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Maritime Arbitration Enforcement Series

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Arbitration in CHINA

ENFORCEMENT OF SCMA AWARDS IN MAINLAND CHINA

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Introduction

Driven by globalization and the "Belt and Road" initiative, Chinese companies are carrying out business activities all over the world. However, given the differences in legal regimes and business cultures, various kinds of cross-border disputes could potentially arise from these business dealings. Considering that a large number of disputes are cross-border, and that time, cost, flexibility, and confidentiality are also key considerations for parties, litigating in a local court of one party rarely suits all the parties. Instead, international arbitration offers an alternative option. Carefully choosing the applicable law and drafting an appropriate arbitration clause in anticipation of potential disputes, therefore, becomes particularly important when entering into a cross-border commercial contract.

This article examines the subject of arbitration from a Chinese law perspective and aims to provide an overview of Chinese arbitration law and maritime law (which is particularly relevant as cross-border trade frequently involves maritime transport) so that parties can have a better understanding of relevant Chinese law and make a informed choice based on their actual circumstances. This article will also provide an overview of the Chinese law on recognition and enforcement of foreign arbitral awards (where the parties choose foreign arbitration), and of the foreign arbitration institutions (such as the Singapore Chamber of Maritime Arbitration ("**SCMA**") that are often chosen by the parties, particularly when one of the parties is a Chinese company.

Overview of Chinese Law on Arbitration

In China, arbitration law is mainly comprised of (1) the Arbitration Law and the arbitration-related legal content in the Civil Procedure Law and the Civil Code; (2) the Comprehensive and Special Judicial Interpretation of the Supreme People's Court; and (3) International Treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**").

In general, parties can agree to settle disputes through arbitration by including an arbitration clause in the contract or by entering a separate written arbitration agreement either before or after the dispute occurs - except in the case of disputes arising from marriage, adoption, guardianship, child maintenance, and inheritance, and of administrative disputes which fall within the jurisdiction of the relevant administrative organs, according to the law.

Under Chinese law, four conditions need to be satisfied to ensure the enforceability of the arbitration agreement. The requirements are as follows:

1) the expression of the parties' intentions to submit disputes to arbitration must be set out in the arbitration agreement;
2) the scope of the matters to be arbitrated must be defined;
3) the specific arbitration commission selected by the parties must be specified; and
4) the arbitration agreement must be in writing and validly executed and entered into by individuals with full legal capacity or by legal persons.

Overview of Maritime Law in China

In China, maritime law is mainly comprised of (1) Laws, such as the Chinese Maritime Code ("**CMC**") and the Special Procedure Law of the People's Republic of China on Admiralty; (2) the Judicial Interpretation of the Supreme People's Court; and (3) International Treaties.

In general, the CMC aims to regulate the interactions between parties engaged in maritime transport and to promote the development of maritime transport and international trade. If any international treaty concluded or acceded to by China contains provisions differing from those contained in the CMC, the provisions of the relevant international treaty shall apply, unless they are provisions China has expressed reservations about. International practice may also be applied to matters where neither the relevant laws of China nor those of any international treaty concluded or acceded to by China, contain any relevant provisions.

Enforceability of Foreign Awards in China

In China, recognition and enforcement of foreign arbitral awards is usually a two-step process, i.e. recognition followed by enforcement. Where a foreign arbitral award requires enforcement by a court in China, the party seeking enforcement must apply to the relevant Chinese Court for both the recognition and the enforcement of the arbitral award. Once the Court recognises the award, then the enforcement is carried out in accordance with the enforcement procedures of Chinese Civil Procedure Law. Where the party seeking enforcement only applies for recognition without applying for enforcement at the same time, the Chinese court will only examine whether the arbitral award can be recognised and makes a ruling accordingly.

Recognition of foreign arbitral awards means Chinese courts have confirmed that foreign arbitral awards are enforceable by law in China. Since technically speaking, the foreign arbitral award is only effective in the territory of the country where the place of the arbitration is located (in the sense that it usually does not become automatically effective in other countries before it is recognised by the relevant judicial authority in that country), and for the award to become effective in China, the parties will need to seek confirmation on the effectiveness of the award from the Chinese courts. Recognition of a foreign arbitral award is a process in which a party applies to the court to review and make a ruling on the effectiveness of the award by the law, i.e. a judicial act to confirm whether a foreign arbitral award is effective in accordance with the procedures prescribed by Chinese law.

Although these are two independent processes, some parties may in practice apply to the court for recognition and enforcement of foreign arbitral awards through a single application. In that case, the court will still usually address the recognition issue first and, if successful, then the enforcement procedure.

The framework of Chinese recognition and enforcement of foreign arbitral awards has been taking shape over the last few decades and is based on international law and domestic law.

The international law basis includes (1) the New York Convention; (2) bilateral or multilateral agreements; and (3) the principle of reciprocity.

New York Convention

Since China acceded to the New York Convention in 1987, Chinese courts have gained extensive experience in the recognition and enforcement of foreign arbitral awards. The Convention is widely applied globally and endows foreign arbitral awards with enforceability in the contracting states, thereby promoting arbitration as a valuable dispute-resolution mechanism for international trade. The New York Convention has become one of the major legal bases for Chinese courts to recognise and enforce foreign arbitral awards.

Bilateral agreements

A bilateral agreement refers to a treaty concluded between two countries only. Increased globalization and the consequential risk of trade frictions and conflicts have led countries to seek arrangements promoting improved trading relations and judicial cooperation. To date, China has entered into bilateral treaties for civil and commercial judicial assistance with 39 countries, 36 of which have come into force and include provisions for the mutual recognition and enforcement of arbitral awards. Bilateral treaties, therefore, form an important legal basis for Chinese courts to recognise and enforce foreign arbitral awards, although the scope of application is relatively narrow given that it is only limited to those countries that have a treaty with China.

The principle of reciprocity

The principle of reciprocity, which refers to the mutual benefit agreed between countries through the mutual transfer of privileges and interests, can also play an important role in the judicial cooperation between states. However, it should be noted that since most countries have acceded to the New York Convention, it is relatively rare for current Chinese judicial practice to publish a case of recognition and enforcement of foreign arbitral awards based on the principle of reciprocity.

Institutional vs ad hoc Arbitration – Chinese Perspective

In China, the principal domestic law for recognizing and enforcing foreign arbitral awards is Article 283 of Civil Procedure Law of the People's Republic of China (Revised in 2017) ("**Civil Procedure Law**"), which stipulates that "*if an award made by a foreign arbitration institution needs to be recognised and enforced by a people's court of the People's Republic of China.... the people's court shall handle the matter according to* ***international treaties*** *concluded or acceded to by the People's Republic of China or in accordance with* ***the principle of reciprocity***" (our emphases).

By way of further explanation, Article 545 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Revised in 2020) ("**Interpretation**") stipulates that where a party applies to a people's court for recognition and enforcement of an arbitral award rendered by an ad-hoc arbitration tribunal outside the territory of the People's Republic of China, such application shall be dealt with by the People's Court in accordance with the provisions of Article 283 of the Civil Procedure Law, the full provision of which is set out above. It indicates that ad hoc arbitration awards are in principle, recognizable in China, as long as they can meet the requirements under the applicable international treaties (mainly the New York Convention) and/or the principle of reciprocity.

Regarding international treaties, there are both multilateral treaties and bilateral treaties applicable in China. For multilateral treaties, it is usually the New York Convention that will apply. For bilateral treaties, as mentioned above, China has entered into bilateral treaties for civil and commercial judicial assistance with 39 countries. Except for the treaty with Turkey, the content of the recognition and enforcement of arbitral awards in the remaining treaties all points to the application of the New York Convention.

Therefore, the Chinese courts will essentially apply the provisions of the New York Convention to recognise and enforce foreign arbitral awards issued in member states of the New York Convention, subject to reciprocity reservation statements[i] and commercial reservation statements.[ii] According to Article I paragraph 2 of the New York Convention, the term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. Accordingly, **both foreign ad-hoc arbitral awards and institutional arbitral awards can, in principle, be recognised and enforced in Chinese courts in accordance with this provision.**

Regarding the principle of reciprocity mentioned in Article 283 of Civil Procedure Law and Article 545 of the Interpretation, given the wide application of the New York Convention, in practice, Chinese courts rarely recognise and enforce foreign arbitral awards based on this principle. However, in theory, foreign arbitral awards issued in non-signatory states of the New York Convention could be recognised and enforced in China under the principle of reciprocity. It is worth noting that the Chinese courts' understanding of the principle of reciprocity has been shifting from "factual reciprocity"[iii] to "presumed reciprocity"[iv] which is a more flexible standard for the recognition and enforcement of foreign judgments.

Status of SCMA Awards in China

The SCMA is a specialist arbitration institution which provides a neutral, cost-effective and flexible framework for maritime and international trade arbitrations that is responsive to the needs of industry users. Its global and regional members hail from all sectors of maritime, trade and arbitration communities. SCMA attracts disputants in the region by providing tailored solutions to suit the region's interests.[v]

Parties can refer any dispute to arbitration under the SCMA Arbitration Rules. While the SCMA Arbitration Rules were designed to address the needs of the maritime community, many other sectors can benefit from choosing SCMA. SCMA's model means that disputants are given all the tools they need to self-administer their arbitration with one distinct advantage — the option of services provided by SCMA's dedicated Secretariat. This translates into maximum flexibility over the arbitration process while ensuring peace of mind that the institution can provide a range of services, where requested. Unless disputants choose to use any of SCMA's services, no costs are levied by the SCMA. The self- administered model means that a party can commence and run the arbitration entirely at its own cost. The SCMA neither imposes any mandatory deposits nor enforces a scale of fees for arbitrator remuneration. Any fees paid to the arbitrator are mutually agreed between disputants and the arbitrator. It has strict admission criteria for inclusion in its panel of arbitrators (for instance, putative arbitrators must have at least 10 years in the shipping industry to be qualified as arbitrators for the SCMA), although parties are not restricted to choosing an arbitrator from the SCMA's panel of arbitrators only.[vi]

According to "2020 Year in Review" issued by SCMA, in 2020, they dealt with a total of 43 cases involving parties from their own country, other countries in Asia (including China), the United Arab Emirates, and other parts of the world. The total claim amount was USD 49.37 million with an average claim amount of USD 1.23 million.

Singapore and China are both parties to the New York Convention. Therefore, once parties obtain an arbitral award issued in Singapore, the basis for applying for recognition and enforcement in China will be the New York Convention. An SCMA award is considered an institutional arbitration award in China,[vii] which, in principle, can be recognised and enforced in Chinese courts. It is worth noting that based on the records of the existing cases published on Itslaw,[viii] as of 1 June 2021, it seems that all the SCMA awards have been successfully recognised and enforced in China, which indicates their acceptance by Chinese courts.

Comment

Arbitration as an alternative dispute resolution method to litigation is becoming increasingly popular. Bearing in mind the issue of recognition and enforcement of awards where international parties are involved, choosing the right place for the arbitration proceedings is critical as it directly impacts whether the parties can successfully enforce the award.

For further information on this topic, you are welcome to contact the authors of this update or your usual contact at Clyde & Co.

[i] Article 1 of the Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China stipulates that this Convention shall apply to the recognition and enforcement of an arbitral award made in the territory of another contracting State.

[ii] Article 1 of the Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China stipulates that this Convention shall only apply to the disputes arising from any contractual or non-contractual commercial legal relationship.

[iii] It generally refers to the premise that the judgment of a foreign court being recognised and enforced in the Chinese court is the country where the foreign court is located has a precedent of recognizing and enforcing the judgment of the Chinese court, otherwise the Chinese court will refuse to recognise and enforce it.

[iv] Article 7 of the Nanning Declaration (第二届中国-东盟大法官论坛南宁声明) dated 8 June 2017 stated that "...states that have not yet concluded the recognition and enforcement of international treaties related to foreign civil and commercial judgments, in the judicial procedures for the recognition and enforcement of the other states' civil and commercial judgments, if there are no precedents in the courts of the opposing states that refuse to recognise and enforce the civil and commercial judgments on the grounds of reciprocity, within the scope permitted by the domestic laws of the state it can be presumed that there is a reciprocal relationship with the opposing state. (尚未缔结有关外国民商事判决承认和执行国际条约的国家，在承认与执行对方国家民商事判决的司法程序中，如对方国家的法院不存在以互惠为理由拒绝承认和执行本国民商事判决的先例，在本国国内法允许的范围内，即可推定与对方国家之间存在互惠关系。)

[v] Singapore Chamber of Maritime Arbitration website https://www.scma.org.sg/Default.aspx?sname=scma&sid= 126&pageid=2969&catid=4175&catname=About-Us (accessed 31 May 2021).

[vi] Singapore Chamber of Maritime Arbitration website https://www.scma.org.sg/Default.aspx?sname=scma&sid= 126&pageid=2969&catid=4206&catname=Resources#FA Q (accessed 31 May 2021).

[vii] (2017) J04MT No.25 (China Light TRI-UNION International Co., Ltd. vs. Tata International Metal (Asia) Co., Ltd.).

[viii] https://www.itslaw.com/home.

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Clyde & Co is a leading international law firm with 440 partners and 2,500 legal staff, operating from over 50 offices and associated offices across six continents. In China, Clyde & Co established a joint law venture with Chinese local law firm Westlink Partnership in 2013 - Clyde & Co Westlink JLV. The joint law venture is able to provide seamless onshore and offshore legal advice as a single entity.

Clyde & Co Westlink JLV draws together Clyde & Co's international expertise with the full domestic Chinese law capability of Westlink Partnership for clients with an interest in China.

The firm's China qualified attorneys have rights of audience before the Chinese Courts / arbitration institutions and can advise on all facets of domestic litigation, arbitration, commercial disputes and insolvency work in China. The team has acted as lead counsel in applications, trials and appellate proceedings, before various levels of courts in China. They also have impressive track records in recognising and enforcing foreign arbitral awards in China.

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#02 | AUG

Arbitration in INDONESIA

MARITIME DISPUTE RESOLUTION AND ARBITRATION ENFORCEMENT: AN INDONESIAN LAW PERSPECTIVE

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Summary

This article provides a brief overview of the Indonesian legal framework pertaining to maritime matters, as well as arbitration proceedings under Indonesian law as one of the means of dispute resolutions available in the country. This article also discusses the enforceability of foreign arbitral awards in Indonesia.

Maritime-related disputes are settled through court proceedings or via arbitration, subject to the parties' agreement on a dispute resolution mechanism stipulated in their contractual documents. While foreign court judgments are not enforceable in Indonesia, foreign arbitral awards – including awards from Singapore Chamber of Maritime Arbitration ("**SCMA**") – are enforceable to the extent that local requirements and procedures under the Indonesian Arbitration Law have been duly complied with.

Overview of Indonesian Law on Arbitration

Matters regarding arbitration in Indonesia are mainly governed under Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolutions ("**Indonesian Arbitration Law**"), which provides general guidelines for dispute resolutions through arbitration proceedings. In addition, Indonesia is also bound to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**1958 New York Convention**"), which affects the recognition and enforcement of foreign arbitral awards in Indonesia, as detailed in the section on enforceability below.

In principle, all arbitration proceedings must be initiated pursuant to an arbitration clause or arbitration agreement as agreed by the relevant parties prior to or after the occurrence of the relevant disputes.

Article 2 of the Indonesian Arbitration Law states that "*the settlement of disputes or differences of opinion between parties in a particular legal relationship* [shall be based on] *an explicit arbitration agreement between the parties which states that any disputes or differences of opinion that arise or are likely to arise of such legal relationship will be settled by way of arbitration or by alternative dispute resolution*".

Under Article 3 of the Indonesian Arbitration Law, no district court in Indonesia shall have jurisdiction to hear disputes between parties that are bound by an arbitration clause or arbitration agreement.

Any arbitral award published is final and binding in nature and therefore, no further legal remedy (appeal to an Indonesian court or otherwise) is available against the validity of the arbitral award.

Overview of Maritime Law in Indonesia

Framework of Maritime Law in Indonesia

In Indonesia, matters relating to maritime law are governed by various laws and regulations, including but not limited to Law No. 6 of 1996 on Indonesian Waters, Law No. 32 of 2014 on Maritime (as amended with Law No. 11 of 2020), Law No. 17 of 2008 on Shipping (as amended with Law No. 11 of 2020) ("**Shipping Law**"), Law No. 31 of 2004 on Fisheries (as emended with Law 45 of 2009) ("**Fishery Law**") and the Indonesian Commercial Code ("**ICC**").

In general, the Shipping Law provides a regulatory framework for the management of maritime resources in Indonesia and its related aspects, including environmental protection, law enforcement, and safety standards. It regulates the conduct of parties engaged in maritime transport and promotes the development of marine transport within the archipelago.

The Fishery Law was promulgated to regulate fishing activities in the country's waters, with some emphasis on ensuring that proper legal enforcement options (including criminal sanctions) are available against violators. These cases are heard in fisheries courts which are under the supervision of the nation's Supreme Court.

The ICC regulates commercial aspects of shipping matters, including the allocation of liability amongst parties involved in collision between vessels. The general rules for liability allocation established under the ICC in the event of vessel collisions are:

(a) If a collision occurs by accident without fault or due to a force majeure or of uncertain cause, damages are to be borne by the party that suffers them (Article 535 of the ICC).
(b) If a collision occurs due to the fault of one party, the party at fault is liable for the damages that were caused. Any loss or damage arising or resulting from non-seaworthiness of the vessel will be added to the liability of the party at fault (Article 536 of the ICC).
(c) If a collision occurs due to the fault of more than one party, the parties at fault are liable in proportion to their respective level of fault in regard to the collision (Article 537 of the ICC).

In addition to these domestic laws, Indonesia is also bound by several international treaties, *inter alia*, the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) as ratified under Presidential Decree No. 18 of 1978, the Convention on the International Regulations for Preventing Collisions at Sea (COLREG Convention) as ratified under Presidential Decree No. 50 of 1979, and the International Convention for the Safety of Life at Sea (SOLAS) as ratified under Presidential Decree No. 65 of 1980 and Presidential Decree No. 21 of 1988.

In Indonesia, international treaties are not automatically enforceable and have no legislative effect in the absence of further ratification by the legislature (or in some cases, the president). Under Law No. 24 of 2000 on International Treaties (Treaties Law), these treaties need to undergo a ratification process through the issuance of a law (*undang-undang*) or presidential decree (*keputusan presiden*), as relevant, in order to be enforceable in Indonesia.

Maritime/Shipping Disputes Resolution in Indonesia

Other than the Maritime Court (*Mahkamah Pelayaran*) which was established to adjudicate disputes where there are indications of negligence or other violations in the application of standards of seamanship in the event of an accident, Indonesia does not have a special court to deal with shipping disputes.

Pursuant to the Shipping Law, the Maritime Court has jurisdiction over all cases involving seamanship standards where marine accidents occur within Indonesian waters or territory, as well as accidents that take place in or with respect to Indonesian flagged ships outside Indonesian waters and territory, including sinking, collision, and grounding cases. The authority of the Maritime Court, however, is limited to the imposition of administrative sanctions with regards to the violations of the seamanship professional standards.

Any other shipping-related contractual disputes are generally resolved through (i) court proceedings; or (ii) arbitration, depending on the parties' choice of forum. In this regard, a district court has broad jurisdiction to hear various types of disputes, including disputes with an unlawful act / tort element, whereas the jurisdiction of arbitration is limited to disputes involving "commercial" matters, which under the Indonesian Arbitration Law include disputes in commerce (*perniagaan*), banking, finance, investment, industry, and intellectual property.

Court proceedings in Indonesia are attractive to some because its conduct is open to public, and they generate records. Court proceedings also afford the losing party with the opportunity to lodge opposition efforts against the court's decision (i.e. appeal, cassation or judicial review).

On the other hand, arbitration proceedings are less time-consuming in comparison to court proceedings in Indonesia. Additionally, arbitration awards are final and binding in nature. As such, parties that are dissatisfied with an award would not be able to appeal or oppose such awards.

There is no specialist arbitral body dealing specifically with maritime disputes in Indonesia. Instead, to the extent the parties have agreed to resolve their disputes via arbitration, Indonesia's domestic arbitration body *Badan Arbitrase Nasional Indonesia* ("**BANI**") has maritime law specialists capable of handling disputes in this context.

International arbitration bodies specialising in maritime disputes, such as the SCMA, are also attractive options. We discuss the enforceability of SCMA awards in Indonesia in a later section below.

Enforceability of Foreign Awards in Indonesia

Foreign Court Judgments are not Enforceable in Indonesia

Indonesia is not a signatory to any multilateral or bilateral treaties that regulate the enforcement of foreign court judgments. This means that judgments rendered by foreign courts are not enforceable in Indonesia (Article 436 (1) of the *Reglement op de Rechtvordering* ("**RV**")).

What commonly takes place in practice is that a party who has obtained a favourable foreign court judgment would file a fresh claim at the relevant Indonesian court to re-litigate the case. As part of the fresh proceedings, the party may submit the foreign court judgment as *prima facie* evidence (Article 436 (2) of the RV). Although they are not bound by foreign court judgments, when examining cases, Indonesian judges may exercise their broad discretion to weigh the evidentiary value and relevance of any submitted foreign court judgment. In exercising such discretion, the court will examine whether the relevant foreign court judgment violated any principles of public order or public policy in Indonesia.

Enforcement of Foreign Arbitration Award in Indonesia

Indonesia is bound by the 1958 New York Convention, which is ratified by the Presidential Decree No. 34 of 1981 on the Ratification of "Convention on the Recognition and Enforcement of Foreign Arbitral Awards". Therefore, any "foreign arbitral award" issued in a country that is also a signatory to the 1958 New York Convention may be recognised and enforced in Indonesia.

The Indonesian Arbitration Law defines a foreign arbitral award as an award handed down either by an arbitration institution or arbitrators under a self-administered arbitration proceeding outside Indonesia. Enforcement of a foreign arbitral award in Indonesia is subject to certain administrative procedures required by the Indonesian Arbitration Law, including foreign arbitral award registration and obtaining a writ of execution (known as an *exequatur* order) from the Central Jakarta District Court ("**CJDC**") – this is detailed below.

Under the Indonesian Arbitration Law, a foreign arbitral award is enforceable in Indonesia if it fulfils the following requirements and procedures:

a. the award must have been rendered by an arbitrator or arbitration panel in a country that is bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (i.e. the 1958 New York Convention);
b. the award must be within the scope of commercial law under Indonesian law;
c. the award does not contravene public order;
d. the award must be registered at the CJDC; and
e. the award has obtained a writ of execution (*exequatur* order) from the CJDC Chairman.

Registration with the CJDC and Procedures in Obtaining Exequatur Order

The foreign award must first be registered at the CJDC by the arbitrator or the arbitrator's proxy, attaching the following documents:

a. power of attorney from the arbitrator (if registered by the arbitrator's proxy);
b. certified true copy of the award, in accordance with the provisions on foreign document authentication, together with its official Indonesian translation;
c. certified true copy of the underlying agreement, in accordance with the provisions on foreign document authentication, together with its official Indonesian translation; and
d. statement from the Indonesian embassy in the country where the award was handed down, stating that the country is bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (i.e. the 1958 New York Convention).

After the award has been registered, the applicant must file an application to obtain a writ of execution (*exequatur* order) from the CJDC Chairman.

Once an exequatur order has been issued, the CJDC will summon the defendant and order them to comply with the arbitral award (*aanmaning* order). If, after the *aanmaning* order, the defendant fail to comply with the arbitral award, execution will be commenced over the defendant's assets by selling them through public auction or private sale.

Attempt to challenge the enforcement of foreign arbitration award

Theoretically, no further legal action can be taken by the parties against the arbitral award. In practice, however, there are a few precedents where enforcement of a foreign arbitral award was challenged on ground that they contravened public policy or order. In the absence of any detailed definition and guidelines on the interpretation of "public policy or order", unsuccessful parties to foreign arbitrations often seek to avoid award enforcement in Indonesia by presenting arguments that enforcement would be against public policy or order. There is no specific timeframe as to when such challenge may be submitted.

Institutional vs ad hoc Arbitration – an Indonesian perspective

The Indonesian Arbitration Law recognizes both "institutional" arbitration (for example, Indonesia's BANI) and "ad hoc" arbitration (i.e. without specifying any institution to administer the proceedings under its rules) as valid means to resolve disputes. As such, the parties are entitled to determine their preferred type of arbitration in their agreement.

The "institutional" approach appears to be dominant in agreements governed by Indonesian laws. However, the parties may also agree on a set of procedural rules to govern their arbitration proceedings under a self-administered arbitration (such as the SCMA) or an "ad hoc" arbitration to the extent that such rules do not contradict mandatory provisions under Indonesian Arbitration Law.

Enforcement of foreign arbitral awards rendered under the two approaches will follow the same procedures as set out in the Indonesian Arbitration Law. Please see discussion in the enforceability section above for the detailed explanation.

Status of SCMA Awards in Indonesia

An SCMA award is considered as a foreign arbitral award under the Indonesian Arbitration Law provided that such an SCMA award is issued outside of Indonesia territory. As such, an SCMA Award obtained shall be enforceable once it has obtained a writ of execution (*exequatur order*) from the CJDC Chairman.

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#03 | SEP

Arbitration in
AUSTRALIA

ARBITRATION AND MARITIME LAW IN AUSTRALIA

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Introduction

According to the 2020 survey conducted by the Australian Centre for International Commercial Arbitration ("**ACICA**"), arbitration in Australia is 'thriving'.[1]

The 2010 arbitration law reforms modernised Australia's legal arbitration framework and brought it in line with international standards.[2] Judgments of Australian Courts demonstrate an approach supportive of arbitral proceedings, as well as a pro-enforcement attitude towards foreign arbitral awards.

Australia has well-developed maritime and admiralty laws with the *Admiralty Act 1988* (Cth) ("**Admiralty Act**") and the *Carriage of Goods by Sea Act 1991* (Cth) ("**COGSA**") at the pinnacle. These statutory laws complement the arbitration framework.

Both institutional and ad hoc arbitrations are gaining popularity[3] due in part to the favourable approach of Australian Courts exercising supervisory jurisdiction.

There is a longstanding practice in Australia of recognition and enforcement of arbitral awards rendered by Singaporean arbitral tribunals, of which SCMA is considered to be one of the most important for maritime claims.

Overview of Australian Law on Arbitration

Overview

Arbitration is a significant mode of dispute resolution within the Asia-Pacific region and Australia. ACICA reported that between 2016 to 2019, a total of 223 arbitrations involving an Australian connection were recorded, with over A$35 billion in dispute.[4]

International arbitration in Australia is governed by the *International Arbitration Act 1974* (Cth) ("**IAA**"). In 2010, the international arbitration regime in Australia underwent a series of reforms aimed at supporting arbitration which resulted in the implementation of amendments to the IAA. The IAA gives effect to the UNCITRAL Model Law[5] and implements the New York Convention,[6] which in turn governs the recognition and enforcement of foreign arbitration awards (discussed in greater detail below).

Domestic arbitration is governed by state and territory laws which have all adopted relatively uniform legislation based on the UNCITRAL Model Law in the form of a Commercial Arbitration Act.[7] Where the UNCITRAL Model Law applies, the arbitration law of an Australian State or Territory will not apply under section 21 of the IAA.[8]

Provisions of the IAA

Section 16(1) of the IAA gives force to the UNCITRAL Model Law.[9] Subject to limited exceptions, the provisions of the UNCITRAL Model Law govern international arbitration in Australia. For example, unlike in jurisdictions such as Singapore and Hong Kong, Article 17B of the UNCITRAL Model Law does not form part of Australian law[10] and so in Australia, parties are required to apply to a Court (not the arbitral tribunal) for *ex parte* interim measures, such as freezing or search orders. All other interim measures are permitted.

The IAA contains several provisions in aid of arbitration proceedings that supplement the UNCITRAL Model Law. For example, Division 3 of Part III of the IAA confers powers on the Australian Courts to make orders assisting parties with gathering evidence in arbitral proceedings, such as issuing subpoenas.[11] Section 23K of IAA confers power on arbitral tribunals to order security for costs.[12] Sections 25 and 26 of the IAA allow for an award of pre and post judgment interest in arbitral proceedings.[13]

Pro-arbitration Spirit

Australia's integrated statutory framework for domestic and international arbitration is supported by a pro-arbitration approach taken by the Australian Courts. For example, the High Court of Australia has recognised that the UNCITRAL Model Law limits the power of Australian Courts to intervene in matters governed by the UNCITRAL Model Law except where curial intervention is provided for by the UNICTRAL Model Law.[14]

Several pieces of legislation in Australia provide for the stay of competing court proceedings in favour of arbitration. Section 7(2) of the IAA provides that on an application by a party to a relevant arbitration agreement, proceedings shall be stayed and referred to arbitration, provided that certain conditions are met.[15] The Federal Court of Australia has recently exercised this power to refer a dispute in relation to a slot charterparty to arbitration.[16] Further, the Federal Court of Australia may stay proceedings in favour of arbitration pursuant to section 29 of the Admiralty Act on a condition that a ship or property under arrest in the proceedings be retained by the Court as security for the satisfaction of any award or judgment that may be made in an arbitration or in a proceeding in the Court of a foreign country.[17] The Federal Court of Australia may also refer proceedings to arbitration with or without the consent of the parties pursuant to section 53A of the *Federal Court of Australia Act 1976* (Cth).[18]

Australian Courts generally uphold arbitration agreements by giving a broad and liberal interpretation to arbitration clauses. As an example, the High Court upheld arbitration agreements contained in three separate deeds which directed parties to resolve disputes '*under this deed*' or '*all disputes hereunder*' by means of arbitration.[19] The exchange of signed letters is also sufficient evidence of a written agreement to arbitrate as provided under Article 7(2) of the UNCITRAL Model Law.[20]

Overview of Maritime Law in Australia

Admiralty Act

At the foundation of maritime law in Australia is the Admiralty Act. The Admiralty Act confers jurisdiction on the Federal Court of Australia and the Supreme Courts of Australian States and Territories to hear maritime claims. The Admiralty Act allows proceedings to be commenced *in rem* against a ship or other property[21] or *in personam* against a person or an organisation.[22]

Part III of the Admiralty Act provides exclusive bases upon which an action *in rem* may be brought, being maritime liens, [23] proprietary maritime claims,[24] owner's liabilities[25] and demise charterer's liabilities.[26]

A maritime lien is a charge attaching to a ship, cargo or freight that secures certain types of maritime claims by giving a right to enforce a claim in a Court exercising Admiralty jurisdiction.[27] In Australia, maritime liens can be supported by claims in relation to ship damage, salvage reward and crew's wages.[28] Claims for towage services and supply of necessities cannot be supported.[29] A maritime lien attaches to the property from the moment the claim arises and so enjoys priority over all other charges.[30] Australian Courts will only enforce a foreign maritime lien[31] if it corresponds to a maritime lien found within the Admiralty Act. For example, this means that maritime liens for the supply of necessaries which are recognised in the United States will not be regarded as maritime liens in Australia.

'Proprietary maritime claims' in respect of which *in rem* proceedings can be brought (broadly) include claims involving rights of possession and ownership of a ship. 'General maritime claims' include claims in respect of damage to ships and personal injury or personal liability as a result of a defect in a ship,[32] as well as claims for the enforcement of or arising out of an arbitral award made in respect of a claim referred to in the Admiralty Act.[33] Additionally, 'general maritime claims' may be brought against surrogate ships, if the owner of the surrogate ship was the relevant person which owned or chartered, or was in possession or control of, the first ship when the cause of action arose.[34] Holders of maritime liens do not have a right of surrogate ship arrest as maritime liens attach only to the ship in respect of which the claim arises.[35]

The procedure for matters under the Admiralty Act is prescribed by the *Admiralty Rules 1988* (Cth) and is supported by the *Federal Court Rules 2011* (Cth).[36] Broadly speaking, proceedings *in rem* are commenced by the filing of a writ with the Federal Court of Australia which is required to be served on the Respondent. The Applicant may then apply for the arrest warrant to be issued in respect of a ship or property. Given the remoteness of some ports in Australia, the Admiralty Marshal in Australia works closely with local customs or police officers or other suitable persons to assist with arrests.

Limitation periods for *in rem* proceedings are governed by the limitations acts of the respective Australian States and Territories, or in default, are set at three years.[37] For example, in New South Wales the limitation period for

actions *in rem* for recovery of crew's wages is six years and an action for damage as a result of a collision or for salvage services is two years.[38] This is in line with limitation periods set out in the *International Convention on Salvage 1989*[39] and the *International Convention Relating to the Arrest of Sea-Going Ships 1952,* respectively.[40]

COGSA

Another important legislation governing maritime law in Australia is the COGSA. The COGSA gives effect to a modified version of the Hague-Visby Rules.

The Australian version of the Hague-Visby Rules, or the Amended Hague Rules,[41] governs sea carriage documents for outward-bound international carriage from Australia.[42] The unmodified version of the Hague-Visby Rules continues to apply to inward-bound international carriage to Australia from the Hague-Visby Contracting States,[43] save for:

(a) inward-bound international carriage to Australia under non-negotiable sea-carriage documents (unless different Rules apply by virtue of the law of the country of shipment),[44] and
(b) inward-bound international carriage to Australia from non-Contracting States (unless sea-carriage document incorporates other Rules).[45]

It should be noted that the definition of '*sea carriage documents*' has been broadened in Australia to include sea waybills and delivery orders, in addition to bills of lading.[46]

Section 11(1)(a) of the COGSA deems the choice of law of sea-carriage documents relating to the carriage of goods by sea out of Australia to be Australian law. Section 11(2)(a) of the COGSA prescribes the compulsory choice of forum for disputes in respect of sea-carriage documents for the carriage of goods by sea into or out of Australia to be Australian Courts.

Any agreement which purports to modify or limit the compulsory choice of law and forum is void[47] and this has led to a number of cases where Australian Courts have struck down clauses providing for arbitration in London.[48] This was clarified by the Full Federal Court of Australia in *Norden*[49] which held that an arbitration clause in a voyage charterparty in favour of foreign arbitration did not fall foul of section 11 of the *COGSA* because a voyage charterparty was an agreement for the hire of a ship and not a '*sea-carriage document*' for the purposes of section 11 of the COGSA.[50]

Section 11(3) of the *COGSA* allows parties to agree on the choice of law applicable in any arbitration proceedings, provided that those arbitration proceedings take place in Australia.

The limitation of liability provisions in Australia are largely consistent with the unmodified Hague-Visby Rules in that the liability of the shipper or the carrier for loss or damage to the goods is limited to an amount not exceeding 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.[51]

The Australian modification to Article 4, rule 5(a) of the Hague-Visby Rules which deals with the limitation of liability, is to replace the term '*bill of lading*' with '*sea carriage document*'.[52] This expands the ambit of documents in which shippers may declare the true value and nature of goods (in which case the declared value of goods is taken to be their *prima facie* value).[53] The enumeration of items packed in a container on the face of the sea carriage document is used for the purposes of limitation of liability, even if the document indicates that the carrier does not know the number of items packed.[54]

At present, the Australian position on the burden of proof under the Hague-Visby Rules differs from the position in UK in *Volcafe*.[55] In Australia, a plaintiff bringing a cargo claim is required to establish negligence on the part of the defendant carrier, which constitutes a breach of Article 3, rule 2, before any question of defences arises; proof of damaged goods on arrival alone is insufficient.[56] While the Australian position was considered by the UK Supreme Court in *Volcafe* and rejected, until the High Court of Australia has an opportunity to reconsider this issue, the position in *Great China Metal*[57] remains authoritative in Australia.[58]

Another notable amendment in Australia is the extension of the period of the carrier's responsibility under the Amended Hague Rules beyond tackle to tackle to the period commencing when goods are delivered to the carrier within a port and ending when goods are delivered to the consignee. In *Seafood Imports*,[59] the Federal Court of Australia, in recognising the extension to the carrier's responsibility afforded by the Amended Hague Rules, found the carrier to be in breach of its obligations to '*properly and carefully*' discharge the goods by failing to ensure that the container in which goods had been contained did not defrost upon arrival at the terminal.[60] In that case, a carrier of fish from Japan to Australia was found liable for the loss of fish which went off as a result of the container defrosting.[61]

Enforceability of Foreign Awards in Australia

Australia adheres to the obligation contained in Article III of the New York Convention to recognise arbitral awards as binding and to enforce them by virtue of the provisions contained in section 8 of the IAA, which was proclaimed as constitutionally valid by the High Court of Australia.[62] Subject to the exclusive grounds upon which enforcement of arbitral awards may be denied (mirrored from the New York Convention),[63] foreign awards may be enforced in a Court of an Australian State or Territory as if the award was a judgment or order of that Court.[64]

Australian Courts have a pro-enforcement approach to foreign arbitral awards.[65] For example, the Federal Court of Australia recently allowed enforcement of arbitral awards that were challenged on the basis of procedural irregularities invoking grounds under section 8(5)(c) and (e) of the IAA,[66] and on the basis that an award arguably lacked authenticity.[67]

Section 8(5) of the IAA contains an exhaustive list of grounds upon which a party may seek refusal of an enforcement of a foreign arbitral award. Only two grounds exist upon which an Australian Court may refuse to recognise an arbitral award in the absence of an application from a party against whom an award is sought to be enforced. These are: (a) if the subject matter of the dispute is not capable of arbitration; or (b) to enforce an arbitral award would be contrary to public policy.[68] The term '*public policy*' is defined in the IAA as the situation where '*(a) the making of the interim measure or award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.*'[69]

Resisting enforcement of arbitral awards on the ground of breach of public policy has proven difficult in Australia. The public policy ground for resisting enforcement has been held to require a breach of '*morality*',[70] '*fundamental principles of law and justice*'[71] or '*real unfairness or real practical injustice*'.[72] Errors of law or fact made by an arbitral tribunal are not considered to be in contravention of public policy in the relevant sense.[73]

Although proof of '*reasonable apprehension of bias*' is sufficient to establish a breach of natural justice,[74] Australian Courts adopt a case-by-case approach to the assessment of bias, and denial of natural justice arguments rarely succeed in resisting enforcement of arbitral awards.[75] Whilst serious illegality is likely to be considered a breach of public policy in Australia following English authorities, it is less clear whether the illegality of a less serious nature, such as an underlying contract that is illegal at the place of the seat but not at the place of enforcement, constitutes a breach of public policy.[76]

The procedure for enforcing foreign arbitral awards in Australia is adopted from the New York Convention; this requires that a party seeking enforcement supply to the Court the following documents:[77]

a) an authenticated original or certified copy of the award;
b) an original or certified copy of the arbitration agreement; and
c) a translation of any parts not in English.

An example of these procedural provisions in action is the case of *Sanum Investments*[78] where the Applicant sought leave to serve the Respondent debtors abroad in the purported enforcement proceedings in relation to a US$200 million award handed by the Singapore International Arbitration Centre. One of the requirements for granting leave to serve an application abroad is for the Applicant to demonstrate a *prima facie* case for enforcement of the award. Having found that certified copies of the arbitral award and arbitration agreements had been tendered[79] and that an award had been made in a New York Convention country,[80] the Court was satisfied that the Applicant established a *prima facie* case for the enforcement of the award.[81] The Court left the investigation of challenges to the recognition and enforcement of the arbitral award raised by the Respondents to be considered at the final hearing. Ultimately, the Singapore Court of Appeal in *ST Group*[82] refused to recognise and enforce the arbitral award because it found that the arbitration was not seated in accordance with the agreement of the parties.

Overall, there is a pro-enforcement attitude towards arbitral awards in Australia embedded in the provisions of the IAA, and in the approach of Australian Courts. This is consistent with the support provided in Australia for arbitral proceedings in a form of limited judicial intervention and effective supervisory jurisdiction. The enforceability of foreign arbitration awards in Australia would thus be of interest to those who have obtained arbitral awards outside of Australia and wish to enforce them against award debtors who hold assets in Australia.[83] Australian practice in relation to the enforcement of foreign arbitral awards provides greater certainty to existing and prospective parties to commercial dealings conducted in Australia.

Institutional vs ad hoc Arbitration – Australian perspectives

Australia's leading arbitral institution is ACICA. Each institution has its own set of arbitration rules which parties may select to be the rules governing their arbitral proceedings. The key advantage of institutional arbitration is the certainty provided to the parties by the established rules and procedures.

In contrast, in an ad hoc arbitration, instead of an arbitral institution prescribing arbitration rules and procedures, parties agree on the conduct of arbitral proceedings. The advantages of ad hoc arbitrations are lower costs,[84] lesser formalities[85] and greater flexibility. Ad hoc arbitrations are, therefore, suited to smaller claims. However, without the guidance of an institutional body, the success of ad hoc arbitrations is significantly dependent on the parties' cooperation and interest in maintaining a relationship in the future. It is also common for parties to ad hoc arbitrations to place greater reliance on the supervisory jurisdiction of the national courts[86] and Australian Courts offer a reliable impartial and rigorous system in support of ad hoc arbitrations.

The rules governing ad hoc arbitrations in Australia are embedded in the UNCITRAL Model Law which is adopted by virtue of section 16(1) of the IAA. Thus, parties have the discretion to choose arbitrators in ad hoc arbitrations and in the event that an agreement cannot be reached, assistance from the national Courts may be sought.

Section 3 of the IAA gives the term '*arbitral award*' the same meaning as that in the New York Convention, which includes '*awards made by arbitrators appointed for each case*'.[87] Accordingly, arbitral awards rendered by ad hoc arbitral tribunals have equal enforcement status in Australia to that of institutional awards.

Pursuant to ACICA's Australian Arbitration Report 2020, most international arbitrations in Australia (including maritime) are commenced pursuant to SIAC or ICC Rules and are seated in Singapore. The most favoured rules for domestic arbitrations are ACICA Rules. Between 2016 and 2019, disputes involving the total value of just over $2 billion were resolved by means of ad hoc arbitrations in Australia, which is the fourth largest total value after ICC, UNCITRAL and SIAC arbitrations. Australian parties prefer UNCITRAL Rules for ad hoc arbitrations.[88]

Status of SCMA Awards in Australia

The SCMA has been an increasingly popular choice in the Asia-Pacific.[89] SCMA's arbitral awards will be recognised and enforced in any New York Convention country.[90] Australia, being one of them, is no exception. Singapore is a popular arbitral seat among Australian parties, and Singaporean arbitral awards have long been granted recognition and enforcement by Australian Courts.[91]

The SCMA Rules prescribe Singapore as the default seat and apply UNCITRAL Model Law,[92] which resembles Australian and global practice. Although there have not been any reported SCMA awards enforced in Australia recently,[93] little reason exists for not awarding the SCMA awards the same status as arbitral awards of other Singaporean institutions which have long been recognised in Australia.

Conclusion

Overall, Australia is a stable and reliable jurisdiction to arbitrate disputes and seek enforcement of arbitral awards. Its modern pro-arbitration approach provides certainty in commercial dealings and preserves party autonomy in choosing a preferred method of dispute resolution. Australia's maritime and admiralty laws provide further support for the arbitration of maritime disputes.

[1] Australian Centre for International Commercial Arbitration, *Australian Arbitration Report* (2020) 6, 4 https://acica.org.au/wp-content/uploads/2021/03/ACICA-FTI-Consulting-2020-Australian-Arbitration-Report-9-March-2021.pdf ('*ACICA Report 2020*').
[2] Australian Law Reform Commission, *International Arbitration*, https://www.alrc.gov.au/publication/legal-risk-in-international-transactions-alrc-report-80/11-international-arbitration/.
[3] According to the *ACICA Report 2020*, 10, the total amount in dispute resolved by means of *ad hoc* arbitration closely follows that of arbitration using rules of major arbitration institutions.
[4] *ACICA Report 2020*, 6.
[5] *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex 1, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex 1; *International Arbitration Act 1974* (Cth), section 16(1).
[6] *Convention on the Recognition and Enforcement of Arbitral Awards 1958*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[7] New South Wales: *Commercial Arbitration Act 2010* (NSW); Victoria: *Commercial Arbitration Act 2011* (VIC); Queensland: *Commercial Arbitration Act 2013* (Qld); South Australia: *Commercial Arbitration Act 2013* (SA); Western Australia: *Commercial Arbitration Act 2012* (WA); Northern Territory: *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); Tasmania: *Commercial Arbitration Act 2011* (TAS).
[8] *International Arbitration Act 1974* (Cth), section 21(1).
[9] *International Arbitration Act 1974* (Cth), section 16(1); cf *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.
[10] *International Arbitration Act 1974* (Cth), section 18B.
[11] *International Arbitration Act 1974* (Cth), section 23J; cf AZB & Partners & Others, *The Asia-Pacific Arbitration Review 2022: A Global Arbitration Review Special Report*, 43, https://www.claytonutz.com/articledocuments/178/Clayton-Utz-Asia-Pacific-Arbitration-Review-2022.pdf.aspx?Embed=Y.
[12] *International Arbitration Act 1974* (Cth), section 23K.
[13] *International Arbitration Act 1974* (Cth), section 25 and 26.
[14] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533, 53 (Hayne, Crennan, Kiefel and Bell JJ). Cf *International Arbitration Act 1974* (Cth), Sch 2, Article 5.
[15] *International Arbitration Act 1974* (Cth), section 7(2).
[16] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 243 (Allsop J). Cf *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649.
[17] *Admiralty Act 1988* (Cth), section 29.
[18] *Federal Court of Australia Act 1976* (Cth), section 53A.
[19] *Rinehart v Rinehart* (2019) 267 CLR 514, 10, 33, 55 (Kiefel CJ, Gageler, Nettle and Gordon JJ).
[20] *Comandate Marine Corp v Pan Australia Shipping* (2006) FCAFC 192, 149 (Allsop J) and 4 (Finn J).
[21] *Admiralty Act 1988* (Cth), sections 14-20.
[22] *Admiralty Act 1988* (Cth), sections 9(1)-(2).
[23] *Admiralty Act 1988* (Cth), section 15.
[24] *Admiralty Act 1988* (Cth), section 16.
[25] *Admiralty Act 1988* (Cth), section 17.
[26] *Admiralty Act 1988* (Cth), section 18.
[27] Martin Davies and Anthony Dickey, *Shipping Law*, (Thomson Reuters, 4th ed, 2016), 134 – 135, 8.10 ('**Davies and Dickey**').
[28] Davies and Dickey, 134, 8.10.
[29] Davies and Dickey, 152, 8.310.
[30] Davies and Dickey, 137, 8.60.
[31] *The Ship "Sam Hawk" v Reiter Petroleum Inc* (2016) 246 FCR 337, 9 (Allsop CJ and Edelman J).
[32] *Admiralty Act 1988* (Cth) section 4.
[33] *Admiralty Act 1988* (Cth) section 4(u).
[34] *Admiralty Act 1988* (Cth) section 19.
[35] Davies and Dickey, 140, 8.120.
[36] Federal Court of Australia, *Admiralty Jurisdiction of the Federal Court*, https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/jurisdiction.
[37] Admiralty Act 1988 (Cth) section 37(1).
[38] Davies and Dickey, 161, 8.500.
[39] IMO Leg/Conf.7/27, 2 May 1989.
[40] *International Convention Relating to the Arrest of Sea-Going Ships* (Brussels, May 10, 1952).
[41] *Carriage of Goods by Sea Act 1991* (Cth), section 7.
[42] *Carriage of Goods by Sea Act 1991* (Cth), Sch 1A, Article 10, rule 1.
[43] Hague-Visby Rules (unmodified), Article 10(1).
[44] *Carriage of Goods by Sea Act 1991* (Cth), Sch 1A, Article 10, rules 2, 3.
[45] *Carriage of Goods by Sea Act 1991* (Cth), Sch 1A, Article 10, rules 2, 3.
[46] *Sea-Carriage Documents Act 1997* (NSW), section 5; *Sea-Carriage Documents Act 1997* (WA), section 5; *Sea-Carriage Documents Act 1998* (SA), section 5; *Sea-Carriage Documents Act 1996* (QLD), section 3; *Sea-Carriage Documents Act 1998* (NT), section 5; *Sea-Carriage Documents Act 1997* (TAS), section 4; *Sea-Carriage Documents Act 1996* (VIC), section 5.
[47] *Carriage of Goods by Sea Act 1991* (Cth), section 11(2)(b).
[48] See for example, *Kim Meller Imports Pty Ltd v Eurolevant Spa* (1986) 7 NSWLR 269; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1.
[49] *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107 ('***Norden***').
[50] *Norden*, 67, 68, 71.

[51] *Carriage of Goods by Sea Act 1991* (Cth), Sch 1A, Article 4, rules 5(a).
[52] *Carriage of Goods by Sea Act 1991* (Cth), Sch 1A, Article 4, rules 5(a).
[53] *Carriage of Goods by Sea Act 1991* (Cth), Sch 1A, Article 4, rules 5(a).
[54] *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296, 280.
[55] *Volcafe Ltd v Compania Sud Americana de Vapores SA (T/as CSAV)* [2018] UKSC 61.
[56] *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (1980) 147 CLR 142; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad* (1998) 196 CLR 161, 43 (Gaudron, Gummow and Hayne JJ) and 98 (McHugh J); *CV Sheepvaartondernemning Ankergracht v Stemcor (A/sia) Pty Ltd* (2007) 160 FCR 342.
[57] *Great China Metal Industries Co ltd v Malaysian International Shipping Corp Berhad* (1998) 196 CLR 161, 43 (Gaudron, Gummow and Hayne JJ) and 98 (McHugh J).
[58] The position has been applied for example in *C/V Scheepvaartonderneming Ankergracht v Stemcor (A/Asia) Pty Ltd* (2007) 160 FCR 342; *Hildtich Pty ltd v Dorval Kaium KK (No 2)* (2007) 245 ALR 125; *Seafood Imports Pty Ltd v ANL Singapore Pte Ltd* (2010) 272 ALR 149.
[59] *Seafood Imports Pty Ltd v ANL Singapore Pte Ltd* (2010) 272 ALR 149 ('***Seafood Imports***').
[60] *Seafood Imports*, 63.
[61] *Seafood Imports*, 77.
[62] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533, 111 (Hayne, Crennan, Kiefel and Bell JJ).
[63] *International Arbitration Act 1974* (Cth) s 8(5); cf *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533, 111 (Hayne, Crennan, Kiefel and Bell JJ).
[64] *International Arbitration Act 1974* (Cth), section 8(2).
[65] See for example, *Traxys Europe SA v Balaji Coke Industry Pty Ltd (No 2)* [2012] FCA 276, 90 where the 2010 amendments to the IAA were said to bring about a '*pro-enforcement bias*' to the enforcement of arbitral awards.
[66] *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116.
[67] *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767.
[68] *International Arbitration Act 1974* (Cth), section 8(7).
[69] *International Arbitration Act 1974* (Cth), section 19.
[70] *Traxys Europe SA v Balaji Coke Industry Pty Ltd (No 2)* [2012] FCA 276, 105.
[71] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214, 19.
[72] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, 55 (Allsop CJ, Middleton and Foster JJ).
[73] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.
[74] Stephen R Tully, 'Challenging Awards Before National Courts For A Denial Of Natural Justice: Lessons From Australia' (2016) 32(4) *Arbitration International*, 674.
[75] Stephen R Tully, 'Challenging Awards Before National Courts For A Denial Of Natural Justice: Lessons From Australia' (2016) 32(4) Arbitration International, 667-668.
[76] Chester Brown and Luke Nottage, 'Interpretation and Application of The New York Convention in Australia' in *Recognition and Enforcement of Foreign Arbitral Awards* (Springer International Publishing, 1st ed, 2017), 123. Cf *Soleimany v Soleimany* (1993) 3 All ER 847.
[77] *International Arbitration Act 1974* (Cth), Sch 1, Article 4, section 9.
[78] *Sanum Investments Ltd v St Group Co. Ltd* [2017] FCA 75 ('***Sanum Investments***').
[79] *Sanum Investments*, 8 (Foster J).
[80] *Sanum Investments*, 9 (Foster J).
[81] *Sanum Investments*, 18 confirmed in S*anum Investments Ltd v ST Group Co Ltd* (No 2) [2019] FCA 1047, 124.
[82] *St Group Co. Ltd v Sanum Investments Ltd* [2019] SGCA 65.
[83] Gregory Nell SC, 'Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia' (2012) 26 A*ustralian and New Zealand Maritime Law Journal* 24, 25.
[84] Harry L Arkin, 'International Ad Hoc Arbitration: A Practical Alternative' (1987) 53 *Arbitration* 260, 261.
[85] Harry L Arkin, 'International Ad Hoc Arbitration: A Practical Alternative' (1987) 53 *Arbitration* 260, 262.
[86] Toby Boys and Lucy Munt, *Australia: Drafting an effective international arbitration agreement – tricks and traps* https://www.mondaq.com/australia/arbitration-dispute-resolution/514940/drafting-an-effective-international-arbitration-agreement-tricks-and-traps.
[87] *International Arbitration Act 1974* (Cth), section 3. Cf *New York Convention*, Article III.
[88] Gitanjali Bajaj and Erin Gourlay, *Commercial Arbitration: Australia* https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/australia.
[89] The number of cases has been growing in the past several years, particularly in the Asia-Pacific, according to SCMA's Year in Review 2018, 2019 and 2020 https://scma.org.sg/SiteFolders/scma/387/YIR/2018YearInReview.pdf
https://www.scma.org.sg/SiteFolders/scma/387/YIR/2019YearInReview.pdf
https://scma.org.sg/SiteFolders/scma/387/YIR/SCMA2020YearInReview.pdf.
[90] *International Arbitration Act 1974* (Cth) section 8.
[91] See for example *Hyundai Engineering Steel Industries Co Ltd v Two Ways Constructions Pty Ltd (No 2)* [2018] FCA 1551.
[92] *Singapore International Arbitration Act (Chapter 143A)*, section 3.
[93] The authors have reviewed the published SCMA reports on Lloyd's Maritime Newsletters and note that there have been no reported SCMA awards involving Australia since 2018 as at 2 August 2021.

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Arbitration in INDIA

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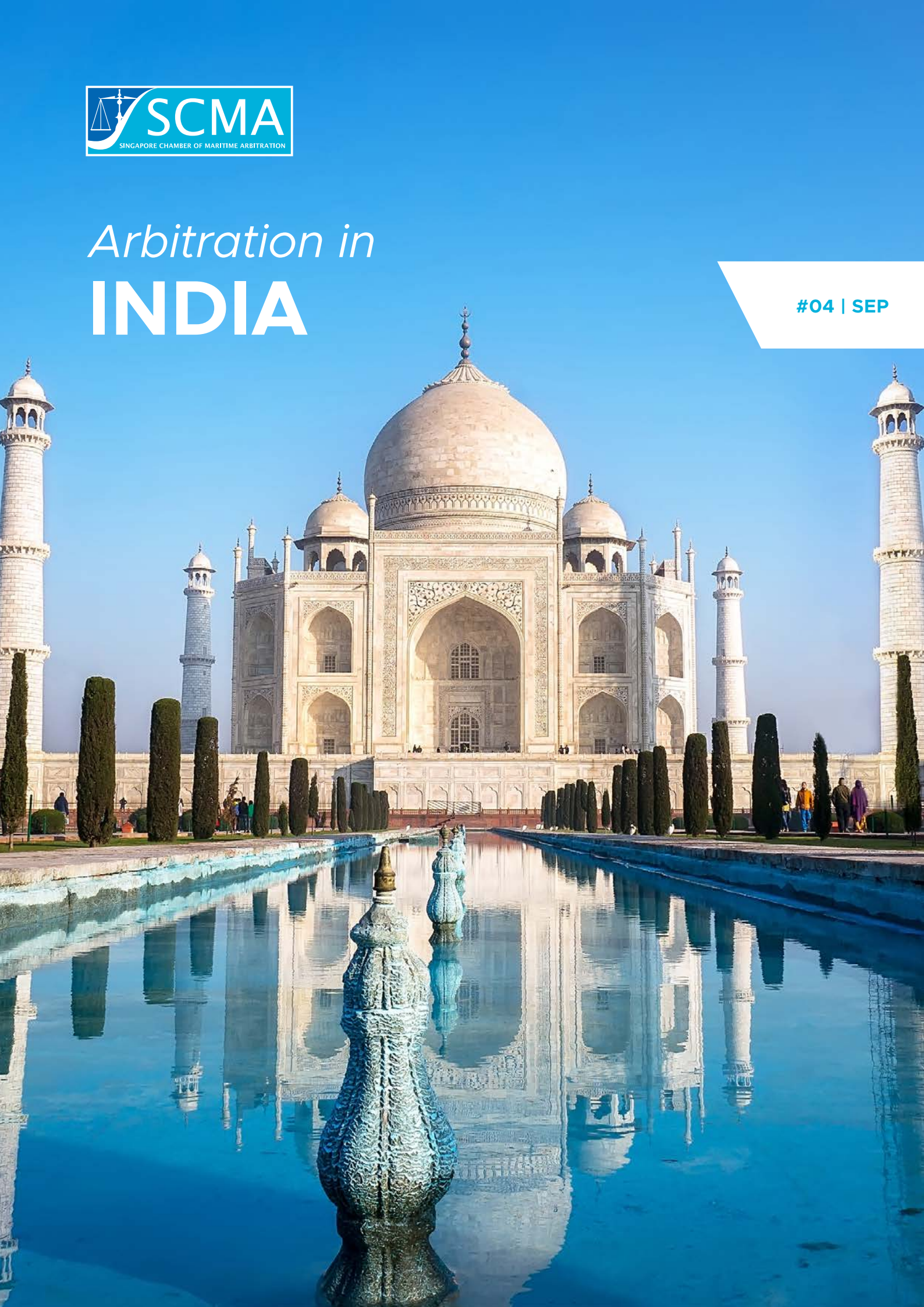

INDIAN PERSPECTIVES ON ARBITRATION AND MARITIME LAW

THE CHAMBERS OF GEORGE REBELLO
Ashwin Shanker, Advocate & Arbitrator
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Summary

India is a pro-arbitration jurisdiction. This is evident from (1) the slew of Parliamentary amendments to The Arbitration & Conciliation Act, 1996 ("**Arbitration Act**") which recognises institutional arbitration procedures and permits appointments by arbitral institutions, as well as (2) the recent decisions by Indian Courts.

While there was little clarity[1] as to whether two Indian parties could seat an arbitration of their disputes outside India, this has now been resolved. The Supreme Court of India recently stated that "*Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals.*"[2]

India's pro-arbitration approach was also most recently evident in the Supreme Court of India's decision in *Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors*,[3] where it was held that emergency arbitrators' awards are valid as they are tantamount to interim reliefs contemplated under section 17 of the Arbitration Act.

In this article, we discuss the pro-maritime arbitration approach of the Indian Courts in the enforcement of domestic and foreign awards.

Enforcement of Awards under Indian Arbitration Law

The arbitral law of India, the Arbitration Act, is divided into four parts namely, Part-I, Part-II, Part-III and Part-IV. Part-I and Part-II lay down the law relating to arbitration, Part-III deals with conciliations, and Part-IV contains supplementary provisions as to formulating rules, repealing other laws, etc.

Part-I and Part-II largely follow the scheme of the UNCITRAL Model Law on International Commercial Arbitration (1985).[4] Part-I of the Arbitration Act governs Indian domestic arbitrations and international commercial arbitrations seated in India.

Section 36 of the Arbitration Act provides for the enforcement of awards rendered in arbitrations governed by Part-I ("**Indian Awards**"). There are no pre-conditions to enforce Indian Awards. Indian Awards are treated on par with decrees of Indian Courts and may be directly enforced.[5] For enforcement, the enforcing party would simply need to file an application to execute the Indian Award, under the Code of Civil Procedure 1908, in a Court of the jurisdiction of the person against whom the award is to be enforced has property.[6]

Part-II governs the enforcement of awards rendered in arbitrations seated outside India ("**Foreign Awards**"). Sections 47,[7] 48,[8] and 49[9] of the Arbitration Act set out the provisions for (i) the evidentiary requirements for enforcement of Foreign Awards; (ii) the pre-conditions for enforcement of Foreign Awards; and (iii) the manner of enforcement of Foreign Awards in terms of the New York Convention on the Recognition & Enforcement of Foreign Arbitral Awards 1958, respectively.

A party wishing to enforce a Foreign Award must apply to a Court and produce before it (i) the original or an authenticated copy of the Foreign Award; (ii) the original or certified copy of the arbitration agreement; and (iii) any other evidence to prove that it is a Foreign Award.[10] The enforcement may be refused by the court *only* if the party against whom enforcement is sought proves to the court that:[11]

a. It was under some incapacity, or the arbitration agreement was not valid in terms of the law governing the arbitration agreement; or
b. No proper notice of appointment of arbitrators or proceedings was given; or
c. The award deals with a dispute outside the scope of the arbitration agreement; or
d. The composition of the tribunal was not in accordance with the agreement or the curial law of the seat; or
e. The award is not yet binding on the parties or has been set aside or stayed by a court at the seat of arbitration.

Enforcement of a Foreign Award may also be refused if the subject matter of the award is not arbitrable in India, or, if the enforcement would be contrary to the public policy of India. When the Court is satisfied of the enforceability of a Foreign Award, it is deemed to be a decree of the Court[12] and can be enforced as such.

In the case of both Indian Awards and Foreign Awards, Courts make no distinction between awards rendered in ad hoc arbitrations and awards rendered in institutional arbitrations. Courts in India regularly permit the enforcement of awards rendered in arbitration proceedings conducted under the rules of the London Maritime Arbitrators Association, the Hong Kong International Arbitration Centre and the ICC International Court of Arbitration, for example.

Ad Hoc & Institutional Arbitration in India

Despite there being no judicial distinction in the enforcement of ad hoc and institutional awards, parties tend to gravitate towards ad hoc arbitration over institutional arbitration in India. One concern of parties is the high costs of institutional arbitration as opposed to the perceived cost-effectiveness of ad hoc arbitration. Parties are also concerned with an apparent institutional rigidity that is not present in ad hoc arbitrations. For these reasons, courts have taken on a bespoke practice in allowing parties to opt out of agreed institutional arbitration and instead referring them to an ad hoc tribunal.

Recently, however, there has been a slight shift in the Indian attitude towards institutional arbitration. Institutional arbitration has started to gain traction as both Courts and disputants are embracing their benefits such as time bound awards, efficiency, and ease of conducting proceedings.

Parliament's amendments to the Arbitration Act in 2016 empower the Supreme Court or the High Court to delegate their powers of appointment of arbitrators, to any institution. In recognition of this, the Supreme Court of India has on occasion directed parties to approach the Mumbai Centre for International Arbitration for the appointment of arbitrators.[13]

Parliament has also enacted legislation to create a new institution, namely, the New Delhi International Arbitration Centre ("**NDIAC**"). This is the first institution to be established by way of statute. The NDIAC has also been given the status of being an institution of national importance.[14]

Thus, recent trends would indicate that where parties incorporate an SCMA model arbitration clause[15] in their contract, the Courts would refer their disputes to the Singapore Chamber of Maritime Arbitration ("**SCMA**"). The Rules of the Singapore Chamber of Maritime Arbitration ("**SCMA Rules**") recognise that SCMA arbitrations may either be seated in Singapore or outside Singapore.

SCMA arbitrations seated in India would be governed by Part-I of the Arbitration Act. Awards rendered pursuant thereto would, as discussed above, be automatically enforceable under section 36 of the Arbitration Act. Enforcement of awards rendered in SCMA arbitrations that are seated in other jurisdictions will be governed by Part-II of the Arbitration Act.

Maritime Law in India

The Parliament of India enacted The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act in 2017 ("**Admiralty Act**"). This piece of legislation expressly grants admiralty jurisdiction to all the High Courts situated in the Indian coastal states, namely, the High Courts of Gujarat, Bombay, Karnataka, Kerala, Madras, Andhra Pradesh, Odisha, and Calcutta.[16]

Prior to the enactment of the Admiralty Act, maritime law in India was an amalgamation of (1) British-era legislation granting admiralty jurisdiction to certain High Courts, (2) post-independence interpretations of the Geneva and Brussels Arrest Conventions, and (3) common law developed by the judiciary through reliance on the decisions of courts in other common law jurisdictions. The Admiralty Act repealed this amalgamation and consolidated maritime law in India.

The Admiralty Act defines maritime claims[17] and brings together various aspects of admiralty and maritime law. Generally, the Admiralty Act empowers High Courts vested with admiralty jurisdiction ("**Admiralty Court**") to arrest a ship calling at a port or within the Indian territorial waters in a state over which the concerned Admiralty Court exercises jurisdiction.[18]

To arrest a vessel in India, a plaintiff/claimant would have to initiate proceedings in any of the High Courts in the coastal states under the Admiralty Act, by showing the existence of a maritime claim. It is to be noted that the general way of instituting proceedings is by way of an admiralty suit. By arresting a ship, a plaintiff/claimant can

overcome the difficulty of personal service on a shipowner by compelling it to enter appearance in the proceedings and furnish security for the ship's release.[19] In the shipowner's absence, an Admiralty Court may attribute a judicial personality to the ship in order to enter a decree against it and execute the decree by judicial sale.[20]

However, the Admiralty Act remains woefully silent on whether a ship can be arrested, and security retained, for the enforcement benefit of an arbitral award. Unfortunately, the Arbitration Act and the Code of Civil Procedure 1908 are also silent on this aspect. These pieces of legislation neither expressly prohibit nor permit the retention of an arrested vessel as security for the benefit of an arbitral award.

Ship Arrest for the Enforcement of a Foreign Award

The legislative lacuna in the Admiralty Act has kept open a debate on whether a ship can be arrested by the Admiralty Court (or Arbitral Tribunal) to obtain security for the benefit of an arbitration. The debate is categorically more difficult to settle vis-à-vis Foreign Awards as compared to Indian Awards. With respect to Indian Awards, at least one of the parties is likely to have other assets in India, thus making enforcement significantly easier.

Arresting a vessel in admiralty proceedings is essentially restraining its movement and preventing its dissipation, to obtain security for the plaintiff/claimant's claim. In a landmark case, the Supreme Court of India has held that a suit cannot be brought simply to obtain interim relief for the purpose of restraining the dissipation or diminishing of assets.[21] This position has also been applied to admiralty law by the Bombay High Court.[22] Thus, the uncomfortable position is that an admiralty proceeding cannot be filed with a single prayer for arresting a ship as security; the plaintiff/claimant in the admiralty proceeding must also pray for a decree from the Admiralty Court.

However, this is problematic in cases where there is an arbitration clause. In these cases, it is the arbitral tribunal that has jurisdiction to decide the merits of disputes among the parties. The statutory provisions in civil procedure, admiralty law or arbitration legislation enabling the retention of security for an arbitration through an admiralty suit that are available in England,[23] Singapore[24] or Hong Kong,[25] are unavailable in India. The Bombay High Court observed that where there is a lacuna in the law, the Courts are bound to fill it by crafting procedural tools for the benefit of innocent plaintiffs/claimants, and that nothing in the statute books in India prevent the Admiralty Court from arresting a ship to obtain security for an arbitration.[26]

This issue has surfaced time and again in Indian Courts. The Bombay High Court's decision in *JS Ocean Liner LLC v MV Golden Progress*[27] ("***MV Golden Progress***") is of particular significance. In *MV Golden Progress*, the Admiralty Court held that an admiralty suit *in rem* against a ship would be stayed in cases where the existence of an arbitration clause is brought to the attention of the Admiralty Court, and the security obtained in the admiralty suit could be retained by the Admiralty Court in the admiralty proceedings entirely at its discretion.[28] The Admiralty Court will stay the *in rem* admiralty suit against a ship and the merits of the dispute will be referred to arbitration. Any award in favour of the plaintiff/claimant will be recognized by the Admiralty Court and be given effect with respect to the security in the admiralty proceedings, provided that the shipowner was given reasonable notice of arbitration and a reasonable opportunity to present its defence in accordance with the Arbitration Act.

The upshot of *MV Golden Progress* is that a plaintiff/claimant is expected to obtain a decree in the admiralty proceedings in terms of the award after applying to a Court for recognition of the award and satisfying the Court that the award is enforceable in terms of sections 47 to 49 of the Arbitration Act. Once the award is declared enforceable by the Court to which an application for recognition of the award is made, a plaintiff/claimant may execute the award/decree against the security which was retained in the *in rem* admiralty suit. This position has been upheld most recently by the Bombay High Court in *Altus Uber v Siem Offshore Redri AS* ("***Altus Uber***").[29]

The decisions in *MV Golden Progress* and *Altus Uber* fill part of the lacuna in Indian law. However, there remains a view among Indian maritime lawyers that no Admiralty Court has the power to retain a ship arrested in an admiralty proceeding *in rem* or security obtained by way of bail for the benefit of a pending or future arbitration.

A Foreign Award holder can enforce its award against a shipowner by following the procedure in *MV Golden Progress*. However, this is procedurally complex as is evident below:

a. The Foreign Award holder would have to first file an admiralty suit (as a plaintiff) by approaching a competent Admiralty Court and obtaining the arrest of the ship.
b. After obtaining arrest and/or receiving security for the claim in the admiralty suit, the plaintiff/claimant would have to bring the existence of an arbitration clause to the attention of the Admiralty Court.
c. The Admiralty Court would then have to mandatorily refer the dispute to arbitration and stay the admiralty suit until an award is rendered.

d. Upon obtaining an award, the Foreign Award holder must mandatorily apply for the recognition and enforcement of the Foreign Award under sections 47 to 49 of the Arbitration Act.
e. After satisfying the Court to which an application for recognition/enforcement that the Foreign Award is enforceable, the Foreign Award holder would have to revive the admiralty suit and claim the security in the admiralty suit for the enforcement benefit of the Foreign Award.

It is still unclear if the Admiralty Court would re-hear the dispute on merits or pass a decree in terms of the Foreign Award which has been declared to be enforceable. Some other questions remain unanswered, as follows:

(1) Is it mandatory to file an admiralty suit prior to reference to arbitration?

In our view, there are legislative and judicial lacunae in this respect.

(2) Can a Foreign Award holder who has not filed an admiralty suit prior to obtaining the Foreign Award arrest a ship for the enforcement of the Award?

The Admiralty Act does not define "enforcement of an award" as a maritime claim. However, the Admiralty Act does not strictly use the words "admiralty suit". The words used are the broader "admiralty proceedings".

(3) Can an award holder file an interim application to arrest a vessel under the Admiralty Act in an application enforce the Foreign Award under the Arbitration Act?

Given that the words used are "admiralty proceedings", in our view, this effectively means that an award holder can adopt this approach. However, this remains to be tested in the Indian Courts. Further, in enforcement proceedings under the Arbitration Act, the Court to which an application to recognise/enforce an award is made would normally first issue notice to the award debtor, and thereafter consider if the award is enforceable in India in terms of section 48 of the Arbitration Act.

Final Comments

Generally, sections 36 (in Part-I), and 47 to 49 (in Part-II) of the Arbitration Act deal with the enforcement of arbitral awards. While awards rendered in institutional arbitrations have always been recognised and enforced on par with awards rendered in ad hoc arbitrations, the gradual traction gained by arbitral institutions is of particular importance for users of the Singapore Chamber of Maritime Arbitration.

Indian Awards conducted under the SCMA Rules can easily be enforced since at least one of the parties is likely to have assets (other than a ship) in India which can be attached by the Court. Foreign Awards rendered under the SCMA Rules on the other hand, are on a slightly different footing. This is due to the lacunae in the law that has only been partially filled by the Courts, and as such, SCMA Foreign Awards can certainly be enforced in India. While there are practical difficulties and procedural complexities in the enforcement of SCMA Foreign Awards, the Indian Parliament and Courts are likely to continue to work together to resolve these issues.

[1] See the apparent conflict between the decisions in *Addhar Mercantile Pvt Ltd v Shree Jagdamba Agrico Exports Pvt Ltd* [2015] SCC Online 7752 (Bombay High Court) and *Sasan Power Ltd v North American Coal Corporation (India) Pvt Ltd* [2015] SCC Online 813 (Madhya Pradesh High Court).

[2] *PASL Wind Solutions Pvt Ltd v GE Power Conversions India Pvt Ltd* [2021] SCC Online 331 (Supreme Court of India) [104].

[3] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors* [2021] SCC Online 557 (Supreme Court of India).

[4] The Arbitration and Conciliation Act, 1996, Preamble.

[5] The Arbitration and Conciliation Act, 1996, section 36(1).

[6] Indian Awards are enforced as a decree of a court in terms of Code of Civil Procedure 1908.

[7] The Arbitration and Conciliation Act, 1996, section 47. Section 47 lays down the evidentiary requirements for the enforcement of Foreign Awards under the New York Convention.

[8] The Arbitration and Conciliation Act, 1996, section 48. Section 48 lays down conditions for denying the enforcement of Foreign Awards under the New York Convention.

[9] The Arbitration and Conciliation Act, 1996, section 49. Section 49 applies for the enforcement of Foreign Awards under the New York Convention.

[10] The Arbitration and Conciliation Act, 1996, section 47.

[11] The Arbitration and Conciliation Act, 1996, section 48.

[12] The Arbitration and Conciliation Act, 1996, section 49.

[13] *MCM Service Pvt Ltd v Italia Thai Development Public Co Ltd*, Arbitration Case (Civ) 44/2019 (Supreme Court of India) 1.

[14] Unfortunately, after Parliament passed the New Delhi International Arbitration Centre Act in 2019, the global SARS-Cov-2 pandemic has slowed down action taken to operationalize the institution.

[15] https://www.scma.org.sg/model-clauses.

[16] Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017, section 2(1)(e).

[17] Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017, section 4(1).

[18] Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017, section 5.

[19] *Chrisomar Corporation v MJR Steel Pvt Ltd* [2017] SCC Online 1104 (Supreme Court of India) [24]; See also, *MV Elisabeth v Harwan Investments Co Pvt Ltd* (1992) 1 SCR 1003 (Supreme Court of India) 1003.

[20] *Chrisomar Corporation v MJR Steel Pvt Ltd* [2017] SCC Online 1104 (Supreme Court of India) [24].

[21] *Bharat Aluminium Co v Kaiser Aluminium & Technical Service, Inc* [2012] SCC Online 693 (Supreme Court of India) [176].

[22] *Rushab Ship International LLC v Bunkers on Board MV African Eagle & Ors* [2014] SCC Online 620 (Bombay High Court).

[23] Civil Jurisdiction & Judgments Act, 1982 section 26, prior to its repeal by the (English) Arbitration Act in 1997. See also, The Arbitration and Conciliation Act, 1996 section 11. Under the Civil Jurisdiction & Judgments Act, English and Welsh admiralty courts were vested with wide discretion to retain security where admiralty proceedings were stayed or dismissed on the ground that the disputes between the parties were to be determined by courts in other parts of the United Kingdom, in another jurisdiction outside the UK or in arbitration. The word "arbitration" was deleted from section 26 of the Civil Jurisdiction & Judgments Act when the Arbitration Act was enacted, containing a similar provision.

[24] International Arbitration Act, section 6.

[25] Arbitration Ordinance, section 20.

[26] I*slamic Republic of Iran v mv Mehrab & Ors* (2002) 4 BomLR 785 (Bombay High Court) [14 & 18].

[27] *JS Ocean Liner LLC v MV Golden Progress* (2007) 2 ArbLR 104 (Bombay High Court).

[28] *JS Ocean Liner LLC v MV Golden Progress* (2007) 2 ArbLR 104 (Bombay High Court) [67].

[29] *Altus Uber & Ors v Siem Offshore Redri AS & Ors* (2019) 5 BomCR 256 (Bombay High Court).

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Arbitration in JAPAN

#05 | SEP

AN INSIGHT INTO JAPANESE MARITIME AND ARBITRATION LAW

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Summary

This article explains the basic Japanese procedure for recognizing foreign arbitration awards, including SCMA awards. This article also introduces readers to the newly proposed amendments to the Japanese arbitration law, which includes provisions for interim measures as provided in the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

Overview of Japanese Arbitration Law

The Japanese Arbitration Law (2003) ("**JAL**") is closely modelled after the UNCITRAL Model Law on International Commercial Arbitration (1985) ("**Model Law**"). Article 13(4) of the JAL recognizes arbitration agreements by electronic communications – this is the only one provision that is based on the UNCITRAL Model Law as amended in 2006. The Japanese government is currently in the process of amending the JAL wholly based on the Model Law as amended in 2006. The new JAL is expected to include interim measures as provided in Chapter IV A of the amended Model Law.

Japan has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("**New York Convention**"). Arbitral awards issued in member countries of New York Convention are enforceable in Japan in accordance with the JAL. As Singapore has ratified New York Convention, it is clear that SCMA arbitral awards are also enforceable in Japan.

Overview of Maritime Law in Japan

Japan ratified the Hague-Visby Rules, and the Carriage of Goods by Sea Act (1957) as amended in 2019 is in effect. They apply to not only the carriage of goods by bills of lading but also to any contract of international carriage of goods by sea generally, including a carriage by sea waybill.

Under Japanese law, the governing law clause, the jurisdiction clause and the arbitration clause in a bill of lading are considered valid as long as they are not against public policy. Therefore, it is possible for a carrier to issue a bill of lading which is subject to Singapore law and jurisdiction, and/or SCMA arbitration. A Japanese court will regard a Singapore governing law clause, jurisdiction clause and SCMA arbitration clause in a bill of lading as valid.

An arbitration clause is often used in charterparties. The Japanese Commercial Code has provisions on bareboat charterparties, time charterparties and voyage charterparties.

An arbitration clause in a charterparty is considered valid and an SCMA arbitration clause is recognized in Japan. For example the SCMA Model Clause would be recognized by a Japanese court – *"Any and all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause*".

Enforceability of Foreign Awards in Japan

Procedure to execute foreign award

An arbitral award (irrespective of whether the place of arbitration is in Japan) has the same effect as a final and binding judgment. However, an execution order by a Japanese court in accordance with Article 46 of the JAL is required if the award holder wants to execute the award in Japan (JAL Article 45(1)). A party that intends to have a civil execution based on an arbitral award may file a petition with a Japanese court for an execution order. An execution order is one that allows the civil execution based on an arbitral award, designating the obligor as the respondent (JAL Article 46(1)). The execution order shall be brought before a court which the parties have agreed, or the court which has jurisdiction over the location of the subject matter of the claim, or the court which has jurisdiction over seizable property of the obligor (JAL Article 46(4)).

When filing the petition, the award holder should submit a copy of the written arbitral award, a document proving that the contents of the said copy are the same as those of the original arbitral award, and a Japanese translation of the written arbitral award (JAL Article 46(2)). In addition to these documents, the arbitration agreement and the proof of the notification of arbitration to the respondent will both be required to prove validity of the award. A power of attorney and the company certificate evidencing the authority of the signor of the power of authority, and the company certificate of the respondent, are necessary in accordance with the Civil Procedural Law.

Resisting enforcement of an award

An arbitral award may not be enforceable if the following grounds exist (JAL Article 45(2)):

(i) the arbitration agreement is not valid due to the limited capacity of a party;
(ii) the arbitration agreement is not valid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the arbitration agreement;
(iii) the party did not receive the notice required under the laws and regulations of the country of the place of arbitration in the procedure of appointing arbitrators or in the arbitration procedure;
(iv) the party was unable to present a defence in the arbitration procedure;
(v) the arbitral award contains a decision on matters beyond the scope of the arbitration agreement or of a petition in the arbitration procedure;
(vi) the composition of the arbitral tribunal or the arbitration procedure is in violation of the laws and regulations of the country of the place of arbitration;
(vii) according to the laws and regulations of the country of the place of arbitration, the arbitral award is not final and binding, or the arbitral award has been set aside or its effect has been suspended by a judicial body of that country;
(viii) the petition filed in the arbitration procedure is concerned with a dispute which may not be subject to an arbitration agreement pursuant to the provisions of Japanese laws and regulations; or
(ix) the content of the arbitral award is contrary to public policy in Japan.

These grounds are largely identical to that of the Article 5 of the New York Convention and Article 36 of the Model Law.

The court is required to make an execution order unless one or more grounds provided JAL Article 45(2) exist (JAL Article 46(7)). A court order is different from a court judgment. A court order can be made only by documentary evidence without an oral hearing in court. The losing party can appeal against the execution order to the High Court within 2 weeks from the date of receipt of the execution order (JAL Article 7).

Discussion on grounds to resist enforcement

a. the arbitration agreement is not valid under the governing law of the arbitration (JAL Article 45 (2)(i) and (ii))

An arbitration agreement shall be in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication measures for parties at a distance which provides the recipient with a written record of the communicated content), or other documents (JAL Article 13(2)).

If a document containing an arbitration agreement is quoted in a contract concluded in writing as constituting part of the said contract, such arbitration agreement is considered to be in writing (JAL Article 13(3)). An agreement made by electronic record is also regarded as "in writing" (JAL Article 13(4)). Therefore, an arbitration agreement by email exchange, in a PDF file attached to an email, or by facsimile, are all accepted as valid.

The arbitration agreement in a bill of lading quoted from the charterparty is valid. The respondent may argue that the signor did not have the authority to sign the agreement on behalf of the debtor company or the arbitral agreement was too vague. The latter reason may be argued based on the ground in JAL Article 45(2)(v).

b. the respondent did not receive the notice required by the governing law of the arbitration (JAL Article 45(2) (iii))

The respondent may argue that they did not receive "a written Notice of Arbitration" provided in Rule 4 of the SCMA Arbitration Rules, 3rd Edition. Such an argument is quite commonplace where the respondent did not appear in the arbitral proceedings. The respondent's receipt of the notice can be proved by the certificate of receipt issued by the courier or the affidavit of the local lawyer who served the notice to the debtor.

c. *the respondent may challenge that they could not defend the case (JAL Article 45 (2) (iv))*

A respondent may argue that the Statement of Claim was not served properly one such that it constitutes the Claimant's failure of their obligation provided Rule 8 of SCMA Rules.

d. *The composition of the tribunal or the arbitration procedure was illegal under the law of the arbitration place (JAL Article 45(2)(vi))*

The argument that the award is illegal as the construction or the application of law to the merits of the case does not constitute the illegality of the procedure. Only procedural illegality shall be taken into consideration under this ground.

There is an interesting case in Japan in where impartiality and independence of an arbitrator was challenged. It was found that an arbitrator whom belonged to a large law firm issued an award without disclosing the fact that one of the lawyers in the same firm consulted one of the parties because the arbitrator did not know of this fact.

The Supreme Court held on 12 December 2017 that the arbitrator would have been in breach of the obligation to disclose all facts which would likely to give rise to doubts as to his impartiality or independence if the arbitrator was aware the facts or could be aware them by reasonable research. Based on the Supreme Court judgment, the Osaka High Court dismissed the debtor's arguments and supported the execution order because the arbitrator was found to be unaware of such facts during arbitration proceedings.

e. *the award should be final and binding (JAL Article 45(2)(vii))*

It should be noted that interim measures or preliminary orders granted by the tribunal provided the Model Law as amended in 2006, Articles 17A and B, are not enforceable in Japan as they are not considered final.

The Japanese government will amend the JAL to make interim measures and preliminary orders enforceable in near future.

f. *the award to the disputes which may not be subject to an arbitration under Japanese law or against Japanese public policy (JAL Article 45(2) (vii) and (viii))*

One observation is that "punitive damage" allowed under US law is considered to be against Japanese public policy.

Judicial Sale of Ship by Execution Order

In relation to judicial sale of ship by execution order, an applicant shall apply for the judicial sale of the ship at the court where the ship exists (Civil Execution Law ("**CEL**") Article 113). The necessary documents for application of the ship judicial sale are the execution order, the arbitration award, the power of attorney, the applicant's company certificate, the respondent's company certificate, and the certificate of ship registry. When a foreign ship is still at sea, the applicant may apply for an order to remove the national certificate of the ship at the District Court of Muroran, Sendai, Tokyo, Yokohama, Niigata, Nagoya, Osaka, Kobe, Hiroshima, Takamatsu, Kitakyushu or Okinawa (CEL Article 115(1)).

When arresting the ship for judicial sale, the court sheriff shall remove the national certificate from the ship (CEL Article 114(1)). The court shall nominate the evaluator of the ship and decide the ship's price based on the evaluator's evaluation (CEL Article 58 and 60). The ship shall be for sale by bid or auction (CEL Article 64). The potential buyer who makes the highest offer is considered the official buyer by the court decision (CEL Article 69). The official buyer shall pay the price to the court by the date decided by the court (CEL Article 78). The money paid to the court will be divided to the applicant and other creditors who joined the judicial sale procedure (CEL Article 84).

Institutional Arbitration and Ad Hoc Arbitration

In charterparties, ad hoc arbitration is sometimes agreed but there are not many ad hoc arbitration proceedings in Japan. It is generally difficult to have ad hoc arbitration without any procedural agreement. Such arbitration completely relies on the arbitrator's ability, knowledge and experience. Therefore, Institutional arbitration like TOMAC (Tokyo Maritime Arbitration Commission) of Japan Shipping Exchange is much more popular than ad hoc arbitration. Japanese users may also look towards the SCMA for its robust arbitration rules.

Nevertheless, while the Japanese courts are more familiar with institutional arbitration, no real difference exists between institutional and ad hoc arbitration under the JAL – the quality of procedure and award is of more importance.

Status of SCMA Awards in Japan

While there is no precedent of an SCMA award enforced in Japan, Singapore is a signatory of the New York Convention and Singapore arbitration is generally well regarded. Theoretically, there should be no problem in enforcing an SCMA award in Japan. On this basis, an award creditor may bring enforcement proceedings in Japan against the award debtors assets.

At the time of writing, the amendment of the JAL is underway. If the new JAL becomes effective in Japan, international dispute resolution will be more important both in Japan and Singapore.

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Arbitration in KOREA

#06 | OCT

ARBITRATION AND MARITIME LAW IN KOREA – A COMPREHENSIVE OVERVIEW

KIM & CHANG
Byung-Suk Chung, Senior Partner
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Overview of Korean Law on Arbitration

Korean Arbitration Law

The primary source of Korean arbitration law is the Korean Arbitration Act 1999 ("**Act**") which governs both domestic and international arbitration proceedings seated in Korea. The Act, as revised in November 2016, is largely based on the UNCITRAL Model Law on International Commercial Arbitration Model Law 1985 ("**Model Law**") with the latest revisions in line with the 2006 amendments of the Model Law. The main feature of the latest amendments includes:

- A broader definition of "arbitration" to cover the subject matter of dispute based on non-property rights capable of being resolved by the parties' agreement (Article 3).
- A more streamlined procedure for recognition and enforcement of domestic and foreign arbitral awards (Articles 37 to 39).
- Detailed provisions regarding interim measures, for example: (i) maintaining the *status quo* pending determination of dispute; (ii) preservation of assets (and providing a means of preserving assets); (iii) preservation of evidence; and (iv) taking actions to prevent imminent harm or prejudice to the arbitral proceedings (Article 18).
- Detailed provisions regarding recognition and enforcement of partial and interim arbitral awards by the Korean courts, while these are limited to the arbitration proceedings seated in Korea (Article 18-7 and Article 2(1)).
- A provision dealing with how the "written form" requirement could be deemed satisfied insofar as the parties' arbitration agreement is concerned (Article 8).

However, there are certain differences between the Model Law and the Act. Amongst other things, the Act has no provision equivalent to Chapter IV A, section 2 of the Model Law which addresses the parties' request for the granting of a provisional order so as not to frustrate the purpose of the interim measure requested. Whilst Article 18-7 of the Act allows the interim measures to be recognised and enforced by the Korean courts (subject to the conditions for granting and grounds for refusing interim measures), its application does not extend to arbitrators' provisional orders.

Moreover, under Article 34(4) of the Model Law, the court may suspend the setting aside proceedings "*in order to give the arbitral tribunal an opportunity to resume the arbitration proceedings or take other actions that may eliminate the grounds for setting aside the award*". However, the power to stay or suspend the setting aside proceedings is not available under the Act.

New York Convention

Korea is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been in force since 9 May 1973 ("**New York Convention**"). This is however subject to both "reciprocity" and "commercial" reservations, meaning that an arbitral award is only treated as a New York Convention award pursuant to the Act if it is rendered in a country that is also a party to the New York Convention and involves commercial transactions arising from the parties' commercial relationship.

Arbitral institutions

The only arbitral institution in Korea is the Korean Commercial Arbitration Board (KCAB) whose principal office is in Seoul.[1] The KCAB has adopted Domestic Arbitration Rules, International Arbitration Rules and Maritime Arbitration Rules. Notably, the KCAB International Rules apply to international arbitration proceedings commenced on or after 1 June 2016 and specific rules regarding joinder of parties and emergency arbitrator proceedings (Articles 21 and 32(4) were introduced.

The KCAB in March 2018 launched the Asia Pacific Maritime Arbitration Center ("**APMAC**") in Busan, the second largest city in Korea and the largest port city in Korea, to cater for and attract maritime cases in Korea and abroad. The KCAB, through the APMAC, has prepared the Maritime Arbitration Rules providing a dispute resolution procedure for disputes in shipping, shipbuilding, marine products, fisheries and related insurance matters.

In conjunction with an establishment of APMAC in Busan, as part of the KCAB, the institutional arbitration, the Korean maritime society has established the Seoul Maritime Arbitrators' Association (SMAA), non-institutional arbitration organization similar to Singapore Chamber of Maritime Arbitration (SCMA) and adopts its own maritime arbitration rules.

Substantive law

Under Article 29 of the Act, the parties may agree to the law applicable to the merits of the case and in the absence of the parties' agreement, an arbitral tribunal is required to apply the law of the state that it considers to have the closest connection to the subject matter of the dispute. An arbitral tribunal may not decide the merits of the case based on equity and/or good faith unless the parties expressly agree (Article 29(3)).

Appointment of arbitrators

There are no restrictions in the Act as to who may act as an arbitrator, nor are there specific eligibility requirements based on qualifications, experience, nationality, gender and religion. The parties may agree on the qualifications of arbitrators and the procedure for selection and appointment of arbitrator(s). The KCAB maintains a separate pool of domestic and international arbitrators from which the parties are free to choose.

The parties are free to agree on the number of arbitrators. Failing prior agreement of the parties, there is a default mechanism for the appointment of arbitrators under Article 11(2) of the Act which provides that "*the number of arbitrators shall be three*". In case of a tribunal with three arbitrators, each party shall appoint one, and the party-appointed arbitrators shall appoint the third arbitrator within 30 days of their appointment, unless otherwise agreed by the parties. If the parties fail to appoint the third arbitrator within 30 days of the request from one party, the third arbitrator shall be appointed by the court or the arbitration institution designated by the court pursuant to Article 12(3)(ii) of the Act.

If the parties have agreed to appoint a sole arbitrator but fail to do so within 30 days of request from one party, the arbitrator shall be appointed by the court or the arbitration institution designated by the court pursuant to Article 12(3)(i) of the Act.

In case of the international or maritime arbitration, the KCAB International or Maritime Arbitration Rules follows the procedures for selection of the arbitrator(s) contained in the Act. On the other hand, in case of the domestic arbitration, the selection procedures are different in that the KCAB Domestic Arbitration Rules require the parties to give priority on the list of candidate arbitrators which is provided by the KCAB.

Interim measures

Under Article 18 of the Act, the tribunal may grant, at the request of the party, interim measures including preservation of a party's property and evidence and maintaining the status quo pending determination of the dispute, to the extent not otherwise agreed by the parties. Prior to the November 2016 Act adopting the 2006 Model Law, an arbitral tribunal had power to grant interim measures but the parties were not able to enforce such measures under Korean law.

For these reasons, and in view of the interim or provisional remedies being readily available by the court in Korea,[2] arbitral interim measures in Korea had not been common in practice. For domestic and international arbitrations seated in Korea, Article 18-7 of the Act allows arbitral interim measures to be enforced through the Korean court. However, the Act does not address enforcement of interim measures ordered by tribunals being seated outside Korea.

For foreign interim measures rendered outside of Korea, their recognition and enforcement are subject to (i) the New York Convention (the place of arbitration is in the contracting state) or (ii) the Korean Code of Civil Procedure and the Korean Code of Civil Execution.

Where the party seeks recognition and enforcement of arbitral interim measures, the court may order that the applicant provide appropriate security if the arbitral tribunal did not already make such an order or where such an order is necessary to protect third parties' rights.

Awards

Article 32 of the Act requires an award to be in writing and signed by all of the tribunal members. The award should be made by a majority of the tribunal members with explanations for failing to achieve a unanimous decision under Article 30.

The International and Maritime Arbitration Rules do not expressly deal with dissenting opinions but there have been some instances of dissenting opinions being issued in arbitral awards. The KCAB International Rules provide that, failing a majority decision of the arbitrators, the preceding arbitrator (or chair of the tribunal) may make a final decision, whereas, under the KCAB Domestic Rules, the preceding arbitrator may make a decision on procedural issues if such power is agreed by the parties or given by the other arbitrators. This however does not apply to small value claims (less than KRW 100 million) for which the expedited procedure applies.

The Act does not specify a time limit in which to issue an award. The KCAB Domestic, International and Maritime Arbitration Rules provide that an award shall be made no later than 30 days for the domestic arbitration proceedings and 45 days for international or maritime arbitration proceedings after the closure of hearing or closing submissions with the possibility of extensions.

Mandatory provisions

In general, the parties are free to agree particular procedural rules, and arbitrators also have wide discretion to determine how the arbitration proceedings should be conducted. The procedural rules laid down in the Act are "default" rules in nature, applicable only in the absence of the parties' agreement. There are however certain mandatory provisions within the Act from which the parties may not deviate. For example, Article 19 of the Act requires that each party shall be treated fairly and impartially, and given a full opportunity to present its case. Article 13 of the Act also requires potential arbitrators to disclose all circumstances which are likely to give rise to justifiable doubts as to their impartiality or independence.

The Act is silent on which specific circumstances that will be regarded as giving rise to justifiable doubts as to independence and impartiality of an arbitrator. However, in relation to the domestic arbitration proceedings under the KCAB Rules, Clause 2 of the KCAB Code of Ethics provides useful guidance as to when arbitrator's impartiality and dependence may be questioned. The Korean Supreme Court has ruled that the parties cannot waive this requirement; and Article 7 of the Act empowers the Korean court to set aside domestic awards and to hear application challenging recognition or enforcement of such arbitral awards.

Virtual hearings

There is no mandatory law in Korea for an arbitration hearing to be conducted by way of "in-person" hearing only. With the virtual hearing format becoming more acceptable in the context of international arbitration since the COVID-19 outbreak, the KCAB has declared that virtual hearings in lieu of in-person hearings are permitted. It also offers guidance that could be used for virtual hearings and meetings, such as the Seoul Protocol on Video Conferencing in International Arbitration. So long as the parties to arbitration expressly agree to proceed with a virtual hearing, and the proceeding has been conducted in accordance with the arbitration rules to which the parties agree, an arbitral award will most likely be enforced in Korea.

Overview of Maritime Law in Korea

Korea is a civil law system country and most of the laws are codified as statutes. The most important source of law dealing with the primary maritime issues is Chapter V (Maritime Commerce) of the Korean Commercial Code. While Korea has not ratified most of the maritime conventions, Korea has by and large adopted the positions of the international conventions and enacted the same in its domestic laws as noted in more detail below.

Since maritime matters involve by nature cross-border and foreign elements, Korean substantive maritime laws may not exclusively be applied in Korea, which necessitates a consideration of which law and jurisdiction is applicable to the case in question. In this regard, the Private International Law of Korea provides general principles and provisions[3] under which the Korean court can exercise international jurisdiction (Article 2), as well as providing which law is applicable to various matters including "maritime commerce" (at Chapter 9, Articles 60 through 62).

Arrest of ships

Korea has not adopted any of the Arrest Conventions (1952 or 1999). Korean law does not recognize *in rem* proceedings, either.

Under Korean law, there are two possible bases to arrest the vessel, (i) by obtaining a prejudgment attachment of a vessel from the court if the claim is asserted against the owner of the vessel; or (ii) by obtaining an arrest order based on mortgage or maritime lien (see below for maritime lien).

An arrest based on the prejudgment attachment (i) is to obtain security for the claims until the judgment is rendered on the merits and there is no restriction as to the nature/kind of the claims (unlike the Arrest Convention) based on which arrest can be made. On the other hand, an arrest based on a maritime lien (ii) is to enforce its rights and proceeds to the auction sale of the target vessel.

Under Korean law, an arrest cannot be executed if the target vessel is ready for sail (Article 744 of the Korean Commercial Code).

Shipowner's Limitation of Liability

a. Applicable law

The matters relating to the global limitation of the shipowner's liability shall be determined by the law of the port of registry of the vessel (Article 60, (iv) of the Private International Law). Thus, in case of the limitation of liability involving a vessel registered in a foreign country, the Korean court will apply the law of the port of registry of that vessel.

b. Korean law

Korea has enacted its domestic law of shipowner's limitation of liability (the global limitation in contrast to the package/weight limitation in an individual carriage of goods by sea) based on the 1976 Limitation Convention, with some modification (Articles 769 through 775 of the Korean Commercial Code). Korea has ratified the International Convention on Civil Liability for Bunker Oil Pollution Damage ("**Bunker Convention**") and the claims arising from the spillage of the bunker shall be subject to the limitation of liability under the said Commercial Code provisions (Article 45 of the Oil Pollution Damage Compensation Guarantee Act).

On the other hand, Korea has ratified the 1992 Civil Liability Convention ("**CLC**"), the 1992 IOPC Fund Convention, and the Supplementary Fund Convention. Thus, the claims arising from the oil pollution under 1992 CLC shall be subject to the 1992 CLC (and the related Fund Conventions). While the international conventions as ratified in accordance with the Korean Constitutional Law shall have the same effect as the domestic law (Article 6 of the Constitutional Law), Korea has enacted the domestic law "Oil Pollution Damage Compensation Guarantee Act" to implement the CLC, the IOPC Fund Convention and the Bunker Convention.

In order to invoke the global limitation of liability of the shipowner, the owner (which also includes the charterer, the salvor, the liability insurer who intend to invoke limitation) shall commence the limitation proceedings within 1 year (6 months, in case of the oil pollution under the CLC; Article 7(2) of the Oil Pollution Damage Compensation Guarantee Act) from the receipt of the claim(s) in writing in excess of the limitation amount (Article 776(1) of the Korean Commercial Code). In Korea, limitation of the shipowner's liability cannot be pleaded as a defence in the legal proceedings.

Maritime liens

a. Applicable law

According to the Private International Law of Korea, matters relating to maritime lien claims (for example, claims that give rise to maritime lien and the priority among the maritime lien claims) shall be determined by the law of the port of registry of the vessel (Article 60 (i) and (ii)).

b. Korean law

Under Korean law, a maritime lien is a substantial security right based on which the maritime lien holder can proceed with the arrest of the vessel, the sale of the vessel by auction and the receipt of the claims in priority from the auction proceeds. Korea does not recognize *in rem* action.

Under Korea law, the following claims give rise to a maritime lien (Article 777(1) of the Korean Commercial Code):

1. Legal costs for the common interests of the creditors; taxes imposed on the vessel in connection with the voyage; pilotage, towage; preservation and inspection costs of the vessel at the last port of call;
2. Claims relating to the employment of crew and other employees of the vessel;
3. Salvage remuneration for the salvage of the vessel and the claims for the general average contribution;
4. Damage claims due to the collision or other maritime casualties; claims for the damage to the maritime facilities, port facilities or sea route; any claims for loss of lives or injury to the crew or passengers; and
5. Claims which are subject to limitation under the CLC (Article 51 of the Oil Pollution Damage Compensation Guarantee Act).

Carriage of goods by sea

a. Applicable law

The parties may agree, expressly or impliedly, to a governing law which may govern the matters relating to the carriage of goods by sea (Article 25(1) of the Private International Law). The governing law may not necessarily be one. The parties may agree different governing laws in respect of certain matter, say, one law for the formation of the contract while another law for the liability of the carrier (depecage of the governing law: Article 25(2) of the Private International Law). Korean courts ruled that the Paramount Clause in the bill of lading could be interpreted to be a parties' agreement as to the governing law in respect of the liability (including its exemption or limitation) of the carrier even if the bill of lading provides for another governing law (Supreme Court Judgment of 12 June 2014 in re 2012 Da 10658 Case).

If the parties do not agree on the governing law, the Korean court shall find the law of a country which has closest connection to the contract (Article 26(1) 1 of the Private International Law).

b. Korean law

Korea has not ratified any convention relating to the carriage of goods by sea such as the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. However, Korea has enacted domestic law on the carriage of goods by sea (Korean Commercial Code Articles 791 through 814) by adopting the provisions of the Hague Visby Rules.

The features of the Korean law for the carriage of goods by sea are as follows:

- Korean law covers the period from the receipt of the cargo to the delivery of the cargo;
- the carrier's liability is based on negligence (no strict liability) but the burden to disprove negligence lies with the carrier;
- similar exemption catalogue as the Hague–Visby Rules is available under Korean law;
- limitation of liability based on the number of the packages and/or the weight (which is almost identical to the Hague-Visby Rules) is also available;
- the lessening of the liability, limitation, or exemption in favour of the carrier shall not be valid;
- employees and agents of the carrier (but not an independent contractor unless expressly agreed in the relevant contract/bill of lading) may invoke the exemption/limitation of the carrier; and
- shorter time bar of one year for both the shipper/consignee's claims against the carrier and the carrier's claims against the shipper/consignee.

Carriage of passengers by sea

a. Applicable law

See the section on the carriage of goods by sea above.

b. Korean law

Korea has not ratified Athens Convention on the carriage of passengers by sea. In the Korean Commercial Code, there are provisions relating to the carriage of passengers by sea (Articles 817 through 826), which provide for the obligations of the carrier, termination of the contract for the carriage of passengers, etc.

In respect of the global limitation of the liability of passenger ships, the Korean Commercial Code provides for limitation of the liability of the shipowner of the passenger ships in line with the provisions of 1996 Protocol to the 1976 Limitation Convention (Article 770(1)(i) of the Korean Commercial Code).

Charterparties

a. Applicable law

See the section on the carriage of goods by sea above.

b. Korean law

The Korean Commercial Code contains the provisions relating to the voyage charterparties, time charterparties and bareboat charterparties (Articles 827 to 851). The Korean Commercial Code provides for the definition of a particular charterparty, relationship with a third party and the time bar. Since charterparties are subject to party

autonomy, the provisions of the Korean Commercial Code relating to the charterparties (except the relationship with a third party) are in principle complementary. However, it is noted that under Korean law the time bar for claims arising from the charterparties is 2 years, subject to extension by agreement (Articles 840, 846 and 851).

General Average

a. Applicable law

According to the Private International Law of Korea, matters relating to general average shall be determined by the law of the port of registry of the vessel (Article 60(v)).

b. Korean law

The Korean Commercial Code provides for some provisions relating to the general average (Articles 865 to 875). However, in practice, the provisions of the Antwerp Rules may apply according to the agreement of the parties. In this regard, it is noteworthy that the time bar for the claims (including the recourse or subrogation claims) arising from the general average is one year from the conclusion of the average adjustment (Article 875).

Collision

a. Applicable law

According to the Private International Law of Korea, matters relating to the collision shall be determined by the law of the place of the collision if the collision occurs at the territorial sea. If the collision occurs at an open sea, then the governing law of the collision shall be the law of the port of registry of the opponent vessel (Article 61).

b. Korean law

Korea has not ratified the 1910 Collision Convention. However, the provisions in the Korean Commercial Code relating to the collision are enacted in line with the 1910 Collision Convention, namely, split of liability according to the respective proportions of negligence in case of the damage to the vessel and/or to the cargo on board, while joint and several liability in case of the personal injury or loss of life. The time bar for the collision claims is 2 years.

Salvage

a. Applicable law

According to the Private International Law of Korea, matters relating to the salvage remuneration shall be determined by the law of the place of the salvage if the salvage is carried out at the territorial sea. If the salvage is carried out at an open sea, then the governing law of the salvage remuneration shall be the law of the port of registry of the salved vessel (Article 62).

b. Korean law

Korea has not ratified the 1983 Salvage Convention. However, the provisions of the Korean Commercial Code relating to salvage are enacted in line with the 1983 Salvage Convention.

Oil pollution

As noted above, Korea has ratified international conventions relating to oil pollution, such as the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Convention and the Bunker Convention.

Marine Insurance

a. Applicable law

See the section on the carriage of goods by sea above.

b. Korean law

The Korean Commercial Code has provisions relating to marine insurance (Articles 693 to 718), which are not in line with the UK Marine Insurance Act 1906. However, in practice, the parties use the internationally recognized forms (such as ICC (A), (B),(C) or ICC Hulls) including English law as governing law.

Enforceability of Foreign Awards in Korea

Application

A party wishing to enforce an arbitral award may apply to the Korean court for recognition and enforcement of the arbitration award under Article 37(3) of the Act. The party must submit an application together with a copy of the arbitral award and, if the award is issued in non-Korean language, a Korean translation has to be filed along with the original award. There is no requirement for a translated copy to be certified and authenticated. The applicant must also submit a power of attorney if legal counsel is appointed, together with a payment receipt for process service and filing fees.

Competent court

There is no separate court in Korea with sole and exclusive jurisdiction over the issue of enforcement of foreign awards.[4] An application for recognition and enforcement of both domestic and foreign arbitral awards is required to be filed pursuant to Article 7(4) of the Act. This may be a court designated by the arbitration agreement, or a court that has jurisdiction over:

- the place of arbitration;
- the place where a respondent's property is located;
- the respondent's domicile or place of business;
- the respondent's place of abode if neither the domicile nor place of business can be found; or
- the respondent's last known domicile or place of business.

There is no need to identify the place of the respondent's properties or assets unless the application is made based on the location of the respondent's assets.

Timeframe

Generally, it takes about 3 to 6 months to obtain the court's decision without a formal hearing (i.e. summary proceedings) and 6 -12 months to obtain the court's judgment with a formal hearing(s). However, the court's decision enforcing arbitral awards will likely take a period of 6 months or longer since the court will likely hold a hearing(s).

Enforceability of New York Convention foreign awards

Under Article 39 of the Act, a foreign arbitral award made in a New York Convention state will be recognised and enforced in accordance with the New York Convention upon the application to the competent court. It may not be refused unless there is proof (a) of incapacity or invalid arbitration agreement; (b) of a lack of proper notice or opportunity to defend; (c) that the award is beyond the scope of the submission to arbitration; (d) of a defect with the arbitral authority or procedure; (e) that the award not binding or has been set aside; (f) that the award is in conflict with the good morals and other forms of social order of Korea (Article 39 and Article 36 of the Act; Article V(1) of the New York Convention).

In practice, the grounds for refusing recognition and enforcement of a New York Convention award are very narrow and limited. Korean courts are 'arbitration friendly' and have a pro-arbitration attitude towards enforcing arbitral awards and they have rarely refused enforcement. In 2018, the Korean Supreme Court held that procedural irregularity or unfairness in the arbitral proceedings ought to be established to the extent that it is intolerable. This is a very high threshold to meet, whereby the applicant is required to prove beyond a simple violation of the parties' agreed procedure or applicable arbitration law (Supreme Court Judgment of 13 December 2018 in re No. 2016 Da49931 Case).

The Supreme Court in re No. 2018 Da240387 rendered on 13 December 2018 also confirmed that Article 36(2)2(b) of the Act (the moral and social order ground for refusal) should not be interpreted to include a case where arbitrator's finding is erroneous on fact and/or law. The enforcement of a foreign arbitral award may not be refused solely on the basis that the foreign arbitral award is unlawful. In the case of *Majestic Woodchips v Donghae Pulp Corporation* (Supreme Court Judgment of 28 May 2009 in re No. 2006Da20290 Case), the Supreme Court also held that recognition and enforcement of an arbitral award can be refused on the basis of fraud only if:

- there is clear evidence that a party seeking enforcement of an arbitral award committed fraud in the arbitral proceedings;
- the counter-party was not aware of the fraud and did not have an opportunity to raise the issue of fraud during the arbitral proceedings; and
- a causal connection exists between the fraud and the outcome of the arbitral proceedings.

Non-New York Convention foreign awards

In relation to foreign arbitral awards from the states that are not party to the New York Convention, Article 39 of the Act provides that these awards will be considered in the same manner as foreign court judgments, pursuant to Article 217 of the Code of Civil Procedure and Articles 26(1) and 27 of the Code of Civil Execution. Under those provisions, a Korean court will recognise and enforce a foreign award not subject to the New York Convention if:

- the award is final and conclusive;
- the jurisdiction of the arbitral tribunal is consistent with Korean law and treaties to which Korea is a party;
- the losing party received adequate notice of the arbitration and sufficient time to defend its case;
- the award is not in conflict with the good morals or other public policy of Korea; and
- the country in which the arbitral award was issued provides reciprocity to Korean arbitral awards.

Post-enforcement actions

Once a final decision of the court recognising and enforcing an award has been obtained, it may be enforced against the defendant's assets by means of compulsory execution (Article 28 of the Code Civil Execution). For compulsory execution by the court bailiff, a writ of execution must be obtained from the court that rendered the recognition and enforcement decision. The plaintiff can obtain the writ of execution by making an application.

Institutional vs ad hoc Arbitration – Korean perspectives

Institutional and ad hoc arbitration are types of arbitration for administering the dispute resolution process based on the terms of agreement and applicable law. In essence, there is no different treatment in Korea in terms of their status, enforcement or recognition of the award. Generally, arbitration parties often favour institutional arbitrations. This is also a general perception prevailing in Korea, at least for profoundly contentious and high value matters. As with the leading international arbitration practice and institutions such as ICC, LCIA, SIAC, Korean arbitration law and arbitral institutions have also developed to assist arbitration parties comprehensively from beginning to end, as well as catering for contingencies that might arise, even if the parties fail or refuse to cooperate.

It is also common practice in Korea to incorporate arbitration institution's rules into a contract. The contracting parties are well aware of the benefits of (i) avoiding the time and expense of drafting a suitable ad hoc clause; and (ii) relying on the availability of pre-established rules and procedures which ensure the arbitration proceedings begin in a timely manner.

That said, ad hoc arbitration proceedings have the potential to be more flexible, quicker and cheaper than institutional proceedings, provided that the parties are willing to mutually agree upon a set of rules and approach the arbitration with cooperation. Ad hoc arbitration could also be more suitable to a specialized area of law, especially maritime law disputes.

Further, the absence of administrative fees or certain procedural elements alone provides an excellent incentive to use the ad hoc procedure. Users of ad hoc arbitration also value the procedural flexibility it offers, which they feel enhances party autonomy when compared with institutional arbitration. Ad hoc arbitration is also favoured in certain sectors, e.g. the shipping and commodities sectors, or by contracting parties who are sophisticated users of arbitration.

In practice however, achieving the parties' consensus on how the arbitration proceedings should be conducted may be difficult, particularly where contested claims involve high value and a complex commercial relationship.

Status of SCMA Awards in Korea

Singapore is a party to the New York Convention; and a SCMA award will be treated as a New York Convention award under the Act as if it was rendered in Korea. As such, the SCMA award will be enforced in accordance with Article 39 of the Act.

Further, considering that there are a number of cases where LMAA awards were successfully recognized and enforced by the Korean court, SCMA awards would also likely be treated as such.

[1] http://www.kcabinternational.or.kr/.

[2] Under Korean law and practice, interim preservation measures are readily available by the Korean court. Thus, we do not think that interim measures in the Act may be used in Korea since the interim measures shall need the Korean court's assistance in order for them recognized and enforced in Korea while the provisional remedies (with the same effect as the interim measures in arbitration procedures) shall be readily available in Korea.

[3] An Amendment Bill is pending at the Parliament to amend and include the detailed provisions regarding the international jurisdiction.

[4] A draft bill is now pending at the Parliament, which establishes "Maritime and International Commercial Court." If the special court dealing with Maritime and International Commercial matter is established, then the court will have jurisdiction over the recognition and enforcement of foreign arbitral awards.

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Arbitration in
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AT LONG LAST, JUSTICE THROUGH COST RECOVERY: MARITIME ARBITRATION IN THE PHILIPPINES

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Overview of Philippine Law on Arbitration

The Philippines was a Colony of Spain until the end of the 19th Century. Consequently, the law of the Philippines was heavily influenced by the Code system of laws in Spain. The Philippines thus adopted both the Spanish Civil Code and the Code of Commerce.

The Philippines updated its own Civil Code in 1950 and promulgated the "New Civil Code" ("**Civil Code**"). From the start of the 20th Century until the end of World War II, the Philippines was in turn a United States colony, and thereafter a United States Commonwealth prior to independence.

Arbitration as a means of resolving disputes has been in the Philippines' statute books for more than half a century, but it has only been in the 21st Century that the mode of dispute resolution has gained some traction. Articles 2028 to 2046 of the Civil Code generally govern the arbitration process, but these Civil Code provisions could best be described as meager. Subsequently, Republic Act no. 876, known as the "Arbitration Law," ("**Arbitration Law**") was enacted in 1953. While the Arbitration Law was a good law, it was still seldom used.

Some five decades later, recognizing the need to unclog court dockets, the Philippine legislature enacted the Republic Act No. 9285 on 4 February 2004. This was to encourage and promote the use of alternative dispute resolution as an efficient mechanism to aid the parties in the resolution of disputes. Republic Act No. 9285, otherwise known as "The Alternative Dispute Resolution of 2004" ("**ADR Law**") is presently the principal law that governs commercial arbitration in the Philippines.

The ADR Law recognized that international commercial arbitration in the Philippines should be governed by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 ("**Model Law**"), while providing for the applicability of the New York Convention on the recognition and enforcement of foreign arbitral awards ("**New York Convention**").

To add flesh to the ADR Law, the Department of Justice promulgated Department Order No. 98 otherwise known as the "Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004" ("**IRR**"), five years after the enactment of the ADR Law. The IRR lays down the procedures and guidelines for the implementation of the ADR Law.

The Arbitration Law, as amended by the ADR Law and subject to specific provisions of the Model Law, continues to govern domestic commercial arbitration, while Executive Order No. 1008 covers arbitration of construction disputes.

Thereafter, in 2009, the Supreme Court issued A.M. No. 07-11-08-SC or the Special Rules of Court on Alternative Dispute Resolution ("**Special ADR Rules**") which sets out, among others, the procedure for the appointment, mandate, termination of the arbitrator's mandate, applications for interim relief, the recognition, enforcement of arbitral awards, and limitation on the judicial review of arbitral awards.

Why Arbitration over Litigation?

Philippines court litigation has historically been a marathon and required endurance, and we place emphasis on the term historically.

A simple example will assist. It used to be that a plaintiff could face numerous interlocutory motions to dismiss, but thankfully, rules have been introduced to limit a defendant to one motion to dismiss. However, one tradition that has not been changed, is the question of recovery of costs and attorney's fees. In the court system, the rule is that each litigant bears his own costs and attorney's fees. So going back to that simple example, the losing party in the interlocutory motion suffers no penalty by having to pay opponents costs, but has managed to delay the plaintiff's cause.

Thankfully, the Arbitration Law and the ADR Law has remedied that small injustice because the arbitrators have been given the power to award costs and attorney's fees, and they do so from first hand experience. We and our clients have been the beneficiaries of that change.

There are other changes especially in the shipping field. In January 2020, Administrative Matter No. 19-08-14-SC, otherwise known as "The Rules of Procedure for Admiralty Cases" ("**Admiralty Rules**"), took effect. The Admiralty Rules is the Philippines' first procedural issuance specifically relating to maritime and admiralty matters such as, *inter alia*, vessel arrest and limitation action. Under the Admiralty Rules, a defendant is not allowed to file a motion to dismiss. Court litigants are still unable to recover cost and attorney's fees, but for shipping lawyers in court, the motion to dismiss is dead and buried.

Overall, dispute resolution through arbitration instead of litigation has had a profound impact due to the allowance of recovery of legal costs.

Overview of Maritime Law in the Philippines

The law on the domestic carriage of goods and passengers are part of the Civil Code. The Code of Commerce (which is a copy of Spanish Code approximately at end of the 19th century) has remained largely unchanged, especially in respect of the maritime and shipping chapters.

The Code of Commerce includes chapters on maritime commerce, collision liability, and limitation of liability, while the rules on cargo damage claims can be found in both the Civil Code and the Code of Commerce. The applicable rules on tort and damages are contained in the Civil Code. Of course, the United States also influenced Philippine shipping law and it was during the Commonwealth era that the United States Carriage of Goods by Sea Act ("**COGSA**") was enacted into law in the Philippines. The Philippine COGSA is very similar to the Hague Rules.

Enforceability of Foreign Awards in the Philippines

The recognition and enforcement of a foreign arbitral award is provided for in Sections 42 to 48 of the ADR Law and Rule 13 of the Special ADR Rules. The grounds to refuse recognition and enforcement are those provided for in the New York Convention. The grounds under Article V of the New York Convention are set out and incorporated in Rule 13.4 (a) and (b) of the Special ADR Rules.

In respect of non-convention awards rendered by a country that does not extend comity and reciprocity to awards rendered in the Philippines, Rule 13.12 of the Special ADR Rules provides that the Regional Trial Court may treat such award as a foreign judgment under Section 48, Rule 39 of the Rules of Court. It will be a challenge to enforce a non-convention award in the Philippines because it will require a trial with witnesses. Contrast that with an award from a New York Convention country where the enforcement procedure is easier and the proceedings are summary in nature. Generally, no witnesses are needed in the latter.

The Philippines generally adheres to a pro-arbitration policy. This is evident in Section 45 of the ADR Law which mandates that the Regional Trial Court disregard any other ground other than those enumerated in Article V of the New York Convention and Rule 13.11 of the Special ADR Rules which provide for the presumption that an arbitral award is subject to recognition and enforcement by a Philippine court. Indeed, when faced with a petition for recognition and enforcement of a foreign arbitral award, the Regional Trial Court's role is pretty much straightforward, either to (a) recognize and/or enforce or (b) refuse to recognize and enforce the foreign arbitral award. In other words, the Regional Trial Court is not allowed to substitute its own judgment for that of the foreign arbitral tribunal. This is clear from Rule 19.11 of the Special ADR Rules which provides:

> "The court can deny recognition and enforcement of a foreign arbitral award **but shall have no power to vacate or set aside a foreign arbitral award**".

The Regional Trial Court's role is limited in the sense that it cannot determine whether the foreign arbitral award is valid or not. This issue is left to the court of the State in which the arbitral award is rendered, as provided in Rule 13.10 of the Special ADR Rules. The Philippine court's inquiry is limited to the determination of the existence of those grounds set out in Rule 13.4 which is subject to a caveat:

> "**The court shall not disturb the arbitral tribunals' determination of facts and/or interpretation of the law**" (Rule 13.11 of the Special Rules of Court).

In *Tuna Processing, Inc. v. Philippine Kingford, Inc* (G.R. No. 185582, February 29, 2012), the Supreme Court rejected a party's defence for lack of legal capacity to sue as a ground to dismiss the foreign corporation's petition for the recognition and enforcement of the foreign arbitral award.

In *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited* (G.R. No. 212734, Dec. 5, 2018), the Supreme Court rejected the Regional Trial Court's decision which refused recognition and enforcement of the foreign arbitral award rendered by an arbitrator in accordance with the ICC Rules. The Regional Trial Court found the dispute to be an intra-corporate controversy, which is not arbitrable under the parties' arbitration agreement. The Court also found that the award of 12% interest was contrary to law and public policy. The Supreme Court pointed out that since the sole arbitrator already ruled out an intra-corporate controversy, the Regional Trial Court should not have determined the facts anew, which directly contradicted those of the arbitrator's factual findings.

The decision in *Mabuhay* is particularly significant because it is in this case that the Supreme Court defined public policy as a ground to challenge the arbitral award. The Supreme Court ruled that "*mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground*". In particular, the Supreme Court categorically stated that:

> "The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society."

Applying this narrow approach to public policy, the Supreme Court debunked Mabuhay's claim that a violation of Article 1799 of the Civil Code (stating that "*a stipulation which excludes one or more partners from any share in the profits or losses is void*") is necessarily a violation of public policy, as not all violations of law would be deemed contrary to public policy.

On the issue of interest, the Supreme Court ruled that even the arbitrator's imposition of 12% interest from the date of the Final Award is not a ground to refuse recognition and enforcement. This is because "*mere incompatibility of a foreign arbitral award with domestic mandatory rules on interest rates does not amount to a breach of public policy*".

The Supreme Court did not consider the 12% interest as unreasonably high or unconscionable that would violate the State's fundamental notions of justice.

A trial court's decision recognizing and enforcing the foreign arbitral awards is immediately executory (Rule 13.11 of the Special ADR Rules). This provision ensures that the decision on the foreign arbitral award is not defeated or rendered illusory during the pendency of the appeal. To reinforce this policy, Rule 19.22 of the Special ADR Rules categorically states that:

> "The appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals directs otherwise upon such terms as it may deem just".

The Court of Appeals may require the party appealing the court's judgment on the arbitral award to post a bond in favor of the prevailing party equal to the amount of the award (Rule 19.25 of the Special ADR Rules). Failure to post a bond will warrant the dismissal of the appeal.

Interestingly, the Regional Trial Court shall award costs to the prevailing party which shall include reasonable attorney's fees (Rule 21.3 of the Special ADR Rules). The Regional Trial Court shall determine the reasonableness of the attorney's fees.

Institutional vs Ad Hoc Arbitration – Filipino Perspectives

Institutional arbitration may be conducted under the auspices of the Philippine Dispute Resolution Center, Inc. (PDRCI) and the Philippine International Center for Conflict Resolution (PICCR), which was established in 2019, with the support of the Integrated Bar of the Philippines. Construction disputes, on the other hand, are under the original and exclusive jurisdiction of the Construction Industry Arbitration Commission (CIAC) created under Executive Order No. 1008.

Under the IRR of the ADR Law (Rule 2 Article 1.6 (D) (1), an ad hoc domestic arbitration conducted through an institution may still be considered as ad hoc if the institution is not a permanent or regular institution in the Philippines. In the absence of an agreement, the President of the Integrated Bar of the Philippines is considered the appointing authority of the tribunal in an ad hoc arbitration.

Institutional arbitration provides a more structured arbitration process than an ad hoc arbitration because of the established rules of procedure and the administrative mechanism in place for the conduct of arbitration. In an ad hoc arbitration, the parties may opt to follow the UNCITRAL Arbitration Rules and the IBA Rules of Evidence for example. In default of an agreement, the parties may follow the arbitration procedure set out in Article 5.23 of the IRR of the ADR Law and the Arbitration Law.

Status of SCMA Awards in the Philippines

Maritime arbitral awards rendered by the SCMA will be considered as a foreign arbitral award under the ADR Law and its enforcement and recognition shall be subject to the procedure set out under the Special ADR Rules and the grounds to refuse recognition and enforcement will be as provided by the New York Convention.

Conclusion

The impact of the Arbitration Law and the ADR Law has had a long gestation period, but we hope that the developments made throughout the years will encourage parties to take advantage of the arbitral process in place in the Philippines.

What we also see as reassuring would be the changes wrought by a simple but significant amendment to the cost recovery regime in order to assist to deliver true justice, and encourage the wider use of ADR for dispute resolution.

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Valeriano del Rosario is a specialist shipping lawyer based in the Philippines. He obtained his LLM in shipping law and policy from the University of Wales Institute of Science and Technology in 1983. He started his shipping career in London at Sinclair Roche and Temperley, and was heavily involved in LOF arbitration. He returned to the Philippines in 1987 and joined the law firm which his father established soon after the War in 1949. His father's firm was organized as V.E. del Rosario & Associates, and the firm was known by the initials VERA. Valeriano is the managing partner of VeraLaw.

Maria Theresa Gonzales has over 25 years of legal experience focused on commercial litigation, arbitration, and intellectual property. In addition to her enconomics and law degrees from the Philippines, she read for her masters in International Commercial Law from the University of Nottingham in England. Theresa was formerly the Chair of the Board of Trustees of the Maritime Law Association of the Philippines (MARLAW) from October 2011 to October 2012 and President from October 2010 to October 2011. She was a member of the Technical Working Group (TWG) of the House Transportation Committee of the Philippine Congress in drafting the Proposed Maritime Code. As resource person, Theresa provided inputs on Ship Mortgage, Maritime Liens, Maritime Arbitration, and International and Domestic Carriage of Goods. She is a co-author of the Philippine chapter on the key maritime issues/developments in the shipping industry in the Philippines published in The Shipping Law Review in the United Kingdom by the Law Business Research.Theresa wrote an article on the "Recognition and Enforcement of a Foreign Arbitral Award in the Philippines" for a Philippine law journal. She had also been invited several times as a speaker on this topic. As a seasoned commercial litigator, she has contributed to jurisprudence on arbitration, employee termination, intra-corporate dispute, and criminal procedure as several of the cases she handled at the trial court level were upheld by the Philippine Supreme Court.

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Arbitration in THAILAND

#08 | OCT

MARITIME ARBITRATION: THAI LAWS AND FOREIGN AWARDS

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Introduction

When it comes to maritime disputes, Thai laws provide special protection to Thai nationals and corporate entities in form of mandatory governing laws, or by restricting Thai courts from making certain rulings. Nevertheless, the Kingdom of Thailand has joined the global trend in ensuring consistency of its arbitration laws with international standards. Disputing parties, including those in maritime disputes, are free to resolve their differences with an arbitral tribunal of their choice.

This article examines the key issues in Thai maritime law and arbitration law, as these two regimes are intertwined when it comes to arbitration of a maritime claim. Arbitral tribunals and legal representatives of disputants should carefully consider key issues in this article in order to ensure enforceability of arbitration awards.

Overview of Thailand's Arbitration Act

Thailand is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("**New York Convention**"). Thailand joined the New York Convention in 1959.

The current legislation regulating the enforcement of arbitral awards in Thailand is the Arbitration Act BE 2545 (2002) ("**Arbitration Act**"). By virtue of the Arbitration Act, Thai law only recognizes and enforces foreign arbitral awards rendered in the contracting states of international treaties which the Kingdom is bound.[1] This piece of legislation is based on the UNCITRAL Model Law on International Commercial Arbitration 1985.[2] It should be pointed out that Thailand did not further adopt amendments to the Arbitration Act based on the UNCITRAL Model Law International Commercial Arbitration 1985 with amendments as adopted in 2006.

Therefore, under the Arbitration Act, arbitral tribunals do not have the power to grant interim injunctions. This is in contrast with countries whose arbitration laws have been amended to include the 2006 amendments to the UNCITRAL Model Law which give arbitral tribunals the power to grant interim measures. Section 16 of the Arbitration Act provides that an interim measure may only be imposed only if a party files a motion requesting the competent court to issue an order imposing an interim measure. Therefore, parties arbitrating in Thailand should be aware that even if a tribunal purports to impose an interim measure in Thailand, such an order will not have any legal significance pursuant to the Arbitration Act.

The Arbitration Act has undergone only minor amendments since 2002. For instance, in 2019 the Arbitration Act was amended to permit disputing parties to appoint a foreign arbitrator to conduct the arbitration proceedings in the Kingdom[3] and allows foreign arbitrators to apply for a permit to work in the Kingdom under the applicable law on immigration.[4] Prior to these amendments, foreigners could not be appointed as an arbitrator in Thai arbitral proceedings.

In addition to the above observations, the Arbitration Act also covers general principles in line with international practice standards, for example, parties to an arbitration agreement may agree on the seat of arbitration, the number of arbitrators, the law applicable to the underlying agreement and the arbitration agreement, the arbitration institution, and so forth.

Overview of Maritime Law in Thailand

During the 1990s, Thailand passed several significant maritime laws. This included the Arrest of Ships Act BE 2534 (1991) ("**Arrest of Ships Act**") , the Carriage of Goods by Sea Act BE 2534 (1991) ("**Carrige of Goods by Sea Act**") and the Vessel Mortgage and Maritime Liens Act BE 2537 (1994) ("**Vessel Mortgage and Maritime Liens Act**").

Arrest of Ships Act

The Arrest of Ships Act applies to any seagoing vessel that is used for the international carriage of goods or passengers to Thailand. The Act permits creditors to apply to the Central Intellectual Property and International Trade Court ("**IPIT Court**"). The Act permits the court to order an arrest of a debtor's vessel as security for the debt if the owner or operator of the vessel incurs a civil liability in Thailand.

To exercise this right, one must be a creditor of the owner or possessor of the vessel. The creditor must also be domiciled within Thailand. The law does not have any requirements as to nationality of the creditor.

Among those who may ask the court to order an arrest of a vessel are creditors of salvages, creditors under vessel leases, hire-purchases or loans or similar service agreements, and creditors of claims for the loss of or damage to cargo on board the vessel. Creditors of claims for the loss of or damage to cargo on board the vessel may also be interpreted as creditors.

Nevertheless, the Act does not allow an arbitral tribunal to play a role in the arrest of a debtor's vessel. This is because the Act vests the power to order an arrest of a vessel exclusively with the Court. In practice, an application for an order to arrest a vessel is the matter for the court and the litigating parties, rather than parties to an arbitration. As such, an arbitrators' role is limited by this Act.

Carriage of Goods by Sea Act

The Carriage of Goods by Sea Act defines the rights, duties and liabilities of carriers and shippers in the inbound or outbound carriage of goods by sea. Contract parties may state the governing laws of their choice in the bill of lading. The Act, however, provides a special condition to the effect that, if one of the contract parties is a Thai individual or a corporate entity under Thai law, the Act will always be the governing law.[5] This affords special treatment to Thai parties.

The contract must be construed, and the rights and duties of the parties must be defined, in line with the provisions of Thailand's substantive laws. Consequently, if a dispute over an international carriage of goods by sea is referred to arbitration, the arbitral tribunal may be required to apply Thai substantive law to the dispute. The Act also limits the carrier's liability, in the absence of agreement with the shipper as to such limit, by the operation of law.[6]

In the event of total or partial loss of or damage to cargo, the Act limits the carrier's liability to the higher of THB 10,000 per shipment or THB 30 per kilogram of cargo. The parties cannot contract out of the applicability of the limit. Any agreement to circumvent the limit is void. The parties may, however, provide in a bill of lading a higher limit than that assumed by the law, in which case the limit of liability provision will not apply.

Additionally, the carrier cannot cite the legal limit of liability if the cargo damage is caused by an act of dishonesty perpetrated by themselves or any of their employees or agents.[7]

In a dispute over the carriage of goods by sea that involves one or more Thai individuals or entities, the arbitral tribunal needs to ensure that the substantive law applied to the matter is Thai law and to consider the carrier's rights and limit of liability under Thai law, so as to avoid recognition and enforcement issues of the arbitral award in Thailand.

Vessel Mortgage and Maritime Liens Act

The Vessel Mortgage and Maritime Liens Act was introduced following the Thai government's decision to issue a special law to deal with maritime liens and mortgages in place of the provisions governing vessel mortgages because Thailand's Civil and Commercial Code were deemed to be unsuitable for maritime issues. This Act applies to vessels of 60 gross tons or more which qualify as a seagoing vessel under the laws governing navigation in Thai waters.

According to the Act, for a vessel to be registered for a mortgage in Thailand, it must have Thai nationality.[8] A foreign vessel cannot be mortgaged under Thai law. However, the Act recognizes the mortgage of a foreign vessel that may have been registered elsewhere by the foreign vessel owner as security for a debt in favor of a third party, and, in the event of enforcement or claim of any of the mortgagee's rights under the Act, the mortgagee will enjoy that right under Thai law.[9]

Recognition and Enforcement of Foreign Arbitral Awards in Thailand

Under the Arbitration Act, the parties to an arbitration agreement may refer a dispute to an arbitral tribunal and pursue arbitration proceedings, whether the seat of arbitration is determined to be Thailand or abroad. That is, the Thai Arbitration Act treats all arbitral awards, whether foreign or Thai, the same. Recognition and enforcement of arbitral awards are based on the same standards under sections 43 and 44 of the Arbitration Act.

In brief, the Arbitration Act provides that the court may not enforce the arbitral award if any disputing party can prove that:

1. Either party is legally incompetent;
2. The arbitration agreement is invalid under the law of the arbitration agreement and seat;
3. The disputing parties cannot proceed with arbitration because no notice of arbitrator appointment or the proceedings were given;
4. The award contains decisions beyond the scope of the issues submitted to arbitration;
5. The composition of the arbitral tribunal falls beyond the scope previously agreed by the parties; or
6. The arbitral award is annulled by the competent court of the seat of arbitration.

Additionally, if in the court's opinion, (1) the dispute is not arbitrable; or (2) the award contradicts the public policy of Thailand, the court may refuse to recognize the arbitral award. The issue of public policy is a key argument that is often raised by a party objecting to the enforcement of the award. As such, relevant precedent Supreme Court judgments should be considered when determining whether an award is in fact contrary to public policy.

One example of a Supreme Court Judgment in respect of public policy is Supreme Court Judgment No 6292/2561. In this case, the arbitral tribunal ruled that the losing party had to pay interest at a rate higher than that stipulated by Thai law. This award was considered contrary to the public policy of Thailand. The Supreme Court ruled that an interest rate higher than the statutory rate under Thai law is not applicable. However, other sections of the award that were not contrary to the Thai public policy remained enforceable.

In the same in 2018, the Supreme Court ruled in Judgment No 4750-4751/2561 that an arbitral tribunal's exercise of its discretion when determining the weight of evidence in relation to the interpretation of penalty and compensation clauses in a construction contract, was not contrary to the basis of the law on arbitration, and was not contrary to public policy. On this basis, the Supreme Court refused to overturn the award and thus found that the award remained enforceable.

Institutional vs Ad Hoc Arbitration

Thailand's Arbitration Act does not restrict the form that an arbitration should take. The parties may choose to have their dispute resolved either by arbitration at an arbitration institute (institutional arbitration) or by one or more arbitrators who are nominated by themselves, provided the nominated arbitrators decide on the dispute impartially, independently and in compliance with the applicable legal requirements (ad hoc arbitration).

Thai courts generally will not intervene in any institutional or ad hoc arbitration.

Despite the fact that Thai courts will not intervene in institutional or ad hoc arbitrations, choosing an institutional arbitration will reduce the possible conflicts over legality of proceedings (for example issues concerning equal treatmen and the full opportunity to present evidence under section 25 of the Arbitration Act).

Institutional arbitration can also prove more convenient, as institutes have their own rules of arbitration that provide clear procedural guidelines to be followed by the parties and the arbitrators. This will help ensure a fair hearing and inspire the parties' confidence that their procedural rights will be fully protected. Moreover, the use of institutional arbitration can reduce the chance that a party will request the court to set aside or refuse to enforce the award.

Status in Thailand of an SCMA award

The Thai court will decide whether to recognize and enforce an award rendered under SCMA's auspices by consulting sections 43 and 44 of Thailand's Arbitration Act.

As Thailand's substantive laws on maritime affairs (such as the Carriage of Goods by Sea Act) are *jus cogens* (that is, mandatory laws), the tribunal will always need to apply such laws when rendering an award, so that the rights, duties and liabilities of the parties are determined in accordance with the substantive laws of Thailand.

The upshot of this means that arbitral proceedings must be conducted with the above mentioned jus cogens in mind to ensure a streamlined enforcement of an SCMA award in Thailand.

[1] Section 41 of the Arbitration Act.

[2] Arbitration: theory and practice, Chaiwat Bunnag, page 2.

[3] Section 23/1 of the Arbitration Act.

[4] Section 23/2 of the Arbitration Act.

[5] Section 4 of the Carriage of Goods by Sea Act.

[6] Section 58 of the Carriage of Goods by Sea Act.

[7] Section 60(1) of the Carriage of Goods by Sea Act.

[8] Section 11 of the Vessel Mortgage and Maritime Liens Act.

[9] Section 21 of the Vessel Mortgage and Maritime Liens Act.

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Arbitration in SRI LANKA

#09 | NOV

ENFORCEMENT OF ARBITRAL AWARDS AND MARITIME LAW – A SRI LANKAN PERSPECTIVE

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Introduction

The significant development of international business, commercial, and financial opportunities have given rise to a considerable number of commercial disputes. As a consequence, this has resulted in the emergence of the various forms of alternative dispute resolution ("**ADR**") procedures.

Basically, ADR is a way to settle or resolve disputes without having to go through the process of litigation. This may exist in several forms or procedures such as facilitation, mediation, conciliation, neutral evaluation and arbitration. Whilst all these procedures are widely recognized, arbitration is considered to be the most formal of the ADR procedures, and is influenced by both national legislation and international convention.

This article examines the Sri Lankan perspective on the arbitration regime as a mechanism of ADR, its enforceability, the various forms of arbitration, as well as the recognition of foreign awards. This article also provides an overview of maritime law and arbitration law, coupled with a comparative analysis of the application of admiralty jurisdiction on the face of arbitration agreements.

Overview of the Sri Lankan Law on Arbitration

Although arbitration has gained traction over the past few years in Sri Lanka ("**SL**"), it is not exactly a modern form of dispute resolution. Arbitration has always been based on the basic legal principle, '*pacta sunt servanda*', or the sanctity of the contract and party autonomy.

Historically, SL relied on the accepted practice of a chosen 'arbitrator', considered to be learned and unbiased (for example, a village headman or chief priest of the temple), to resolve disputes. This occurred long before the adversarial system of dispute resolution was introduced by the Dutch and the British.[1]

Legal Framework

Sri Lanka follows a dualist approach, whereby international conventions signed require the passing of enabling statutes for incorporation into domestic law. Some of the relevant legislation relating to arbitration is set out below:

- Code of Civil Procedure No 2 of 1889 ("**CPC**")
- Arbitration Act No 11 of 1995 ("**AA**")[2] – currently in force; has repealed certain sections of the CPC.
- The current AA in force is based on the UNCITRAL Model Law, and the New York Convention ("**New York Convention**")[3]. By being a member of the New York Convention, SL has ratified and given effect to its provisions through the current arbitration law (that is, the AA) in force.

Is an Arbitration Agreement Separate from the Contract?

A prerequisite to commencing arbitration proceedings is that the contracting parties have agreed to such arbitration. Although SL law recognizes the freedom of the contracting parties to choose their own frame of arbitration agreement (along with the freedom to select the number of arbitrators, rules, proceedings, place, language and so on), the existence of an agreement to arbitrate, either as an arbitration clause or as a separate agreement, is the one common foundation it is all based on.[4]

In the event the parties prefer to have a separate arbitration agreement in addition to the main contract, this is possible, but the provisions in the two separate agreements must not be contradictory.

Recognition and Enforcement of Arbitral Awards (Local and Foreign) in SL

The AA provides for the recognition and enforcement of both local and foreign arbitral awards.

Section 33 of the AA specifically provides for an arbitral award to be recognized as binding irrespective of the country in which it was rendered. This may be done upon application by a party to the High Court of SL under and in accordance with the provisions of the AA.

A contractual party to an arbitration agreement may, within 1 year after the expiry of 14 days of the delivery of an arbitral award is made, apply to the High Court of SL for the enforcement of such award.

The Procedure in Enforcing an Arbitral Award

The procedure to be adopted in enforcing an arbitral award delivered in SL or outside of SL is the same and is provided for under Section 31 of the AA. The procedure is as follows:

1. Institute proceedings in the Commercial High Court, by way of filing a petition and supporting affidavit naming all relevant parties along with all the relevant supporting documents.
2. Issue of notice of the application on the respondent by the Court specifying a date for the respondent to appear and provide objections, if required.
3. Fixing of a date by the Court for inquiry, once objections are filed.
4. Inquiry to be held either by the provision of oral or written submissions.
5. The case shall be fixed for judgment at the conclusion of the inquiry.
6. If the judgment is delivered in the petitioner's favour and no appeal is lodged by the respondent, the petitioner can take steps to enforce the said judgment against the respondent upon the entering of decree as per the judgment and proceed to execute a writ in satisfaction of judgment.

In the event of an appeal, the Supreme Court may in the exercise of its appellate jurisdiction, affirm, reverse, or vary the order, judgment or decree of the High Court, subject to the provisions of the AA. This is provided the parties have not signed an "exclusion agreement" in which they have sought to exclude any right to appeal in relation to the award.

Grounds for Setting Aside & Refusal of Enforcement in SL

a. SL Awards

Section 32 of the AA provides that an arbitral award made in an arbitration held in SL may be set aside by the High Court, on application made within sixty days of this receipt of the award, where the party making the application furnishes proof that:

1. A party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication on that question, under the law of Sri Lanka;
2. 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;
3. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on maters beyond the scope of the submission to arbitration: Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
4. 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 provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

A SL seated award may also be set aside where the High Court finds that:

(a) The subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka: or
(b) The arbitral award is in conflict with the public policy of Sri Lanka.

In the event an application is made to set aside an award, the High Court may order that any money made payable by the award be brought into Court, or otherwise secured pending the determination of the application.[5]

b. Foreign Awards in SL

The limited grounds on which the enforcement of a foreign arbitral award may be refused by SL Courts is provided for by Section 34 of the AA. These grounds which are stated below, mirror those in Article V of the New York Convention:

1. A party to the arbitration agreement is under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication as to the law to which the parties have subjected such agreement, under the law of the country where the award was made;
2. The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator, the arbitral proceeding or was otherwise unable to present his case;
3. The award deals with a dispute which was not contemplated by or did not fall within the terms of the submission to arbitration, or it contains a decision on matters beyond the scope of the submission to arbitration;
4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, with the law of the country where arbitration took place; and
5. 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 law of which, that award was made.

Application of Section 5 of the AA in Arbitral Proceedings and Enforcement of Awards

Section 5 of the AA states that where a party to an arbitration agreement institutes legal proceedings in a court against the other party in respect of a matter initially agreed to be submitted for arbitration, "*the court will have no jurisdiction to hear such matter should the other party object to the same*". However, there are certain limited situations where courts have permitted a party to an arbitral agreement to obtain interim or injunctive relief in support of arbitration. For example:

(a) To preserve the status quo of a disputed matter until the constitution of the arbitral tribunal and/or determination of an Arbitral Panel of the substantive dispute. Parties seeking such interim relief from court will be to require inter alia to establish a prima facie case (by full disclosure of facts) and convince court that they will suffer grave and irreparable damage (which would render any subsequent decision by an arbitral tribunal nugatory) unless such interim relief is granted.
(b) In addition to the injunctive relief described above, there are also certain instances where the CPC of Sri Lanka permits a party to make an application against another party (against whom he has a cause of action in respect of certain money/damages claims) to sequester the property of the debtor where it can be established inter alia that he has no adequate security to meet the claim, and that the debtor is fraudulently alienating his property to avoid payment of the said debt/damage and/or intends to leave Sri Lanka.

"An Error on the Face of an Award" and the Duty of Arbitrators to Give Reasons

An error in the award is regarded as one of fact or law, or both. As to whether a failure to provide reasons by an arbitrator gives rise to such an error, this is explained below.

Although there is no reported judgment in SL in relation to the duty of an arbitrator to give reasons, SL Courts have shown willingness to recognize principles of natural justice in arbitration.[6]

The role of an arbitrator, particularly 'the duty to give reasons' is imposed by Section 25(2) of the AA, although the consequences for failure to give such reasons is not specified by the AA following a similar approach taken in the UNCITRAL Model Law.

Section 25(2) provides that "[t]*he award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14*".

However, in the case of *Light Weight Body Armour*,[7] it was upheld by the Supreme Court of SL that the basic principle of law is that an arbitral award cannot be questioned or scrutinized on the merits of the award or dispute but can be revised or set aside on the limited bases as set out in Sections 32 and 34 of the AA alone.

Accordingly, even though the application of this duty to give reasons is universally recognized and is also regulated by the AA, SL Courts are reluctant to interfere and evaluate the merits of an award, unless it falls within the ambit of the limitations set out in the AA.

Institutional vs ad hoc Arbitration

Arbitration can either be institutional or ad hoc. Institutional arbitration refers to arbitration rules administered, promulgated and endorsed by an arbitration institute. As the institute provides the procedural infrastructure for arbitration, contracting parties may find this method to be more expedient than ad hoc arbitration, which is more generic in nature, in the sense that it is not administered by the procedural infrastructure of a particular arbitration institutional and the parties having to be responsible for all aspects of arbitration.

Both these types of arbitration are recognized and accepted in SL, although institutional arbitration is more encouraged. The Institute for the Development of Commercial Law and Practice and the Sri Lanka National

Arbitration Centre ("**SLNAC**") are two well known, reputed Sri Lankan institutes that facilitate both institutional and ad hoc arbitrations in an organized, expeditious and a cost-effective framework. Although the SLNAC does not have any institutional rules on arbitration, this centre conducts a large number of international and domestic arbitrations annually.[8]

Status of SCMA Awards in SL

While the same provisions described above[9] in relation to the recognition and enforcement of foreign arbitral awards is applicable in the case of awards being delivered at the SCMA, the setting aside of a particular award shall also be bound by the aforementioned provisions (if the award is SL seated).[10] Once an arbitral award is rendered in Singapore, the procedure for applying for its recognition and enforcement in SL shall be the provisions of the AA which is based on the New York Convention. Considering how both Singapore and Sri Lanka are parties to the New York Convention, the interested party may be bound by such convention as well as the SCMA Arbitration rules in respect of the recognition and enforcement of the particular arbitral award.

As the option of an arbitral clause being incorporated into the contract or the option of having a separate arbitration agreement are both accepted in SL to constitute an agreement for arbitration, the contracting parties' desire to have their maritime dispute determined at the SCMA must specify this desire in writing either by incorporating an arbitration clause to that effect, or by entering into a separate arbitration agreement specifying such terms.

The SCMA is a reputed arbitration centre specializing primarily in maritime arbitration. The SCMA possesses an effective framework inclusive of specific rules and model clauses, which are recommended to be taken into consideration by the contractual parties when drafting their arbitration clauses or agreements.

Overview of Maritime Law in Sri Lanka

The maritime law of SL is founded on English maritime law. The modern law governing maritime activities in SL is composed of both national legislation, and international conventions or treaties.

Maritime law was firstly introduced to SL by the British through Section 2 of the Civil Ordinance of 1852, and the law since then has been supplemented by numerous statutes, conventions and judicial decisions. These are listed below:

National Maritime Legislation and Arbitration

- Merchant Shipping Act No 52 of 1971 (as amended by Act No 36 of 1988 and Act No. 3 of 2006)
- Carriage of Goods by Sea Act No 21 of 1982
- Admiralty Jurisdiction Act No 40 of 1983 ("**AJA**")
- Arbitration Act No 11 of 1995
- The Marine Pollution Prevention Act ("**MPA**")

International Conventions/Treaties on Maritime Legislation and Arbitration applicable in SL

- Hague/Visby Rules of 1968 – which is currently in force and have been given statutory force in SL by the recent Carriage of Goods by Sea Act No 21 of 1982.
- The New York Convention
- Conventions regulating pollution: such as the international convention for the prevention of pollution from ships, which was given statutory force in SL by the MPA, The Convention on Civil Liability for Oil Pollution Damage 1969, and International Oil Pollution Fund
- The United Nations Convention on the Law of the Sea
- The International Convention for the Safety of Life at Sea

Admiralty Jurisdiction in Sri Lanka

Section 2(1) of the AJA lists the type of 'maritime claims'[11] upon which an admiralty action can be instituted. The AJA read together with Section 13(1) of the Jurisdiction Act No 2 of 1978 confers admiralty jurisdiction on the High Court of SL.

Apart from the determination of maritime disputes, the AJA also provides for the institution of action in relation to collisions of a vessel within the territorial waters of SL. In either case, the carrier should be either the owner or charterer in possession or in control of the ship, whilst also being the beneficial owner or demise charterer of the vessel at the time the action is brought (establishment of the *personam* link).

Procedure Applicable to Maritime Claims

SL Courts follow an adversarial process and maritime claims may be brought by way of (a) regular proceedings before national Courts; or (b) *in rem* proceedings under the AJA.

a. Maritime actions founded as regular actions

The procedure of a regular action governed by the CPC is as follows:

1. Institution of action by filing of a plaint by the plaintiff/claimant, followed by an answer by the party defendant.
2. In the event the party defendant pleads a counter/cross claim against the plaintiff, the plaintiff to be given the opportunity to file a replication addressing the said counter claim.
3. Commencement of the trial process by way of leading evidence (leading of evidence in chief by way of affidavit of witnesses may also be allowed).
4. Filing of written submissions by both parties and provision of oral submissions (at the discretion of court or on the motion of a party). All matters of law and legal arguments will be made at this stage.
5. Conclusion of trial.

b. In rem proceedings

In the case of *in rem* proceedings, where arrest orders are sought upon filing of action as per the AJA, the skeletal procedure in brief is as follows:

1. Service of the writ of summons on the defendant vessel.
2. The process of arrest and release made either on the payment of the claimed sum into court, or on the provision of security is affected by following the 'regular' trial process.
3. In certain circumstances, interim application by the owners of the defendant vessel challenging the maintainability of the action is allowed by Court.

Maritime Arbitration

a. The New York Convention and the AA

The provisions of the AA as detailed above are applicable in matters concerning maritime arbitration and as mentioned, the New York Convention which has been ratified by SL, obliges the SL Courts to recognize and enforce arbitration agreements, as well as foreign arbitral awards without reviewing the arbitrator's decision, except in the very limited instances.

As mentioned earlier in this article, the grounds for setting aside an arbitral award listed in Article V of the Convention is applicable to cases of maritime arbitration as well.

A judgment obtained from the national court under the 'regular procedure' may require enforcement overseas where the judgement-debtor is a foreign party or does not have assets locally. The enforcement of such an award (delivered in SL) in a foreign jurisdiction, may be effected without much inconvenience, as most States are a party to the New York Convention. Therefore, regulating certain maritime disputes through arbitration is relatively more conducive.

b. Convention on the Carriage of Goods by Sea

Hague-Visby rules are included in its entirety as a schedule to the Carriage of Goods Act. However, the Hague-Visby rules do not contain provisions on arbitration, although the time bar limits may have an impact on the application of arbitral causes. Accordingly, Article 3(6) of the Hague-Visby Rules provides for a one-year limit in bringing suits against the carrier and the ship computed from the date of the delivery or the date when the goods should have been delivered.[12]

Arbitration Clauses & Agreements and the Application of Admiralty Jurisdiction

Many charter parties and bills of lading provide for disputes to be determined by arbitration.

According to Section 5 of the AA, where such a document contains an arbitration clause, the carrier may object to a SL Court exercising jurisdiction in respect of such dispute, thereby binding both parties to resort to arbitration as originally agreed. Section 5 of the AA states that where a party to an arbitration agreement institutes legal proceedings in a court against the other party in respect of a matter initially agreed to be submitted for arbitration, "*the court will have no jurisdiction to hear and determine such matter if the other party objects…*"

This is contrasted with Section 2(1) of the AJA, which states:

> "The admiralty jurisdiction of the High Court of the Republic of Sri Lanka shall, *notwithstanding anything to the contrary in any other Law*, be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims.

The impact of Section 5 of the AA on Section 2 of the AJA has been determined by SL Courts in that Section 5 of the AA cannot have any adverse effects on Section 2(1) of the AJA in determining maritime claims. This is because the AJA is recognized as specialized legislation, and is *sui generis* as to the type of action or procedure.

Although in the case of *SCI Mumbai*,[13] it was expressed that the provisions of the AA are applicable to admiralty proceedings when there is an arbitration agreement between the parties due to the acceptance of the principle of 'party autonomy', the Court was also of the view that the provisions of the AA do not derogate from the jurisdictional powers of the Admiralty High Court, in determining maritime claims under the AJA.

The phase "*notwithstanding anything to the contrary in any other Law*" refers to anything that may contradict the provisions of AJA as being ineffective, and in line with the Sri Lankan case law, it can be said that the AA does not have an application, especially in the absence of any expressed arbitration agreement, in connection with the claims made under Section 5 of the AJA.

This is further confirmed by Lord Hatherley's statement in *Garnet v. Bradbury*:[14]

> "An Act directed towards a special class of objects will not be repealed by a subsequent General Act embracing in its generality these particular objects unless same reference be made, directly or by necessary inference, to the preceding special Act."
>
> (Where in this scenario the 'General Act' being the AA, and the 'Special Act' being the AJA).

Conclusion

Arbitration as an ADR procedure is an indispensable mechanism available to disputants in this fast-changing global economy.

The provisions of the AA are applicable in matters concerning all arbitration agreements maritime or otherwise, while the New York Convention which has been ratified by SL, obliges Sri Lankan Courts to recognize and enforce arbitration agreements, as well as foreign arbitral awards without reviewing the arbitrator's decision, except in the very limited instances. Having an arbitration agreement would give the parties the opportunity to enforce an award in a foreign jurisdiction in a more conducive and a timely manner, as most States are a party to the New York Convention.

[1] Law and Practice of Commercial Arbitration in Sri Lanka, by Dr. Harsha Cabral – Chapter 2, page 5.
[2] Arbitration Act (AA), accessible at: https://www.slnarbcentre.com/pdf/ARBITRATION-ACT.pdf.
[3] Convention on the recognition and enforcement of foreign arbitral awards of 1958
[4] Section 3(1) of the AA – "in the form of an arbitration clause in contract or in the form of a separate agreement."
[5] Section 32(2) of the AA.
[6] *Kristley (Private) Limited v The State Timber Corporation* (2002) 1 SLR 227.
[7] *Light Weight Body Armour Ltd V Sri Lanka Army SC (HCA) 27A/2006*.
[8] Law and Practice of Commercial Arbitration in Sri Lanka, by Dr. Harsha Cabral – Chapter 20, page 129.
[9] Please refer the provisions under the headings "Grounds for Setting Aside & Refusal of Enforcement in SL" in this article.
[10] Please refer the provisions under the heading "Grounds for Setting Aside & Refusal of Enforcement in SL", article.
[11] The admiralty jurisdiction of the High Court of Sri Lanka shall have jurisdiction to hear and determine any of the following questions or claims:
(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
(c) any claim in respect of a mortgage of or charge on a ship or any share therein;
(d) any claim for damage received by a ship;
(e) any claim for damage done by a ship;
(f) any claim for loss of life or personal injury sustained in consequence of
(i) any defect in a ship or in her apparel or equipment; or
(ii) the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglect or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of good on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
(g) any claim for loss of or damage to goods carried in a ship;
(h) any claim arising out of an agreement relating to the carriage of goods in a ship, use or hire of a ship;
(i) any claim in the nature of salvage;
(j) any claim in the nature of towage in respect of a ship;
(k) any claim in the nature of pilotage in respect of a ship;
(l) any claim in respect of
(i) goods or materials supplied, or
(ii) services rendered, to a ship for her operation or maintenance;
(m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
(n) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which under any law in force for the time being is recoverable as wages;
(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
(p) any claim arising out of an act which is or is claimed to be a general average act;
(q) any claim arising out of bottomry;
(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for jetsam, flotsam, lagan and derelict found in or on the sea, the shores of the sea or any tidal water or for property found in the possession of convicted pirates.
[12] Maritime Arbitration, by K. Kanag-Isvaran, P.C.
[13] *Colombo Commercial Fertiliser Limited V Motor Vessel "SCI Mumbai CA PHC APN 47/2013*.
[14] [1878] 3 App, Cases 944.

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Arbitration in
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ARBITRATION OF MARITIME DISPUTES – A MYANMAR PERSPECTIVE

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Introduction

Since Myanmar's economy opened up a decade ago in 2011, there has been an increase in the flow of Foreign Direct Investment ("**FDI**") into the country. With the opening up, there have also been legal reforms to ensure that there is a strong legal framework to attract and protect foreign investment, as well as provide a better environment for all investors to do business. Consequently, various new laws have been enacted such as the Companies Law, the Arbitration Law and the Investment Law.

In Myanmar, arbitration has always been a mechanism that was used in settling disputes, particularly in contracts involving foreign parties, although the arbitration regime was outdated and not well developed under the 1944 Arbitration Act. Fortunately, it has now been updated with the enactment of the 2016 Arbitration Law. It has also gained in popularity as more local companies have become aware of arbitration, and remains the dispute resolution mechanism of choice in cross-border transactions.

This article discusses arbitration and maritime law in Myanmar to provide insights to investors interested in Myanmar.

Overview of Myanmar Law on Arbitration

On 5 January 2016, the Union Parliament of Myanmar enacted the Arbitration Law 2016 ("**Arbitration Law**") which is based on the UNCITRAL Model Law on International Commercial Arbitration (1985) ("**Model Law**"). The new Arbitration Law also gives effect to Myanmar's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and replaces the Myanmar Arbitration Act of 1944.

The Arbitration Law is the main procedural law on domestic and international arbitration.

The Arbitration Law respects the principle of party autonomy. The parties are free to choose the law governing the arbitration and the seat of the arbitration. If the seat of arbitration is Myanmar, the Arbitration Law will govern the arbitration. If the seat of arbitration is in any country other than Myanmar or if the seat of arbitration has not been designated or determined upon, sections 10, 11, 30, 31 and Chapter 10 of the Arbitration Law shall be relevant. These set out the Myanmar Court's power to order a stay of proceedings in favour of arbitration, to intervene in arbitral proceedings, to provide assistance in the taking of evidence, to enforce the interim awards made by the arbitral tribunal, and to recognise and enforce foreign arbitral awards.

The significant departures from or amendments to the Model Law are as follows:

(1) The Arbitration Law sets out specific instances where a party must state its objection without undue delay, failing which, it will be deemed to have waived such an objection (compare Article 4 of the Model Law). These include pleas that the arbitral tribunal has no jurisdiction; that the arbitral proceedings were not conducted properly; that any provision of the arbitration agreement or the arbitration law was not complied with; and that the arbitral tribunal or the arbitral proceedings were affected in some manner leading to the proceedings not being conducted properly. If a party proceeds with the arbitration without stating any such objections, he shall be deemed to have waived his right to object.
(2) The Arbitration Law makes clear that where an action is brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue of whether the court proceedings should be stayed in favour of arbitration is pending.
(3) Contrary to the Model Law, if the parties have not agreed on a number of arbitrators in the arbitration agreement, the default position is that a sole arbitrator is to be appointed.
(4) The Arbitration Law adds to the Model Law by stating that in the event of any dispute concerning whether any of the grounds for the termination of the mandate of the arbitrator is triggered, a party may request the court to decide the issue. However, no appeal lies from a decision of the court on the issue.
(5) The Arbitration Law, going beyond the Model Law, appears to have adopted the position under the Singapore International Arbitration Act ("**Singapore IAA**") in granting a right of appeal against both positive and negative determinations of jurisdiction by an arbitral tribunal. Therefore, the Arbitration Law provides that a party may appeal against a jurisdictional decision of the arbitral tribunal within 30 days of such decision.

(6) The Arbitration Law also confers specific powers on an arbitral tribunal to grant interim measures of protection and orders, although the formulation of the powers of the tribunal does not follow the text of the Model Law, but is instead modelled closely on Section 12 of the Singapore IAA (the version at the material time). Therefore, Myanmar did not adopt the 2006 version of the Model Law on measures and orders by the tribunal.

(7) The Arbitration Law specifically provides that orders, decisions and directions issued by an arbitral tribunal may be enforced with the permission of the court as if they were court orders. This is an important adoption of the principle of Article 17H Model Law but not its text.

(8) The Arbitration Law expands on Articles 9 and 17J of the Model Law and sets out in some detail the nature of interim measures of protection that may be ordered by a court in aid of arbitration. Further, an order made by the court granting any such interim measures of protection will cease to have effect if the arbitral tribunal makes an order on the same issues.

(9) When the parties fail to make a choice of law, the Arbitration Law does not adopt the indirect approach of Article 28(2) Model Law which require reference to rules of conflicts of law (that is, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable") but rather the direct approach which does not require reference to any rules of conflicts of law (that is, "the arbitral tribunal shall apply the rules of law which it considers applicable"). It should also be noted that whereas the Model Law allows the parties to choose "rules of law", the Arbitration Law only allows the tribunal to choose "the law" thus limiting the tribunal to a choice of a national law rather than some other rules such as the UNIDROIT Principles of International Commercial Contracts.

(10) When both parties are from Myanmar (that is, in a domestic arbitration), the tribunal shall decide the dispute in accordance with the prevailing substantive law of Myanmar. There is no equivalent provision in the Model Law.

(11) The Arbitration Law additionally confers on the arbitral tribunal the power to determine, in the award, the costs of arbitration and its apportionment among the parties.

(12) Unlike the Model Law, under the Arbitration Law, any party may, unless agreed otherwise by the parties and with notice to the arbitral tribunal and other parties, apply to the court for a ruling on an issue of law arising from the arbitral proceedings even before the award is issued. The court may rule on such an issue of law if it is convinced that the rights of parties are materially prejudiced. This recourse is only available to domestic arbitrations and not international arbitrations. The court will however not consider such an application if it is convinced that such an application was not made in accordance with the agreement of the parties, or was made without notice to the arbitral tribunal, or that the consideration of such an application will increase costs or delay the proceedings. An arbitral tribunal may continue with the arbitral proceedings notwithstanding that such an application is pending before the court.

(13) Unlike the Model Law, a party may also appeal on an issue of law arising from a domestic award. However, parties may agree to exclude such a right. The court shall allow the appeal if it is convinced that its ruling upon the issue materially prejudices the rights of a party or the award of the arbitral tribunal in respect of the dispute submitted for its decision is completely wrong. Consequently, the court may confirm the award, vary the award, return the award to the arbitral tribunal for reconsideration of the whole or any part of the award, or set aside the whole or part of the award.

Both domestic and foreign arbitral awards can be enforced under the Arbitration Law as a decree rendered by the Myanmar court under the Code of Civil Procedure (the "**CPC**").

In terms of seeking the court's assistance under the Arbitration Law, any application made under the Arbitration Law shall be classified as a Civil Miscellaneous Case and will be conducted in accordance with the CPC.

While still in its nascent stages of development, arbitration in Myanmar is growing as a preferred mode of dispute resolution. As the market develops, specialised arbitration institutes such as SCMA will also become better known and utilised.

Overview of Maritime Law in Myanmar

Myanmar Maritime Law mainly consists of:

(1) Legislation, which includes:
   a. the Merchant Shipping Act,
   b. the Carriage of Goods by Sea Act,
   c. the Bills of Lading Act, and
   d. the Territorial Sea and Maritime Zones Law;

(2) Rules issued under the laws, and directives and orders issued by the Myanmar Port Authority ("**MPA**") and the Department of Marine Administration ("**DMA**"); and

(3) International treaties, including the Maritime Labour Convention and the United Nations Convention on the Law of the Sea.

The Merchant Shipping Act, Carriage of Goods by Sea Act and Bills of Lading Act are respectively based on the India Merchant Shipping Act 1923, India Carriage of Goods by Sea Act 1925 and the India Bills of Lading Act 1856. The Territorial Sea and Maritime Zones Law was re-enacted in 2017.

The MPA is responsible for amongst other things, exercising regulatory functions with respect of marine and port services and facilities, facilitating port operators and port users in order to promote smooth flow of trade, initiating port development plans and implementing projects in collaboration with the private sector and conducting fruitful cooperation with regional/international organisations and business institutions.

The DMA is responsible for amongst other things, maritime legislation, accident investigations, safety, environmental protection, security, ship survey, ship registration, and seafarers' certification and verification.

Myanmar Courts have jurisdiction over any civil claims including maritime disputes. However, parties can agree to settle maritime disputes through arbitration by including an arbitration clause in the contract or by entering a separate written arbitration agreement. We are not aware of any reported cases related to maritime arbitration in Myanmar to date.

Enforceability of Foreign Arbitral Awards in Myanmar

Since Myanmar is a party to a New York Convention, Myanmar Courts can recognize and enforce foreign arbitral awards rendered in the contracting states of the New York Convention and awards rendered in Myanmar can similarly be enforced in other contracting states of the New York Convention.

Section 46(b) of the Arbitration Law provides that the court may refuse to recognise and enforce a foreign award, if any of the following in submission for recognition and enforcement of foreign award can be proved by the respondent:

(1) a party to the arbitration agreement was, under the law applicable to them, under some incapacity;
(2) the arbitration agreement is not valid under the law to which the parties have subjected it, or in the absence of any indication in that respect, under the law of the country where the award was made;
(3) the party was not given proper notice of the appointment of the arbitrator, or the arbitration proceedings were not carried out properly or the respondent was otherwise unable to present its case in the arbitration proceedings;
(4) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration or it contains a decision on the matter beyond the scope of the submission to arbitration;
(5) 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
(6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Section 46(c) of the Arbitration Law further provides that the court may refuse to enforce the award if it finds that:

(1) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or
(2) the enforcement of the award would be contrary to the public policy of the State.

Section 46(d) of the Arbitration Law provides that where the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority referred to in subsection (b) of section 46, the court may, if it considers proper to do so, postpone the order to enforce the award and may also order the respondent to provide appropriate security on the application of the party claiming enforcement of the award.

As a matter of procedure, Section 45 of the Arbitration Law provides that the party seeking to enforce a foreign award must produce to the court:

(1) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;
(2) the original arbitration agreement or an authorised copy thereof; and
(3) such evidence as may be necessary to prove that the award is a foreign award.

Further, where the award or arbitration agreement required to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in the Union of Myanmar.

In general, every court in Myanmar has jurisdiction to enforce foreign arbitral awards subject to certain pecuniary limit of its jurisdiction. The pecuniary limit of the Myanmar Courts are as follow: Township Court up to MMK 10 million, District Court up to MMK 1,000 million and no limits apply to the High Courts. In addition to such pecuniary limits, the Courts have territorial limits. Suits must therefore be instituted in a Court which has territorial jurisdiction based on the location in which the defendant resides, carries on business or personally works for gain, or where the cause of action arises.

After the foreign arbitral award is recognised, the judgement creditor shall apply to execute the foreign arbitral award in a Myanmar Court against the judgement debtor, based on its relevant jurisdiction.

The usual methods of execution applicable to a judgment issued by the Myanmar court will apply:

(a) attachment and sale of any property;
(b) examination of the judgment debtor on his property;
(c) application for garnishee orders requiring third parties, such as banks, who are indebted to the judgment debtor to pay the judgment creditor the amount of any debt due or accruing due to the judgment creditor in satisfaction of the judgment;
(d) arrest and detention in prison; and
(e) commencement of insolvency (against individuals) or winding up (against companies) proceedings, where applicable.

Application for execution of the decree may be either oral or written pursuant to Order 21, Rule 11 of the CPC.

Institutional vs ad hoc Arbitration – Myanmar Perspective

Myanmar Courts, in general, have jurisdiction to enforce both institutional and ad hoc arbitral awards under the Arbitration Law.

As mentioned above, arbitration is well accepted in Myanmar and is the preferred mode of dispute resolution in commercial contracts, particularly in cross-border transactions or where a foreign party is involved. Parties in such transactions would also generally prefer to have an international arbitral institution and its rules to administer their disputes. SCMA, as a specialised international arbitral institution, is well placed to be one of such institutions.

The Union of Myanmar Federation of Chambers of Commerce and Industry established the Myanmar Arbitration Centre in 2019. As it is a relatively new establishment, it has not been widely adopted as the arbitral institution of choice in arbitration agreements of Myanmar-related transactions. Further, it does not yet have an established panel of international arbitrators and its procedures and rules are not publicly or easily accessible. Nevertheless, it has taken on a small handful of ad hoc cases but there is no publicly available information on the outcome of these cases.

Status of SCMA Awards in Myanmar

Currently, we are not aware of any reported SCMA awards that have been enforced in Myanmar. However, given that SCMA is a specialised maritime arbitration centre with rules tailored for maritime disputes, we expect that usage of SCMA in shipping disputes connected to Myanmar will rise as trade grows for Myanmar and shipping volumes increase.

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Arbitration in VIETNAM

#11 | NOV

ENFORCEABILITY OF AN SCMA AWARD: A VIEW FROM VIETNAM

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Introduction

The last decade of the twentieth century marked serious attempt in the "renovation" of both arbitration law and maritime law in Vietnam. Since then, Vietnam has undergone significant developments in these areas thanks to the growing economy both in size and depth, as well as the integration with international practice.

In fact, arbitration law in Vietnam has been promulgated in line with the UNICTRAL Model Law on International Commercial Arbitration 1985 ("**Model Law**"), and the 1958 New York Convention ("**New York Convention**"), whereas maritime legislation has been built based on several well recognised maritime related conventions.

This article, accordingly, provides an overview of Vietnamese arbitration and maritime law, while focus will be placed on the enforceability of foreign maritime arbitral awards pursuant to the recognition and enforcement regime under the current regulations.

Overview of Vietnamese Law on Arbitration

Before the Doi Moi (Renovation) policy in 1986, arbitration in Vietnam was first recorded in the forms of the State Economic Arbitration System, the Foreign Trade Arbitration Committee and the Maritime Arbitration Committee in the 1960s.

After 1986, significant changes in state policy raised awareness of arbitration in Vietnam. This came in the form of the conclusion of a number of bilateral investment treaties[1] and eight regional and bilateral free trade agreements, as well as the accession of Vietnam into the New York Convention on 12 September 1995, effective on 11 December 1995.[2]

In the early 2000s, the National Assembly Standing Committee issued the first legislation on arbitration called Ordinance No. 08/2003/PL-UBTVQH11 on Commercial Arbitration on 25 February 2003, effective on 1 July 2003 ("**Ordinance**").

The Ordinance created the very first foundation for the development of arbitration in Vietnam. Seven years later, the National Assembly of Vietnam passed the current Law No. 54/2010/QH12 on Commercial Arbitration ("**LCA**") on 17 June 2010, effective from 1 January 2011.

The LCA is considered as the cornerstone of ADR in general and commercial arbitration in Vietnam, and it is relatively in line with the amended 2006 UNCITRAL Model Law, with slight modifications to adapt with the situation in Vietnam. The significance of the LCA, in comparison to the UNCITRAL Model Law, include, amongst other things:

- The lack of the definition of "commercial activities" that are arbitrable in the LCA, which is in turn defined in the 2005 Commercial Law of Vietnam. This makes the scope of arbitrable activities unclear with regard to tort claims of a commercial nature in the UNCITRAL Model Law.
- The LCA, instead of distinguishing between domestic arbitration and international arbitration, only provides for the definition of "foreign arbitration" and "foreign arbitral award". This distinction is based on the nationality of the arbitration institution rather than the seat of the arbitral award.
- Domestic ad hoc arbitration awards are required to be registered with national courts in order to be enforced by the state enforcement agency.

To facilitate the implementation of the LCA, the Government issued Decree No. 63/2011/ND-CP dated 28 July 2011, and the Council of Judges of the Supreme People's Court of Vietnam issued Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 ("**Resolution 01/2014**"). Resolution 01/0214 is another milestone in establishing a pro-arbitration approach in Vietnam as it ensures the effectiveness of arbitral proceedings by addressing the gaps of the LCA, such as providing the legal ground for a local court to order interim relief to support foreign arbitration seated in Vietnam, guidance on invalid and inoperable arbitration agreements, and other issues related to the principle of competence-competence and the annulment of arbitral awards.

Unlike the UNCITRAL Model Law, the recognition and enforcement of foreign arbitral awards in Vietnam are not governed by the LCA but are regulated by a chapter of the 2015 Civil Procedure Code, which is analysed below.

Overview of Maritime Law in Vietnam

Maritime law in Vietnam dates back to the period before 1990 when international maritime activities were governed by by-law documents issued by the Government and relevant Ministries. Nevertheless, it was not until 1990 that the first maritime code was issued, building the foundation for maritime activities under Vietnamese laws. The 1990 Maritime Code replaced the majority of previous legislative documents on maritime activities and became a major milestone for Vietnam in the attempt to integrate with international maritime law. The legislation has internalised several provisions of generally recognised international conventions of the International Maritime Organization (IMO), Comité Maritime International (CMI), and United Nations Conference on Trade and Development (UNCITAD) on legal issues relating to the maritime industry.[3]

After 13 years of implementation, in consideration of the progress of the development and international business integration of Vietnam in general and of the maritime industry in specific, the amendment and supplementation of the Maritime Code is vital. The amendment and supplementation of the Maritime Code are based on certain principles, including: (i) to inherit and be compatible with the reality of the industry, (ii) to ensure the unification of other laws within the Vietnamese legal framework, and (iii) to ensure that the amendment and supplementation must be in line with the developing conditions of the Vietnamese maritime industry and be unified with international maritime treaties and customs. Accordingly, the National Assembly of Vietnam promulgated a new Maritime Code in 2005, effective from 1 January 2006.

Thereafter, on 27 August 2008, the National Assembly Standing Committee issued Ordinance No. 05/2008/UBTVQH12 on procedures on ship arrests, reflecting basic principles of the arrests of ship to secure maritime claims as set out in the 1952 and 1999 Conventions on Ship Arrests even though Vietnam has not been a Contracting Party to these Conventions.

Furthermore, the first legislation on the law of the sea was passed by the National Assembly of Vietnam in June 2012 under the name of Law No. 18/2012/QH13 on the Vietnamese sea, which reflects fundamental principles of the 1982 UNCLOS. These legislative documents, together with its supplementations and guidance, formed a legal framework for the development of the maritime industry of Vietnam.

After 10 years of implementation, the 2005 Maritime Code faced certain drawbacks, one of which was the heavy reliance on the by-law documents due to its general drafting. In order to govern the maritime industry with significant developments in Vietnam and match with other legislative documents also stipulating certain aspects of maritime law, the National Assembly of Vietnam passed the current Maritime Code on 25 November 2015, which took effect from 1 July 2017.

In addition, in an attempt to integrate into the community of international maritime law, Vietnam acceded to a number of international conventions, including, amongst others:

- 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS)
- 1948 Convention on the International Maritime Organization and its 1993 Amendment (IMO Convention)
- 1966 International Convention on Load lines (1966 Load Lines Convention)
- 1969 International Convention on Tonnage Measurement of Ships (1969 Tonnage Convention), 1972 International Regulations for Preventing Collisions at Sea (1972 COLREGS),
- 1974 International Convention for the Safety of Life at Sea and its 1978 Protocol (SOLAS Convention)
- 1978 International Convention on Standards of Training, Certification and Watchkeeping for seafarers (1978 SCTW Convention).

Several provisions of these conventions have been adopted into domestic legislation, which has created uniformity between the regulations applicable to foreign and domestic vessels. Vietnam, however, is not a contracting party of any international convention on carriage of goods, but several provisions of the 2015 Maritime Code are in line with the 1968 Hague-Visby Rules, the 1978 Hamburg Rules, and the 2009 Rotterdam Rules.

Enforceability of Foreign Awards in Vietnam

As mentioned earlier, Vietnam is a member of the New York Convention, and the regulation on the recognition and enforcement of foreign arbitral awards in Vietnam have been adopted into Vietnamese laws and is currently governed by Chapter XXXV-Part VII of Civil Procedure Code No. 92/2015/QH13 ("**2015 CPC**").

To date, Vietnam has also concluded bilateral treaties on judicial assistance on civil matters with 17 countries, eight of which refer to the application of New York convention, and the remaining treaties stipulate specific procedures for recognition and enforcement of foreign arbitral awards in Vietnam.[4]

The 2015 CPC, within its own context, does not provide a definition for a foreign arbitral award, but instead refers to the definitions already established under the LCA.

Pursuant to the LCA, a foreign arbitration means "*an arbitration established under foreign arbitration law as per the parties' agreement to resolve dispute either outside or inside the territory of Vietnam*".[5] As explained earlier, an arbitration seated in Vietnam but under the rules of the foreign institution would still be considered a foreign arbitration. Thus, foreign arbitral awards are defined as awards issued by "*foreign arbitration*" institutions either outside or inside the territory of Vietnam.[6] The "foreign" element of arbitral awards shall be determined by the "nationality" of the arbitration institution rather than the place of issuance,[7] which is different from the approach of the New York Convention and the UNCITRAL Model Law. The definition of the LCA, however, still complies with Article I(1) of the New York Convention.[8]

The CPC also provides for the prescriptive period for the application for recognition and enforcement of foreign arbitral award in Vietnam, which is three years since the effective date of the award.[9] In order to seek for the recognition for enforcement of foreign arbitral awards in Vietnam, award creditors shall file a dossier including the application enclosing the arbitral award and arbitration agreement together with other supporting documents. The dossier should be submitted to the competent provincial court except for the cases the judicial assistance treaties expressly require the submission of the dossier to the Ministry of Justice.[10]

With regard to the grounds for refusal of recognition, apart from replacing the concept of "public policy" in the New York Convention by the unique concept of the "fundamental principles of the laws of the Socialist Republic of Vietnam", other circumstances whereby the Court might refuse to recognise and enforce a foreign arbitral award[11] are quite similar to the provisions of Article V of the New York Convention and Article 36 of the UNCITRAL Model Law. Notably, unlike its predecessor, being the 2004 Civil Procedure Code amended in 2011, the 2015 CPC clearly stipulates that the burden of proof of the existence of the grounds for refusal of recognition and enforcement of foreign arbitral awards shall be borne by the award debtor. After the award is recognised by the court, it shall be enforced by the state enforcement agency under the provisions of the 2008 Law on the Enforcement of Civil Judgements (as amended in 2014 and 2018).

In the past, the high number of foreign arbitral awards being refused recognition by the Vietnamese courts due to the non-compliance with the New York Convention[12] used to be a serious concern for foreign investors for several years.[13]

Prior to the new pro-arbitration approach of Vietnamese courts (thanks to the establishment of Resolution 01/2014 and the 2015 Civil Procedure Code), it was reported that 24 out of 52 applications (46.2 percent) for recognition and enforcement of foreign arbitral awards in Vietnam were dismissed. Notably, the "violation of fundamental principles of Vietnamese laws", while not officially guided by any legislation, used to be a frequent ground for refusal of recognition of foreign arbitral awards in Vietnam. However, international organisations and projects, such as the International Finance Corporation (IFC) under World Bank Group, the United States Agency for International Development Governance for Inclusive Growth (USAID GIG), supported the Ministry of Justice and the Supreme People's Court in the holding of a number of training for the local judges on this topic. This has created positive changes on the situation of recognition and enforcement of foreign arbitral awards in Vietnam.

In particular, the recent statistic on the number of refused awards has significantly decreased to around 21 percent of all applications.[14]

Prior to 2014, the ground of "violation of fundamental principles of Vietnamese laws" was widely interpreted by the local courts. To be specific, certain Vietnamese legislation, such as the 2015 Civil Code, the 2005 Commercial Law or the LCA, provide for specific provisions labelled as the fundamental principles of such laws. Accordingly, in theory, the local court should only invoke the above ground if there are violations of only those specific fundamental provisions. However, there were cases where the local courts invoked other normal provisions of these laws to hold that fundamental principles of Vietnamese laws had been violated and accordingly declined the recognition of foreign arbitral awards. As a result, any difference between the substantive law applicable to the dispute and the Vietnamese law could be invoked as a violation of fundamental principles of Vietnamese laws. This has caused foreign arbitral awards to be easily denied recognition and enforcement by the Vietnamese courts. Currently, though the ground of "violation of fundamental principles of Vietnamese laws" is still invoked, there has been a more cautious approach of local courts since the early 2010s.[15]

Notably, in September 2020, the Ministry of Justice published a report on how Vietnamese courts handled the applications for recognition and enforcement of foreign arbitral awards calculating from 2012.[16] This illustrates a transparency of the results of the recognition and enforcement of foreign arbitral awards procedure. Currently, a resolution illuminating the procedure for recognising and enforcing foreign arbitral awards in conformity with the New York Convention and the 2015 Civil Procedure Code is being drafted by the Supreme People's Court.[17] It is expected that the issuance of the guidance from the Supreme People's Court on the recognition and enforcement of foreign arbitral awards would further improve the current situation and ease the concerns of foreign investors on the enforceability of the foreign arbitral awards in Vietnam.

Institutional vs ad hoc Arbitration – Vietnamese perspectives

Vietnamese laws, particularly the LCA, do recognise both forms of arbitration, namely institutional arbitration and ad hoc arbitration.

Pursuant to the LCA, domestic institutional arbitration is defined as a form of dispute settlement at an arbitration centre under the LCA and the rules of proceedings of such arbitration centre. Like in international law and practice, the arbitral procedure of institutional arbitration shall follow the arbitration rules of the arbitration centre.

After the issuance of the institutional arbitral award, if the award debtor does not perform the award within the period as specified, and there is no application for the annulment of such award, the award creditor can directly apply to request the Civil Judgement Enforcement Agency to coerce the award debtor to perform the award.[18] Foreign institutional arbitral awards must however be recognised under the 2015 CPC before its enforcement within the territory of Vietnam.

Domestic ad hoc arbitration is defined as a form of dispute settlement under the LCA in which the procedure shall be governed by the regulations of the LCA and approved by the parties.[19] Indeed, the LCA respects and prioritises parties' agreement on the ad hoc arbitral procedure save for the case where the agreed procedure is contrary to the provisions in the LCA.[20] If the parties do not agree on the arbitral proceeding, the LCA promulgates certain provisions to assist and supervise the dispute settlement via ad hoc arbitration.

For example, regarding the establishment of an ad hoc arbitral tribunal, the local courts are entitled to appoint (i) an arbitrator for the respondent, (ii) a presiding arbitrator, or (iii) a sole arbitrator per the request of the parties, whenever there is no agreement or appointment from the involved parties or party nominated arbitrators.[21] Unless otherwise agreed by the parties, the commencement date of ad hoc arbitration shall start from the receipt date of the request for arbitration by the respondent.[22] The statement of defence and counterclaim of the respondent shall be submitted within 30 days from the receipt of the request.[23]

The local courts also assist the arbitral tribunal in collecting evidence,[24] summoning witnesses,[25] or applying interim measures.[26] For domestic arbitration, the involved parties or the arbitral tribunal are entitled to apply to local court seeking for their assistance on the above matters. Nevertheless, for foreign arbitration, only those seated in Vietnam may seek for such assistance. Foreign arbitrations seated outside of Vietnam may only seek for Vietnamese court assistance by way of judicial assistance treaties but it in practice it is not feasible. Additionally, the local courts also have power to resolve complaints about the jurisdiction of the arbitral tribunal[27] and applications for the annulment of arbitral awards.[28]

In order to apply for the enforcement of a domestic ad hoc arbitration award, the award creditor must register the award at the court where the arbitral tribunal has issued the award, even though this registration requirement does not affect the validity of the award.[29] However, it should be noted that the requirement of registration of an ad hoc arbitral award is only applicable for domestic arbitral awards and the laws are silent on foreign arbitral awards.

In terms of institutional arbitral awards, according to the report of the Ministry of Justice,[30] from 1 January 2012 to 30 September 2019, there were 14 applications to recognise and enforce SIAC arbitral awards in Vietnam and only four of which was dismissed. While the full texts of the court decisions are not published, certain reasons behind the dismissals have been reported.

In particular, one application was dismissed on the ground of violation of fundamental principles of Vietnamese laws, while another was for the violation of SIAC Arbitration Rules. Also, subject to the full reasons of the court, there were dismissals in 2014 and 2015 on the controversial ground relating to the validity of contract which affected the existence of arbitration agreement. However, it can be seen from the statistics that eight SIAC awards were recognised since the establishment of the LCA as a sign of the pro-arbitration approach taken by local courts in Vietnam.[31]

As ad hoc arbitration is generally unreported, there is not much information or statistics on the number of ad hoc arbitrations in Vietnam. Nonetheless, according to the public information, so far, there has been only one ad hoc arbitration, which was conducted in accordance with the UNCITRAL Model Rules and administered by the VIAC. The dispute arose from an agreement for architecture design services, and during the arbitral procedure, the Court appointed a sole arbitrator pursuant to an explicit procedure within the arbitration agreement of the parties. The award debtor, later on, filed an application to annul the award on one of the grounds that the arbitrator, if not agreed by the parties, must be designated by the secretary general of the Permanent Court of Arbitration pursuant to Article 6 of the UNCITRAL Model Rules. However, the Court invoked its rights of appointment as mentioned above and considered the parties estopped from objecting the appointment during the arbitral procedure. The award was thus upheld.[32]

Status of SCMA Awards in Vietnam

As the court database has only been available in recent years and there has not been any compulsory requirement to report cases on recognition and enforcement of foreign arbitral awards, there is a lack of information on the number of SCMA awards that have been recognised in Vietnam. To the best of our knowledge to date, there was only one reported court decision relating to the recognition and enforcement of SCMA Award in Vietnam publicly available.

In Decision No. 27/2015/QDPT-KDTM dated 19 August 2015, the High People's Court of Ho Chi Minh City dismissed the application for recognition and enforcement of a Singapore arbitral award, amongst other things, for the reason that the award was not yet legally binding on the parties as the award creditor failed to prove the registration of the ad hoc arbitral award in Singapore. The Vietnamese court found that the registration was a basic requirement for the validity of the arbitral award.

In that case, the award creditor was a shipowner having concluded a fixture note on the chartering of its vessel to carry goods from Thai Lan to Vietnam with the award debtor in 2011. Due to the failure of the award debtor in making payment of the freight, the award creditor appointed a sole arbitrator to commence arbitral proceedings under a provision in the fixture note.

The arbitral award was issued in 2012 in favour of the shipowner, who then applied to the local court in Vietnam for recognition and enforcement. According to the first-instance decision No. 156/2014/QDST-KDTM, the People's Court of Ho Chi Minh City decided to recognise and enforce the Singapore arbitral award on the ground that (i) the award debtor could not prove the invalidity of the award and (ii) the award debtor was duly served with arbitral related documents.

However, the High People's Court of Ho Chi Minh City under its Decision No. 27/2015/QDPT-KDTM reversed the lower court's decision pursuant to Article 370.1 of the 2004 Civil Procedure Code amended in 2011, where one of the relevant reads as follows:

> ***Article 370. - Cases of non-recognition***
> *1. Foreign arbitral awards shall not be recognised and enforced in Vietnam in the following cases:*
> *...*
> *f) The foreign arbitral awards have not yet been legally binding on the parties;*
> *...*

The ambiguity of this decision is that from the court's perspective, one of the objections is that the arbitral award issued under ad hoc proceeding must be verified by the competent Singapore court.[33]

Since the award creditor did not prove the validity of the award, the Court eventually refused the recognition of the Singapore arbitral award. However, we understand that the registration requirement of an ad hoc arbitral award is only optional rather than mandatory in comparison with certain countries.[34] The High Court in this case seemed to apply the provisions of the LCA on the compulsory requirement for registration of an ad hoc arbitral award for enforceability. However, it should be noted that this decision was based on the 2004 CPC, while currently, pursuant to the 2015 CPC, the burden of proof is borne by the award debtor. Therefore, this decision should be considered as an exception rather than normal court practice in Vietnam.

An arbitral award rendered under the arbitration model of SCMA would likely be considered as a foreign award. However, there should not be any discrimination between SCMA awards and any other institutional foreign arbitral awards in terms of the procedure for recognition and enforcement in Vietnam, as well as the grounds for refusal of recognition of such awards. It is expected that with further training in the future, the local courts would not impose any additional requirements for registration of ad hoc arbitral awards.

Furthermore, even in case of a request by the Vietnamese courts, the validity of the award could be easily confirmed by SCMA, preferably by a certificate enclosed with the award.

Conclusion

Vietnam has been improving the pro-arbitration approach of local courts since the passing of the LCA in 2010.

Vietnamese arbitration law, in line with the UNCITRAL Model Law and the New York Convention, did recognise a distinction between institutional arbitration and ad hoc arbitration, with court registration for ad hoc domestic arbitral awards being an additional requirement. However, under the 2015 CPC, there is no longer any explicit distinction between foreign institutional arbitral awards and foreign ad hoc arbitral awards, meaning that all foreign arbitral awards must be recognised by the competent local courts under the same regime stipulated by the provisions of the 2015 CPC before being enforced within the territory of Vietnam.

With the further development of the shipping industry and the increase in the number of maritime-related transactions concluded between Vietnamese and foreign parties, we can anticipate the increase of SCMA awards to be sought for recognition and enforcement in Vietnam in the near future.

It is hoped that the sound legal framework of both Vietnamese arbitration and maritime law inches closer to the international standards, and thus facilitates the ease of enforcement of SCMA arbitral awards in Vietnam.

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[1] Up to present, Vietnam has concluded 67 BITs with countries and regions across the world https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam last accessed on 18 August 2021.

[2] Nguyen Manh Dzung and Nguyen Thi Thu Trang (2015), Vietnam Chapter, Global Arbitration Review – The Asia-Pacific Arbitration Review 2016.

[3] Ministry of Transportation (2003), Report on the 13-year implementation of the Maritime Code (1991-2003).

[4] According to Official Correspondence No. 33/ TANDTC-HTQT of the Supreme People's Court dated 17 March 2021 regarding the judicial assistance and service of documents to foreign countries https://thuvienphapluat.vn/cong-van/Thu-tuc-To-tung/Cong-van-33-TANDTC-HTQT-2021-cong-tac-tuong-tro-tu-phap-tong-dat-van-ban-to-tung-ra-nuoc-ngoai-468111.aspx last accessed on 18 August 2021.

[5] Article 3.11 of the 2010 Law on Commercial Arbitration

[6] Article 3.12 of the 2010 Law on Commercial Arbitration.

[7] Decision No. 142/2005/QDPT dated 12 July 2005 of the Supreme People's Court of Hanoi.

[8] Article 1.1 of the New York Convention reads as follows: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, … It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

[9] Article 451.1 of the 2015 Civil Procedure Code.

[10] Article 452.2, 453.2 of the 2015 Civil Procedure Code.

[11] Article 459.1 of the 2015 Civil Procedure Code.

[12] Ministry of Justice, 'Report on assessment of and comparison between the laws of Vietnam on recognition and enforcement of arbitral award and the UNCITRAL Model Law, and recommendation on feasibility to apply the UNCITRAL Model Law on Vietnam' http://vibonline.com.vn/du_thao/17048 last accessed on 18 August 2021.

[13] Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh (2022), Arbitration developments in Vietnam: adapting to global challenges, Global Arbitration Review – The Asia-Pacific Arbitration Review 2022.

[14] Ministry of Justice, 'Report on assessment of and comparison between the laws of Vietnam on recognition and enforcement of arbitral award and the UNCITRAL Model Law, and recommendation on feasibility to apply the UNCITRAL Model Law on Vietnam' http://vibonline.com.vn/du_thao/17048 last accessed on 18 August 2021, see also Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh (2022), Arbitration developments in Vietnam: adapting to global challenges, Global Arbitration Review – The Asia-Pacific Arbitration Review 2022.

[15] Ministry of Justice, 'Report on assessment of and comparison between the laws of Vietnam on recognition and enforcement of arbitral award and the UNCITRAL Model Law, and recommendation on feasibility to apply the UNCITRAL Model Law on Vietnam' http://vibonline.com.vn/du_thao/17048 last accessed on 18 August 2021.

[16] See https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx?fbclid=IwAR3Qs8iK7SY6yP9RmtSHnegKHLXYbejvd_w7zuQk93lfNStHl9tOvhGY3HQ last accessed on 18 August 2021.

[17] Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh (2022), Arbitration developments in Vietnam: adapting to global challenges, Global Arbitration Review – The Asia-Pacific Arbitration Review 2022.

[18] Article 66 of the 2010 Law on Commercial Arbitration.

[19] Article 3.6, 3.7 of the 2010 Law on Commercial Arbitration.

[20] Article 68.2(b) of the 2010 Law on Commercial Arbitration.

[21] Article 41 of the 2010 Law on Commercial Arbitration, Article 8 of Resolution No. 01/2014/NQ-HDTP.

[22] Article 31.2 of the 2010 Law on Commercial Arbitration.

[23] Article 35.3, 36.2 of the 2010 Law on Commercial Arbitration.

[24] Article 46 of the 2010 Law on Commercial Arbitration, Article 11 of Resolution No. 01/2014/NQ-HDTP.

[25] Article 47 of the 2010 Law on Commercial Arbitration, Article 11 of Resolution No. 01/2014/NQ-HDTP.

[26] Article 53 of the 2010 Law on Commercial Arbitration, Article 12 of Resolution No. 01/2014/NQ-HDTP.

[27] Article 44 of the 2010 Law on Commercial Arbitration, Article 10 of Resolution No. 01/2014/NQ-HDTP.

[28] Chapter Xi of the 2010 Law on Commercial Arbitration.

[29] Article 62.1 of the 2010 Law on Commercial Arbitration.

[30] See https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx?fbclid=IwAR3Qs8iK7SY6yP9RmtSHnegKHLXYbejvd_w7zuQk93lfNStHl9tOvhGY3HQ last accessed on 18 August 2021.

[31] Ibid

[32] See https://www.viac.vn/en/view-of-arbitrators/vietnamese-centre-hosts-first-case-under-uncitral-rules-a90.html last accessed on 18 August 2021.

[33] Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh (2019), Vietnam Chapter, Global Arbitration Review – The Asia-Pacific Arbitration Review 2020.

[34] Redfern & Hunter, International Arbitration, 6th Edition, Oxford University Press, Para. 9.171-172.

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OVERVIEW OF BANGLADESHI ARBITRATION AND MARITIME LAW

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Overview of Bangladeshi Arbitration Law

Arbitration Law

The primary source of Bangladesh's arbitration law is the Arbitration Act 2001 ("**Act**") which governs domestic and international commercial arbitration. As per Section 3(1) of the Arbitration Act 2001, the Act applies whenever the place of arbitration is in Bangladesh. The legislature adopted the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") while enacting the Arbitration Act with a view to modernising the previous Arbitration Act of 1940.

After the Arbitration Act 2001 came into force Bangladesh, inclusion of arbitration clauses in commercial contracts have become the norm. Even if a contract does not contain an arbitration clause, arbitration under the Act may be invoked for resolution of any commercial dispute, if the parties to the dispute so decide, so long as the place of Arbitration is Bangladesh.

Among other things, the definition of an arbitral tribunal in section 2(o) and the composition of the arbitral tribunal in section 11 of the Act, are modelled on article 2(b) and article 10 of the Model Law. Section 2(o) of this Act adopts the definition of an arbitral tribunal in article 2(b) being "a sole arbitrator or a panel of arbitrators". Article 10 of the Model Law grants to the parties the greatest possible freedom in the choice of the number of arbitrators to constitute the arbitral tribunal. That is to say, the parties may choose a sole arbitrator or any number of arbitrators including even numbers, and in the absence of an agreement of the parties, the default number is three.

However, section 11 of the Act departs from the Model Law in two ways. Firstly, it provides that the number of arbitrators constituting the arbitral tribunal shall not be an even number unless otherwise agreed by the parties. Secondly, where the parties appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as the Chairperson of the tribunal. Thus, the default number is three arbitrators while the maximum number is any uneven number that may be determined by the parties.

New York Convention

Bangladesh ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") on 6 May 1992 and the Convention entered into force on 4 August 1992. The Act provides for enforcement of foreign arbitral awards in accordance with the New York Convention.

Arbitral Institutions

Bangladesh International Arbitration Centre ("**BIAC**") is the first international arbitration institution of the country. It is registered as a not-for-profit organization and commenced operations in April 2011 under a license from the Government. BIAC provides a neutral, efficient, and reliable dispute resolution service in this emerging hub of South Asia's industrial and commercial activity. BIAC introduced its Arbitration Rules in April 2012 and Mediation Rules in 2014, both of which were updated in 2019.

Substantive Law

Under the Arbitration Act, the parties are allowed to choose any substantive law. For example, any party may select Bangladeshi law as the substantive law and the rules of International Chamber of Commerce ("**ICC**") for the arbitral proceedings. However, the Act allows an arbitral tribunal, in the absence of the parties' choice of substantive law, the freedom to apply any rule of law as suitable in the circumstances of a dispute.

Appointment of Arbitrators

Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator. In the event of default, courts can appoint an arbitrator under section 12 of the Act, but they must give due regard to any agreement of the parties as to the qualifications required of the arbitrator, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator (Section 12(9)).

The most noteworthy deviation from the Model Law is that section 12 uses the words "District Judge and Chief Justice" instead of the word "court" used in article 11. In other words, the Model Law permits court intervention in the matter of appointment of arbitrators, while this section avoids court intervention and vests the default power to appoint arbitrators in the "Learned District Judge in case of arbitration other than international commercial arbitration and in the Honourable Chief Justice or an Honourable Judge of the Supreme Court designated by the Honourable Chief Justice in case of international commercial arbitration".[1]

The Act also allows the appointment of an arbitrator to be challenged on the grounds of impartiality, independence and the arbitrator's qualifications as agreed by the parties (Section 13).

Interim measures

Under section 7A of the Act, the judiciary in Bangladesh has previously held conflicting views regarding the applicability of the Act by dint of Section 3 in cases where the seat of arbitration has been agreed by the parties to be outside of Bangladesh.

In *HRC Shipping Ltd v. MV X-Press Manaslu* ("**HRC case**"),[2] the High Court, following *Bhatia International v. Bulk Trading SA*,[3] was of the view that the court can order interim measures where the seat of arbitration is outside Bangladesh. On the other hand, in *STX Corporation Ltd v. Meghna Group of Industries Limited* ("**STX case**"),[4] the High Court adopted a completely different approach and held that the provision of the Act is not applicable to a foreign arbitration except as provided in Section 3(2) of the Act itself, meaning that interim measures would not be available in foreign-seated arbitrations.

Thereafter, the High Court Division revisited the ratio of both the HRC and STX cases in *Project Builders Ltd (PBL) v. China National Technical Import and Export Corporation and others*,[5] and confirmed that there is no scope to deviate from the provisions of section 3 of the Act. However, recently in *Southern Solar Power Ltd. and Ors Vs. Bangladesh Power Development Board and Ors*,[6] the High Court Division comprising Honourable Justice Mr Muhammad Khurshid Alam Sarkar, held that the "*...Court is well competent to entertain an application under Section 7A of the Arbitration Act regarding an arbitration which would take place or is taking place in a foreign country.*" This means that Bangladeshi courts have the power to order interim measures in both local & foreign arbitrations.

Awards

An arbitral award is enforceable on the same footing as a court decree. However, there is a time limit for initiating proceedings for setting aside an award. Proceedings for setting aside an arbitral award will have to be initiated under section 42 within 60 days of receipt of an award. Section 43 along with section 42 of the Act provide the grounds for setting aside an arbitral award. Fraud, corruption, or conflict with the public policy of Bangladesh, a violation of the principles of natural justice, acting beyond the terms of the submission and deciding on matters that are legally not arbitrable are the grounds on which an award can be set aside.

Virtual Hearings

Nothing under the Act prohibits virtual hearings. Sections 25 and 26 of the Act allow the Tribunal and/or the parties' full freedom to decide on a procedure and a place respectively for holding oral hearings. There is no legal bar against fixing a designated digital platform like "Zoom" or "Skype" or other similar platforms available in Bangladesh.

Further, during this COVID–19 pandemic, the Parliament enacted the Adalat Kartrik Tottho-Projukti Bebohar Ordinance, 2020 (Use of Information communication technology by court Ordinance, 2020), which allows the conduct virtual hearings.

Overview of Maritime Law in Bangladesh

Bangladesh is a common law system country based on English common law. The law on admiralty and maritime affairs in Bangladesh can be traced back to the Law relating to the Admiralty Courts of England, in particular, the Admiralty Court Act, 1861, The Courts of Admiralty Act, 1891 and the Admiralty Rules of 1912. Now, the Admiralty Courts Act 2000 deals with all issues related to Admiralty Jurisdiction of the Admiralty Court of Bangladesh while the Admiralty Rules of 1912 is still applicable. Any person or company can initiate a suit in the Bangladesh Admiralty Court involving a vessel. The most common causes for admiralty suits in Bangladesh are vessel Collisions, cargo short landing, cargo damages, non-payment of crew & supplier, charterparty claims involving freight & hire, salvage, ship finance, and so on.

The Admiralty court may exercise its authority over all ship or aircraft, whether Bangladeshi or not and whether registered or not and wherever the residence or domicile of their owners may be, in relation to such claims as provided under the Admiralty Court Act 2000.

Arrest of ships

Bangladesh is not a signatory to any arrest convention. Bangladesh law recognises *in rem* and *in personam* proceedings.

The High Court Division of the Supreme Court of Bangladesh has admiralty jurisdiction. To file an application for the arrest of a ship, the applicant must initiate a suit before the Admiralty Court. After the application for arrest is heard and if the court is prima facie satisfied, it passes an order for arrest of the ship for security of the claim amount. Ships may be arrested for maritime liens as well as maritime claims, and the Court does not require any counter security for arrest. To date, the practice for awarding damage for wrongful arrest is still at an early stage; A P&I club's letter of undertaking or letter of indemnity is not accepted for release of the vessel and a vessel is only released upon furnishing a bank guarantee.

Shipowner's Limitation of Liability & Collision

Bangladesh is not a signatory to any of the conventions relating to limitation of liability & collision. However, our Merchant Marine Ordinance incorporated provisions on limitation of liability which is similar to the 1957 Brussels Convention. Limitation of shipowner's liability arising from collision is provided under sections 471 and 472 of the Bangladesh Merchant Shipping Ordinance, 1983.

Maritime liens

Sections 477 to 479 of the Bangladesh Merchant Shipping Ordinance 1983, recognize maritime liens on seaman's wages and the master's wages. No other statute recognizes maritime liens. However, the Court follows the English law of maritime liens. If the plaintiff's claim is a maritime lien, the claim survives even in case of a change in ownership of a ship, and the ship can still be subjected to arrest. If the claim is a maritime claim and not a maritime lien, the ship cannot be arrested if, before filing of the suit, ownership of the ship has changed.

Carriage of goods by sea

The laws relating to carriage in Bangladesh are the Carriers Act 1865, the Carriage by Air (International Convention) Act 1966, the Carriage of Goods by Sea Act 1925, and the Railway Act 1989. In the absence of any special laws, the Carriers Act 1865 is uniformly applicable to all the modes of carriage. Accordingly, the Carriers Act 1865 applies to inland water carrier, land carriers. It does not apply in case of carriage by Air (including inland air) and carriage by sea. The Carriage of Goods by Sea Act, 1925 reflects the Hague Rules (Brussels 1924). Under the present legal system of Bangladesh, MTO cannot lawfully operate with regard to carriage by sea since Carrier has been defined as the owner /charterer of a ship (Article I of the schedule to the carriage of goods by Sea Act 1925).

Charterparties

A charter party agreement would be governed by the Bills of Lading Act, 1856, the Carriage of Goods by Sea Act, 1925 and the Contract Act, 1872. After the contract of affreightment ends, the carrier incurs a new liability as bailee and the limitation for bringing a suit in that case would be 3 years under Article 115 of the Limitation Act.

Disputes involving charterparty claims for example, freight, sub freight, lien of cargo, etc. are mostly referred to arbitration. However, on very limited occasions an admiralty suit may be brought before the Admiralty Court of Bangladesh. The Admiralty Court will arrest a cargo if the vessel is also arrested, but the sole arrest of cargo is not allowed.

Salvage

The Maritime Conventions Act, 1911 is an enactment of the British Parliament, resulting from the ratification of the Collision Convention 1910[7] and the Salvage Convention 1910.[8] The Maritime Conventions Act, 1911, gave statutory effect to both the provisions of the Collision Convention 1910 and the Brussels Salvage Conventions 1910. Though Bangladesh did not ratify the conventions of 1910, the Courts of Bangladesh have followed the English enactment.

The High Court Division of the Supreme Court of Bangladesh in *Owners M.L. Madina vs. Owner Jalamoni* (1978)[9] applied the principle of the Maritime Conventions Act, 1911 giving recognition to the applicability of such Act in admiralty jurisdiction. The Appellate Division of the Supreme Court in *Bangladesh Inland Water Transport*

Corporation vs. M/s. Seres Shipping Corporated World Trade Centre (1984)[10] concurred with the finding of the High Court Division as to the applicability of Maritime Conventions Act, 1911. Since then, no dispute has been raised as to the applicability of Maritime Conventions Act, 1911 in Bangladesh. At present, reference is made to the Maritime Conventions Act, 1911 whenever required by our judiciary to address the issue of salvage in admiralty suits.

Marine Insurance & General Average

In Bangladesh, in the absence of any legislation relating to Marine Insurance, the courts have followed the principles of good faith, etc. of English Law and English decisions as well as the provisions of UK Marine Insurance Act, 1906.

The Supreme Court of Bangladesh in *Eagle Star Insurance Company Limited vs. Rahmania Trading Co.*[11] stated "*... [t]here is no such law in our country, Marine Insurance contract is therefore governed by the general principles of contract and the English principles. The principles in English Marine Insurance Act 1906 are also applicable.*" The Appellate Division in *Sadharan Bima Corporation vs. Bengal Liners Ltd.*[12] also held "*...in respect of marine insurance in general the Court of Bangladesh follow the general principles of contract and English law and practice.*"

Enforceability of Foreign Awards

Application

Foreign arbitral awards are enforceable under section 45 of the Arbitration Act. The Act clearly sets out provisions dealing with recognition and enforcement of foreign arbitral awards. Section 45 of the Act states that, notwithstanding anything contained in any other law for the time being in force, subject to section 46, a foreign arbitral award shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bangladesh.

However, there are grounds for refusing recognition or execution of foreign arbitral awards as set out in section 46 of the Act which include, amongst others, incapacity of any party, invalidity of the arbitration agreement, inadequate notice of arbitration to the party against whom award is invoked, subject matter of the dispute not capable of being settled by arbitration and award being in conflict with public policy of Bangladesh or contrary to public policy.

Competent Court

Section 45 of the Arbitration Act provides that unless there is any of the ground enumerated under section 46 for refusal, any foreign award shall be executed upon an application made to the Court of the District Judge, by any party in accordance with the Provision of the Code of Civil Procedure 1908 as if it were a decree of the Court.[13]

Timeframe

An award can be enforced only after "*the time for making an application to set aside the arbitral award under section 42 has expired or such application having been made has been refused*". An application to the court for setting aside the award must be made within 60 days.[14]

Enforceability of New York Convention foreign awards

Section 45 of the Act embodies Article III of the New York Convention, in that it makes a foreign arbitral award binding for all purposes on parties to the arbitration agreement and such an award can be executed by the local court as if it was a decree of the local court. This principle has been upheld in the case of *Canada Shipping and Trading SA v TT Katikaayu and another (Admiralty Jurisdiction)*,[15] where it was held that "*[o]nce an arbitration proceeding in a foreign country is completed, the Arbitral Award, on an application by any party, will be enforced by a court of this country under the Civil Procedure Code in the same manner as if it were a decree of the court.*" Thus, there is no requirement to obtain separate permission from the local court for enforcement.

Institutional and ad hoc Arbitration

Institutional and ad hoc arbitration are types of arbitration for administering the dispute resolution process based on the terms of the agreement and the applicable law. There is no difference in terms of their status, enforcement, or recognition of the award in Bangladesh. As with the leading international arbitration practice and institutions, BIAC has also developed to assist parties to arbitrations comprehensively from beginning to

end. It is now becoming common practice in Bangladesh to incorporate an arbitration institution's arbitration rules into a contract. Ad hoc arbitration under Arbitration Act used to be more popular domestically, but this is slowly changing.

Status of SCMA Awards in Bangladesh

Singapore is a party to the New York Convention and a SCMA award will be treated as a New York Convention award under the Act. An SCMA award will therefore be enforced in Bangladesh in accordance with Section 45 of the Act.

[1] Government of Bangladesh & Others Vs. Samir and Co 28 DLR (AD) 21.
[2] Reported in 58 DLR 185.
[3] Reported in 2002 AIR (SC) 1432.
[4] Reported in 64 DLR 550.
[5] Reported in 69 DLR 290.
[6] 2019(2) LNJ.
[7] Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels.
[8] Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea.
[9] 30 DLR 149.
[10] 36 DLR (AD) 82.
[11] (1976) 28 DLR (AD) 111.
[12] 16 BLD (AD) 186.
[13] Banerjee v M.N. Bhagwata (2002) 3 Arb LR 113 (Gau).
[14] Section 42, the Arbitration Act, 2001.
[15] 49 DLR (AD) (1997) 187 at 196.

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Arbitration in HONG KONG

#13 | DEC

ENFORCEABILITY OF SCMA AWARDS IN HONG KONG

HILL DICKINSON HONG KONG
Damien Laracy, Partner, Head of Hong Kong Office
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Overview

Hong Kong and Singapore are alike in many aspects, including their positions as leading alternative dispute resolution and maritime law centres in the Asia Pacific region. Both being world class arbitration and maritime law hubs, Hong Kong and Singapore are very collaborative in their arbitration regime. From the Hong Kong perspective, Singapore seated arbitration awards are enforceable as though they are judgments rendered by the Hong Kong Court.

The SCMA is a Singaporean arbitral body specifically established to facilitate resolution of maritime claims. Its counterpart in Hong Kong is the Hong Kong Maritime Law Group ("**HKMAG**"). In the eyes of the Hong Kong Court, an SCMA award has virtually equivalent status as HKMAG awards.

This article examines how an SCMA award would be recognised and enforceable in Hong Kong by providing an overview of the arbitration law and maritime law regimes in Hong Kong.

Overview of Hong Kong Arbitration Law

Arbitration is a means of dispute resolution alternative to litigation where disputes would be heard by a designated independent third party (a private individual, panel or a tribunal) instead of a court. Both parties to the disputes must consent to submit their disputes to arbitration. The usual practice is that the arbitration agreement would be incorporated into the commercial contract through an arbitration clause. If arbitration clauses are not included in the contract, a separate mutual agreement is required. Unlike litigation, arbitration is simple, confidential, flexible and also time-and-cost effective.

Hong Kong is one of the leading international arbitration centres and the Hong Kong courts generally adopt a pro-arbitration stance. In *Shagang South Asia (Hong Kong) Trading co. Ltd. v Daaewoo Logistics (The Nikolaos A)* [2015] EWHC 194 (Comm), Lord Justice Hamblen described Hong Kong as "*a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts.*" According to the 2021 International Arbitration Survey conducted by Queen Mary University of London, Hong Kong is the third most preferred seats for arbitration worldwide.[1]

Under Hong Kong law, the main legislation that regulates arbitration is the Arbitration Ordinance (Cap. 609). The Ordinance is mainly based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985) ("**Model Law**"). It superseded the old Arbitration Ordinance (Cap. 341) and unified the legal frameworks of domestic arbitration and international arbitration in Hong Kong.[2]

Regarding the legal position of arbitration in Hong Kong, Justice Chan listed out 10 key principles behind the Hong Kong courts' approach to arbitral proceedings in *KB v S and Others* [HCCT 13/2015]. The 10 principles are set out as follows:

1. The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
2. Under the Arbitration Ordinance, the court should only interfere in the arbitration of the dispute as expressly provided for in the Ordinance.
3. Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
4. Enforcement of arbitral awards should be "almost a matter of administrative procedure" and the courts should be "as mechanistic as possible" (*Re PetroChina International (Hong Kong) Corp Ltd [2011] 4 HKLRD 604*).
5. The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (*Grand Pacific Holdings v China Holdings Ltd [2012] 4 HKLRD 1 (CA)*).
6. In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of "must be serious, even egregious", before the court would find

that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings v China Holdings Ltd [2012] 4 HKLRD 1 (CA)*).

7. In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited [2009] 4 HKLRD 353 (CA)*).
8. Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of *bona fide* (*Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111*).
9. Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111*).
10. The Hong Kong Court of Final Appeal clearly recognised in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act *bona fide* (p 120I and p 137B of the judgment).

These 10 principles fortify the pro-arbitration and pro-enforcement attitude of courts in Hong Kong. According to the 2020 annual case statistics released by the Hong Kong International Arbitration Centre ("**HKIAC**"), 318 new arbitration cases were submitted to the HKIAC in 2020, which is its highest record of the decade.[3] The arbitration friendly stance of the Hong Kong Court also facilitates recognition and enforcement of foreign arbitral awards in Hong Kong. All this demonstrates that arbitration continues to thrive in Hong Kong despite the Covid-19 pandemic.

Overview of Maritime Law in Hong Kong

Following China's resumption of sovereignty over Hong Kong on 1 July 1997, Hong Kong continues to adopt the common law system instead of China's socialist law system under the principle of "One country, Two systems". Therefore, maritime law in Hong Kong is based upon pre-1997 English common law as the substantive law, which aligns Hong Kong with most of the other commonwealth jurisdictions. Maritime law in Hong Kong has gained the global recognition as the most advanced law with the highest standard.[4]

In conjunction with the body of common law, the following two pieces of legislation form a maritime law system familiar to the vast majority of the global entities:

1. By virtue of the Carriage of Goods by Sea Ordinance (Cap 462), the Hague-Visby Rules have the force of law in Hong Kong. The applicability of the Hague-Visby Rules provides certainty to entities globally as to the rights and liabilities of the carriers and other interested parties such as cargo owners and international traders.
2. By virtue of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434), the Convention on Limitation of Liability for Maritime Claims (the 1976 Limitation Convention) and the Protocol of 1996 to amend the 1976 Limitation Convention (the 1996 Protocol) have the force of law.

An Admiralty Court has been set up under the High Court in Hong Kong to specifically deal with maritime disputes and claims listed out in section 12A of the High Court Ordinance (Cap 4) ("**HCO**"). Section 12B of the HCO together with Order 75 of the Rules of High Court (Cap 4A) provide for the complete regime of the mode and procedures whereby the Hong Kong Admiralty Court would exercise admiralty jurisdiction, including the arrest of vessels to secure a maritime claim.

Enforceability of Foreign Awards in Hong Kong

According to section 84 of the Arbitration Ordinance, with the leave of the Court, an arbitral award made either in or outside Hong Kong is enforceable in the same manner as a judgement of the Court.

There are three main categories of foreign awards for the purposes of enforcement:

Convention awards

According to section 2 of the Arbitration Ordinance, a convention award is defined as "*an arbitral award made in a State or the territory of a State, other than China or any part of China, which is a party to the New York Convention.*" The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") is an international convention ratified by more than 160 states worldwide. Arbitral awards issued by one of the signatories of the New York Convention are enforceable in other contracting states.

Hong Kong, as a Special Administrative Region of the People's Republic of China, is not itself a separate contracting state party to the New York Convention. However, after the handover of Hong Kong to the PRC on 1 July 1997, the PRC, which is a contracting party to the Convention, extended application of the Convention to Hong Kong. As Hong Kong is included as one of the contracting states to the New York Convention, foreign awards issued by other signatories are enforceable in Hong Kong. The enforcement of the convention awards is governed by Division 2 of Part 10 of the Arbitration Ordinance.

Mainland awards

Section 2 of the Arbitration Ordinance defines Mainland awards as awards issued by any part of China other than Hong Kong, Macao and Taiwan. On 21 June 1999, based on Article 95 of the Basic Law, the Department of Justice in Hong Kong and the Supreme People's Court in China reached the "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region" ("**1999 Arrangement**"), which allows mutual recognition of arbitral awards between Hong Kong and mainland China. The 1999 Arrangement came into effect on 1 February 2000. Since then, arbitral awards made in accordance with the Arbitration Law of the PRC by the arbitral authorities in the Mainland becomes enforceable in Hong Kong via the reciprocal arrangement. Such enforcement is governed by Division 3 of Part 10 of the Arbitration Ordinance.

A Supplemental Arrangement was signed on 27 November 2020 to supplement and modify four main aspects of the 1999 Arrangement:

1. Simultaneous enforcement of awards in both jurisdictions was prohibited under the 1999 Arrangement. However, the Supplemental Arrangement now permits the parties to apply for the enforcement of the arbitral awards before the courts of China and Hong Kong at the same time, as long as the total amount to be recovered does not exceed the amount determined in the award.
2. The Supplemental Arrangement clarifies that the enforcement of arbitral awards under the 1999 Arrangement includes both "recognition" and "enforcement" of the awards.
3. An express provision has been added whereby the courts of the Mainland China and Hong Kong may order preservation or mandatory measures before or after its acceptance of an enforcement application.
4. The Supplemental Arrangement expands the scope of arbitral awards covered by the 1999 Arrangement. All arbitral awards made in the Mainland are now enforceable in Hong Kong under the Arrangement. Previously, only awards made by certain recognized Mainland arbitral authorities were enforceable.

It should also be noted that the time limitation periods for enforcing arbitration awards are different in China and Hong Kong. The limitation period in Hong Kong is 6 years from the date on which the cause of action accrued, while the limitation period in China is 2 years.

Macao awards

A similar reciprocal enforcement arrangement between Hong Kong and China was also made between Hong Kong and Macao in 2013. The "Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macau Special Administrative Region" provides for the mutual recognition and enforcement of arbitral awards between Hong Kong and Macao which are the two Special Administrative Regions of the PRC. The enforcement is governed by Division 4 of Part 10 of the Arbitration Ordinance.

In short, enforcement of foreign awards in Hong Kong is straightforward. Foreign arbitral awards issued by China and Macao are enforceable in Hong Kong under the reciprocal arrangements, while those issued by different international countries are enforceable via the New York Convention.

As mentioned above, the pro-arbitration Hong Kong Court takes a "mechanistic" and quasi-administrative approach to the enforcement of any qualified foreign award. The Arbitration Ordinance lists out three main documents required as evidence for enforcement of arbitral awards (section 85), Convention awards (section 88), Mainland awards, (section 94) and Macao awards (section 98C). These are:

(1) the duly authenticated original award or a duly certified copy of it;
(2) the original arbitration agreement or a duly certified copy of it; and
(3) a certified translation of the award or the agreement if it is written in a language other than English or Chinese.

Institutional vs ad hoc Arbitration – Hong Kong perspectives

There are two different types of arbitration, namely, institutional arbitration and ad hoc arbitration.

Institutional Arbitration

Institutional arbitrations are administered by an arbitral institution. Each institution has its own set of rules to regulate the arbitration process. Parties typically agree to hold the arbitral proceedings under a set of arbitration rules promulgated by a chosen institution. They do not have the complete freedom to decide on the arbitration procedures. Institutional arbitration can ensure that the proceedings will be conducted in an orderly manner under the supervision of the arbitral institution.

Arbitral institutions in Hong Kong include the HKIAC, HKMAG, China Maritime Arbitration Commission Hong Kong Arbitration Centre and the International Chamber of Commerce. The decisions made by these arbitral institutions are final and binding.

The Hong Kong Court is also well versed with recognizing and enforcing awards issued by other international arbitration bodies, such as the Singapore International Arbitration Centre and the SCMA.

Ad Hoc Arbitration

Ad hoc arbitrations are arranged between the parties and the arbitrators. They are not administered by arbitral institutions; instead, they are administered by arbitrators appointed by the parties. The parties have full discretion to decide the arbitrators selected, the number of arbitrators and the applicable rules that shall govern the arbitration. They may also agree to adopt a set of pre-existent rules, such as the UNCITRAL Rules of Arbitration, the LMAA Rules or the SCMA Rules.

Status of SCMA Awards in Hong Kong

The SCMA Rules provide that the default seat of the arbitration is Singapore. As aforementioned, under the New York Convention, arbitral awards issued by one of the signatories of the New York Convention are enforceable in other contracting states. As Singapore is a signatory to the New York convention, awards issued under the SCMA Rules, or by a Singapore seated Tribunal applying the SCMA Rules, are enforceable in Hong Kong.

The SCMA Rules also allow parties to agree that the seat of the arbitration to be elsewhere than Singapore. Depending on the agreed seat of the arbitration, SCMA awards of any ad hoc arbitration is enforceable the same way as any of the other local (Hong Kong seated) or foreign (Singapore seated for instance) awards as long as they come under the scope of the Arbitration Ordinance.

Concluding Remarks

The global maritime industry is delighted to see that both Hong Kong and Singapore have now their own designated arbitral bodies and sets of rules specifically tailored for maritime disputes. The Hong Kong Court treats SCMA awards virtually no different from HKMAG awards. This no doubt facilities effective alternative dispute resolution globally, and more saliently within the Asia Pacific region.

For further information and assistance in relation to this topic, feel free to reach the authors of this article or your usual contacts at Hill Dickinson.

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[1] Queen Mary University of London, "2021 International Arbitration Survey: Adapting arbitration to a changing world" (White and Case LLP 2021), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf, accessed 12 July 2021.

[2] LCQ14: Hong Kong as an International Arbitration Hub", https://www.info.gov.hk/gia/general/201912/18/P2019121800402.htm, accessed 12 July 2021.

[3] "2020 Statistics" (HKIAC, April 22, 2021) https://www.hkiac.org/about-us/statistics, accessed 14 July 2021.

[4] "Marine Legal Services" (HKMPB) https://www.hkmpb.gov.hk/en/marine-legal-services.html, accessed 20 July 2021.

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Our Hong Kong office is also highly regarded for its international trade work assisting banks, commodities traders, shipowners, charterers and insurers with trade and transport-related arbitration and litigation. This work often evolves into advising on sanctions issues and trade strategies and structures, as well as insolvency and restructuring advice. We also have a solicitor advocate, as well as accredited arbitrators and mediators.

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Arbitration in
NEW ZEALAND

#14 | DEC

A GUIDE TO NEW ZEALAND ARBITRATION

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Introduction

New Zealand is a pro-arbitration jurisdiction. Its legal arbitration framework supports the principles of party autonomy and procedural flexibility, and both domestic and international arbitral awards are enforceable through the New Zealand courts.

Most arbitrations in New Zealand relate to construction or commercial disputes. Maritime arbitrations are not common, as most commercial maritime contracts provide for arbitration in England or Singapore.

Overview of New Zealand Arbitration Law

Arbitrations are conducted pursuant to the New Zealand Arbitration Act 1996 (**the Act**). The Act is partly based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (**UNCITRA**L) in 1985.

Rules

Schedule 1 of the Act, which largely reproduces the Model Law, sets out the rules that apply to all arbitrations held in New Zealand, whether domestic or international.

Schedule 2 sets out various provisions which are designed specifically to apply to domestic arbitrations. Under section 6 of the Act, these automatically apply to domestic arbitrations unless the parties agree otherwise, but do not apply to international arbitrations held in New Zealand unless the parties expressly agree. This is because other national laws may apply to various aspects of the arbitration as well. Parties to international arbitration may elect to hold the arbitration in one particular country while applying the law of another country. For this reason, Schedule 1 of the Act, which largely reproduces the Model Law applies automatically, parties to international arbitrations conducted in New Zealand have the choice to opt into the more specific provisions contained within Schedule 2.

An arbitration is regarded as international if one or more of the following criteria applies:

a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
b) One of the following places is situated outside the state in which the parties have their places of business:
   i. The place of arbitration if determined in, or pursuant to, the arbitration agreement; or
   ii. Any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Procedure

The Act reflects the principle of party autonomy by providing that an arbitral tribunal must conduct the arbitration in accordance with the procedure agreed by the parties.[1] However, many arbitrations will follow procedures that reflect, to varying degrees, the procedures already established in litigation. The procedural structure for a typical domestic arbitration may include some or all of the following steps:

- Request for arbitration
- Establishing the arbitral tribunal
- Establishment of applicable procedure
- Exchange of statement of claim, statement of defence and counterclaim, and reply to counterclaim
- Exchange of documents: requests for and objections to disclosure of additional documents, tribunal's ruling, and preparation of agreed bundle
- Witness administration: exchange of witness statements and reply witness statements of non-expert and expert witnesses, as well as a joint conferral for experts

- Pre-hearing administrative conference
- Filing of pre-hearing submissions and draft hearing schedule;
- Hearing
- Awards: substantive and costs

Separability

Article 16(1), Schedule 1 of the Act provides for separability of arbitration clause. In other words, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

Interim orders

The Act enables arbitral tribunals to make orders for interim measures while the proceedings are ongoing. These cover a broad range of orders which require a party to do any or all of the following:

- Take action which would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings.
- Provide a means of preserving assets out of which a subsequent award may be satisfied.
- Preserve evidence that may be relevant and material to the resolution of the dispute.
- Give security for costs.

Interim orders may include, for example, orders requiring a party to continue performing its obligations under the contract; orders for inspection of goods, property or documents; anti-suit injunctions; freezing orders / Mareva injunctions, and so on.

Confidentiality

Arbitrations are usually confidential. Sections 14 – 14I of the Act provide a comprehensive set of rules on privacy and confidentiality.

Challenging an award

After an award is made in the arbitration, the dispute may continue in two ways.

First, a party may apply to the High Court to have the award set aside on specified grounds set out in Article 34 of Schedule 1 to the Act. The majority of applications to set aside an award are alleged procedural failures of a tribunal or of a party. Some substantive errors by a tribunal may be covered by the ground that the award is in conflict with public policy, while claims relating to the adjudicability of a dispute by arbitration may be made under the grounds of incapacity of a party, jurisdiction or arbitrability.

Second, under Clause 4 of Schedule 2 of the Act, a party may also appeal on a question of law to the High Court. Because this appears in Schedule 2, parties to domestic arbitration may appeal to the High Court unless they explicitly exclude this right. Parties to international arbitrations, however, must expressly provide for the court to be able to exercise this power. Clause 5(10) of Schedule 2 of the Act specifies the meaning of "question of law" and notes that it includes an error of law that involves an incorrect interpretation of the applicable law, but does not include any question as to whether the award was supported by any evidence or any sufficient or substantial evidence, and whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts. There is no general right of appeal on the facts, but in some cases the High Court has regarded a question of mixed fact and law as a question of law capable of founding an appeal under clause 5.

Overview of Maritime Law in New Zealand

New Zealand is a common law jurisdiction. Its legal framework is based on both legislation and case law. In the maritime context, legislation provides the broader framework and is supplemented by international conventions, domestic regulations, rules and standards.

Legislative Framework

The principal legislation is the Maritime Transport Act 1994 ("**MTA**"). The MTA regulates maritime activity (safety), the marine environment (prevention of pollution, etc.), the protection of seafarers, the international carriage of goods by sea, and liability for civil maritime claims and maritime offences (including the incorporation of international conventions).

International conventions ratified by New Zealand are usually implemented through the MTA. These include the International Convention on Salvage 1989 (the 1989 Salvage Convention), the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) (as amended by the 1996 Protocol) and the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules).

Other conventions are given effect by subordinate regulations; for example, the Maritime Rules (discussed below) give force to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) and the International Convention for the Safety of Life at Sea 1974 (SOLAS).

Other legislation focuses on specific matters, such as admiralty jurisdiction,[2] domestic carriage of goods,[3] biosecurity,[4] non-sector-specific employee safety,[5] security measures around ships and ports,[6] criminal provisions relating to maritime matters,[7] rights and liability under shipping documents and the delivery of goods, liens for freight and warehousing of cargo,[8] formation of port companies and management and operation of the commercial aspects of ports,[9] discharge from ships and offshore installation within 12 nautical miles,[10] ship registration, transfer of ownership and mortgages,[11] and outward shipping policy.[12]

Several different pieces of legislation apply to the maritime environment both in internal waters and New Zealand's territorial seas and exclusive economic zone: the MTA, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the Resource Management Act 1991.[13]

Carriage of Goods

The Hague-Visby Rules apply to every bill of lading ("**BOL**") relating to the international carriage of goods if:[14]

- the BOL is issued in a contracting state;[15]
- the carriage is from a port in a contracting state; or
- the contract contained in or evidenced by the BOL provides that the Hague-Visby Rules or the MTA are to govern the contract.

The MTA prevents parties from limiting the jurisdiction of New Zealand courts in respect of a:[16]

- BOL (or similar) relating to the international carriage of goods; or
- non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL (as provided for in Section 209 of the MTA).

However, the provisions of the MTA do not affect the enforceability of arbitration agreements and foreign choice-of-law clauses.[17]

Domestic carriage of goods by sea is governed by Part 5, Subpart 1 of the Contract and Commercial Law Act 2017 ("**CCLA**").[18] The Act applies to all domestic carriage pursuant to a contract of carriage, even if the ship is simultaneously engaged in international carriage.[19]

The CCLA outlines the liability for all those involved in domestic carriage, including those who arrange carriage or provide incidental services to carriage.[20] The Act provides (subject to exceptions) for strict liability for carriers for loss or damage to goods. Loss caused by delay in delivery is not covered by the Act (common law principles apply).

The CCLA recognises four types of contracts of carriage:[21]

- 'at owner's risk': the carrier will be liable only where the loss or damage is intentionally caused by the carrier;
- 'at declared value risk': the carrier is liable for the loss or damage to the amount specified in the contract. If the contract is silent, Sections 256 to 260 will apply;
- on declared terms': the contracting parties may regulate the carrier's liability under the contract; and
- 'at limited carrier's risk': the carrier is liable for the loss or damage to any goods in accordance with Sections 256 to 260. Section 259 caps the liability for carriers at NZ$2,000 for each unit of goods lost or damaged.[22]

Subject to limited defences,[23] the default rule is that the contracting carrier is liable to the contracting party for loss or damage to any goods, whereas the contracting carrier is responsible for them, whether caused by the contracting carrier or by an actual carrier.[24]

The right to sue for freight arises when a carrier ceases to be responsible for the goods.[25] The right to sue is supported by a lien.[26] If the owner does not pay within two months' notice of the lien, the carrier may sell the goods by public auction.[27]

Enforceability of Foreign Awards in New Zealand

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), to which New Zealand is a party, provides for the recognition and enforcement of foreign arbitral awards.

Article 35(1), Schedule 1 of the Act provides that an arbitral award, irrespective of the country in which it was made, must be recognised as binding and, on application to the Court, must be enforced by entry as a judgment in terms of the award, or by action. There is no requirement of reciprocity; that is to say, there is no requirement that the New Zealand courts will only recognise and enforce awards made in countries which also recognise and enforce awards made in New Zealand.

An arbitral award may be enforced in New Zealand by making an application for enforcement in the High Court. If the amount of the award is under NZ$350,000 an application may also be made in the District Court. The District Court does not have exclusive jurisdiction and a party may therefore apply for enforcement of an award in the High Court even if the amount of the award is lower than NZ$350,000.

Under Article 35(2) of Schedule 1 to the Act, the party seeking to enforce the award must supply the court with the duly authenticated original award, or a duly certified copy of the award, as well as the original or a duly certified copy of the arbitration agreement, as well as English translations of all documents, if needed. The applicant is not required to prove the validity of the arbitration agreement, although the party opposing enforcement may challenge the application under this ground.

The party seeking to enforce the award must serve notice of the application for entry of the award on the opposing party, although this requirement may be waived in exceptional circumstances (such as where there is a risk that assets will dissipate before the award can be enforced against the assets). The opposing party may oppose entry of the award as a judgment, by applying for an order for refusal of recognition and enforcement of the award.

Article 36(1), Schedule 1 of the Act sets out various grounds for refusing recognition or enforcement. These are as follows:

- A party to the arbitration agreement was under some incapacity;
- The arbitration agreement was invalid under the law to which the parties subjected it or the law of the country in which the award was made;
- 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 in some other way unable to present its case;
- The award relates to a dispute which does not fall within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission;
- The composition of the arbitral tribunal or procedure was not in accordance with the parties' agreement;
- The award is not yet 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) the award was made;
- The subject matter of the dispute is not capable of settlement by arbitration under New Zealand law; or
- The recognition / enforcement of the award would be contrary to New Zealand public policy (i.e. when the making of the award was induced or affected by fraud / corruption, or a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award).

Institutional vs ad hoc Arbitration – New Zealand perspectives

The choice between institutional or ad hoc arbitration largely turns on whether the parties have a preference for the increased definition and certainty provided by institutional rules, versus the flexibility and often decreased formality provided by ad hoc arbitration.

Ad hoc arbitration

Parties in New Zealand have the option to decide their own rules for an ad hoc arbitration. Ad hoc arbitration is governed under the Act.

As discussed earlier in this article, Schedule 1 of the Act largely reproduces the UNCITRAL Model Law, thereby providing a basic framework which ad hoc arbitrations can use. Schedule 1 applies to both domestic arbitrations (i.e. where all parties to the arbitration have their principal place of business in New Zealand, per Article 1(3) of Schedule 1) and international arbitrations. Schedule 2 of the Act sets out a further set of rules specifically for domestic arbitrations.

The procedure for international arbitrations which take place in New Zealand will be governed by the applicable provisions of the Act (which, as noted above, largely reproduces the Model Law), in addition to any additional rules under Schedule 2 which the parties agree to utilise. However, these rules may be at a level of generality which could be considered inadequate for an international commercial arbitration, especially if the amount at stake is significant. Parties may thus choose to utilise other rules of procedure as well.

Institutional arbitration

The most prominent arbitration institution in New Zealand is the Arbitrators' and Mediators' Institute of New Zealand (**AMINZ**).

There are also two smaller arbitration institutes: the New Zealand Dispute Resolution Centre (**NZDRC**), and the New Zealand International Arbitration Centre (**NZIAC**).

None of these institutions have specialist maritime expertise.

It is not common for maritime arbitrations involving a non-New Zealand party to be seated in New Zealand. Typically, parties to maritime contracts will choose arbitration in London or Singapore.

Status of SCMA awards in New Zealand

As New Zealand is a signatory to the New York Convention, SCMA awards are enforceable.

Conclusion

New Zealand is a pro-arbitration jurisdiction which provides various options for domestic or international arbitration.

Enforcement of arbitral awards through the New Zealand courts is also a relatively straightforward process.

While maritime-related disputes in New Zealand may proceed to arbitration, those with an international flavour will typically be seated outside of New Zealand, in jurisdictions such as Singapore or London.

[1] Article 19, Schedule 1, the Act.
[2] Admiralty Act 1973 (and Part 25 of the High Court Rules 2008).
[3] Contract and Commercial Law Act 2017, Part 5, Subpart 1.
[4] Biosecurity Act 1993.
[5] Health and Safety at Work Act 2015.
[6] Maritime Security Act 2004 and Maritime Security Regulations 2004, giving effect to aspects of the International Ship and Port Facility Security Code 2004.
[7] Maritime Crimes Act 1999.
[8] Contract and Commercial Law Act 2017, Part 5, Subpart 2.
[9] Port Companies Act 1988.
[10] Resource Management Act 1991 (and Resource Management (Marine Pollution) Regulations 1998).
[11] Ship Registration Act 1992.
[12] Shipping Act 1987.
[13] There is a further division in the safety context between local regulations of recreational boating and shipping under navigation safety by-laws, and national regulations under the MTA and the Maritime Rules.
[14] MTA, Schedule 5, Article 10. Section 209 of the MTA also extends the application of the Hague-Visby Rules to carriage of goods by sea evidenced by a non-negotiable document (other than a bill of lading or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a bill of lading.
[15] As to 'contracting states', see Section 211 of the MTA. Under that Section, if the Secretary of Foreign Affairs and Trade to certifies that, for the purposes of the Rules, a state specified in the certificate is a contracting state, it will be presumed to be until the contrary is proven.
[16] MTA, Section 210(1).
[17] MTA, Section 210(2); Mobil Oil New Zealand Ltd v. The Ship 'Stolt Sincerity' HC Auckland AD628/93, 14 March 1995.
[18] It applies to the carriage of goods performed or to be performed by as carrier under a contract (whether the carriage is by land, water, air or multimodal) unless an exception in Section 243 applies (namely international carriage). See CCLA, Section 242.
[19] CCLA, Section 243(2).
[20] CCLA, Section 246. 'Carriage' includes any 'incidental service' undertaken to facilitate carriage. For example, stevedores.
[21] CCLA, Section 248.
[22] Liability is limited to NZ$2,000 for each unit of goods or to the declared value. Pursuant to Section 260, liability is not limited if the loss of or damage to goods is caused intentionally by the carrier; liability for damages other than loss of or damage to goods; liability for damages that are consequential on the loss of or damage to the goods: CCLA, Section 259.
[23] A carrier will avoid liability if he or she can prove that the loss or damage resulted directly, without fault on his or her part, from: an inherent vice; breach of the contracting party's statutorily implied warranties relating to the condition, packing and lawfulness of the consignment; seizure under legal process; or saving or attempting to save life or property in peril: CCLA, Section 260(2) and (3).
[24] CCLA, Section 256.
[25] CCLA, Section 283. An action for recovery of freight may be brought against the consignee if property in the goods has passed to the consignee: CCLA, Section 284.
[26] CCLA, Section 285. The carrier's lien is active, which means there is a right to sell the goods in certain circumstances. The carrier's lien is also particular, which means that it is confined to the sum owing in relation to the goods held, and does not extend to a general balance of account.
[27] CCLA, Section 288.

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Legal advice and services linked to maritime law is a core area of expertise for Hesketh Henry. Our marine lawyers are leaders in their speciality and have extensive domestic and international experience. They advise across both contentious and transactional aspects of maritime business – providing commercially-driven, efficient, cost-effective recommendations. Our marine clients include vessel owners and operators, logistics companies, ship repairers, shipbrokers, port agents, service providers, P&I Clubs and marine insurers, both in New Zealand and internationally.

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Arbitration in
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MALAYSIAN ARBITRATION AND MARITIME LAW

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Introduction

Recent years have seen a rapid increase in the use of arbitration in Malaysia as the preferred means to resolve disputes arising under commercial contracts. Various stakeholders have actively promoted Malaysia as an arbitration friendly seat with the presence of established arbitration institutions, an efficient and pro-arbitration judiciary, and experienced arbitrators located in the region.

This article provides a brief overview of Malaysian arbitration and maritime law. It also outlines the procedure for the recognition and enforcement of foreign arbitral awards in Malaysia (including SCMA Awards) and the growing body of relevant case law that has emerged from the Malaysian Courts recently.

Overview of Malaysian Arbitration Law

The Arbitration Act 2005 ("**Act**") provides the legal framework for both domestic and international arbitration in Malaysia. It closely adopts the UNCITRAL Model Law on International Commercial Arbitration 1985 ("**UNCITRAL Model Law**"). The Act was substantially amended in 2018 to follow the latest revision of the UNCITRAL Model Law.[1] The procedure for Court proceedings relating to arbitration, such as applications for interim relief, or for the enforcement of an arbitration award, are contained in Order 69 of the Rules of Court 2012 ("**ROC**").

The Act provides that any dispute which the parties have agreed to refer to arbitration is arbitrable unless the arbitration agreement is contrary to public policy, or the subject matter of the dispute is not capable of settlement by arbitration under Malaysian law.[2] Such non arbitrable disputes include family and inheritance matters, company insolvency and winding up, and criminal offences. The Court has the power to look at the subject matter of the dispute in deciding on arbitrability.[3]

An "international arbitration" is defined widely to include arbitrations where either one of the parties to the arbitration agreement has its place of business outside Malaysia, or where the seat of the arbitration, or place where a substantial part of the obligations of any commercial or other relationship is to be performed outside Malaysia.[4]

An arbitration agreement must be in writing although its content may be recorded in any form, including by any electronic communication.[5]

The Act explicitly defines the parameters of the Court's powers to interfere in the arbitral process and provides that no Court shall intervene in matters governed by the Act, except where so provided in the Act.[6] In interpreting the provisions of the Act, the Malaysian Courts have consistently adopted a pro-arbitration approach by emphasising the finality of the award and minimal curial intervention in international arbitration.[7] Thus, although the Court has wide powers to grant interim reliefs for an arbitration (including for arbitrations seated outside of Malaysia) such as orders for the arrest of property pursuant to the admiralty jurisdiction of the High Court, preservation and sale of property and for interim injunctions or measures (including freezing injunctions), such powers are limited to supporting the arbitral proceedings and the Court will not usurp the role and functions of the arbitral tribunal.

The Act provides for a mandatory stay of any court proceedings brought in breach of an arbitration agreement, unless the agreement is null and void, inoperative or incapable of being performed.[8] Where admiralty proceedings are stayed on the application of a party because the matter is the subject of an arbitration agreement, the court in granting the stay may order that the property arrested be retained as security for the satisfaction of any award given in the arbitration, or order that the stay of the proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.[9]

Judicial intervention in an arbitration award is also strictly limited to the specific statutory grounds stated in the Act which relate the tribunal's jurisdiction, irregularities in the arbitral process, fraud and breaches of public policy. These grounds are considered further below.

Overview of Maritime Law in Malaysia

The development of maritime law in Malaysia has been aided by the establishment in 2010 of the Admiralty Court which is a specialist Court within the Commercial Division of the Kuala Lumpur High Court where admiralty or *in rem* proceedings are determined by specialist Judges who are typically more conversant with the legal issues and industry norms.

The High Court has the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.[10] Thus, the High Court's admiralty jurisdiction extends to most claims of a "maritime" nature relating to ships including claims for possession or ownership of a ship, enforcement of a ship mortgage, damage received or done by a ship, cargo loss or damage, breach of agreements for the hire of a ship, salvage, crew wages, ship building and repair claims, and disbursements incurred in the operation and maintenance of a ship.[11]

Malaysian law recognizes the creation of a maritime lien for a limited class of admiralty claims as under English law,[12] and such claims are not defeated by a change of ownership of the vessel.[13] The issuance of a valid *in rem* writ also creates a statutory lien for the claim which survives a change of ownership.

The admiralty jurisdiction of the Court is invoked by the service of an *in rem* writ on or arrest of the ship. A warrant of arrest issued out of the Admiralty Court is effective for execution in any port located in West Malaysia notwithstanding that the vessel is outside port limits; but provided that the vessel is ascertained to be within Malaysian territorial waters at the time of execution. [14]

The Admiralty Court recently clarified in *Premium Vegetable Oils Sdn Bhd v The Owners and/or Demise Charterers of The Ship or Vessel "Ever Concord"*[15] that the amendments to Order 70 Rule 4 of the ROC provide that the arrest warrant is issued by the Court as of right provided that the formal requirements for the arrest prescribed under the ROC have been satisfied. Hence, the arresting party is no longer required to make full and frank disclosure of all material facts in its affidavit when applying for the arrest warrant.

Enforceability of Foreign Awards

Malaysia is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). The Act provides that on an application to the High Court, an award from a State which is party to the New York Convention shall, subject to the relevant requirements be recognised as binding and enforced by entry as a judgment in terms of the award.[16] The applicant must produce a duly authenticated original award and original arbitration agreement or certified copies of the same.[17] Where the award or arbitration agreement is in a language other than the national language or English, an English translation certified as correct by a sworn translator or by an official of a diplomatic or Consular agent of the country in which the award was made must be provided.[18]

The recent Federal Court case of *Siemens Industry Software GmbH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd & Ors*[19] clarified that only the dispositive portion of the award needs be exhibited and registered for enforcement and not the reasoning or findings of the tribunal, for to register the entire award would undermine the confidentiality of the arbitration proceedings which is a cornerstone of arbitration.

Partial or interim awards may also be recognized and enforced, but not interlocutory orders.[20] The tribunal is also empowered to issue interim measures in the form of an arbitral award.[21]

The respondent may apply to set aside an order for enforcement within 14 days of service of the order. The award shall not be enforced until the expiration of that period, or if the respondent applies within that period to set aside the award, until after the application has been finally disposed.[22]

Section 39 of the Act sets out the grounds on which recognition of the award (and consequently enforcement) may be refused. These mirror Article 36 of the UNCITRAL Model Law and are similar to the grounds under Section 37 of the Act for setting aside an award. In short, a party seeking to resist recognition (and enforcement) must show either that:

- A party to the arbitration agreement was under an incapacity;[23]
- The arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the state in which the award was made;[24]
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;[25]
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;[26]
- The award contains decisions on matters beyond the scope of the submission to arbitration;[27]

- 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 Act from which the parties cannot derogate), or, failing such agreement, was not in accordance with the Act;[28] 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.[29]

An award may also have its recognition or enforcement refused if it is in conflict with the public policy of Malaysia or if the subject matter of the dispute is not arbitrable under Malaysian law.[30] The Act provides that an award is in conflict with public policy where the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice (which comprises the twin pillars of the rule against bias and the right to be heard)[31] has occurred during the arbitral proceedings or in connection with the making of the award.[32]

The Malaysian Courts have also defined public policy narrowly, where in *Jan De Nul (Malaysia) Sdn Bhd v. Vincent Tan Chee Yioun*[33] the Federal Court held that a conflict of public policy only arises where the upholding of an award would shock the conscience or is clearly injurious to the public good or violates the basic notions of morality and justice. These statutory grounds for setting aside or refusing enforcement of the award are exhaustive. There is no appeal on the merits of the award and errors of fact and law are final and binding on the parties.[34]

Institutional vs Ad Hoc Arbitration

There is no requirement in the Act for an arbitration to be administered by any institution. Malaysian law also does not distinguish between an institutional and an ad hoc arbitration award. An award is enforceable as long as there is a valid arbitration agreement and the requirements for enforceability under the Act have been satisfied.

That said, most commercial parties prefer to opt for institutional arbitration because of the advantages of a ready procedural framework and administrative support. The leading arbitral institution is the Asian International Arbitration Center (AIAC). Additionally various trade and industry bodies such as the Palm Oil Refiners Association of Malaysia (PORAM) and the Malaysian Institute of Architects (*Pertubuhan Arkitek Malaysia or PAM*) routinely conduct arbitrations under their respective rules of procedure.

Status of SCMA Awards in Malaysia

SCMA Awards have been upheld in Malaysia[35] and would be regarded like any other foreign arbitral award subject to the same procedures for recognition and enforcement as outlined above.

Conclusion

Malaysia has progressively laid the foundations to this day in order to establish itself as a reliable and pro-arbitration seat in this region. The modern legislative framework currently in place, which is in line with international arbitration rules and best practices, coupled with the recent decisions of the courts have engendered confidence in respect of Malaysia's commitment to uphold the sanctity of the arbitral process. The stage is set for arbitration to thrive in Malaysia for years to come.

[1] Arbitration (Amendment) (No. 2) Act 2018.
[2] Section 4(1) of the Act.
[3] Section 37(1)(b)(i) of the Act.
[4] Section 2 of the Act.
[5] Sections 9(3), (4) and (4A) of the Act.
[6] Section 8 of the Act.
[7] For eg. by the Court of Appeal in Cairn Energy India Pty Ltd v The Government of India [2009] 6 MLJ 795 and most recently by the Federal Court in Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd [2020] 9 CLJ 466.
[8] Section 10(1) of the Act.
[9] Section 10(2A) of the Act.
[10] Section 24 of the Courts of Judicature Act 1964.
[11] Section 20 United Kingdom Supreme Court Act 1981.
[12] That is claims for salvage, crew wages, damage done by a ship and bottomry and respondentia.
[13] See Halsbury's Laws of Malaysia – Admiralty (Volume 1(1)) at [10.060] and [10.062].
[14] Paragraph 16 of the Practice Direction No. 2 / 2007.
[15] [2021] 9 MLJ 936.
[16] Section 38(1) of the Act.
[17] Section 38(2) of the Act and Order 69 Rule 8(3) of the ROC.
[18] Section 38(3) of the Act and Order 69 Rule 8(3) of the ROC.
[19] [2020] 5 CLJ 143.
[20] Section 2 of the Act defines an "award" as "a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders".
[21] Section 19 of the Act.
[22] Order 69 Rule 8(7) of the ROC.
[23] Section 39(1)(a)(i) of the Act.
[24] Section 39(1)(a)(ii) of the Act.
[25] Section 39(1)(a)(iii) of the Act.
[26] Section 39(1)(a)(iv) of the Act.
[27] Section 39(1)(a)(v) of the Act.
[28] Section 39(1)(a)(vi) of the Act.
[29] Section 39(1)(a)(vii) of the Act.
[30] Section 39(1)(b) of the Act.
[31] See Tanjung Langsat Port Sdn Bhd v. Trafigura Pte Ltd & Another Case [2016] 4 CLJ 927.
[32] Section 37(2) of the Act.
[33] [2019] 1 CLJ 19.
[34] See for instance the Federal Court decision in Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd [2020] 9 CLJ 466 and the Court of Appeal's judgment in Tune Talk Sdn Bhd v Padda Gurtaj Singh [2019] 1 LNS 85.
[35] See the Court of Appeal decision of Sintrans Asia Services Pte Ltd v. Inai Kiara Sdn Bhd [2016] 5 CLJ 746 which concerned an SCMA Award.

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