글로벌 법제전략 연구 13-22-⑧-7

KLRI-UNCITRAL Joint Research : Perspectives and Trends(Ⅶ)

Implementation of the UNCITRAL Arbitration Framework in Asia and the Pacific

Peter Binder

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

글로벌 법제전략 연구 13-22-⑧-7

KLRI-UNCITRAL Joint Research : Perspectives and Trends(VII)

Implementation of the UNCITRAL Arbitration Framework in Asia and the Pacific

Peter Binder

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

KLRI-UNCITRAL Joint Research : Perspectives and Trends(VII)

Implementation of the UNCITRAL Arbitration Framework in Asia and the Pacific

연구자 : Dr. Peter Binder, LL.M.
(Attorney-at-Law, Vienna, Austria)

2013. 12. 13.

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

Abstract

More than other parts of the world the Asia and Pacific region has in recent years not only shown an active interest in attracting international business but also to provide for an environment in which any arising disputes can be resolved through arbitration in the region without having to resort to European destinations or further afield. This fact is emphasized by the high adoption rate in the Asia and Pacific region of the legal instruments in the arbitration field offered by the United Nations Commission on International Trade Law (UNCITRAL).

Following the substantial revisions made by UNCITRAL to its arbitration framework in recent years this study examines the status quo in a few selected jurisdictions in the region ranging from highly developed arbitration hubs (such as Hong Kong and Singapore) to countries where arbitration is still in its infancy (such as Bangladesh) or where other factors affect the success story (such as in Japan).

The jurisdictions examined in this study are insofar comparable in that they have all adopted the UNCITRAL Model Law on International Commercial Arbitration and in that are all situated in the Asian and Pacific region, however the development and status quo of arbitration in some of these jurisdictions could not be more different. Similarly, the arbitral institutions covered by this study and their rules too share a common denominator, that being the UNCITRAL Arbitration Rules. Again, despite their shared origin it is fascinating to see which routes these arbitral institutions took and how they formed the UNCITRAL text to meet their own requirements.

At the outset of the study stands a brief introduction into arbitration followed by a detailed explanation of the entire UNCITRAL arbitration framework. The second and main part of the study features the country reports whereby first the arbitration legislation of the jurisdiction is examined followed by the institutions and their rules. The study is concluded with recommendations for increasing conformity with the UNCITRAL arbitration framework in the examined jurisdictions.

Key Word: Alternative Dispute Resolution (ADR), Asia Pacific Region, arbitral institutions, arbitration, arbitration rules, implementation of law, law reform, New York Convention, United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, UNCITRAL Model Law on International Commercial Arbitration.

Contents

Ⅰ. Introduction

A. Definition and characteristics of arbitration

1. Definition

Arbitration is a method for resolving disputes arising out of defined legal relationships where in the underlying contract the parties agree that all disputes which will arise (or which have already arisen) from the contract will be submitted to final and binding resolution by a sole-arbitrator or a panel of arbitrators. For the purpose of this study it is important to differentiate between

- institutional arbitration, where the parties agree on an arbitral institution to administer the arbitration under its own rules providing a multitude of ancillary services and between
- ad hoc arbitration, where the parties decide not to have their arbitration administered by an institution but choose to base the process purely on the arbitration law of the place of arbitration (often accompanied by special ad hoc arbitration rules such as the UNCITRAL Arbitration Rules).

In contrast to arbitration mediation, conciliation and other forms of alternative dispute resolution (ADR) also involve a private third party assisting in the resolution of the dispute, however these alternative forms of dispute resolution all have in common that the parties submit to them on a purely voluntary basis and unilateral termination of the procedure mostly has no consequences for the parties. These forms of dispute resolution all require a “backup” means of dispute resolution, either per default in court litigation or in the form of arbitration (where so agreed).

Judicial resolution of disputes by way of court litigation is the standard default way of resolving legal disputes. No special agreement in the underlying contract is needed to address the courts. In contrast to arbitration, the judicial decision is open to appeal to higher courts. Where the parties have agreed to arbitration they may no longer address the courts for the resolution of the merits of the dispute.

2. Characteristics

The process of arbitration is characterized by the following features:

- Freedom to conclude an agreement to arbitrate: The parties to a contract generally have the free choice in deciding how disputes arising out of that contract are to be resolved. Failing an agreement on an alternative method of dispute resolution the parties will commonly only be permitted to address the courts for the resolution of their dispute. The concept of arbitration rests on the principle that the parties are at freedom to conclude an arbitration agreement, which ousts the jurisdiction of the courts and transfers this jurisdiction onto an arbitration tribunal. This freedom is only restricted by the arbitrability of the subject matter, i.e. whether the subject matter under dispute may by law be submitted to arbitration
- Free nomination of arbitrators: A further characteristic of arbitration is the parties' option to freely choose their arbitrator(s) without influence by third parties or bodies such as the courts. The rules of some arbitral institutions limit the choice of arbitrators to a fixed list of persons or restrict the choice otherwise, however this practice of restriction is on the steady decline and most modern rules advocate the free choice.

- Independence of arbitrators: Especially due to the quasi-judicial functions which arbitrators commonly hold, it is important that they are able to execute their duties in an independent and impartial manner. The maintenance of this independence is vital for the future of the institution of arbitration as only independent arbitrators will be trusted by the parties.
- Final and binding decision of the arbitrators: In contrast to the judicial system, the arbitral process only has a single level of jurisdiction which renders a final and binding award. However, all arbitration regimes allow for a setting aside procedure for awards rendered in proceedings which violate due process or where the award violates public policy. These setting aside proceedings nevertheless only address very severe deficiencies of the arbitral process and cannot be compared with the regular judicial appeals procedure.
- Arbitral award has same legal effect as a court judgment: In order for arbitration to be effective arbitral awards must be assigned the same legal effect as court judgments are given in the same jurisdiction. It is therefore vital that the arbitration law clarifies this legal effect thereby expressing its unconditional commitment to the arbitral process.

B. Advantages and disadvantages of arbitration

The two main reasons why parties choose to oust the jurisdiction of the national courts and decide to have their disputes resolved before private arbitral tribunals are (a) the opportunity of being able to choose a neutral forum as well as the tribunal and (b) the possibility of reaching the resolution of

a dispute which is fully enforceable worldwide[1]. The short summary below displays the main advantages and disadvantages of arbitration:

1. Advantages

Free choice of an arbitrator: The possibility of choosing who is to decide a dispute or at least having some influence on this individual's nomination process is regarded by many users of arbitration as being amongst the greatest advantages. In making a choice for the ideal candidate the parties pay great attention to the arbitrator's legal and technical expertise as well as his ability to render a fair and impartial award.

Choice of the forum: The place of the arbitration also plays an important role in arbitration, this especially so because the parties often distrust the legal systems in their opponent's jurisdiction and decide to settle on a neutral forum. Also, the law of the forum determines the procedural background for the conduct of the arbitral proceedings.

Choice of the applicable law: While many national laws allow the parties to freely choose the substantive law applicable to the contract, this choice of law may be restricted by bi- or multilateral conventions or other legal instruments. Arbitration laws such as the UNCITRAL Model Law on International Commercial Arbitration actively encourage this freedom of choice of substantive law for contracts which are subject to arbitration agreements thereby giving the parties greatest freedom in the arrangement of their contractual relationship.

Enforceability of arbitral awards on an international level: According to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereafter: "the New York Convention"),

1) Pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

which to date has been ratified and acceded to by 149 states[2], an arbitral award rendered in any of the Convention's member states must be recognized and enforced in the same manner as an ordinary court judgment in all other member states. Due to the lack of a comparable equally extensive regime for the global enforcement of court judgments, the New York Convention must be regarded as the backbone of the success of international commercial arbitration.

Speed and flexibility of the process: Due to the rapid nomination of an arbitral tribunal and the fact that it can convene virtually anywhere worldwide, arbitration can be an extremely speedy and flexible process – provided the legal background fosters this flexibility. Also, the fact that there is only a single level of jurisdiction greatly contributes to the speedy final and binding resolution of the disputes, saving time and money of the involved parties.

2. Disadvantages

Limited powers of the arbitral tribunal: Due to the fact that the arbitral tribunal derives its jurisdiction from the agreement of the parties, the tribunal's jurisdiction cannot reach beyond this point. Therefore, when coercive powers become necessary an arbitral tribunal is heavily dependent on the underlying law and on the municipal courts' assistance in offering such means. In general, however, the powers accorded to arbitrators - whilst usually adequate for the purpose of resolving the matters in dispute - fall short of those conferred upon a court of law.

Jurisdiction subject to arbitration agreement: The fact that an arbitral tribunal derives its jurisdiction from the underlying contract and that thus each contract must expressly stipulate the resolution of any disputes by arbitration

2) *Cf.* the website of UNCITRAL: http://www.uncitral.org/uncitral/en/uncitral_texts/ arbitration/ NYConvention_status.html [Accessed on 30.10.2013]

makes the institution of arbitration heavily dependent on the underlying contract and the parties' ability to conclude a valid and workable arbitration agreement therein. This disadvantage can best be eliminated by loosening the requirements for concluding an arbitration agreement to the greatest extent possible.

Costs: Arbitration is not necessarily a cheaper method of resolving disputes when compared with court litigation as the fees and expenses of the arbitrators (unlike the salary of a judge) must be borne by the parties. In international commercial arbitrations of any significance these charges may be substantial particularly when they are assessed by reference to the amounts in dispute.

C. Pre-requisites for the successful implementation of an arbitration regime

The success of a jurisdiction as a forum for (international commercial) arbitration is heavily dependent on the way in which the national arbitration regime is implemented. Especially in international arbitration circles news travels fast regarding the advantages and pitfalls of arbitrating in a particular jurisdiction and it can thus be difficult to shake off a negative reputation once gained.

In order for an aspiring forum for arbitration to launch itself successfully, the following points need to be taken into consideration:

- Arbitration and civil procedure: Not only the procedure for arbitration, but also the civil procedure which the assisting courts follow must be set out by law in a clear and understandable manner following international best practices. Especially the legal counsel of the parties will first and foremost address these procedural laws when assessing the suitability of a new forum.

- Judicial assistance: Without the assistance of the courts arbitral proceedings are heavily reliant on the co-operation of the parties. However, often this reliance is insufficient and coercive powers become necessary. For such cases, a successful arbitral forum will provide a clear and flexible regime for judicial assistance, which withstands the temptation of (negative) judicial interference in the process.
- Independence: The very fact that the parties are free to select their arbitrators already contributes a great deal towards the securing of independence of the arbitral process from the influence of government. However, there remain a number of areas where governments or their affiliated bodies could be tempted to exercise undue influence such as in the field of judicial assistance, the enforcement phase or the running of the arbitration centre. The exercise of such undue influence would quickly reduce the users' trust in the institution of arbitration.
- Recognition and enforcement: A forum where an arbitral award is not recognized as equally binding as a court decision or where arbitral awards are not enforced effectively will not be able to gain much reputation as a venue for successful arbitration. After all, the main point in conducting an arbitration procedure is to obtain an effective and enforceable result at the end of the process.
- Education: Local legal service providers such as lawyers and also the business community must be educated regarding the specifics of the institution of arbitration in order for the process to be well accepted on a national level.

*　　*　　*

Fortunately, the United Nation's Commission on International Trade Law (UNCITRAL) has over the years developed a framework for the successful implementation of an arbitration regime for adoption by interested countries which is explained in the following chapter.

Ⅱ. The UNCITRAL arbitration framework

In order to fully understand the achievements of the UNCITRAL in the field of arbitration it is at first necessary to examine the entire framework that UNCITRAL has put in place in the area of international (commercial) arbitration over the years. Without comprehension of the individual elements of this framework - many of which are in place in one way or another in all of the countries covered by this study - it may be difficult to grasp the connections between these legal instruments and the way in which they are intended to be used.

These individual legal instruments are explained below in chronological order of their drafting.

1. New York Convention 1958

The New York Convention entered into force on 7 June 1959 and is a multilateral convention seeking to provide common legislative standards for the recognition of arbitration agreements as well as for the recognition and enforcement of foreign and non-domestic arbitral awards.[3] The Convention's main aim is the non-discrimination against foreign and non-domestic arbitral awards and it obliges member states to ensure such arbitral awards are recognized and enforced in their jurisdiction in the same way as domestic awards. A further aim of the New York Convention is to require courts of its member states to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Although the New York Convention was not drafted by UNCITRAL (the

3) The text of the New York Convention can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [Accessed on 30.10.2013]

latter organisation only coming into existence in 1966) the convention is nevertheless monitored by UNCITRAL and its application worldwide is studied very closely. Due to the New York Convention having close to 150 member states its reach can be described as almost universal and the recognition as well as enforcement network offered by the convention remains the cornerstone of the success of international commercial arbitration worldwide. All jurisdictions featured in this study have ratified or acceded to the convention.[4)]

Based on its fundamental importance UNCITRAL was keen to ensure that any further texts it drafted within its arbitration framework were in conformity with the New York Convention's text.

2. UNCITRAL Arbitration Rules 1976

Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules 1976 (hereafter: “the 1976 Rules” or “the original Rules”)[5)] offer a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The 1976 Rules attempt to cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings as well as establishing rules in relation to the form, effect and interpretation of the award. They are widely used in ad hoc arbitrations as well as administered arbitrations and the institutional arbitration rules of most of the institutions examined below are effectively based on the UNCITRAL Arbitration Rules.

In 1982 UNCITRAL adopted its “Recommendations to assist arbitral in-

4) *Cf.* UNCITRAL's official status list: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

5) The 1976 Rules can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf [Accessed on 30.10.2013]

stitutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules". These recommendations were prepared by the Commission to facilitate the use of the 1976 Rules in administered arbitration and to deal with instances where the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules. When the UNCITRAL Arbitration Rules were revised in 2010 (see below) the Recommendations were also updated accordingly.

3. UNCITRAL Model Law on International Commercial Arbitration 1985

In an attempt to address the considerable disparities that exist in national arbitration laws, UNCITRAL in 1985 adopted the UNCITRAL Model Law on International Commercial Arbitration (hereafter: "the 1985 Model Law").[6] Its aim was to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.

The 1985 Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention through to the setting-aside of arbitral awards through and their recognition and enforcement. Its approach reflects the worldwide consensus on the key aspects of international arbitration practice and the text has been adopted by over 90 individual jurisdictions of all regions and of different legal or economic systems.[7] The Model Law both in

6) The 1985 Model Law can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf [Accessed on 30.10.2013]

7) For further reference on the Model Law and its adoption refer to Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edn (London; Sweet & Maxwell, 2010)

its original 1985 version as well as in its revised 2006 version (see below) is important for the purposes of this study due to the fact that all jurisdictions covered here are recognized by UNCITRAL as having "Model Law conform" arbitration legislation in place.[8)]

4. UNCITRAL Notes on Organizing Arbitral Proceedings 1996

In the form of a non-legislative text the UNCITRAL Notes on Organizing Arbitral Proceedings 1996 (hereafter: "the Notes")[9)] were devised to assist practitioners in arbitration by providing them with an annotated list of matters which an arbitral tribunal may encounter during the course of arbitral proceedings. These matters include the choice of a set of arbitration rules, the language and place of an arbitration, questions relating to confidentiality and matters such as the conduct of hearings and the taking of evidence.

The Notes do not intend to impose any legal requirements on the arbitrators or parties to an arbitration and they are not deemed suitable to be used as arbitration rules. Rather they serve as practical guidance for less experienced arbitrators or in cases where different arbitration cultures may clash. In line with the revision of the UNCITRAL Arbitration Rules in 2010 (see below) it was decided to also modernize and revise the Notes, however this task has currently still on the "future work" agenda of UNCITRAL.

8) *Cf.* here for a list of countries recognized by UNCITRAL as having adopted arbitration laws that are conform with the 1985 or 2006 version of the Model Law: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [Accessed on 30.10.2013]

9) The Notes can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf [Accessed on 30.10.2013]

5. UNCITRAL Model Law on International Commercial Arbitration 2006

In 2006 the UNCITRAL Model Law on International Commercial Arbitration underwent a revision (hereafter: "the Model Law" or "the revised Model Law")[10] which modernised certain parts of the text and brought them in line with modern arbitral practice. This revision touched upon issues such as the form requirements of an arbitration agreement or the establishment of a new regime for interim measures in arbitration.

At the same time UNCITRAL released the "2006 Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958"[11] which attempts to encourage a more liberal interpretation of the form requirements set forth in the New York Convention by the member states.

6. UNCITRAL Arbitration Rules 2010

In 2010 UNCITRAL revised the 1976 UNCITRAL Arbitration Rules with the aim of bringing the text in line with modern arbitral practice. These new, revised Rules (hereafter: "the 2010 Rules" or "the revised Rules")[12] feature a multitude of innovations which are set out below.

At the outset of the revision process of the Rules the UNCITRAL Secretariat developed a list of possible areas of improvement to the original 1976 text based on suggestions received from experts in the context of a

10) The revised Model Law can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [Accessed on 30.10.2013]

11) The 2006 Recommendation can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf [Accessed on 30.10.2013]

12) The revised Rules can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [Accessed on 30.10.2013]

conference it had convened. The key understanding was an alignment of the Rules with current international arbitral practice as well as with the Model Law[13] and the following topics were identified and later implemented in the revised Rules:[14]

- Multiparty arbitration
- Consolidation of cases before arbitral tribunals
- Truncated arbitral tribunals and obstructing arbitrators
- Confidentiality of information in arbitral proceedings
- Interim measures
- Liability of arbitrators
- Raising claims for the purpose of set-off
- Third-party intervention in arbitral proceedings

Some two years after the revision, UNCITRAL in 2012 also updated its "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010" which were issued to reflect the numerous changes made to the Rules.

Being the most recent and modern edition, the revised 2010 Rules will be the main focus of this study which reflects on the degree of their implementation in the region.

7. UNCITRAL Rules on Transparency in Treaty- based Investor-State Arbitration 2013

The most recent part of UNCITRAL's arbitration framework is brand new as it was only released in July 2013 and it for the first time shows UNCITRAL venturing outside the purely commercial arbitration field into the

13) United Nations document no. A/CN.9/WG.II/WP.143, para.2.
14) United Nations document no. A/CN.9/610/Add.1, paras.3-10.

area of investment arbitration: the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereafter: the "Transparency Rules").[15)]

The Transparency Rules are designed to apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors. They regulate a number of issues such as the publication of information at the commencement of arbitral proceedings, the publication of documents, third party submissions, etc. all of which are important in cases where there is a public interest in the arbitration which is commonly the case in investment arbitration rather than in (private) international commercial arbitration.

* * *

Some parts of the UNCITRAL arbitration framework were clearly designed for enactment by governments into their legislative regimes or for adoption by arbitral institutions. The following country analysis will examine to what degree the most important elements of the UNCITRAL arbitration framework, those being the UNCITRAL Model Law, the New York Convention and the UNCITRAL Arbitration Rules, were implemented in the featured jurisdictions of the Asia and Pacific region.

15) The Transparency Rules can be accessed here: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf [Accessed on 30.10.2013]

Ⅲ. Country analysis

A. Bangladesh

(Source: Central Intelligence Agency (CIA) World Factbook[16])

16) https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html [Accessed on 30.10.2013]

With over 160 million inhabitants Bangladesh is amongst the most populated countries in the world[17], however economically it plays a marginal role at best with a GDP per capita of $2,100 (est. 2012). Not surprisingly Bangladesh plays little role in the international commercial arbitration field and it is primarily the government which chooses to conduct arbitrations in the country. International B2B commerce still prefers to opt for dispute resolution in a more established jurisdiction such as Singapore, Paris or London. One obvious reason for international businesspeople to avoid resolving their disputes in Bangladesh is the backlog of pending cases in the Bangladeshi courts where on 1 January 2013 there were 2,454,360 cases pending, 963,081 being of a civil nature.[18]

Despite reforms of the Bangladesh legal system having been undertaken, the court system is clearly overburdened - a phenomena which affects other jurisdictions in the region too. This overburdened court system is at the same time an ideal opportunity for arbitration to gain a foothold and - as the below analysis will show - major improvements have been made here in recent years. However, the issue of court assistance in arbitration, be it during the proceedings where necessary or at the enforcement stage still remains a problematic area because of said backlog.

1. Arbitration in Bangladesh: Legislation

a. Bangladesh Arbitration Act 2001

Entering into force on 10 April 2001[19] the Bangladesh Arbitration Act

17) Central Intelligence Agency (CIA) World Factbook - Bangladesh, *cf.* https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html [Accessed on 30.10.2013]

18) Statistics of the Bangladesh International Arbitration Centre, *cf.* http://biac.org.bd/court-statistics/ [Accessed on 30.10.2013]

19) Notification No. SRO 87-Law/2001, 09.04.2001, Published in Bangladesh Gazette Extraordinary, 10.04.2001

2001 (hereafter: "the Bangladesh Act") repealed the previous - severely aged - arbitration legislation: the Arbitration (Protocol and Convention) Act, 1937 as well as the Arbitration Act, 1940.[20] The Bangladesh Act has been recognized by UNCITRAL as constituting an adoption of its 1985 Model Law[21] as the text follows the model to a high degree. However, the Bangladesh Act also regulates various other issues which are not addressed by the Model Law. Some of these issues are:

- Sec. 7A: Details on the powers of the courts to make interim orders
- Sec. 11(3): Automatic nomination of an additional arbitrator where parties have appointed an even number of arbitrators
- Sec. 21: Details on arbitral tribunal-ordered interim measures
- Sec. 28: Consolidation of proceedings and concurrent hearings
- Sec. 38(6) and (7): Awarding of interest and costs in the arbitral award
- Sec. 49: Details on the deposit of costs of the arbitration
- Sec. 50: Provision on disputes as to the arbitrator's remuneration or costs
- Sec. 52: Provision in case of bankruptcy of a party

Many of these additional issues are commonly dealt with in the rules of arbitral institutions, however considering that at the time of passing the Bangladesh Act there were no arbitral institutions active in Bangladesh (see below) and most of the arbitrations were conducted on an ad hoc basis, this approach makes sense.

Due to the fact that the Bangladesh Act was drafted in 2001 it could obviously not accommodate the 2006 revisions to the Model Law which feature

20) Sec. 59(1) of the Bangladesh Arbitration Act 2001

21) UN doc. no. A/CN.9/773, II., A. para. 8; *cf.* also: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [Accessed on 30.10.2013]

the new approach of alleviating form requirements in arbitration agreements and a new, detailed regime on interim measures. Although Sec. 21 of the Bangladesh Act recognized the shortfall of the 1985 Model Law in the area of interim measures and provided a light regime of its own, it would be worthwhile for a future reform to contemplate an alignment in this regard. Even more so should serious consideration be given to the adoption of UNCITRAL's new stance to form requirements of arbitration agreements in any possible reform process.

b. New York Convention

Bangladesh acceded to the New York Convention (without making declarations or reservations) on 6 May 1992, it entered into force on the 4 August of the same year.[22] Whilst no specific enacting legislation has been passed in Bangladesh, Chapter X of the Bangladesh Act dealing with the recognition and enforcement of foreign arbitral awards largely reflects the text of the New York Convention.

2. Arbitration in Bangladesh: Institutions and Rules

The two major arbitral institutions in Bangladesh are

- the Bangladesh Council for Arbitration (BCA) of the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) and
- Bangladesh International Arbitration Centre (BIAC).

a. Bangladesh Council for Arbitration (BCA)

The Federation of Bangladesh Chambers of Commerce and Industry

22) *Cf.* the UNCITRAL website at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

(FBCCI) founded the Bangladesh Council of Arbitration (BCA) in 2004 to promote arbitration as a simple, harmonious, cost effective and speedy process for the resolution of commercial disputes.[23] The BCA was Bangladesh's first ever alternative dispute resolution (ADR) council and its rules, the "Rules of Arbitration of the Bangladesh Council of Arbitration", were drafted to be in line with the Bangladesh Act. [24] Further, pursuant to Rule 4.5 of the BCA Rules, the FBCCI encourages "[a]ny Chamber of Commerce, trade association or any arbitral or other organisation [to] adopt [the BCA Rules]" for dispute resolution.

Said "Rules of Arbitration of the Bangladesh Council of Arbitration" (2004)[25] provide (a) for arbitration administered by the Bangladesh Council of Arbitration as well as (b) for the Bangladesh Council of Arbitration to act as an appointing authority under the UNCITRAL Arbitration Rules, the latter being of importance in the context of this study. In this regard Rule 4.3. of the BCA Rules states:

> "The Council shall be competent to function as appointing authority as contemplated under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."

The schedule of fees of the Bangladesh Council of Arbitration fails to mention the fees for acting as appointing authority which could indicate infrequent usage of this practice.[26] However and more importantly, the BCA's approach to default arbitrator nomination (see below) it must be observed as this stands in contrast to the UNCITRAL Rules' approach and could lead to

---

23) *Cf.* http://www.cacci.org.tw/CACCI%20Profile/2004%20August/FBCCI.pdf [Accessed on 30.10.2013]

24) *Cf.* http://www.worldtradereview.com/news.asp?pType=N&iType=A&iID=83&siD=24&nID=15170; http://www.bangladesh-web.com/view.php?hidRecord=6990 [Accessed on 30.10.2013]

25) http://www.fbcci-bd.org/BCA/bca.htm [Accessed on 30.10.2013]

26) *Cf.* http://www.fbcci-bd.org/BCA/chap-8.htm [Accessed on 30.10.2013]

undesirable outcomes.

The BCA Rules themselves do not follow the UNCITRAL Arbitration Rules in any identifiable way whereby it is submitted that most - if not all - of the latter Rules' relevant provisions are in one way or another reflected in the former text. All in all the text of the BCA Rules is quite detailed and the provisions appear well thought out and complete even when compared with the 2010 UNCITRAL Arbitration Rules that were released some years later. A few salient features of the BAC Rules are highlighted below:

- Rule 9.3. has an interesting approach to the number of arbitrators: Following the Bangladesh Act (see above) an even number of arbitrators is not permissible and in case the parties have agreed so an additional arbitrator must still be nominated. Also, in cases where the arbitration agreement fails to specify whether there should be one or three arbitrators this number is *prima facie* determined by the amount in dispute whereby he threshold is 50 million Bangladesh Taka (equivalent to approx. 635.000,- US$).
- Rules 9.4 and 9.5. deal with the nomination of arbitrators and this offers some surprises: Default appointments by the BCA must be chosen from the BCA's "Panel of Arbitrators" and any party appointed arbitrators or party-agreed sole arbitrators must be enlisted as "Special arbitrators" on the "Panel of Arbitrators" before being nominated. From the text of Rule 8.5.1 of the BCA Rules the Chairperson of the Governing Body is in charge of this enlistment whereby it appears that he has discretion to do so ("... may include ..."). It is unclear how this entire procedure would work in the case where the BCA is acting as an appointing authority under the UNCITRAL Rules and the approach of restricting arbitrators that stand for nomination to a closed list no longer meets best international practices.

- Rule 12 on the place of arbitration is another curious provision. It orders that "[t]he Arbitration proceedings shall be held at such place or places in Bangladesh as the Council may determine having regard to the convenience of the Arbitrators and the parties" leaving the parties little room for flexibility.
- On the positive side it is worth mentioning that the BAC Rules - in contrast to the UNCITRAL Rules - actively address the issue of confidentiality (Rule 41) and that they provide for a fast track regime for urgent cases (Rule 11).

b. Bangladesh International Arbitration Centre (BIAC)

Three prominent business Chambers of Bangladesh, namely, International Chamber of Commerce-Bangladesh (ICC-B), Dhaka Chamber of Commerce & Industry (DCCI) and Metropolitan Chamber of Commerce & Industry (MCCI), Dhaka are sponsors of Bangladesh International Arbitration Centre (BIAC). The BIAC claims to be renowned for its first-rate, state-of-the-art arbitration facilities, experienced panel of independent arbitrators and excellence in serving its clients which is demonstrated by its extensive website.[27)]

The BIAC Arbitration Rules 2011 were published and distributed at its 1st Anniversary event on 21 April 2012 and are said to incorporate some of the leading developments in domestic and international arbitration, while conforming to the Bangladesh Arbitration Act 2001.

Undoubtedly the Bangladesh International Arbitration Centre and the Bangladesh Council for Arbitration are competitors for the same market, whereby the latter has the advantage of having been in the market slightly longer. In comparing the two sets of institutional arbitration rules the follow-

27) *Cf.* http://biac.org.bd/ [Accessed on 30.10.2013]

ing can by stated:

- Only the BAC and its Rules offer to act as an appointing authority, a feature particularly important in ad hoc arbitration proceedings under the UNCITRAL Rules. The BIAC fails to mention its acting as an appointing authority anywhere in the rules or on its extensive website (although this does not necessarily mean that it does not provide this service when approached).
- Both the BAC and BIAC Rules fail to closely follow the UNCITRAL Arbitration Rules but they de facto incorporate most, if not all of the latters' provisions.
- While being somewhat shorter in length and providing a degree less of detail the BIAC Rules nevertheless distinguish themselves by providing more party autonomy which is visible for example in Rule 7's complete freedom to nominate an arbitrator or in Rule 17(1)'s freedom to choose the place of arbitration.
- In contrast to the BAC and UNCITRAL Rules, Rule 6 of the BIAC Rules determines a sole arbitrator as the default number of arbitrators (subject to review by the Arbitration Committee).
- Similar to the BAC, the BIAC Rules provide less details than the UNCITRAL Rules as regards tribunal ordered interim measures and more details than the latter Rules in the area of confidentiality and fast track proceedings.

3. Contact details of major arbitration institutions

- Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry
  Federation Bhaban (2nd Floor), 60, Motijheel C/A
  Dhaka, Bangladesh

Tel: +88-02-956 01 023
Fax: +88-02-71 760 30
E-mail: fbcci@bol-online.com
Homepage: www.fbcci-bd.org

- Bangladesh International Arbitration Centre (BIAC)
  69/1 Panthapath
  Suvastu Tower (6th floor)
  Dhaka-1205
  Tel: +88 -02-862-9227
  Fax: +88-02-862-4351
  E-mail: info@biac.org.bd
  Homepage: www.biac.org.bd

B. Hong Kong

(Source: Central Intelligence Agency (CIA) World Factbook[28])

The Special Administrative Region of the People's Republic of China Hong Kong (hereafter “Hong Kong”) is one of the leading economies in the Asia-Pacific region. It is the world's 11th largest trading economy and is characterized by free trade, low taxation as well as minimal government

28) https://www.cia.gov/library/publications/the-world-factbook/geos/hk.html [Accessed on 30.10.2013]

intervention. Hong Kong also has the world's sixth largest foreign exchange market, is a major banking centre and has one of Asia's largest stock markets.[29)]

It is therefore no surprise that Hong Kong is also a major player in the region (and world-wide) international arbitration market, rivalled locally only by Singapore.

1. Arbitration in Hong Kong: Legislation

a. Arbitration Ordinance

Arbitration in Hong Kong is primarily governed by the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong[30)]; hereafter: "Arbitration Ordinance") effective from 1 June 2011 which like its predecessor, the Arbitration Ordinance Cap. 341, is based on the UNCITRAL Model Law. While the earlier law still followed a split regime - an international regime based on the UNCITRAL Model Law and a different domestic regime - the new Arbitration Ordinance unifies the two. The new approach is clearly more user-friendly as it effectively extends the application of the UNCITRAL Model Law to all arbitrations in Hong Kong.[31)]

Alongside the Arbitration Ordinance there is a well-developed body of case law on arbitration related issues by the Hong Kong courts that should be taken into account in addition to the provisions of the Arbitration Ordinance. Even UNCITRAL's case law database "Case Law on UNCITRAL Texts (CLOUT)"[32)] features over 90 cases decided by Hong Kong courts and

29) *Asia Arbitration Handbook*, Edited by Michael Moser and John Choong, Oxford University Press 2011 (hereafter cited as "Moser"), para. 4.03.
30) Gazette number L.N. 38 of 2011
31) *Cf.* http://www.hkiac.org/index.php/en/arbitration-ordinance [Accessed on 30.10.2013]
32) *Cf.* http://www.uncitral.org/uncitral/en/case_law.html [Accessed on 30.10.2013]

which are considered to be of relevance when interpreting the Model Law.

The Arbitration Ordinance is one of the overall 13 jurisdictions which have adopted the Model Law in the revised 2006 version[33] and it therefore meets the most up-to-date standards as recommended by UNCITRAL. Interestingly and quite unusually, the text of the law itself goes to great lengths to highlight that it stems from the Model Law[34] even going so far as to set out where it modifies or supplements the model in Schedule 1 of the Arbitration Ordinance - a practice demonstrating the highest degree of clarity.

Some of the noteworthy features of the Arbitration Ordinance are:

- Sec. 18 complements the Model Law by offering a comprehensive regime relating to the confidentiality/protection of information relating to arbitral proceedings and awards made in such proceedings.
- Sec. 19 enacts the less liberal Option I of Article 7 of the 2006 Model Law thereby not opting for a complete liberalization of the form requirements of the arbitration agreement but nevertheless still following a route approved by UNCITRAL.
- Secs. 22A - 22B deal with emergency arbitrators, a feature also not found in the Model Law (and which is commonly rather to be found in arbitration rules).
- Sec. 23 deviates from Article 10(2) of the Model Law insofar as it determines that in cases where the number of arbitrators is not determined by the parties it is always the Hong Kong International Arbitration Centre (HKIAC) may decide whether one or three arbitrators should hear the case.

---

33) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [Accessed on 30.10.2013]

34) Sec. 4 of the Arbitration Ordnance.

- Secs. 30 and 31 stipulate - again in departure from the Model Law - that in cases where the parties have agreed on an even number of arbitrators a so called “umpire” may additionally be appointed.

Further, a number of provisions of the Arbitration Ordinance deal with the following matters not addressed by the Model Law, such as:

- The power of the tribunal to order security for costs, to issue directions for the discovery of documents and the giving of evidence by affidavit (sec. 56).
- The tribunal's ability to limit the amount of recoverable costs (se. 57).
- Various special powers of courts in relation to arbitral proceedings (sec. 60).
- The taxation of costs of arbitral proceedings (sec. 75).
- The determination of an arbitral tribunal’s fees and expenses in case of a dispute (sec. 77).
- The parties' liability to pay fees and expenses of arbitral tribunal (sec. 78).
- Allowing the arbitral tribunal to award interest even if unclaimed (sec. 79).
- The liability of arbitrators and arbitral institutions (sec. 104).
- The consolidation of arbitrations (schedule 2, sec. 2)
- The appeal against arbitral award on question of law (schedule 2, sec. 5).

There is no doubt that the Arbitration Ordinance is a well-drafted albeit in parts perhaps too detailed piece of legislation reflecting the needs of the well established institution of arbitration in Hong Kong. Many of the additional provisions added to the Model Law-basis of the law are commonly to

be found in arbitration rules. While this may seem unusual for some users it is beneficial in cases where parties agree to arbitrate on an ad hoc basis purely relying on the law without using any additional arbitration rules. Due to the non-mandatory nature of most of these additional provisions the parties are of course at liberty to use any other set of arbitration rules.

b. New York Convention

Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong as a Special Administrative Region of China subject to the statement originally made by China upon accession to the Convention. These statements were the reservation that China (and thus now also Hong Kong) applies the Convention only to recognition and enforcement of awards made in the territory of another contracting state and that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.[35] Part 10 (secs. 87 - 98) of the Arbitration Ordinance deals with the enforcement of New York Convention as well as mainland China awards.

2. Arbitration in Hong Kong: Institutions and Rules

a. Hong Kong International Arbitration Centre (HKIAC)

Without doubt the Hong Kong International Arbitration Centre (HKIAC) is the primary arbitration institution in Hong Kong and a major player in the Asia and Pacific region. The HKIAC also has certain powers vested in it by

35) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

the Arbitration Ordinance.

The HKIAC was established in 1985 by a group of leading Hong Kong business people and professionals in an effort to meet the growing need for arbitral services in Asia. Initially, the Hong Kong business community and the Hong Kong Government funded the HKIAC, however today the Centre is financially self-sufficient, and completely free and independent from any type of influence or control.[36)]

While historically ad hoc arbitration - especially under the UNCITRAL Arbitration Rules assisted by the HKIAC - played the main role in this institution's business,[37)] in September 2008 the HKIAC issued its first set of institutional rules, the "HKIAC Administered Arbitration Rules". These rules provide for a "light touch" administered arbitration and are said to be promoted to be based on the UNCITRAL Arbitration Rules and on the Swiss Rules, [38)] they may be used both in domestic or international arbitrations. The fact that these rules are based on the UNCITRAL Arbitration Rules helped ease the transition away from the former practice of ad hoc arbitration under the UNCITRAL regime towards a more institutionalized approach.[39)]

1) Administered arbitration at HKIAC

The HKIAC Administered Arbitration Rules have recently been revised and the new 2013 version of the Rules comes into force on 1 November 2013. The main improvements of the new 2013 Rules are stated to be:[40)]

- Multiple parties and multiple contracts catered for,
- improvements to the Expedited Procedure,

---

36) *Cf.* http://www.hkiac.org/index.php/en/hkiac/about-us [Accessed on 30.10.2013]
37) Moser, para. 4.23
38) Moser, para. 4.82; *cf* also http://www.hkiac.org/index.php/en/arbitration-rules-and-guidelines [Accessed on 30.10.2013]
39) Moser, para. 4.82
40) http://www.hkiac.org/index.php/en/news/479 [Accessed on 30.10.2013]

- improved terms and conditions to streamline the arbitrator appointment process and
- the availability of emergency relief.

Closer examination of the HKIAC Administered Arbitration Rules 2013 shows that despite containing various additional provisions and the obvious adaptation of the Rules to work as institutional rules, there is little doubt that they are in principle still based on the UNCITRAL Arbitration Rules 2010. The most salient features of the Rules and some of their departures from the original text are:

- Article 3: A provision giving the HKIAC the full power to interpret the Rules and setting forth various definitions.
- Articles 4.5 and 5.2: The notice of arbitration and the response thereto may be submitted in English or Chinese where the parties have not made a determination on this point.
- Article 6: The HKIAC is authorized to decide whether there shall be one or three arbitrators if the parties have not agreed on this point (in line with sec. 23(3) of the Arbitration Ordinance). There are exceptions for the expedited procedure (see below).
- Article 23: There is a choice between regular tribunal ordered interim measures (where the HKIAC Rules follow the UNCITRAL regime) and "Emergency Relief" (i.e. before the tribunal has been constituted, where the Emergency Arbitrator Procedures of Schedule 4 apply; see below).
- Articles 27 and 28 are extensive and detailed provisions on joinder of additional parties to the arbitration and on the consolidation of arbitrations.
- Article 29 provides a useful provision dealing with claims arising out of or in connection with more than one contract and sets out

how they may be dealt with in one single arbitration.

- Article 41 offers an expedited procedure where the amount in dispute does not exceed HKD 25 million, where the parties expressly agree to this or in cases of "exceptional urgency".
- Schedule 4 of the HKIAC Rules provides the detailed procedure for the Emergency Arbitrator procedures which any party may address before the arbitral tribunal has been constituted.

2) Ad hoc arbitration at HKIAC

Despite the fact that HKIAC has in recent years promoted its institutional arbitration activities, ad hoc arbitrating with assistance of the HKIAC is still an attractive option for parties who prefer this approach. Here it is worth remembering that in ad hoc proceedings the HKIAC is authorized to carry out two important functions in relation to an arbitration under the Arbitration Ordinance:

- On the one hand the HKIAC may appoint arbitrators or umpires where the parties have failed to agree or have not designated an appointing authority or the designated appointing authority fails to carry out its function.
- On the other hand, the HKIAC may determine whether a tribunal of one or three arbitrators should consider a dispute

When carrying out the above two functions the HKIAC will follow the Arbitration (Appointment of Arbitrators and Umpires) Rules.[41)]

For parties wishing to use the HKIAC as an appointing authority under ad hoc arbitration rules such as the UNCITRAL Arbitration Rules Article 1.2 of the HKIAC Administered Arbitration Rules stipulates:

41) *Cf.* http://www.hkiac.org/index.php/en/arbitration-ordinance [Accessed on 30.10.2013]

"Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming HKIAC as appointing authority, or from requesting certain administrative services from HKIAC, without subjecting the arbitration to the provisions contained in these Rules."

There is also a fee schedule for providing these services:

"At the request of either party (or both parties) in an ad hoc arbitration, the HKIAC may (1) appoint arbitrator(s) or umpire(s); and (2) determine the number of arbitrators. The fee for appointing one arbitrator is HK$4,000, and the fee for determining the number of arbitrators is HK$4,000."[42)]

3. Contact details of major arbitration institutions

- Hong Kong International Arbitration Centre
  38th Floor Two Exchange Square
  8 Connaught Place
  Central, Hong Kong SAR
  Telephone: +852 2525 2381
  Fax: +852 2524 2171
  Email: adr@hkiac.org
  Website: www.hkiac.org

42) *Cf.* http://www.hkiac.org/index.php/en/fees [Accessed on 30.10.2013]

C. Japan

(Source: Central Intelligence Agency (CIA) World Factbook[43])

Despite being one of the world's major economies with the fifth highest GDP of US $4.704 trillion (in 2012, estimated)[44] commercial arbitration and

43) https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html [Accessed on 30.10.2013]

44) https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html [Accessed on 30.10.2013]

other forms of alternative dispute resolution play little to no role at all in Japan. Some see the reasons for this in the Japanese court system being reliable, predictable and quite efficient often making court litigation less costly then international arbitration.[45] Others put this "arbitration phobia" down to a lack of education and promotion of arbitration and alternative dispute resolution in Japan[46] and others again - perhaps more convincingly - regard the generally low litigiousness of Japanese society and cite social-cultural reasons for arbitration not being able to gain a foothold in Japan.[47]

Wherever the reasons may lie for this infrequent use of arbitration the Japanese government cannot be blamed for not having undertaken its best efforts in recent years to provide an arbitration friendly environment for instance by enacting modern arbitration legislation in 2004 (see below). Also, the main Japanese arbitration institution is currently revising its rules to meet the most modern standards (see below).

1. Arbitration in Japan: Legislation

a. Japanese Arbitration Law (Law No. 138 of 2003)

Japan's arbitration legislation which was first introduced as part of the Code of Civil Procedure of 1890 remained largely unchanged during the last century, it was only recently completely reformed and brought in line with the 1985 Model Law.[48] Thus, on 1 March 2004 the new Japanese

45) Moser, para. 1.10

46) *Cf.* http://www.asialaw.com/Article/2023143/Channel/16960/Japans-arbitration-phobia.html [Accessed on 30.10.2013]

47) For an excellent introduction into this topic *cf.* T. Cole, *Commercial Arbitration in Japan: Contributions to the Debate on Japanese 'Non-Litigiousness',* New York University Journal of International Law and Politics (JILP), Vol. 40, No. 1, 2007, p. 29 et seq.

48) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [Accessed on 30.10.2013]

Arbitration Law (Law No. 138 of 2003, hereafter "Arbitration Act") came into force applying to both domestic and international arbitrations. Although it may be tempting to blame the country's "arbitration phobia" on the outdated 1890ies standard of arbitration law this would not be entirely accurate due to the fact that the textual limitations of the 1890 Act were supplemented by various court decisions that brought Japanese arbitral law in line with international standards even before the adoption of the Model Law.[49] Also, a sudden increase in arbitration in the last decade after the introduction of modern arbitration legislation could not be registered (see below JCAA statistics).

Although the Arbitration Act was released only shortly before the revised 2006 Model Law provisions were unveiled the Act is still based on the 1985 version. However the drafters of the Act were diligent enough to observe the early drafting efforts of the revised Model Law at UNCITRAL and to anticipate at least one of the features of the revised model in their own text (see below).[50]

Other than that the Arbitration Act largely follows the 1985 Model Law text with some alterations, the most salient being:

- Article 13(4): An arbitration agreement made by way of an electromagnetic record which records its content (e.g. records produced by electronic, magnetic or any other means unrecognizable by natural sensory function and used for data-processing by a computer) is also deemed to be "in writing". This approach anticipates the later released Option I - Article 7(4) of the 2006 Model Law.[51]

49) Footnote 47 at p. 40.

50) T. Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, Newsletter, No. 17, April 2004, p. 2. (http://www.jcaa.or.jp/e/arbitration/docs/news17.pdf [Accessed on 30.10. 2013])

51) id.

- Article 38(4): The arbitrators are specifically authorized to attempt to settle a dispute if consented to be to by the parties.
- Article 44: This provision on setting aside of arbitral awards deviates from Article 34(4) of the Model Law by not allowing the court to suspend the setting aside proceedings in order to remit the award to the arbitral tribunal to correct the grounds for setting aside.
- Article 47: A provision on the remuneration of arbitrators.
- Articles 48 and 49: Provisions on the deposit and apportionment of the costs of the arbitral proceedings.
- Articles 50 - 55: Detailed rules on bribery in arbitration.
- Annex of supplementary provisions, Articles 3 and 4: Provisions on exceptions from arbitration concerning consumer and labour-related cases

b. New York Convention

Japan acceded to the New York Convention on 20 June 1961, it entered into force on the 18 September of the same year.[52] On accession Japan reserved the application of the convention only to recognition and enforcement of awards made in the territory of another contracting state (reciprocity reservation).

2. Arbitration in Japan: Institutions and Rules

a. Japan Commercial Arbitration Association (JCAA)

The International Commercial Arbitration Committee, the former body of

52) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

JCAA, was established in 1950 within the Japan Chamber of Commerce and Industry, with the support of six other business organizations including the Japan Federation of Economic Organizations, the Japan Foreign Trade Council and the Federation of Banking Associations of Japan. It was designed to serve as an organization to settle commercial disputes and promote international trade thereby contributing to the development of the Japanese economy.[53)]

In 1953, with the further growth of international trade, the International Commercial Arbitration Committee was reorganized as the Japan Commercial Arbitration Association (JCAA) to become independent from the Japan Chamber of Commerce and Industry in order to expand and streamline its business activities.[54)]

Despite having been set up in a professional manner and functioning for over half a century the JCAA could so far also not resolve the "arbitration phobia" that seems to exist in Japan as is demonstrated by the extra-ordinarily low case load for an international arbitration institution:

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Cases	8	16	8	14	15	9	11	15	12	17	26

(Source: SIAC - Statistics of Arbitral Institutions, excerpt. *Cf.*: http://www.siac.org.sg/why-siac/facts-figures/statistics)[55)]

The JCAA offers institutional rules as well as rules for administering arbitrations under the UNCITRAL Arbitration Rules, both of which are highlighted below.

53) *Cf.* http://www.jcaa.or.jp/e/jcaa/history.html [Accessed on 30.10.2013]
54) id.
55) [Accessed on 30.10.2013]

1) JCAA Commercial Arbitration Rules

The JCAA Commercial Arbitration Rules (JCAA Rules) are the institution's own rules for administering domestic and international arbitrations, they seem to be under constant revision: The rules were substantially amended by the JCAA at the time of the enactment of the Arbitration Act in 2004 and thereafter minor amendments were made in 2006 and 2008. At present the JCAA is again undergoing a revision process for the JCAA Rules as it has "determined that it should review and amend the Rules in light of recent trends in the amendment of arbitration rules, such as the 2010 Amendments to the UNCITRAL Arbitration Rules, and those of other arbitral institutions."[56)]

The revision process is expected to last until early December 2013 with the new Rules coming into force on 1 January 2014[57)]. This reduces the usefulness of any research on the current 2008-version of the Rules undertaken in this study and the below commentary will attempt to show some areas where improvements could be made in the revision process.

- Structure: The current JCAA Rules do not seem to follow the structure of the UNCITRAL Rules (or of any other set of arbitration rules for that matter). Although adhering to the build used by the UNCITRAL Rules is not mandatory, their approach is familiar to many practitioners and offers itself also to the revised JCAA Rules.
- Default number of arbitrators: Rule 24 of the JCAA takes the opposite approach to that suggested by UNCITRAL: In case the parties do not determine the number of arbitrators, there shall only be one arbitrator who decides the dispute. While this is clearly in the interest of keeping the costs of arbitration low a three member

56) JCAA Newsletter No. 30, September 2013, p. 11.
57) id.

tribunal is often in a better position to decide more complicated and higher value disputes. The parties do however have the option to request the JCAA to increase the default number of arbitrators to three "taking into consideration the amount in dispute, the complexity of the case and other circumstances", whereby the JAA has the final say in whether this is appropriate.

- Procedure followed after replacement of an arbitrator: While Rule 31 of the JCAA Rules addresses the issue of the replacement of an arbitrator it leaves the question unanswered whether and from which stage onwards the hearings are to be repeated or not. Article 15 of the 2010 UNCITRAL Arbitration Rules would offer itself as a possible solution here.
- Default applicable law: In determining the law applicable to the substance of the dispute where there is no agreement of the parties Rule 41(2) of the JCAA Rules follows the approach of Article 36(2) of the Japanese Arbitration Law applying the "law of the country or state to which the dispute in the arbitral proceedings is most closely connected". Despite recognizing this approach as being in line with the Arbitration Law it is worth considering UNCITRAL's new approach as set forth in Article 35(1) of the 2010 UNCITRAL Rules which gives the arbitrators more discretion to apply the law which they deem to b appropriate.
- Place of arbitration: Rule 42's approach of determining the default place of arbitration as "the place of business of the Association where the claimant submitted the written request for arbitration"[58] is vastly out of date and modern arbitration rules commonly allow

58) Provided this is a correct translation, it was taken from the English version of the JCAA Rules as provided for at: http://www.jcaa.or.jp/e/arbitration/rules.html [Accessed on 30.10.2013]

the arbitrators to determine the place of arbitration in case of default (*cf.* for example Article 18(1) of the UNCITRAL Arbitration Rules).

- Interim measures: When reviewing the JCAA Rules it may be worthwhile examining Article 26 of the 2010 UNCITRAL Rules and some of the details it offers on the topic of arbitral tribunal ordered interim measures.

2) JCAA Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules

The JCAA has devised a useful set of administrative and procedural rules for arbitrations that are conducted under the UNCITRAL Rules and where the JCAA was chosen to perform a function. These Administrative and Procedural Rules are pretty much self explanatory and they offer numerous links to provisions of the UNCITRAL Arbitration Rules, albeit to the former 1976 version. Although not mentioned by the JCAA's reform programme,[59] a revision of these Administrative and Procedural Rules with references to both versions of the UNCITRAL Rules would be worthwhile.

3. Contact details of major arbitration institutions

- The Japan Commercial Arbitration Association
  Tokyo Office
  Hirose Bldg.
  3-17, Kanda Nishiki-cho,
  Chiyoda-ku, Tokyo 101-0054
  Tel : 03(5280)5161 Fax: 03(5280)5160
  Email: arbitration@jcaa.or.jp

59) JCAA Newsletter No. 30, September 2013, p. 11.

D. Korea (Republic of)

(Source: Central Intelligence Agency (CIA) World Factbook[60])

In the past two decades, South Korean companies have become frequent users of commercial arbitration, particularly in the areas of construction, real estate and international commercial disputes. Shipbuilding, construction and advanced technology are just some of the industries in which South Korean

60) https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html [Accessed on 30.10.2013]

companies are significant global players leading Korean parties to regularly enter into arbitration agreements. Cross-border joint venture and M&A transaction agreements involving South Korean parties also regularly feature arbitration clauses.[61]

The institution of arbitration is now well established in South Korea as an alternative to civil litigation for international commercial disputes, and the Korean Commercial Arbitration Board's caseload in recent years suggests that arbitration is also becoming an accepted alternative for settling domestic commercial disputes. Recent amendments to the Korean Commercial Arbitration Board's Arbitration Rules show a sensitivity towards the need for modern standards in arbitration and the setting up of the UNCITRAL Regional Centre for Asia and the Pacific in Korea puts the country firmly on the arbitration map.

1. Arbitration in Korea: Legislation

a. Korean Arbitration Act

The Arbitration Act of Korea was originally enacted and promulgated as Law No. 1767 on 16 March 1966 with numerous amendments and revisions following in the ensuing years, the most important revision being the one made on 31 December 1999[62] with the adoption of the 1985 UNCITRAL Model Law.[63] Despite there being various amendments to the Arbitration Act since 1999, the most recent of those being as recent as 2010[64], Korea has so far not proceeded to enact the 2006 revisions to the Model Law.

61) *Cf.* http://uk.practicallaw.com/resource/8-381-2907 [Accessed on 30.10.2013]
62) Act No. 6083, December 31, 1999
63) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [Accessed on 30.10.2013]
64) Act No. 10207, March 31 2010

However, it appears there is a currently a reform process underway with the aim of enacting a 2006-Model Law-conform act in 2014.[65)]

The Arbitration Act does not show any significant departures from the 1985 version of the Model Law and the inclusion of the revised 2006 Model Law approaches of the loosening of form requirements for arbitration agreement or the detailed regime for interim measures would certainly benefit the Act.

b. New York Convention

Korea acceded to the New York Convention on 8 February 1973, it entered into force on the 9 May of the same year. On accession Korea reserved the application of the convention

- only to recognition and enforcement of awards made in the territory of another contracting State ("reciprocity reservation") and
- only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law ("commercial reservation").[66)]

Article 39(1) of the Arbitration Act specifically refers to the application of the New York Convention in Korea.

2. Arbitration in Korea: Institutions and Rules

a. Korean Commercial Arbitration Board (KCAB)

Established in 1966 the Korean Commercial Arbitration Board (KCAB) is the only institution in Korea authorized to conduct commercial arbitrations

65) *Cf*: http://globalarbitrationreview.com/reviews/55/sections/192/chapters/2164/ [Accessed on 30.10.2013]

66) *Cf.:* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

in accordance with the Arbitration Act,[67] however there is no restriction to any foreign arbitral institution providing its services in Korea or to Korean parties.[68] Apart from its own domestic and international arbitration rules, the KCAB can also administer arbitration proceedings in accordance with any other arbitration rules as agreed by the parties concerned[69] and - according to its own promotional material - stands prepared to administer major sets of rules and procedures, such as the UNCITRAL Arbitration Rules.[70] However, unlike is the case with other institutions in the region the KCAB does not make explicit reference to its appointing authority-services for ad hoc proceedings in its Rules or in its fee schedule, which could possibly confuse potential users.

The caseload statistics for the KCAB are certainly impressive showing active use of the institution by the business community. Below are the figures detailing only the international cases lodged between the years 2000 – 2010:

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Cases (int'l)	40	65	47	38	46	53	47	59	47	78	52

(Source: SIAC - Statistics of Arbitral Institutions, excerpt. *Cf.*: http://www.siac.org.sg/why-siac/facts-figures/statistics)[71]

1) KCAB International Arbitration Rules 2011

The KCAB recently revised both its Domestic and International Arbitration Rules. Both sets of revised rules came into effect on 1 September 2011 and

67) *Cf.:* http://www.kcab.or.kr/jsp/kcab_eng/kcab/kcab_112_ex.jsp [Accessed on 30.10.2013]
68) Moser, para 2.54
69) *Cf.:* http://www.kcab.or.kr/jsp/kcab_eng/kcab/kcab_112_ex.jsp [Accessed on 30.10.2013]
70) *Cf.:* http://www.kcab.or.kr/jsp/kcab_kor/upload/brochure_en_02.pdf [Accessed on 30.10.2013]
71) [Accessed on 30.10.2013]

in cases where an arbitration agreement was made after that date the revised Rules automatically apply to the arbitration. However, in case of the arbitration agreements made prior to said dates the former rules will apply even when the request for arbitration was submitted after 1 September 2011.

The revised International Arbitration Rules are promoted to reflect the latest standards and best practice in the international arbitration[72] and they apply by default to all arbitration agreements entered into after 1 September 2011 where one of the parties is not Korean or the venue of the arbitration is designated outside the Republic of Korea, unless the parties agree otherwise.[73]

These rules largely follow the structure of the UNCITRAL Arbitration Rules 2010 and they are a good example of how the UNCITRAL regime can be incorporated into a set of institutional arbitration rules while maintaining the familiar pattern. Apart from the obvious alterations that were necessary to make them work as institutional rules, the KCAB International Arbitration Rules deviate from the UNCITRAL Rules in the following main areas:

- Article 11: Where the parties failed to reach agreement on the number of arbitrators the default number is one. However, in this case the Secretariat of the KAB may consider it appropriate to appoint three arbitrators taking into consideration the parties' intentions, the amount, the complexity or other factors of the dispute. UNCITRAL's solution is the other way round: the default is a three member arbitral tribunal with the option of reducing this to a sole arbitrator by the appointing authority under certain circumstances (Article 7(2) UNCITRAL Arbitration Rules).

72) *Cf.* http://www.kcab.or.kr/jsp/kcab_eng/noticebrd/eng_noticebrd_2020_s.jsp [Accessed on 30.10.2013]

73) *Cf.* Article 3 of the KCAB International Arbitration Rules; http://www.kcab.or.kr/jsp/kcab_eng/law/law_02_ex.jsp [Accessed on 30.10.2013]

- Article 28: As regards tribunal ordered interim measures the KCAB International Arbitration Rules do not reflect the recent 2010 UNCITRAL Rules' innovation in this area but appear to follow the original 1976 Rules' standard which by modern understanding is quite unsatisfactory. This may be partly due to the fact that the Korean Arbitration Act in its current form also still follows the Model Law's 1985 standard (see above) which did not include a modern regime for interim measures. It will be interesting to see whether the revised 2014 Korean Arbitration Act provides a more modern and detailed approach to interim measures and if any such changes are reflected in the KCAB's institutional rules.
- Article 33: In contrast to the UNCITRAL Arbitration Rules, the KCAB International Arbitration Rules determine that unless the parties have agreed otherwise the arbitral tribunal “shall make its Award within forty-five (45) days from the date on which final submissions are made or the hearings are closed whichever comes later.” (Article 33(1) KCAB International Arbitration Rules). This approach is not uncommon amongst institutional arbitration rules and its purpose is to speed up proceedings, however exceptions to this rule are permissible by the KCAB Secretariat in appropriate cases.
- Chapter 6: This whole chapter (i.e. Articles 33 - 48 of the KCAB International Arbitration Rules) deals with the expedited procedure for claims where the amount in dispute does not exceed 200 million Korean Won (approx. USD 190.000) or where the parties specifically agreed on it. Salient features of this expedited procedure are the default appointment of a sole arbitrator by the Secretariat from its Roster of International Arbitrators, rapid scheduling of hearing and a three months time limit between the constitution of the tribunal and the making of the award.

2) KCAB Domestic Arbitration Rules 2011

In contrast to the KCAB's International Arbitration Rules the Domestic Rules at first sight appear to be less guided by the former or by UNCITRAL Rules. However close examination of the individual provisions show many factual similarities albeit the structure and titles of the individual articles are different. There are some notable, individual features of the Domestic Rules such as

- the introduction of a Tribunal Clerk at the KCAB,
- a conciliation procedure ("settlement through conciliation"),
- some restrictions on the appointment of arbitrators or
- details on record keeping during hearings and interpretation/translation,

to name but a few. Issues such as the introduction of a modern interim measure-regime are also not included in the Domestic Rules inviting improvement in this regard.

3. Contact details of major arbitration institutions

- Korean Commercial Arbitration Board
  43rd Fl., Trade Tower (Korea World Trade Center) 159, Samsung-dong, Gangnam-gu,
  Seoul 135-729, Republic of Korea.
  Telephone: +82-2-551-2000/19
  Fax: +82-2-551-2020/2113

E. Malaysia

(Source: Central Intelligence Agency (CIA) World Factbook[74])

Since the 1970s Malaysia has transformed itself from a producer of raw materials to an emerging multi-sector economy with a focus on manufactur-

74) https://www.cia.gov/library/publications/the-world-factbook/geos/my.html [Accessed on 30.10.2013]

ing, tourism, petroleum and timber. Major multi-national banking institutions and international corporations have set up their Asian hub in Malaysia making the country an attractive target for dispute resolution services.[75)]

The close proximity to the regional arbitration hub Singapore is certainly a competitive disadvantage for Malaysian arbitration providers such as the Kuala Lumpur Regional Centre for Arbitration who are clearly struggling to emerge from the shadows.

1. Arbitration in Malaysia: Legislation

Contemporary arbitration legislation in Malaysia can be traced back to as early as the 1890 Arbitration Ordinance XIII of the Straits Settlements. In 1950, the Arbitration Ordinance 1950 which was based on the English Arbitration Act 1889 replaced the 1890 Ordinance for all the States of the then Federation of Malaya. On 1 November 1972, Malaysia adopted the arbitration laws prevailing in Sabah and Sarawak and it was known as the Arbitration Act 1952.[76)]

Without much reform taking place in the second half of the last century and the increasing success as an arbitration venue of Malaysia's neighbouring country Singapore the pressure to modernize the arbitration legislative regime in the new millennium resulted in the enactment of the Arbitration Act 2005. The 2005 Act is said to be largely based on the Model Law and the New Zealand Arbitration Act of 1969 and it came into effect on 15 March 2006.[77)]

---

75) Moser, para. 14.03.

76) Sundra Rajoo, *National Courts and Interaction with Arbitral Tribunals: Harmonious Interpretation*, cf. http://www.baliraif2012.com/assets/pdf/session1/SundraRajoo_NATIONALCOURTSANDINTERACTIONWITHARBITRAL%20TRIBUNALS.pdf, page 3 [Accessed on 30.10.2013]

77) Sundra Rajoo, *National Courts and Interaction with Arbitral Tribunals: Harmonious Interpretation*, cf. http://www.baliraif2012.com/assets/pdf/session1/SundraRajoo_NATIONALCOURTSANDINTERACTIONWITHARBITRAL%20TRIBUNALS.pdf, page 4 [Accessed

More recently the Act was amended by the Arbitration (Amendment) Act 2011 containing amendments that come into force on 1st July 2011 and that intended to fill the lacunas which had become apparent following a series of judicial decisions and other recent/best practices observed.[78)]

a. Arbitration Act 2005 (as amended 2011)

The 2005 Arbitration Act is an interesting piece of legislation: on the one hand it clearly follows the Model Law's approach and text, but on the other hand it includes various other additions and features, some of which clearly do not meet best international practices.

As regards the part of the text that follows the Model Law it appears to be focused on the original 1985 version but provides its own solutions to some of the issues addressed in the 2006 Model Law revisions. It is submitted that these could have easily been incorporated in the latest 2011 amendments of the Malaysian Arbitration Act but this opportunity was not embraced. Some of the most salient features of the Arbitration Act in comparison to the UNCITRAL framework are:

- Part II of the Arbitration Act (which largely follows the Model Law) applies to domestic and international arbitrations whereas Part III (including provisions on consolidation, on the determination of questions of law by the courts, on the costs of the arbitration, etc) by default only applies to domestic cases.
- Sec. 6(2) of the Arbitration Act is more detailed and “modern” than Article 3 of the Model Law in addressing the issue of correspondence which is sent by electronic mail. However, the following sec. 9 of the Act fails to follow through with this “modern” approach and it

on 30.10.2013]

78) id.

does not adopt any of the relaxed form requirement-options advocated by the revised 2006 Model Law, not even the Model Law's Option I which specifically addresses arbitration agreement concluded in various electronic formats.

- Both sec. 11 on court ordered interim measures and sec. 19 on arbitral tribunal ordered interim measures go beyond the wording of the 1985 Model Law to offer a more detailed and satisfactory solution than offered by the latter. However, both these provisions of the Arbitration Act do not seem to match the comprehensive approach recommended by the 2006 Model Law in its Chapter IV.A.
- The number of arbitrators to decide a dispute in cases where the parties were unable to agree on this number is different in domestic cases (i.e. one arbitrator) to international cases (i.e. three arbitrators - like in the Model Law), cf. sec. 12 of the Arbitration Act.
- Sec. 17(2) of the Arbitration Act complements Article 15 of the Model Law by including details on the possible repetition of hearings in case of substitution. A different approach can be found in Article 15 of the UNCITRAL Arbitration Rules.
- Sec. 33(6) departs from the Model Law by permitting the arbitral tribunal to award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realization and to determine the applicable rate of interest.
- Part III which - as was explained above only applies to domestic arbitrations - contains a number of provisions which are uncommon for the modern understanding of arbitration and which would damage Malaysia as venue for dispute resolution if they were also applicable to international cases. The concerned provisions are secs.

41 and 42 of the Arbitration Act which allow a party to apply to the High Court to determine a question of law either during the course of the proceedings or once an award has been rendered. Such a review of the arbitral award on the merits (other than where an infringement of public policy is at issue) is not supported by the UNCITRAL arbitration framework or by international best practices.

- Part IV of the Arbitration Act contains some further additional provisions not contained in the Model Law, they apply both to domestic and international cases. These address the liability of the arbitrator (sec. 47), the immunity of arbitral institutions (sec. 48), and the bankruptcy of a party to an arbitration agreement (sec. 49)

b. New York Convention

Malaysia acceded to the New York Convention on 5 November 1985, it entered into force on 3 February 1986. On accession Malaysia reserved the application of the convention

- only to recognition and enforcement of awards made in the territory of another contracting State ("reciprocity reservation") and
- only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law ("commercial reservation").[79]

Chapter 8 (i.e. secs. 38 and 39) the Arbitration Act 2005 provides the legislative implementation of the New York Convention in Malaysia.

79) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

2. Arbitration in Malaysia: Institutions and Rules

a. Kuala Lumpur Regional Centre for Arbitration (KLRCA)

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO). It is a non-profit non-governmental international arbitral institution and is administered by a Director under the supervision of the Secretary General of AALCO.[80)]

The KLRCA's portfolio of dispute resolution services is wider than that of most arbitral institutions and its main service areas are:

- "regular" commercial arbitration under the *KLRCA Arbitration Rules*,
- arbitrations which arise from commercial transactions that may contain Shariah elements or are premised on Shariah principles ("Islamic Arbitration") under the *KLRCA i-Arbitration Rules*,
- expedited proceedings under the *KLRCA Fast Track Arbitration Rules*,
- mediation/conciliation under the *KLRCA Mediation/Conciliation Rules* and
- domain name dispute resolution.

b. KLRCA Arbitration Rules

The KLRCA Arbitration Rules have a long standing connection with the UNCITRAL Arbitration Rules in that the latter reproduce the UNCITRAL text in Part II with some modifications and adaptations featured in Part I of the text. On 15th August 2010 KLRCA became the first arbitration centre in the world to adopt the UNCITRAL Arbitration Rules as revised in 2010.[81)]

80) *Cf.* http://www.klrca.org.my/corporate/ [Accessed on 30.10.2013]

After just over a year in force the 2012 KLRCA Arbitration Rules were recently once again amended and the newest version of the rules, that being the 2013 KLRCA Arbitration Rules, came into force on 24 October 2013. The newest amendments are promoted as enhancing the incorporation of international trends in arbitration proceedings and as bringing KLRCA's functions in line with current practices in international commercial arbitration.[82] Unless the parties stipulate otherwise, the 2013 KLRCA Arbitration Rules will automatically apply to all arbitrations under the auspices of the KLRCA commenced after their coming into force.

As was the case with the 2010 and 2012 Rules, the 2013 KLRCA Arbitration Rules once again adhere to the practice of incorporating the full text of the 2010 UNCITRAL Arbitration Rules into Part II of the former. Due to the fact that UNCITRAL amended the 2010 UNCITRAL Arbitration Rules in July 2013 by including a new Article 1(4) making reference to the Transparency Rules[83] a further revision of the Arbitration Rules (or at least a clarification) will be necessary in the near future.

While many arbitral institutions' rules worldwide are de facto based on the UNCITRAL Arbitration Rules only few are as transparent about this fact as the KLRCA Arbitration Rules. The approach of actually reproducing the text of the 2010 UNCITRAL Arbitration Rules as part of the KLRCA Arbitration Rules and only supplementing them with a few clearly marked additional provisions (in Part I of the text) is highly conducive to providing clarity to the users, many of whom will be familiar with the UNCITRAL Arbitration Rules from ad hoc arbitration.

---

81) *Cf.* http://www.klrca.org.my/scripts/view-anchor.asp?cat=10#12 [Accessed on 30.10. 2013]

82) *Cf.* http://www.klrca.org.my/scripts/list-posting.asp?recordid=448 [Accessed on 30.10. 2013]

83) *Cf.* http://www.unis.unvienna.org/unis/pressrels/2013/unisl186.html [Accessed on 30.10. 2013]

The following is a summary of the main adaptations that the KLRCA Arbitration Rules made on implementation of the UNCITRAL Arbitration Rules:

- Rules 2.1 and 2.2: The request for arbitration is to be served to the Director of the KLRCA and the date of receipt of the request for arbitration by the latter (complete with all the accompanying documentation and the non-refundable registration fee) shall be treated as the date on which the arbitration has commenced. This approach is different to that of Article 3(2) of the UNCITRAL Arbitration Rules, however it is the customary approach for institutionally administered arbitrations.
- Rule 3.1: All documents served pursuant to Articles 3, 4, 20, 21, 22, 23 and 24 of the UNCITRAL Arbitration Rules shall be served on the Director of the KLRCA at the time of such service on the other party or immediately thereafter.
- Rule 4 (General): Details on the KLRCA as acting appointing authority.
- Rules 4.8: This provision deserves closer examination:

> "Where the parties have agreed that any arbitrator is to be appointed by one or more parties, or by any authority agreed by the parties, including where the arbitrators have already been appointed, that agreement shall be treated as an agreement to nominate an arbitrator under these Rules and shall be subject to appointment by the Director of the KLRCA in his discretion."

By making these arbitrator-appointments subject to the discretion of the Director of the KLRCA (even in cases where the parties are in agreement on an appointment) potential future users could be discouraged

from opting for KLRCA arbitration for fear of undue influence by the Director and his/her unrestricted discretion. Especially users with no knowledge of how and to what extent the Director of the KLRCA makes use of the discretion will - quite justifiably - avoid this potential risk factor.

The above mentioned provision also seems to violate the principle of priority of the agreement of the parties in all aspects of arbitration which is clearly advocated throughout the UNCITRAL arbitration framework.

- Rule 11: The arbitral tribunal must deliver its award within three months from the (extendable) date of delivery of the closing oral submissions or written statements.
- Rule 15: A more comprehensive confidentiality regime then under the UNCITRAL Arbitration Rules.
- Part III, Schedule 2 now introduces a regime for requesting emergency interim relief from an emergency arbitrator "concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the arbitral tribunal".

3. Contact details of major arbitration institutions

- Kuala Lumpur Regional Centre for Arbitration
  No. 12, Jalan Conlay
  50450 Kuala Lumpur, Malaysia
  Tel: +603 - 2142 0103
  Fax: +603 - 2142 4513
  Email: enquiry@klrca.org.my
  Website: www.klrca.org.my

F. Singapore

(Source: Central Intelligence Agency (CIA) World Factbook[84])

The city state of Singapore is situated in the centre of South-East Asia and has developed as an important regional centre for commerce as well as an important financial centre. Over 7.000 multinational companies have regional headquarters in Singapore and there has been a rush of foreign banks, public

84) https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html [Accessed on 30.10.2013]

and private, to establish branches or subsidiaries in the city state.[85]

Reasons for Singapore's emergence as one of the world's leading centres for international commercial arbitration are to be found in its excellent geographic location being situated in the heart of South-East Asia surrounded by the Indonesia, Malaysia and Thailand and further afield China to the east and India to the west. This geographic advantage is enhanced by other factors such as Singapore's government and courts having a reputation for integrity and competence as well as the latter having proven to be very knowledgeable on international arbitration.[86]

1. Arbitration in Singapore: Legislation

After gaining independence in 1965 Singapore enacted a unitary arbitration act which preserved the Arbitration Ordinance enacted by the previous Crown Colony and which did not distinguish between domestic and commercial arbitration. In 1995 the International Arbitration Act was enacted giving rise to the dual regime for domestic and international cases:[87]

- the Arbitration Act[88] for domestic arbitrations and
- the International Arbitration Act[89] for international cases.

The following analysis will focus on the International Arbitration Act which is closely based on the UNCITRAL Model Law and has greater importance in the international context.

85) http://www.siac.org.sg/why-siac/arbitration-in-singapore; http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia [Accessed on 30.10.2013]
86) id.
87) Moser, paras. 15.10 - 15.12.
88) Chapter 10, Act 37 of 2001, Revised Edition 2002
89) Chapter 143A, Act 23 of 1994, Revised Edition 2002

a. International Arbitration Act

Without doubt the International Arbitration Act is one of the key ingredients to Singapore's outstanding reputation as a venue for international commercial arbitration in the region. The Act has one of the clearest adoptions of the Model Law by stating in its sec. 3(2): “Subject to this Act, the [1985] Model Law ... shall have the force of law in Singapore.” Despite making reference to the 1985 Model Law the Act incorporates some of the revisions made by UNCITRAL in the revised 2006 Model Law:

- Sec. 2 of the International Arbitration Act adopts Article 7, Option I of the 2006 revised Model Law and thereby takes one of the accepted approaches for relaxing the form requirements of the arbitration agreement.
- Sec. 4 of the International Arbitration Act adopts Article 2A of the 2006 revised Model Law which addresses the interpretation of the Model Law's text.

The International Arbitration Act then proceeds to set out the adaptations made to the Model Law which include the following:

- Sec. 9: Default number of arbitrators is one in contrast to Article 10(2) of the Model Law.
- Sec. 12: Detailed provision on the powers of the arbitral tribunal.
- Sec. 12A: Specifics on court ordered interim measures.
- Secs. 16 and 17: Details on the appointment of a conciliator and the power of the arbitrator to act as conciliator.
- Sec. 20: Awarding interest on arbitral awards, such a provision is missing in the Model Law.
- Sec. 25 and 25A: Provisions on the liability of arbitrators and the immunity of the appointing authority as well as of arbitral institutions.

Pursuant to sec. 5 of the International Arbitration Act most of the Act and the Model Law do not apply to purely domestic arbitrations and its follows that the (domestic) Arbitration Act governs those situations. Thereby it is noteworthy that for domestic cases secs. 45 and 49 of the (domestic) Arbitration Act allow the determination of questions of law by courts during the arbitral proceedings as well as appeals against arbitral awards based on questions of law. Both the latter are not in line with the UNCITRAL approach.

b. New York Convention

Singapore acceded to the New York Convention on 21 August 1985, it entered into force on 19 November of the same year. On accession Singapore reserved the application of the convention only to recognition and enforcement of awards made in the territory of another contracting State ("reciprocity reservation").[90]

The second schedule of the International Arbitration Act provides the legislative implementation of the New York Convention in Singapore.

2. Arbitration in Singapore: Institutions and Rules

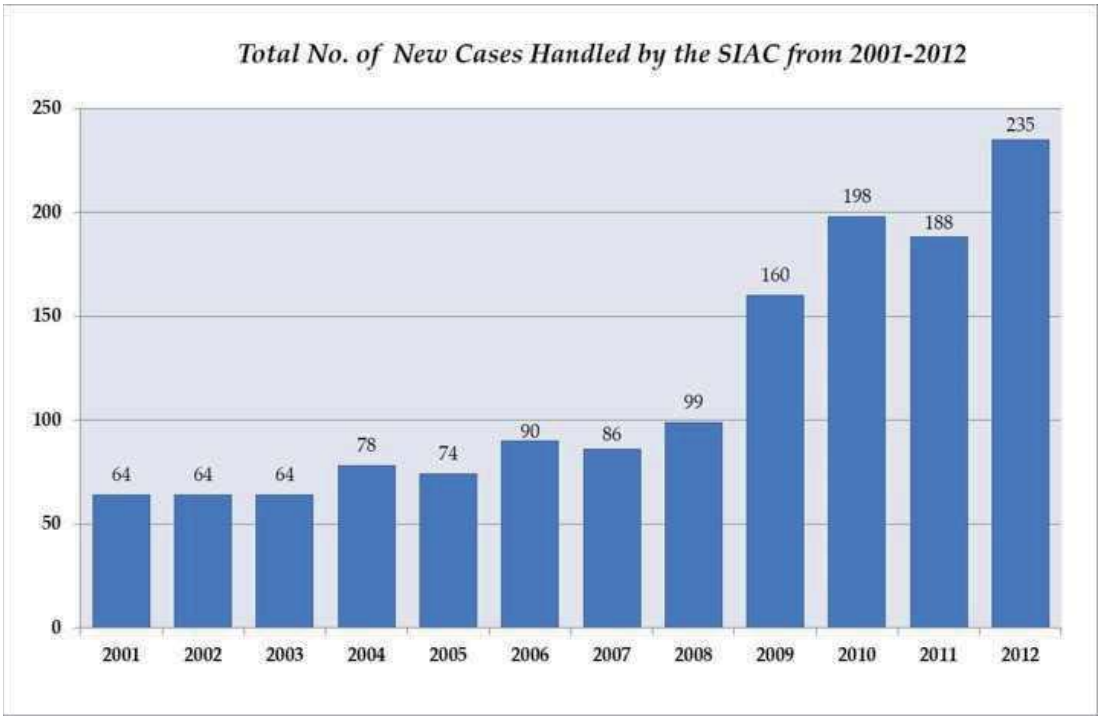
a. Singapore International Arbitration Centre(SIAC)

The Singapore International Arbitration Centre(SIAC) commenced operations in July 1991 with the main objective of developing Singapore to be a regional and international hub for commercial arbitration. SIAC operates as an independent, not-for-profit organisation and its operations are overseen by a Board of Directors, composed of representatives from the international and

90) *Cf.* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 30.10.2013]

local business and professional communities in Singapore.[91]

The statistics of SIAC are quite impressive:



(Source: SIAC website, http://www.siac.org.sg/why-siac/facts-figures/statistics[92])

Similar to its competitors SIAC offers a number of different services in the dispute resolution field:

- Regular administered international commercial arbitration (*SIAC Arbitration Rules*),
- appointing authority services for ad-hoc proceedings under the UNCITAL Arbitration Rules (*SIAC Practice Note on Case Administration, Appointment of Arbitrators and Financial Management for Cases under the UNCITRAL Rules 2010*),

91) Cf. http://arbitrationlaw.com/pdf/singapore-international-arbitration-centre-siac-world-arbitration-reporter-war-2nd-edition [Accessed on 30.10.2013]

92) [Accessed on 30.10.2013]

- expedited arbitration procedures for disputes arising from derivative trading (*SIAC SGX-DT Arbitration Rules*) and
- expedited arbitration procedures for disputes arising from derivative clearing (*SIAC SGX-DC Arbitration Rules*)

b. SIAC Arbitration Rules

The SIAC Arbitration Rules 2013 came into force on 1 April 2013 and they are the fifth edition of the text. It is obvious that the Rules follow the structure and in parts the exact wording of the UNCITRAL Arbitration Rules 2010, however the necessary adaptations to their institutional use were made.

Salient features of the SIAC Rules which do not originate from the UNCITRAL Arbitration Rules include:

- Rule 5: Expedited procedure for cases where the amount in dispute does not exceed S$5m (i.e. approx US$ 4m) or in case of exceptional urgency.
- Rule 24: Granting of additional powers to the arbitral tribunal such as the power to order the correction of any contract or to direct any party to give evidence by affidavit.
- Schedule 1: Regime for an emergency arbitrator dealing with urgent situations before the arbitral tribunal has been constituted.

c. SIAC Practice Note on Case Administration, Appointment of Arbitrators and Financial Management for Cases under the UNCITRAL Rules

The SIAC devised the “Practice Note on Case Administration, Appointment of Arbitrators and Financial Management for Cases under the UNCITRAL Rules” (hereafter: “the Practice Note”) to apply to all cases administered by the SIAC under the 1976 or 2010 UNCITRAL Arbitration

Rules. These are cases where the institution is designated to administer the arbitration, whether stipulated in the arbitration agreement or agreed upon subsequent to the dispute arising.

The functions of SIAC under the Practice Note include:

- Appointment of arbitrators;
- Financial management of the arbitration;
- Case management, which includes liaising with arbitrators, parties and their authorised representatives on proper delivery of notices, monitoring schedules and time lines for submissions, arranging hearing facilities and all other matters which facilitate the smooth conduct of the arbitration;
- Exercising such supervisory functions under the UNCITRAL Rules as may be necessary; and
- Scrutiny and issuance of awards made by the Tribunal, if requested by the Tribunal.[93)]

The Practice Notes are an innovative and useful feature and clarify various issues that may be encountered by parties in the ad hoc arbitration scenario (such as service of documents, fees, expenses and deposits thereby). It is obvious from the Practice Notes that SIAC has experience in assisting as an appointing authority in ad hoc arbitrations.

93) Cf. sec. 3 of the Practice Notes.

3. Contact details of major arbitration institutions

- Singapore International Arbitration Centre (SIAC)
  32 Maxwell Road
  #02-01, Maxwell Chambers
  Singapore 069115
  Tel: +65 6221 8833
  Fax: +65 6224 1882
  Email: corpcomms@siac.org.sg
  Website: www. siac.org.sg

Ⅳ. Conclusions and recommendations

This study has shown numerous methods of adopting or enacting elements of the UNCITRAL arbitration framework. Due to the fact that all of the jurisdictions examined are categorized by UNCITRAL as having "Model Law conform" arbitration legislation in place it can be assumed that the adoption or enactment methods employed by these arbitration laws largely correspond with the notion UNCITRAL has in mind.

Some concluding comments and recommendations for the individual jurisdictions are however called for:

Bangladesh: When looking at the arbitration picture in Bangladesh it can in summary be said that an update of the Bangladesh Act with the standards of the 2006 UNCITRAL Model Law would certainly help to promote the attractiveness of the country as an arbitration venue. The real reform work however lies in making the local court system more effective and helping it to better cope with the caseload.

Hong Kong: The Hong Kong Arbitration Ordinance is definitely amongst the most modern and well established Model Law based arbitration laws available at the moment. It shows how the 2006 revision of the Model Law can be incorporated for both domestic and international cases while introducing many a useful feature in addition. Countries who are considering reforming their own arbitration legislation are well advised to consult the Arbitration Ordinance for inspiration.

Much the same applies for the HKIAC Administered Arbitration Rules which show how a set of institutional arbitration rules can be based on the UNCITRAL Rules and where adaptations and alterations are useful.

Japan: The main recommendations in the case of arbitration in Japan lie less in the implementation of the UNCITRAL arbitration framework as this

has largely been done (or is currently being undertaken) but more in promoting the awareness for the advantages arbitration can offer to the local business community. Upgrading the Japanese Arbitration Law to the full 2006 Model Law standard and a modernization of the JCAA's Rules incorporating some of the most recent innovations would appear to be steps in the right direction.

More vitally, however, it appears that educational and promotional activities for arbitration and alternative dispute resolution in Japan may be of greater importance at this time.

Korea: The establishment of arbitration in Korea following the international best practices recommended by the UNCITRAL arbitration framework seems to be well underway and the current revision process of the Arbitration Act may also help to further increase the country's attractiveness as a dispute resolution venue.

Institutionally the KCAB seems well positioned to conduct arbitrations and to promote arbitration in Korea in more general terms. Despite their recent revision the KCAB's Arbitration Rules may need further adjustment when the revision of the Arbitration Act is finalized and special attention should be given to issues not yet picked up from the UNCITRAL framework such as tribunal ordered interim measures.

Malaysia: Malaysia as a venue for arbitration has done many things right by adopting Model Law conform legislation and offering a highly innovative arbitration centre in the form of the KLRCA. It is evident that Malaysia is in competition with Singapore, one of the major international arbitration hubs in the region. Some of the measures Malaysia could take to further promote itself as a viable option for dispute resolution are to bring the Arbitration Act fully in line with the standards set by the 2006 UNCITRAL Model Law (such as the new approach to loosening the form requirements of arbitration

agreements or a detailed interim measure regime), to delete the duality between domestic and international cases thereby introducing a uniform regime and to remove court reviews on questions of law in domestic cases.

As regards the KLRCA Rules it is worth keeping the transparent approach of incorporation of the UNCITRAL Arbitration Rules but one should consider removing the Director of the KCLRA's broad discretion in the appointment process. More stability in the KLRCA Rules would also be beneficial to the user's trust in the institution as there have been new versions released almost every year recently.

Singapore: There is not much arguing that Singapore is one of the major leaders in arbitration in the Asia and Pacific region, a fact that is clearly demonstrated by the impressive SIAC case statistics. It is evident that the Singapore government has put much effort into providing the best legislative background for international arbitration leaving only little room for improvement.

As regards the arbitration legislation the only point that could be discussed for a future review would be the move away from the divided domestic-international arbitration legislation regime towards a uniform text for all arbitrations. In this case the review provisions on questions of law as found in the domestic Arbitration Act would clearly have to be removed as they do not meet best international practices.

References

- *Legislation*

Bangladesh Arbitration Act 2001 (Notification No. SRO 87-Law/2001, 09.04. 2001, Published in Bangladesh Gazette Extraordinary, 10.04.2001)

Hong Kong Arbitration Ordinance (Cap 609. of the Laws of Hong Kong, Gazette number L.N. 38 of 2011)

Japanese Arbitration Law (Law No. 138 of 2003)

Korea Arbitration Act 1999 (Act No. 6083, December 31, 1999)

Korea Arbitration Act 2010 (Act No. 10207, March 31 2010)

Malaysia Arbitration (Amendment) Act 2011 (Act No. A1395, 1 July 2011)

Singapore Arbitration Act (Chapter 10, Act 37 of 2001, Revised Edition 2002)

Singapore International Arbitration Act (Chapter 143A, Act 23 of 1994, Revised Edition 2002)

- *Journals/Books*

Binder, Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed, 2010)

Cole, Tony, "Commercial Arbitration in Japan: Contributions to the Debate on Japanese 'Non-Litigiousness'", *New York University Journal of International Law and Politics (JILP)*, Vol. 40, No. 1, 2007

Moser, Michael J. and Choong, John (Eds.), *Asia Arbitration Handbook* (Oxford University Press, 2011)

Nakamura, Tatsuya, "Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration", *JCAA Newsletter*, No. 17, April 2004 (http://www.jcaa-.or.jp/e/arbitration/docs/news17.pdf)

Rajoo, Sundra, "National Courts and Interaction with Arbitral Tribunals: Harmonious Interpretation",

(http://www.baliraif2012.com/assets/pdf/session1/SundraRajoo_NATIONAL-COURTSANDINTERACTIONWITHARBITRAL%20TRIBUNALS.pdf)

- *Online resources and United Nations documents*

Asialaw, http://www.asialaw.com

Bangladesh International Arbitration Centre, http://biac.org.bd

Bangladesh Council of Arbitration, http://www.fbcci-bd.org/BCA/bca.htm

Bangladesh Web, http://www.bangladesh-web.com

Central Intelligence Agency (CIA) World Factbook:

Bangladesh: https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html

Hong Kong: https://www.cia.gov/library/publications/the-world-factbook/geos/hk.html

Japan: https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html

Korea: https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html

Malaysia: https://www.cia.gov/library/publications/the-world-factbook/geos/my.html

Singapore: https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html

Federation of Bangladesh Chambers of Commerce and Industry (FBCCI), http://www.cacci.org.tw/CACCI%20Profile/2004%20August/FBCCI.pdf

Hong Kong International Arbitration Centre, http://www.hkiac.org/index.php/en/arbitration-ordinance

Global Arbitration Review, http://globalarbitrationreview.com

Japan Commercial Arbitration Association, http://www.jcaa.or.jp

Korean Commercial Arbitration Board, http://www.kcab.or.kr

Practical Law, http://uk.practicallaw.com/resource/8-381-2907

Singapore International Arbitration Centre, http://www.siac.org.sg

UNCITRAL - Arbitration Rules 1976, http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

UNCITRAL - Arbitration Rules 2010, http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

UNCITRAL - Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

United Nations document no. A/CN.9/WG.II/WP.143

United Nations document no. A/CN.9/610/Add.1

United Nations document no. A/CN.9/773, II., A

UNCITRAL - Model Law on International Commercial Arbitration 1985, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

UNCITRAL - Model Law on International Commercial Arbitration 2006, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

UNCITRAL - Notes on Organizing Arbitral Proceedings, http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf

UNCITRAL - Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

UNCITRAL - Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

UNCITRAL - Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf

UNCITRAL - Rules on Transparency in Treaty-based Investor-State Arbitration, http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf

World Trade Review, http://www.worldtradereview.com

About the author

Dr Peter Binder acts both as arbitrator and counsel providing national and international legal advice. In his function as law reform consultant, Dr Binder frequently advises governments seeking to implement arbitration or ADR laws. He is a member of the UNCITRAL Working Group on Arbitration and Conciliation.

Dr. Binder is also the author of *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edition (London, Thomson/Reuters/Sweet & Maxwell, 2010) and of the *Analytical Commentary to the UNCITRAL Arbitration Rules* (London, Thomson/Reuters/ Sweet & Maxwell, 2013).

For further information please refer to the author's website:

www.international-commercial-arbitration.com