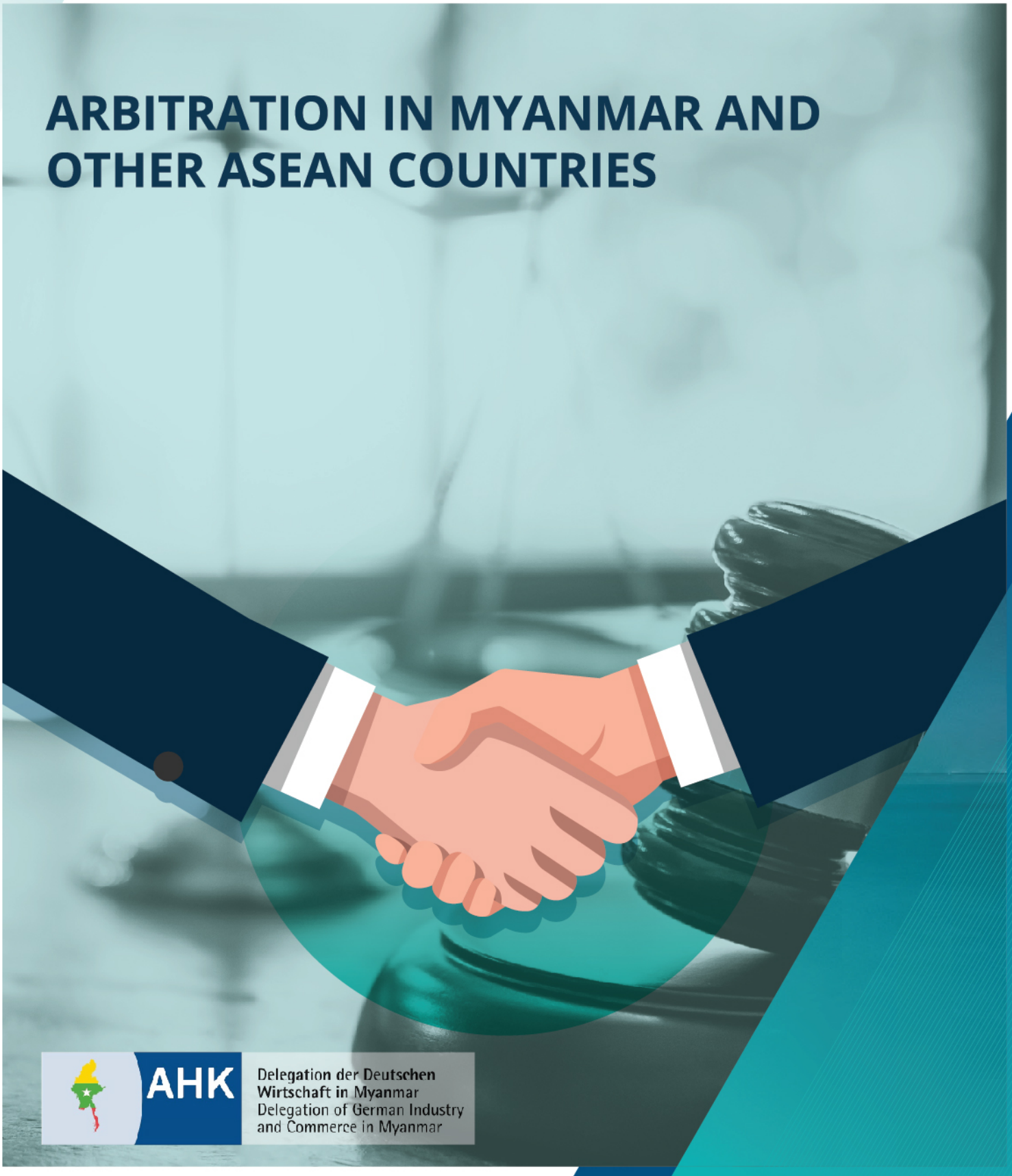
KONRAD ADENAUER STIFTUNG

# ARBITRATION IN MYANMAR AND OTHER ASEAN COUNTRIES



AHK Delegation der Deutschen Wirtschaft in Myanmar
Delegation of German Industry and Commerce in Myanmar

# ARBITRATION IN MYANMAR AND OTHER ASEAN COUNTRIES

ISBN 9789997195401

Publisher:
Konrad-Adenauer Stiftung Ltd.
Myanmar Representative Office
Yangon, Myanmar
info.myanmar@kas.de
www.kas.de/myanmar/en/

## Content

**About the Konrad-Adenauer-Stiftung**

The basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS) are freedom, justice and solidarity. KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU), named after the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967), who united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany and his intellectual heritage continues to serve both as our aim as well as our obligation today.

We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world. With 100 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialogue at the national and international levels as well as the exchange between cultures and religions.

We are guided by the conviction that human beings are the starting point in the effort to bring about social justice and democratic freedom while promoting sustainable economic activity. By bringing people together who embrace their responsibilities in society, we develop active networks in the political and economic spheres as well as in society itself. The guidance we provide on the basis of our political know-how and knowledge helps to shape the globalization process along more socially equitable, ecologically sustainable and economically efficient lines.

We cooperate with governmental institutions, political parties, civil society organizations, media and think tanks, building strong partnerships along the way. In particular, we seek to intensify political cooperation in the area of development cooperation at the national and international levels on the basis of our objectives and values. Together with our partners we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

Since 2006, Konrad-Adenauer-Stiftung has had an active presence in Myanmar. The Myanmar country project focuses on four objectives:

- Strengthening society's representation in the legislature by enabling parliaments and parties to do effective work
- Building out the capacities of democratic and legal institutions as well as civil society and media
- Promoting a sustainable Social Market Economy
- Developing mechanisms of cooperation among Southeast Asian countries, Europe and Germany on the basis of democratic and peace-supporting principles

For more information please visit: https://www.facebook.com/kas.myanmar
https://www.kas.de/web/myanmar/home

# Foreword

Since Myanmar's opening to the international scene in 2011 and the ease of economic sanctions towards the country since, imports from overseas increased as well as public expenditure, leading to the current account deficit to reach 5% of the country's GDP for the year 2017/2018. To cover the deficit, the Myanmar government has called for Foreign Direct Investment (FDI) and development assistance funds.
Indeed, FDI proved to be one of the major leverages for the economic growth of the ASEAN region, with peaks of investments in countries such as Thailand during the years 1999-2016 and Vietnam from 2010 to today.

Myanmar authorities expected that the inflow of FDI will keep on increasing by the end of 2018 thanks to the enactment of a new Myanmar Company Law in December 2017. This Law now allows companies with foreign subscription of less than 35% to be regarded as domestic companies.
However, such expectations of inflow have not been realized. FDI dropped by almost US$900 million between the last two fiscal years. The decrease of investments in the last years by Western investors can be explained through political reasons but also because they believe that further improvement could be made in terms of Myanmar's legal commercial framework.

International arbitration is one solution to increase foreign investor's confidence in Myanmar as such a procedure would enable the resolution of disputes in the country to not depend on local courts but instead by a neutral arbitrator chosen by both parties involved in the dispute.
Yet the knowledge of this resolution procedure remains limited despite the enactment of the Arbitration Law in Myanmar in 2016.

In this publication we aim to give an overview of the procedure of arbitration in different countries of ASEAN, i.e., in Malaysia, Myanmar, Philippines, Singapore and Vietnam, to familiarize Myanmar legal practitioners and law students on the matter. We hope to bring further awareness on the topic in the country as local arbitrators will be more sought after in the years to come. Furthermore, the Belt and Road Initiative (BRI) in which China is the main player and which includes several major infrastructure projects in Myanmar will also lead to more demand for arbitration as the risks of disputes increases.

Thus, familiarizing Myanmar lawyers and potential investors on arbitration is all the more crucial as it does not only serve the purpose of encouraging FDI into the country, but also of solving future disputes related to large and sometimes controversial foreign infrastructure projects affecting the region.

Finally, I would like to thank all the authors of this book for sharing with us their expertise, as well as the Delegation of German Industry and Commerce in Myanmar for being our partner on this project.

Yangon, June 2019.

Dr. Norbert Eschborn
Myanmar Representative Office
Yangon, Myanmar
info.myanmar@kas.de
Konrad-Adenauer-Stiftung Ltd.

# Arbitration Laws and Regulations in Malaysia

**Dato' Mah Weng Kwai**

## Introduction

Arbitration is a mode of alternative dispute resolution that has seen its relevance and importance increase in recent times in Malaysia. The relevance of arbitration for dispute resolution in the construction and building industry as well as for all types of commercial disputes is notable. In Malaysia, the principal Act governing arbitration is the Arbitration Act 2005, which is modelled after the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration 1985 ("Model Law"). The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") was ratified by Malaysia on November 5, 1985. The New York Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.[1]

### Asian International Arbitration Centre

The Asian International Arbitration Centre [AIAC], formerly known as the Kuala Lumpur Regional Centre for Arbitration, serves as a neutral and independent venue for the conduct of domestic and international arbitrations and other alternative dispute resolution proceedings. Arbitral proceedings in Malaysia are usually held in the Asian International Arbitration Centre. The AIAC has its own set of rules, i.e. the AIAC Arbitration Rules 2018, which has been in force since March 9, 2018.

### Eligibility of Arbitrators in Malaysia

There are no specific requirements and/or qualifications for an individual to be eligible to be and/or appointed as an arbitrator. Arbitrators do not have to be legally qualified, but arbitrators must be independent and impartial. In the event an arbitrator is found to be not independent or impartial, parties may challenge the appointment of the arbitrator. Parties are usually advised to appoint arbitrators who have sufficient experience in arbitration and the technical knowledge on the subject matter in dispute.

## Brief History of Arbitration in Malaysia

The history of arbitration in Malaysia can be traced back to the Arbitration Ordinance XIII of 1809 of the Straits Settlements of Malaya. In 1952, the Arbitration Act 1952 (Act 93), which was *in pari materia* to the Arbitration Act 1950 of England was enacted. As the laws and practice of arbitration in Malaysia developed over the years, there were many proposals to amend the Arbitration Act 1952. Numerous calls were made for reform in the arbitration laws in Malaysia, as the Arbitration Act 1952 was seen to be outdated.

The Arbitration Act 1952 was eventually repealed and replaced by the enactment of the Arbitration Act 2005 (Act 464).

[1] United Nations Commission on International Trade Law, (2015), *"Convention on the Recognition and Enforcement of Foreign Arbitral Awards"*, New York: United Nations, p. 1

## The Arbitration Act 2005

The Arbitration Act 2005 came into force on March 15, 2006 and is applicable to all forms of arbitration. During the drafting of the Arbitration Act 2005, two points were taken into consideration: (1) whether there should be any distinction between international arbitrations and domestic arbitrations, and if so, what distinctions should be made; and (2) whether there should be a separate domestic arbitration Act as in Singapore, and if so, how should it be modelled? [2]

The Arbitration Act 2005 distinguishes between international arbitrations and domestic arbitrations, and it based its definition of international arbitrations on the Model Law. A basic reasoning for this is that, in the international perspective, parties would not prefer to have any local court intervention more than is prescribed and allowed under the Model Law, while from the domestic perspective, there is still a need for supervision by the courts in matters of appeals on points of law. The legal definition of international arbitration in the Arbitration Act 2005 is "an arbitration where (a) one of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia; (b) one of the following is situated in any State other than Malaysia in which the parties have their places of business: (i) the seat of arbitration if determined in, or pursuant to, the arbitration agreement; (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 State". [3]

Although the Arbitration Act 2005 was seen as an Act necessary for the reform of arbitration laws in Malaysia, it is not without its flaws. In 2010, the Arbitration (Amendment) Bill 2010 was introduced to address the inconsistency in relation to the interpretation of provisions in the Arbitration Act 2005.[4] The Arbitration (Amendment) Bill 2010 was subsequently passed into law as the Arbitration (Amendment) Act 2011 which came into force on June 2, 2011.

## The Arbitration (Amendment) Act 2011

The Arbitration (Amendment) Act 2011 mainly deals with areas of ambiguity in the law which arose in the implementation of the Arbitration Act 2005. The principal amendments introduced by the Arbitration (Amendment Act 2011) were the amendments to section 8 (Court intervention), sections 9 and 10 (Court's power to stay court proceedings and to provide interim relief); and section 42 (points of law).

The amendment to section 8 clarified that court intervention should be limited to situations specifically covered and/or provided for by the Arbitration Act 2005, and to discourage the application of common law or inherent powers.[5] These situations include but are not limited to the right of appeal against the arbitral tribunal's rejection of a challenge to an arbitrator (section 15) and applications for setting aside an arbitral award (section 37). [6] The amendments made to sections 9 and 10 in respect of the court's power to stay court proceedings where an arbitration clause exists and the court's power to provide interim relief in support of arbitration clarified that these powers, following the Model Law, should apply to Malaysian seat and foreign seat arbitrations. [7]

---

[2] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 9
[3] Arbitration Act 2005, s. 2(1)
[4] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 10
[5] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 80
[6] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 82
[7] Ibid 6

The necessity for the amendments to provide that the court's powers should apply to both Malaysian seat and foreign seat arbitrations arose from the decision of the High Court in the case of *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors* [8] in 2008, where the learned judge decided that the Court has no inherent or residual powers to intervene in arbitration matters where the seat of arbitration was outside Malaysia.

The amendment to section 42 in relation to references on points of law to the High Court of Malaya clarified that the High Court should dismiss any reference unless the question of law substantially affects the rights of one or more parties. [9] In 2017, the decision of the Federal Court in the case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang & other appeals* [10] confirmed the amendment to section 42 and had expanded the scope of judicial challenges under section 42 by providing a non-exhaustive list of questions that would meet the "paradigm of any question of law". A challenge under section 42 is applicable only to domestic arbitral awards unless otherwise agreed by the parties in writing and will only apply to international arbitration if it is so agreed by the parties in writing. [11]

The decision in the *Far East*[12] case was held to have widened the applicability of section 42 of the Arbitration Act. Previously, the Courts used to apply a stricter test before setting aside an arbitral award upon a finding of an error of law by the arbitrator. Certain restrictions had to be put in place to ensure the Court did not have too wide a discretion in the applicability of section 42 to set aside an arbitral award.

## The Arbitration (Amendment) (No. 2) Act 2018

In 2006, amendments were made to the UNCITRAL Model Law on International Arbitration. To reflect these changes in Malaysia, the Arbitration (Amendment) (No. 2) Act 2018 was passed on May 8, 2018. The passing of the Arbitration (Amendment) (No. 2) Act 2018 expresses the efforts to establish itself as a "safe haven" for arbitrators and an arbitration-friendly jurisdiction.

The changes made in the Arbitration (Amendment) (No. 2) Act 2018 are the (i) amendments to sections 2, 4, 9, 11, 19, 30, 33, (ii) introduction of new sections 3A, 19A-19J, 41A, 41B and (iii) repeal of sections 42 and 43. [13]

The amended section 2 and the introduction of section 19H clarifies the status of an "emergency arbitrator" as an arbitral tribunal and awards/orders granted by the emergency arbitrator. There is no longer any ambiguity on the enforceability of an award rendered by an emergency arbitrator.

The introduction of section 3A reinstates the parties' right to choose representations by any representatives, not just by a lawyer. This is necessary as parties often find themselves in a dispute involving a subject-matter which requires expert opinions for a resolution. Section 3A further provides that parties to an arbitration seated in East Malaysia can now be represented by West Malaysian or foreign lawyers.

The amendment to section 4 allows the courts to look into the subject matter of the dispute when deciding on its arbitrability. Section 9 is amended to recognize arbitration agreements in electronic form.

---

[8] [2008] 5 CLJ 654
[9] Ibid 6
[10] [2018] 1 MLJ 1
[11] Lim, T.W., "Federal Court Changes Malaysian Law on Arbitration" *(LHAG Update)*
https://www.lh-ag.com/wp-content/uploads/2017/11/Federal-Court-Changes-Malaysian-Law-on-Arbitration.pdf (accessed on 13 November 2018)
[12] Ibid 8
[13] AIAC, "The Arbitration (Amendment) (No. 2) Act 2018 Comes Into Force – The New Era of Arbitration in Malaysia" *(AIAC Announcement)*
https://www.aiac.world/news/254/The-Arbitration-(Amendment)-(No.-2)-Act-2018-Comes-Into-Force--%E2%80%93-The-New-Era-of-Arbitration-in-Malaysia (accessed on 14 November 2018)

Previously, only national courts could order interim measures, but the amended sections 11 and 19, and the newly-introduced sections 19A – 19J empowers the arbitral tribunals to grant interim measures. Section 19J sets out the guidelines upon what the High Court may grant interim measures or preliminary orders in respect of arbitration proceedings, notwithstanding the seat of arbitration may be outside Malaysia.

The amendment to Section 30 reinstates parties' rights to choose any law or rules of law applicable to the substance of a dispute and the arbitral tribunal's rights to decide according to equity and good conscience, if so authorized by parties. Section 33 is amended so as to empower the arbitral tribunal to grant pre- and post-award interest on any disputed sum at such rate deemed appropriate by the arbitral tribunal.

The introduction of sections 41A and 41B ensures confidentiality of arbitration and arbitration-related court proceedings. Disclosure of the information of arbitral proceedings will only be allowed in limited circumstances and when necessary, so as to protect or pursue a party's legal interest and/or to enforce or challenge the arbitral award.

The repeal of sections 42 and 43 in the Arbitration (Amendment) (No. 2) Act 2018 can be regarded as one of the more significant changes made, if not the most. The repeal of sections 42 and 43 ensures minimal court intervention and to uphold the principle of finality of arbitral awards. Domestic parties can no longer challenge arbitral awards in the High Court on the basis and/or grounds of question of law that substantially affects their rights.

However, domestic parties seeking to set aside an award may still rely on Section 37 of the Arbitration Act 2005. For a setting aside of an arbitral award to succeed, it must be proven that [14]:

(1) a party to the arbitration agreement was under any incapacity;
(2) 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 Malaysia;
(3) the party making the application was not given proper notice of the appointment of an arbitration or of the arbitral proceedings or was otherwise unable to present that party's case;
(4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
(5) the award contains decisions on matters beyond the scope of the submission to arbitration; or
(6) 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 Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Arbitration Act.

Furthermore, an arbitral award may also be set aside if the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia or that the award is in conflict with the public policy of Malaysia.[15]

Although the repeal of section 42 may have been prompted by the Federal Court's decision in the *Far East* [16] case as the scope of applicability under section 42 was expanded, the repeal should instead be regarded as an effort to promote arbitration as an alternative mode of dispute resolution in Malaysia [17] with minimal court intervention and finality of arbitral awards.

---

[14] Arbitration Act 2005, s. 37(1)(a)
[15] Arbitration Act 2005, s. 37(1)(b)
[16] *Ibid 8*
[17] *Ibid 13*

# Curial Intervention

## Arbitration Agreements

An arbitration agreement is essential as its non-existence would only render disputes to be litigated in the courts. The existence of an arbitration agreement needs to be established before a court can stay proceedings before it. The necessity of an arbitration agreement is highlighted by section 38 of the Arbitration Act 2005, as the enforcement of an arbitral award requires the applying party to produce the arbitration agreement and a failure to produce the same would result in the refusal of the enforcement application.

## Interim Relief

In most cases, parties urgently seek interim measures to maintain the status quo pending the disposal of the arbitration proceedings, for example to prevent dissipation of assets and protection of evidence. [18] The powers to order interim measures are granted to both the arbitral tribunal and the High Court. The Arbitration (Amendment) (No. 2) Act 2018, in its new sections 19A – 19J, introduced a raft of supplementary provisions in relation to the granting of interim measures by both the arbitral tribunal and the High Court. [19]

## Jurisdiction

The determination of a tribunal's jurisdiction is vital to an arbitration as it demarcates the substantive matters that are within its scope of relevance. The jurisdiction of an arbitral tribunal depends on its mandate or competence. The doctrine of competence-competence recognizes the competence of a tribunal to decide on its own jurisdiction and such a doctrine is necessary for an effective arbitral process. If without such competence, any challenge to the tribunal's jurisdiction would be referred to the High Court. [20] It is significant to note that in the case of *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & others,*[21] it was held that an arbitration agreement does not oust the courts' jurisdiction and is therefore not illegal and void.[22]

## Natural Justice

A party to an arbitration may set aside an arbitral award on the grounds of a breach of natural justice. In the case of *Chain Cycle Sdn Bhd v Government of Malaysia,*[23] the High Court held that, to demonstrate that there has been a breach of natural justice, the procedural unfairness or impropriety had to result in prejudice to the applicant. [24] In the case of *Sime Darby Property Berhad v Garden Bay Sdn Bhd,*[25] the High Court was of the view that any breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under a section 37(1)(b)(ii) read with section 37(2)(b) to set aside the application.[26]

---

[18] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 236
[19] Crystal W., "Malaysian Arbitration (Amendment) (No. 2) Act 2018: A Practical Commentary", (Legal Herald) https://www.lh-ag.com/wp-content/uploads/2018/06/4_Malaysian-Arbitration-Amendment-No-2-Act-2018-A-Practical-Commentary-by-Crystal-Wong-Wai-Chin.pdf (accessed on 14 November 2018)
[20] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 164
[21] [2008] 6 MLJ 817, CA at 821
[22] Zakaria, A., Rajoo, S., and Koh, P., (2016), "Arbitration in Malaysia: A Practical Guide", Malaysia: Sweet & Maxwell Asia, p. 92
[23] [2014] 10 CLJ 22
[24] Avinash Pradhan, "International Arbitration" https://www.rajahtannasia.com/media/2890/international-arbitration-malaysia.pdf (accessed on 14 November 2018)
[25] [2017] MLJU 145
[26] [2017] MLJU 145 at [25]

## Challenges to Arbitration

There are many challenges faced by parties involved in arbitral proceedings. Parties in arbitral proceedings often incur the heavy costs of arbitration, which is also contributed by the length of the arbitral proceedings. Arbitration sees challenges in the alternative modes of dispute resolutions, such as mediation, negotiation and conciliation. Parties may decide against arbitration in favour of Court proceedings and/or alternative dispute resolution mechanisms due to the costs and inefficiency of arbitration.

## Best Practices of Arbitration

Despite its challenges, arbitration has its best practices. The option to refer to arbitration has seen many agreements being carefully drafted setting out the scope of the parties' agreement to resolve any disputes and/or claims by way of arbitration. In addition, parties have the option to mutually agree on the appointment of the arbitrator.

Even as an alternative dispute resolution mechanism, arbitration has seen parties carefully providing detailed statement of cases and witness statements. As the arbitrator's award is final and binding on the parties, arbitration and the arbitral awards are often regarded as being as effective as the courts and their judgments.

The form and contents of an arbitral award are governed by section 33 of the Arbitration Act, where an arbitral award shall be made in writing and signed by the arbitrator. An award shall state the reasons on which it is based unless parties have agreed otherwise or it is an award on agreed settlement terms. An award shall also state its date and the seat of arbitration as determined and shall be deemed to have been made at that seat. Upon the making of the award, a copy of the award signed by the arbitrator shall be delivered to the parties.[27] Thereafter, the successful party will make an application in writing to the High Court to recognize the award made as binding and enforce the award by entry as a judgment in terms of the award or by action.[28]

## Policy Recommendations

Previously, there were many instances where reference to arbitration was unclear, causing disagreement between parties on the mode of dispute resolution. Parties to an agreement have to be more careful when drafting the clause to refer a dispute to arbitration in the agreement to reflect the true intention of the parties when deciding on the mode of dispute resolution. The AIAC Model Clause in respect of an arbitration clause is as follows: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the AIAC Arbitration Rules." [29]

As parties often incur high costs in arbitration, it is recommended that only one arbitrator needs to be appointed as opposed to a panel of three arbitrators in arbitral proceedings unless of course, the subject matter is very complex and elaborate and the claim, and counterclaim, if any, is of a substantial amount. Furthermore, obtaining common free dates of counsel are often a cause of delay in arbitral proceedings.

---

[27] Arbitration Act 2005, s. 33
[28] Arbitration Act 2005, s. 38
[29] AIAC, "Model Arbitration Clause & Model Submission Agreement"
https://www.aiac.world/Arbitration-Model-Arbitration-Clause--Model-Submission-Agreement (accessed on 25 June 2019)

It is advantageous to have proceedings during the hearing of the arbitration recorded similar to the court recording transcription (CRT) system in court proceedings. The implementation of a similar system would reduce the length of arbitral proceedings. However, the parties should also take note that this will add to the cost of arbitral proceedings.

## Conclusion

In conclusion, arbitration laws have been in force in Malaysia for many years and Malaysia has seen the growth and development of the arbitral process. Arbitration in Malaysia continues to be governed by the Arbitration Act 2005, the recent amendments provided by the Arbitration (Amendment) (No. 2) Act 2018, and arbitration in Malaysia is further guided by the AIAC Arbitration Rules 2018. The amendments and reforms of the arbitration laws are to ensure that Malaysia is and will remain a "safe seat" for arbitrators, whereby the autonomy of parties and minimal court intervention are prioritised.

As "the past allows judgment of the present to plan for the future", it is safe to say that there is a bright future for arbitration as an alternate dispute resolution mechanism in Malaysia, especially when the recent amendments to the Arbitration Act 2005 in 2018 will help Malaysia to be an arbitration-friendly country.

# Arbitration Laws and Regulations in Myanmar

**William Dale Greenlee**

## Background to Arbitration in Myanmar

Arbitration is a process of dispute resolution between contracting parties without resorting to a conventional court process. The Arbitration Law of 2016 ("Arbitration Law") replaced the Myanmar Arbitration Act of 1944 and is broadly based on the United Nations Commission on International Trade Law on International Commercial Arbitration ("UNCITRAL Model Law") to establish a uniform legal framework for efficient settlement of cross-border disputes. The Arbitration Act of 1944 only provided for domestic arbitration and there was no reference to international arbitration or procedures for recognition and enforcement of foreign arbitral awards. Under the Arbitration Act of 1944, the foreign arbitral award could be enforced on the basis of the Geneva Convention on the Execution of Foreign arbitral Awards, 1927 and the Geneva Protocol on Arbitration Clauses, 1923 through the Myanmar Arbitration (Protocol and Convention) Act 1937. However, a foreign award was only enforceable if it was rendered in a country that is a signatory to the Geneva Protocol on Arbitration Clauses 1923 or the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and there are reciprocal provisions in relation to enforcement of foreign arbitral awards in the other country. Since Myanmar failed to recognize foreign awards, Myanmar arbitral awards were generally not recognized in foreign countries.

Myanmar ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") in April 2013 and thereafter enacted the Arbitration Law as its national law to give effect to the provisions of the New York Convention. The Arbitration Law is applicable to both domestic and international arbitration.[1]

## Arbitration Agreement

The arbitration agreement is a pre-requisite for commencement of arbitral proceedings. The essentials of arbitration agreements have been laid down in Section 9 of the Arbitration Law which states that:

(i) the arbitration agreement should be in writing. An arbitration agreement will also be deemed in writing if it is signed by the parties;

(ii) the arbitration agreement concluded by electronic means will be deemed in writing if the information contained therein is accessible for reference; or

(iii) the arbitration agreement will be deemed in writing if it is contained in an exchange of statement of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.[2]

---

[1] International arbitration is defined as an arbitration where:
(i) Any party to an arbitration has, at the time of the conclusion of the agreement, it place of business and commerce in a country outside Myanmar;
(ii) The place of arbitration, if determined in, or pursuant to the arbitration agreement is situated outside the country in which the parties to an arbitration agreement have their places of business;
(iii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected, is situated outside the country in which the parties to an arbitration agreement have their places of business; or
(iv) the parties to the arbitration agreement have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

[2] Section 9 of the Arbitration Law.

By signing an arbitration agreement, the parties agree to submit their disputes to arbitration and waive their rights to access the courts. An arbitration agreement is separate from the main agreement entered into between the parties, and the invalidity or termination of the main agreement does not necessarily invalidate or terminate the arbitration agreement.[3] The agreement to arbitrate could be in the form of a clause in the agreement or a separate agreement in itself.[4]

Nevertheless, when drafting an arbitration clause/agreement, it is prudent to consider the following:

(i) unambiguous and explicit intention to refer all future/existing disputes, whether contractual or not to arbitration;
(ii) governing law of the main agreement, where arbitration clause forms part of the main agreement;
(iii) governing law of the arbitration clause/agreement since the arbitration clause is considered separate from the main agreement;
(iv) the procedural law governing the arbitration proceedings, that is the seat of arbitration;
(v) institutional arbitration as against ad hoc arbitration; and
(vi) location of assets for enforcement of the arbitral award.

These points are utterly important because the arbitration agreement is considered separate from the main agreement and these clauses determine the jurisdiction of the arbitral tribunal which is threaded to the enforcement of arbitral award.

## Arbitral Tribunal

Parties' autonomy is of immense importance in arbitration and according parties to an arbitration agreement are free to determine the number of arbitrators and the procedure for appointing them. Provided, if the number of arbitrators is more than one, then it should be an odd number. Failing such determination, the arbitral tribunal should consist of a sole arbitrator.[5] However, where the party/parties fails to appoint the arbitrator(s), or the two appointed arbitrators fails to appoint a third arbitrator, or the arbitral institution appointed by the parties fails to perform its functions, unless otherwise mentioned in the arbitration agreement, a party may file an application to the Chief Justice (Chief Justice of the High Court of the State or Region having jurisdiction for domestic arbitration and in case of international arbitration, the application will be referred to the Chief Justice of Myanmar) or the relevant person/institution designated by the Chief Justice for appointment of an arbitrator(s).

If the parties fail to agree on the appointment of the arbitrator and the arbitration agreement provides for a tribunal consisting of three (3) arbitrators, then the two (2) appointed arbitrators will appoint the third arbitrator, who will act as a presiding arbitrator. If any of the parties fail to appoint the arbitrator within thirty (30) days from the date of receipt of request from the other party or the two appointed arbitrators fail to appoint the presiding arbitrator within thirty (30) days from the date of their appointment, the arbitrator will be appointed, by the Chief Justice or the relevant person/institution designated by him on the request of the party.[6]

---

[3] Doctrine of Separability.
[4] Section 9 (b) of the Arbitration Law.
[5] Section 12 of the Arbitration Law.
[6] Section 13 (d) of the Arbitration Law.

The Arbitration Law does not impose any restriction on the nationality of the arbitrators appointed and the parties have the freedom of selecting their arbitrator in arbitration proceedings regardless of nationality. While appointing a sole or a third arbitrator, the Chief Justice or the person/institution designated by him may appoint an arbitrator having nationality of a country other than the nationality of parties if the parties are of different nationalities.[7]

Equality before the law and *audi alteram partem* are the foundation of the arbitration proceedings. The parties are free to agree on the procedure, including the language to be followed by the arbitral tribunal in conducting the proceedings. In the absence of an agreement between the parties in relation to the conduct of the proceedings, the arbitral tribunal may, subject to the provisions of Arbitration Law conduct the arbitration proceedings in such manner as it considers appropriate.

The arbitral tribunal is empowered to determine the admissibility, relevance and materiality of any evidence presented before it. Unless otherwise agreed by the parties, the arbitral proceedings should commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Unless otherwise agreed by the parties, if without showing sufficient cause, the claimant fails to communicate his/her statement of claim, the arbitral tribunal shall terminate the arbitral proceedings. Whereas, where the respondent fails to communicate his statement of defense, the arbitral tribunal should continue the proceedings. However, such failure in itself shall not be treated as an admission of the claimant's allegations.

In the event, any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

## Court's Intervention and Sanctity of Arbitration

In order to preserve the sanctity of arbitration and to ensure that the arbitral award is rendered fairly and in an expeditious manner, Section 7 of the Arbitration Law states that the court in Myanmar[8] shall not interfere except in matters provided under the Arbitration Law. The scope of interference by the court is limited to the following, where it has the same powers for deciding any present case:

(i) taking and preservation of evidence;
(ii) issuing an order in relation to any property which is the subject matter of dispute in the arbitration;
(iii) inspecting, preserving, photographing and seizure of any property under dispute;
(iv) examine the property under dispute;
(v) authorise any person to enter the premises in the possession and control of a party to the arbitration for such purposes;
(vi) sale of any property which is the subject matter of arbitration; or
(vii) grant an interim injunction or appoint a receiver.[9]

---

[7] Section 13 (g) of the Arbitration Law.
[8] The term "court" is defined to refer to the District Court or High Court of the Region or High Court of the State having original jurisdiction to adjudicate matters relating to arbitration as the subject matters of a suit in Myanmar.
[9] Section 11 of the Arbitration Law.

The Arbitration Law further elaborates that where a party to the arbitral proceedings is in need of an urgent interim measure, the court may - on receiving the application from such a party - make the order as it considers it necessary for the purpose of preserving evidence or the assets. Whereas, if the interim measure is not urgently required, the court shall - on receiving the application from the party - issue the order in consultation with the arbitral tribunal or on the written agreement of the other parties on notice to them and the arbitral tribunal.[10]

It further states that the court should only interfere in the matters in which the person authorised by the parties to arbitration, the arbitral tribunal or the arbitration institution has no authority or is unable to act efficiently. However, it is important to note that there is no arbitration institution based in Myanmar.

Also, section 7 of the Arbitration Law states that no court is authorised to intervene the arbitration process except where provided under the Arbitration Law. This implies that save for exceptions stated under the law, the parties are restricted to approach the courts as a means of dispute resolution. This is of crucial importance as judicial intervention by the local court may impede foreign investment where foreign investors would prefer to have foreign arbitration. Further, the court's interference would affect the conclusiveness of the arbitral award.

The Arbitration Law states that unless otherwise agreed by the parties to the arbitration agreement, the arbitral award made by the arbitral tribunal shall be final and binding on the parties or any other person claiming through or under them. However, the Arbitration Law lays down few situations where the arbitral award may be challenged and kept aside, which includes and is not limited to situations where any of the party is able to prove that the subject matter of the dispute is not capable of settlement by arbitration under the existing law or the award is in conflict with the national interest of Myanmar.

## Challenge the Appointment of an Arbitrator

Impartiality and independence are the foundation of the arbitral proceedings. The arbitrator so appointed should disclose in writing the circumstances, if any, which may challenge his/her independence and impartiality. The appointment of an arbitrator can be challenged only:

(i) in the event of circumstances that give rise to justifiable doubts as to his/her independence or impartiality; or

(ii) where he/she does not possess the qualifications agreed to by the parties.[11]

It is pertinent to note that the Arbitration Law does not elaborate the circumstances that may raise justifiable doubts to the independence/impartiality of the arbitrator and is left to be determined by the tribunal/courts depending on the case before them.

The parties are free to agree on a procedure for challenging an arbitrator. Elsewise a party may challenge the appointment of an arbitrator within fifteen (15) days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the circumstance stated above, and send a written statement to that effect with the reasons for challenging to the arbitral tribunal.

---

[10] Section 11 (b) and (c) of the Arbitration Law.
[11] Section 14 of the Arbitration Law.
[12] Section 15 of the Arbitration Law.

Any challenge to the appointment of the arbitrator should be decided by the arbitral tribunal, unless the challenged arbitrator withdraws from his office or the other party agrees to challenge. If the arbitral tribunal decides against the challenge, the arbitral tribunal should continue the arbitral proceedings and make the award. Following which, the challenging party may within thirty (30) days from the date of decision of the arbitral tribunal rejecting the challenge apply to the court to decide on the validity of the challenge.[12]

## Termination of Mandate of an Arbitrator

The mandate of an arbitrator will be terminated if:

(i) an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without due delay; or
(ii) the arbitrator withdraws from his/her office or the parties agree to terminate his or her mandate.

If the parties are unable to decide on the grounds for terminating the mandate of the arbitrator, any party may apply to a competent court to decide this. Provided that no appeal shall lie against the decision of the court in relation to the termination of the mandate of the arbitrator.

Additionally, the mandate of an arbitrator will also be terminated if:

(i) the arbitrator withdraws from his or her office; or
(ii) parties agree to terminate his or her mandate.[13]

If the mandate of an arbitrator is terminated as mentioned above, a substitute arbitrator shall be appointed in accordance with the procedure agreed by the parties for appointment of replacing an arbitrator. However, the appointment of the substitute arbitrator will not affect any order or ruling of the arbitral tribunal made before the replacement of the arbitrator.

## Jurisdiction of Arbitral Tribunal: Principal of Competence-Competence

Section 18 of the Arbitration Law states that unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction (Competence-Competence), including any objections with respect to the existence or validity of the arbitration agreement, and for such purpose, should treat:

(i) an arbitration clause forming part of the contract as an agreement independent of the other terms and conditions laid down in the contract; and
(ii) a decision by the arbitral tribunal that the agreement is null and void will not for that reason alone render the arbitration clause invalid.

---

[13] Section 16 of the Arbitration Law.

A party may raise an objection on the jurisdiction of the arbitral tribunal before the submission of the written statement of defence. The arbitral tribunal may also admit a later plea if the delay is justified. The arbitral tribunal may decide on its jurisdiction either as a preliminary issue or an award on the merits, following which any dissatisfied party may within thirty (30) days appeal to the court in accordance with the provisions of the Arbitration Law.[14]

Therefore, the arbitral tribunal has the authority to decide on its own jurisdiction though it derives its jurisdiction from the arbitration agreement entered between the parties. This priority afforded to the arbitral tribunal is important to maintain the independence of the arbitrators and the legitimacy of the arbitral proceedings.

## Form and Contents of Arbitral Award

The arbitral award should be made in writing (specifying the date and place of arbitration) and should be signed by the arbitrator(s). Unless otherwise agreed by the parties, the arbitral award should refer to a reasoned decision. A signed copy of the arbitral award should be delivered to each party.

## Power of the Court to Enforce Arbitral Award

### A. Enforcement of an interim award

Any interim award[15] made by an arbitral tribunal whether in or outside Myanmar during the course of arbitration will be enforceable by the court in Myanmar in the same manner as an order and decision of the court.[16]

### B. Enforcement of domestic arbitral award

A domestic arbitral award will be enforceable as decree of the court under the Code of Civil Procedure.

### C. Recognition and enforcement of foreign arbitral awards

The court should enforce a foreign arbitral award as a decree of the court. The party applying for the recognition and enforcement of the arbitral award is required to submit the following documents to the court:

(i) the original arbitral award or duly certified copy of the same, authenticated in the manner required by the law of the country in which the award was made;[17]

(ii) the original arbitration agreement entered between the parties or duly certified copy of the same; and

(iii) such evidence as may be necessary to prove that the award is a foreign award.[18]

## Setting Aside an Arbitral Award

The court may refuse to recognize and enforce any domestic or foreign arbitral award if the party against whom the award is made is able to prove any of the following:

---

[14] Section 18 of the Arbitration Law.
[15] Orders, decisions or directions by the arbitral tribunal.
[16] Section 31 of the Arbitration Law.
[17] Where the arbitral award is in foreign language, the party applying for enforcement should submit an English translation, certified as correct by a diplomatic or consular or official translator of the country where the award is made or certified as correct in accordance with the existing laws of Myanmar.
[18] Section 45 of the Arbitration Law.

(i) the parties to the arbitration agreement were under some incapacity under the law applicable to them;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;[19]

(iii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(v) 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 was held; or

(vi) the arbitral 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 arbitral award was made.

The courts may further refuse to recognize and enforce the arbitral award if:

(i) the subject matter of the dispute cannot be settled by arbitration under the laws of Myanmar; or

(ii) the enforcement of the arbitral award would be contrary to the national interests (public policy) of Myanmar.

Like many other jurisdiction, the Arbitration Law does not elucidate situations where the arbitral award would be considered as contrary to public policy of the country.[20]

## Conclusion

Arbitration is a long and arduous road in Myanmar. The Arbitration Law reflects the concept of a party's autonomy in the arbitral process. Though a specific timeframe of three (3) months has been provided for challenging a domestic arbitral award, no such timeframe has been prescribed for foreign arbitration which may in turn delay the enforcement of the foreign arbitral award. Furthermore, the term "national interest" in the Section 46 of the Arbitration Law should be narrowly interpreted, as any broad interpretation would affect the raison d'être of arbitration. To-date, the Myanmar courts did not had an occasion to interpret the provisions of the Arbitration Law and it will be interesting to see how the courts will give effect to its provisions to establish its place as a preferred arbitration hub in the region.

[19] Section 46 of the Arbitration Law.
[20] Section 46 of the Arbitration Law.

# Arbitration Laws and Regulations in the Philippines

**Anthony Amunategui Abad**

Arbitration in the Philippines has had a history as early as the existence of the modern American legal system, with varying degrees of recognition and status. In fact, the existence of the legal foundations for arbitration and other forms of alternative dispute settlement pre-date even the modern Philippine state as presently known, as well as many other of the nation's core laws.

In the Philippine context, Arbitration may be viewed throughout the development cycle of the legal system as having an early era, a period of development, a shift in framework towards a mandatory nature, and finally a period of judicial encouragement and alignment with global legal practice in the context of the modern commercial system. Such developments shall be looked at with respect to each phase of development, with special sectors being discussed separately.

## Early History of Arbitration in the Philippines

Even before the existence and structure of the judiciary as it is now presently recognized, some foundation and precedent already existed for the practice of private dispute settlement in the Philippines as an auxiliary to regular venues for dispute resolution. The Supreme Court itself has noted that, while "…sparse though the law and jurisprudence may be on the subject of arbitration in the Philippines, it was nonetheless recognized in the Spanish Civil Code; specifically, the provisions on compromises made applicable to arbitrations under Articles 1820 and 1821."[1]

Hence, while the form of arbitration as such may not have manifested in the early years as they are seen now, the essence of allowing the submissions of legal disputes to third parties has always been in existence under Philippine law, even during the Colonial and Commonwealth Periods. As early as 1901, the Courts have declared that: "It would be highly improper for courts out of untoward jealousy to annul laws or agreements which seek to oust the courts of their jurisdiction."[2]

Said ruling reflected a shift from believing that arbitration agreements were vehicles by which courts were ousted of their jurisdiction, to a paradigm wherein arbitration would eventually become part and parcel of the judicial dispute resolution process.

During the 1920s, an increase in favorability to arbitration started to become manifest, with the then-Supreme Court of the Philippine Islands noting that the foundations of arbitration were old and well developed precedents on expediting dispute resolution. The Court noted that: "The settlement of controversies by arbitration is an ancient practice at common law. In its broad sense, it is a substitution, by consent of the parties, of another tribunal for the tribunals provided by the ordinary processes of law.… Its object is the final disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties."[3]

---

[1] Said Articles provided as follows:
Art. 1820. Persons capable of making a compromise may also submit their contentions to a third person for decision.
Art. 1821. The provisions of the next preceding chapter with respect to compromises shall also be applicable to arbitrations.

[2] Chan Linte vs. Law Union and Rock Insurance Co., et al., 42 Phil. 548 (1921).

[3] Wahl and Wahl vs. Donaldson, Sims and Co. [1903], 2 Phil., 301)

By 1924, the Court was already of the view that arbitration was on-track towards full development in the Islands, claiming that: "In the Philippines fortunately, the attitude of the courts toward arbitration agreements is slowly crystallizing into definite and workable form The rule now is that unless the agreement is such as absolutely to close the doors of the courts against the parties, which agreement would be void, the courts will look with favor upon such amicable arrangements and will only with great reluctance interfere to anticipate or nullify the action of the arbitrator."[4]

One of the sectors which would provide some of the most significant contributions to the development of arbitration was the field of labor relations. Whether utilized in business transactions or in employer-employee relations, arbitration was gaining wide acceptance. As a consensual process, it was preferred to orders imposed by government upon the disputants. Moreover, court litigations tended to be time-consuming, costly, and inflexible due to their scrupulous observance of the due process of law doctrine and their strict adherence to rules of evidence. This role was recognized by the court, which stated that: "Arbitration found a fertile field in the resolution of labor-management disputes in the Philippines. Although early on, Commonwealth Act 103 (1936) provided for compulsory arbitration as the state policy to be administered by the Court of Industrial Relations, in time such a modality gave way to voluntary arbitration."[5]

## Codification of Arbitration in the 1950s and Beyond

The period of the 1950s gave rise to the formalization of the role of arbitration in the country through its enactment and implementation in a variety of legislation, including many fundamental statutes. For instance, the New Civil Code of the Philippines, Republic Act No. 386 which was passed on June 18, 1949.

Specifically, the new Civil Code finally provided through Articles 2042-2046,[6] the general rule that all dispute may be subject to Arbitration, as confirmed by the Court itself stating that: "However, the parties may opt for recourse to third parties, exercising their basic freedom to establish such stipulation, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy."[7]

Of greater significance as well was the inclusion of Article 2046, which provided that "The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of court as the Supreme Court shall promulgate." The provision of such authority would eventually go on to allow successive Supreme Courts to gradually develop the procedural framework for arbitration.

Eventually, the growing recognition of arbitration both locally and internationally led to the acknowledgment that there was a growing need for a law to regulate arbitration in general. This acknowledgement was concretized when Republic Act No. 876 (1953), otherwise known as the Arbitration Law, was passed. Said Act was obviously adopted to supplement — not to supplant — the New Civil Code on arbitration.[8]

---

[4] Chung Fu vs. CA, G.R. No. 96283 February 25, (1992).
[5] Manila Electric Co. v. Pasay Transportation Co., 57 Phil. 600 (1932).
[6] Art. 2042. The same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision.
Art. 2043. The provisions of the preceding Chapter upon compromises shall also be applicable to arbitrations. Art. 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to Articles 2038, 2039, and 2040.
Art. 2045. Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.
Art. 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of court as the Supreme Court shall promulgate.
[7] Chung Fu vs. CA, G.R. No. 96283 February 25, (1992).
[8] Civil Code, Article 1306

The law provided for the formalizing of roles of arbitrators in proceedings within the Philippines, as well as the granting of subpoena powers to private arbitrators. It likewise provided for the form and contents of awards and prescribed the extent of the powers possessed by arbitrators in the resolution of disputes. In that sense, Republic Act No. 876 formed the first modern arbitration law in the Philippines.

At around the same period, on 10 June 1958, the Philippines signed the United Nations Convention on the Recognition and the Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), hence leading to the integration in the Philippine legal system of International Commercial Arbitration, although ratification took place sometime after on 6 July 1967.

After the developments in the 1950s, the field soon began to specialize in response to the unique needs of the different industries where arbitration was pursued as a remedy and an alternative to the perennially clogged dockets in the Philippines. In recognition of the pressing need for an arbitral machinery for the early and expeditious settlement of disputes in the construction industry, a Construction Industry Arbitration Commission (CIAC) was created by Executive Order No. 1008, enacted on February 4, 1985. This, along with the previously mentioned Labor sector, represents the mandatory sectors of arbitration in the Philippines, although other regulators likewise recognize it on a voluntary basis.

## Modernization of Arbitration

In 2004, Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004, was passed. This law may be said to be an adoption in its entirety of the UNCITRAL Model Law of June 25 1985, as well as the amendments as adopted in 2006. Said law effectively forms the reckoning point from where Philippine Arbitration laws begin to align with global best practices on the matter, which coincides with the general trend on increasing standardization of ease of doing business and a desire to lower barriers to trade, which concomitantly would include both the security provided by alternative dispute settlement, and the reliability of the mechanisms by which international arbitral awards could be enforced.

In addition, the state formally adopted arbitration as a state policy, with Section 2 thereof declaring that to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes was a goal, as was to encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets.[9]

These were followed by the passage of the Implementing Rules and Regulations of the ADR Act in December 4 of 2009 as promulgated in Department of Justice Circular No.98, and finally the promulgation by the Supreme Court of the Philippines of the Special Rules of Court on Alternative Dispute Resolution in A.M. No. 07-11-08-SC ("Special ADR Rules") in 2009.

At around the same time, the Supreme Court promulgated its landmark decision in Korea Technologies vs. Lerma,[10] highlighting both the mandatory nature of arbitration and the need for confirmation of foreign arbitral awards in the Philippines, as well as highlighting the doctrine that foreign arbitral awards remain reviewable in the Philippines.

---

[9] Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004

[10] Korea Technologies vs. Lerma, G.R. No. 143581, January 7, 2008.

## Modes and Practice of Alternative Dispute Resolution in the Philippines

In the Philippines, there are five broad categories of Alternative Dispute Resolution which have been specifically defined by law. These are Arbitration, Mediation, Mediation-Arbitration, Early-Neutral Evaluation, and Mini-Trial. These are described briefly as follows:

**Arbitration**- This refers to a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award;[11]

**Mediation** – This refers to a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute; [12]

**Mediation-Arbitration**- (or Med-Arb) is a two-step dispute resolution process involving both mediation and arbitration; [13]

**Early-Neutral Evaluation** – This means an ADR process wherein parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a non- binding assessment by an experienced, neutral person, with expertise in the subject in the substance of the dispute; [14]

**Mini-Trial** – This means a structured dispute resolution method in which the merits of a case are argued before a panel comprising senior decision makers with or without the presence of a neutral third person after which the parties seek a negotiated settlement;[15]

Some or all of these modes may be availed successively. Likewise, in the Philippines, arbitrations are broadly categorized both as to their character or governing law (International or Domestic Arbitration), as to the subject matter of their dispute (e.g commercial arbitration), and as the means in which the arbitration is conducted ("ad hoc" or institutional).

The Philippines adopts the UNCITRAL Model Law of 1985 by express reference in the ADR Act of 2004, both expressly adopting the Model Law itself, as well as the interpretation thereto provided for by the UN, specifically providing that "regard shall be had to its international origin and to the need for uniformity in its interpretation and resort may be made to the travaux preparatoires and the report of the Secretary General of the United Nations Commission on International Trade Law dated March 25, 1985 entitled, "International Commercial Arbitration: Analytical Commentary on Draft Trade identified by reference number A/CN. 9/264."

---

[11] Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004, Section 3(C)
[12] Id., Section 3(Q)
[13] Id., Section 3(T)
[14] Id., Section 3(N)
[15] Id., Section 3(U)

In the Philippines, the requirements for these forms of ADR broadly follow the requirement that it must be (i) in writing, and (ii) clearly express the intent of the parties to arbitrate. With respect to the requirement of being written, although the ADR Law provides as follows: “A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement”, this may be liberally interpreted.[16]

## Arbitration, when International or Domestic

Sec.32 of R.A. 9285 provides as follows: Law Governing Domestic Arbitration. — Domestic arbitration shall continue to be governed by Republic Act No. 876, otherwise known as "The Arbitration Law" as amended by this Chapter. The term "domestic arbitration" as used herein shall mean an arbitration that is not international as defined in Article 1(3) of the Model Law.

Thus, domestic arbitration is defined in relation to international arbitration, which is then defined thusly:

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

Since arbitration in the Philippines is governed by the principle of party autonomy, the parties are free both with respect to the choice of their arbitral seat, as well as the institution and the rules of procedure to be adopted with respect to the governing of such a procedure. They are likewise not precluded from being represent by foreign counsels in an arbitration proceeding, nor having foreign arbitrators sit in tribunals, as opposed to the general restriction of foreigners practicing law.

## Arbitration, when Ad Hoc or Institutional

The Philippines supports both Ad Hoc and Institutional Arbitrations. Thus, as defined Institutional Arbitration “shall mean the person or institution named in the arbitration agreement as the appointing authority; or the regular arbitration institution under whose rules the arbitration is agreed to be conducted. Where the parties have agreed to submit their dispute to institutional arbitration rules, and unless they have agreed to a different procedure, they shall be deemed to have agreed to the procedure under such arbitration rules for the selection and appointment of arbitrators.”

Although the Arbitration Law curiously omits to define ad hoc arbitration, the law provides for their composition. In ad hoc arbitration, the default appointment of an arbitrator shall be made by the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative.

---

[16] Article 4.7 of Department Circular No. 98, The Implementing Rules and Regulations of the ADR Act of 2004 provides as follows: An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contracts is writing and the reference is such as to make that clause part of the contract.

Institutional Arbitration is the predominant mode of arbitration employed in the Philippines, with a number of established institutions for domestic arbitration such as the Philippine Dispute Resolution Center, Inc. ("PDRCI"), the Philippine Institute of Arbitrators ("PiArb"), and the newly introduced Philippine International Center for Conflict Resolution, Inc. ("PICCR"), which has been annexed to the national lawyers' organization, the Integrated Bar of the Philippines.

Beside the historical point, for most companies and businessmen there are several practical questions, that might be interesting:

1. Intervention of courts and legal power of courts in arbitration(…)
2. Enforcement of arbitrational awards(…)
3. Can arbitrational awards/the arbitrators be appealed? How does this work?

## Role of the Courts

As a general rule, the role of the courts in arbitration cases in the Philippines may be described as cooperative and complementary. The Courts play a fundamental role prior to the constitution of an arbitral tribunal by being both a source of Interim Measures of Protection for parties to protect their interests pending the constitution of a tribunal. They may likewise be called upon by duly constituted arbitral tribunals for the issuance of orders in aid of arbitration. Interim orders issued by the Courts are likewise subject to review and modification by the arbitral tribunal in the exercise of its own discretion.

Furthermore, the Courts are tasked with the enforcement and recognition of foreign arbitral awards, and the vacating of domestic arbitral awards. These are broadly subject to the same grounds as those found in the New York Convention, but as described further as follows.

Domestic Arbitral Awards may be vacated on the following grounds under the ADR Act and the Special ADR Rules:

(i) the arbitral award was procured by corruption, fraud or other undue means; or
(ii) there was evident partially or corruption in the arbitral tribunal or any of its members; or
(iii) the arbitral tribunal was guilty of misconduct or any form of misbehavior that has materially prejudiced the rights of any party such as refusing to postpone the hearing upon sufficient cause shown or to hear evidence pertinent and material to the controversy; or
(iv) one or more of the arbitrators was disqualified to act as such under this Chapter and willfully refrained from disclosing such disqualification; or
(v) the arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to it was not made.

On the other hand, a foreign arbitral award may be refused recognition on the following grounds:

(a) the parties to the arbitration agreement are, under the law applicable to them, under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or; failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise in able to present his case; or

(c) the award deals with dispute not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) 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 too place; or

(e) the award has not 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.

Recognition and enforcement of an arbitral award may also be refused if the Regional Trial Court where recognition and enforcement is sought finds that:

(a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Philippines; or

(b) the recognition or enforcement of the award would be contrary to the public policy of the Philippines.

There is a distinction in the manner in which awards from Convention and Non-Convention countries are enforced, however. In Convention countries, the New York Convention shall govern the recognition and enforcement of arbitral awards covered by said Convention. The petitioner shall establish that the country in which the foreign arbitration award was made is a party to the New York Convention.

On the other hand, for a Non-Convention Award, the recognition and enforcement of foreign arbitral awards not covered by the New York Convention shall be done in accordance with procedural rules to be promulgated by the Supreme Court. The court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award. These rules were promulgated as requiring Non-Convention awards to be enforced as though they are Foreign Judgments in need of Recognition and Enforcement.

With respect to judicial review, the general rule is that Courts are precluded from disturbing an arbitral tribunal's factual findings and interpretations of law. In no instance, however, are to Courts to review arbitral awards on the facts or the merits of the rulings on fact and laws contained in the same, except where they constitute grave errors of fact. This has been expressed by the Courts in the rule that “simple errors of fact, of law, or of fact and law committed by the arbitral tribunal are not justiciable errors in this jurisdiction.”[17] This includes by necessary implication that the Court may review the decision of arbitral tribunals if the same are found to have grave or severe errors of fact, law, or both. What constitutes a grave error in such instances has yet to be clarified by the Supreme Court.

[17] Fruehauf Electronics Philippines Corporation, Vs.Technology Electronics Assembly And Management Pacific Corporation, G.R. No. 204197, November 23, 2016.

# Arbitration Laws and Regulations in Singapore

**Matthew Coghlan**

## Introduction

Arbitration is a fairly recent form of dispute resolution mechanism in the Singapore legal landscape. It was introduced in the 1980s and 1990s with the passing of the Arbitration Act and International Arbitration Act. Yet Singapore has rapidly become a regional and global arbitration success story. The latest Queen Mary University and White & Case International Arbitration Survey in 2018[1] showed that Singapore has again moved up the ranks of the international commercial arbitration field:

1. The Singapore International Arbitration Centre (SIAC) is now the third most preferred arbitral institution in the world behind London (LCIA) and Paris (ICC) and ahead of Hong Kong (HKIAC) for the first time;
2. Singapore is now the third most preferred seat of arbitration in the world too; and,
3. SIAC and Singapore are now the most preferred institution and seat in Asia.[2]

SIAC handled a record high of 452 new case filings from six continents and 58 jurisdictions in 2017.[3] Its Court of Arbitration consists of leading international arbitration experts and professionals.[4] The SIAC panel of arbitrators comprises more than 400 international arbitrators from more than 40 jurisdictions.[5]

There are a number of important underlying factors that explain how Singapore has been able to establish itself as a leading gateway for legal services:

1. An open economy and pro-business environment. The latest World Bank Doing Business Report 2019 ranks Singapore as the second easiest place to do business and the easiest place in the world to enforce contracts.[6]
2. Strong rule of law, a trusted legal system, respected judiciary and quality jurisprudence.[7] The World Justice Project Rule of Law Index 2017-2018 ranked Singapore equal seventh.[8]
3. A strategic hub for Asia-focused business operations and service providers that is home to 7,000 MNCs,[9] 8,000 Indian companies and 7,500 Chinese companies.[10]

Singapore did not build its sophisticated international dispute resolution hub overnight.[11] Its current success in international arbitration in particular has been well-earned by continuous legislative, institutional and administrative improvements to meet the needs of international parties.[12]

---

[1] https://www.whitecase.com/publications/insight/2018- interntial-arbitration-survey-evolution-international-arbitration
[2] Opening Address by the Second Minister for Law, Ms Indranee Rajah, at the SIAC Congress 2018 Gala Dinner, 18 May 2018, https://www.mlaw.gov.sg/content/minlaw/en/news/-speeches/2M-opening-address-SIAC-congress-2018-gala-dinner.html
[3] Lim Seok Hui, 'Singapore: a regional leader for dispute resolution',
https://www.vantageasia.com/singapore-the-regional-leader-for-legal-services/ (18 September 2018)
[4] http://www.siac.org.sg/2014-11-03-13-33-43/about-us/court-of-arbitration
[5] http://www.siac.org.sg/our-arbitrators/siac-panel
[6] http://www.doingbusiness.org/en/rankings and http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts
[7] Alvin Yeo and Lim Wei Lee, 'Singapore' in IBA Arbitration Committee, Arbitration Guide (International Bar Association, Updated 2018)
[8] http://data.worldjusticeproject.org
[9] Multinational Companies
[10] Speech by Ms Indranee Rajah, Senior Minister for State for Law & Finance, at the Launch Ceremony of ICC's Case Management Office in Singapore, 23 April 2018,
https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/speech-by-sms-indranee-rajah-icc-case-management-office-launch-ceremony.html
[11] Gary F Bell, 'Singapore's Implementation of the Model Law: If at First You Don't Succeed', in Gary F Bell, The UNCITRL Model Law and Asian Arbitration Laws: Implementation and Comparisons (Cambridge University Press, 2018)
[12] Alvin Yeo and Lim Wei Lee, 'Singapore' in IBA Arbitration Committee, Arbitration Guide (International Bar Association, Updated 2018)

## Legal Framework
## Domestic and International Arbitration

The overall legal framework for arbitration in Singapore aims to be 'arbitration friendly'. Singapore has separate laws for domestic and international arbitration: the Arbitration Act Chapter 10 (Act 37 of 2001, Revised Edition 2002) (AA)[13] and the International Arbitration Act Chapter 143A (Act 23 of 1994, Revised Edition 2002) (IAA).[14] The AA applies to domestic arbitration if the place of the arbitration is Singapore and Part II of the IAA does not apply.[15] The IAA applies to international arbitration,[16] and non-international arbitration if there is a written agreement for Part II of the IAA or Model Law. Under Section 5(2) of the IAA, an arbitration is 'international' if:

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

Most disputes are 'arbitrable' in Singapore, unless contrary to public policy or not capable of settlement by arbitration.[17]

The Arbitration Act and IAA adopt the UNCITRAL Model Law on International Arbitration (1985) (Model Law).[18] The adoption of the Model Law allows Singapore to follow international best practices, which are familiar to the wide range of civil law and common law jurisdictions in Asia. While the IAA modifies the Model Law in certain respects, probably 80 per cent of it has been adopted.[19] Further, although Singapore has not introduced the 2006 Amendments to the Model Law, the IAA has adopted many of its principles and some of the amendments to the IAA adopted it - these include a relaxation of the writing requirement of the arbitration agreement, and new provisions making awards and orders of emergency arbitrators enforceable.

Singapore acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (NYC) on 21 August 1985 and applies it on a reciprocal basis.[20] The NYC was incorporated in Part III of the IAA so that domestic and international arbitration awards made in Singapore are binding and enforceable in Singapore and the 159 NYC contracting party countries.[21]

---

[13] https://sso.agc.gov.sg/Act/AA2001
[14] https://sso.agc.gov.sg/Act/IAA1994
[15] Section 3, AA
[16] Section 5(1), IAA
[17] Section 48(1), AA; Section 11, IAA
[18] Gary F Bell, 'Singapore's Arbitration Laws', in Eric E Bergsten, International Commercial Arbitration (Oxford University Press, 2012-2014)
[19] Gary F Bell, 'Singapore's Implementation of the Model Law: If at First You Don't Succeed', in Gary F Bell, The UNCITRL Model Law and Asian Arbitration Laws: Implementation and Comparisons (Cambridge University Press, 2018)
[20] http://www.newyorkconvention.org/countries
[21] http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=7&id_news=1000&opac_view=-1

The operation of two arbitration frameworks in Singapore allows parties to opt in or opt out of one regime or the other by agreement.[22] While the AA and IIA are similar in many respects, the main differences between the two frameworks according to one leading arbitration practitioner in Singapore are "the degree of court intervention in the arbitral process and respect for party autonomy."[23] For example, the courts have discretion to grant a stay of proceedings in favor of arbitration under the Arbitration Act, whereas no such discretion exists under the IAA.[24]

## Arbitration Agreement

An 'arbitration agreement' is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[25] An arbitration agreement must be in writing and it may take the form of an arbitration clause in a contract or a separate agreement.[26] An arbitration agreement is independent of other contract terms.[27] Arbitrators have the power to decide on their own jurisdiction including regarding the existence and validity of the arbitration agreement.[28]

## Arbitrator Appointment

Arbitrators do not need to hold special qualifications except independence and impartiality, unless the parties agree to special qualifications. One major benefit of arbitration is the ability to select arbitrators that have experience of the specific nature and type of dispute. The main arbitral institutions all maintain approved arbitrator lists that apply a certain degree of quality control and have minimum standards in terms of experience, age, etc. However, arbitrators have an ongoing duty to disclose circumstances that are likely to give rise to justifiable doubts about impartiality or independence; for instance, personal, business or professional relationships with parties.[29]

The parties are free to decide on the number of arbitrators for the arbitration tribunal.[30] They almost always agree to appoint an odd number of one or three arbitrators. If they have not agreed on the number, the presumption in Singapore is one arbitrator.[31]

The parties can also decide on the procedure for appointment.[32] If they fail to agree on the procedure or fail to appoint a sole arbitrator, the parties may apply to the President of the Court of Arbitration of SIAC to make the appointment.[33] Under the IAA, if the parties fail to agree on the procedure to appoint three arbitrators, each party appoints one arbitrator and agree to appoint the third arbitrator who will be the presiding arbitrator.[34] If the parties cannot agree on the appointment of the third arbitrator in either domestic or international arbitration, each party may ask the President to do it.[35]

---

[22] https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-04-international-and-domestic-arbitration-in-singapore
[23] https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-04-international-and-domestic-arbitration-in-singapore
[24] Morgan Lewis, An Introductory Guide to Arbitration in Singapore, Second edition 2018
[25] Section 4(1), AA; Section 2A(1), IAA
[26] Section 4(2) and (3), AA; Section 2A(2) and (3), IAA
[27] Section 21(2), AA
[28] Section 21(1), AA
[29] Section 14(1), AA
[30] Section 12(1), AA
[31] Section 12(2), AA; Section 9, IAA
[32] Section 13(2), AA
[33] Section 13(3), AA; Section 8(2), IAA
[34] Section 9A, IAA
[35] Section 13(4), AA; Section 9A, IAA

## Arbitral Procedure

If Singapore is the place of arbitration, the parties can decide the arbitral procedure.[36] If there is no agreement between the parties regarding the procedure, the tribunal conducts the arbitration in the manner that it considers appropriate.[37] The tribunal is required to hold oral hearings if requested,[38] otherwise it has the power to decide whether to hold oral hearings or documents only.[39]

In domestic arbitration, the tribunal has the power to make orders or give directions for security for costs, discovery, the preservation and interim custody of evidence for the purposes of the proceedings, and to administer oaths and affirmations.[40] In international arbitration, the tribunal also has the power the grant an interim injunction or any other interim measure or to secure the amount in dispute.[41] In both domestic and international arbitration, the tribunal's orders or directions are enforceable by leave of the court.[42]

## Arbitral Awards

An arbitral 'award' is a "decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award…".[43] Orders or directions that do not make decisions on the substance of the dispute are not awards.[44] 'Interim' awards are awards that are not the final award, 'partial' awards are awards that only decide part of the dispute, while 'interlocutory' awards are interim awards that are final awards on issues except the matter of quantum. There is no statutorily imposed time limit for the tribunal to make an award but the parties can stipulate it in the agreement.

The decision of the tribunal must be by a majority of the arbitrators if there is a panel.[45] The award must be in writing, it must be signed by the arbitrator or arbitrators, and it must state the date and place of arbitration.[46] The award must give reasons unless the parties agree or it is an award on agreed terms.[47]

## Award Challenges

Appeal to the court on a question of law in the award is allowed in domestic arbitration.[48] Before granting leave to appeal, the court must be satisfied per Section 49(5) of the AA that:

a. The determination of the question will substantially affect the rights of one or more of the parties;
b. The question is one which the arbitral tribunal was asked to determine;
c. On the basis of findings of fact in the award -
    (i) The decision of the arbitral tribunal on the question is obviously wrong; or
    (ii) The question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and,

[36] Section 23(1), AA; Section 15A, IAA
[37] Section 23(2), AA
[38] Section 25(2), AA
[39] Section 25(1), AA
[40] Section 28(2), AA
[41] Section 12(1), IAA
[42] Section 28(4), AA; Section 12(6), IAA
[43] Section 2(1), AA; Section 2(1), IAA
[44] Sections 2(1) and 28(4), AA; Sections 2(1) and 12(6), IAA
[45] Section 19(1), AA
[46] Section 38(1) and (3), AA
[47] Section 38(2), AA
[48] Section 49, AA

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

An application to set aside an award must be made to the court and the grounds for setting aside are similar for domestic and international arbitration. [49] However, under the IAA, the grounds for setting aside are exhaustive and the court has no power to review the merits of the dispute or tribunal d ecisions of fact or law.

Under Section 48(1) of the AA, the court can set aside an award:

a. If the party who applies to the court to set aside the award proves to the satisfaction of the court that -
   (i) A party to the arbitration agreement was under some incapacity;
   (ii) 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 Singapore;
   (iii) The party making the application was not given proper notice of the appointment of an arbitrator or the arbitration proceedings or was otherwise unable to present his case;
   (iv) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration…;
   (v) The composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties…;
   (vi) The making of the award was induced or affected by fraud or corruption;
   (vii) A breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or
b. If the court finds that -
   (i) The subject matter of the dispute is not capable of settlement by arbitration under the Act; or
   (ii) The award is contrary to public policy.

## Award Enforcement

The enforcement of both domestic and international arbitral awards that are made in Singapore requires the leave of the court.[50]

Part III of the IAA sets out the procedure for the enforcement of foreign arbitral awards made in a NYC contracting party. Foreign arbitral awards can be enforced by action, judgment or order with the leave of the court.

# Arbitration Institutions

Many of the world's major arbitration institutions are now located in Singapore including the previously mentioned Singapore International Arbitration Centre (SIAC), the Singapore Chamber of Maritime Arbitration, Permanent Court of Arbitration (PCA), International Centre for Settlement of Investment Disputes (ICSID), and International Court of Arbitration of the International Chamber of Commerce (ICC).

[49] Section 48, AA; Section 31, IAA
[50] Section 46(1), AA; Section 19, IAA

SIAC has its own arbitration rules for international commercial arbitration (the latest version is the SIAC Rules 2016) and it now also has new international investment arbitration rules for treaty disputes (SIAC IA Rules 2017).[51] Parties involved in SIAC-managed arbitrations in Singapore primarily use the SIAC Rules but they can adopt the UNCITRAL Rules as well. SIAC provides Model Clauses for parties that wish to use SIAC Rules or UNCITRAL Rules in their agreements to govern arbitration in the event of a dispute arising in contract performance.

SIAC offers 'special procedures' for parties under the SIAC Rules:

- It has provided an 'expedited procedure' to fast-track lower value, less complex cases in 6 months since 2010;[52]
- SIAC was the first arbitral institution to introduce provisions for the appointment of an 'emergency arbitrator' to deal with requests for urgent interim relief prior to the establishment of the tribunal;[53] and,
- It was one of the first institutions to adopt an 'early dismissal' procedure for claims or defences lacking legal merit.[54]

## Implementation Experience

According to one leading arbitration scholar in Singapore, the Singapore courts application of the IAA and Model Law has improved in time and recent decisions of the Court of Appeal are strong.[55] However, where the courts have made decisions that might undermine the certainty of the arbitration regime or be perceived to be unsupportive of arbitration, the Singapore Parliament has generally moved speedily to clarify the position. The most well-known cases are the 2001 High Court case of John Holland and the 2002 High Court case of Dermajaya. In John Holland, the court held that adopting the ICC Arbitration Rules meant rejecting the IAA and Model Law. The Parliament amended Section 15 of the IAA quickly to make it clear that an arbitration agreement that adopts arbitration rules does not exclude the IAA or Model Law. In Dermajaya, the court held that the UNCITRAL Rules were incompatible with the IAA and Model Law. Again, the Parliament moved with alacrity to pass a new Section 15 and introduce Section 15A of the IAA to explain the right relationship between arbitration rules and arbitration law.

## Policy Recommendations

Singapore has now developed world-class domestic and international arbitration laws and institutions, which support it as the new leading arbitration hub in Asia and so continuing to increase arbitration caseloads. Nonetheless, some amendments have been suggested that might be made to strengthen the framework:

- Consolidate the IAA and Model Law into one statute, rather than the IAA modifying some Model Law provisions and then appending it. Hong Kong consolidated its arbitration law into one law in 2010; and,
- Merge the AA into the consolidated IAA because the AA, IAA and Model Law are increasingly consistent with each other. Again, Hong Kong has done so, retaining limited domestic arbitration sections.[56]

[51] http://www.siac.org.sg/our-rules/rules
[52] Rule 5.2, SIAC Rules, http://www.siac.org.sg/our-rules/rules/siac-rules-2010
[53] Rule 26.1 and Schedule 1, SIAC Rules
[54] Rule 29, SIAC Rules
[55] Gary F Bell, 'Singapore's Implementation of the Model Law: If at First You Don't Succeed', in Gary F Bell, The UNCITRL Model Law and Asian Arbitration Laws: Implementation and Comparisons (Cambridge University Press, 2018)
[56] Gary F Bell, 'Singapore's Implementation of the Model Law: If at First You Don't Succeed', in Gary F Bell, The UNCITRL Model Law and Asian Arbitration Laws: Implementation and Comparisons (Cambridge University Press, 2018)

# Arbitration Laws and Regulations in Vietnam

**Nguyen Nhu Phat**

## History of Legal Development of Economic Arbitration in Vietnam

Historically speaking, economic arbitration emerged and developed hand in hand with economic contract regime. The Prime Minister (PM) issued Decree No. 04/TTg dated 04 January 1960 to enact provisional Statute on economic contracts. On 14 November 1960, the PM issued Decree No. 20/TTg on State Economic Arbitration Organization. Accordingly, economic arbitration was organized at central, sector, city, province, and ministry levels with mandate of handling economic contract disputes.

The Government issued Decree No. 54-CP dated 10 March 1975 on regime of economic contract, Decree No.75-CP along with Organization and Operational Statute of Economic Arbitration Centre. Accordingly, economic arbitration was to be established as a state organ with mandate of managing activities related to economic contracts. That was to maintain State discipline on economic contract, to resolve disputes on economic contract and handle violations thereof. According to Decree No. 24/HDBT dated 10 August 1981 of the Council of Ministers, Economic Arbitration Commission was named uniformly to Economic Arbitration, category of arbitrator was established. On 17 April 1984, the Council of Ministers enacted Decree No. 62/HDBT providing mandates, functions, competence and organization of economic arbitration of ministry, province and district.

On 10 January 1990, the Council of State[1] issued Ordinance on Economic Arbitration providing organization, decentralization of power, procedure for handling disputes relating to economic contracts. In particular, the Ordinance abolished the ministry-level arbitration.

In the centrally planned period, State economic arbitration possessed particular features as follow:

- A state organ under the umbrella of the executive, arbitrator is state officer.
- Economic arbitrations from central to local levels form a system with interdependent and binding relationship in terms of organization and procedure.
- State economic arbitration not only enjoys competence to resolve disputes related to economic contract but also has mandate to manage economic contract regime.
- Despite being a State organ, decisions of State economic arbitration are not ensured through state enforcement power as decisions and judgments of the court.[2]

In the transition to new economic regime, means for resolution of economic disputes required a novel approach. On 28 December 1993, the Amended and Supplemented Law on Organization of People's Court was approved, economic court was established within the People's Court system with mandate of resolution of economic disputes. In the same vein, the arbitration system under the executive power was dissolved.

[1] It was composed of heads of state, permanent working organ of the National Assembly with legislative mandate similar to the Standing Committee of the National Assembly currently.
[2] History of arbitration regime, https://luatminhkhue.vn/tu-van-luat-dan-su/lich-su-hinh-thanh-che-dinh-trong-tai.aspx.

Besides the arbitration system under the executive, non-government arbitration system had existed in parallel.

After the establishment of State economic arbitration organization of 1960, during 1963 – 64, in foreign trade sector, two arbitration organizations outside of the State system were established for resolution of international disputes, that were Arbitration Commission on Foreign Trade and Maritime Arbitration Commission. The emergence of these two institutions stemmed from the need for international economic relations of Vietnam with other socialist countries. In spite of its non-governmental nature, these two institutions operated in accordance with Statute of Organization provided by the Government and were under supervision by state bodies.

Pursuant to Decision No. 204/TTg dated 28 April 1993 of the PM, the two arbitration organizations were to be merged into Vietnam International Arbitration Centre (VIAC).[3] VIAC is non-government arbitration organization at the Vietnam Chamber of Commerce and Industry (VCCI). The organization and operation of VIAC are provided under the Organizational Statute of VIAC issued with Decision No. 204/TTg dated 28 April 1993 of the PM and Rules of Procedure of VIAC issued by VCCI.

On 05 September 1994, the Government issued Decree 116-CP on the organization and operation of economic arbitration centres. Accordingly, economic arbitration is categorized as a socio – professional organization, in other words, it is non-government organization authorized to handle certain disputes in accordance with the law, and is separated from the mandate of State management as having been provided previously.

On 25 February 2003, the Standing Committee of the National Assembly enacted Ordinance[4] on Arbitration No. 08/2003/PL-UBTVQH and on 15 January 2004, the Government issued Decree No. 25/2004/ND-CP detailing and guiding the implementation of articles under the Arbitration Ordinance. In general, the Ordinance broadened considerably the competence of arbitration in Vietnam in comparison with arbitration's under Decree No. 116-CP.

The 2003 Ordinance on Commercial Arbitration is based on the succession and development of previous regulations on arbitration with study of laws of other countries on commercial arbitration as well as the UNCITRAL Model Law on International Commercial Arbitration of 1985. However, after a period of application, a number of regulations under the Ordinance showed their shortcomings, inadequacy, and inconsistency with the swift phase of Vietnam's economic reform. That is the practical ground for enactment of the 2010 Law on Commercial Arbitration with a view to improve regulations on arbitration.

The Law on Commercial Arbitration No. 54/2010/QH12 has taken effect since 01 January 2011 replacing the 2003 Ordinance on Commercial Arbitration. The law provides competence of commercial arbitration, forms of arbitration, arbitration organization, arbitrator; procedures; rights, obligations and responsibilities of parties participating in an arbitral case; jurisdiction of the court with regard to arbitral activities; organization and operation of foreign arbitration in Vietnam, enforcement of arbitral awards.

Commercial arbitral tribunals are empowered to resolve disputes relating to issues as follow:

1. Disputes arise from commercial activities.
2. Disputes between parties, of which at least one party conduct commercial activities.
3. Other disputes to be resolved by arbitration provided for by the law.[5]

[3] It is the seventh biggest arbitration centre at present.

[4] Ordinance is legislative by-law enacted by the Standing Committee of the National Assembly with legal value standing in the middle of law of the National Assembly and decree of the Government.

[5] Articles 1, 2 of the 2010 Law on Commercial Arbitration.

For arbitration procedure, arbitral awards are final and effective immediately, not based on two-level hearings as the court procedure. Normally, parties shall abide by the award because free choice of arbitration procedure lies within them. Therefore, the Law on Commercial Arbitration encourages parties to self-enforce the arbitral award (Article 65 of the Law on Commercial Arbitration).

In case of non-compliance, since the expiration of enforcement of the arbitral award,[6] the party may request organs of civil judgment enforcement to execute/enforce the award in accordance with the law on civil judgment enforcement (Articles 66, 67 of the Law on Commercial Arbitration).

Arbitral awards may be set aside under the Law on Commercial Arbitration. Artile 68 of the Law provides:

1. The court[7] shall hear [an application for] setting aside an arbitral award on receipt of a petition from one of the parties.
2. An arbitral award which falls within any one of the following cases shall be set aside:
   - (a) There was no arbitration agreement or the arbitration agreement is void;
   - (b) The composition of the arbitration tribunal was [or] the arbitration proceedings were, inconsistent with the agreement of the parties or contrary to the provisions of this Law.
   - (c) The dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside.
   - (d) The evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; [or] an arbitrator received money, assets or some material benefit from one of the parties in dispute which affected the objectivity and impartiality or the arbitral award.
   - (e) The arbitral award is contrary to the fundamental principles of the law of Vietnam.

Within 30 days since the receipt of arbitral awards, the party, with sufficient grounds to prove that the arbitral awards rendered fall in circumstances provided under Article 68.2 of this Law, may petition to the court to set aside the awards. Application for setting aside arbitral award must enclose documents an evidences to prove legitimate and legal grounds (Article 69 of the Law on Commercial Arbitration).

## The Implementation of the Law on Commercial Arbitration and Issues

### Assessment of Outcomes

In recent period, arbitration has contributed greatly to rapid settlement of commercial disputes, to ensure legitimate rights and interests of disputants, to shoulder the burden of caseloads in the court system, and to improve competitiveness of enterprises.

However, although the number of arbitral cases handled by arbitration have witnessed an increase during the past 4 years in relation to the practical demand, the resolution of commercial disputes remain limited. Statistically speaking, cases handled by arbitration in Vietnam account for less than 1 per cent of total commercial cases handled by the court annually.[8]

---

[6] Time for enforcement of the arbitral award is set in the arbitral award (Article 62 of the Law on Commercial Arbitration).
[7] Economic Court under the Provincial level Court where the arbitral tribunal is based.
[8] Mai Dan, arbitral cases have not boosted hope, http://thoibaotaichinhvietnam.vn/pages/xa-hoi/2018-06-07/so-vu-giai-quyet-qua-trong-tai-va, 7.6.2018.

In general, awards of arbitral tribunals are in compliance with the Law on Commercial Arbitration, rules of procedure and other regulations. Despite the fact that the role of arbitration is increasingly bolstered, the number of arbitral cases remain limited.

Besides the limitation of the law, court's abuse of power to set aside arbitral awards has taken shape in many years; that also is the cause for limited effectiveness in resolving cases through arbitration, causing enterprises' loss of confidence in arbitration.[9]

## Limitations in the Implementation of the Law on Commercial Arbitration

The implementation of the law on arbitration to resolve commercial disputes over the period has shown a number of issues as follow:

First, there are bottlenecks in "invocation of law" to determine jurisdiction of commercial arbitration:

The Ordinance on Commercial Arbitration provided clearly "commercial activities" within the jurisdiction of arbitration.[10] Subsequently, the Law on Commercial Arbitration recognizes the concept of "commercial activities" without any further details. Hence, rather than invocation of Section 1 Article 3 of the 2005 Commercial Law on commercial activities , there is expectation that the Arbitration Law may shed light on the understanding of the concept of commercial activities.[11] Therefore, a handful of arbitrators are confused with the identification of their competence.[12]

Second, regarding setting aside of arbitral awards:

Section 2 Article 68 of the Law on Commercial Arbitration provides 5 circumstances where arbitral awards may be set aside by the court, one of which is: "contrary to basic principles under Vietnam's law".

It is vague and ambiguous to comprehend "basic principles under Vietnam's law" resulting in different interpretations of the court of this ground for setting aside of arbitral awards. However, the power to interpret the law lies within the legislative branch, which barely utilizes this power for such an end. Given recent legal development, the court is now empowered to not to interpret the law but to formulate and develop case law. This leads to the situation of that arbitral awards are set aside arbitrarily by the judges.

Third, regarding non-compliance with the requests of arbitral tribunals:

During the handling of disputes, it is legally provided that arbitral tribunal has the power to gather evidence and subpoena witnesses, however, in practice the law does not provide how the tribunal can enforce its decisions. Therefore, in cases arbitral tribunal subpoenas a witness to be present before it, the witness barely show up because s/he supposes that such a request does not possess the binding value as the court's.

Fourth, regarding arbitration clause:

The law on commercial arbitration does not provide specifically the content of arbitration clause. The failure to legalize is a huge deficiency, given direct effect of arbitration clause on jurisdiction of the tribunal in resolution of the dispute; In return, the arbitration agreement depends heavily on the content of the agreement.

---

[9] Setting aside of Awards by Arbitral Tribunal in Vietnam: from the angle of Ho Chi Minh city, MA thesis, Graduate Academy of Social Sciences, p. 70.

[10] Accordingly, that is "performance of one or more commercial acts by a business organization or individual including the purchase or sale of goods or the provision of services; commercial distribution, representation or agency; bailment; leasing out or leasing; hire purchase; construction; consultancy; technical activities; licensing; investment; finance and banking; insurance; exploration and exploitation; transportation of goods and passengers by air, sea, rail or road; and other commercial acts pursuant to law."

[11] Commercial activities mean "activities for the purpose of generating profits, including: sale and purchase of goods, provision of services, investment, commercial promotion and other activities for the profit purpose."

[12] Pham Cong Thien Dinh, Resolution of contractual disputes through commercial arbitration under Vietnam's Law, MA Thesis, Graduate Academy of Social Sciences, 2015, p. 47.

Fifth, regarding the application of interim measures:

Under Section 1 Article 48 of the 2010 Law on Commercial Arbitration, parties to the dispute may request arbitral tribunal or court to apply interim measures with purposes to ensure the expedition, convenience and effectiveness in the handling of the case.

However, current law only provides in case a party had requested the court for the application of interim measures, and then made such a request to the arbitral tribunal (Section 3 Article 49 the 2010 Law on Commercial Arbitration). Such regulations are inadequate and incomprehensive because the law does not make preparations for probable occurrence of other circumstances.

Sixth, regarding unenforceable arbitration agreement:

Under Section 1 Article 43 the 2010 Law on Commercial Arbitration, the lawmakers provide circumstances where "the arbitration agreement is unenforceable, arbitral tribunal shall suspend the case and inform promptly both parties". However, the law and by-laws do not provide clearly how to identify the unenforceability of an arbitration agreement. The vagueness and ambiguousness results in hurdles to suspension of the case by the arbitral tribunal.

## Recommendations for Improvement of the Law

The analysis of legal provisions on arbitration has shown a number of shortcomings. Hence, the paper will provide certain recommendations to boost the effectiveness in implementation of the law on commercial arbitration in Vietnam.

First, due to internal consistency of the legal system, every subject needs to get acquainted with, learn experience and methods to invoke the law in the application of Vietnam's law. Albeit lack of power to interpret the law, the court is authorized to "ensure the consistency in the application of the law during trials" (Article 2 of the 2014 Law on the Organization of People's Court), the Supreme People's Court may issue guidance on the content of "commercial activities" as provided under the Law on Commercial Arbitration by the reference to Article 3 of the Commercial Law of 2005.

Second, the concept of "contrary to basic principles of Vietnam's law" is causing headache to not only arbitrators but also legal practitioners in Vietnam presently. Therefore, while the law could not give an exhaustive list of "rightful/ wrongful" manifestations and for reasonable identification of legal conducts to be carried out, there is a need:

- The Supreme People's Court needs to provide qualitative guideline on phenomenon that may be in breach of basic principles of Vietnam's law.
- The court should be more proactive in creating and developing case laws relating to the interpretation of this legal principle to shed light for conducts of legal practitioners.

Third, the law needs to provide that the requests of arbitral tribunal are binding as much as court's in the procedural process.

Another measure is to empower enforcement mechanism of decision/requests of arbitral tribunal through the assistance of the court.

Fourth, there is a need to supplement new provisions under the Law on Commercial Arbitration with regard to the content of arbitration agreement. This measure can address the deficiency in the law, ensure the transparency, consistency, unambiguousness, and strictness of the law, and particularly to sidestep the risk of revocation of arbitral awards due to the incompatibility of arbitration agreement with the law.

Fifth, besides Section 1 Article 48 of the 2010 Law on Commercial Arbitration, there is a need to supplement a provision on the application of interim measures in the handling of disputes by the arbitral tribunal. The Law on Commercial Arbitration should provide explicitly the handling method to ensure the comprehensiveness, and more importantly to ensure legitimate rights and interests of disputants.

Sixth, the arbitration law and its by-laws need to provide in which case the arbitration agreement is unenforceable (which is mentioned under the Section 1 Article 43 of the 2010 Law on Commercial Arbitration) so that the arbitral tribunal shall suspend the case and inform parties promptly.

**Anthony Amunategui Abad** is a former Tariff Commissioner and an international trade lawyer. He also has several publications in competition law and currently serves as a dispute resolution panelist at the WTO. He is a Professor of International Trade Law and Competition at the Ateneo Law School, the CEO of TA Trade Advisory Group Inc (TradeAdvisors) and the Founding Partner of Abad Alcantara and Associates (TradeLawyers). Mr. Abad holds a Master of Public Administration from the Harvard University Kennedy School of Government, and Law and Economics (Honors) degrees from the Ateneo de Manila University.

**Dato' Mah Weng Kwai** is on the Asian International Arbitration Centre's panel of arbitrators and is certified as a mediator by the Malaysian Mediation Centre. He also sat as an arbitrator at the Singapore International Arbitration Centre. The subject matter of the cases he dealt with include inter alia, building and construction cases, sale and purchase of shares, telecommunication contracts, marine dredging and others. He served as a Commissioner in the Human Rights Commission of Malaysia (SUHAKAM). Mr. Weng Kwai obtained his Master of Laws degree with Honours in 1985 from the University of Sydney.

**Nguyen Nhu Phat** is a Senior Researcher, Associate Professor, and Doctor of Law. He is a leading expert in the field of comparative law and competition law in Vietnam. He has held a number of professional posts such as member of the Central Committee of Vietnam Lawyers Association, Vietnam – Germany Friendship Association, and arbitrator at the Vietnam International Arbitration Center. Mr. Phat has made 81 publications, authored and co-authored 61 books domestically and internationally. He received his PhD degree in law from German Academy of Sciences in 1990.

**Matthew Coghlan** is an Australian lawyer with fifteen years of experience working on law and development issues in Southeast Asia. He has assisted governments, donors and NGOs in a wide range of legal and policy issues in international trade and investment, human rights, gender, anti-corruption and public health. He received a Bachelor of Arts and a Bachelor of Legislative Law (Honours) from the Melbourne Law School and a Master of Arts in International Relations from the Australian National University.

**William D. Greenlee, Jr.** is the Managing Director of DFDL in Myanmar. His practice focuses on mergers and acquisitions, corporate, energy, mining and infrastructure, project finance and securities. He has advised on Myingyan, the first internationally tendered power project in Myanmar. He is involved in negotiating, structuring, documenting and managing large transactions, private equity and opportunity-fund companies and other international companies throughout Asia. He holds a Juris Doctor from the University of San Francisco, California.