alternative dispute resolution (ADR) recognised:

ADR is a recognised and well promoted form of dispute resolution in Vietnam. This process is stipulated in the regulations on commercial dispute resolution. Not only does Vietnamese law have provisions on dispute resolution outside the court and arbitration procedures, the law also provides that the parties have the right to agree on how to settle their dispute at any stage in a trial or in arbitration proceedings.

Forms of ADR available for commercial disputes:

In addition to the court system and apart from arbitration which is dealt with, above, negotiation and mediation/conciliation are available for commercial dispute resolution.

Legislation or court rules making ADR mandatory or optional in commercial disputes:

Vietnamese Law contains provisions prescribing the situations in which negotiation and mediation is mandatory.

- The Law on Commerce provides that the parties involved in commercial disputes must first attempt to resolve them though negotiation or mediation/conciliation between the parties.[xv]

- The Ordinance on Procedure for Settlement of Civil Cases[xvi] and the Ordinance on Procedure for Settlement of Economic Cases[xvii] stipulate that prior to the commencement of the hearing in an economic trial and in the proceedings of civil disputes, the court may conduct an amicable settlement process.

- The Law on Foreign Investment in Vietnam provides for the principle that an investment. dispute must be first resolved though negotiation or mediation/conciliation.[xviii]

Legal implications flowing from choices between the various procedures:

Vietnamese law stipulates that the parties decide on the form of ADR. The Ordinance for

the Settlement of Economic Cases provides[xix] that an individual or a juridical person subject to procedure prescribed by law has the right to initiate economic action in order to request the court to protect their legitimate right under the law. The Ordinance also allows the plaintiff to withdraw or modify the content of the petition.[xx] The parties have the right to settle the dispute amicably. The Law on Foreign Investment in Vietnam[xxi] allows the parties to choose resolve the dispute by negotiation and conciliation.

If the parties agree to arbitration, the dispute is referred to an arbitration centre for resolution. However, if an adjudication for bankruptcy is involved, under the Law on Bankruptcy only the court have jurisdiction to make such an order.[xxii]

Rules, if any, defining the role and procedures of mediator:

Vietnamese Law has no specific provision on the role and procedure of mediator, conciliator, facilitator or expert in international commercial dispute. However, the Commercial Law provides that parties to a dispute may agree to choose a body. organisation or individual as the conciliator or mediator.[xxiii] Nevertheless, the Ordinance on Procedure for Settlement of Economic Cases allows for amicable settlement at a court (before or after opening of the hearing). This Ordinance provides that prior to the commencement of the hearing, the court shall conduct amicable settlement for the parties in an attempt to resolve the dispute.[xxiv] This Ordinance also provides that in the event that the parties agree on a settlement, the court, shall make a settlement protocol and issue a decision to recognise the agreement. This decision shall be enforceable, The conciliator/ mediator in this court mandated process is the judge who is in charge of the case.

Resort to arbitration or courts during ADR:

Vietnamese law provides that the parties to a dispute may refer the dispute to a court or to arbitration, but only after the parties have attempted unsuccessfully to resolve their dispute through negotiation or mediation/conciliation.

Confidentiality and admissibility of evidence in other proceedings:

The Ordinance on Procedure for Settlement of Economic Cases provides that the economic cases shall be tried in public, except cases which require the protection of a state secret or the legitimate request of a party for confidentiality.[xxv]

Recognition and enforceability of settlements:

The Ordinance for the settlement of Civil Cases[xxvi] and the Ordinance for the Settlement of Economic Cases[xxvii] contain provisions for the recognition and enforcement of settlement agreements arrived at through the amicable settlement procedure.

Limitations on the choice of ADR and jurisdiction of the mediator in commercial disputes:

There is no limitation on the choice of ADR except in bankruptcy situations. Nor are their limitations on the jurisdiction of the mediator/conciliator in commercial disputes.

Restrictions on foreign legal representation in ADR proceedings or on nationality of mediator:

There is no legislative restriction on foreign legal representation in ADR proceedings or on the nationality of mediator in Vietnam.

LEGAL SOURCES AND REFERENCES

There is no internet site containing authoritative information on dispute resolution facilities in Vietnam.

The relevant laws are follows:

- Law on People's Court Organization 1993.
- Law on Bankruptcy 1993.
- Commercial Law 1997.
- Law on Civil Aviation of Vietnam 1991.
- Maritime Code of Vietnam 1996.
- Law on Foreign Investment in Vietnam 1996.
- Ordinance on Procedure for Settlement of Civil Cases 1989.
- Ordinance on Procedure for Settlement of Economic Cases 1994.
- Ordinance on Recognition and Enforcement of Foreign Arbitral Awards 1995.
- Decree 116/CP on Organisation and Operation of Commercial Arbitration 1994.
- Regulation on organisation of Vietnam International Arbitration Centre issued in conjunction with Decision No.204/TTg date 28 April 1993

BIBLIOGRAPHY

ENDNOTES

[i] (Art. 14)
[ii] (Art. 4)
[iii] (Art. 1)
[iv] Art. 2
[v] Art. 2
[vi] Art. 32
[vii] Art. 19
[viii] Art. 22
[ix] Arts. 28,29
[x] Arts. 28-30
[xi] Art.24
[xii] Art.37
[xiii] Art.16
[xiv] Art.20
[xv] Art.239, Item 1
[xvi] Art.43
[xvii] Art.36
[xviii] Art.24.
[xix] Art.1
[xx] Art.2
[xxi] Art.24
[xxii] Art.4
[xxiii] Art.239, item 2
[xxiv] Art.36
[xxv] Art.7
[xxvi] Art.44
[xxvii] Art 36