

# A Study of International Commercial Arbitration in the Commonwealth



The Commonwealth

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# Contents

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Authors and Affiliates	iii
Executive Summary	vii
<b>1 Introduction</b>	<b>1</b>
<b>2 The Commonwealth – Past and Present</b>	<b>9</b>
2.1 Trade and Investment within the Commonwealth	10
2.2 Socio-Economic Benefits of International Commercial Arbitration	12
2.3 Contemporary Arbitration Landscape in the Commonwealth	20
<b>3 Challenges</b>	<b>29</b>
3.1 Effectiveness of the Legislative Framework Applicable to Arbitration	29
3.2 Judicial Attitudes to Arbitration	31
3.3 Familiarity with Arbitration for Business and Users	34
3.4 Familiarity and Expertise in Arbitration within the Legal Profession	42
3.5 Quality of Arbitrators	43
3.6 Diversity Among Arbitrators and Counsel	44
3.7 Time and Cost Considerations in Arbitration	47
3.8 Regulatory Considerations	48
3.9 Use of Technology	50
3.10 Impact of Arbitration on the Development of the Law	51
<b>4 Solutions</b>	<b>69</b>
4.1 Modernise Arbitral Framework	69
4.2 Increasing Awareness of Arbitration Among Users	85
4.3 Capacity-building	88
4.4 Enhancing Time and Cost Efficiencies	97
4.5 Enhancing Diversity within the Arbitration Community	104
4.6 Regulatory Changes	106
4.7 Mechanisms to Facilitate Cross-border Arbitration	108
<b>5 Concluding Remarks</b>	<b>133</b>
<b>6 Recommendations</b>	<b>135</b>
<b>7 Acknowledgements</b>	<b>137</b>
<b>8 Annex: Country Reports</b>	<b>141</b>



# Executive Summary

A key priority of the Commonwealth is to foster increased trade and sustainable economic growth and development across Commonwealth member countries. International business drives this economic growth and development. All business dealings, however, give rise to the risk of disputes. The uncertainty over how to manage the dispute resolution risk has been identified as a trade barrier in particular for small and medium-sized enterprises (SMEs) which prefer to self-hedge rather than taking the risk of trading cross-border. Foreign direct investment equally demands a neutral, time and cost-efficient, and enforceable dispute resolution regime. Businesses trading cross-border have a number of dispute resolution mechanisms available to them, one of which is international commercial arbitration. Among other advantages, international commercial arbitration allows disputing parties the freedom to choose neutral arbitrators, international enforceability of the resulting arbitral awards (as granted by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which has been signed by 161 countries), and also confidentiality.

This study was commissioned at a meeting of senior officials of Commonwealth Law Ministries in October 2018 to examine the socio-economic benefits of international commercial arbitration and broadly survey the contemporary landscape of commercial arbitration across all Commonwealth member countries.\* The terms of reference for this study were to assess the state of international

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\* The report considers developments up until 31 July 2019.



commercial arbitration in each Commonwealth jurisdiction, identify issues that may be holding back the use of international commercial arbitration as a dispute resolution mechanism by local businesses, and to find possible solutions to these issues while recognising the importance of diversity and the needs of small developing Commonwealth countries. To assess the challenges of international commercial arbitration, the study employed a mix of blackletter law, law in context, and comparative law analysis, the compilation of national country reports covering all Commonwealth jurisdictions, and the undertaking of stakeholder surveys and interviews. The study has identified 10 challenges which hinder the widespread use of international commercial arbitration within the Commonwealth.

One of the main challenges regarding the widespread use of international commercial arbitration in the Commonwealth is the overall efficiency of the applicable arbitration framework. In many Commonwealth countries the international commercial arbitration framework does not reflect modern best practice; in particular, cost efficiency can hinder the use of international commercial arbitration.

- 58 per cent of Commonwealth countries do not have an international arbitration framework that reflects modern best practice. A small number of countries do not have a legislative framework for arbitration at all. Additionally, 30 per cent of Commonwealth countries have not yet become members of the New York Convention. Countries that lack these hallmarks of a modern international arbitration framework are at risk of: (a) losing foreign direct investment (FDI), and (b) losing trade revenue from not having a modern dispute resolution regime available to their business community.<sup>1</sup>
- The rising costs of international commercial arbitration has been identified in the stakeholder surveys, interviews, other international arbitration surveys, and the literature as one of the foremost challenges facing any international arbitration framework.<sup>2</sup>

Another set of challenges impeding the use of international commercial arbitration centres on familiarity and understanding. The three key stakeholder groups who are in particular need of gaining a more in-depth understanding of international commercial arbitration have been identified as the judiciary, business community and users, and the legal profession.

- A judiciary not aware of its obligations regarding international commercial arbitration will discourage foreign direct investment and the use of international commercial arbitration by businesses.<sup>3</sup>
- Businesses, in particular small and medium-sized enterprises (SMEs), generally lack familiarity with international commercial arbitration.<sup>4</sup>
- There is a lack of understanding and expertise in international commercial arbitration within the legal profession. This arises because international commercial arbitration is a relatively new subject in the canon of the (Commonwealth) university syllabus. Therefore, a large sector of the legal profession is unlikely to have gained an understanding of international commercial arbitration during their studies. Additionally, many international arbitration practitioners do not have the required caseload to acquire the necessary in-depth expertise regarding international commercial arbitration.<sup>5</sup>

Arbitrator quality and diversity have been identified as challenges to international commercial arbitration in the Commonwealth. Responses to the study surveys

and information gathered through stakeholder interviews have indicated a concern that in international commercial arbitration the quality of arbitrators can vary. The quality concern is, *inter alia*, linked to the lack of arbitrators with specialised industry knowledge.<sup>6</sup> The lack of diversity within the international commercial arbitration community has been identified as an issue hindering the development and widespread use of international commercial arbitration by the international commercial arbitration community itself. The lack of diversity of the international commercial arbitration community, in particular among arbitrators, detracts from the capacity of the international arbitration system to perceive and to give full weight to geographical or cultural factors that might have informed the disputing parties' dealings.<sup>7</sup>

Regulatory challenges, such as parties' ability to freely instruct international counsel, visa requirements, and tax regulations may also make it harder for international commercial arbitration to flourish in a particular country or the wider Commonwealth.<sup>8</sup>

The use of technology also impacts on the uptake and usage of arbitration. Technology plays an important part in modern-day dispute resolution. This can include tools like video conferencing and hearing room technology, artificial intelligence, and cloud-based storage to support the conduct of an arbitration. Technological literacy by users, access to technology, and cybersecurity are important concerns in this regard. Currently, technology is not being used to its full potential by stakeholders to aid the international commercial arbitration process.<sup>9</sup>

The impact of arbitration on the development of the law might be perceived as a challenge. The confidential nature of arbitration may hinder the practical application and interpretation of the law, which in turn can delay law reform.<sup>10</sup>

The study sets out seven solutions to the challenges identified. Firstly and most importantly, all Commonwealth member countries should have a modern international commercial arbitration framework that incorporates best practice and enhances cost efficiency.

- Commonwealth member countries should be encouraged and supported to modernise their arbitration commercial international arbitration framework by becoming party to the New York Convention,<sup>11</sup> and adopting a modern arbitration law based on the 2006 UNCITRAL Model Law.<sup>12</sup>
- Cost-effectiveness can be improved through several different means, set out in the study.<sup>13</sup> Costs can also be eased by ensuring legal aid is accessible for business and for international commercial arbitration;<sup>14</sup> or permitting and promoting the use of third-party funding,<sup>15</sup> allowing contingency fee arrangements,<sup>16</sup> and before and after the event legal expense insurance.<sup>17</sup>

Issues relating to a lack of familiarity and understanding of international commercial arbitration can be alleviated through a range of awareness-raising and capacity-building solutions.

- Awareness of international commercial arbitration needs to be increased amongst the business community, in particular among SMEs, the legal profession, government officials, in particular policy and legal advisers, and the Commonwealth Secretariat.<sup>18</sup> Commonwealth member jurisdictions should work together with all stakeholders to formulate and to support an awareness-raising strategy.

- Capacity-building also requires a multi-pronged response; in particular:
  - Commonwealth jurisdictions should send a clear signal to and work with their universities, law societies, bar councils, and their business communities about their expected respective roles regarding capacity-building in the international commercial arbitration space as well as the use of technology to aid international dispute resolution.<sup>19</sup>
  - Member jurisdictions need to work with and to support their judiciary to gain the necessary familiarity with the international commercial arbitration framework.<sup>20</sup>
  - Commonwealth jurisdictions and their stakeholders are encouraged to collaborate with existing capacity-building programmes.
  - The availability of scholarships to gain proficiency in international dispute resolution and in particular international commercial arbitration and exchange and secondment programmes will aid capacity-building.<sup>21</sup>

The study highlights the importance of recognising and acknowledging diversity within the international commercial arbitration community and sets out a number of possible actions which actively foster diversity such as diversity reporting, a Commonwealth diversity pledge, and co-operation with law societies, bar councils, and arbitral institutions.<sup>22</sup>

Regulatory changes and additional mechanisms and initiatives should be considered to facilitate international commercial arbitration within the Commonwealth.

- Regarding regulatory changes, member countries should consider permitting foreign counsel participation in arbitration,<sup>23</sup> enhancing existing tax and visa restrictions,<sup>24</sup> and informing stakeholders about the impact of the European Union General Data Protection Regulation (GDPR).
- Other mechanisms and initiatives to aid cross-border arbitration include, inter alia, the facilitation of online dispute resolution platforms,<sup>25</sup> the establishment of a Commonwealth cross-border dispute resolution regime,<sup>26</sup> and the creation of an association of Commonwealth arbitral institutions.<sup>27</sup>

## Notes

- 1 See Section 3.1.
- 2 See Section 3.7.
- 3 See Section 3.2.
- 4 See Section 3.3.
- 5 See Section 3.4.
- 6 See Section 3.5.
- 7 See Section 3.6.
- 8 See Section 3.8.
- 9 See Section 3.9.
- 10 See Section 3.10.
- 11 See Section 4.1.1.
- 12 See Section 4.1.2.
- 13 See Section 4.4.2.
- 14 See Section 4.4.1 c) Legal aid / legal assistance schemes.
- 15 See Section 4.4.1 d) Third-party funding & contingency fee agreements.
- 16 Ibid.
- 17 See Section 4.4.1 e) Legal expense insurance.

- 18 See Sections 4.2.1–4.2.5.
- 19 See Section 4.3.1 a) University education.
- 20 See Sections 4.3.1 and 4.3.2.
- 21 See Sections 4.3.3 and 4.3.4.
- 22 See Section 4.5.
- 23 See Section 4.6.
- 24 See Section 4.6.
- 25 See Section 4.7.1.
- 26 See Section 4.7.2.
- 27 See Section 4.7.3.



# 1

## Introduction

A key priority of the Commonwealth is to foster increased trade and sustainable economic growth and development across Commonwealth member countries.<sup>1</sup> This goal is consistent with the aspirations of the Charter of the Commonwealth<sup>2</sup> and the United Nations 2030 Agenda for Sustainable Development,<sup>3</sup> as increased trade and development will allow member countries to better achieve the Sustainable Development Goals 2030 (SDGs).

Economists universally agree that the growth of modern economies is highly dependent on international trade.<sup>4</sup> The expansion into international markets by businesses, especially small to medium-sized enterprises (SMEs),<sup>5</sup> is critical for the sustained growth and development of a nation's economy. While large corporations are essential to global and national economic growth, there is growing consensus that SMEs will be the predominant form of business and driver of economic growth in the long term. SMEs are therefore critical to sustainable growth in any economy.<sup>6</sup> SMEs generally constitute about 95–99 per cent of all businesses in a country and usually contribute to over 50 per cent of employment.<sup>7</sup> Notwithstanding the importance of SMEs, in reality – and in contrast to large businesses and multinationals – the majority of SMEs do not engage in cross-border trade.<sup>8</sup> As a result, a significant source of economic growth remains untapped.

One of the reasons for the limited forays into international markets by SMEs is the high risks associated with global trade and the inability of SMEs to mitigate such risks, particularly when compared to large businesses and multinational companies.

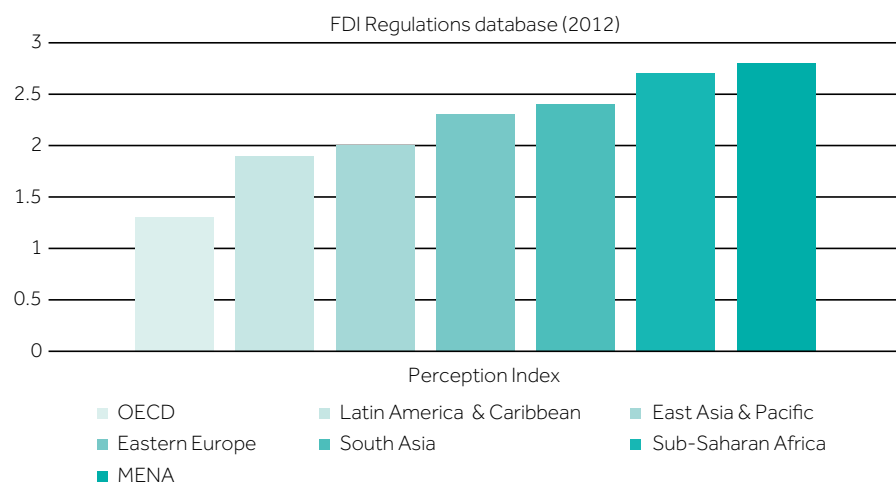
An Organisation for Economic Co-operation and Development (OECD) study into barriers faced by SMEs in accessing international markets revealed certain critical constraints on their ability to engage in cross-border trade. Political risks, corruption, and rule of law issues, limited firm resources and international contacts, as well as a lack of requisite managerial knowledge about internationalisation, were found to be critical constraints to SMEs' cross-border trade.<sup>9</sup> Embedded in these constraints is the risk associated with access to justice as SMEs lack the knowledge and resources to effectively engage in cross-border disputes.

Indeed, empirical research confirms that the uncertainty in obtaining effective resolution to cross-border disputes is a major trade barrier for businesses engaged in international trade.<sup>10</sup> The European Commission's study into intra-EU trade by SMEs found that one third of respondents felt that difficulties relating to the resolution of cross-border conflicts stifled their cross-border trade.<sup>11</sup> Similarly the World Bank and the International Finance Corporation in their 2012 co-published study, *Doing Business 2012*, reported that efficiency and transparency in dispute resolution were pivotal in encouraging cross-border trade.<sup>12</sup> Hence, research suggests that an effective cross-border dispute resolution regime is essential to encourage SMEs to engage in international trade.

Therefore, to boost participation of SMEs in international trade and thereby ensure increased trade and sustained economic growth, it is imperative to eliminate or significantly reduce the trade barriers arising from the misconceptions and unfamiliarity with cross-border dispute resolution.

In line with the Commonwealth Connectivity Agenda for Trade and Investment,<sup>13</sup> countries might also want to attract foreign direct investment (FDI) to benefit from the positive impact of FDI on poverty reduction<sup>14</sup> and, inter alia, to work towards Sustainable Development Goal 1.<sup>15</sup> One important cornerstone of attracting FDI is the provision of what foreign investors perceive to be a neutral, efficient, and enforceable dispute resolution mechanism should a dispute with a local business arise.<sup>16</sup> The World Bank in its 2012 study of 100 economies found that, where the

**Figure 1.1 Perception of the legal ADR as an obstacle to FDI per region<sup>18</sup>**



**Note:** The AMD Perception Score measures the average perception of contributors, based on a scale from 1 to 5, of the extent to which their legal framework on ADR is an obstacle to FDI. The highest scores indicate the regions where the obstacle is perceived as bigger.

alternative dispute resolution (ADR) legal framework is not strong, ADR is perceived as an obstacle to FDI.<sup>17</sup>

Senior officials of Commonwealth law ministries at their meeting in October 2018 requested a study into the landscape of international commercial arbitration in all Commonwealth member countries.<sup>19</sup> The aim of the study was to assess the state of international commercial arbitration, identify issues that are preventing the use of international commercial arbitration as a dispute resolution mechanism by businesses in the Commonwealth, and to find possible solutions while highlighting the importance of diversity and the needs of small developing Commonwealth countries.

Alongside cross-border litigation, international commercial mediation and negotiation, international commercial arbitration is part of the canon of available dispute resolution mechanisms open to businesses when faced with a cross-border dispute. The benefits of international commercial arbitration are generally described as: neutral, efficient, expert, final, and enforceable.<sup>20</sup> Indeed, where there are industry-specific arbitration practices and communities, international commercial arbitration offers the benefit of trade specialists (whether lawyers or otherwise) that are familiar with the trade resolving disputes specific to that trade. Arbitration also generally offers privacy and confidentiality in the dispute resolution process, particularly in common law jurisdictions such as the Commonwealth member countries.

Furthermore, arbitration is also seen as providing access to effective commercial justice.<sup>21</sup> Statistics show that international commercial arbitration is the preferred mechanism for the resolution of cross-border disputes among Fortune 500 companies,<sup>22</sup> as well as the preferred dispute resolution mechanism in the commodity trade<sup>23</sup> and in maritime matters.<sup>24</sup> Recent research into the dispute risk management needs of SMEs suggests that international commercial arbitration will be able to fulfil the SMEs' cross-border dispute resolution needs to a greater extent than the current default mechanism of cross-border litigation.<sup>25</sup>

Given the popularity of international commercial arbitration among a number of critical business sectors and its utility as a cross-border dispute resolution mechanism for SMEs, the focus of this study is firstly to assess its value as a dispute resolution mechanism for intra-Commonwealth trade. In a second step the study explores which measures might be necessary to strengthen the effectiveness of international commercial arbitration across the Commonwealth.<sup>26</sup>

The study was led by the Commonwealth's Office of Civil and Criminal Justice Reform. An expert group, consisting of Funke Adekoya SAN, Gary Born, Robert Griffith QC and Audley Sheppard QC, and led by Dr Petra Butler, supported the Commonwealth Office.<sup>27</sup> Dharshini Prasad served as the Executive Secretary to the expert group. The International Arbitration group at Wilmer Cutler Pickering Hale and Dorr LLP also provided technical assistance to the Commonwealth. The expert group was further assisted by a task force comprising international arbitration, trade, and capacity-building specialists representing the different regions of the Commonwealth.<sup>28</sup> The study was conducted between January and August 2019.

The study employed a mixed blackletter law, law in context, and comparative law analysis.<sup>29</sup> In addition to relying on available literature the study compiled a country report for each of the Commonwealth countries that outlines the country's



international commercial arbitration landscape.<sup>30</sup> To gain a further insight into attitudes towards international commercial arbitration and the challenges it faces, eight stakeholder surveys were conducted<sup>31</sup> and 65 interviews held with international commercial arbitration and commodity arbitration specialists throughout the Commonwealth.<sup>32</sup> In addition, round-table meetings were held with representatives from the London Court of International Arbitration (LCIA), the London Maritime Arbitration Association (LMAA), Federation of Oils, Seeds and Fats Association (FOSFA), the London Minor Metals Association, the Rubber Trade Association of Europe (RTAE), and the Refined Sugar Association.<sup>33</sup> The study received submissions from the Chartered Institute of Arbitrators (CIArb), the LMAA, and Duarte Henriques from BCH Lawyer (Lisbon). The study also includes the views of Professor Richard Susskind OBE on the use of technology to aid dispute resolution, and qualitative research from the SME Justice project on the contracting patterns of SMEs.

## Notes

- 1 On 20 April 2018, the Commonwealth Heads of Government committed themselves to the goal of increasing intra-Commonwealth trade to US\$2 trillion by 2030 and expanding intra-Commonwealth investment. To achieve this goal, they adopted at the Commonwealth Heads of Government meeting in London in April 2018, a *Declaration on the Commonwealth Connectivity Agenda for Trade and Investment*, a six-point connectivity agenda to boost trade and investment links across the Commonwealth. See the Commonwealth (20 April 2018), 'Commonwealth adopts forward-looking Connectivity Agenda for Trade and Investment', available at: <http://thecommonwealth.org/media/news/commonwealth-adopts-forward-looking-connectivity-agenda-trade-and-investment> (accessed 12 August 2019).
- 2 See *Charter of the Commonwealth 2013*, art. 9 ('We are committed to an effective, equitable, rules-based multilateral trading system, the freest possible flow of multilateral trade on terms fair and equitable to all, while taking into account the special requirements of small states and developing countries').
- 3 United Nations General Assembly (21 October 2015), *Transforming our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1.
- 4 See e.g., Frankel, J A and D H Romer (1999), 'Does trade cause growth?', *American Economic Review*, Vol. 89 No. 3, 379–99; Alcalá, F and A Ciccone (2004), 'Trade and Productivity', *The Quarterly Journal of Economics*, Vol. 119 No. 2, 613–46; Zahonog, O P (2016), 'Trade and Economic Growth in Developing Countries: Evidence from Sub-Saharan Africa', *Journal of African Trade*, Vol. 3, 41; Mogoe, S and I Mongale (2014), 'The Impact of International Trade on Economic Growth in South Africa: An Econometrics Analysis', *Mediterranean Journal of Social Sciences*, Vol. 5 No. 14, 60; Ahamad, Md (2018), 'Impact of International Trade on Economic Growth in Bangladesh', *International Journal of Science and Research (IJSR)*, Vol. 7, 1624–27; Johnson, H G (1958), *International trade and economic growth: studies in pure theory*, Harvard University Press, Cambridge.
- 5 What constitutes a small to medium-sized enterprise is generally defined by the number of employees. How many employees constitute a large enterprise is different from country to country (e.g. SMEs in New Zealand are businesses with less than 70 employees whereas in the United Kingdom an SME is a business with less than 250 employees. The unifying characteristic of SMEs in all countries is that they constitute 97 to 99 per cent of all business in any given country. The definition also comprises micro enterprises, i.e. enterprises that are owner operated.
- 6 See e.g., Muriithi, S (2017), 'African Small And Medium Enterprises (SMEs) Contributions, Challenges And Solutions', *International Journal of Research & Reflection in Management Science*, Vol. 5, 13; Butler, P and H Campbell (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New*

- Zealand Universities Law Review*, Vol. 26, available at: <https://www.victoria.ac.nz/law/about/staff/petra-butler/Access-to-Justice-paper.pdf> (accessed 27 August 2019); OECD (2009), 'Top Barriers and Drivers to SME Internationalisation', Report by the OECD Working Party on SMEs and Entrepreneurship, OECD, available at: <https://www.oecd.org/cfe/smes/43357832.pdf> (accessed 29 August 2019).
- 7 World Trade Organization (2016), *World Trade Report 2016: Levelling the trading field for SMEs*, available at: [https://www.wto.org/english/res\\_e/booksp\\_e/world\\_trade\\_report16\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf) (accessed 20 August 2019); Butler, P and Herbert, C (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26, available at: <https://www.victoria.ac.nz/law/about/staff/petra-butler/Access-to-Justice-paper.pdf> (accessed 27 August 2019); OECD (2017), 'Enhancing the Contributions of SMEs in a Global and Digitalised Economy', available at: <https://www.oecd.org/mcm/documents/C-MIN-2017-8-EN.pdf> (accessed 26 August 2019); OECD (2009), 'Top Barriers and Drivers to SME Internationalisation', Report by the OECD Working Party on SMEs and Entrepreneurship, OECD, available at: <https://www.oecd.org/cfe/smes/43357832.pdf> (accessed 26 August 2019).
  - 8 World Trade Organization (2016), 'World Trade Report 2016: Levelling the trading field for SMEs'; Abel-Koch, J et al. (2018), 'France, Germany, Italy, Spain, and the United Kingdom: Internationalisation of European SMEs – Taking Stock and Moving Ahead', available at: <https://www.british-business-bank.co.uk/wp-content/uploads/2018/03/Internationalisation-of-European-SMEs-2018-FINAL-VERSION.pdf> (accessed 20 August 2019); OECD (2017), 'Enhancing the Contributions of SMEs in a Global and Digitised Economy', available at: <https://www.oecd.org/mcm/documents/C-MIN-2017-8-EN.pdf> (accessed 26 August 2019).
  - 9 OECD (2009), 'Top Barriers and Drivers to SME Internationalisation', Report by the OECD Working Party on SMEs and Entrepreneurship, OECD; OECD (2004), 'Facilitating SMEs Access to International Markets', available at: <https://www.oecd.org/industry/smes/31919223.pdf> (accessed 20 August 2019).
  - 10 This uncertainty, which may be due to unfamiliarity with the judicial procedure of the forum or difficulty of enforcement of judgments, dissuades business from engaging in international trade or making a particular investment.
  - 11 European Commission (2011), 'European contract law in business-to-business transactions', available at: [https://ec.europa.eu/commfrontoffice/publicopinon/flash/fl\\_320\\_en.pdf](https://ec.europa.eu/commfrontoffice/publicopinon/flash/fl_320_en.pdf) (accessed 20 August 2019).
  - 12 See World Bank & International Finance Corporation (2012), 'Doing business in a more transparent world', available at: <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB12-FullReport.pdf> (accessed 20 August 2019).
  - 13 The Commonwealth (2018), 'Declaration on the Commonwealth Connectivity Agenda for Trade and Investment', available at: <http://thecommonwealth.org/declaration-commonwealth-connectivity-agenda-trade-and-investment> (accessed 20 August 2019).
  - 14 Ibid; Magombeyi, M and N M Odhiambo (2017), 'Foreign Direct Investment And Poverty Reduction', *Comparative Economic Research*, Vol. 20 No. 2, 73.
  - 15 Sustainable Development Goal 1 "End poverty in all its forms everywhere".
  - 16 Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', Abstract (accessed 27 August 2019).
  - 17 Ibid. p. 3. Twenty-six Commonwealth countries were incorporated in the study: Australia, Bangladesh, Brunei Darussalam, Cameroon, Canada, Cyprus, Ghana, India, Kenya, Malaysia, Mauritius, Mozambique, New Zealand, Nigeria, Pakistan, Papua New Guinea, Rwanda, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Tanzania, Uganda, United Kingdom, Zambia.

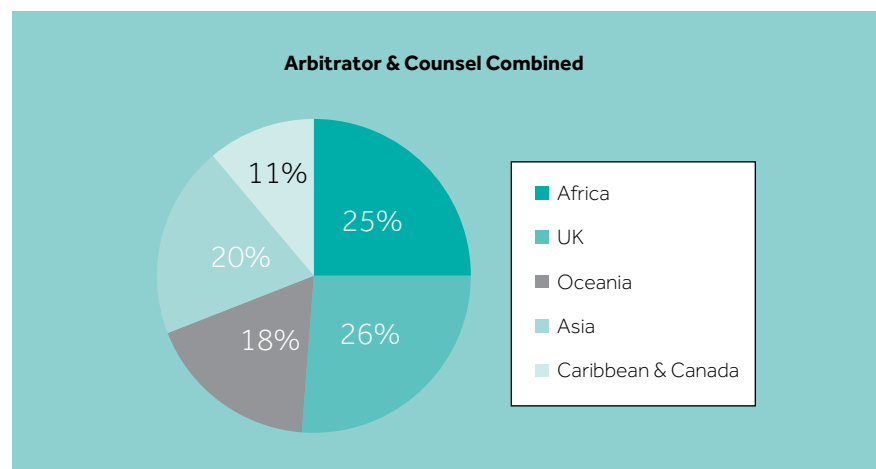
- 18 Ibid p.3.
- 19 This study uses the terms 'international commercial arbitration', 'international arbitration' and 'arbitration' interchangeably.
- 20 See Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 73–93; Born, G B and P Butler (2017) 'Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution', available at: [https://www.uncitral.org/pdf/english/congress/Papers\\_for\\_Programme/104-BORN\\_and\\_BUTLER-BATs\\_An\\_Improved\\_Means\\_of\\_International\\_Dispute\\_Resolution.pdf](https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/104-BORN_and_BUTLER-BATs_An_Improved_Means_of_International_Dispute_Resolution.pdf) (accessed 26 August 2019), 2 et seq.; Butler, P & C Herbert (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26, available at: <https://www.victoria.ac.nz/law/about/staff/petra-butler/Access-to-Justice-paper.pdf> (accessed 26 August 2019), 198 et seq.; Blackaby, N et al. (2015), *Redfern and Hunter on International Arbitration*, 6th edn, Oxford University Press, 28–31; Lew, J D M et al. (2003), *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, para. 1–13.
- 21 See Butler, P & C Herbert (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', p. 186.
- 22 White & Case and Queen Mary University of London (2018), '2018 International Arbitration Survey: The Evolution of International Arbitration', available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF) (accessed 20 August 2019). It has to be noted that according to the study's methodology section business involvement was through in-house counsel – which suggests that the businesses surveyed were large businesses.
- 23 See e.g. the Federation of Oils, Seeds and Fats Associations (FOSFA); The Grain and Feed Trade Association (GAFTA); International Cotton Association (ICA), the London Metal Exchange (LME), the British Coffee Association (BCA) and the Refined Sugar Association (RSA); LexisPSL Commercial (2019), 'Commodities arbitration – trade associations and arbitration rules', available at: [https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5R60-TNF1-DXSN-642J-00000-00/Commodities\\_arbitration\\_trade\\_associations\\_and\\_arbitration\\_rules](https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5R60-TNF1-DXSN-642J-00000-00/Commodities_arbitration_trade_associations_and_arbitration_rules) (accessed 20 August 2019).
- 24 Michael Collet (2013), 'Maritime Arbitration', Chapter 8 in Julian David Mathew Lew, Harris Bor et al. (eds), *Arbitration in England with Chapters on Scotland and Ireland*, Kluwer Law International, 145.
- 25 See Butler, P & G Whelan, 'Does the dispute resolution regime in Europe really serve MSMEs?', available at: [https://www.uv.es/esteco/SEMINARIS\\_2019/2019-10-28\\_PetraButler\\_PONENCIA.pdf](https://www.uv.es/esteco/SEMINARIS_2019/2019-10-28_PetraButler_PONENCIA.pdf) (accessed April 2020).
- 26 The study does not address consumer to business disputes.
- 27 The Commonwealth, 'Commonwealth International Arbitration Study', available at <http://thecommonwealth.org/arbitration-study>.
- 28 Anthony Daimsis (professor, University of Ottawa), Tejas Karia (partner, Shardul Amarchand Mangaldas & Co, New Delhi), Dr Emilia Onyema (School of Oriental and African Studies, London), Nania Owusu-Anomah Sackey (Bentsi-Enchill, Accra); Mahesh Rai (director, dispute resolution, Drew & Napier LLC, Singapore), Dr Jan Yves Remy (deputy director, Shridrath Ramphal Centre, University of the West Indies (Cavehill Campus), Kamal Shah (partner, Stephenson Harwood LLP, London), Ana Tuiketui (barrister, Suva).
- 29 See generally McGonville, M and W H Chui (eds) (2007), *Research Methods for Law*, Edinburgh University Press, Edinburgh.
- 30 See country reports in Annex.
- 31 Overall 653 responses were received. The arbitrator, counsel, business and academic surveys were available on the Commonwealth Secretariat website in English, French and Portuguese, and were open between 18 March and 10 May 2019 (English version) and 23 March to 10 May (Portuguese & French versions). The student survey was available

in English from 5 May to 10 June. The availability of the surveys was made known to and advertised through the African Arbitration Association, 21 (2019) Asian Dispute Review, Association of Young Arbitrators (AYA), Australian–German Chamber of Commerce, Australia International Chamber of Commerce, ALB & CDR articles, Australian Dispute Resolution Network website, Arbitral Women notification & LinkedIn, Bar Councils, Commonwealth Secretariat website & LinkedIn, Commonwealth Law Societies, Commonwealth Small States Unit, Commonwealth Business and Investment Council, Commonwealth Lawyers' Association, Chartered Institute of Arbitrators website & database, Chambers of Commerce, Commonwealth Lawyers' Association website, expert and task force members' LinkedIn, Hong Kong–APEC Trade Policy Study Group, IBA Africa, International Comparative Legal Guides website, ICCA, Indisputable website, Kluwer Arbitration Blog article by Tochukwu Anaenugwu, national Law Societies and Bar Councils, LinkedIn Amanda Lee, LSE Arbitration Club notification, MAA database, OGEMID, SIAC database, Vis Moot arbitrator database, WilmerHale database. Responses received were from 173 arbitrators, 294 counsels, 46 academics, 62 students and 34 businesses.

*Arbitrator demographic:* 78 per cent of respondents were Commonwealth citizens (44% UK, 21% Africa, 16% Oceania, 11% Caribbean & Canada, 8% Asia); 78 per cent of respondents worked in the Commonwealth (46% in the UK, 22% in Africa, 14% in Oceania, 19% in Asia, 9% in the Caribbean & Canada); 54 per cent were predominantly appointed by non-Commonwealth parties; 80 per cent of respondents were male; the majority group of respondents (31%) were between 65 and 74 years old, followed by respondents in the 45–54 age bracket (23%), and 9 per cent of respondents were over 75 years old; 49 per cent only practised as an arbitrator; 60 per cent of respondents worked as sole practitioners; 24 per cent of respondent arbitrators got their first appointment 2–5 years ago, 16 per cent 6–10 years, 11 per cent 11–15 years, 16 per cent 16–20 years, 18 per cent 21–35 years and 4 per cent over 35 years ago; 28 per cent of respondents had sat as a sole arbitrator or a panel member in 1–5 domestic arbitrations in their career and 14 per cent in over 100; 22 per cent of respondents had sat as a sole arbitrator in an international arbitration in their career, 16 per cent in 11–25 arbitrations, and 10 per cent in over 100; 15 per cent of respondents had sat in over 100 arbitrations as a panel member in an international arbitration in their career, 26 per cent were a tribunal member in 1–5 arbitrations so far, and 26 per cent had no experience as a member of an arbitral panel; the majority of respondents get their appointments through party appointments (38%), followed by roughly equal party and institutional appointment (34%), and institutional appointment (25%); the majority of respondents had appointments to ad hoc arbitrations (40%), 37 per cent had more institutional appointments and 23 per cent reported that they had equal appointments to institutional and ad hoc arbitrations; 87 per cent stated that they had not been appointed to be an arbitral secretary; the majority of arbitrators were a fellow or member of an arbitral institution or a member of the Chartered Institute of Arbitrators (41% and 76% respectively); 27 per cent of respondents took on more than 5 new cases in the last year; the preferred seats were London (37%), Singapore (11%), Hong Kong & New York (5%) reasons for the preference were: that is was the home city, an easy place to get to, or the diversity of the talent pool (a remark particularly associated with New York and Singapore).

*Counsel demographic:* 84 per cent of respondents were a Commonwealth citizen (26% Africa, 24% Asia, 24% Oceania, 18% UK, 6% Canada, 5% Caribbean); 80 per cent worked in the Commonwealth (25% Asia, 20% Africa, 18% Europe, 20% Oceania, 3% Canada); 56 per cent of respondents stated that their clients were predominantly from Commonwealth countries; 37 per cent of respondents were female and 61 per cent male (2% preferred not to say); 63 per cent of respondents were between 25 and 44 years old (33% 25–34 years; 30% 35–44 years); 18 per cent of respondents were law firm partners, 8 per cent barristers (QC or equivalent); 20 per cent practising lawyers in a fused profession jurisdiction, and 11 per cent in-house counsel; 32 per cent of

respondents worked in an organisation with less than 20 lawyers or in an organisation with more than 100 lawyers; the majority of respondents (56%) had more than 10 per cent post-qualification experience; the respondents' practice areas reach from (unsurprisingly) commercial law (71%), international dispute resolution (71%), domestic dispute resolution (45%), energy, environment, natural resources law (34%), foreign investment (28%) to media & entertainment (9%), life sciences (2%), and maritime & shipping, human rights, education, and family law; the client base of the respondents was to 56 per cent individuals, to 61 per cent a mixture of domestic and international large businesses, to 42 per cent domestic SMEs; 48 per cent of respondents had been involved in 1–5 international dispute resolutions in the last year, 21 per cent in 6–10, and 11 per cent in over 20; the value of the claim and the applicable law were the determining factors regarding the respondents' preferred B2B dispute resolution method.



The *arbitral institution survey* was sent directly to 72 international arbitration institutions in the Commonwealth (to all where an address could be obtained) and two arbitral institutions outside the Commonwealth. The survey was open to trade associations – 14 responses were received (3 Oceanian, 1 Caribbean, 2 European, 1 African, 5 Asian arbitral institutions, 2 trade associations); the *judiciary questionnaire* was distributed through the Commonwealth Magistrate and Judges Association; a slightly modified survey was sent to all Commonwealth Chief Justices. Overall 19 members of the judiciary responded (7 European, 1 Caribbean, 4 African, 3 Asian, 3 Oceanian judges and 1 judge who did not identify his/her country affiliation). A *government survey* was sent to all Attorney-General's' offices and was returned by 11 Governments (4 African, 5 Oceania, 1 Asian, 1 European).

- 32 Twenty seven per cent of the interviewees were women; 41 per cent were barristers or independent arbitrators, 47 per cent predominantly senior partners in law firms. The remaining interviewees were from the following sectors: international arbitral institutions, academia, third-party funding provider, law firm associates. Eleven per cent were from the Caribbean and Canada; 26 per cent from Europe; 20 per cent from Africa; 15 per cent from Oceania; and 22 per cent from Asia.
- 33 While the study has sought to adopt an expansive approach to gathering empirical data, it was necessarily limited by both time and resource constraints. Thus, a number of key stakeholders may not have been adequately (or at all) surveyed. For instance, the study does not include survey or interview data from the insurance sector. Where possible, the study has sought to supplement these gaps in data through research and data in existing literature. The study also does not incorporate all aspects of the data points that were gathered in the course of the surveys and interviews. This report instead focuses on key trends that emerge from the empirical data gathered.

# 2

## The Commonwealth – Past and Present

The Commonwealth is a free and voluntary association of independent and equal sovereign states. Historically, the Commonwealth is one of the world's oldest political associations of states,<sup>1</sup> dating as far back as the first half of the twentieth century, which marked the decolonisation of the British Empire.<sup>2</sup> The modern-day Commonwealth is rooted in the post-war political landscape and originated with the signing of the London Declaration on 26 April 1949.<sup>3</sup> The Declaration emphasised the freedom and equality of its members as a 'free association of [...] independent nations' and the shared commitment of its members in their co-operative 'pursuit of peace, liberty and progress'.<sup>4</sup>

Today, the Commonwealth membership has grown from the 8 countries in 1949 to 53 independent countries,<sup>5</sup> with a total population of approximately 2.4 billion people, spanning all continents. Member countries hail from Africa, Asia, the Americas, Europe, and the Pacific.<sup>6</sup> Indeed, repositioning away from its colonial legacy, the Commonwealth has emerged as an association of independent countries bound together by a shared inheritance in language, culture, the rule of law, history, and tradition, by respect for all states and peoples, and by shared values and principles.<sup>7</sup> The Commonwealth is thus often described more as a 'family' and less as a political alliance.<sup>8</sup>

A distinct and remarkable characteristic of the Commonwealth is its diverse membership. The Commonwealth comprises large and small, developed and developing, and landlocked and island economies. Approximately 94 per cent of

the Commonwealth population live in Asia and Africa combined. Of the member countries, 31 are classified as small states – countries with a population size of 1.5 million people or less – and it also includes some of the largest countries in the world.<sup>9</sup> While some economies are rich in natural resources that form the bulk of their exports, others are dependent on merchandise exports, and some on services exports. Apart from trade and economic disparities, the Commonwealth is also linguistically and legally diverse. Although the English language and the common law legal system permeate throughout, numerous countries adopt other languages for official communications or as national languages. Legal systems also diverge. For example, as a result of its mixed colonial history, the official language of Mozambique is Portuguese, and its legal system is based on civil law.<sup>10</sup> Vanuatu's legal system, for example, is based on common law, civil law, and custom. Malay, Chinese, Tamil, Afrikaans, Zulu, and Fijian represent just a few of the other numerous official languages used across the Commonwealth.

Despite the diversity in economic, social, and legal capabilities, the Commonwealth has spearheaded several intergovernmental and co-operative initiatives aimed at greater integration and socio-economic development of member countries, particularly in the area of trade and investment.<sup>11</sup> A recent example is the Commonwealth Connectivity Agenda on Trade and Investment, an agreement by all 53 member states in which they adopted a six-point connectivity agenda to boost trade and investment links across the Commonwealth.<sup>12</sup>

At an organisational level, the Commonwealth Secretariat is instrumental in facilitating the work of the Commonwealth. It is the backbone and the main intergovernmental body of the Commonwealth.<sup>13</sup> The Secretariat promotes the shared values and principles enshrined in the Commonwealth Charter by convening frequent stakeholder governmental meetings and executing priority plans and commitments agreed by the Commonwealth Heads of Governments. In this regard, the Secretariat has provided necessary training and technical support targeted towards the promotion of democracy, rule of law, human rights, good governance, and social and economic development of all member countries.<sup>14</sup>

## 2.1 Trade and Investment within the Commonwealth

The Commonwealth has in recent years enjoyed a tremendous volume of trade in goods and services<sup>15</sup> and FDI<sup>16</sup> involving both member countries and non-member countries. Although the Commonwealth is a voluntary association and not a formal trading bloc, empirical evidence suggests that Commonwealth member countries enjoy a unique trade advantage courtesy of their shared Commonwealth heritage, historical ties, familiar administrative and legal systems, and the use of predominantly one language as a means of communication during trade.<sup>17</sup> An empirical study found that Commonwealth members on average tend to trade about 20 per cent more between themselves (considering goods and services together) and generate 10 per cent more FDI flows between themselves than with non-member countries. It also found that bilateral trade costs between Commonwealth member countries were on average 19 per cent lower, compared with other country pairs.<sup>18</sup> This phenomenon has been termed the 'Commonwealth effect'.<sup>19</sup> Deepening this effect and harnessing its fullest potential by boosting intra-Commonwealth trade remains a top priority for the Commonwealth.<sup>20</sup>

According to the 2018 *Commonwealth Trade Review*, the Commonwealth's global exports of goods and services stood in 2016 at US\$3.1 trillion, accounting for about

14.8 per cent of the total global exports of goods and services.<sup>21</sup> Major drivers of this trade were the United Kingdom, being the largest exporter with combined exports of US\$734 billion in 2016, and Canada, being the second largest exporter at US\$474 billion in 2016, comprising 25 per cent and 16 per cent of the Commonwealth's exports respectively.<sup>22</sup>

In terms of global FDI into the Commonwealth, inflows were estimated at US\$250 billion in 2017, compared to almost US\$430 billion in 2016 (this latter boost was due to three merger and acquisition deals in the UK).<sup>23</sup> As at 2018, the accumulated FDI stock in the Commonwealth was over US\$5 trillion. Overall, FDI inflows into the Commonwealth have been uneven. Between 2010 and 2016, 10 members received more than 90 per cent of the FDI inflows into the Commonwealth. The top five recipients were the UK, Singapore, Canada, Australia, and India. These five countries accounted for nearly 80 per cent of the total FDI flows into the Commonwealth.<sup>24</sup>

Intra-Commonwealth trade has seen a steady rise in recent years. Intra-Commonwealth exports of goods and services stood at US\$560 billion in 2016, constituting approximately 20 per cent of Commonwealth members' total world trade.

In terms of intra-Commonwealth trade in merchandise goods, Asian Commonwealth countries were the major drivers of this trade, accounting for about 52 per cent of total exports. Singapore, Malaysia, and India recorded the largest shares of intra-Commonwealth exports, between 19.4 per cent and 14.2 per cent, followed closely by Australia and the United Kingdom. In terms of imports, the United Kingdom, India, and Singapore were the largest importers from within the Commonwealth.<sup>25</sup> Regarding intra-Commonwealth services trade, 'travel' comprised the largest share of intra-Commonwealth trade in services followed by 'transportation'. Leading exporters in this category include the Solomon Islands, New Zealand, and Fiji.

As for FDI, Commonwealth member countries invest in each other more than they invest in the rest of the world.<sup>26</sup> Cumulative greenfield investment from 2003 to 2017 into the Commonwealth was valued at US\$2.8 trillion in 2017 and generated 7.2 million jobs through 50,000 projects. However, the cumulative intra-Commonwealth greenfield investment from 2003 to 2017 is estimated to have generated 1.4 million jobs through 10,000 projects and has been valued at about US\$700 billion. Therefore, intra-Commonwealth investment comprised about 24 per cent of total greenfield investment.<sup>27</sup>

Overall, economists estimate that there is scope for increased growth and costs savings in Commonwealth trade and investment. They project that intra-Commonwealth trade and investment will soar to US\$1 trillion by 2020, with intra-Commonwealth trade alone to reach US\$700 billion by 2020.<sup>28</sup>

To aid the increase and to sustain intra-Commonwealth trade, member countries should try to remove the trade barrier associated with the uncertainty of international dispute resolution and should attempt to increase the participation of member countries' SMEs in cross-border trade.<sup>29</sup> In particular, for SMEs of developing member countries those measures will support their participation in intra-Commonwealth trade.<sup>30</sup> As outlined in Chapter 1, economists see the participation of SMEs in cross-border trade as the foremost guarantee of stabilising and enhancing a country's GDP. In addition, as also stated in Chapter 1, a strong ADR framework is important to encourage FDI.



The importance of removing the trade barrier associated with the uncertainty of international dispute resolution for Commonwealth SMEs is evidenced by the 2018 *Commonwealth Trade Review* analysis regarding the enforcement of contracts and efficiency of the court system. The Review established that those two factors were relevant governance indicators with potential impact on intra-Commonwealth trade. The Review found that efficient contract enforcement increases trade and investment, reduces trade costs, and boosts business confidence. It also determined that further trade gains could be realised from greater efficiency and that for every 10 per cent reduction in time taken to enforce a contract, there is a corresponding 6.4 per cent increase in intra-Commonwealth trade.<sup>31</sup>

## 2.2 Socio-Economic Benefits of International Commercial Arbitration

A natural consequence of increased cross-border commercial activity – trade in goods and services and FDI – is an increase in the number of potential cross-border disputes. To foster economic development and sustained growth in trade, these international disputes will require effective and efficient dispute resolution mechanisms.

To date, the default dispute resolution mechanism for cross-border disputes has been international litigation.<sup>32</sup> It is generally accepted that international litigation is unsatisfactory and has several uncertainties that greatly increase trading costs and pose significant barriers to trade and FDI.<sup>33</sup> Although these uncertainties are symptomatic of dispute resolution in general, most risks are particular to international litigation. They include the risks of inconsistent or conflicting national laws, lack of requisite experience and expertise, enormous costs and time, parallel proceedings, the lack of confidentiality, and the difficulty of enforceability of judgments.<sup>34</sup> International Arbitration Africa (I-ARB) stated:<sup>35</sup> 'A major factor in the rise of arbitration in Africa is the general reluctance of foreign investors to submit disputes to the local courts of an African country. Some of the major concerns foreign investors have with regards to courts in Africa are: lack of impartiality of judges, corruption, political instability and civil unrest, length of proceedings.' The I-ARB goes on to point out that another major reason to support international arbitration is that investors prefer the 'relative ease of enforcement because of the existing mechanism under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")'.<sup>36</sup>

### Parallel proceedings

Nelson Honey, a company situated in New Zealand supplying honey, and William Jacks, a Singaporean distribution company, had contractual dealings for four years but did not have a formal written contract with each other when two consignments of honey did not meet William Jacks' expectations. William Jacks declined to take delivery of the honey. Nelson Honey sued William Jacks in the Nelson High Court, whereas William Jacks sued Nelson Honey in the High Court in Singapore. Both Courts held that they had jurisdiction to hear the respective case. There is no judgment on the merits in either Court which

suggests that the parties, wary of the costs of two sets of proceedings and that opposing judgments would not end the dispute, settled their differences.

In addition to illustrating that the danger of parallel proceedings is of practical importance, the case is also a good example of what is discussed in Section 3.3.2 below: the failure of many SMEs to formalise their contract negotiations in one written contract document.

*William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd [2015] SGHCR 21 & Nelson Honey & Marketing (NZ) Ltd v William Jacks and Company (Singapore) Ptd Ltd [2015] NZHC 1215*

Some member countries have taken measures to make international litigation suitable for today's global trade. Several member countries, including Singapore,<sup>37</sup> have instituted international commercial courts to give litigants the option of having their disputes adjudicated by a panel of experienced judges comprising specialist commercial judges from the respective country and international judges from both civil law and common law traditions (as is the case in Singapore).<sup>38</sup>

The Hague Convention of 30 June 2005 on Choice of Court Agreements<sup>39</sup> and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters<sup>40</sup> attempt to remedy the uncertain recognition and enforcement of foreign judgments. The Conventions, akin to the European Union's Brussels Regulation,<sup>41</sup> have created a uniform set of core rules to facilitate effective recognition and enforcement of foreign judgments in both civil and commercial matters. The drafters' objective regarding the 2019 Convention, for example, was to create a single global framework that provides for the mutual recognition and enforcement of judgments given by a court of a contracting state in another contracting state, with the primary objective of enhancing access to justice.<sup>42</sup> However, the 2005 Convention has only been signed by the European Union, Denmark, Mexico, Montenegro, the United Kingdom, and Singapore. It remains to be seen whether the 2019 Judgments Convention, which took 17 years to negotiate, will have more success.<sup>43</sup>

A judgment is a sovereign act of a state. A foreign judgment therefore will not be lightly enforced by a court despite the principle of comity.<sup>44</sup> In particular, if no reciprocal arrangement between states exists, the judgment creditor has to file court proceedings to enforce the judgment debt.<sup>45</sup> The foreign judgment creditor might perceive those court proceedings as biased against him or her should the court hold that the judgment could not be enforced. That said, it is possible to enforce a foreign monetary judgment through the common law action on judgment debt, which allows the judgment creditor to apply for summary judgment by producing the foreign judgment as proof of debt owed by the judgment debtor. The court may then issue a summary judgment, unless the application is opposed by the judgment debtor. However, this common law procedure is often slow, expensive, uncertain, and ineffective. In addition to this common law action, enforcement of foreign judgments is also made possible by statute. The statutes currently found in the Commonwealth are now in many cases antiquated and do not reflect current best practice.<sup>46</sup> The Commonwealth Secretariat issued a Model Law on the

Recognition and Enforcement of Foreign Judgments<sup>47</sup> in 2018 which is designed to assist member countries to modernise their approach to the recognition and enforcement of foreign judgments. It contains provisions for the enforcement of both monetary and non-monetary judgments and follows the approach taken by the 2005 and 2019 Hague Conventions.

### The issue of enforcement of judgments

Applicant sought to enforce the judgments, worth around £30 million, obtained in Malaysian courts in 2008 in England and Wales. The Respondent appealed the decision of the High Court that the judgments could be registered, arguing that the registration of the Malaysian judgments should be set aside on three grounds:

First, that there was an appeal pending, alternatively that the Respondents are entitled and intend to appeal, to the Federal Court of Malaysia. Accordingly, the registration of the foreign judgments is barred by section 9(2)(e) of the Administration of Justice Act 1920.

Second, that the Applicant's delay in bringing the application for registration amounts to an abuse of process, alternatively that the Court should exercise discretion and refuse registration by reason of such delay.

Third, that the Applicant was in breach of rule 74.4 of the Civil Procedure Rules 1998 by failing to exhibit a transcript of the judgment of the Court of Appeal of Malaysia.

The Court held that it would be wrong to set aside registration of the judgments on the basis of the proposed appeal:

First, it was not an appeal against the 2008 judgments themselves, but in respect of the declaratory relief granted by the Malaysian Court of Appeal as to the enforceability of such judgments.

Second, the proposed appeal could not be brought as of right, but the Respondents must first obtain permission to appeal significantly out of time.

Third, there was no proper evidence before the Court to indicate that the Respondents would be able to satisfy the Malaysian Federal Court that the appeal raised either a novel question of general principle or a question of importance on which there would be some public advantage in having a decision of the Federal Court.

However, the Court found that to allow enforcement in the English jurisdiction while the Malaysian Federal Court decided to entertain the intended appeal could cause embarrassment. The Court therefore stayed the enforcement of the judgments pending the decision of the Federal Court on the current

applications and, in the event that the Federal Court grants leave to appeal out of time, until the conclusion of such appeal proceedings.

The judgment illustrates the length of proceedings and the uncertainties parties might be faced with when trying to enforce a judgment.

*Tenaga Nasional Berhad v Frazer-Nash Research Limited, Kamkorp Limited*  
[2018] EWHC 2970 (QB)

International commercial mediation<sup>48</sup> or international commercial arbitration provide an alternative to international litigation if the parties so choose. As stated above, international commercial arbitration is today the choice for large businesses and multinationals which find that it provides a remedy to most of the issues that make international litigation unsatisfactory. Arbitration's generally accepted advantages<sup>49</sup> – *neutrality, efficiency, expertise, finality, and enforceability* – provide businesses with the needed certainty and predictability to engage in trade.<sup>50</sup> Indeed, it is for these very reasons that arbitration has been the predominant method of dispute resolution for over two centuries in certain sectors (such as shipping).

	<b>International litigation</b>	<b>International commercial arbitration</b>	<b>International commercial mediation</b>
Jurisdiction	- Party autonomy (by contract) - Domestic civil procedure law - Hague Choice of Court Convention	Party autonomy (by contract)	Party autonomy (by contract)
Applicable Procedural Rules	Domestic civil procedure law	- Rules agreed by the parties (either ad hoc or institutional) - Applicable arbitral legislation	Rules agreed by the parties
Place or seat	At the forum of the court with jurisdiction	Chosen by the parties	None
Venue	At the forum of the court with jurisdiction	Chosen by the parties (and may vary from the seat)	Chosen by the parties
Language	Official language of the court	Chosen by the parties	Chosen by the parties
Taking of evidence	Domestic civil procedure law	- Chosen by the parties or determined by the tribunal - Standard guidelines may be incorporated (e.g. IBA and Prague rules on the taking of evidence)	None

	<b>International litigation</b>	<b>International commercial arbitration</b>	<b>International commercial mediation</b>
Confidentiality	Public	- Chosen by the parties (expressly or through the choice of arbitral rules) - Implied by law	Chosen by the parties
Time	Varies between jurisdictions; as set out in the country reports, the average time of enforcing contracts (proceedings and enforcement) is 636 days in the Commonwealth. <sup>51</sup> Timings may extend where there is a possibility appeal(s)	Varies depending on the nature and scale of the dispute. According to the 2012 World Bank survey arbitral proceedings took 326 days on average (based on global data) <sup>52</sup>	Typically expeditious (1–2 days)
Decision-makers	Judge (designated by the courts / not chosen by the parties)	Arbitrator (generally chosen by the parties; otherwise appointed by appointing authority/ institution)	Mediator (generally chosen by the parties)
Qualification of party representatives	Must have standing before the court (as prescribed in applicable legislation and court rules)	No restriction on qualification of party representatives (save some countries where the arbitrator must be locally qualified)	No restriction on qualification of party representatives
Interim measures	Domestic civil procedure law	- Rules agreed by the parties (either ad hoc or institutional) - Applicable arbitral legislation	None
Choice of law	Private international law of the forum; Court determines applicable law which generally allows parties' choice of a domestic law	Parties generally have an unfettered choice of law (subject to mandatory overriding laws) and may choose between national legal systems and other bodies of law, including lex mercatoria or soft law regimes such as the UNIDROIT principles	Not applicable
Appeals (merits)	Generally available	Subject to the procedural rules chosen by the parties and the applicable arbitral legislation. Judicial review at the enforcement and recognition stage is generally limited (often limited to lack of jurisdiction and procedural irregularities)	None

	International litigation	International commercial arbitration	International commercial mediation
Legal regimes and data on cross-border enforcement	<ul style="list-style-type: none"> <li>- There was no separate information available for all Commonwealth countries (the information was generally aggregated proceedings &amp; enforcement).</li> <li>- Reciprocal treaties on the recognition of foreign judgments</li> <li>- 2005 and 2019 Hague Conventions</li> </ul>	<ul style="list-style-type: none"> <li>- Enforcement proceedings required (557 days on average globally)<sup>53</sup></li> <li>- 1958 New York Convention</li> <li>- 1927 Geneva Convention (less prominent today)</li> </ul>	<ul style="list-style-type: none"> <li>- 2019 Singapore Convention</li> </ul>

The security that international commercial arbitration provides in terms of the fair and enforceable determination of a cross-border dispute will help to reduce the risks and trade barriers posed by the uncertainty of international dispute resolution. It can thereby aid the increased participation of businesses in international trade and FDI.<sup>54</sup>

The following sections discuss the generally perceived socio-economic benefits of international arbitration in greater detail.

### 2.2.1 Enhancing access to justice

International commercial arbitration will enhance access to justice for businesses and SMEs in particular, by capitalising on its generally accepted advantages which remedy the obstacles often encountered in international litigation.

For example, there is as yet no universally (or near universally) accepted regime for the enforcement of national court decisions across jurisdictions. The 2005 and 2019 Hague Conventions on choice of court agreements and on the recognition and enforcement of foreign judgments have been ratified by a limited number of states and other efforts to create similar regimes for the recognition and enforcement regime have not been successful.<sup>55</sup> Current mechanisms on the enforcement of foreign judgments are thus typically bilateral or of limited multilateral effect.<sup>56</sup> Where available, the mechanisms are generally not expeditious. Furthermore, each of these mechanisms may contain different grounds on which foreign judgments can be refused enforcement, giving rise to possible inconsistencies in approaches.

In contrast, the enforcement of foreign arbitral awards is, today, generally subject to a single legal framework under the New York Convention.<sup>57</sup> In broad terms, the Convention requires that courts of contracting states give effect to arbitration agreements and recognise and enforce arbitral awards made in the territory of another contracting state. These obligations are subject to narrow exceptions. At the enforcement stage, the Convention also eliminates the cumbersome requirement of double *exequatur*<sup>58</sup> that existed under its predecessor conventions and reverses the burden of proof from the award-creditor to the award-debtor. At

the time of writing, the New York Convention has 161 signatory states, making it one of the most widely ratified treaties, whether in international commerce or otherwise. Indeed, the cross-border enforcement of arbitration agreements and awards guaranteed by the Convention is among the hallmarks of international arbitration, which finds no parallel in other forms of international dispute resolution. According to the Singapore International Dispute Resolution Academy's (SIDRA) International Dispute Resolution Survey, enforceability is a key reason why arbitration remains the most favoured cross-border dispute resolution mechanism.<sup>59</sup>

To the extent that cross-border disputes may result in litigations in multiple national courts, there is also a considerable risk of increased costs as parties will generally have to 'layer' counsel and engage different lawyers in each relevant jurisdiction. This is usually due to the restrictions placed in many jurisdictions on the practice of law and the ability of foreign counsel to appear before national courts. As there are generally no restrictions on the qualifications of party representatives that may appear before arbitral tribunals, the risk of 'layering' counsel is reduced (albeit that parties may still wish to instruct multiple counsel where multiple laws are involved).

In addition, parties may also suffer from a trust deficit where they are required to litigate before the national courts of a counterparty as there may be a perception (whether correct or not) of bias or at least of some 'home advantage'. This risk is substantially (if not entirely) reduced as parties in international arbitration proceedings can choose a neutral seat and generally have the ability to choose their decision-makers and feel confident that there is a neutral, expert, and unbiased tribunal.

Empirical research and information gathered through the country reports also indicates that in many Commonwealth countries court proceedings are lengthy in comparison with, for example, the most developed Commonwealth countries or the European Union member states<sup>60</sup> and the average international arbitral proceeding. This reduces investors' confidence, as pointed out by the I-ARB regarding Africa as stated above, as well as their willingness to engage in trade, and on SMEs' ability to solve cross-border disputes through the courts. Such issues will often result in cash flow problems for SMEs. International arbitration significantly ameliorates these obstacles through the relatively speedy resolution of disputes.

International commercial arbitration also offers parties the ability to choose the law applicable to their dispute in a manner that is virtually unfettered (save for mandatory overriding laws). As a private dispute resolution mechanism, international arbitration allows the parties to choose national or non-national laws, including *lex mercatoria*, and soft law rules such as the UNIDROIT principles or the Convention on the Contracts for the International Sale of Goods (CISG) directly.<sup>61</sup> The possibility to choose a non-state contract regime offers parties the opportunity to select a contract law regime that has been designed in particular for cross-border business-to-business contracts.<sup>62</sup>

### 2.2.2 Improving trade and attracting FDI for member countries

Empirical studies have found that concerns relating to the uncertainty of international litigation pose a significant trade barrier for SMEs and businesses in general.<sup>63</sup> Key concerns include whether disputes will be efficiently and effectively

resolved through international litigation, particularly where SMEs are unfamiliar with the judicial processes and legal systems of a foreign country.<sup>64</sup> This barrier of uncertainty often deters SMEs from engaging in otherwise viable cross-border trade, which in turn reduces the volume of trade and thus revenue for a state.<sup>65</sup>

Countries can mitigate this barrier to trade by creating and fostering an international arbitration legal regime and environment, consistent with international best practices, that is a more expert, fair, efficient, enforceable, confidential, and neutral way for businesses to manage their dispute resolution risk.<sup>66</sup> International arbitration significantly mitigates the trade barriers triggered by the uncertainty of international dispute resolution as the same procedural mechanism can, in theory, be applied across disputes regardless of the jurisdiction it relates to. Indeed, empirical research suggests that an effective arbitral regime increases FDI within a state.<sup>67</sup>

It should be noted that, if widely adopted, the 2019 Singapore Convention and the 2019 Hague Judgments Convention will make international commercial mediation and cross-border litigation, respectively, more attractive. Their adoption will allow for more straightforward enforcement of mediated settlements and judgments and will provide an alternative to international commercial arbitration. Hence, even though to date international commercial arbitration seems to be the only cross-border dispute resolution regime that mitigates the trade barriers triggered by the uncertainty of international dispute resolution, in the future cross-border mediation and litigation might become alternatives to international commercial arbitration. Member countries should therefore not lose sight of those developments.

### 2.2.3 Developing the domestic legal industry within member jurisdictions

International commercial arbitration can develop the domestic legal industry in two major ways: the transfer of expertise, and revenue generation for lawyers. In terms of the former, the use of international commercial arbitration will enhance capacity-building for the domestic legal community. Parties' freedom in arbitration to choose their arbitrator will expose the domestic legal profession to the thinking of foreign counsel and arbitrators and to the transfer of knowledge and expertise in comparative jurisprudence and associated benefits. Indeed, these positive effects may extend beyond the legal sector if there is a growth of industry-specific arbitration communities (for instance, in shipping, insurance or commodity trading) that involve a wide range of non-lawyer arbitrators and party representatives, such as trade and other industry experts.

Arbitration also provides multiple additional streams of revenue for lawyers. In addition to domestic litigation, lawyers could practise international commercial arbitration globally either in the capacity of counsel (international arbitration has no admission rules), arbitrator, or as legal expert. The government also stands to benefit from these additional streams of revenue through payment of taxes.

More broadly, the use of arbitration and conduct of arbitration-related activities could contribute to the growth of a jurisdiction's economy. Arbitration activity could contribute to a country's economy in several ways including generating income



for arbitrators, counsel and all personnel involved in the arbitration; generating associated tourism income such as hotel, transportation, and meal expenses and raising the political profile and reputation of the jurisdiction on the international scene. A study carried out in Toronto, Canada, estimated the total impact of arbitration on the economy of the City of Toronto to be Can\$256.3 million in 2012 and Can\$273.3 million in 2013.<sup>68</sup>

## 2.3 Contemporary Arbitration Landscape in the Commonwealth

Despite the various socio-economic benefits outlined above, there does not appear to be widespread and consistent use of international arbitration across the Commonwealth. Commercial arbitration practice in the Commonwealth is characterised by a significant disparity across its 53 member countries and 54 jurisdictions.<sup>69</sup> Some member jurisdictions have a fully developed arbitration practice (modern arbitration legislations, strong arbitral institutional practice, signatories to the New York Convention, and arbitration-friendly courts). In some other jurisdictions the arbitration practice is not well developed and the arbitration culture is generally weak. In a few jurisdictions arbitration is almost non-existent as there is no legal framework for international commercial arbitration.<sup>70</sup> These factors raise important concerns about the role of national courts in the arbitral process and their ability to provide judicial support and exert supervisory control over the proceedings, including in relation to providing interim relief and enforcing awards.

Fifty-eight per cent of Commonwealth jurisdictions have an arbitral framework that does not respond adequately to the demands of cross-border trade.<sup>71</sup> A considerable number of Commonwealth jurisdictions still use arbitration statutes modelled on the 1889 or 1950 English Arbitration Act.<sup>72</sup> Thirty per cent of Commonwealth jurisdictions have not acceded to the New York Convention, despite that convention being the single most important international instrument for the practice and development of international commercial arbitration.<sup>73</sup> It provides the framework for the enforcement of arbitration agreements and arbitral awards.<sup>74</sup> Presently 161 countries, including all significant trading partners of the Commonwealth, have acceded to the New York Convention,<sup>75</sup> but 16 Commonwealth jurisdictions have not.<sup>76</sup>

The burgeoning intra-Commonwealth trade and the dynamics of Commonwealth trade in general require a cross-border dispute resolution regime which allows parties to adequately manage their dispute resolution risk. Greater costs savings will certainly be unlocked and barriers to trade reduced where both inter- and extra-Commonwealth trading partners are assured that their disputes will be efficiently handled, and awards easily enforced. As outlined in Chapter 1, at this point international commercial arbitration offers the best cross-border dispute resolution regime. Above all SMEs will benefit from a comprehensive international commercial arbitration framework. SMEs are the engines of economic growth, particularly for developing countries, since SMEs decentralise wealth more equitably compared with larger industries and often provide women in particular with a source of income.<sup>77</sup> Against this backdrop, the following sections outline the key challenges and solutions to accessing international arbitration across the Commonwealth.

## Notes

- 1 Commonwealth Network, 'History of the Commonwealth', available at <http://www.commonwealthofnations.org/commonwealth/history/> (accessed 20 August 2019).
- 2 Ibid.
- 3 The London Declaration 1949, text available at: <http://thecommonwealth.org/sites/default/files/history-items/documents/London%20Declaration%20of%201949.pdf> (accessed 20 August 2019).
- 4 Ibid.
- 5 In addition to the 53 independent members, the Commonwealth also comprises associated and overseas territories which are formally governed by the United Kingdom, Australia or New Zealand or linked to these member countries but are self-governing. The people of these associated states are regarded as part of the Commonwealth family and are eligible to take part in many activities. Some of these associated states include Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Cook Islands, Falkland Islands, and Norfolk Island. See Commonwealth Network, 'Associated & Overseas Territories', available at: <http://www.commonwealthofnations.org/commonwealth/commonwealth-membership/associated-and-overseas-territories/> (accessed 20 August 2019).
- 6 See <http://thecommonwealth.org/member-countries> (accessed 20 August 2019).
- 7 Charter of the Commonwealth 2013.
- 8 Commonwealth Network, 'History of the Commonwealth', available at <http://www.commonwealthofnations.org/commonwealth/history/> (accessed 20 August 2019).
- 9 The Commonwealth, 'Member countries', available at: <http://thecommonwealth.org/member-countries> (accessed 20 August 2019).
- 10 Ibid.
- 11 Declaration on the Commonwealth Connectivity Agenda for Trade and Investment (London, 16–20 April 2018) available at <http://thecommonwealth.org/declaration-commonwealth-connectivity-agenda-trade-and-investment> (accessed 20 August 2019)
- 12 The Commonwealth (2019), 'Declaration on the Commonwealth Connectivity Agenda for Trade and Investment', agreed at the Commonwealth Heads of Government Meeting on 20 April 2018, available at: <https://www.chogm2018.org.uk/sites/default/files/DeclarationontheCommonwealthConnectivityAgendaforTradeandInvestment%20pdf.pdf> (accessed 20 August 2019). The six-point connectivity agenda includes Physical Connectivity, Digital Connectivity, Regulatory Connectivity, Business to Business Connectivity, Supply Side Connectivity and Inclusive and Sustainable Trade. See The Commonwealth (2018), 'Commonwealth adopts forward-looking Connectivity Agenda for Trade and Investment', available at: <http://thecommonwealth.org/media/news/commonwealth-adopts-forward-looking-connectivity-agenda-trade-and-investment> (accessed 12 August 2019).
- 13 The Commonwealth (2017), 'Commonwealth Secretariat Strategic Plan 2017/2018–2020/21', available at: [http://thecommonwealth.org/sites/default/files/inline/CommonwealthSecretariatStrategic\\_Plan\\_17\\_21.pdf](http://thecommonwealth.org/sites/default/files/inline/CommonwealthSecretariatStrategic_Plan_17_21.pdf) (accessed 20 August 2019).
- 14 For example, between 2013 and 2015, the Commonwealth Secretariat arranged seminars and workshops that trained more than 150 people from 35 Commonwealth jurisdictions to draft clear, unambiguous legislation. A 12-week programme delivered by the Commonwealth Secretariat and Ghana School of Law provided training to 37 legislative drafters from 16 Commonwealth countries in Africa. The programme covered topics from grammatical style to translating international treaties into national law. Regional seminars in Belize (January 2013), Trinidad and Tobago (February 2013), Grenada (May 2014), Barbados (November 2014), Maldives (June 2015), and Auckland (June 2014) provided training for drafters in Asia, the Caribbean and the Pacific (<http://thecommonwealth.org/promotion-administration-and-delivery-rule-law>; accessed

- 12 Sept 2019); see also The Commonwealth (2017), *Annual Results Report 2016/17*, Commonwealth Secretariat.
- 15 See The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat, Chapter xviii, available at: [http://thecommonwealth.org/sites/default/files/inline/Strengthening\\_the\\_Commonwealth\\_9781849291798\\_UPDF.pdf](http://thecommonwealth.org/sites/default/files/inline/Strengthening_the_Commonwealth_9781849291798_UPDF.pdf) (accessed 20 August 2019). The combined total exports of goods and services of all Commonwealth members was US\$3.1 trillion in 2016. Trade among Commonwealth members – that is, intra-Commonwealth exports of goods and services – stood at US\$560 billion in 2016. Intra-Commonwealth trade as a proportion of global trade is rising and is now 20 per cent of Commonwealth countries' total trade with the world. This underlines the growing significance of Commonwealth markets for many member countries.
- 16 Intra-Commonwealth greenfield investment comprises one-quarter of global greenfield FDI flows, and members are investing three times more in each other, creating more jobs, than the global average. Intra-Commonwealth greenfield investment is projected to reach almost US\$1 trillion (US\$870 billion) by 2020 (The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat, at xviii).
- 17 See The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Overview.
- 18 See The Commonwealth (2015), *Commonwealth Trade Review 2015: The Commonwealth in the Unfolding Global Trade Landscape – Prospects, Priorities, Perspectives*, Commonwealth Secretariat.
- 19 Ibid.
- 20 See The Commonwealth (2018), 'Commonwealth adopts forward-looking Connectivity Agenda for Trade and Investment', available at: <http://thecommonwealth.org/media/news/commonwealth-adopts-forward-looking-connectivity-agenda-trade-and-investment> (accessed 20 August 2019). See also Kluwer Arbitration Blog (2019), 'A Fresh Look at Arbitration in the Commonwealth: The Opportunity to Shape the Future', T Anaenugwu, available at: <http://arbitrationblog.kluwerarbitration.com/2019/04/26/a-fresh-look-at-arbitration-in-the-commonwealth-the-opportunity-to-shape-the-future/> (accessed 20 August 2019).
- 21 The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat.
- 22 The Commonwealth Asian members accounted for 41.1 per cent of the combined total Commonwealth exports of goods and services in 2016. Among them, Singapore and Malaysia were the lead exporters, jointly accounting for 38 per cent of the total Commonwealth exports of goods and services. South Africa and Nigeria, representing the Commonwealth's members in sub-Saharan Africa (SSA) were lead exporters for that region, contributing around 4 per cent of total Commonwealth exports. In the SSA region, merchandise exports are the preferred export commodity compared to services exports. In 2016, it accounted for 90 per cent and 84 per cent respectively of Nigeria and South Africa's export baskets. See The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat.
- 23 Ibid.
- 24 Ibid.
- 25 Ibid.
- 26 The growth rate in intra-Commonwealth greenfield FDI is greater than the comparable growth rate in greenfield FDI into the Commonwealth from the rest of the world. In 2016, the top sources of intra-Commonwealth greenfield investment were the United Kingdom at 26 per cent, India at 19 per cent, Malaysia at 14 per cent and Singapore at 14

- per cent, whereas the top destinations for greenfield investment were India, Bangladesh, Singapore, Nigeria, and Sri Lanka respectively. See The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat.
- 27 Ibid. Commonwealth least developed countries (LDCs) have also been recipients of intra-Commonwealth FDI flows. Between 2003 and 2016, an average of 13 per cent of intra-Commonwealth FDI has been invested in Commonwealth LDCs, aggregating a total of about US\$81 billion. Eighty-nine per cent of this total is split between five Commonwealth LDCs – Papua New Guinea, Bangladesh, Mozambique, Uganda, Tanzania, and Zambia respectively. The rest is split among other LDCs – Kiribati, Lesotho, Malawi, Rwanda, Sierra Leone, Solomon Islands, the Gambia, Tuvalu, and Vanuatu.
- 28 See The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat.
- 29 See Chapter 1 of this report.
- 30 Hambayi, T (2019), 'Why the Future is African – And Why SMEs Should Lead the Way', *NextBillion Notes*, available at: <https://nextbillion.net/future-african-smes/> (accessed 20 August 2019); National Federation of Self Employed & Small Businesses Limited (2018), 'UK Small Business Statistics – Business Population Estimates for the UK and Regions in 2018', available at: <https://www.fsb.org.uk/media-centre/small-business-statistics> (accessed 20 August 2019).
- 31 The Commonwealth (2018), *Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage – Trade, Technology, Governance*, Commonwealth Secretariat.
- 32 Butler, P & H Campbell (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26, pp 186, 188; compare Briggs, A (2017), 'Choice of forum and submission to jurisdiction', in Basedow, J et al., *Encyclopedia of Private International Law*, Edward Elgar Publishing, Ch 9.
- 33 Butler, P & H Campbell (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26, pp 186, 188.
- 34 See Born G & P Butler (2017), 'Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution'.
- 35 International Arbitration Africa (I-Arb), 'Project Proposal by I-Arb Africa to African Development Bank', Introduction available at: [https://au.int/sites/default/files/documents/32066-doc-proposal\\_afdb\\_-\\_conference\\_on\\_arbitration.pdf](https://au.int/sites/default/files/documents/32066-doc-proposal_afdb_-_conference_on_arbitration.pdf) (accessed 17 August 2019). It should be noted that impartiality of judges, corruption and political instability did not feature prominently in the responses regarding the advantages of international commercial arbitration in any of the surveys conducted.
- 36 International Arbitration Africa (I-Arb), 'Project Proposal by I-Arb Africa to African Development Bank'.
- 37 Singapore International Commercial Court (2019), 'Establishment of the SICC', available at: <https://www.sicc.gov.sg/about-the-sicc> (accessed 17 August 2019).
- 38 Similar courts exist in Doha and Dubai. Website of the Qatar International Court <<https://www.qicdrc.com.qa/>> (accessed 22 August 2019); website of the Dubai International Financial Centre <<https://www.difccourts.ae/>> (accessed 22 August 2019). European countries such as Belgium, the Netherlands, France and Germany have also established specialised international commercial courts. Ioana Knoll-Tudor, 'The European and Singapore International Commercial Courts: Several Movements, a Single Symphony' (6 March 2010).
- 39 Hague Conference on Private International Law (2005), Convention on Choice of Court Agreements, resolved at the HCCH Convention of 30 June 2005, available at: <https://>

- www.hcch.net/en/instruments/conventions/full-text/?cid=98 (accessed 17 August 2019).
- 40 Hague Conference on Private International Law (2019), Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, resolved (but not yet in force) at the HCCH Convention of 2 July 2019, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (accessed 17 August 2019).
- 41 EU Regulation No 1215/2012 (2012), Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> (accessed 17 August 2019).
- 42 Compare HCCH (2019), 'Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters', available at: <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> (accessed 27 August 2019), preamble.
- 43 In fact, early academic discussion on the Judgments Convention has suggested that the Convention might inadvertently trigger a rise in international commercial arbitration (Catherine Green, 'An Unexpected Boon? The Potential for The Judgments Convention To Effectively Promote International Commercial Arbitration?' (Auckland University, Faculty of Law, research paper 2019)).
- 44 Lord Collins et al. (2012), *Dicey, Morris & Collins, The Conflict of Laws*, 15th edn, Vol. I, 14-007 et seq.
- 45 Ibid., 14-013, 14-012, 14-011.
- 46 Commonwealth Secretariat (2018), *Model Law on Recognition and Enforcement of Foreign Judgments*, Commonwealth Secretariat, London, Introduction, available at: [http://thecommonwealth.org/sites/default/files/key\\_reform\\_pdfs/D16227\\_1\\_GPD\\_ROL\\_Model\\_Law\\_Rec\\_Enf\\_Foreign\\_Judgements.pdf](http://thecommonwealth.org/sites/default/files/key_reform_pdfs/D16227_1_GPD_ROL_Model_Law_Rec_Enf_Foreign_Judgements.pdf) (accessed 17 August 2019).
- 47 Ibid.
- 48 Mediation refers to a 'method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably' (United Nations Convention on International Settlement Agreements Resulting from Mediation (2019), Preamble).
- 49 Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2018.
- 50 See Butler, P & Herbert, C (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26.
- 51 Information is based on the World Bank, *Doing Business Report 2019*. There was no information available for Nauru and Tuvalu. The shortest length of proceedings including enforcement was 164 days, the longest 1,445 days. The data does not distinguish between domestic and cases with an international element.
- 52 Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', Abstract.
- 53 Ibid.
- 54 Myburgh, A & J Paniagua (2016), 'Does international commercial arbitration promote Foreign Direct Investment?', *The Journal of Law and Economics*, Vol. 59 No. 3, 597–627.
- 55 Exceptions are the Brussels Regulation and the Trans-Tasman Proceedings Act 2010. Early academic discussion on the Judgments Convention has suggested that the Convention might inadvertently trigger a rise in international commercial arbitration (Catherine Green, 'An Unexpected Boon? The Potential For The Judgments Convention To Effectively Promote International Commercial Arbitration?' (Auckland University, Faculty of Law, research paper, 2019)).

- 56 Hague Conference on Private International Law (2019), Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, resolved (but not yet in force) at the HCCH Convention of 2 July 2019, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (accessed 17 August 2019); Commonwealth Secretariat (2018), Model Law on Recognition and Enforcement of Foreign Judgments, Commonwealth Secretariat, London, Introduction.
- 57 If the parties agreed on a choice of jurisdiction clause the risk of multiple proceedings is reduced but not eliminated. For example, courts of England and Wales might not enforce a choice of jurisdiction clause in the following circumstances:
- where there are related contracts and they each provide for a different court/forum to have jurisdiction. It may be more convenient to have the litigation in the other forum or, if the dispute goes to the heart of the transaction, the jurisdiction clause in the other contract may apply;
  - where, since agreeing the clause, some factor that could not have been foreseen at the time the bargain was struck has occurred;
  - where rules of jurisdiction provide that certain disputes have to be decided by certain courts;
  - the 'battle of forms' type of situation where it is not clear on which terms the parties have contracted;
  - where the clause is non-exclusive and the other party initiates proceedings in another EU state.
- (see Lord Collins et al. (2012), *The Conflict of Laws*, 15th edn, Vol I, 16-099 et seq.; Ashurst (2019), 'Jurisdiction Clauses', available at: <https://www.ashurst.com/en/news-and-insights/legal-updates/jurisdiction-clauses/> (accessed 17 August 2019).) However, the risk of not being able to enforce a judgment is relatively high due to the lack of a widely accepted mechanism akin to the New York Convention for the enforcement of judgments (See Sections 2.3 and 4.1 of this report).
- 58 'Double exequatur' requirement demands that the award becomes 'final and operative' in the country where rendered before enforcement can be granted in another country (compare Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, art. 4); see also Freyer, D & H Gharavi (1998), 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity', 13 *ICSID Review* 101.
- 59 Ministry of Law Singapore (2019), 'Ability to Enforce Outcomes Top Consideration in Choice of Dispute Resolution Mechanism'.
- 60 See World Bank Group (2018), 'Doing Business 2018 – Reforming to Create Jobs', available at: <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full-Report.pdf> (accessed 21 August 2019); and see country reports – on average court proceedings take 636 days in the Commonwealth (that includes the enforcement of the judgment; statistical data is based on the World Bank *Doing Business Report* 2019): in the most efficient jurisdiction a court proceeding takes on average 164 days, in one Commonwealth country the World Bank reports a duration of an average 1,445 days; in the majority of countries court proceedings will take on average between about 400 and 600 days; European Commission (2018), 'The 2018 EU Justice Scoreboard', available at: [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2018\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf) (accessed 21 August 2019), Figure 9.
- 61 Lord Collins et al. (2012), *The Conflict of Laws*, 15th edn, Vol I, 16047 et seq, 16-053; Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 2670–81.
- 62 Blackaby, N et al. (2015), *Redfern and Hunter on International Arbitration*, 6th edn, Oxford University Press, 206.

- 63 See The World Bank & The International Finance Corporation (2012), 'Doing business in a more transparent world', available at: <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB12-FullReport.pdf> (accessed 20 August 2019); European Commission (2011), 'European contract law in business-to-business transactions', available at: [https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl\\_320\\_en.pdf](https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf) (accessed 20 August 2019).
- 64 See Section 1. International Arbitration Africa (I-Arb), 'Project Proposal by I-Arb Africa to African Development Bank', Introduction available at: [https://au.int/sites/default/files/documents/32066-doc-proposal\\_afdb\\_-\\_conference\\_on\\_arbitration.pdf](https://au.int/sites/default/files/documents/32066-doc-proposal_afdb_-_conference_on_arbitration.pdf) (accessed 17 Aug 2019).
- 65 See Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', Abstract, 4.
- 66 See Born, G B & P Butler, 'Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution', para 7 et seq. See Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', 4. Other methods of dispute resolution may be able to offer the same benefit. For instance, the 2019 Singapore Convention and the 2019 Hague Judgments Convention, if widely adopted, will make international commercial mediation and cross-border litigation respectively more attractive. Their adoption will allow for more straightforward enforcement of mediated settlements and judgments and will provide an alternative to international commercial arbitration. However, it is likely that these mechanisms will require time to develop a comprehensive body of jurisprudence and best practices, akin to what international arbitration already provides.
- 67 Myburgh, A & J Paniagua (2016), 'Does international commercial arbitration promote Foreign Direct Investment?', *The Journal of Law and Economics*, Vol. 59 No. 3, 597–627; Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', 4.
- 68 See Charles River Associates (2012), 'Arbitration in Toronto: An Economic Study', available at: <http://www.crai.co.uk/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf> (accessed 10 March 2020). It is noted that 'Arbitration Place' was established in Toronto in 2012, for arbitrators to have offices and as a venue for hearings.
- 69 For the purpose of the study the United Kingdom is represented by England, Wales & Northern Ireland and Scotland.
- 70 See Kluwer Arbitration Blog (2019), 'A Fresh Look at Arbitration in the Commonwealth: The Opportunity to Shape the Future', T Anaenugwu, available at: <http://arbitrationblog.kluwarbitration.com/2019/04/26/a-fresh-look-at-arbitration-in-the-commonwealth-the-opportunity-to-shape-the-future/> (accessed 20 August 2019).
- 71 See country reports and below Section 2.2.3 ; Kluwer Arbitration Blog (2019), 'A Fresh Look at Arbitration in the Commonwealth: The Opportunity to Shape the Future'.
- 72 See country reports: 5 countries' Arbitration Acts are modelled on the 1889 English Arbitration Act, 14 on the 1950 Act, 2 countries do not have any arbitration legislation and a further 5 countries have arbitration legislation based on arbitration acts predating 1977.
- 73 New York Convention, 'Contracting States' <http://www.newyorkconvention.org/countries> (accessed 3 August 2019)
- 74 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), arts II & V.
- 75 New York Convention, 'Contracting States', <http://www.newyorkconvention.org/countries> (accessed 3 August 2019).

- 76 Belize, the Gambia, Grenada, St Lucia, St Kitts & Nevis, Kingdom of Eswatini, Tonga, Kiribati, Malawi, Namibia, Nauru, Samoa, Seychelles, Sierra Leone, Solomon Islands, Tuvalu.
- 77 Sapovadia, V K (2015), 'Analysing Challenges & Opportunities of Ethiopian SMEs: Micro & Macro Economic Drivers', available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2589674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589674) (accessed 3 August 2019); Khurana, K (2018), 'Sustainable Business Strategies for Local Fashion Communities (small and medium scale enterprises) in Ethiopia and Ukraine', *Fashion & Textile Research Journal*, Vol. 20, 22, 25; see regarding FDI: Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', p. 4.





# 3

## Challenges

### 3.1 Effectiveness of the Legislative Framework Applicable to Arbitration

A large majority of the Commonwealth jurisdictions have their legal systems based on, or strongly influenced by, common law.<sup>1</sup> Some jurisdictions have a mixed legal system with influences from both common and civil law,<sup>2</sup> which is usually a heritage of multiple colonisation by different countries,<sup>3</sup> as well as traditional legal roots and custom.<sup>4</sup>

The arbitration legislative framework across the Commonwealth can be categorised into two main subsets: firstly, jurisdictions with arbitration legislation based on the now-repealed England and Wales arbitration statutes, notably the Arbitration Act 1889 (1889 Act) and the Arbitration Act 1950 (1950 Act); and secondly, jurisdictions with an updated arbitration legislation based on the Arbitration Act of England and Wales 1996 (English Arbitration Act 1996)<sup>5</sup> or the UNCITRAL Model Law on International Commercial Arbitration 1985 or even as amended in 2006 (UNCITRAL Model Law).<sup>6</sup> Very few jurisdictions fall outside these two categories.<sup>7</sup>

The arbitration legislative framework of many Commonwealth jurisdictions is influenced by the (now-repealed) 1889 and 1950 Acts.<sup>8</sup> Both Acts formed the basis and served as models for the current arbitration statutes and/or their predecessors of Commonwealth jurisdictions.<sup>9</sup> Arbitration has evolved remarkably since these

Acts. English arbitration legislation has been repealed, amended and updated multiple times.<sup>10</sup> Yet, the arbitration legislative framework of many Commonwealth jurisdictions has not been updated.

The 1889 and 1950 Acts contain provisions that are not in line with modern commercial arbitration best practice. For example, legislation modelled on the 1889 Act uses language which no longer resonates in today's international arbitration discourse. For example, an arbitration agreement is referred to as a 'submission';<sup>11</sup> and arbitrators are referred to as 'umpires' in the arbitral process.<sup>12</sup> The 1889 and 1950 Acts also lack provisions on the power of an arbitral tribunal to determine its jurisdiction and the doctrine of separability,<sup>13</sup> which are cardinal principles of arbitration today and are widely accepted.<sup>14</sup> Further, the Acts are inconsistent with the requirements of the New York Convention, which reflects international best practice and mandates the enforcement of international arbitration agreements and foreign arbitral awards subject only to strictly defined exceptions.<sup>15</sup>

South Africa expressed concerns over the unsuitability of its old legislative regime, based on the 1889 and 1950 Acts, in the following terms:

[The Arbitration Act] was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international arbitrations. By present-day standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (i.e. the principle that the arbitral tribunal's jurisdiction is derived from the parties' agreement to resolve their dispute outside the courts by arbitration). In short, the 1965 Act is widely perceived by those involved in international arbitration as being totally inadequate for this purpose.<sup>16</sup>

Despite its apparent unsuitability, 58 per cent of Commonwealth jurisdictions still have legislation in force which is based on either the 1889 or 1950 Acts.<sup>17</sup> In some jurisdictions, there is even a complete absence of a specifically applicable legislative framework for (international) commercial arbitration.<sup>18</sup>

While arbitral legislation that does not conform to modern best practice does not necessarily lead to a hostile arbitral ecosystem,<sup>19</sup> it does affect the perception of a jurisdiction's arbitration friendliness and suitability for modern arbitration practice. Furthermore, to the extent that legislation that does not conform to best practice and the modern demands on an international arbitration framework permits greater judicial intervention in arbitral proceedings (in contrast to modern arbitral laws that limit the powers of courts), there is, in theory, greater scope for recalcitrant parties to adopt dilatory tactics that unduly delay and disrupt proceedings.<sup>20</sup> In this study these premises could be tested only to a limited extent. Many Commonwealth jurisdictions still show very little or no arbitration activity, limiting the data set on which analysis can be conducted.<sup>21</sup>

The need for a modern international commercial arbitration framework that reflects best practice was also recognised by respondents to the surveys. As one Oceanian Government emphasised in its response to the survey: 'The revision and update of the current legal framework for arbitration by ratifying the New York Convention and by the domestication of a new arbitration bill based on the Model Law or appropriate

model legislation that is appropriate for the country [is one of the most pressing issues regarding international arbitration in the country].’ Similarly as one of the respondent judges noted: ‘Nineteen Commonwealth countries are not members of the New York Convention. This means only 65% of Commonwealth countries can take full advantage of international arbitration. This needs to be a priority led by the Commonwealth.’<sup>22</sup> The need to have a state-of-the-art international commercial arbitration regime, i.e. the need for all Commonwealth jurisdictions to be member states of the New York Convention and to have a modern arbitration law,<sup>23</sup> was an important concern expressed in the responses to the arbitrator, counsel, and academic surveys.<sup>24</sup>

Commonwealth countries that lack the hallmarks of a modern international arbitration framework, i.e. being a member state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and having a modern arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration 2006, are at risk

- a. of losing foreign direct investment (see Sections 2.2.1, 4.1.1) and
- b. of losing trade revenue by not making a modern dispute resolution regime available to their country’s business community (see Section 3.3.2).

### 3.2 Judicial Attitudes to Arbitration

The judiciary in any jurisdiction plays an essential role in creating an environment that encourages and facilitates the use of arbitration. Establishing a complementary and supportive relationship between arbitral tribunals and national courts is indeed one of the most relevant challenges to modern international arbitration practice. On the one hand, international arbitration users often need to rely on national courts to support the arbitration proceedings and guarantee that party autonomy will be respected.<sup>25</sup> On the other hand, an excessively interventionist court risks damaging the users’ trust in arbitration.<sup>26</sup> The balance between these two opposed characteristics has been described as a relationship which ‘swings between forced cohabitation and true partnership’.<sup>27</sup> Modern international arbitration legislation attempts to strike the right balance between these characteristics.<sup>28</sup> However, at the heart of the challenge lies the fact that, to a large extent, much still depends on the judges themselves.

Interviewees, as well as those responding to the arbitrator and counsel questionnaires, highlighted the importance of having a judiciary well aware of their role in relation to international commercial arbitration. Counsel ranked the need for a sympathetic, arbitration educated judiciary embedded within an appropriate legal framework as one of the most pressing issues facing the Commonwealth.<sup>29</sup> Some Commonwealth jurisdictions’ lack of legal infrastructure has been creating enforcement bottlenecks. Arbitration specialists in Singapore identified common problems that range from unfamiliarity with the proper procedures at one end of the spectrum to active judicial interference on the other. That led to ‘awards getting stuck in local court proceedings when, on paper at least, these Commonwealth countries are supposed to be arbitration friendly’.<sup>30</sup> An interviewed third-party funder explained: ‘[y]ou are looking for

certainty of process – that you can be reasonably confident that once you have gotten an award that it won't be subject to strange proceedings at the seat.<sup>31</sup> However, for arbitrators, issues of judicial intervention or comparable standards of review and enforcement between Commonwealth courts were pressing issues facing the Commonwealth, ranked after capacity-building/ education/ awareness building, law reform, costs, and inter-Commonwealth communication.<sup>32</sup> One arbitrator wished to have in their own country 'a court designated to handle arbitral matters only with judges well-versed in arbitration presiding over said court'.<sup>33</sup> It has to be noted that all respondent arbitral institutions perceive their judiciary as arbitration friendly. Counsel, when asked directly whether they perceived their local judiciary as arbitration friendly, answered resoundingly 'yes' (83 per cent).

Respondents to the judiciary questionnaire overwhelmingly (73 per cent) thought that their national legislation provided a suitable framework for the adjudication of arbitration issues before them. Thirty-three per cent of respondent judges had attended judicial training that focused on international arbitration. However, the majority had attended conferences or workshops, or had commented on government policy regarding international arbitration. The majority of the respondent judges saw international commercial arbitration as a useful alternative to cross-border litigation. Fifty-three per cent of the respondent judges could not remember having adjudicated a case involving an international arbitration issue in the past year. They perceived the average success rate of setting aside applications to be nil, and the success rate of applications for recognition and enforcement of awards to be very high.

Arbitration jurisdictions which are considered arbitration friendly and in line with modern arbitration practice have a track record of co-operation between arbitration tribunals and national courts, with intervention in arbitration procedures limited to a minimum.<sup>34</sup> Normally, this is achieved through, firstly, a suitable arbitration legal framework (as discussed in Sections 4.1.1 and 4.1.2)<sup>35</sup> and secondly, national courts that respect the respective roles of international commercial arbitration and international litigation in cross-border commercial dispute resolution.<sup>36</sup>

In this study, the Commonwealth jurisdictions' (i) case law, (ii) statistics and (iii) impressions of practitioners about the relationship between national courts and arbitration tribunals were analysed to gauge judicial attitudes to arbitration. These sources indicate a significant disparity between member jurisdictions in the approach of the judiciary.

For example, as noted in the country report of one European member country,

the attitude of the state courts is not always arbitration friendly. Some features of arbitration in [the country] have influenced the attitude of the state courts, which tend to intervene with the arbitration proceedings. In particular, the provisions on mandatory arbitration in the Arbitration Act have encouraged some judges to view arbitration as an element of the [country's] legal system. For example, [...] the courts interpreted [the pertinent provision] of the Arbitration Act (which provides for stay of court proceedings in the presence of an arbitration agreement) in a way that permitted to continue court proceedings even when courts found that an arbitration agreement existed.<sup>37</sup>

Similarly, the courts in one West African member country have demonstrated a less supportive approach to arbitration. For instance, the courts in that jurisdiction

have consistently interpreted the applicable provisions in the arbitral legislation to hold that the courts are not bound to uphold arbitration agreements because such agreements oust the courts' jurisdiction.<sup>38</sup>

In another Central African member country, arbitration practitioners reported negative impressions about the national courts, regardless of the fact that the applicable legal framework represents a modern approach to international commercial arbitration. Some commentators stated that the 'courts remain plagued with misunderstanding as to enforcement of foreign awards'.<sup>39</sup> This was identified as potentially caused by the lack of familiarity of courts and practitioners with arbitration. According to one arbitration practitioner in the jurisdiction, 'the state and state-owned enterprises did not have any issues with using international arbitration since they had enough money to hire sophisticated law firms. SMEs preferred litigation which led to a denial of the SMEs' access to justice since SMEs cannot afford the costs of litigation.'

The Indian judiciary is a good example of one which created over time a complementary and supportive relationship with international commercial arbitration. Prior to 2011, India, regardless of its modern legal framework for arbitration practice, had a track record of case law which evidenced considerable interference in arbitration procedures and assumption of jurisdiction, despite there being valid arbitral agreements.<sup>40</sup> Indian courts held on several occasions<sup>41</sup> that Part I of the 1996 Indian Arbitration Act, applicable essentially to domestic arbitration proceedings, could be applicable to proceedings outside India.<sup>42</sup> These decisions created a general perception that Indian courts were not arbitration friendly. This was because courts had a broadly permissive basis to annul awards and thus to undermine the finality of awards. The finality of an award, i.e. the lack of ability to appeal the arbitral tribunal's decision, is one of the key advantages of international commercial arbitration.

However, in the last 10 years there has been a considerable shift in the ethos of India's judiciary that, combined with amendments to the Indian arbitration legislation<sup>43</sup> and other governmental efforts to improve international arbitration,<sup>44</sup> has started to positively influence international perception regarding the hostility of the jurisdiction to arbitration. The courts – particularly at the appellate levels – are increasingly adopting less interventionist approaches. This is reflected in the counsel survey results: 93 per cent of Indian respondent counsel perceived the Indian judiciary as supportive of arbitration.<sup>45</sup>

The jurisdictions' courts' decisions are shaped by the experience of members of the judiciary and the local bar. Factors such as legal training, influence of litigation on the local arbitration practice, the level of arbitration experience, and the jurisdictional policy of the jurisdiction have proved relevant to the courts' decisions concerning international commercial arbitration. In the surveys and interviews conducted, arbitrators, and counsels identified capacity-building generally, but the training of judges in particular, among the three most important issues facing the Commonwealth regarding the use of international commercial arbitration.<sup>46</sup>

A judiciary not aware of its obligation regarding international commercial arbitration will discourage foreign direct investment and the use of international commercial arbitration by the country's businesses (see Section 3.3.1 and Section 3.3.2).

### 3.3 Familiarity with Arbitration for Business and Users

According to the Queen Mary School of International Arbitration (QM) studies<sup>47</sup> the preferred method of cross-border commercial dispute resolution for large businesses and multinational corporations is international commercial arbitration (see Chapter 1). Additionally, certain industries in particular take advantage of international commercial arbitration as a dispute resolution mechanism (see Chapter 1). For example, in the commodity trade and under maritime and insurance contracts arbitration is the mandated dispute resolution mechanism (see Chapter 1). By contrast, however, SMEs are often not taking advantage of international commercial arbitration (see Chapter 1).

#### 3.3.1 Multinationals and large businesses

The QM School of International Arbitration has conducted several international arbitration surveys<sup>48</sup> that show the rise in popularity of international commercial arbitration among large businesses and multinationals.<sup>49</sup> In the 2018 QM study 97 per cent of respondents indicated that international arbitration is their preferred method of dispute resolution.<sup>50</sup> This result proves a remarkable increase from the finding in 2006, when 73 per cent of respondents stated that their preferred method is international arbitration.<sup>51</sup>

However, it should be pointed out that the respondents in these surveys appear to be in-house counsel.<sup>52</sup> This suggests that the businesses represented in the QM surveys are large businesses and multinationals. At least 73 per cent of respondents in 2006, 63 per cent of respondents in 2013, and 38 per cent of respondents in 2016 were corporations with over US\$500 million annual turnover.<sup>53</sup> The statistics therefore do not accurately represent SMEs.

#### 3.3.2 Small and medium-sized enterprises

This study sought to remedy the information gap regarding the cross-border dispute risk management by SMEs by providing surveys for businesses. However, while surveys were disseminated to all Chambers of Commerce in the Commonwealth whose addresses could be ascertained, there were few responses from businesses.<sup>54</sup> The responses to the business survey, however (unexpectedly), indicate that Chambers of Commerce do not play an important role in facilitating cross-border trade for SMEs. The responses were supplemented by research undertaken by an international research group that studies the contractual behaviour of SMEs in particular to ascertain how SMEs minimise their dispute resolution risk.<sup>55</sup> Even though the jurisdictions include non-Commonwealth countries the research nevertheless provides an insight in the contractual behaviour and dispute resolution risk management of SMEs. The survey data and the research data suggest that SMEs are generally less familiar with international arbitration as a method of dispute resolution.<sup>56</sup>

The survey results are a clear reminder that there is a difference in contractual behaviour, including dispute resolution behaviour and preference, between SMEs and large businesses. SMEs build their business relationship on trust and honesty. Those qualities are more important than the revenue stream the business partner represents. However, 72 per cent of businesses that responded to the study survey had a single written contract document and 88 per cent acknowledged that they

did think about what could go wrong in a cross-border contractual relationship. Qualitative research undertaken in New Zealand<sup>57</sup> found that only 64 per cent of SMEs have one single contract document and only 35 per cent of Spanish SMEs<sup>58</sup> always had a formal written contract document whereas 50 per cent of Spanish SMEs stated that they have never signed a contract. Fifteen per cent of Spanish SMEs stated that they occasionally sign a contract when either the other party requires it or there are special circumstances that require a formal written contract. Unexpectedly, ancillary contractual documents, such as order forms, bills of lading and letters of credit are only used by 50 per cent of the respondents to the study survey, whereas 90 per cent of Spanish SMEs acknowledged that they use order forms or pro-forma invoices.

Twenty-four per cent of respondents can demand full payment before delivery. Internet banking is the preferred method of payment. Businesses, especially smaller businesses, that responded to the study survey said they had not had a dispute with one of their overseas trading partners (53 per cent). In New Zealand the number is even higher: 78 per cent of businesses had never engaged in a 'formal' dispute resolution process.<sup>59</sup> Negotiation is the preferred method of dispute resolution, i.e. SMEs try to resolve their dispute amicably, according to the business respondents to the study survey,<sup>60</sup> and this finding is corroborated by the New Zealand research. On the other hand, only 25 per cent of Spanish SMEs resort to negotiation if a dispute arises; 40 per cent of Spanish SMEs resort to court proceedings. SMEs interviewed for the New Zealand study had lucky escapes – they were either able to settle their disputes before or during cross-border litigation or they were able to walk away from the business relationship without losing their business and chose to never trade with a business from that country again. Others were wary of making a foray into foreign markets: for over 50 per cent of New Zealand, Spanish, and Austrian<sup>61</sup> SMEs and 88 per cent of survey respondents dispute resolution concerns were an issue when venturing into a foreign market – this corroborates the findings of the World Bank/IMF and European Commission studies.<sup>62</sup> Otherwise they spent considerable time and money on finding out about their prospective foreign business partner.<sup>63</sup>

Small businesses need dispute resolution that is accessible, timely, affordable and, where possible, capable of maintaining business relationships.

Australian Small Business and Family Enterprise Ombudsman; also along the same lines: partner, law firm, London; partner, law firm, Oceania; arbitrator, Caribbean; representative arbitral institution.

### 3.3.3 Business sectors that are oriented towards international commercial arbitration

This study has sought to supplement the research regarding the familiarity of businesses and users with arbitration across the Commonwealth through (i) reports by arbitral institutions; (ii) country reports prepared for this study; and (iii) other international arbitration surveys. These sources indicate that some sectors of the business community have a greater tendency than others to use arbitration to resolve their disputes.

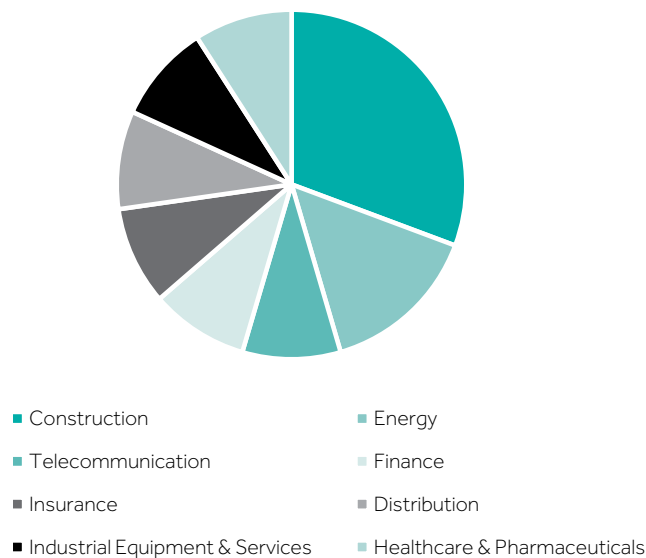


### Reports by arbitral institutions

By looking at the statistical reports of various arbitration institutions, it is possible to gauge which industries are the most common users of institutional arbitration. This study has thus focused on three institutions in particular: the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC). It must be emphasised that the data from these institutions is not representative of practices across jurisdictions or industries. Indeed, there are a large number of arbitral institutions and associations that engage in or administer disputes and it was not feasible to canvass data from across all these sources. Indeed, a large number of arbitrations also take place under ad hoc rules for which there is no statistical data available. The data below does, however, provide a sampling of the trends that emerge across different sectors.

In 2018, there were 841 new arbitrations filed with the ICC.<sup>64</sup> Of the 841 cases, 320 parties came from the Commonwealth, which takes up approximately 14 per cent of the total number of parties in all 2018 filings.<sup>65</sup> The construction industry is the biggest sector and had the greatest number of new cases in 2018, making up around 27 per cent of all the new referred cases in 2018 (up from 23 per cent in 2017).<sup>66</sup> The second biggest sector was the energy sector, with approximately 13 per cent of new cases (down from 19 per cent in 2017).<sup>67</sup> No other industry had more than 8 per cent of new cases. Sectors related to telecoms and specialised technologies, financing and insurance, general trade and distribution, industrial equipment and services, and health/pharmaceuticals and cosmetics shared between 5 and 8 per cent of the new cases.<sup>68</sup> The sector with the most significant change was the finance and insurance industry, which accounted for approximately 20 per cent of new cases in 2016,<sup>69</sup> but fewer than 8 per cent in 2018.<sup>70</sup>

**Figure 3.1 ICC cases by country, 2018**

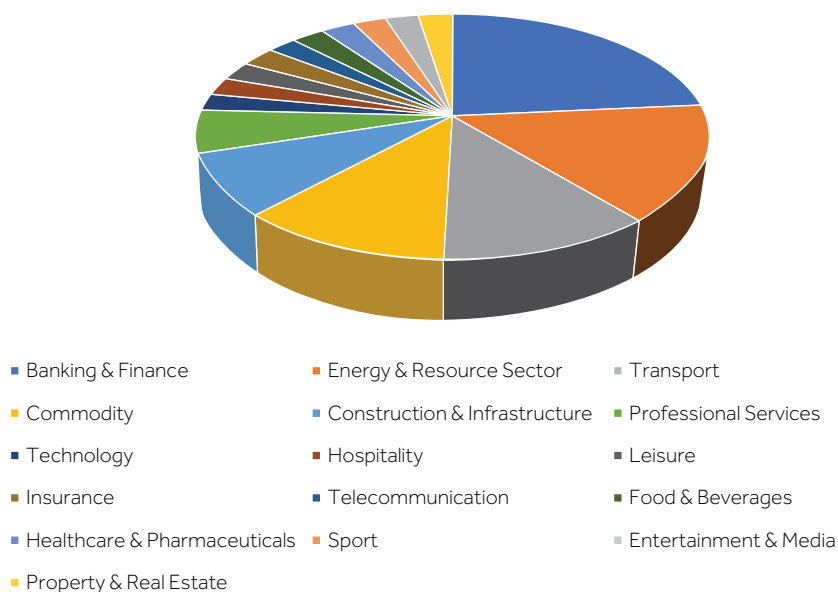


In 2018, 317 new arbitrations were filed with the LCIA.<sup>71</sup> Approximately half of the total number of parties in all 2018 filings were from Commonwealth jurisdictions.<sup>72</sup> Twenty-nine per cent of new cases arose from banking and finance disputes (up from 24 per cent in 2017), followed by the energy and resources sector, representing 19 per cent of cases (down from 24 per cent in 2017).<sup>73</sup> Approximately 14 per cent

of all cases were from the transport and commodities sector (up from 11 per cent in 2017).<sup>74</sup> Construction and infrastructure cases represented 10 per cent of cases (up from 7 per cent in 2017) and professional services took another 7 per cent of cases (down from 10 per cent in 2017).<sup>75</sup> No other sector had a share of more than approximately 3 per cent, which included technology, hospitality and leisure, insurance, telecommunications, food and beverage, healthcare and pharmaceuticals, sport, entertainment and media, and property and real estate.<sup>76</sup>

As for SIAC, in 2018, 402 new arbitrations were referred to SIAC.<sup>77</sup> Fifty-eight per cent of the total number of parties in 2018 were from Commonwealth jurisdictions.<sup>78</sup> Disputes in the trade, commercial, maritime/shipping sectors dominate SIAC's caseload. Around 27 per cent of the new referred cases in 2018 came from the trade sector (down from 31 per cent in 2017),<sup>79</sup> followed by the commercial sector, which is approximately 19 per cent of new cases (down from 22 per cent in 2017).<sup>80</sup> The maritime and shipping industry accounted for 18 per cent of new cases in 2018 (down from 20 per cent in 2017).<sup>81</sup> SIAC saw an increase in the proportion of its arbitration relating to the corporate sector (15 per cent in 2018, up from 14 per cent in 2017) and the construction and engineering sector (11 per cent in 2018, up from 9 per cent in 2017).<sup>82</sup>

**Figure 3.2 LCIA cases by industry, 2018**

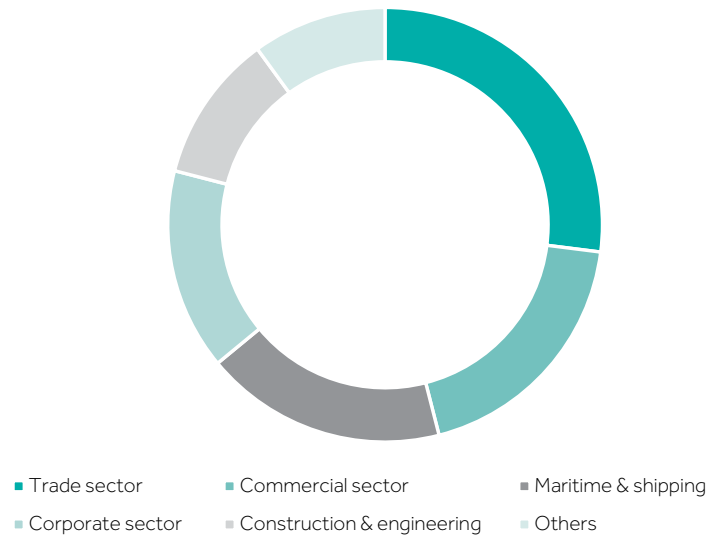


### International arbitration surveys

The QM studies also provide another source of empirical evidence as to the industries that are more familiar with arbitration. However, as mentioned above, the respondent corporations in these surveys are large enterprises. This will likely affect the reliability of the data vis-à-vis SMEs.

- a. 2006 International Arbitration Study – Corporate Attitudes and Practices: The 2006 survey found that the shipping, energy, oil and gas, and insurance sectors employ international arbitration as the most commonly used dispute resolution mechanism.<sup>84</sup> The respondent corporations answered that most

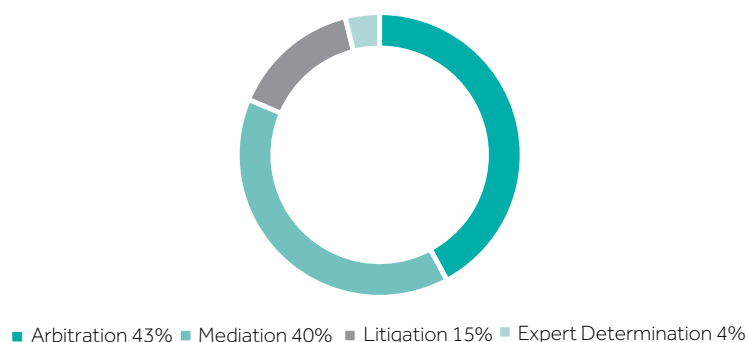
**Figure 3.3 SIAC arbitrations by industry, 2018<sup>83</sup>**



of the disputes arose from commercial transactions (38 per cent), followed by construction disputes (14 per cent), shipping disputes (11 per cent), joint venture agreement disputes (9 per cent), intellectual property disputes (6 per cent) and insurance disputes (5 per cent).<sup>85</sup>

- b. 2013 Corporate Choices in International Arbitration – An Industry Approach: The 2013 QM survey confirmed that arbitration’s popularity depends on the industry concerned. Construction and energy are industries where arbitration is perceived as the preferred mechanism of dispute resolution.<sup>86</sup> In the energy sector, arbitration is the preferred dispute resolution mechanism, followed by litigation, adjudication, and mediation.<sup>87</sup> In the construction sector, arbitration is overwhelmingly cited as the preferred option, ahead of litigation. The financial services sector, on the other hand, responded that they choose court litigation as the preferred method, almost four times more often than arbitration.<sup>88</sup>
- c. 2016 International Dispute Resolution Survey – An insight into resolving Technology, Media and Telecoms Disputes: For technology, media and telecoms (TMT) disputes, there is a strong preference for arbitration over litigation.<sup>89</sup> While in-house dispute resolution policies are likely to adopt mediation over arbitration, the respondents’ personal preferences are for arbitration.<sup>90</sup> Although respondents stated that arbitration was their preferred mechanism, the dispute resolution mechanism that was most used over the last five years was litigation.<sup>91</sup> Eighty-two per cent of respondents expected that there will be a general increase in international arbitration for TMT disputes.<sup>92</sup>

**Figure 3.4 Preferred dispute resolution mechanism for technology, media and telecoms disputes (all respondents)**



- d. 2018 International Arbitration Survey: The Evolution of International Arbitration: With regard to the future of international arbitration, respondents believe that the use of international arbitration is likely to increase in the energy, construction/infrastructure, technology, and banking and finance sectors.<sup>93</sup> Eighty-five per cent of respondents believe that the use of international arbitration is likely to increase even more in the future.<sup>94</sup> Eighty-two per cent of respondents expect the same for construction and infrastructure disputes, and 81 per cent of respondents expect that the technology sector will use international arbitration more in the future.<sup>95</sup>

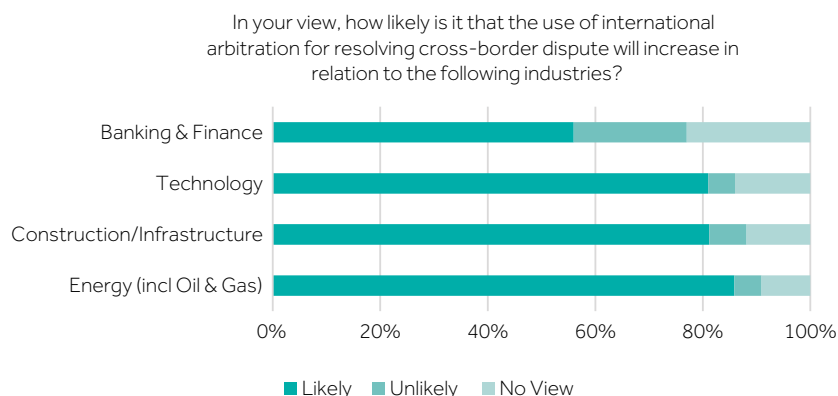
### Country reports

To identify industries that have a strong presence in the Commonwealth's arbitration practice, the study surveyed available statistics and commentaries on each specific Commonwealth country. It should be noted, however, that in 24 out of the 54 Commonwealth jurisdictions no information was available on sectors where arbitration is routinely used.<sup>96</sup> Often, there was no publicly available statistic or commentary pertaining to the use of arbitration at all. The survey results show trends in the following sectors:

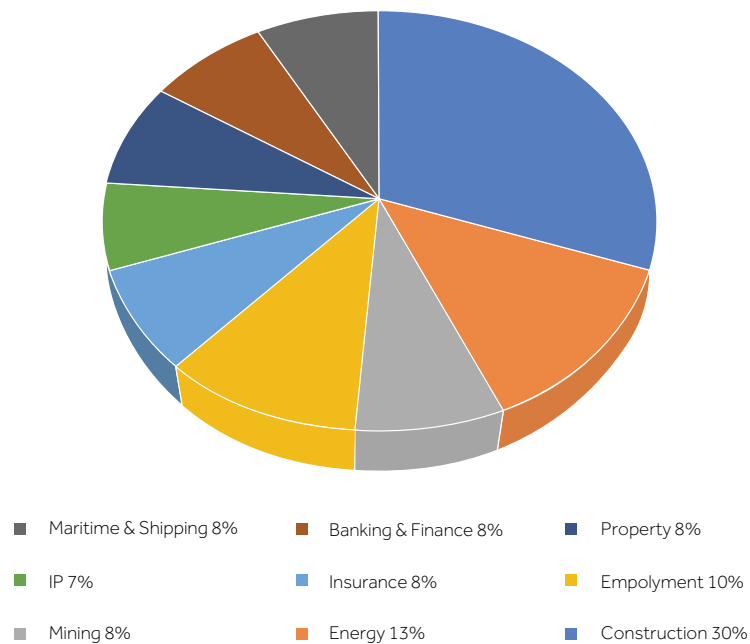
Responses to the judiciary survey confirmed that in the judges' perception of international commercial arbitration it was the preferred cross-border dispute resolution mechanism in construction, mining, financial services, and employment contracts.<sup>97</sup> The respondent counsels' clients insisted on international arbitration clauses predominantly in M & A contracts.<sup>98</sup>

- a. Construction industry: Construction is the industry that appears to favour arbitration in 25 Commonwealth jurisdictions. In Africa, 10 jurisdictions: Botswana,<sup>99</sup> Cameroon,<sup>100</sup> Gambia,<sup>101</sup> Ghana,<sup>102</sup> Kenya,<sup>103</sup> Mozambique,<sup>104</sup> Nigeria,<sup>105</sup> Rwanda,<sup>106</sup> South Africa<sup>107</sup> and Uganda have reported that arbitration is regularly used to resolve complex construction cases.<sup>108</sup> In Asia, six Commonwealth jurisdictions: Bangladesh,<sup>109</sup> Malaysia,<sup>110</sup> India,<sup>111</sup> Singapore,<sup>112</sup> Pakistan<sup>113</sup> and Sri Lanka have been documented as doing the same.<sup>114</sup> In Europe, Malta<sup>115</sup> and the United Kingdom have been noted as adopting a similar practice (although there is an equally strong, if not stronger, emphasis on the use of adjudication to resolve construction disputes in the United Kingdom).<sup>116</sup> In the Caribbean and American region, Trinidad and Tobago,<sup>117</sup> The Bahamas,<sup>118</sup> Jamaica<sup>119</sup> and St Lucia<sup>120</sup> the construction industry is using international

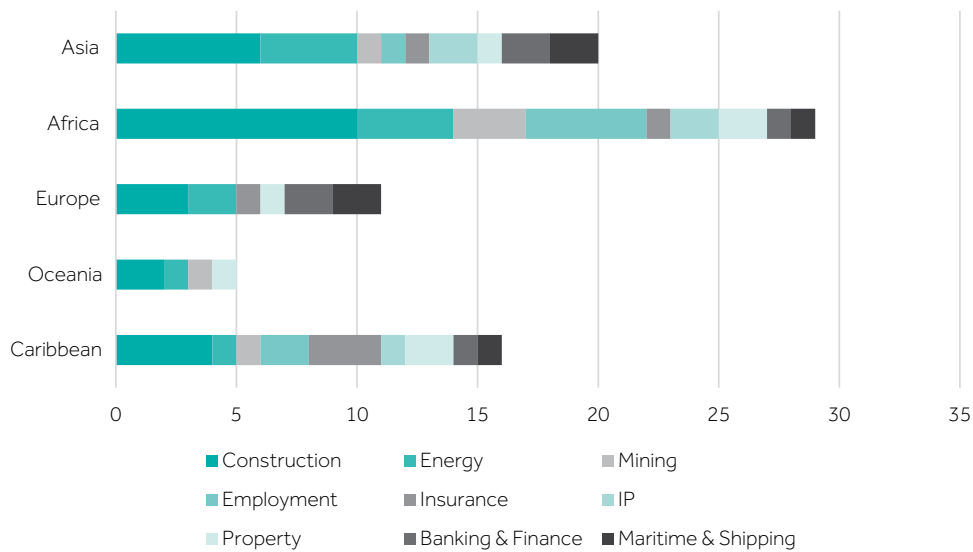
**Figure 3.5 Trends in use of international arbitration, 2018 International Arbitration Survey**



**Figure 3.6 Industries in the Commonwealth in which arbitration is used to resolve disputes**



- commercial arbitration as its preferred dispute resolution mechanism. In the Pacific region, Australia and New Zealand have reported that arbitration is commonly used in construction disputes.<sup>121</sup>
- b. Energy disputes: In 12 jurisdictions including Ghana,<sup>122</sup> Mozambique,<sup>123</sup> Nigeria,<sup>124</sup> Trinidad and Tobago,<sup>125</sup> Australia,<sup>126</sup> Singapore,<sup>127</sup> India,<sup>128</sup> Brunei,<sup>129</sup> Rwanda,<sup>130</sup> Malaysia,<sup>131</sup> Scotland<sup>132</sup> and Malta<sup>133</sup> arbitration is very common for resolving energy disputes.
  - c. Mining industry: Six jurisdictions: Ghana,<sup>134</sup> Rwanda,<sup>135</sup> Mozambique,<sup>136</sup> Pakistan,<sup>137</sup> Papua New Guinea<sup>138</sup> and Jamaica are using mainly arbitration to resolve disputes in the mining sector. For example, Jamaica has been actively involved in arbitral decisions in the mineral sector, especially bauxite.<sup>139</sup>
  - d. Employment disputes: In some countries such as Namibia<sup>140</sup> and the Kingdom of Eswatini,<sup>141</sup> the use of arbitration is still very much limited to employment disputes. Jurisdictions including Botswana,<sup>142</sup> Ghana,<sup>143</sup> Nigeria,<sup>144</sup> Singapore,<sup>145</sup> Trinidad and Tobago,<sup>146</sup> and St Lucia regularly use arbitration for employment disputes as well.<sup>147</sup>
  - e. Insurance disputes: Ghana,<sup>148</sup> St Lucia,<sup>149</sup> Bermuda,<sup>150</sup> The Bahamas,<sup>151</sup> England and Wales and Malaysia have been noted as regularly using arbitration for insurance disputes.<sup>152</sup>
  - f. Intellectual property disputes: In Ghana,<sup>153</sup> Trinidad and Tobago,<sup>154</sup> Uganda,<sup>155</sup> Singapore<sup>156</sup> and Malaysia, arbitration is popular to resolve intellectual property disputes.<sup>157</sup>
  - g. Property disputes: Arbitration is commonly used in property and land disputes in Ghana,<sup>158</sup> Mozambique,<sup>159</sup> Papua New Guinea,<sup>160</sup> Trinidad and Tobago,<sup>161</sup> The Bahamas,<sup>162</sup> Scotland<sup>163</sup> and Malaysia.<sup>164</sup>
  - h. Banking and finance: Trinidad and Tobago,<sup>165</sup> Uganda,<sup>166</sup> Singapore,<sup>167</sup> Malaysia,<sup>168</sup> Malta,<sup>169</sup> and England and Wales have been noted as jurisdictions where arbitration is commonly used in the banking and finance sector.<sup>170</sup>
  - i. Maritime and shipping: Arbitration is routinely used in the maritime and shipping area in Ghana,<sup>171</sup> Singapore,<sup>172</sup> Malta,<sup>173</sup> The Bahamas,<sup>174</sup> England and Wales<sup>175</sup> and Malaysia.<sup>176</sup>

**Figure 3.7 Industries that commonly use arbitration, by region**

### Commodity trade, maritime and insurance contracts

It should also be recognised that a number of trade associations have their own standard form contracts (or terms and conditions) that nominate arbitration as the method of dispute resolution for industry contract disputes.<sup>177</sup> It is one part of ensuring conformity.<sup>178</sup> These standard form contracts typically provide for English law as the governing law of the dispute. There are numerous examples of associations using arbitration in their standard form contracts: the most famous are London's Grain and Feed Trade Association (GAFTA) and the Federation of Oils, Seeds and Fats Associations (FOFSA).<sup>179</sup> Standardised arbitration clauses are also common in insurance and reinsurance contracts.<sup>180</sup> Arbitration is preferred by these associations because of its adaptability, speed, cost efficiency, and simplicity.<sup>181</sup> The arbitral tribunal can be composed of industry experts: individuals actually involved in the particular trade rather than independent lawyers.<sup>182</sup> The trade association procedure may also provide for the exclusion of legal practitioners, with the focus rather being on business experience. The trade association procedure can also cater for string arbitration (based on string contracts, similar to consolidated proceedings).<sup>183</sup> Trade associations also provide for shorter arbitrations (similar to expedited proceedings) and multi-tier arbitrations, incorporating a right of appeal.<sup>184</sup> Reputational risk exists where businesses fail to comply with the assigned process or the final award,<sup>185</sup> as the trade associations allow for 'defaulter provisions' where market participants can be informed if a member fails to carry out or abide by an arbitral award.<sup>186</sup> These trade associations have mastered the uncertainty of dispute resolution for industry participants to ensure stability in trade.

Maritime arbitration encompasses charter-party disputes, claims under bills of lading, disputes concerning the sale and purchase of vessels, shipbuilding disputes, salvage claims, and disputes under related transactions such as international sales of goods.<sup>187</sup> The majority of maritime arbitration cases are held in London (over 1,750 in 2016), followed by Singapore (120 cases in 2016) and Hong Kong (46 cases in 2016), and fewer than 20 maritime arbitrations in Dubai and Paris.<sup>188</sup> Therefore, the majority of maritime arbitrations are conducted under the rules of the London Maritime Arbitrators Association (LMAA) or other ad hoc rules employing similar procedures. Arbitrations under Lloyd's Standard Form of Salvage Agreement

(LOF) are administered by Lloyd's Salvage Arbitration Branch. Salvage arbitration is a specialised sub-sector of maritime arbitration.<sup>189</sup> In general, maritime disputes are resolved in arbitration because the parties have agreed to London arbitration (with or without reference to LMAA terms) in their contract. Many standard printed contracts contain London arbitration clauses, and there are many other forms of London arbitration agreement in circulation in the relevant markets. Four main types of arbitration are conducted under LMAA standard terms: small claims procedure, fast and low-cost arbitration, intermediate claims procedure, and LMAA terms. As with trade association arbitration, maritime arbitration takes account of the special circumstances of the industry and the particular expertise necessary.

International commercial arbitration is the dispute resolution mechanism of choice in cross-border disputes for large businesses and multinationals as well as certain sectors, such as construction, mining, energy, and banking and finance. However, SMEs, which make up at least 97 per cent of all businesses in any given country, generally do not take part in international commercial arbitration.

### 3.4 Familiarity and Expertise in Arbitration within the Legal Profession

International (commercial) arbitration is a relatively new subject in the canon of Commonwealth university teaching. According to the responses to the academic survey, international commercial arbitration has only become part of the teaching syllabus in the last 7 to 15 years, i.e. international commercial arbitration has been taught for less than a generation.<sup>190</sup> It is encouraging that in the respondents' universities, international commercial arbitration is now taught as part of the undergraduate syllabus.<sup>191</sup> At this point, therefore, managing partners, senior government officials, law society presidents, and other decision-makers could only have acquired any knowledge of international arbitration through other means. Seventy-four per cent of respondents to the arbitrator survey, for example, stated that they had taken part in a specialised arbitrator training course. Counsel and arbitrators regularly participate in and/or speak at conferences, workshops, and seminars.<sup>192</sup> These events provide the platform to disseminate knowledge and to provide knowledge transfer opportunities in addition to more widely targeted offers to upskill, for example through the CI Arb. Sixty-one per cent of judges who responded to the judiciary survey had acquired knowledge regarding international arbitration through conferences, judicial training (in particular, in Singapore), a master's degree, or a CI Arb course.

The challenge that jurisdictions currently face in terms of developing their respective international arbitration community is, first, to increase the local legal profession's familiarity with and knowledge of arbitration. As, for example, a New Zealand SME owner observed: 'I wouldn't have a clue where to start [drafting a cross-border contract] and I also probably would fear that if I went to my usual lawyer he wouldn't have a clue either ...'<sup>193</sup>

Secondly, a challenge lies in providing for continuing education for arbitrators and counsel who already practise international arbitration. Many international

arbitration practitioners do not engage in sufficient international arbitration cases to grow their expertise and experience in international arbitration.<sup>194</sup> For example, in the 2018 School of Oriental and African Studies (SOAS) survey of African arbitration practitioners (including lawyers, academics, engineers and in-house counsel), 90 per cent of the interviewees described themselves as arbitration practitioners. However, '82 per cent of respondents did not sit as arbitrator in international arbitration; and 58 per cent did not sit as arbitrator in domestic arbitration', and '59 per cent of respondents did not act as counsel in international arbitration; and 40 per cent of respondents did not act as counsel in domestic arbitration'.<sup>195</sup> Similarly, 62 per cent of respondents to the study's counsel survey stated that they had been involved in less than five international arbitrations as counsel in the past year, even though 84 per cent stated that international arbitration was one of their main practice areas (15 per cent of counsel had been involved in more than 11 arbitrations).<sup>196</sup> Their own perceived need for continuing education in the area of international arbitration is evidenced by 79 per cent of counsel stating that they were interested in further education, which could include completing a specialised Master of Laws or undertaking advocacy or cross-examination training. The majority of respondents were willing to invest more than 20 hours a year in additional training, preferably within their country of residence and at a cost of less than £1,500 a year.<sup>197</sup>

There are a few additional reasons for the lack of expertise in arbitration within the legal profession. In the case of one south Asian state, an interviewee indicated<sup>198</sup> that the legal profession may simply prefer the tried and tested procedures of the local courts, and hence not perceive a need to upskill on international commercial arbitration. Additionally, legal practitioners whose clients are predominantly SMEs might, in large parts of the Commonwealth (as indicated in the SME research), have no obvious business need.<sup>199</sup> While experience and expertise in arbitration can, of course, be acquired through practice, educational programmes can offer a stronger and more comprehensive grounding in the principles of arbitration.

There is an underlying basic lack of understanding regarding international commercial arbitration in the legal profession. Many international arbitration practitioners do not have the required caseload to acquire the necessary expertise regarding international commercial arbitration.

### 3.5 Quality of Arbitrators

The responses to the counsel and arbitral institution questionnaires, and in particular the feedback received in interviews, indicate there is some concern among respondents over the quality of arbitrators.<sup>200</sup> Members of the judiciary in some jurisdictions also indicated concerns over the quality of arbitrators as a challenge to the development of international arbitration in their jurisdictions.

As one interviewee with experience working at a top international arbitration practice stated: 'There are some fantastic arbitration specialists around; however, there is a lot of B quality and a lot of politics.' Another interviewee with a successful arbitration practice commented: 'It seems like that in international arbitration self-promotion is as much a necessary skill as the law.' Outside the context of this



study, the CIArb has stressed the importance of quality arbitrators: 'An available pool of qualified arbitrators is necessary for the smooth functioning of arbitrations; however, similarly a demand for arbitration is necessary to support professionals.'<sup>201</sup>

It could not be ascertained from the empirical data gathered for this study which sectors are affected in particular and what the factors leading to the quality concerns are. The concern regarding the arbitrator quality raises an important point about the long-term use of international arbitration. As with any adjudicatory system, the efficacy and legitimacy of international arbitration ultimately depends on the quality of the decision-making. If parties are not satisfied with the quality of their arbitrators, it follows that they will be unlikely to continue using arbitration to resolve their disputes. As some survey respondents, in particular from the judiciary, indicated, ineffective arbitrators can also hinder the overall growth and development of arbitration in certain jurisdictions where the field is, as yet, in the early stages.

One reason for the lack of quality could be a lack of understanding and familiarity with international arbitration or the substantive principles applicable to the dispute, including instances where arbitrators lack specialised sectoral knowledge. As the Dispute Resolution Centre identified in its survey response for this study, one of the challenges facing the Commonwealth was 'ensuring parties can access arbitrators who are genuine subject matter experts, i.e. technical arbitrators, applying consistent international standards and principles of natural justice and ensuring that arbitrators understand local law and procedures.'<sup>202</sup> In some instances, there is also a risk that arbitrators simply fail to dedicate sufficient time and resources to effectively managing their cases.

The quality of arbitrators was a concern expressed especially in interviews but also by respondents in the study surveys.

### 3.6 Diversity Among Arbitrators and Counsel

Diversity, both gender and ethnic/geographical, has been repeatedly identified as a concern in the literature and by the international arbitration community.<sup>203</sup> Responses in interviews conducted for this study also voiced increasing concern over a lack of professional diversity vis-à-vis the participation of non-lawyers as party representatives and arbitrators.<sup>204</sup> The lack of diversity is closely linked to the issue of expertise and familiarity, i.e. 'we do not have enough diverse people suited for the job'.<sup>205</sup> To paraphrase the words of two prominent arbitration practitioners, 'although disputes arise between Asians and Africans, South Americans and Europeans, etc., the counsel leading the legal teams as well as the tribunals deciding those cases remain overwhelmingly white, Caucasian, and male' (with some high-profile exceptions).<sup>206</sup> Importantly, an Oceanian arbitrator stressed: 'You cannot expect international arbitration to blossom without being attuned to custom and local rules.'<sup>207</sup>

A survey was published in 2017, with respondents based in Asia, Australasia, the Middle East, North, East, and West Africa, North America, Latin America and the Caribbean, and Europe. It indicated that while 84 per cent of respondents thought there were too many male arbitrators, and 80 per cent thought there were too

many white arbitrators, only 12 per cent thought gender was a 'very important' or 'important' factor to consider when appointing tribunals. The number was slightly higher (26 per cent) for ethnic/national identity.<sup>208</sup> This shows that while lack of diversity was identified as a problem, it did not translate into solutions regarding the appointment.

Similarly, the 2018 SOAS Arbitration in Africa Survey of 2018 highlighted the need for increasing diversity on tribunals and within the tribunal secretary pool, especially in the domestic sphere, in order to increase the number of experienced arbitrators from the region – which had been identified as a concern.<sup>209</sup>

A study conducted on arbitration in Australia and the United Kingdom<sup>210</sup> similarly concluded that the lack of gender diversity mirrored a similar trend in legal practice more generally. In Australia, while the situation had drastically improved at the bottom of the ladder (with 62.3 per cent of law graduates in Australia being female), the top remained predominantly male (with only 25 per cent of partners and 3.4 per cent of managing partners at Australian law firms being female). The situation was only slightly better with senior counsel in Australia (10.8 per cent female). Statistics from the UK demonstrated similar trends. While 61.5 per cent of the newly admitted solicitors in the UK were female, only 29 per cent of the partners in large UK law firms were female. The LCIA arbitrator statistics almost mirrored these numbers, with only 23 per cent of appointed arbitrators being female.<sup>211</sup> The study also acknowledged a lack of ethnic and regional diversity (and a lack of relevant statistics and information).

Interestingly, diversity was not identified as a pressing concern by respondents who completed the counsel survey for this study.<sup>212</sup> The survey asked participants to identify the three main concerns affecting international arbitration. Of the respondent counsel, only 4 per cent thought that diversity was an issue that needed to be resolved on a national level and 5 per cent of respondents believed that it needed to be resolved within the Commonwealth. Of the female respondents (who represented 37 per cent of the total counsel respondent pool), only 5 per cent identified diversity as a major concern in the Commonwealth.<sup>213</sup> At the international level diversity was perceived as a more important issue, with 8 per cent of counsel listing it as one of the three most pressing issues. However, for female counsel, diversity was the most pressing issue on the global stage (25 per cent).<sup>214</sup>

African respondent counsel identified awareness-raising (16 per cent), more arbitration centres (9 per cent) and training (9 per cent), followed by costs (7 per cent) as the most pressing issues concerning international arbitration in their respective countries. Diversity, including more diverse arbitrators, was only identified by 4 per cent of respondents as a pressing issue in their respective countries. Regarding the Commonwealth, costs and training, as well as capacity-building (10 per cent each respectively) were thought to be more pressing than co-operation among Commonwealth countries and allowing African Commonwealth lawyers to take part in international (Commonwealth) arbitration (diversity) (8 per cent respectively). Diversity was also not the most pressing concern on the international plane. Costs were, for 16 per cent of African counsel, the most pressing international arbitration

issue globally. Enforceability and diversity-related issues, such as 'an open space for African lawyers with a passion for international arbitration' were second, with 8 per cent of respondents identifying these as pressing issues globally.

Arbitrators identified the diversity and widening of the arbitrator pool third equal with costs as the most pressing issue for the Commonwealth and third equal with the issue of interference of the judiciary in arbitral proceedings globally. Hence, for arbitrators themselves, a diverse pool, including gender, geographical representation but also subject matter expertise, was more important than for counsel. This result is particularly noteworthy since the respondents to the arbitrator survey were predominantly male (80 per cent) and the majority were between 65 and 74 years old.<sup>215</sup>

A lack of diverse 'quality' arbitrators is problematic since a tribunal that does not reflect the geographical and cultural make-up of the parties is arguably in danger of being less likely and able to give due weight to those geographical or cultural factors that might have informed the parties' dealings.

I think the issue of cultural difference is under-explored in the context of cross-border dispute resolution. And I think we miss some of the national characteristics hard code when we start to think about how tribunals interact with each other, or how they react to different case presentation styles, or how they respond to witnesses and the way witnesses respond to the dynamic of a hearing room and the position of arbitrations within that \dots and for the benefit of the Commonwealth users [of international commercial arbitration] we need to construct a process that recognises and brings into account the differing cultural backdrops of the parties.

Partner, law firm, UK

There was also general consensus that a diverse tribunal improves the overall quality of the decision-making process.<sup>216</sup> This is evidenced by the overall responses to the arbitrator survey that identified a more diverse and wider pool of arbitrators as one of the most important issues facing the Commonwealth and the international arbitration community. There was a line of response in the surveys conducted for this study that linked the lack of diversity to the dominance of a few international arbitration hubs.<sup>217</sup>

For tribunals to be able to adequately reflect and to give due account of the parties' geographical and/or cultural affiliation, a pool of qualified arbitrators representing all parts of the Commonwealth and consisting of all genders must be available.

### 3.7 Time and Cost Considerations in Arbitration

Arbitration is often seen as more efficient than litigation as parties are given more flexibility to decide how they wish to resolve their dispute. It is unusual for there to be unlimited document production and there are fewer opportunities for disruptive applications to be made. The arbitral tribunal plays a key role in ensuring arbitral efficiency. The majority of respondents to the arbitrator and counsel survey stated that, on average, arbitral proceedings were concluded within one to two years.<sup>218</sup> These responses are in line with the World Bank findings.<sup>219</sup> The LCIA 2013–2016 Costs and Duration Report corroborates the study's survey findings, noting that the median duration of an arbitration under the LCIA rules was 16 months and that '70% of cases with an amount in dispute under US\$1 million [were] completed within 12 months'.<sup>220</sup>

However, many respondents noted that institutional and/or high-value arbitration may not be as time- or cost-efficient as is perhaps being claimed.<sup>221</sup> As interviewed Singaporean arbitration practitioners explained: 'overbooking of a select few arbitrators who are notoriously overbooked [are the reason for delay]. Because these individuals are very highly sought after, and they accept more appointments than is necessarily expedient, their focus on individual cases correspondingly decreases and schedules are more likely to clash.' Interviewees of the 2015 QM International Arbitration Survey on 'Improvements and Innovations in International Arbitration' responded that "'Costs" was by far the most complained of characteristic, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".'

The responses to the surveys conducted as part of this study also indicate that, in particular, costs are pressing issues facing international arbitration globally and in the Commonwealth. For 10 per cent of the respondents, arbitrators' costs, along with issues related to diversity, were the most pressing issues in the Commonwealth. Twenty-four per cent of arbitrators identified capacity-building in all its forms (including education and awareness) as one of the pressing issues, followed by the need for law reform (17 per cent). Only 4 per cent of arbitrators, however, found that time was a pressing issue in the Commonwealth.<sup>222</sup> Four per cent of counsel identified costs as a pressing international arbitration issue in their respective country, 8 per cent regarding the Commonwealth as a whole (capacity-building and a functioning institution were of greater concern than costs), and 13 per cent globally. Time/delay on the other hand was not identified as a comparatively major issue by respondents in either the arbitrator or the counsel surveys.

Some Commonwealth jurisdictions have also recognised the potential for delays and high costs involved in arbitration proceedings. The India Law Commission, for instance, recognised that arbitration 'has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative'.<sup>223</sup> Discussion on remedying these issues has centred on the role the arbitral tribunal can play in ensuring more efficient proceedings.

These concerns cannot be understated. Delay and high costs in arbitration, apart from raising practical concerns, also have implications for the right of access to arbitration,<sup>224</sup> which in certain circumstances can amount to a denial of access to justice.<sup>225</sup> A process that is prohibitively expensive for a party to resolve a dispute impairs the party's rights to justice. A way to remedy this problem is the provision

of legal aid. All Commonwealth jurisdictions provide some form of legal assistance. However, it is generally unclear whether legal assistance extends to businesses and/or alternative dispute resolution mechanisms.<sup>226</sup> Third-party funding, contingency fee agreements<sup>227</sup> and before and after the event legal cost insurance<sup>228</sup> are other options open to businesses to fund an international commercial arbitration claim.<sup>229</sup> As far as information could be ascertained, none of these funding possibilities was available throughout the Commonwealth.<sup>230</sup>

While time and costs raise valid concerns, it is worth emphasising that, on average, arbitration proceedings still tend to be perceived as more cost-efficient than litigation, especially in jurisdictions where the judicial system is overloaded. As discussed above, arbitration can, in theory, be more attractive for cross-border disputes because it avoids the need to (i) hire several lawyers qualified in different jurisdictions to act in different courts; (ii) conduct several proceedings in different jurisdictions; (iii) engage in an appeal since the possibilities to appeal an arbitral award are limited; and (iv) engage in extensive enforcement proceedings under different national enforcement regimes.

Furthermore, the time and costs criticisms above do not extend to all forms of arbitration. Indeed, some types of arbitrations are well known for their efficient resolution of disputes. For example, the London Maritime Arbitrators Association (LMAA) and the Grain and Feed Trade Association (GAFTA) arbitrations are often commended for their efficiency by users. Under the LMAA Terms 2017, '[t]he awards should normally be available within not more than six weeks from the close of proceedings. In many cases, and in particular where the matter is one of urgency, the interval should be substantially shorter'. Further, hearings of up to 2 days should be scheduled within 3 months; hearings of 3–5 days should be scheduled within 6 months; and hearings for 6–10 days should be scheduled within 10 months. As for GAFTA arbitrations: '[t]he average time taken between 2017–2018 from the date of the timetable begin set to the date of issue was 7 months for a first-tier award and 11 months for an appeal.' Interviews held with arbitrators that predominantly arbitrated commodity disputes or disputes under an association confirmed that the majority of arbitrations were done within six months.<sup>231</sup> It should be noted that proceedings in commodity arbitration are generally conducted on the papers only. It also needs to be mentioned that under many of the commodity association rules, an appeal is possible which prolongs the timeline and adds to the costs.<sup>232</sup>

The rising costs of international commercial arbitration has been highlighted by this study's stakeholder surveys, interviews, other international commercial arbitration surveys and the literature as one of the first and foremost challenges to international commercial arbitration in the Commonwealth.

### 3.8 Regulatory Considerations

A jurisdiction's regulatory design, even if not directly related to international commercial arbitration, can nevertheless have an undesirable impact on its and the Commonwealth's international commercial arbitration framework.

An example is the parties' right to select their legal representatives, which is of fundamental significance. The quality of a party's representatives can have substantial consequences for the party's ability to present its case, for the outcome of the arbitral process and for the parties' perceptions regarding the fairness and legitimacy of the process.<sup>233</sup>

A factor influencing the parties' selection of an arbitral seat is the ease of instructing international counsel. In most international arbitrations, at least one party to the dispute is from somewhere other than the arbitral seat. In many arbitrations, no party is from the arbitral seat. Parties may have established relationships with particular sets of counsel in their local jurisdiction or through previous representations in related or unrelated matters. The ease of being able to instruct international counsel is thus of particular importance to parties foreign to the arbitral seat.

An example of the liberalisation of the restrictions on instructing international counsel is Singapore. In 1988, the Singapore High Court excluded a well-respected New York law firm from representing a client in an international arbitration seated in Singapore in *Turner (East Asia) Pte Ltd v Builders Federal (HK) Ltd, Josef Gartner & Co.*<sup>234</sup> The decision was extensively criticised internationally.<sup>235</sup> The Singapore Parliament subsequently amended the relevant legislation to permit foreign lawyers to represent parties in international arbitrations seated in Singapore. At first, the amended legislation required the local Singapore counsel to be retained, along with foreign counsel, in matters involving Singaporean law.<sup>236</sup> This requirement of retaining local counsel was subsequently dropped, such that Singapore now respects the parties' full freedom to select their representatives in locally seated international arbitrations.<sup>237</sup> The success of the Singaporean approach is echoed by an arbitrator's response to the survey question regarding his or her preferred seat:

Most arbitration-friendly seat – hardly any visa/work permit requirements for foreign arbitrators to enter and do arbitrations, fees of foreign arbitrators are tax free, parties are free to engage counsel of whatever nationality/residence of their choice, many foreign counsel having offices in Singapore and being able to enter Singapore with ease, as confirmed by the wide variety of different nationalities of counsel appearing in international arbitration cases almost on a daily basis.

Respondent, arbitrator survey

Restrictions limiting the international parties' ability to instruct foreign counsel in an arbitration deter such parties from choosing the jurisdiction as an arbitral seat in the first place. The application of visa requirements, as well as taxation regulations, may also effectively result in the exclusion of foreign counsel from representation in locally seated arbitrations.<sup>238</sup> The survey results suggest that the additional resource strain to obtain visa and taxation approvals is seen by some arbitrators and counsel as one of the pressing issues facing the Commonwealth and is an issue globally. (In addition, arbitration specialists have alluded to the prohibitive nature of visa and taxation approvals in the interviews conducted for this study.<sup>239</sup>) However, 76 per cent of the respondent arbitrators reported that they do not encounter any prohibiting regulatory measures.

Regulatory chill (restrictions placed on the ability of foreign counsel to appear in arbitrations, visa and tax requirements) is limiting the establishment of a vibrant and expert international commercial arbitration community in the Commonwealth.

### 3.9 Use of Technology

The use of technology in international commercial arbitration has the potential to reduce a substantial number of inefficiencies within the process, while facilitating greater access to dispute resolution services in a more cost-effective way. All eight stakeholder surveys asked about the use of technology in aid of dispute resolution, e.g. the use of email, video conferencing, the availability of hearing room technology (e.g. multimedia presentation facilities, real-time electronic transcripts), the use of a virtual hearing rooms, the use of artificial intelligence, and e-filing. Based on the survey results, it appears that technology is to some degree prevalent in both litigation and arbitration. As regards litigation, the survey of judges indicates that email is recognised as a means of communication in all courts of the respondent judges and is used by half of the courts to file documents. One third of the courts are equipped with video conferencing technology that allows parties and experts to present multimedia presentations (although a majority of respondent judges also reported that in the past year the video conferencing facilities offered had not been used). Sixty-three per cent of all respondent judges stated that their civil procedure codes (or equivalent) allow parties to introduce evidence based on artificial intelligence. In addition, 31 per cent of the judges indicated that artificial intelligence (e.g. data analytics, technology assisted document review) had been used 1–5 times in their court in the last year. In sum, while the use of technology is formally recognised and permitted in a range of ways in the litigation context, it appears to be underused by parties.

The use of technology in arbitration fares slightly better than in litigation. Over half of the respondent arbitrators used video conferencing and hearing room technology 1–5 times in the past year. However, virtual hearing rooms are a rarity. In addition, artificial intelligence appears less prevalent in international commercial arbitration than in litigation. The use of video conferencing, hearing room technology, and virtual hearing rooms by counsel mirrors that of arbitrators.<sup>240</sup> Respondent arbitral institutions that have hearing premises all offer video conferencing and hearing room technology. The most recently inaugurated arbitral institutions that responded to the survey also possess virtual hearing room technology. There does, however, appear to be greater use of artificial intelligence by counsel in case management: the majority of counsel use cloud-based storage and 27 per cent report having used artificial intelligence to aid their cases in the past year.

The use of technology does not come without challenges: (i) arguably most importantly, the meaningful use of technology assumes technological literacy by the stakeholders;<sup>241</sup> (ii) stakeholders may also have insufficient access to the required technology; and (iii) depending on the sophistication and vulnerability of the technology available, there could be concerns in securing the confidentiality and privacy of communications.

Technology is, however, a key part of the growth of dispute resolution both domestically and internationally.<sup>242</sup> Indeed, reflective of the future, students see

technology as very much part of their working life and international commercial arbitration: 26 per cent stated that technology will have a crucial impact on international commercial arbitration, and 38 per cent saw it as having a role in aiding arbitral proceedings. However, 14 per cent believed that it would destroy the 'charm' of international arbitration.<sup>243</sup> Technology also has the potential to aid access to international commercial arbitration and to reduce international arbitration's carbon footprint.<sup>244</sup> Alexander Fessas, Secretary-General of the ICC Court of Arbitration, identified four stages of an arbitration proceeding where technology can be useful: communications, storage of documents, research tools, and hearing logistics.<sup>245</sup> It is therefore essential that member jurisdictions identify ways (as discussed below) to harness the benefits of technology in providing more effective dispute resolution systems, whether in arbitration or litigation.<sup>246</sup>

Stakeholders in Commonwealth countries to date are not using available technology to its full potential to aid the international commercial arbitration process.

### 3.10 Impact of Arbitration on the Development of the Law

While not an issue that directly influences the use of international arbitration across the Commonwealth, it is worth highlighting that there is some debate among the judiciary, academics, and policy-makers in relation to whether the use of international commercial arbitration may have an effect on the development of the law.<sup>247</sup> To the extent that it may influence the broader legal ecosystem within which arbitration exists, this is an issue worth considering.

The confidential nature of arbitration awards has the potential to deprive the judiciary, policy-makers, and academics of valuable insights regarding the practical application and interpretation of the law in question.<sup>248</sup> This may, in turn, delay desirable law reform. Since issues that may require policy intervention escape the usual discourse of commentary on jurisprudence or discussion in Law Society or Bar Council committees, policy-makers might not be made aware of the need of reform, or may become aware only after some time. In addition, the legal profession and the courts might lose valuable precedent. The importance of binding precedents and authoritative interpretation of contractual clauses is heightened in industries which use standard form contracts.<sup>249</sup>

However, the broader public interest in developing the law must be balanced against the interests of the parties in disputes. Parties will undoubtedly argue that the resolution of disputes between the parties, through the court or arbitration or mediation, should be the priority before considerations such as the impact on the development of the law.<sup>250</sup>

While there are arguments on both sides, as a practical matter there are solutions that alleviate any risk of arbitration hindering the law by reducing the number of cases decided by the courts. These solutions are discussed in Chapter 4.



## Notes

- 1 Virtually all Commonwealth countries have a legal background grounded in common law principles. See Section II A of the country reports.
- 2 See, for instance, Cameroon, Mauritius, Mozambique, Rwanda, South Africa, and Sri Lanka.
- 3 For example, that is the case of Mozambique and Sri Lanka.
- 4 Rwanda, for instance, recovered and incorporated some features of its native tribal dispute resolution methods into the formal legal order of the country (Section II A country report). Article 75(2) of the Solomon Islands Constitution (1978) provides Parliament with the mandate to have 'particular regard to the customs, values and aspirations of the people of Solomon Islands.'
- 5 For example, Bangladesh and Scotland have relied regarding certain provisions on the 1996 Act.
- 6 UNCITRAL Model Law on International Commercial Arbitration, see [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration) (accessed 2 Sept 2019).
- 7 Tonga and Vanuatu do not have arbitration legislation and are not signatories of the New York Convention. The Chief Justice of Tonga has stated that there is no international commercial arbitration activity in Tonga [response to the Chief Justice's survey]. No information is available as to the international arbitration practice in Vanuatu. The Seychelles' arbitration legislation is still influenced by the 1809 French Code of Commerce (see country report).
- 8 Botswana, Kingdom of Eswatini, Namibia, Sierra Leone, United Republic of Tanzania; Antigua and Barbuda, Belize, Dominica, Grenada, Guyana, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Trinidad and Tobago; Kiribati, Nauru, Papua New Guinea, Solomon Islands, Tuvalu.
- 9 See country reports. See also Butler, D (2004), 'The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress', *Journal of International Arbitration*, Vol. 21 No. 2, 169–203.
- 10 The English Arbitration Act of 1889 was 'supplemented by further statutes in 1924, 1930 and 1934 to form the Arbitration Acts 1889–1934'. 'The 1950 Act sought to consolidate the various Arbitration Acts from 1889–1934', and it was later replaced by the English Arbitration Act 1996. See Lew, J D M et al. (2013), *Arbitration in England With Chapters on Scotland and Ireland*, Kluwer Law International, 5.
- 11 Eswatini Act 24/1904, The Arbitration Act (1904), s. 2; Samoa Arbitration Act (1976), s 5.
- 12 Eswatini Act 24/1904, The Arbitration Act (1904), s. 8; Dominica Arbitration Act (1988), s 10; Grenada Arbitration Act (1989), s 8.
- 13 See article 16 of the Model Law.
- 14 See Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 350–53 & 1047–51.
- 15 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), arts II & V.
- 16 See South African Law Commission (1998), 'Project 94 – Arbitration: An International Arbitration Act for South Africa', available at: [http://www.justice.gov.za/salrc/reports/r\\_prj94\\_july1998.pdf](http://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf) (accessed 21 August 2019), para. 1.3.
- 17 Including Antigua and Barbuda, Belize, Botswana, Cameroon, Dominica, Gambia, Grenada, Guyana, Kingdom of Eswatini (previously Swaziland), Kiribati, Lesotho, Malawi, Namibia, Nauru, Pakistan, Papua New Guinea, St Lucia, Samoa, Seychelles, Sierra Leone, Solomon Islands, St Vincent and the Grenadines, Tanzania, Trinidad and Tobago, and Tuvalu.
- 18 Including St Kitts and Nevis, Tonga and Vanuatu.
- 19 Some Caribbean countries have demonstrated that trained and experienced judges in international commercial arbitration can overcome legal challenges based on

- arbitration principles recognised by common law. That is the case of Antigua and Barbuda and Dominica, whose decisions are subject to the Eastern Caribbean Supreme Court. Although the arbitral legislation of both countries is still based on the English Arbitration Act 1950, the two countries presented few, but good examples of court decisions pro-arbitration. See *VT Leaseco Ltd v Fast Ferry Leasing Ltd* (2007), Claim No. ANUHCV 0312/2005, ECSC HC, Ruling; *Canisby Limited v Flat Point Development Limited* (2017), Claim No. ANUHCVAP2016/0005, ESCS CA; *Calais Shipholding Co v Brown Energy Trading Ltd* (2012), Claim No. DOMHCV2009/0096, ECSC HC.
- 20 See Horvath, G & S Wilske (2013) (eds), *Guerrilla Tactics in International Arbitration*, Wolters Kluwer.
- 21 Most countries analysed do not provide statistical data comparing arbitration practice and court activity. Refer, for instance, to the country reports of Kiribati, Nauru, Papua New Guinea, Samoa, most Caribbean countries, and some African countries, such as the United Republic of Tanzania, Seychelles, and the Kingdom of Eswatini.
- 22 The percentage is slightly better than the judge indicated.
- 23 The benchmark for a modern arbitration law is: UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', available at: [https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (accessed 27 August 2019).
- 24 For 27 per cent of arbitrators, having a state of the art international commercial arbitration regime was one of the most pressing issues to the success of international arbitration in the Commonwealth after education and capacity-building (39%); it was one of the most pressing issues for the Commonwealth for 6 per cent of counsel (for 12% it was costs, followed by education & capacity-building 10%, and recognition and enforcement 8%) and for 7 per cent of academics who identified education & capacity-building as the most pressing issue (28%), followed by costs (8%).
- 25 Blackaby, N et al. (2015), *Redfern and Hunter on International Arbitration*, 6th edn, Oxford University Press, Oxford, p. 415.
- 26 'Supervisory court intervention has the potential of seriously disrupting the arbitration process and impeding the parties' quest for a speedy dispute resolution. It is a common feature of recent arbitration legislation to limit the scope for court intervention.' Lew, J D M et al. (2003), *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 358.
- 27 Blackaby, N et al. (2015), *Redfern and Hunter on International Arbitration*, 6th edn, p. 415.
- 28 The Kenyan Arbitration Act (1995), provides in article 10 that 'Except as provided in this Act, no court shall intervene in matters governed by this Act.' The law contains provisions where the courts of the country can provide assistance to the arbitral tribunal, for example, article 7 states '(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure. (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.'
- 29 The cost of international commercial arbitration, education and capacity-building generally, and recognition and enforcement, were identified as more pressing issues by respondent counsel. If one classifies recognition and enforcement as an issue of a judiciary not in step with international commercial arbitration then a judiciary not having a complementary and supportive relationship with international commercial arbitration is the most pressing concern for respondent counsels in the Commonwealth (15%, followed by costs 12% and education & capacity-building 10%). In comparison counsel

- identified 'education & awareness of international arbitration' as the biggest challenge facing their respective jurisdictions.
- 30 Interview Singapore arbitration specialists.
- 31 Interview with third-party funder.
- 32 In comparison arbitrators placed 'an arbitration knowledgeable and friendly judiciary' between capacity/ education/ awareness-raising and costs regarding international commercial arbitration issues facing their respective jurisdictions see (Section 4.3.1 c).
- 33 Response to arbitrator questionnaire.
- 34 Lew, J D M et al. (2003), *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 355 ('The general trend is towards limiting court intervention to those cases where it is either necessary to support the arbitration process or required by public policy considerations').
- 35 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, The Hague, 2196–97 ('[U]nder Article II of the [New York Convention (and similar provisions in other conventions), as well as under leading national arbitration regimes, the parties' agreement excluding interlocutory judicial interference in the arbitral process is binding on Contracting States and their courts').
- 36 Born, G B (2014), *International Commercial Arbitration*, The Hague, 2192–96 ('Courts in Model law jurisdictions have held that Article 5 is a mandatory provision, with which courts are obliged to comply. (...) National courts in common law jurisdictions have repeatedly and (almost) uniformly rejected requests for judicial intervention in the procedural conduct of international arbitrations. (...) National court decision in civil law jurisdictions are similar. (...) There are only isolated exceptions to the principle of judicial non-interference, typically in ill-considered lower court decisions. Indeed, it is striking how few instances there are, even in less-developed legal systems, of interference by national courts in the ongoing conduct of international arbitrations. There are occasional deviations from the principle of judicial non-interference when national courts refer parties to arbitration.').
- 37 See also European Parliament (2014), 'Legal Instruments and Practice of Arbitration in the EU, Study for the Juri Committee', available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL\\_STU\(2015\)509988\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf) (accessed 27 February 2019), 136 *et seq.*
- 38 *Kabia v Kamara* (1967) SLSC 1215, relying on *Scott v Avery* (1856) 10 ER 1121; which relies on *Kili v Hollister* (1746) 1 Wils. 129 (at [818]). The law has been further obfuscated by Sierra Leone's Court of Appeal's decision in *Ogoo and Another v Huawei Technologies Limited and Another* (2012), CIV. APP 31/2010 SLCA 01, where it held that the failure to submit to arbitration in accordance with the terms of an agreement is not an irregularity but a question of jurisdiction.
- 39 See country reports.
- 40 CI Arb (2019), 'Changing trends of international commercial arbitration in India' <https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/> (last accessed 3 August 2019)
- 41 See, for instance, *Delhi High Court in Dominant Offset Pvt. Ltd. vs Adamovske Strojirny A.S.* 68 (1997) DLT 157 and *Olex Focas Pvt. Ltd. & Anr. v Skoda Export Company Ltd. & Anr.* (2000) IAD Delhi 527.
- 42 The Indian Supreme Court, for example, confirmed in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 its jurisdiction to grant interim measures in an international arbitration administered by the International Chamber of Commerce, seated outside of India. In *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 the Indian Supreme Court set aside an award made in England, under LCIA rules, in an expansive interpretation of public policy grounds, stating that 'the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest' [para 31 The latter decision suggested that Indian courts would be able to

- use the public policy exception to review an award on its merits which could have led to increased controversy in arbitration disputes.
- 43 See Section III.C of the Indian country report for more details. One commentator has noted that '[e]ven if the change as explained above in the attitude of the State High Courts and Supreme Court is perceivable, the Government of India could visualize the ill-effects brought forth by the judgements up to 2010. Government of India, with a view to offset the ill-effects, introduced a bill to make the Arbitration and Conciliation Act workable by effecting appropriate amendments to the existing provisions and by introducing certain new provisions into the Act. The bill came to be passed as the Arbitration and Conciliation (Amendment) Act 2015 (hereinafter referred to as the 2015 Act).' See Gogiseti, V (2019), 'Changing trends of international commercial arbitration in India', available at: <https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/> (accessed 21 August 2019).
- 44 "'Government of India with a view "to speed up the resolution of the commercial disputes and to facilitate effective conduct of international and domestic arbitrations"' has set up a High-Level Committee (HLC) with Justice B N Srikrishna former Judge of Supreme Court as its chairman and judges of the State High Courts and Supreme Court, representatives of Industry and senior advocates as the members.".' See Gogiseti, V (2019), 'Changing trends of international commercial arbitration in India', available at: <https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/> (accessed 21 August 2019).
- 45 Thirty-seven Indian counsels responded to the counsel survey, 32 per cent of whom were female, 65 per cent male and 3 per cent preferred not to say. The majority of Indian counsels (51%) were between 25 and 34 years old and had more than 10 years post-qualification experience (49%). The majority of respondents (38%) worked in a law firm with less than 20 lawyers (32% in a law firm with more than 100 lawyers) and 89 per cent of respondents worked in commercial law and 84 per cent in international commercial arbitration. To the question 'what are the three most pressing issues in your country that need to be resolved to strengthen international arbitration?' [free flowing answer]. The lack of well-equipped and managed institutions was the predominant concern (15%), followed by the quality and availability of arbitrators (13%). Only 11 per cent of respondents felt that the judiciary could be more supportive to international arbitration.
- 46 See above notes 24, 29.
- 47 See regarding all international arbitration studies conducted by Queen Mary School of International Arbitration: <http://www.arbitration.qmul.ac.uk/research/> (accessed 29 August 2019).
- 48 According to the Queen Mary survey methodology the respondents were comprised of the following groups: academics, arbitral institutions, arbitrators, 'arbitrator and counsel in equal proportion', expert witnesses, in-house counsel, and private practitioners. 12 per cent were categorised as 'other' (e.g. judges, third funders, government officials). It is noteworthy that the business voice is only represented through in-house counsel which suggests that only large businesses and multinationals have been part of the survey. In addition, in-house counsel does not necessarily represent the thinking of management in its entirety. It also should be noted that in-house counsel only represented a small percentage of respondents, e.g. 10 per cent in the 2018 Study.
- 49 See e.g. PwC & Queen Mary, University of London (2006), '2006 International Arbitration Study: Corporate Attitudes and Practices', available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy\\_2006.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf) (accessed 21 August 2019) (the '2006 QM Study'); PwC & Queen Mary, University of London (2013), 'Corporate Choices in International Arbitration: Industry Perspectives', available at: <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf> (accessed 21 August 2019) (the '2013 QM Study'); Pinsent

- Masons LLP & Queen Mary, University of London (2016), 'Pre-empting and resolving Technology, Media and Telecoms Disputes', available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing\\_Tech\\_report\\_online\\_singles.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf) (accessed 21 August 2019) (the '2016 QM Study'); and White & Case LLP & Queen Mary, University of London (2018), '2018 International Arbitration Survey: The Evolution of International Arbitration', available at: [www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF) (accessed 21 August 2019) (the '2018 QM Study').
- 50 Either on a stand-alone basis (48%) or in conjunction with ADR (49%). See the 2018 QM Study note 49, p. 5.
- 51 See the QM 2006 Study(note 49), 5.
- 52 Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2018.
- 53 PwC & Queen Mary, University of London (2006), '2006 International Arbitration Study: Corporate Attitudes and Practices' (note 49); PwC & Queen Mary, University of London (2013), 'Corporate Choices in International Arbitration: Industry Perspectives'; Pinsent Masons LLP & Queen Mary, University of London (2016), 'Pre-empting and resolving Technology, Media and Telecoms Disputes'.
- 54 Thirty-four businesses responded to the study survey: 13 per cent of respondents were businesses with over 500 employees (23% of businesses had over 100 employees) and 13 per cent were owner operated, whereas the majority of businesses (38%) had between 2 and 10 employees and 23 per cent had between 20 and 99 employees. Twelve per cent had import experience, 12 per cent had export experience, 23 per cent had both and 42 per cent had no cross-border trade experience. Sixty-four per cent of the respondent business found their overseas business partner via the internet, 32 per cent relied on word of mouth, 27 per cent on national governmental business development agency or ministry, and 36 per cent of respondents used trade fairs and their Chamber of Commerce to find a new business partner. Fifty-two per cent of respondents visit their new business partner to check them out.
- 55 See <https://www.msmejustice.com/> (accessed 13 August 2019).
- 56 See regarding the research group: <https://www.msmejustice.com/>; re publications see Butler, P & C Geissler, 'Contractual Realities of SMEs – Access to Commercial Justice', *2020 Austrian Yearbook on International Arbitration* p 466; Butler, P & H van Oeveren (forthcoming), 'SMEs and International Commercial Dispute Resolution: Without leading the horse to water, it's unlikely that it will drink', UNCITRAL.
- 57 The research was undertaken between 2015 (pilot) and 2018. 48 SMEs and 4 large companies were interviewed. SMEs in New Zealand are defined as businesses with less than 50 employees (<https://www.mfat.govt.nz/assets/FTAs-in-negotiations/UK-FTA/Trade-and-small-medium-enterprises-.pdf> accessed 17 Aug 2019). Geographically the companies were distributed throughout New Zealand and they operated in the agricultural (in particular honey and wine), manufacturing (from biscuits to specialised high-tech products), distribution, sale of goods (in particular timber), and service sectors. The research was undertaken by Georgia Whelan, solicitor, Chapman Tripp; Hanneke van Oeveren, solicitor, Kensington Swan; and Dr Petra Butler.
- 58 The research was undertaken by Dr Cayetana Santaolalla, professor University of Mondragón. The research was undertaken between February and May 2019 and comprised 38 SMEs and 2 large businesses. Regionally, six SMEs (all wine export) came from Alava; six SMEs (wine export, food, manufacturer) came from Navarra, 26 SMEs (8 wine export, 8 food companies, 4 footwear companies, 4 construction companies, 2 engineering companies). The two large businesses were located in Navarra and had between 400 and 500 employees. The definition of an SME in Spain is a firm that employs fewer than 250 workers.

- 59 Australian Small Business and Family Enterprise Ombudsman, *Access to Justice – where do Small Businesses go?* (Commonwealth of Australia, 2018). The report found that 78 per cent of Australian small businesses did not have a dispute in the last year (p. 14). The Australian Small Business and Family Enterprise Ombudsman survey indicated that as business size increases, they face a higher incidence of disagreements. Larger businesses – in Australia those employing more than 19 people or with revenues greater than A\$3 million – face nearly double the number of disagreements compared to sole traders (those with revenue of less than A\$250,000). When disagreements occurred, only 42 per cent of sole traders sought advice, compared to 75 per cent of larger businesses. For the majority of disagreements, larger businesses (67%) were able to resolve the dispute without escalating it to a formal process, compared to the overall average of 41 per cent.
- 60 Twenty-nine per cent of respondents stated that they would negotiate if their business partner fails to carry out their obligation(s), 24 per cent would cancel the contract, 24 per cent would invoke the dispute resolution clause in the contract. A survey by the Australian Small Business and Family Enterprise Ombudsman found that the 'first thing 9 out of 10 businesses did was to speak with the other party to try and resolve the dispute' and that 1 in 3 disputes were not escalated through a formal process because: it was possible to resolve the dispute another way (41%), or the expected costs were considered to be more than the potential gain (15%), or the business did not have time to follow up the dispute (11%) (Australian Small Business and Family Enterprise Ombudsman, *Access to Justice – where do Small Businesses go?* (Commonwealth of Australia, 2018), 9. The survey does not distinguish between domestic and cross-border disputes and only 4 per cent of respondents reported a dispute with a foreign business (p. 7).
- 61 The research has been undertaken by Christina Geissler, University of Linz, and involved 15 SMEs from different sectors mainly from the Linz region.
- 62 The World Bank & The International Finance Corporation (2012), 'Doing business in a more transparent world', available at: <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB12-FullReport.pdf> (accessed 20 August 2019); European Commission (2011), 'European contract law in business-to-business transactions', available at: [https://ec.europa.eu/comfrontoffice/publicopinon/flash/fl\\_320\\_en.pdf](https://ec.europa.eu/comfrontoffice/publicopinon/flash/fl_320_en.pdf) (accessed 20 August 2019).
- 63 Fifty-two per cent of survey respondents reported that they would visit their prospective business partner before contracting, a finding corroborated by especially New Zealand SMEs where a number have stated that they even have invited the prospective business partner and their family to a holiday in New Zealand to meet them and to establish a relationship of trust.
- 64 ICC (2019), 'ICC Dispute Resolution 2018 Statistics', available at: [http://files-eu.clickdimensions.com/iccwboorg-avxnt/files/web\\_icc\\_disputeresolution2018statistics.pdf](http://files-eu.clickdimensions.com/iccwboorg-avxnt/files/web_icc_disputeresolution2018statistics.pdf) (accessed 21 August 2019), 8.
- 65 Ibid., 19–21.
- 66 ICC (2018), 'ICC Dispute Resolution 2017 Statistics', available at: <https://iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf> (accessed 21 August 2019), 61.
- 67 Ibid., see also ICC (2019), 'ICC Dispute Resolution 2018 Statistics', 13.
- 68 ICC (2019), 'ICC Dispute Resolution 2018 Statistics', 13.
- 69 ICC Dispute Resolution 2016 Statistics, p. 113.
- 70 ICC (2019), 'ICC Dispute Resolution 2018 Statistics', 13.
- 71 LCIA (2019), 'LCIA 2018 Annual Casework Report', available at: <https://www.lcia.org/News/2018-annual-casework-report.aspx> (accessed 21 August 2019), 4.
- 72 At least 48.7 per cent of the parties are from the Commonwealth (many Commonwealth jurisdictions were represented as a part of the remaining sum).

- LCIA (2019), 'LCIA 2018 Annual Casework Report', available at: <https://www.lcia.org/News/2018-annual-casework-report.aspx> (accessed 21 August 2019), 9.
- 73 LCIA (2019), 'LCIA 2018 Annual Casework Report', 5; LCIA (2018), 'LCIA 2017 Annual Casework Report', available at: <https://www.lcia.org/News/lcia-releases-2017-casework-report.aspx> (accessed 21 August 2019), 5.
- 74 LCIA (2019), 'LCIA 2018 Annual Casework Report', 5; LCIA (2018), 'LCIA 2017 Annual Casework Report', 5.
- 75 LCIA (2019), 'LCIA 2018 Annual Casework Report', 5; LCIA (2018), 'LCIA 2017 Annual Casework Report', 5.
- 76 LCIA (2019), 'LCIA 2018 Annual Casework Report', 5.
- 77 SIAC (2019), 'Annual Report 2018', available at: [http://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_AR2018-Complete-Web.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR2018-Complete-Web.pdf) (accessed 23 August 2019), 14.
- 78 Out of 1,036 total parties, 608 parties are from the Commonwealth. SIAC (2019), 'Annual Report 2018', 17.
- 79 SIAC (2019), 'Annual Report 2018', 17; SIAC (2018), 'Annual Report 2017', available at: [http://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2017.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf) (accessed 23 August 2019), 15.
- 80 SIAC (2019), 'Annual Report 2018', 17; SIAC (2018), 'Annual Report 2017', 15.
- 81 Ibid.
- 82 Ibid.
- 83 SIAC (2019), 'Annual Report 2018', 17.
- 84 PwC & Queen Mary, University of London (2006), 'International Arbitration: Corporate attitudes and practices 2006', available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Iastudy\\_2006.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Iastudy_2006.pdf) (accessed 23 August 2019), 5.
- 85 Ibid., 5.
- 86 PwC & Queen Mary, University of London (2013), 2013 International Arbitration Survey: Corporate Choices in International Arbitration, Industry perspectives, available at: <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf> (accessed 23 August 2019), 7.
- 87 Ibid.
- 88 Ibid.
- 89 Pinsent Masons LLP & Queen Mary, University of London (2016), 'Pre-empting and resolving Technology, Media and Telecoms Disputes', available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing\\_Tech\\_report\\_online\\_singles.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf) (accessed 21 August 2019), 20.
- 90 Ibid.
- 91 Ibid.
- 92 Ibid., 25.
- 93 White & Case LLP & Queen Mary, University of London (2018), '2018 International Arbitration Survey: The Evolution of International Arbitration', (above n 49) 29.
- 94 Ibid.
- 95 Ibid.
- 96 This information was not available in Cameroon, Lesotho, Malawi, Mauritius, Namibia, Seychelles, Pakistan, Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, St Kitts and Nevis, St Vincent and the Grenadines and Cyprus.
- 97 Responses represent 7 European, 1 Caribbean, 4 African, 3 Asian and 3 Oceanian judges and 1 judge who did not identify his/her country affiliation. From the responses the perception of arbitration as the preferred dispute resolution of cross-border employment disputes seems to be particularly strong in Africa whereas for European and Asian judges' construction, mining and financial services disputes were the disputes that most often used international arbitration in a cross-border dispute.

- 98 Forty-three per cent of respondents to the counsel survey; followed by 29 per cent sale of goods and services contracts.
- 99 Bosman, L (2013), Chapter 1.2: 'Botswana', in Bosman, L (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 34
- 100 See country report Section VI.E.1
- 101 Ehiribe, I (2013), Chapter 2.2: 'The Republic of Gambia', in Bosman, L (ed.), *Arbitration in Africa: A Practitioner's Guide*, 150.
- 102 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview', available at: [https://uk.practicallaw.thomsonreuters.com/6-610-7025?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-610-7025?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) (accessed 23 August 2019).
- 103 Njoroge-Kibe, L & C N Kimani (2018), 'Litigation and enforcement in Kenya: Overview', available at: [https://1.next.westlaw.com/Document/I6da5f045db8e11e8a5b3e3d9e23d7429/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&isplcus=true&firstPage=true](https://1.next.westlaw.com/Document/I6da5f045db8e11e8a5b3e3d9e23d7429/View/FullText.html?contextData=(sc.Default)&transitionType=Default&isplcus=true&firstPage=true) (accessed 23 August 2019).
- 104 PLMJ (2014), 'Arbitration in Mozambique in the Oil and Mines Sectors', available at: [https://www.plmj.com/xms/files/v1\\_antigos\\_antiores\\_a\\_abr2019/newsletters/2014/Outubro/Arbitration\\_in\\_Mozambique\\_in\\_the\\_oil\\_and\\_mines\\_sectors.pdf](https://www.plmj.com/xms/files/v1_antigos_antiores_a_abr2019/newsletters/2014/Outubro/Arbitration_in_Mozambique_in_the_oil_and_mines_sectors.pdf) (accessed 23 August 2019).
- 105 Adekoya, F & P-A Iwu (2017), 'Arbitration procedures and practice in Nigeria: overview' available at: [https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk) (accessed 23 August 2019).
- 106 Kemirembe, O M K (2015), 'Communication and perception impact endline study on arbitration and other alternative dispute resolution (ADR) services in Rwanda', available at: <http://www.kiac.org.rw/IMG/pdf/-28.pdf> (accessed 23 August 2019).
- 107 Taitz, N (2016), 'Arbitration procedures and practice in South Africa: overview', available at: [https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk#co\\_anchor\\_a247769](https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk#co_anchor_a247769) (accessed 23 August 2019).
- 108 Munyantwali, S (2018), 'Arbitration in Africa: Uganda, part 1 of 2', available at: <http://arbitrationblog.practicallaw.com/arbitration-in-africa-within-j-munyantwali-uganda-part-1-of-2/> (accessed 23 August 2019).
- 109 Khan, M (2017), 'Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: A Bangladesh Perspective' in Garimella, & Jolly, S (eds), *Private International Law: South Asian States' Practice*, Springer, 285
- 110 KLRCA Annual Reports, 2015–2017.
- 111 Parekh, S (2016), 'Arbitration procedures and practice in India: overview', available at: [https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk) (accessed 23 August 2019).
- 112 SIAC (2019), 'Annual Report 2018', available at: [http://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_AR2018-Complete-Web.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR2018-Complete-Web.pdf) (accessed 23 August 2019).
- 113 Judiciary Questionnaire, a Respondent from Pakistan.
- 114 Asouzu, A A & V Raghavan, 'The Legal Framework for Arbitration in Sri Lanka – Past and Present', *Journal of International Arbitration*, Vol. 17 No. 6, 111–35.
- 115 See country reports England, Wales and Northern Ireland Section VI.E.1; Scotland Section VI.E.1.
- 116 Judiciary Questionnaire, a Respondent from the United Kingdom, see country report.
- 117 See <https://disputeresolutioncentre.org.tt/alternative-dispute-resolution/arbitration> (accessed 23 August 2019).
- 118 See <https://practiceguides.chambers.com/practice-guides/international-arbitration-2019/bahamas/1-general> (accessed 23 August 2019).



- 119 See country report.
- 120 See <http://www.drastlucia.org/index.php/arbitration-panels> (accessed 15 May 2019).
- 121 Jones, D et al. (2018), 'Australia, Global Arbitration Review', available at: <https://globalarbitrationreview.com/chapter/1170031/australia> (accessed 2 May 2019); New Zealand see country report.
- 122 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.
- 123 PLMJ (2014), 'Arbitration in Mozambique in the Oil and Mines Sectors'.
- 124 Adekoya, F & P-A Iwu (2017), 'Arbitration procedures and practice in Nigeria: overview'.
- 125 See <https://disputeresolutioncentre.org.tt/alternative-dispute-resolution/arbitration>.
- 126 Jones, D et al. (2018), 'Australia, Global Arbitration Review'.
- 127 SIAC (2019), 'Annual Report 2018'.
- 128 See country report Section VI.E.1.
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- 130 Kemirembe, O M K (2015), 'Communication and perception impact endline study on arbitration and other alternative dispute resolution (ADR) services in Rwanda'.
- 131 Abraham, S & D Chua (2018), 'IBA Arbitration Guide: Malaysia', available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=1B17C5AC-3A6B-4B20-9BCE-B85BD419A124> (accessed 28 March 2019).
- 132 See country report Section VI.E.1.
- 133 See country report Section VI.E.1.
- 134 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.
- 135 Kemirembe, O M K (2015), 'Communication and perception impact endline study on arbitration and other alternative dispute resolution (ADR) services in Rwanda'.
- 136 PLMJ (2014), 'Arbitration in Mozambique in the Oil and Mines Sectors'.
- 137 Judiciary Questionnaire, a Respondent from Pakistan.
- 138 See country report Section VI.E.1.
- 139 Maynard, P D (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?', *Caribbean Law Review*, Vol. 20, 36–52, available at: [http://www.maynardlaw.com/Summitpercent202017/Session\\_Notes\\_2017/Session\\_1/Caribbeanpercent20Arbitrationpercent20Centrespercent20Novpercent202013percent20\(2014\)percent2020percent20Carib.percent20L.R.percent20\(36-52\).pdf](http://www.maynardlaw.com/Summitpercent202017/Session_Notes_2017/Session_1/Caribbeanpercent20Arbitrationpercent20Centrespercent20Novpercent202013percent20(2014)percent2020percent20Carib.percent20L.R.percent20(36-52).pdf) (accessed 23 August 2019), 16.
- 140 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia', available at: <https://www.herbertsmithfreehills.com/latest-thinking/guide-to-dispute-resolution-in-africa> (accessed 23 August 2019).
- 141 <https://www.export.gov/article?id=Swaziland-Dispute-Settlement> (accessed 23 August 2019).
- 142 The use of arbitration in Botswana is still very much linked to employment disputes. See World Justice Project (2018), 'Rule of Law Index 2017–2018', available at: [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf) (accessed 23 August 2019).
- 143 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.
- 144 Judiciary Questionnaire, a Respondent from Nigeria.
- 145 SIAC (2019), 'Annual Report 2018'.
- 146 See country reports Section VI.E.1.
- 147 See <http://www.drastlucia.org/index.php/arbitration-panels> (accessed 15 May 2019).
- 148 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.

- 149 See <http://www.drastlucia.org/index.php/arbitration-panels> (accessed 15 May 2019).
- 150 Judiciary Questionnaire, a Respondent from Bermuda.
- 151 See country report Section VI.E.1.
- 152 Abraham, S & D Chua (2018), 'IBA Arbitration Guide: Malaysia'.
- 153 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.
- 154 See <https://disputeresolutioncentre.org.tt/alternative-dispute-resolution/arbitration> (accessed 23 August 2019).
- 155 Munyantwali, S (2018), 'Arbitration in Africa: Uganda, part 1 of 2'.
- 156 SIAC (2019), 'Annual Report 2018'.
- 157 Abraham, S & D Chua (2018), 'IBA Arbitration Guide: Malaysia'.
- 158 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.
- 159 Graça, J (2013), Chapter 1.7: 'Mozambique', in Bosman, L (ed.), *Arbitration in Africa: A Practitioner's Guide*, 65.
- 160 See country report Section VI.E.1.
- 161 See <https://disputeresolutioncentre.org.tt/alternative-dispute-resolution/arbitration> (accessed 23 August 2019).
- 162 <https://practiceguides.chambers.com/practice-guides/international-arbitration-2019/bahamas/1-general> (accessed 20 April 2019).
- 163 See country report Section VI.E.1.
- 164 Abraham, S & D Chua (2018), 'IBA Arbitration Guide: Malaysia'.
- 165 See <https://disputeresolutioncentre.org.tt/alternative-dispute-resolution/arbitration> (accessed 23 August 2019).
- 166 Munyantwali, S (2018), 'Arbitration in Africa: Uganda, part 1 of 2'.
- 167 SIAC (2019), 'Annual Report 2018'.
- 168 Abraham, S & D Chua (2018), 'IBA Arbitration Guide: Malaysia'.
- 169 See country report Section VI.E.1.
- 170 LCIA, Annual Report 2018, p 5.
- 171 Amegatcher, N & M Amarteifio (2018), 'Arbitration procedures and practice in Ghana: overview'.
- 172 SIAC (2019), 'Annual Report 2018', p 17.
- 173 See country Section VI.E.1.
- 174 Partner, law firm, Caribbean; see country report Section VI.E.1.
- 175 See <http://lmaa.org.uk/> (accessed 23 August 2019).
- 176 Abraham, S & D Chua (2018), 'IBA Arbitration Guide: Malaysia'.
- 177 Mackie, J C S (1977), 'Arbitration and the Commodity Trades', *Arbitration*, Vol. 44 No. 1, 13–17.
- 178 Karstaedt, R & C Graf (2015), 'Selected Areas and Issues of Arbitration in Germany, Trade Arbitration in Germany', in Nacimiento, P et al. (eds), *Arbitration in Germany: The Model Law in Practice*, 2nd edn, Kluwer Law International, 795, 796.
- 179 For further examples, see Karstaedt & Graf, above n178, for German examples; Swangard, M & T Pickford (2016), 'The Arbitration Agreement and Arbitrability, Commodity Arbitrations', in Klaussegger, C et al. (eds), *Austrian Yearbook on International Arbitration 2016*, Manz'scheVerlags-und Universitätsbuchhandlung, 29–46; and Dewhirst, W (1985), 'The London Metal Exchange', *Arbitration*, Vol. 51 No. 1, 221–24.
- 180 Kroeger, D M & D A Johnson (2017), 'Arbitration of Insurance Disputes', in Shore L et al. (eds), *International arbitration in the United States*, Kluwer Law International, 687–94.
- 181 Trinaldo-de Mestral, E (2018), 'Arbitrating Commodity Trading, Shipping and Related Disputes', in Arroyo, M, *Arbitration in Switzerland: The Practitioner's Guide*, 2nd edn, Kluwer Law International, 1323–44.

- 182 Swangard, M & T Pickford, (see above n179), 33. For further discussion of commodity arbitration, see generally the following sources: Swangard, M (2013), 'Commodity Arbitration', in Lew, J D M et al., *Arbitration in England, with chapters on Scotland and Ireland*, Kluwer Law International, 105–44; Faint, R (2000), 'Commodity and maritime arbitration in London: how the grain trade approaches the problem', *Arbitration*, Vol. 66 No. 4, 306–9; Choudhury, A (2001), 'What the user wants and needs out of ADR', *Arbitration*, Vol. 67 No. 4, 317; and Mackie, J C S (1977), 'Integration of Arbitration Systems as regards the Commodity Trades', *Arbitration*, Vol. 44 No. 2, 89–94.
- 183 Swangard, M & T Pickford (n179 above), 39 and 40.
- 184 *Ibid.*, 35 and 36.
- 185 Covo, J (1992), 'Commodities, Arbitrations and Equitable Considerations', *ASA Bulletin*, Vol. 10, Issue 2, 133–51, 137.
- 186 Swangard, M & T Pickford (n179 above), 43.
- 187 Collett, M (2013), 'Chapter 8: Maritime Arbitration', in Lew, J D M et al. (eds), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer Law International, para. 8-1.
- 188 Herbert Smith Freehills, 'The Maritime Arbitration Universe In Numbers: One Year On', available at: <http://www.hfw.com/downloads/001161-HFW-The-maritime-arbitration-universe-in-numbers-One-Year-On-May-19.pdf> (accessed 17 August 2019).
- 189 For a discussion of salvage arbitration see Rose, F (2009), *Kennedy and Rose Law of Salvage*, Sweet & Maxwell, paras. 14.047-14.105. LOF arbitrators are appointed by Lloyd's from a panel. Disclosure is limited and there is a presumption against expert evidence. Any party may appeal, in which case the matter is referred to an appeal arbitrator nominated by Lloyd's. Awards are published.
- 190 In 35 per cent of respondents' universities; in 25 per cent of respondents' universities international (commercial) arbitration has only been taught since last year. International arbitration has been offered longer at the respondents' university at postgraduate level than undergraduate level (majority respondents' university between 10 and 15 years). The majority of respondents (52%) to the academic survey were either Commonwealth citizens or as non-citizens taught in a Commonwealth country. Seventy-three per cent of the respondents were academics (PhD students, researchers, professors (24% lecturers, 16% readers/associate professors, 11% professors) the rest were students (note that the student questionnaire was released later on the initiative of Rudhdi Walawalkar, ILS Law College, Pune) and practitioners. Sixty-nine per cent of respondents researched in the area of international (commercial) arbitration.
- 191 In 59 per cent of respondents' universities international commercial arbitration is taught as a module/ course/ credit that is party of a broader undergraduate degree; whereas 53 per cent of respondents stated that international commercial arbitration was taught as a module/ course/credit as part of a postgraduate degree. It is noteworthy that in the majority of universities where international commercial arbitration is taught as a module/credit/course either on undergraduate or postgraduate level it is taught more than 20 hours (42% and 50% respectively). In 9 per cent of universities students can take a postgraduate degree specialising in international arbitration.
- 192 Twenty-nine per cent of respondent arbitrators held a specialised international arbitration postgraduate degree and a further 29 per cent are prepared to spend more than 20 hours on specialised international commercial arbitration training a year, flying more than 5 hours to attend it (48%). Forty-nine per cent of respondent arbitrators spoke at 1–5 events (36% of respondents did not speak at any event whereas 6% spoke at more than 10 events). Sixty-four per cent of respondent arbitrators attended 1–5 events (15% of respondents did not attend any events). Fifty per cent of respondent arbitrators are willing to invest more than US\$2,000 per year into training (the highest amount mentioned was \$25,000; some respondents, however, might have included travel and accommodation costs).

- Forty-eight per cent of counsel spoke at 1–5 conference in the past year whereas 52 per cent did not speak at any conference in the past year. Seventy-nine per cent of respondent counsel stated that they were interested in attending formal international arbitration training. Regarding the preference of what kind of training, the answers ranged from doing a specialised LLM, attending the CI Arb fellowship programme, to advocacy and training on cross-examination. Fifty-two per cent of respondents were willing to invest more than 20 hours a year in additional training. Unlike the respondent arbitrators, counsels preferred training within their country of residence (38%). Only 26 per cent of respondents were willing to fly more than 5 hours to attend training and only 43 per cent of respondents were willing to spend more than US\$2,000 on training (that is excluding the counsel who wished to pursue an LLM).
- 193 Van Oeveren, H (2016), "It hurts my head to think about it" – SMEs and the Legal Framework for International Commercial Contracts', available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2817303](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817303) (accessed 27 August 2019), 30 fn 124.
- 194 The lack of experience has flow-on effects: see the discussion regarding the quality concerns in respect of arbitrators (below E) and discussion regarding diversity in international arbitration (below F).
- 195 Onyema, E (2018), 'SOAS Arbitration in Africa Survey Report. Domestic and International Arbitration: Perspectives from African Arbitration Practitioners', available at: <https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf> (accessed 23 August 2019), 7.
- 196 Forty-nine per cent of respondent counsels had more than 10 years post-qualification experience.
- 197 See above note 191.
- 198 Partner, law firm, Pakistan.
- 199 See Section 3.3.2 of this report.
- 200 The quality of arbitrators was expressed by between 2 per cent and 5 per cent of respondents to the arbitrator and counsel survey respectively in respect of the Commonwealth and globally and was voiced strongly in a number of interviews from interviewees located in Oceania, London, and the Caribbean particularly. The significance of the empirical finding is that the concern of the quality of arbitrators was a common and constant concern. It also has to be noted that given that the surveys asked the respondents to nominate freely, ie no list to choose from, the three most pressing issues in their home jurisdiction, the Commonwealth and globally that any statistical ascertainable value is noteworthy. Even in the sub-group of Indian counsel where the quality of arbitrators was the second most identified concern together with the availability of arbitrators, 'only' 13 per cent of counsel identified quality as an issue.
- 201 Chartered Institute of Arbitrators, written submission to study.
- 202 Response to arbitral institution questionnaire.
- 203 See for example van Haersolte-van Hof, J (2015), 'Diversity in Diversity', in van den Berg, A (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA & Kluwer International 638; Franck, S, Freda, J, Lavin, K, Lehmann, T & A van Aaken (2014), 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration', *53 Colum J Transnat'l L*, 429; Haridi, S (2015) *BCDR International Arbitration Review* 305.
- 204 For instance, one interviewee from the commodity and trade sector identified a growing emphasis on lawyers and legal qualifications in arbitration as hindering the role of non-lawyers in the field. This concern is exacerbated by regulations in some jurisdictions, such as India, that impose strict qualification requirements on arbitrators, including familiarity with aspects of Indian law. See also Indian Arbitration and Conciliation (Amendment) Act 2019, Eighth Schedule.
- 205 See Anderson, G & R Jerman (2019), 'Diversity in International Arbitration', available at: <https://uk.practicallaw.thomsonreuters.com/w-019-5028?comp=pluk&transitionType=Default&contextData=%28sc.Default%29> (accessed 23 August 2019).

- 206 Barrington, L & R Rana SC (2015), 'Arbital Women/TDM Special Issue on "Dealing with Diversity in International Arbitration"', *Transnational Dispute Management*, Vol. 4, available at: <https://www.transnational-dispute-management.com/article.asp?key=2233> (accessed 23 August 2019).
- 207 Arbitrator, Oceania; similarly partner, law firm, Caribbean.
- 208 Bryan Cave Leighton Paisner (2017), 'International Arbitration Survey: Diversity on Arbitral Tribunals', available at: [https://www.bclplaw.com/images/content/1/5/v1/150194/FINAL-Arbitration\\_Survey\\_Report.pdf](https://www.bclplaw.com/images/content/1/5/v1/150194/FINAL-Arbitration_Survey_Report.pdf) (accessed 23 August 2019); see also Minter Ellison Rudd Watts (2018), 'International and Domestic Arbitration Predictions: 2018 Litigation Forecast', available at: <https://www.minterellison.co.nz/our-view/international-and-domestic-arbitration-predictions> (accessed 23 August 2019); AMINZ (2018), 'Dignity and Respect Policy', available at: [https://www.aminz.org.nz/Folder?Action=View%20File&Folder\\_id=150&File=Dignity%20and%20Respect%20Policy.pdf](https://www.aminz.org.nz/Folder?Action=View%20File&Folder_id=150&File=Dignity%20and%20Respect%20Policy.pdf) (accessed 23 August 2019).
- 209 Onyema, E (2018), 'SOAS Arbitration in Africa Survey Report. Domestic and International Arbitration: Perspectives from African Arbitration Practitioners', 17, 19, 34.
- 210 Quick, G & C Wayland (2018), 'Gender diversity in international arbitration: does the Arbitration Pledge go far enough?', available at: <https://www.ashurst.com/en/news-and-insights/insights/the-arbitration-pledge-does-it-go-far-enough-180411/> (accessed 23 August 2019).
- 211 LCIA (2019), *2018 Annual Casework Report*, 14.
- 212 The make-up of the respondents to counsel questionnaire was: 37 per cent women, the majority of respondents was between 25 and 34 years old. Geographical respondents represented the Commonwealth: from the Caribbean to Malaysia, from New Zealand to the UK. Since the survey allowed free-flowing answers it has to be noted that the majority of answers re diversity did not distinguish between gender diversity, ethnic or age diversity. Some African respondents mentioned particularly the participation of African lawyers in international arbitration or the lack thereof.
- 213 Female counsel identified the three most pressing issues that needed to be resolved to strengthen international arbitration in their respective countries as awareness-raising(10%), a supportive, non-interventionist judiciary (9%), and suitable laws (8%).
- 214 Diversity was followed by costs (12%) and the application of common and uniform rules and standards (8%)
- 215 Thirty-one per cent of arbitrators were between 65 and 74 years old, followed by respondents in the 45-54 age bracket (23%), and 9 per cent of respondents were over 75 years old.
- 216 See generally Peach, L (2015), 'We need women on boards for many reasons: ethics isn't one', available at: <https://theconversation.com/we-need-women-on-boards-for-many-reasons-ethics-isnt-one-37472> (accessed 23 August 2019).
- 217 See generally 'Why does gender diversity matter?' in Quick, G & C Wayland (2018), 'Gender diversity in international arbitration: does the Arbitration Pledge go far enough?'. For African and Asian respondents to the arbitrator survey capacity-building and awareness-raising was by far the most important issue facing the Commonwealth (15%). Diversity of appointment and in particular the participation of African arbitration specialists in international commercial arbitration in the Commonwealth was seen as important as costs and enforcement (each identified by 8% of respondents). These findings reflect the challenge regarding capacity-building of arbitration practitioners in certain parts of the Commonwealth where the lack of involvement in international commercial arbitration cases hinders the arbitration practitioners' familiarisation on a breadth of international commercial arbitration issues.
- 218 Eighteen per cent of respondent counsel reported that the arbitrations they were involved lasted on average less than 12 months and 24 per cent stated an average

length of 2-5 years. None of the respondent counsel had experienced an arbitration lasting longer than 5 years. Forty-five per cent of respondent arbitrators who sat as sole arbitrator stated that arbitration was concluded on average in less than 12 months. Again, none of the respondents had been involved in an arbitration lasting 5 or more years. None of the respondent arbitral institutions which administer arbitrations takes on average longer than two years to administer an international commercial arbitrations with 50 per cent stating that arbitrations are concluded on average in less than a year.

- 219 Pouget, S (2013) 'Arbitrating and Mediating Disputes – Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment', 14-Abstract
- 220 LCIA (2017), 'LCIA Releases Updated Costs and Duration Analysis', Available at: <https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx> (accessed 29 August 2019). However, it should be noted that according to the World Bank survey if one includes the time to enforce an award international commercial arbitration might not necessarily offer a time advantage (see Section 2.2.). Even though the available data regarding the length of court proceedings does not differentiate between domestic cases and cases with an international element the statistics emphasises the importance of an international arbitration supporting judiciary.
- 221 See for an overview of costs in international commercial arbitration, as practised generally for high value or stake claims, Wiegand, N (2017) 'Can Asia cut the Costs?', *Journal of International Arbitration*, 401; Ulmer, N, (2010), 'The Cost Conundrum', 26 *Arbitration International* 221; compare Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 1996, 1997 regarding the recognition by leading arbitral institutions of the need to better ensure that arbitrators fully comply with their obligations to minimise costs.
- 222 Seven per cent of arbitrators identified costs as a pressing issue in their respective countries and for 12 per cent costs was globally one of the most pressing issues.
- 223 Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996, August 2014, at para. 3.
- 224 Williams, D & J Walton (2014), 'Costs and Access to International Arbitration', *Arbitration*, Vol. 80, 432.
- 225 Butler, P & C Herbert (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26, 186, 206 et seq; compare also McNee, A (2019), *Legal Expenses Insurance and Access to Justice*, International Bar Association.
- 226 For example, Australia provides initial legal advice/assistance to small businesses in all states and territories (see country reportSection ); in the Bahamas legal assistance to businesses seems to be provided through Eugene Dupuch Law School clinics (see country report); Malawi's Legal Aid Bill section 2 defines a legally aided person as a 'natural or legal person' (see country reportSection VII.A.). For example, in Botswana, India, and Namibia legal aid appears to extend to arbitration (see country reports Section VII.A.). On the information available it seems that only 9 per cent of Commonwealth jurisdictions extend legal aid to businesses and in 26 per cent jurisdictions legal aid appears to cover arbitrations. However, it is unclear whether this includes international arbitration.
- 227 As far as information was available, contingency fee agreements are legal in at least 37 per cent and prohibited in 33 per cent of all Commonwealth jurisdictions.
- 228 Legal insurance is offered according to the information available in 38 per cent of Commonwealth jurisdictions, including, for example, Australia, England & Wales, Scotland, Cyprus and South Africa.

- 229 The majority of respondents to the counsel survey stated that they were aware of the different funding possibility but not had it seen operate in practice (56%). Eighty-one per cent of respondents to the arbitrator survey had never been an arbitrator in an arbitration to their knowledge a party was funded by a third-party funder.
- 230 Even though costs were identified as one of the most pressing issues, hardly any of the responses to the survey results mention third-party funding and none mention contingency fee arrangements or before or after legal cost insurance.
- 231 Interview with commodity arbitrator, London, and arbitrator with particular technical expertise, London.
- 232 Article 10 of the Arbitration Rules No. 125 of GAFTA, gives the parties a right to appeal against an award to a Board of Appeal that must be elected and constituted and must comply with the procedure established on such rules; as well, article 7 of the Rules of Arbitration and Appeal of the FOSFA INTERNATIONAL, gives the parties the right to appeal an award of arbitration to a Board of Appeal.
- 233 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 2831.
- 234 Turner (E. Asia) Pte Ltd v Builders Fed. (H.K.) Ltd (1988) 42 BLR 122 (Singapore High Ct.).
- 235 See, e.g., Lowenfeld, A (1988), 'Singapore and the Local Bar: Aberration or Ill Omen?', *Journal of International Arbitration*, Vol. 5 No. 3, 71; Rivkin, D (1991), 'Restrictions on Foreign Counsel in International Arbitrations', *XVI Y.B. Comm. Arb.*, 402.
- 236 Singapore, Legal Profession (amendment) Act (1992), Amend. No. 7.
- 237 Singapore, Legal Profession (amendment) Act (2009), s. 35.
- 238 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 2840.
- 239 Especially arbitrators from Asia, Africa and Oceania.
- 240 Over 50 per cent had used those services 1–5 times in the past year.
- 241 Eighty-eight per cent of the respondent businesses use the internet in particular to find a new business partner and/or to acquire information ('to check out') their new potential business partner through their websites (48%). However, that does not mean that they would feel able or comfortable to use IT based processes in an international dispute resolution. Fifty-seven per cent of New Zealand SMEs and only 35 per cent of Austrian SMEs stated that they would feel comfortable to use technology to help them settle their disputes.
- 242 See, for example, Scherer, M (2019), 'Artificial Intelligence and Legal Decision-Making: The Wide Open?', *36 Journal of International Arbitration*, 539.
- 243 Students who responded to the survey were international arbitration affine with 97 per cent of respondents stating that they would like to work in international arbitration in the future. Sixty-one per cent of the respondent students had participated in the Willem C Vis Moot (the 'Vis Moot' one of the world largest moot competitions dedicated to international commercial arbitration and the Convention on Contracts for the International Sale of Goods). The majority of respondents studied in a Commonwealth country at the time of the survey (55%), pursued a master's degree (63% – only 2% a specialised international arbitration master), and were female (62%). Seventy-five per cent of respondent students were between 21 and 26 years old (the majority between 24 and 26 years). Fifty-three per cent of respondents had already engaged with the international arbitration community through, inter alia: publication of a journal article, entry in the Kluwer Arbitration blog, conference presentation, internship, arbitration society at university.
- 244 UNCITRAL (2017), 'Technical Notes on Online Dispute Resolution', Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), Annex I, para. 2; see the green pledge for international arbitration by Lucy Greenwood: <https://www.greenwoodarbitration.com/greenpledge> (accessed 30 August 2019).

- 245 Panjwani, P (2018), 'The Present and near Future of New Technologies in Arbitration (Report on the Club Español de Arbitraje's Third Annual Conference)', *33 Spain Arbitration Review / Revista del Club Español del Arbitraje*, 21, 28.
- 246 Efforts undertaken in line with the Commonwealth Connectivity Agenda (available at: <http://thecommonwealth.org/declaration-commonwealth-connectivity-agenda-trade-and-investment> (accessed 26 August 2019)) will help to address the challenges identified. If countries embark on the formulation of a digitisation policy, it will be important to keep the issues related to international dispute resolution technology in mind. Only one of the respondent Governments had a digitalisation policy.
- 247 See the concern regarding CISG jurisprudence: Schmidt-Ahrendts, N (2011), 'CISG and Arbitration', *Belgrade Law Review*, Year LIX No. 3, 211–23; Mistelis, L (2009), 'CISG and Arbitration', in Janssen, A and O Meyer (eds), *CISG Methodology*, Sellier European Law Publishers, 387–88; C J Thomas, 'The Baillii Lecture 2016: Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', available at: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-baillii-lecture-20160309.pdf> (accessed 27 August 2019).
- 248 Glover, M (2015) identifies additional issues associated with privacy and confidentiality of arbitral awards: 'Litigation proceedings in court enable public discussion of governmental and public affairs; they provide checks against both unfairness to some litigants that may flourish behind closed doors and potentially corrupt practices by attorneys, judicial officers, and litigants. Second, and relatedly, privatizing dispute resolution may undermine the functioning of judicial institutions themselves by decreasing public and private investment in the courts. Third, privatization threatens to impede public awareness of the substantive law, inasmuch as private proceedings frustrate the public's ability to understand the state of the law, how particular laws are interpreted, and how claims are pursued.' In addition, she adds that it threatens to diminish not just the public realm, but also the public law itself- the transparency and mechanisms of law-making [ 'Disappearing Claims and the Erosion of Substantive Law' 124 *Yale L.J.* 3052, 3056-3058].
- 249 Examples of standard form contracts in international commerce include: the NEC3 Engineering and Construction Contract used widely in construction projects; the bill of lading used in international shipping; and the International Swaps and Derivatives Association Master Agreement for OTC derivatives transactions. Standard form contracts are contracts or parts of contracts which the party using it will not individually negotiate with its counterpart but which the party will use generally for all its contractual relationships.
- 250 See Eder, B (2016), 'Does arbitration stifle development of the law? Should s.69 be revitalized?', available at: [https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20\\_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf](https://www.londonarbitrators.org/sites/londonarbitrators.org/files/CIArb%20_%20EDER%20AGM%20Keynote%20Address%2028%20April%202016%20AMND.pdf) (accessed 26 August 2019).





# 4

## Solutions

The challenges outlined in Chapter 3 pose legal, regulatory, and structural hurdles to the use of international commercial arbitration across the Commonwealth. The quantitative and qualitative research conducted as part of this study, which also involved surveys with key interest groups, highlighted a number of solutions to address these challenges. These solutions range from the traditional (legislative change and capacity-building) to the more innovative (such as a specialised commercial cross-border dispute resolution regime, and the establishment of a Commonwealth Association of Arbitral Institutions). This chapter outlines these various solutions.

### 4.1 Modernise Arbitral Framework

There are different ways to address the challenges faced by different countries. However, the most important aspect is having a strong and predictable legal framework in which arbitrations are conducted and that clearly defines key issues, including the role of national courts in arbitral proceedings, the powers and duties of arbitrators and the mechanism for the enforcement of awards.

This section considers what the Commonwealth jurisdictions can do to modernise their arbitration legal framework. There are two main ways:

- a. Accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention);<sup>1</sup> and

- b. Adopt arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration 2006 (UNCITRAL Model Law).

Not only are the New York Convention and UNCITRAL Model Law the foundations of a strong and predictable arbitration legal framework, but they are essential legal instruments for full and equal participation in today's international trade and investment system. Put simply, they provide an 'international passport' for access to the benefits of foreign markets and investment.

The accession to the New York Convention and the adoption of the UNCITRAL Model Law signal the nation's dedication to the promotion of a stable legal framework for the resolution of cross-border disputes recognised by the international commercial community. This stable legal framework is an important foundation to attract foreign investment.<sup>2</sup>

These measures also aid local businesses trading cross-border. The adoption of a stable legal framework within the state educates local businesses about the importance of cross-border dispute resolution mechanisms.<sup>3</sup>

#### 4.1.1 The New York Convention

Member jurisdictions should accede to the New York Convention and adopt enabling legislation.

Member jurisdictions may wish to seek technical and expert assistance in relation to developing policy for acceding to the New York Convention and adopting the necessary implementing legislation.

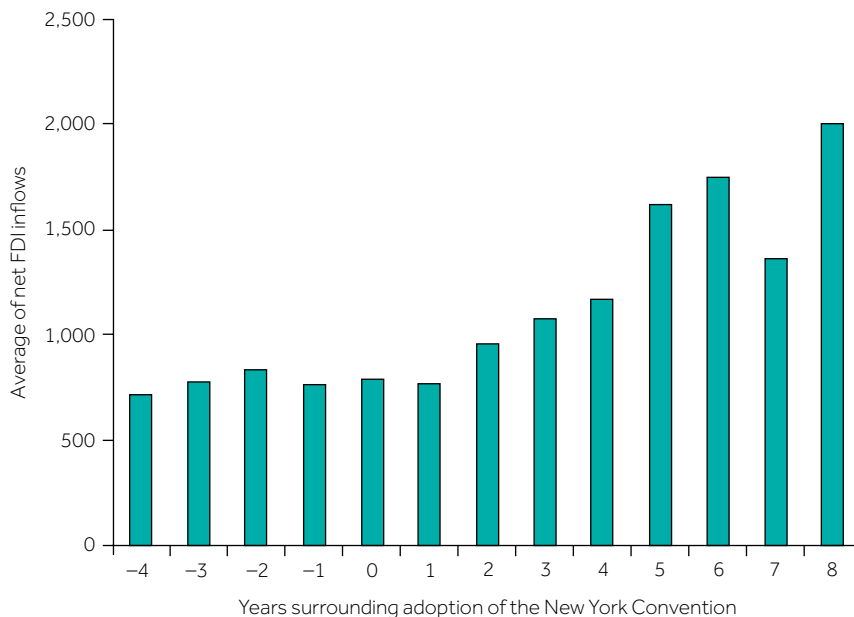
The New York Convention is widely regarded as the cornerstone of a modern international arbitration framework and credited with making international arbitration the most popular method of resolving international commercial disputes.<sup>4</sup> The New York Convention has been ratified and acceded to by 161 nations, including all significant trading states and most major developing states.<sup>5</sup> Currently, 38 Commonwealth countries are parties to the New York Convention.<sup>6</sup>

##### Benefits of acceding to the New York Convention

Acceding to the New York Convention will send a powerful signal to potential trading partners and investors that the Commonwealth jurisdictions are committed to taking steps to open and modernise their economies and to protect the rights of foreign investors.

A study based on data from the United Nations Conference on Trade and Development on net foreign direct investment (FDI) inflows from 'a balanced panel of countries that joined the NY Convention in the period 1975–2003'<sup>7</sup> found that there was a 'reasonably robust'<sup>8</sup> positive relationship between the adoption of the New York Convention and the increase of FDI inflows:

**Figure 4.1 Foreign direct investment inflows before and after a country joins the New York Convention<sup>9</sup>**



The study has found that '[i]n the 4 years prior to signing the NY Convention, the growth in average FDI inflows is just over 2 percent. The growth is 10 percent for the 4 years after joining the NY Convention and 11 percent for the full 8 years after joining the NY Convention.'<sup>10</sup> An earlier study had found that ratifying the New York Convention generally increased a country's trade by 15 to 38 per cent.<sup>11</sup>

For all the benefits of acceding to the New York Convention, there will be little cost to the Commonwealth countries in ratifying it. As mentioned above, there are no direct monetary obligations arising from accession to the New York Convention. There are also no reporting obligations or periodic review of compliance or implementation. The main indirect cost that will be incurred is the cost of training the judiciary, legal practitioners, and government policy and legal advisers.

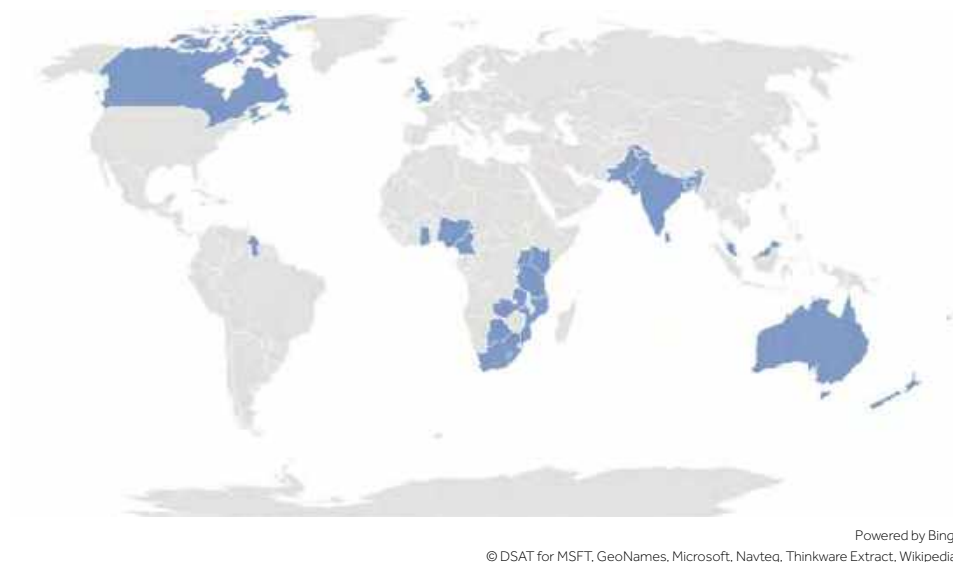
The New York Convention does not limit the authority of states to regulate arbitrations that are seated within their own borders. It requires only that states undertake to enforce, through their national courts, arbitration agreements and arbitral awards that are foreign or international in character. This requirement could be achieved directly by national courts under existing arbitration statutes in the Commonwealth jurisdictions or, alternatively, by adoption of the 2006 UNCITRAL Model Law. As discussed below, the latter course is preferable. Adopting the 2006 UNCITRAL Model Law would provide the Commonwealth jurisdictions that do not yet have modern arbitration legislation that incorporates modern best practice with an opportunity to review and reform their arbitration legislation.

Even with respect to the enforcement of foreign arbitral agreements and awards, the New York Convention allows states to refuse enforcement if the subject matter of the dispute is not capable of settlement by arbitration under national law. To take advantage of this protection, the Commonwealth jurisdictions would need to adopt

legislation defining certain categories of disputes as 'not capable of settlement by arbitration'. '[T]ypical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labour or employment grievances; and certain intellectual property matters.'<sup>12</sup> In general, the types of disputes which are non-arbitrable arise from a common set of considerations which are typically the subject of uniquely governmental authority,<sup>13</sup> such as public rights, or interests of third parties.

As discussed below, the New York Convention also allows states to refuse enforcement of arbitral awards if the enforcement would be contrary to public policy. The public policy exception provides a necessary safety valve that prevents intrusion on state sovereignty if a foreign award is irreconcilable with the enforcing state's legal structure.

**Figure 4.2 Commonwealth signatories to the New York Convention**



## Overview of the New York Convention

To achieve the above-mentioned benefits, the New York Convention requires contracting states to recognise and enforce international arbitration agreements and foreign arbitral awards, save in limited circumstances. The obligations imposed by the New York Convention are relatively minimal. The following paragraphs set out the main features of the New York Convention.

### Enforcement of arbitration agreements

With respect to arbitration agreements, article II of the New York Convention provides:

1. Each Contracting State **shall recognize an agreement in writing** under which the parties undertake **to submit to arbitration** all or any differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. [emphasis added]

2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article II has generally been interpreted by courts and the academic literature as requiring contracting states to recognise and enforce international arbitration agreements, provided that the agreement is in writing, unless the agreement is 'null and void, inoperative, or incapable of being performed'. Consequently, the courts in contracting states may not allow an action to proceed in the courts if there is a valid arbitration agreement among the parties. Instead, the courts are required to stay the action or to terminate the action and refer the parties to arbitration, as provided in their arbitration agreement.

Most authorities agree that the courts of contracting states should apply only internationally accepted contract defences – such as fraud, duress, or waiver – to their consideration of whether an arbitration agreement is 'null and void, inoperative, or incapable of being performed'. Article II of the New York Convention is generally interpreted as prohibiting the application of particular national requirements that discriminate against arbitration agreements and a high threshold must be met in order for courts to find that an arbitration agreement is 'null and void'.<sup>14</sup>

Under article II, a contracting state may exempt certain categories of disputes from arbitration altogether and refuse enforcement of an arbitration agreement concerning such a dispute, by defining them under its own national law as disputes 'not capable of settlement by arbitration'. Many states exclude at least some specific categories of disputes from arbitration including, for example, disputes concerning family law, employment, or consumer claims.<sup>15</sup> In general, a state has broad latitude under the New York Convention to define what categories of disputes are non-arbitrable.<sup>16</sup>

A party may also raise objections to an arbitral tribunal's jurisdiction under article II (1) on the basis that there is no 'agreement ... under which the parties undertake to submit to arbitration'. Such objections stem from the alleged lack of consent from a party to an arbitration agreement.<sup>17</sup> These objections usually take the form of allegations that there are: '(a) lack of agreement on essential terms; (b) lack of consent; (c) indefinite or uncertain arbitration agreements; (d) arbitration agreements referring to non-existent arbitral institutions or rules; (e) internally contradictory arbitration agreements; (f) "optional" arbitration agreements; (g) duress or undue influence; and (h) lack of notice.'<sup>18</sup>

### Recognition and enforcement of arbitral awards

With respect to arbitral awards, the New York Convention provides that contracting states must recognise and enforce arbitral awards that are 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought' and awards that are 'not considered as domestic awards in the State where their recognition and enforcement are sought'.<sup>19</sup> Thus, the New York Convention requires contracting states to enforce arbitral awards that were made in another state. Contracting states may extend the reach of the New York

Convention to awards that were made within their own territory by defining, through their own national legislation, certain categories of arbitral awards as 'non-domestic' (e.g., awards involving a party domiciled outside of the state, or owned by a foreign parent). The New York Convention is not meant to affect contracting states' authority to regulate domestic arbitration awards.

The obligation to recognise and enforce foreign arbitral awards is set out in article III of the New York Convention:

Each Contracting State **shall recognize arbitral awards as binding and enforce them** in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

Under article III, contracting states must recognise and enforce foreign arbitral awards and may not impose any procedural requirements on foreign arbitral awards which are more onerous than those applicable to domestic arbitral awards. Article IV requires a party seeking recognition and enforcement of a foreign arbitral award to provide in the local official language a 'duly authenticated original award or a duly certified copy thereof' and 'the original agreement [to arbitrate] ... or a duly certified copy thereof'.

The New York Convention offers the contracting states the possibility to refuse the recognition and enforcement of a foreign arbitral award under the circumstances set out in article V. Under the New York Convention, foreign arbitral awards are presumed to be valid, and the party resisting enforcement has the burden of proving that one of the enumerated grounds in article V is met.

The enumerated grounds in article V are intended to allow courts in contracting states to refuse enforcement of foreign arbitral awards where the arbitrators lacked jurisdiction, where there was a violation of a party's due process rights, or where the enforcement of the award would be contrary to the public policy of the enforcing state. The specific grounds in article V are as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - a. the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - b. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - c. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

- d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - e. the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- a. the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - b. the recognition or enforcement of the award would be contrary to the public policy of that country.

These exceptions to the presumed validity and enforceability of foreign arbitral awards have been interpreted narrowly.<sup>20</sup> However, they present a guarantee to the country where the enforcement is sought that the foreign award complies with the state's most essential principles and values. In particular, article V(2)(b), which allows an enforcing court to refuse enforcement where it would be 'contrary to the public policy' of the enforcing state, is generally interpreted as referring to fundamental public policies of the enforcing state. Thus, generally, the public policy exception can be invoked to resist enforcement of an award that requires conduct that would be illegal under national law, or that itself violates fundamental national laws, historic public policies, or international public policy.<sup>21</sup>

Just as article II of the New York Convention allows contracting states to refuse enforcement of an arbitration agreement if it concerns a subject matter not capable of settlement by arbitration, article V(2)(a) allows contracting states to refuse enforcement of an arbitral award if the 'subject matter of the difference is not capable of settlement by arbitration under the law of that country'. Many states have defined certain categories of disputes as non-arbitrable under their own national law.<sup>22</sup>

### Reservations when acceding to the New York Convention

A state acceding to the New York Convention may elect to make two reservations. First, a state 'may on the basis of reciprocity declare that it will apply the New York Convention to the recognition and enforcement of awards made only in the territory of another Contracting State'<sup>23</sup> (i.e. the reciprocity reservation). Secondly, a contracting state may 'declare that it will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration'<sup>24</sup> (i.e. a subject matter based reservation).

### Reciprocity reservation

The reciprocity reservation was designed to encourage additional states to accede to the New York Convention in order to gain the benefits of the New York Convention for the enforcement of arbitral awards made in their own territory, and, with that, to provide an incentive for parties to seat their international arbitrations in a contracting state.<sup>25</sup> Thus, historically, many contracting states have elected to make the 'reciprocity' reservation, including the following Commonwealth jurisdictions: Antigua and Barbuda, Barbados, Botswana, Brunei, Cyprus, India, Jamaica, Kenya, Malaysia, Malta, Mozambique, New Zealand, Nigeria, Pakistan,



Saint Vincent and the Grenadines, Singapore, Trinidad and Tobago, and the United Kingdom.<sup>26</sup>

However, in light of the success of the New York Convention and the fact that the majority of the world's trading countries have now acceded to the New York Convention, the reciprocity reservation is not as significant today as it once was (because there are fewer non-contracting states in which arbitral awards are likely to be made).<sup>27</sup> Indeed, the UNCITRAL Model Law (discussed below) contains a provision requiring the recognition of a foreign arbitral award 'irrespective of the country in which it was made'.<sup>28</sup> In determining whether to adopt the reciprocity reservation, states should consider whether there is a high likelihood that a substantial number of awards being enforced in its courts will be made in a non-state party to the New York Convention.

### Reservation on 'commercial' subject matter

Contracting states may declare that they will apply the New York Convention only to disputes regarded as 'commercial' under their national laws. More than half of the contracting states have made this reservation, including Barbados, Botswana, China, Korea, Jamaica, and the United States.<sup>29</sup>

The New York Convention does not define the term 'commercial', which is instead subject to the national law of each contracting state. Most courts and commentators have interpreted the term 'commercial' broadly and, consequently, the exceptions to enforcement narrowly.<sup>30</sup> In light of this background, the Commonwealth jurisdictions have substantial flexibility in deciding whether or not to adopt a commercial reservation.

#### 4.1.2 The UNCITRAL Model Law

Member jurisdictions should adopt a modern arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration 2006.

Member jurisdictions may wish to select the definition of 'arbitration agreement' in article 7 – Option 1 of the Model Law.

Member jurisdictions may wish to make the following amendments to the Model Law, reflecting international best practices:

- Include emergency arbitrators to the definition of 'arbitral tribunal'
- Adopt additional provisions on the role of the court in referring or rejecting requests that claims be submitted to arbitration
- Adopt additional provisions that permit a challenged arbitrator to withdraw from office and clarify when the mandate of a challenged arbitrator terminates.

Member jurisdictions might want to consider the following additions to the Model Law:

- A provision that sets out the confidentiality and privacy obligations of the parties

- A provision that sets out the liability and immunity of arbitrators, appointing authorities and arbitral institution
- A provision concerning legal representation in arbitral proceedings
- A provision concerning appeals on a point of law.

Member jurisdictions might want to seek technical advice from UNCITRAL and expert assistance in relation to adopting the 2006 UNCITRAL Model Law and international best practices.

### Benefits for states in adopting the UNCITRAL Model Law

Many commentators agree that '[t]he simplest and most effective way for a State to assure all parties and arbitrators about the quality of its law on international arbitration is to enact the [Model Law]'.<sup>31</sup> The UN has recommended that all members of the UN take the UNCITRAL Model Law into consideration for adoption.<sup>32</sup> To date, the UNCITRAL Model Law has been adopted in 80 states in a total of 111 jurisdictions, generally with no or few modifications. At present, 47 Commonwealth jurisdictions,<sup>33</sup> Hong Kong and Macao, Japan, Korea, various states in the United States (including California and Texas), and various European Union member states have adopted legislation on the basis of the Model Law.

The efficacy of any national arbitration legislation ultimately depends on the enforcement of the legislation by the national courts. Nevertheless, the Model Law's uniform standards and procedures can provide an effective framework for a jurisdiction with a developing legal system.

By adopting the 2006 Model Law, Commonwealth jurisdictions can be assured that their international arbitration legislation is modern and effective. They also benefit from the growing body of authority from other jurisdictions interpreting and implementing the provisions of the Model Law.<sup>34</sup> This is a clear benefit for both domestic and international commercial parties, who will have more certainty in the application of a Model Law based arbitration legislation being able to rely on considerable precedent and academic literature. In addition, adopting the 2006 Model Law assures potential foreign investors that the national courts will recognise and enforce an agreement to resolve disputes through arbitration, which can be an important consideration in assessing whether to invest.

Additionally, the Model Law's primary objective in highlighting the importance of party autonomy is attractive to commercial parties.<sup>35</sup> Parties are given the freedom to agree on how to arbitrate their disputes with mandatory safeguards that they must be treated with equality and be given full opportunity to present their case.<sup>36</sup>

Except where the UNCITRAL Model Law specifically provides, the national courts shall not intervene in the arbitral process. This provides greater certainty.

The adoption of the 2006 Model Law (together with the adoption of the New York Convention) will render the particular Commonwealth jurisdiction a more attractive venue for commercial parties selecting a seat for international arbitration and for enforcement of arbitral awards, as well as encouraging the flow of investment and capital.

The Commonwealth jurisdictions that have adopted the 1985 version of the UNCITRAL Model Law are also well advised to update their arbitration legislation to reflect the amendments in the 2006 version of the UNCITRAL Model Law. The UNCITRAL Secretariat explains the revisions:

The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the [New York Convention]. The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).<sup>37</sup>

### Overview of the Model Law

The UNCITRAL Model Law 'reflects worldwide consensus on key aspects of international arbitration practice [and has] been accepted by States of all regions and the different legal or economic systems of the world'.<sup>38</sup> The UN General Assembly '[recommended] that all States give due consideration to the [Model Law], in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.'<sup>39</sup>

The UNCITRAL Model Law (Model Law) was first developed in 1985 to address the inadequacy of, and disparities among, national arbitration laws.<sup>40</sup> The aim was to establish a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.<sup>41</sup> The UNCITRAL updated the Model Law in 2006. The amendments were intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices, to establish a more comprehensive legal regime dealing with interim measures in support of arbitration, and to harmonise the discrepancies in the application and interpretation of the Model Law.

The Model Law was designed to work in conjunction with the New York Convention. It implements, and in some cases clarifies and extends, the requirements of the New York Convention. In particular, the Model Law adopts the same narrow grounds for review of arbitral awards that are set out in article V of the New York Convention for international arbitration awards that are made both within and outside of the jurisdiction.

The Model Law provides a legislative framework that is supportive of international arbitration, by:

- a. requiring the enforcement of international arbitration agreements and awards;
- b. limiting judicial interference in the arbitration process;

- c. recognising the autonomy of the parties to shape the arbitral process;
- d. authorising judicial support as necessary to ensure the smooth functioning of the arbitral process; and
- e. providing for default rules regarding the arbitral process.

The Model Law is consistent with international arbitration practice in ascribing an important role to the supervisory court of the arbitration (i.e. the court of the jurisdiction in which the arbitration is seated).<sup>42</sup> It provides that the law of the 'place of arbitration' governs a range of highly important issues arising in the arbitral process.<sup>43</sup>

Under the Model Law, virtually all aspects concerning the relationship between an international arbitration and the national courts are determined by the law of the place of arbitration. This applies to provisions regarding the judicial power to appoint arbitrators, to remove arbitrators, to consider jurisdictional issues, to assist in evidence-taking, and to annul arbitral awards.<sup>44</sup>

The law of the place of arbitration, by virtue of article 1(2), applies also to procedural issues concerning the conduct of the arbitration. Among other things, articles 18 and 19 of the Model Law set forth mandatory requirements regarding the equal treatment of the parties and the recognition of the parties' procedural autonomy.

### **Suggested derogations from the Model Law**

International arbitration practice has developed since UNCITRAL released the 2006 Model Law.<sup>45</sup> Following a rise in the number of arbitration cases,<sup>46</sup> a diversification of the profile of parties and practitioners,<sup>47</sup> and the growth of institutional arbitration,<sup>48</sup> new arbitration trends have brought in changes to arbitration proceedings. Thus, the 2006 Model Law does not address some of these new elements. These include concerns in relation to counsels' and arbitrators' conduct,<sup>49</sup> and the adoption of new arbitration rules providing new procedural options to parties.<sup>50</sup>

To ensure that a state's international arbitration act conforms with the developments in international arbitration practice, Commonwealth member jurisdictions should consider certain modifications, derogations, and additions. This section first sets out modifications that should be made to existing provisions of the UNCITRAL Model Law and then sets out new additions on issues that are not expressly governed by the UNCITRAL Model Law.

### **Additions to existing provisions under the UNCITRAL model law**

#### ***Emergency arbitrator***

Most institutional arbitral rules now allow parties to obtain urgent interim relief by seeking interim measures from an emergency arbitrator who can be appointed even before the constitution of the tribunal.<sup>51</sup> The AMINZ Rules,<sup>52</sup> ACICA Rules,<sup>53</sup> ICC Rules,<sup>54</sup> SCC Rules<sup>55</sup> and SIAC Rules<sup>56</sup> are just some of the examples that allow parties to seek emergency interim relief.

Therefore, it is suggested that the Commonwealth jurisdictions that wish to adopt provisions allowing for enforcement of the orders of emergency arbitrators should do so by amending the definition of 'arbitral tribunal' to include 'emergency arbitrator'. Article 2 of the UNCITRAL Model Law should be supplemented by

adopting the following definition, modelled on section 2(1) of the Singapore International Arbitration Act 1994:<sup>57</sup>

'arbitral tribunal' means a sole arbitrator, a panel of arbitrators or an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties.

#### *Definition and form of arbitration agreement*

Article 7 of the Model Law provides two options for defining an arbitration agreement. Option I provides a more detailed definition which requires the arbitration agreement to be in writing and sets out how the 'in writing' requirement is satisfied.<sup>58</sup> Option II simply provides a general definition that an "[a]rbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.<sup>59</sup>

It is suggested that Commonwealth jurisdictions adopt Option I as it provides more detailed and useful guidance for parties, practitioners, and the judiciary. It follows the New York Convention in requiring an arbitration agreement to be in 'writing', and provides a broad definition of the writing requirement which includes a record of the 'content' of such agreement 'in any form', whether or not the contract has been concluded orally, by conduct, or other means.<sup>60</sup>

#### *Arbitration agreement and substantive claim before court*

Article 8 of the UNCITRAL Model Law governs the situation when a party to an arbitration agreement brings a claim in court. Commonwealth jurisdictions should consider adopting the following additions:

8. – (3) If the court refuses to refer the parties to arbitration, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall have no effect in relation to those proceedings.
- (4) If the court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action.
- (5) A decision of the court to refer the parties to arbitration under subsection (1) shall not be subject to appeal.
- (6) For any appeal from any decision of a court to refuse to refer the parties to arbitration under subsection (1), leave of the court making that decision shall be required.

These additions are based on sections 12(3), 12(4), 12(5) and 12(6) of the Fiji International Arbitration Act 2017. The Fijian Act is one of the newest Commonwealth international commercial arbitration laws and reflects modern best practice.<sup>61</sup> The amendments are helpful clarifications and provide useful guidance.

Subsection (3) is based on section 20(4) of the Hong Kong Arbitration Ordinance (which in turn borrows from section 9(5) of the English Arbitration Act 1996 with minor modifications). Subsection (3) is intended to avoid the situation in which a *Scott v Avery* arbitration clause (providing for the submission of any dispute to arbitration before litigation)<sup>62</sup> would be unworkable and a party can neither arbitrate nor litigate.

The other additions are useful clarifications of what courts may order when referring parties to arbitration, as well as the limits on any appeals from a decision of the court in that respect. In particular, whether and how much to limit the right of appeal from decisions of courts under article 8(1) of the UNCITRAL Model Law is a question of local procedural law. These are not matters regulated by the New York Convention (or other international arbitration conventions) and differ among jurisdictions.

### *Arbitrator challenge procedures*

Commonwealth jurisdictions should also consider including the following to article 13 of the UNCITRAL Model Law:

13. – (4) An arbitrator who is challenged under subsection (2) is entitled to withdraw from his or her office as an arbitrator.
- (5) The mandate of a challenged arbitrator terminates in one of the following circumstances:
- a. the arbitrator withdraws from his or her office;
  - b. the parties agree to the challenge;
  - c. the challenge is upheld according to the parties' agreed procedure or by the arbitral tribunal, and no request is made for the court to decide the challenge; or
  - d. the court, upon request to decide the challenge, upholds the challenge.

The additions are again based on the Fijian International Arbitration Act 2017, sections 18(4) and 18(5).<sup>63</sup> Article 13(4) provides explicit authority to an arbitrator to voluntarily withdraw when challenged. Article 13(5) sets out an exclusive set of circumstances when the mandate of a challenged arbitrator terminates, and is based on section 18(5) of the Fijian Arbitration Act 2017. These additions clarify the result of an arbitrator being challenged.

### **Proposed new additions to the UNCITRAL Model Law**

Some member jurisdictions have amended their Model Law based legislation to reflect the development of international commercial arbitration in recent years. Other member jurisdictions might want to consider similar amendments and promote 'best practice' legislation among Commonwealth jurisdictions.

### *Confidentiality, privacy and permitted disclosure*

Jurisdictions may also wish to deal specifically with privacy and confidentiality of arbitration in their arbitration legislation. Privacy and confidentiality are distinct concepts. Privacy refers to the principle that under virtually all national arbitration laws and institutional rules, only the parties to the arbitration agreement, and not third parties, may participate in the arbitral proceedings.<sup>64</sup> Confidentiality, as a related concept, refers to obligations which bind parties not to disclose information concerning the arbitral proceedings. As Jolles et al. reasoned, favouring confidentiality flowed from the private character of arbitration and also from the role that party autonomy plays in arbitration, thus supporting an inherent expectation that the proceedings would be confidential.<sup>65</sup> Various studies and analyses support that analysis and reflect the fact that parties, in choosing to arbitrate, place substantial value on both privacy and confidentiality.<sup>66</sup>

Arbitration proceedings are potentially impliedly private and confidential even in the absence of express provisions. While in some jurisdictions courts have held that arbitrations are impliedly confidential,<sup>67</sup> courts in other jurisdictions have rejected such an argument.<sup>68</sup>

The jurisdictions should set out provisions on privacy and confidentiality in their respective arbitration legislations. A suggested provision, modelled on the confidentiality provisions and exceptions set out in various institutional arbitration rules and arbitration legislation, is set out below:

“Confidentiality and privacy”

1. Unless otherwise agreed by the parties, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential.<sup>69</sup>
2. Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to:
  - a. the arbitral proceedings under the arbitration agreement; or
  - b. an award made in those arbitral proceedings.
3. Nothing in subsection (2) prevents the publication, disclosure or communication of information referred to in that subsection by a party:
  - a. if the publication, disclosure or communication is made to protect or pursue a legal right or interest of the party; or
  - b. if the publication, disclosure or communication is made to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside the [State]; or
  - c. if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
  - d. if the publication, disclosure or communication is pursuant to an order made by the arbitral tribunal, allowing a party to do so. Such an order may only be made at the request of a party, and after giving each of the parties an opportunity to be heard;<sup>70</sup> or
  - e. if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.<sup>71</sup>

The Commonwealth jurisdictions might also consider ensuring their relevant civil procedure laws to provide national courts powers to grant remedies for disclosure or injunctions against disclosure, of confidential information.<sup>72</sup>

Liability and immunity of arbitrators, appointing authorities and arbitral institutions

The Commonwealth jurisdictions may wish to consider expressly dealing with the liability and immunity of arbitrators, appointing authorities and arbitral institutions in the international arbitration legislation. Immunity is a necessary aspect of the adjudicative character of the arbitrator’s mandate. It is recognised that the vast majority of modern arbitration regimes provide arbitrators with expansive immunities from civil claims based on the performance of their duties as an arbitrator. There are varying degrees of this immunity, but typically they tend to be broadly framed.<sup>73</sup>

A provision along the following lines, modelled after similar provisions in Australia and Singapore, could read:

Immunities of arbitrators, appointing authorities and arbitral institutions

1. An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.<sup>74</sup>

2. The appointing authority, or an arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator, shall not be liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.
3. The appointing authority, or an arbitral or other institution or person by whom an arbitrator is appointed or nominated, shall not be liable, by reason only of having appointed or nominated him, for anything done or omitted by the arbitrator, his employees or agents in the discharge of purported discharge of his functions as arbitrators.
4. This section shall apply to an employee or agent of the appointing authority or of an arbitral or other institution or person as it applies to the appointing authority, institution or person himself.<sup>75</sup>

### *Representation in arbitral proceedings*

Like the UNCITRAL Model Law, many international arbitration conventions as well as national arbitration laws do not contain provisions to deal with the representation of the parties in arbitral proceedings.<sup>76</sup> Conversely, several other jurisdictions, including England, Austria, Germany, Belgium, Hong Kong, Australia, and Fiji, have express provisions which provide recognition of the parties' right to representation of their own choice.<sup>77</sup> The prevailing trend has been to recognise the parties' freedom to choose their representatives in international arbitration proceedings. Expressly providing for this matter will guarantee parties that local restrictions on representation will not be imposed in the context of international arbitral proceedings.<sup>78</sup>

Commonwealth jurisdictions should consider including a provision concerning legal representation. The following addition is modelled on section 29 of the Australian International Arbitration Act:

#### Representation in arbitral proceedings

1. Unless otherwise agreed by the parties, a party may appear in person before an arbitral tribunal and may be represented:
  - a. by himself or herself;
  - b. by a duly qualified legal practitioner from any legal jurisdiction of that party's choice;
  - c. by any other person of that party's choice.
2. A legal practitioner or a person, referred to in subsection (1)(b) or (c) respectively, while acting on behalf of a party to an arbitral proceeding to which this Act applies, including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within the legal jurisdiction in which the arbitral proceedings are conducted.

### *Appeals on points of law*

As stated in Section 3.10, there is some concern that an increase in arbitration diverts cases from the courts and therefore hinders the development of the law. One solution, to strengthen the role of the courts when parties have chosen arbitration as their dispute resolution regime, is to allow appeals on points of law in arbitration. Another potential solution is to allow the publication of arbitral awards.<sup>79</sup> Some arbitration institutions already adopt rules that allow publication of otherwise confidential awards provided that the parties agree to such publication.<sup>80</sup>



Allowing appeals on points of law arising out of arbitration may undercut two major advantages of arbitration: firstly, the efficiency of the procedure, by 'undermining' the finality of the award and, secondly, diverting cases away from courts which may have little capacity to hear them. However, where jurisdictions feel the development of legal principles is hindered by arbitration, the following clause may be adopted, which is modelled on section 69 of the English Arbitration Act 1996:

#### Appeal on point of law

1. Unless otherwise agreed by the parties, a party to arbitral proceedings seated in [this jurisdiction] may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
2. An appeal shall not be brought under this section except –
  - a. with the agreement of all the other parties to the proceedings, or
  - b. with the leave of the court.
 The right to appeal is also subject to additional restrictions.<sup>81</sup>
3. Leave to appeal shall be given only if the court is satisfied –
  - a. that the determination of the question will substantially affect the rights of one or more of the parties,
  - b. that the question is one which the tribunal was asked to determine,
  - c. that, on the basis of the findings of fact in the award –
    - i. the decision of the tribunal on the question is obviously wrong, or
    - ii. the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
  - d. that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
4. An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
5. The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
6. The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
7. On an appeal under this section the court may by order –
  - a. confirm the award,
  - b. vary the award,
  - c. remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
  - d. set aside the award in whole or in part.
 The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
8. The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
 

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the [Appeal Court of the jurisdiction].

Under section 69, parties have the right to appeal on certain 'question[s] of law'.<sup>82</sup> Parties may contract out of the application of section 69 by express agreement

or the incorporation of institutional arbitration rules that include a waiver. Major institutional rules include a waiver that effectively opts out of section 69.<sup>83</sup> In practice, most section 69 applications arise in relation to certain sectoral disputes (such as shipping) where, as a matter of industry practice in the industry's standard form contract, parties agree to having the right of appeal.<sup>84</sup> Some jurisdictions have adopted a modified version of section 69, requiring parties expressly to opt in, to avail themselves of the benefit of an appeal on a point of law.<sup>85</sup>

## 4.2 Increasing Awareness of Arbitration Among Users

The need for awareness-raising regarding international commercial arbitration has been one of the dominant themes among the survey respondents and the study's interview partners.<sup>86</sup> Awareness-raising must reach three stakeholder groups: (i) the legal profession, (ii) businesses, i.e. the users, and (iii) government officials, i.e. legal and policy advisers.

### Member jurisdictions

Member jurisdictions should ensure that their legal and policy advisers are aware of the benefits of international commercial arbitration as a cross-border dispute resolution mechanism, the legal framework necessary to support it, and how the use of technology can support cross-border dispute resolution. (Section 4.2.3)

Member jurisdictions should collaborate with their respective business communities to raise awareness among the business community, in particular among SMEs, of the methods of cross-border dispute resolution, including international commercial arbitration. (Section 4.2.2)

Member jurisdictions should support their respective law societies and bar councils, as well as their arbitral institutions, in any effort to raise awareness among the legal profession and the business community. (Section 4.2.1)

### Commonwealth Secretariat

The Commonwealth's Office of Civil and Criminal Justice Reform should raise awareness within the Commonwealth Secretariat regarding the benefits of international commercial arbitration as a cross-border dispute resolution mechanism and the use of technology in aid of it. It should liaise with other Commonwealth Secretariat offices and Commonwealth Associations to enable them to raise awareness among their stakeholders. (Section 4.2.5)

The Commonwealth Secretariat might want to support member countries in their efforts to raise awareness of international commercial arbitration, in particular among their public service officers. (Section 4.2.5)

### Other stakeholders

Law societies, bar councils, chambers of commerce, trade organisations and associations, and arbitral institutions should continue with their efforts to

raise awareness about the benefits of international arbitration as a neutral, efficient and enforceable dispute resolution mechanism. It is important that awareness-raising reaches the wider communities, i.e. the uninitiated SMEs, and it must therefore be inexpensive for the wider communities to engage. (Sections 4.2.1–5)

### 4.2.1 The legal profession

As discussed in Section 3.4, basic knowledge about international commercial arbitration is low among the Commonwealth's legal profession. It is therefore important to raise the general awareness of international commercial arbitration as an available cross-border dispute resolution option.<sup>87</sup> This is especially so since the legal profession will be instrumental in educating their client base on the benefits and use of arbitration. Lawyers, law societies, and bar councils are best placed to raise wide-ranging, general, and inexpensive awareness among their respective countries' legal profession through specific conferences, workshops, webinars, and/or articles. Law societies and bar councils might want to work with the local arbitral institutions (if any exist) or, for example, the CI Arb. However, it will also be important to introduce international commercial arbitration as part of general (and not arbitration-specific) events to allow a truly widespread dissemination of knowledge about international commercial arbitration.<sup>88</sup>

Awareness of the benefits of technology, as discussed in Chapter 1 and Section 3.9, can add to dispute resolution (and international commercial arbitration in particular) and should be raised using the same tools as described above. Commonwealth jurisdictions might wish to consider linking the awareness-raising of benefits of technology for international commercial arbitration with their efforts under the Commonwealth Connectivity Agenda.

The Commonwealth Law Conference, organised by the Commonwealth Lawyers' Association, reaches diverse sections of the Commonwealth legal profession. It will be a crucial part of any international commercial arbitration and law and technology awareness-raising. Regional conferences, such as the South Pacific Lawyers' Conference, are also a good vehicle.

### 4.2.2 The business community

There are different ways to increase awareness among businesses. Local Chambers of Commerce, business organisations and governments need to play an important role in raising awareness about cross-border contracting and international commercial arbitration to businesses. Again, the use of technology to simplify cross-border contracting and how technology can address the issues arising in the case of a cross-border dispute should also be part of the awareness-raising effort.

Like the legal profession, businesses should be offered a wide range of inexpensive methods and vehicles to be made aware of the availability of international commercial arbitration as a neutral, efficient, enforceable dispute resolution mechanism, and the benefits of technology.<sup>89</sup> For example, panels presenting on cross-border contracting, including cross-border dispute resolution and international commercial arbitration, and/or commodity trade contracts and

dispute resolution, can be included in general and sector-specific business conferences. Governments should use their general business outreach means to raise awareness of the benefits of international commercial arbitration as a cross-border dispute resolution mechanism and the benefits of technology in aiding cross-border dispute resolution.

One of the most important vehicles for awareness-raising regarding international commercial arbitration among businesses, especially SMEs, are the businesses' local lawyer whose main practice revolves around property transactions and domestic contracts.<sup>90</sup> Therefore, it is of paramount importance to raise awareness among the general legal profession (see Section 4.2.1).

### 4.2.3 Government policy and legal advisers

International commercial arbitration needs a legal framework (see Section 4.1). It is therefore paramount that Commonwealth jurisdictions have legal and policy advisers who are aware of the global and Commonwealth discourse regarding international (commercial) arbitration to keep abreast of developments. Advisers should be encouraged to take advantage of opportunities to learn about international arbitration and a budget should be made available. To fully appreciate the benefits of international arbitration (see Section 2.2), it will be important to engage advisers from a wide range of ministries, including those dealing with justice, trade, and foreign affairs. The conferences held by the UNCITRAL and the Asian Development Bank (ADB) in the South Pacific are examples of successful awareness-raising initiatives. The conferences are particularly geared towards legal and policy advisers and the judiciary.<sup>91</sup>

### 4.2.4 Arbitral institutions & trade associations

Arbitral institutions, the CI Arb, and trade associations should be encouraged to continue their valuable outreach not only to the legal profession but also to the business community. As suggested above, co-operation with governments, general business associations, and Chambers of Commerce will be useful. It is important to reach a wide audience. This includes lawyers whose area of specialisation is not the drafting of cross-border contracts, as well as SMEs. Awareness-raising should also be accessible, i.e. inexpensive.

### 4.2.5 Commonwealth secretariat

To allow widespread awareness-raising regarding the benefits of international commercial arbitration as a cross-border dispute resolution mechanism, initiatives should be built into other Commonwealth programmes and projects where appropriate. The Commonwealth's Office of Civil and Criminal Justice Reform should therefore support other Commonwealth offices to incorporate awareness-raising about the benefits of international commercial arbitration into their work. International commercial arbitration might be, for example, a dispute resolution mechanism of choice in resolving climate change disputes.<sup>92</sup> In addition, the Office of Civil and Criminal Justice Reform should collaborate with Commonwealth associations, such as the Commonwealth Enterprise and Investment Council. The Commonwealth Business Forum is another platform which should be used to raise awareness.

### 4.3 Capacity-building

Capacity-building was identified in the responses to the arbitrator, counsel, and judiciary surveys as one of the most pressing issues, and also as the priority issue for the Commonwealth to address.<sup>93</sup> Capacity-building encompasses all international commercial arbitration stakeholders: the legal profession, the business community, the Commonwealth Secretariat, and the governments of the member countries.

Capacity-building will address a number of the challenges identified: first, businesses, and in particular SMEs, will benefit from capacity-building that will allow them to make an informed dispute resolution choice when negotiating a cross-border contract or if a cross-border dispute arises. It will also allow businesses to access existing specialised trade regimes, such as commodity trade associations and their dispute resolution offerings. Secondly, enhancing the capacity of the legal profession regarding international commercial arbitration will make an overall contribution to the diversity and the quality of international commercial arbitration specialists. Third, familiarisation of the judiciary with international commercial arbitration will strengthen the country's international arbitration framework and will assure foreign direct investors that redress in their country of investment will be available to them. Fourth, well-informed participants are more likely to conduct the process in a time- and cost-efficient manner. Finally, government legal and policy advisers familiar with international commercial arbitration will be able to efficiently implement and maintain a modern international commercial arbitration framework that reflects best practice.

Given the Commonwealth's generally shared history, the general reliance on the common law, and the widespread use of English among the legal profession and users of international commercial arbitration, the Commonwealth provides a supportive environment to build international commercial arbitration capacity for all stakeholders.<sup>94</sup>

#### Commonwealth jurisdictions

Member jurisdictions should send a clear signal to their universities, law society and bar council, and business community about their expected respective roles regarding capacity-building in the international commercial arbitration space as well as the use of technology to aid international dispute resolution within the country's legal community. (Section 4.3.1 a) University education)

Member jurisdictions need to work with and to support their judiciary to gain the necessary familiarity with the international commercial arbitration legal framework, in particular the New York Convention, to support that framework. (Section 4.3.1 c) Judiciary)

Member jurisdictions should, in consultation with the judiciary, consider developing programmes to facilitate capacity-building within the judiciary, facilitating the exchange of best practices and training on international commercial arbitration. (Section 4.3.1 c) Judiciary)

Member jurisdictions should:

- provide information on specific websites regarding best practice cross-border contracting and the benefits of the different international dispute resolution mechanisms available to businesses, including international commercial arbitration and the use of technology (Section 4.3.2)
- send a clear signal to their business communities regarding the need to familiarise businesses, in particular SMEs, with best practices regarding cross-border contracting and the benefits of international commercial arbitration as a cross-border dispute resolution mechanism and the use of technology in the cross-border dispute resolution space (Section 4.3.2)
- establishing scholarships for their citizens to pursue a master's degree in international arbitration. (Section 4.3.1 a); Section 4.3.3)

Member jurisdictions should make the following freely and easily accessible online:

- Legislation and regulations
- Policy papers

Member jurisdictions should consult with their judiciary regarding the possibility of making judgments on international commercial arbitration issues freely available on the internet.

Commonwealth jurisdictions should collaborate to collect and to analyse data regarding matters related to international dispute resolution and international commercial arbitration in particular. (Section 4.3.6)

### **Commonwealth Secretariat**

The Commonwealth Secretariat should consider

- offering distant learning/online courses on international dispute resolution and/or particular courses on international arbitration and law & technology through *The Commonwealth of Learning*. (Section 4.3.1 b) Professional training)
- organising an annual international arbitration event (which could form part of the Commonwealth Law Conference). (Section 4.3.3)
- encouraging all sections of the Commonwealth Secretariat to build in international arbitration training into their programmes where appropriate. (Section 4.3.3)
- establishing a 'clearing house' international arbitration website and database which will provide
  - information on scholarships, internships and exchange programmes in the area of international commercial arbitration within the Commonwealth (Section 4.3.4)

- information on international arbitration training programmes by reputable providers (Section 4.3.4)
- information on conferences, seminars, workshops in Commonwealth countries and selected significant international arbitration events worldwide (Section 4.3.4)
- a database which includes links to other databases, judgments, academic literature and arbitral awards (Section 4.3.4)
- a platform which allows users to exchange information (Section 4.3.4)

The Commonwealth Secretariat can help member jurisdictions to seek technical assistance from UNCITRAL and expert assistance in relation to:

- developing policy for ratifying the New York Convention and adopting the necessary implementing legislation (Section 4.3.5 and Section 4.4.1)
- Adopting the UNCITRAL Model Law on International Commercial Arbitration (Section 4.3.5 and Section 4.1.2)

### 4.3.1 Legal profession

Due to the fact that international commercial arbitration is a relatively new addition to the university syllabus, i.e. the overwhelming majority of mid-career and senior legal professionals will not have had the opportunity to learn about international commercial arbitration during their legal education, it is important to offer capacity-building opportunities to all levels as well as all sectors of the legal profession, including the judiciary.<sup>95</sup>

#### University education

Capacity-building must begin at university. Even though it would be desirable for all law students to be exposed to an in-depth international commercial arbitration education at university, the ever-increasing demands on the compulsory elements of university legal education means this is unlikely. It may, however, be desirable that a basic knowledge of international dispute resolution, including international commercial arbitration, be incorporated as a compulsory part of the syllabus. These basic modules should provide the essential toolkit for any future practitioners to understand the benefits and costs of arbitration and adequately advise clients, including to know when to consult an expert, and for any policy or legal adviser to be aware of the need to provide a modern legal framework for international commercial arbitration.

Law faculties should promote awareness of, and facilitate participation in, the Willem C Vis Moot.<sup>96</sup> The goal of the Vis Moot is 'to foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a concrete problem of a client and to train law leaders of tomorrow in methods of alternative dispute resolution.' The Moot takes place every year in Hong Kong and Vienna and attracts students and representatives of the

international arbitration community from all parts of the world. It therefore provides a good introduction into the practice of international commercial arbitration.

The Vis Moot exercise is an ideal platform to spread enthusiasm on arbitration in Sri Lanka. Since the arbitration culture in Sri Lanka is such that it is looked upon by practitioners as a mere 'side-practice', it is advisable to afford more concentration of support to the students keen to learn and practise arbitration with a view towards a sustainable solution.

Respondent, student survey

Law faculties should endeavour to offer international arbitration as a stand-alone course or at least as part of other courses, such as international dispute resolution or alternative dispute resolution at undergraduate level to expose students to international arbitration during their primary legal education. The respondents to the university survey reported that if international arbitration was taught at undergraduate or postgraduate level it was taught for at least 20 hours.<sup>97</sup> It would generally be desirable to integrate international dispute resolution as part of other subjects, such as international environmental law and climate change.

Business faculties should include (international) dispute resolution segments into business modules dealing, for example, with entrepreneurship or start-ups.

Where universities offer modules on international commercial arbitration at postgraduate level, they should also consider offering other related courses such as international commercial contracts or international business transactions.<sup>98</sup> Universities could work together with their respective law society and bar council to offer postgraduate courses on international arbitration as part of the law society's and bar council's continuing education offerings.

The Commonwealth universities that need assistance regarding the international commercial arbitration course content should use the Commonwealth universities' network to assist.<sup>99</sup> The Commonwealth Secretariat can also help with the development of an international commercial arbitration curriculum.

Importantly, *The Commonwealth of Learning* should develop an international arbitration curriculum and should offer courses, inter alia, through the Virtual University for Small States of the Commonwealth.

Member jurisdictions should make student scholarships available to attend specialised international dispute resolution postgraduate programmes, international arbitration LLM programmes, or other specialised international arbitration courses.<sup>100</sup>

Forty-eight per cent of respondents to the university survey stated that the impact of technology on the law, including, for example, e-commerce and e-discovery, was part of the curriculum. Respondents acknowledged that technology was offering great advantages to international arbitration with regard to cost and time efficiency, as well as discovery and procedure in general. Given the member countries' commitment to the Connectivity Agenda, Commonwealth law faculties should



endeavour, if necessary with the assistance of the Commonwealth Secretariat and *The Commonwealth of Learning*, to incorporate law and technology into their syllabus.

### Professional training

Given the lack of basic knowledge about international commercial arbitration within the profession,<sup>101</sup> it is important that continuing education opportunities are offered to the legal profession, lawyers, in-house lawyers, and legal and policy advisers alike. Law societies and bar councils should offer inexpensive training opportunities; for example, through seminars, workshops, and webinars.

I believe in the first place education on international arbitration is the key. It may surprise you how some practising lawyers may not even see the need to arbitrate between businesses as the first step. Therefore, this is the starting point, no matter what or how infrastructures are put in place without practitioners ... realising the importance to arbitrate, it may be a useless project.

Practitioner, University survey

The training of the legal profession would address many of the challenges outlined above, including the lack of familiarity and expertise in international commercial arbitration among practitioners, and the quality of arbitrators. A more diverse legal profession will give rise to a more diverse field of trained arbitrators.<sup>102</sup> A better-trained profession will be better able to choose the best-suited arbitrator for the case at hand. Capacity-building should ideally take place in the member country or the region to allow widespread participation and also visibility and cost-effectiveness. Again, existing vehicles such as annual law society conferences should be used, and law societies and bar councils should work together, along with the arbitral institutions, the (commodity) trade associations and their regional counterparts to offer a platform for the discussion of current issues in international arbitration, and also to provide the requisite training.

One international provider of international arbitration trainings and workshops for practitioners is the CIArb. It 'offers world-renowned training in Alternative Dispute Resolution (ADR) to anyone who wants to learn about dispute avoidance, management and resolution'.<sup>103</sup> CIArb also provides arbitrator training programmes. Many courses are available remotely. Another international training provider is the International Chamber of Commerce (ICC), which also provides online courses.<sup>104</sup> Law societies and bar councils should harness the ICC's and CIArb's longstanding expertise and approach either or both regarding joint programmes.

An example of a successful in-country initiative is the combining of local resources with international assistance. The ADB and UNCITRAL have assisted the Pacific Island countries not only regarding their accession to the New York Convention but also regarding capacity-building of businesses, lawyers, and judges in these countries.<sup>105</sup> The Commonwealth Secretariat will consider whether to support efforts such as that of the ADB, or emulate those programmes in other parts of the

Commonwealth with local partners. The endorsement of existing programmes will benefit from established systems of training as well as limiting the costs that the Commonwealth Secretariat will bear. Developing the Commonwealth Secretariat's own training (with local partners) will give it the autonomy to tailor the training specifically to the intended stakeholder group. Developing the Commonwealth Secretariat's own training may, however, entail higher costs to the Secretariat; yet at the same time it will allow the Secretariat to decide what portion of the costs it passes over to the Commonwealth members. The Commonwealth Secretariat's experience in setting up other training programmes will inform its decision.

These training programmes can also foster greater integration between Commonwealth countries. Practitioners from jurisdictions that have a more developed arbitral legal framework and practice can share their experience with practitioners from jurisdictions that are less developed in the space.

Relatively cost-effective ways for lawyers to acquire international commercial arbitration expertise and forge networks do already exist. Lawyers at the beginning of their careers can intern at law firms which have a considerable international arbitration practice. Additionally, some of the Commonwealth arbitral institutions, such as the London Court of Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), the Indian Council of Arbitration, or the Nani Palkhivala Arbitration Centre, already provide internship opportunities for young lawyers.<sup>106</sup> For lawyers with more experience they may be seconded to an international arbitration practice at a firm from a different part of the Commonwealth. The Commonwealth Secretariat may assess what role it can play in fostering such opportunities and initiatives. This could include dissemination of the relevant information throughout the Commonwealth.

Given the commitment expressed in the Commonwealth's Connectivity Agenda to foster the use of digital technology and the advantages its use can bring to international commercial arbitration, law societies and bar councils should offer continuing education opportunities in law and technology.

## Judiciary

A judiciary that has the capacity to forge a symbiotic relationship with international commercial arbitration<sup>107</sup> is one of the key elements and a prerequisite for developing a modern international arbitration framework.<sup>108</sup> Member country governments need to work with their judiciaries to deliver international commercial arbitration training; for example, through their judicial training bodies. Member jurisdictions may wish to partner with existing programmes, such as the 'ICCA–New York Convention Roadshow'.<sup>109</sup> The Commonwealth Magistrates and Judges Association provides a useful platform to organise additional training events for the judiciary, which enables judges from different jurisdictions to exchange their experiences.

Another measure identified in the responses to the judiciary and counsel surveys was to have specialist judges to hear cases involving international arbitration issues. This would allow the development of expertise in handling such issues, to ensure the efficiency and accuracy of decisions. Another measure that could facilitate capacity-building within the local judiciary could be the medium-term employment of foreign judges with particular expertise in international commercial arbitration. They could, in turn, provide training to the local judiciary.<sup>110</sup>

Rwanda's successful measures to promote the use of international commercial arbitration are a good example of what means a state can adopt to increase trust in arbitration. Rwanda did not have a tradition in the practice of modern arbitration, and up to 2004 the country did not have arbitration legislation. However, Rwanda invested heavily in enhancing arbitration awareness in the country, and, particularly in relation to the national courts, invested in the legal training of Rwandan judges. Rwanda created separate commercial courts presided over by more than 22 judges with specialised commercial and arbitration knowledge. In the first years which followed the creation of the commercial courts, Rwanda hired Mauritian judges with experience in commercial and arbitration matters to assist in the establishment of the new courts. This measure intended to create good examples of case law and to provide indirect training to other Rwandan judges, both goals which appear to have been successfully achieved by Rwandan courts. Furthermore, the government also offered scholarships to Rwandan judges, so the judges could attend master programmes in commercial and arbitration matters abroad, in order to improve their legal training.

These efforts resulted in a perception of the courts as arbitration-friendly and prepared to deal with different commercial cases. Moreover, Rwanda has also seen an increase in the number of arbitration cases opting for the country as a seat in domestic and international procedures.

#### 4.3.2 Business community

The member jurisdictions should discuss with their respective business communities, including trade associations, how best to reach out to businesses, especially SMEs, to educate them on best cross-border contract practice and the benefits of international commercial arbitration and the use of technology. Information about best practice cross-border contracting and cross-border dispute resolution mechanisms including international commercial arbitration should be made available on the government websites regularly consulted by the business community.<sup>111</sup> Research conducted for the MSME Justice project in New Zealand suggests that the majority of SMEs do not have the time to attend training and are unaware of the usefulness of training on cross-border dispute resolution management.<sup>112</sup> Hence member jurisdictions and business associations should think about new ways of delivering training to SMEs.

#### 4.3.3 Fostering discourse and international conversations

It is important to foster international arbitration scholarship, discourse, and knowledge transfer. The primary responsibility for fostering scholarship and discourse lies with the universities, the professional organisations, the arbitral institutions, and the specific international arbitration professional organisations, such as the CI Arb and ICCA. However, the Commonwealth Secretariat can play an important role by assisting in organising conferences for academics, the legal profession, the judiciary, and the business community. Existing structures, such as the Commonwealth Law Conference or Commonwealth Business Forum can be

used to foster discourse. The Secretariat can co-organise events for the judiciary with the Commonwealth Magistrates and Judges Association.

The Commonwealth Secretariat is uniquely placed to bring together Commonwealth legal practitioners, the judiciary, academics, government officials, and students. The Commonwealth Secretariat's unique role in this regard was highlighted in the responses to the surveys. Therefore, the Commonwealth Secretariat should, in addition to assisting with the organisation of conferences, seminars or workshops, consider hosting its own international dispute resolution event which, inter alia, focuses on international arbitration in the Commonwealth.

#### 4.3.4 Clearing house website and database

Some respondents to the survey expressed a need for an online platform consolidating basic arbitration information and sources. The Commonwealth Secretariat should consider, in line with some of its potential undertakings outlined in the preceding paragraphs, establishing a clearing house website. This platform could include links to other platforms that host international arbitration content, such as the UNCITRAL, the New York Convention, and the QM surveys websites.<sup>113</sup> The platform could also provide guidance on model arbitration clauses, choosing the applicable law and the seat of an arbitration, and which characteristics should be taken into account before choosing ad hoc or institutional arbitration. This Commonwealth online platform could facilitate access to information for less familiar users.

Apart from general training, two other specific measures were identified in the responses to the judiciary survey. The first is the establishment of a free repository or database of court decisions and academic commentaries related to arbitration. This could form a common knowledge base for practitioners and judges to conduct research and find relevant authorities. There are some existing databases which provide free access to legislation and court decisions (such as CommonLII) and academic publications (such as SSRN). However, wide-ranging free access to academic commentaries, particularly leading texts in the field, is likely to be more challenging given that these publications will be subject to proprietary rights. Secondly, the responses to the judiciary survey identified that the Commonwealth could, in tandem, also provide training on the standard form contracts and, in particular, how to navigate their arbitration clauses.

One possible solution for providing further access to academic databases in Commonwealth jurisdictions while overcoming cost concerns is to provide access to the countries' law societies' and university libraries. Law societies could subscribe to the most commonly used arbitration databases<sup>114</sup> and offer in-site access to practitioners. The subscription costs could be partially funded by national governments, and partially shared among the law societies' members. Additionally, law societies could provide specific content via email, upon online requests by members. This could facilitate access in specific regions (e.g. those where only one law society office supports an entire region, such as the OECS Bar Association in the Eastern Caribbean countries).

#### 4.3.5 Technical assistance to governments

The Commonwealth Secretariat should help member jurisdictions to seek technical assistance from UNCITRAL and/or experts regarding the policy development

necessary for the ratification of the New York Convention and implementing legislation, as well as for the adoption of the UNCITRAL Model Law. It is important that technical assistance is delivered in co-operation with the jurisdiction's responsible government officials, not only to transfer knowledge and skills regarding the implementation of the international commercial arbitration legal framework but, importantly, to take account of the jurisdiction's special circumstances, if necessary, in the legislation.<sup>115</sup>

#### 4.3.6 Data collection

Up-to-date data is required to enable the necessary continuous policy development which allows for the adherence to best practice regarding the member jurisdictions' international commercial arbitration framework. The Commonwealth jurisdictions should develop a data collection and analysis agenda. Data that might be useful to collect to help with ongoing policy development might include the number of institutional and ad hoc arbitrations, diversity data, and international commercial arbitration issues in the courts.

Commonwealth jurisdictions should consider:

- whether to amend their arbitration law to provide that any award shall be made within a certain time period unless the parties agree otherwise (Section 4.4.1)
- ensuring access to international commercial arbitration for indigent parties by:
  - repealing the doctrines of champerty and maintenance for international commercial arbitration at least in so far as to allow third-party funding (Section 4.4.1 d);
  - allowing contingency fee agreements;
  - encouraging before the event legal cost insurance (Section 4.4.1 e);
  - making legal aid available for international commercial arbitration and including businesses in the eligible group of legal recipients.
- encouraging parties to make use of trade association mechanisms for the resolution of disputes, such as in the insurance, maritime and commodities sectors (Section 4.4.1 a);
- increasing awareness of mechanisms in ad hoc and institutional arbitrations for the time- and cost-effective resolution of disputes, including mechanisms on multi-party and multi-contract disputes, expedited procedures, bifurcation and the resolution of preliminary issues and early dismissal procedure/summary procedures (Section 4.4.2 a).

## 4.4 Enhancing Time and Cost Efficiencies

One reason why arbitration is generally preferred over other means of dispute resolution is because of its speed and cost-effectiveness. As noted in Section 3.7 above, while this promise of efficiency holds true in some sectors, there are growing concerns over increased costs and delays in others. In some jurisdictions, such as India, the prevalence of ad hoc arbitration has contributed to ineffective dispute resolution processes.<sup>116</sup> The following sections explore certain methods for enhancing time and cost efficiencies in arbitration.

While the avenues below are aimed at enhancing the arbitral framework and process for disputing parties, it is worth emphasising that improving the time- and cost-effectiveness of arbitration also directly benefits member jurisdictions. As discussed above (Section 2.2.1), one of the main challenges faced by member jurisdictions is improving the time taken for the enforcement of contracts in national courts. Having a more effective arbitration regime allows member jurisdictions to do just this. Arbitration generally offers a faster route for resolving international commercial disputes, its procedure can be crafted according to the parties' needs, and, as an alternative to litigation, it can help reduce the backlog of cases in national courts.

### 4.4.1 Legislative techniques to enhance efficiency

Some jurisdictions have also enacted legislative amendments to foster development of the common law. As discussed above,<sup>117</sup> certain amendments to the Model Law should be considered by all member jurisdictions. However, given common new procedural developments in international arbitration, member jurisdictions should also carefully consider tailor-made legislative options, bearing in mind their own local practice, or particular areas of inefficiency that may hinder arbitration practice in that state.

One such example is section 29A of the Indian Arbitration and Conciliation Act 1996. Section 29A provides that any award shall be made within 12 months from the date of the constitution of the tribunal or appointment of the sole arbitrator<sup>118</sup> and the parties can agree to extend such time limit by six months.<sup>119</sup> There are also incentives for tribunals to issue awards within six months.<sup>120</sup> For any further extension beyond the 12- or 18-month extended time limit, the parties to the arbitration must apply to a court.<sup>121</sup> If the court finds that the delay was attributable to the tribunal, it may order reduction of the arbitrator's fees of up to 5 per cent for each month of the delay.<sup>122</sup> In a similar vein, one interviewee stated: 'best practice guidance would be to ensure that adequate time is allowed immediately after the hearing, not for the hearing to run over, but for the tribunal to actually get on with doing the work of making the decision and getting those conclusions recorded while it's still fresh in their minds.'<sup>123</sup>

Section 29A of the Indian Arbitration and Conciliation Act in its current form was enacted in 2019.<sup>124</sup> The addition of a similar provision into the Model Law was received with some controversy among practitioners and scholars, because the time limits have undoubtedly put pressure on parties and counsel to expedite their case preparations. Initial feedback on the amended section 29A of the 1996 Act, however, suggests that, in practice, the use of strict time limits has contributed to

more efficient case management and, ultimately, a swifter resolution of disputes than under the previous regime.

There are two additional ways the Commonwealth jurisdictions could adopt time limits which may address the potential controversy in enacting strict time limits for tribunals to render awards. First, Commonwealth jurisdictions may legislate such that the time limit only applies to certain categories of disputes submitted to arbitration. For example, it could apply to disputes arising out of particular subject matters (e.g. intellectual property or financial services disputes) where resolution is more time sensitive. This, however, runs the risk of being legislatively uncertain. Commonwealth jurisdictions would need to consider and delimit the definitions of the subject matter to ensure that disputes do not arise out of the interpretation of such definitions.

Second, Commonwealth jurisdictions may also legislate such that the time limit only attaches to disputes that are below a certain monetary value. The monetary value of a claim may be construed as a proxy for the complexity of the dispute. However, sometimes the complexity of a claim is not directly reflected in the amount of damages sought. For example, a complex arbitration involving violation of intellectual property may involve only a claim for declaratory relief for past or future violations. A balanced legislative approach to ensuring strict time limits might involve the adoption of both a subject matter limit and a monetary value limit.

The English Civil Procedure Rules provide a useful demonstration of how these limits can be implemented in practice. The Rules allocate claims to the small claims track, fast track, or the multi-track depending on the subject matter and monetary value of the claims.<sup>125</sup>

### **Increase awareness of specialised arbitration regimes**

Some industries have industry-specific dispute resolution institutions. These include GAFTA,<sup>126</sup> which promotes the international trade in agricultural commodities, spices and general produce, and the LMAA, which focuses on the resolution of disputes within the shipping and commodity trades in the world.<sup>127</sup> The International Cotton Association also administers<sup>128</sup> quality and technical arbitrations.

These industry-specific commodity arbitrations have been recognised for their speed and efficiency.<sup>129</sup> Traders and businesses within these industries should make use of these facilities to assist and provide a specifically tailored process in resolving their disputes.

### **Funding of international commercial arbitration**

Some parties may be unable to pay the costs of arbitration. Indeed, the cost of arbitration, as noted in Section 3.7 above, can pose a considerable obstacle to the right of access to arbitration. There are four mechanisms that can be employed to ensure that indigent parties have access to arbitration: (i) legal aid, (ii) third-party funding, (iii) contingency fee agreements, (iv) legal cost insurance.

### **Legal aid/ legal assistance schemes**

There is no uniform framework in the Commonwealth through which legal aid and assistance is delivered. However, legal aid is generally not granted to businesses or for arbitration. Extending legal aid to indigent businesses would recognise

the contribution that SMEs make to the economy. Small businesses can be as vulnerable as indigent persons, especially when trading cross-border, and a single dispute can put an SME in jeopardy. Australia, for example, has recognised the need to support small businesses. There are a number of agencies in the Australian states and territories that provide at least initial free legal assistance to small businesses, above all the Australian Small Business and Family Enterprise Ombudsman.<sup>130</sup>

In some Commonwealth jurisdictions, such as Namibia<sup>131</sup> and Bangladesh,<sup>132</sup> legal aid already extends to alternative forms of dispute resolution including arbitration.<sup>133</sup> Such legal aid schemes recognise the advantages arbitration can entail. Commonwealth jurisdictions that do not want to provide unmitigated legal aid for arbitration may wish to follow Namibia's example, where legal aid for arbitration is available only if the director of Legal Aid considers that the dispute is properly suited for arbitration.<sup>134</sup>

### Third-party funding & contingency fee agreements

Today, there is a growing sector of generalist third-party funders that provide litigation funding for disputes across a range of sectors.<sup>135</sup> These third-party funders provide funding to the disputing party, typically in exchange for a portion of the damages recovered in any arbitration.

Various funders have differing monetary thresholds below which they will not fund claims. The lowest funding threshold identified in research for this study is claims worth £200,000.<sup>136</sup> These thresholds may change as the industry develops, particularly in relation to SMEs.

Historically, under the common law, rules on champerty and maintenance prevented third parties from funding litigation. Maintenance refers to an unconnected third-party assisting to maintain the dispute by providing, for example, financial assistance. Champerty is a form of maintenance where a third party pays some or all of the costs of a dispute in return for a share of the proceeds.<sup>137</sup> The prohibition of third-party funding was based on the public policy ground of protecting the purity of justice.<sup>138</sup> There was a fear that a third party could manipulate the litigation process and, as Lord Denning put it, 'be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses'.<sup>139</sup>

In the current era of encouraging access to justice, these concerns are widely considered to be out of date. Addressing the issue in 2013, Lord Neuberger (then the president of the UK Supreme Court) said that 'access to the courts is a right and the State should not stand in the way of individuals availing themselves of that right'.<sup>140</sup> The rules against maintenance and champerty have been relaxed in a number of jurisdictions, including England and Wales and parts of Australia, Canada, and the USA. In those jurisdictions third-party litigation and arbitration funding is now permitted.<sup>141</sup> Singapore and Hong Kong have enacted legislation to allow third-party funding for international arbitration.<sup>142</sup>

According to the country reports, a number of Commonwealth jurisdictions retain the rules on maintenance and champerty as part of their common law heritage.<sup>143</sup> Should member jurisdictions wish to facilitate third-party funding arrangements, it will be necessary to first legislate to relax such rules. As the ICCA–Queen Mary



Taskforce on Third Party Funding Report observes: 'The business of law is changing, and dispute funding is very much an integral part of the future of the global arbitration and litigation markets.'<sup>144</sup>

To allow all parties, including SMEs, to use international commercial arbitration as a cross-border dispute resolution mechanism, third-party funding should be available. Member jurisdictions which do not wish to abolish maintenance and champerty in their entirety could carve out an exception for third-party funding in international arbitration.<sup>145</sup>

The information available suggests that in half of the member jurisdictions contingency fee arrangements are prohibited.<sup>146</sup> Allowing contingency fee arrangements is another avenue for member jurisdictions to ensure that businesses have the means at their disposal to access international commercial arbitration.

### Legal expense insurance

Legal expense insurance is common in civil law countries and in certain sectors which have, historically, developed insurance regimes to provide cover for the costs of litigating claims.<sup>147</sup> This type of insurance covers the cost of pursuing or defending legal actions. In return for a premium, paid in advance, the insurer covers the risk of the legal costs of a potential litigation or arbitration. It will fund the costs of bringing or defending a claim in arbitration, but it will not take a share in the proceeds of a successful award. Since the insurance is paid before a dispute has arisen it is often referred to as 'before the event' insurance (BTE).

BTE is not liability insurance as it does not cover the amount at the core of the dispute. It is also not 'after the event' insurance (ATE), which is coverage purchased once a dispute has arisen. ATE provides cover against an adverse costs award or against non-recovery of a party's own costs and is usually paid for by a contingent premium if the claim succeeds. However, this type of insurance does not usually provide funding; funding is not the purpose of this insurance scheme.

A common form of BTE in international arbitration is FD&D (freight, demurrage and defence) cover. This type of insurance is offered by P&I clubs or FD&D clubs in the shipping industry<sup>148</sup> and the insurance cover extends to legal costs associated with claims and disputes in relation to 'matters of a shipping nature',<sup>149</sup> and in particular matters concerning the 'building, buying, selling, owning and ... operation of a vessel'.<sup>150</sup> FD&D cover includes in-house legal advice, as well as financing for local or outside counsel. It also includes legal advice on maritime issues more broadly.<sup>151</sup> FD&D cover is generally only extended to members of the insurance club.

The UK Defence Club, for instance, provides FD&D cover with respect to contractual disputes under time and voyage charters, including hire and re-delivery disputes, cancellation/fixture disputes, non-payment of freight and demurrage and laytime disputes, claims arising out of counterparty defaults, shipbuilding and ship repair disputes, sale and purchase disputes, bunker quality disputes, disputes over the safety of ports or berths, oil major and other ship vetting disputes, disputes with agents and brokers, and disputes which members may have with other underwriters.<sup>152</sup>

BTE might offer advantages especially for SMEs since it allows before the event dispute resolution costs risk management in their budgets.<sup>153</sup> Member countries,

therefore, should encourage the insurance industry to offer BTE which covers disputes resolved through international commercial arbitration.<sup>154</sup>

#### 4.4.2 Increasing awareness of existing procedural tools and mechanisms

The parties are the biggest driving force behind the efficiency of the arbitral procedure since they decide the rules that apply and the arbitrators they appoint. States, therefore, other than the measures outlined in the preceding section, have only limited ability to influence the time and cost challenge of international commercial arbitration. Some of the measures and key players to address the cost and time challenges are discussed below.

##### Use of institutional arbitration over ad hoc arbitration

In some jurisdictions, notably India, the inefficiencies in the arbitral process have been attributed to a prevalence of ad hoc arbitration over institutional arbitration. In particular, the Law Commission of India noted that, among other things, the lack of case administration and oversight over fee structures used by arbitrators in ad hoc arbitrations creates systemic issues in the arbitral process.<sup>155</sup>

In these jurisdictions, a shift towards institutional arbitration could alleviate the inefficiencies in the arbitral process. An arbitral institution not only provides the necessary case administration throughout the proceedings, but it also provides a procedural framework as institutions have developed institutional arbitration rules to govern the proceedings. As explained by the Law Commission of India:

Arbitration may be conducted ad hoc or under institutional procedures and rules. When parties choose to proceed with ad hoc arbitration, the parties have the choice of drafting their own rules and procedures which fit the needs of their dispute. Institutional arbitration, on the other hand, is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of such institution. Essentially, the contours and the procedures of the arbitral proceedings are determined by the institution designated by the parties. Such institutions may also provide qualified arbitrators empaneled with the institution. Further, assistance is also usually available from the secretariat and professional staff of the institution. As a result of the structured procedure and administrative support provided by institutional arbitration, it provides distinct advantages, which are unavailable to parties opting for ad hoc arbitration.<sup>156</sup>

It must be noted that this concern over ad hoc arbitration is by no means universal. As set out above, arbitrations conducted under LMAA<sup>157</sup> and GAFTA rules offer prime examples of ad hoc arbitrations that operate with commendable speed and cost-effectiveness.

Research conducted by KIAC in Rwanda found that lawyers (of which 21 per cent preferred ad hoc arbitration and 59 per cent preferred to use both ad hoc and institutional arbitration), and construction industry users such as contractors, engineers, and architects (of which 27 per cent favoured ad hoc and 27 per cent institutional arbitration) perceived the advantages of ad hoc arbitration to be that 'unlike institutional arbitration, in ad hoc arbitration there are no fixed charges and the fee is negotiable on both sides'.<sup>158</sup>

### Mechanisms on multi-party and multi-contract disputes

The rules on consolidation, joinder and intervention in arbitration further facilitate this procedural efficiency.<sup>159</sup> Related issues can be consolidated into a single proceeding and dealt with in the same set of proceedings. Proceedings may also be run concurrently, for instance by appointing the same tribunal in multiple related cases or by having a single hearing for related cases. These procedures allow parties to resolve issues efficiently and save on costs by preparing for one set of proceedings instead of several. Numerous arbitral rules provide for such procedures. An example is article 10 of the ICC Rules, where parties may consolidate their claims if they agree or if all the claims are made under the same arbitration agreement, or where the dispute arises in connection with the same legal relationship.<sup>160</sup> Other rules with such mechanisms include the LCIA, LMAA, SCC, SIAC, CEITAC, and HKIAC rules.<sup>161</sup>

Commonwealth jurisdictions may also wish to consider a legislative amendment either to the arbitration legislation adopting the UNCITRAL Model Law or their existing arbitration legislation to allow consolidation, joinder, and intervention. The court of the seat of arbitration may then assist in situations where the parties have opted for ad hoc arbitration or institutional rules that do not expressly provide for the tribunal's power to consolidate, join or allow intervention.

### Expedited procedures

The expedited arbitration procedure provides a faster procedure in arbitration with a shorter timeline and at a reduced cost.<sup>162</sup> This procedure is usually applicable to arbitrations with a smaller quantum in dispute or where the parties agree to the use of expedited arbitration procedures. In recent years, the expedited arbitration procedure has gained more attention due to increasing concerns with high costs and delays in arbitration.<sup>163</sup> Expedited arbitration procedures will be the subject of the UNCITRAL Working Group II meeting at its 70th session.<sup>164</sup>

Under the SIAC Rules, the expedited procedure provides that the arbitration should be concluded six months from the time of appointment of the tribunal.<sup>165</sup> This procedure is available to parties where the amount in dispute does not exceed S\$6 million<sup>166</sup> and the parties have either agreed to the procedure or it is a case of exceptional urgency.<sup>167</sup>

Similarly, under the ICC Rules that came into force on 1 March 2017, the expedited procedure is available for claims for amounts not exceeding US\$2 million or where the parties have otherwise agreed in their arbitration agreement to use the expedited procedure.<sup>168</sup> Under the Swiss Rules, since 2004, the expedited procedure has been used in over 36 per cent of Swiss Rule cases, either in disputes not exceeding CHF1 million (equivalent to US\$1.1 million) or due to agreement between the parties. The 2012 amendment to the rules introduced a provisional deposit of CHF5,000 (US\$5,500) before the file would be forwarded to the arbitral tribunal. This deposit facilitates an even faster process as the tribunal is able to start proceedings immediately without having to wait for the receipt of advance costs.

The LMAA also offers a small claims procedure, which is akin to an expedited arbitration. The mechanism is available for disputes below US\$100,000, unless the parties agree otherwise.<sup>169</sup> The claims are resolved by a sole arbitrator for a fixed fee, currently set at £4,000.<sup>170</sup> There is no formal disclosure process for evidence

gathering and the hearings last no longer than a day.<sup>171</sup> Anecdotal evidence suggests that proceedings subject to the small claims track are typically resolved within three months and, on average, nearly 200 cases a year are routed through this mechanism.

### Resolution of preliminary issues

In some cases, there may be clearly identified and discrete issues of fact and/or 'self-contained' questions of law that, if resolved, could be dispositive of all or part of a claim.<sup>172</sup> These issues can and should be resolved in a preliminary bifurcated phase as it can result in substantial time and cost savings for the parties. Jurisdictional objections are classic examples of issues ripe for preliminary determination.<sup>173</sup> If a party succeeds on its objections, it may no longer need to participate in the proceedings or, where the issue goes to the scope of the arbitration agreement, it may have successfully reduced the number of issues in dispute. The ability to bifurcate a proceeding to resolve preliminary issues falls within the broad case management powers of arbitral tribunals.<sup>174</sup> Some rules also provide for and/or expressly encourage arbitrators to ensure effective case management and to consider whether there are any issues that can be resolved in a preliminary bifurcated phase.<sup>175</sup>

### Early dismissal procedures/summary procedure

Early dismissal or summary procedures in arbitration is another option afforded to parties in some circumstances to reduce the time taken in arbitration in allowing meritless claims or defences to be dismissed. Whether the tribunal has the power to grant summary procedures depends on the rules of the arbitral institution itself and on what the parties have agreed to. In some cases, the parties themselves have provided that the tribunal would have the power to follow summary procedures.<sup>176</sup> In most cases, however, such express language is absent and the question of whether the tribunal has the necessary power is dependent on the arbitral rules chosen by the parties.

A summary decision by a tribunal on certain issues of fact or law can reduce the associated time and costs of the procedure. As a result, it can improve the efficiency of the entire arbitral process. For example, under the SCC Rules, article 39(2) provides that the summary procedure is available at any time during the arbitration and is not only a procedure for the early dismissal of claims. A party requesting the procedure must indicate the grounds for its request and demonstrate that the procedure is efficient and appropriate.<sup>177</sup> The other party may then submit comments on the request and the tribunal may issue an order dismissing or granting the summary procedure in the appropriate form.<sup>178</sup> The ICSID Rules,<sup>179</sup> the HKIAC Rules,<sup>180</sup> and the SIAC Rules<sup>181</sup> also include a summary procedure by allowing parties to apply for the early dismissal of a claim on the basis it is manifestly without legal merit or outside the jurisdiction of the tribunal.

While the rules of other arbitral institutions do not expressly provide for a summary procedure or early dismissal procedure, they provide that arbitrators have broad case management powers.<sup>182</sup> The case management powers accorded to the tribunal safeguard ensure that the tribunal is able to effectively ensure that arbitration proceedings are facilitated efficiently.

## 4.5 Enhancing Diversity within the Arbitration Community

Member jurisdictions should be aware of the challenges regarding diversity in international commercial arbitration and should send a clear signal to their law societies, bar councils and arbitral institutions by requiring transparent diversity reporting.

Member jurisdictions should co-operate with their law societies, bar councils and arbitral institutions in order to foster diversity in international arbitration.

Where involved in international commercial arbitrations, member countries should consider diversity as a factor in making their arbitral appointments.

The Commonwealth Secretariat needs to ensure that in its decisions regarding international commercial arbitration due regard will be given to diversity.

Commonwealth jurisdictions and the Commonwealth Secretariat should consider launching a Commonwealth diversity pledge.

As noted in Section 3.6 above, there is a need to address the lack of diversity within the international arbitration community. This requires eliminating the general barriers restricting equal access including (but not limited to) financial barriers, social class, lack of flexibility, a culture of exclusivity, and unconscious bias.<sup>183</sup> Certain arbitration-specific barriers also need to be addressed, including a lack of easily accessible information on diverse candidates, lack of dialogue in certain regions, lack of visibility of diverse candidates, lack of diversity statistics, and weak internal processes for ensuring diversity appointments and hiring.<sup>184</sup> The respondents to the arbitrator survey identified 'diversity' as one of the issues the Commonwealth should engage with and find a solution for.<sup>185</sup>

Encourage and endorse diverse arbitration communities and discourage elitist and exclusionary initiatives such as the establishment of institutions with closed lists and panels.

Respondent, Arbitrator survey

However, to date, no significant statistics could be found on ethnic/regional diversity in arbitration, and certain arbitral institutions within Commonwealth jurisdictions still have no specific policies or practices on diversity reporting.

There are several solutions that could address this challenge. First, to the extent that a lack of diverse arbitral and counsel appointments stems from insufficient experience in international arbitration, the capacity-building measures outlined in Sections 4.3 and 4.4 above, if enacted, will play an important role in addressing the diversity gap.

Second, a member country or a state-owned enterprise party to an international commercial arbitration should seek to appoint counsel and arbitrators from its region rather than 'automatically' looking towards those from the main international arbitration centres. Member jurisdictions should ensure that due regard is given to diversity in their decision-making processes related to international commercial arbitration.

Third, arbitral institutions and other appointing authorities (such as the national courts in some jurisdictions) should be encouraged to more actively consider diverse candidates and report statistics on their appointment practices each year. The reporting component is essential as it makes the appointing authorities more conscious of diversity considerations.

Indeed, this now appears to be ingrained in the practice of the leading arbitral institutions, which include diversity data in their annual reports. These institutions have shown marked improvements in their approaches to diversity in recent years. The ICC, for instance, reported that the number of female arbitrator appointments in ICC proceedings more than doubled between 2015 and 2018, from 136 to 273. Thirty-five per cent of the arbitrators it appointed were also below the age of 50.<sup>186</sup> In geographical terms, the ICC also appointed arbitrators from over 87 jurisdictions, which was a new record.<sup>187</sup> In 2018, the LCIA appointed arbitrators from 34 jurisdictions and 43 per cent of the appointments selected by the LCIA Court were female, while 23 per cent of arbitrator appointments selected by parties were women.<sup>188</sup> Statistics from other leading institutions – the SCC, SIAC, and HKIAC – reflect similar trends.<sup>189</sup> While international arbitration still has some distance to cover in addressing diversity, both in terms of arbitrator and counsel representation, the growing emphasis on diversity signals promising change.

Fourth, steps could be taken to reduce the information gap within the arbitral community on suitable diverse candidates. This gap is multi-fold and includes a lack of information on diverse candidate profiles as well as on current statistics on gender, racial and ethnic diversity within arbitration (especially on counsel teams). Organisations such as Arbitrator Intelligence<sup>190</sup> and Arbitral Women,<sup>191</sup> as well as other service providers,<sup>192</sup> are engaged in providing the arbitral community with access to information and online databases. However, it is a work in progress, and such projects need horizontal expansion into jurisdictions where information collection practices are still sparse. Indeed, even the existing platforms could be improved. As one interviewee from the trade and commodities sector noted, these sources may carry certain inbuilt biases in how they profile arbitrator candidates; for instance, with a preference for legally trained arbitrators over non-lawyers. Another issue is the cost involved in accessing information from these organisations and service providers, which may be considered prohibitive for certain practitioners and SMEs. Alternatives with law societies akin to the solution proposed above (Section 4.3.4) to provide access to other databases may provide an alternative.

There is a significant need to improve the scope of dialogue on this issue, in order to create awareness on diversity appointments. Campaigns such as the Equal Representation in Arbitration Pledge,<sup>193</sup> the Alliance for Equality in Dispute Resolution,<sup>194</sup> the GQUAL Campaign,<sup>195</sup> and the Debevoise Women's review<sup>196</sup> are examples of how stakeholders are adding to the narrative around the need for diversity. A similar commitment on behalf of the Commonwealth jurisdictions would go a long way in promoting diversity and inclusivity within this sector.

When we sent the client a list of possible arbitrator appointments, the client demanded to know why the list did not contain a more diverse range of candidates.

Counsel, law firm, UK

The business community equally needs to support diversity by, for example, having confidence in their local legal profession and by appointing arbitrators from their region. The business community as users of international commercial arbitration have the ultimate decision-making power in the appointment of counsel and arbitrator.

The Commonwealth Secretariat should have particular regard to diversity issues in decision-making processes related to international commercial arbitration.

Some of the existing diversity initiatives are primarily aimed at achieving gender diversity. As discussed in Section 3.6, however, diversity is also required in terms of cultural and geographical backgrounds. To support capacity-building and the diversification of the international arbitration community the member jurisdictions and the Commonwealth Secretariat could consider launching a Commonwealth diversity pledge. The pledge would be open for adoption by the member jurisdictions and the Commonwealth Secretariat but also, for example, by arbitral institutions, law societies, bar councils, businesses, and universities. Such a pledge would not need to be limited to international arbitration.

## 4.6 Regulatory Changes

Commonwealth jurisdictions should consider permitting the participation of foreign counsel in international arbitrations seated in their jurisdictions.

Member countries may wish to consider and enhance the existing tax frameworks and visa restrictions applicable to arbitrators and foreign counsel that participate in international commercial arbitrations in their jurisdictions.

Member jurisdictions should be aware of the impact of the GDPR on natural and legal persons in their countries. They may also wish to inform stakeholders about the impact of the GDPR. European Union Commonwealth member countries may wish to consider allowing the processing of personal data for parties to comply with their disclosure obligations in international commercial arbitration.

The key regulatory concern identified in the study relates to the right of parties to instruct foreign counsel in their international arbitration disputes in certain jurisdictions and the concomitant ability of foreign counsel to practise international arbitration.<sup>197</sup> The solution to this concern would be to liberalise the legal profession to permit the participation of foreign counsel in international arbitrations.

There is no universal or consistent approach amongst jurisdictions on the ability of foreign counsel to participate in international arbitration proceedings. While some national arbitration statutes do not expressly guarantee the parties' freedom to select their representatives in international arbitrations (such as the UNCITRAL Model Law), other national arbitration statutes expressly guarantee parties the right to representation of their choice.<sup>198</sup> For example, the Australian International Arbitration Act 1974 and the Fiji International Arbitration Act 2017 allow parties to appear before an arbitration represented 'by any other person of that party's choice'.<sup>199</sup> The relevant laws in Singapore and Hong Kong provide that restrictions on legal practitioners do not apply in arbitral proceedings.<sup>200</sup>

Some jurisdictions have gradually liberalised the restrictions on representation by foreign counsel in international arbitration. For example, in Singapore, a 1988 decision by the Singapore High Court excluded a New York law firm from representing a client in an international arbitration seated in Singapore.<sup>201</sup> A legislative amendment in 1992 was then passed which permitted foreign lawyers to represent parties in international arbitrations seated in Singapore, with the requirement that local counsel be retained, along with foreign counsel, in matters involving Singapore law.<sup>202</sup> In 2004, however, that requirement was dropped such that Singapore now allows the parties full freedom to select legal representatives in Singapore-seated international arbitrations.<sup>203</sup>

An approach of complete liberalisation enabling full freedom to select legal representatives to international parties would immediately put a jurisdiction on par with the standards of leading international arbitration centres. A complete liberalisation could, however, risk imposing sudden change on local businesses and practices of the domestic legal profession. By contrast, an approach of gradual liberalisation would provide greater opportunity for the domestic legal profession, and the arbitration community in particular, to acclimatise to the participation of foreign counsel, while requiring the involvement of local counsel in international arbitrations. A disadvantage of gradual liberalisation is in increasing the parties' costs, which may deter parties from selecting the jurisdiction as the arbitral seat in the first place. It will be important for each jurisdiction to balance these competing interests and engage with their respective legal professions to determine what, if any, change in the participation of foreign counsel would be most appropriate to the needs of the jurisdiction.

In relation to the visa and tax considerations raised above, member jurisdictions may wish to consider legislative changes that liberalise visa restrictions for arbitration proceedings (in relation to both foreign counsel and arbitrators) and separate tax regimes for arbitrators. Should a more restricted approach be appropriate, member jurisdictions may also wish to consider treaties that provide reciprocal benefits for counsel and arbitrators from certain countries. The Commonwealth Secretariat proposes exploring these options in a further phase, subject to the interest of member countries.

Another aspect of regulatory concern is the use and 'processing' of personal data in arbitration. Within the European Union, the General Data Protection Regulation (GDPR) sets out wide-ranging protection against the processing of personal data.<sup>204</sup> Arbitral institutions situated in the European Union without a doubt fall into the ambit of the GDPR. However, the extent to which arbitrators and arbitral tribunals are data controllers and, consequently, have to abide by the GDPR's data management framework is less clear.<sup>205</sup> Moreover, in certain instances, the



GDPR's territorial scope may extend outside the European Union, thus turning non-European economic operators (especially those offering goods or services in the European Union, e.g. arbitral institutions outside the European Union) into possible addressees of its rules. The definition of 'personal data' under the GDPR is broad.<sup>206</sup> 'Processing' of personal data is also broadly defined.<sup>207</sup> In court litigation, processing of personal data is lawful if it 'is necessary for compliance with a legal obligation to which the controller is subject'.<sup>208</sup> In summary, the GDPR applies in the international commercial arbitration context to:<sup>209</sup>

the 'processing' of 'personal data' in the context of the activities of an establishment of a controller or a processor in the Union, whether or not the processing takes place in the Union; and

to the 'processing' of 'personal data' of data subjects who are in the Union by a controller or processor not established in the Union where the processing relates to the offering of goods or services (whether free or paid for) or the monitoring of behavior which takes place within the European Union.

The performance of discovery obligations in court is therefore arguably lawful. However, the issue is less clear when it comes to arbitration. An arbitrator's directions give rise to a party's disclosure obligations. This obligation is ultimately consensual, contractual, or quasi-contractual.<sup>210</sup> The GDPR includes a number of areas where the European Union member states are expressly allowed to derogate from its terms. This includes the right to exempt 'judicial proceedings' and 'the enforcement of civil law claims' from the application of parts of the regime.<sup>211</sup> The Commonwealth European Union members are well advised to consider a legislative carve-out for arbitration, for example in respect of 'the enforcement of civil law claims'. This would permit the processing of personal data for parties to comply with their disclosure obligations. Other member jurisdictions may wish to consider the impact of the GDPR on their natural and legal persons and may wish to inform stakeholders of its possible impact.

## 4.7 Mechanisms to Facilitate Cross-border Arbitration

While developed countries and large businesses have the knowledge and resources to avoid expensive international litigation, small states and small enterprises have limited access to finance and to the latest technologies and information on general international standards. Overcoming these problems by providing a more efficient dispute resolution system for parties by facilitating international arbitration across borders is one of the main challenges identified in this study. The following sections set out a number of proposals to enhance and facilitate the use of international arbitration.

### 4.7.1 Online Dispute Resolution (ODR)

#### **Member countries should consider developing a digitisation strategy.**

The Commonwealth Secretariat should consider incorporating the possibility of developing an ODR platform into the work programme it is undertaking as part of the Connectivity Agenda.

The Commonwealth Secretariat should consider providing guidelines and possible rules to be applied in ODR.

As discussed in Section 3.9, all eight stakeholder groups surveyed are familiar with technology aiding the dispute resolution process. The depth of their familiarity varies and depends on, for example, age (students unquestionably accepting that technology will be an integral part of the international arbitration process and newly established arbitral institutions providing a wide variety of technology-based services including a virtual hearing room<sup>212</sup>) or geographical location (island state courts are more likely to use technology than their big country counterparts<sup>213</sup>). As identified by the Connectivity Agenda,<sup>214</sup> member jurisdictions should enhance their ICT capabilities, which includes not only providing the infrastructure, but also ensuring that all stakeholders have access to technology and the capacity to use it.

Respondents to the business, arbitrator, counsel, and arbitral institution surveys were also asked to comment on their familiarity with and feasibility of online dispute resolution (ODR) platforms in international arbitration. Although there is no uniform definition of ODR, the UNCITRAL defines ODR as a 'mechanism for resolving disputes through the use of electronic communications and other information and communication technology' in its Technical Notes on Online Dispute Resolution.<sup>215</sup> ODR, for the purpose of this report, is defined as a method of dispute resolution that uses a virtual location, and proactively assists parties to resolve disputes in ways that go beyond facilitating the exchange of information.<sup>216</sup> ODR systems may be partially or completely reliant on artificial intelligence (AI) to automate their functionality.<sup>217</sup> ODR is designed to assist parties in resolving disputes in a simple, fast, flexible, and secure manner, without the need for physical presence at a meeting or hearing.<sup>218</sup> ODR is often seen by academics and policy-makers as a cost-effective way of resolving low-value disputes. It may therefore be particularly attractive to SMEs.<sup>219</sup> ODR systems can and often are based on international commercial arbitration principles and rules.<sup>220</sup>

ODR platforms have been developed by both the public and private sector.<sup>221</sup> For example, PayPal's Dispute Resolution Centre for e-commerce disputes is a good example of a private online initiative that reportedly handles over 60 million e-commerce disputes annually.<sup>222</sup> In the public sector, Her Majesty's Court Service has implemented a judicial ODR service for fixed sum claims of up to £100,000 and it issues more decisions than any other local county court in England and Wales.<sup>223</sup> While the focus of the OECD and EU programmes is more on business-to-customer (B2C) e-commerce matters,<sup>224</sup> other areas like intellectual property disputes, insurance disputes, customer-to-customer (C2C) and business-to-business (B2B) disputes may all fall within the ambit of ODR.<sup>225</sup>

Of the respondents, 70 per cent of arbitrators reported that they would be comfortable to be an ODR arbitrator. Interestingly, while 73 per cent of counsel responded that their clients would not be comfortable with ODR, 65 per cent of the businesses that responded to the surveys indicated a preference for ODR or an online forum to resolve their dispute (notably, within the business respondents, only half of the large businesses preferred ODR). Neither the New Zealand or Austrian qualitative empirical research corroborates that enthusiasm for ODR, as 57 per cent and 35 per cent of SMEs respectively considered ODR as a potential dispute resolution option. The New Zealand and Austrian research findings are in line with the response to the business survey that negotiation is the dispute resolution mechanism of choice<sup>226</sup> and the finding that trust is the core tenet of SME contracting. Hence, the high acceptance of ODR in the business survey may be explained by the respondents equating ODR with the use of technology to aid dispute resolution.

Parties do not know enough about online dispute resolution, and which form it may take in practice to trust it will lead to an adequate resolution of their dispute.

Arbitral institution

The advance of technology is transforming the landscape of dispute resolution. It is changing the way the justice system operates and improving access to justice.<sup>227</sup> ODR is at the forefront of this trend and provides speed and cost-effectiveness in the context of cross-border disputes.<sup>228</sup> The popularity of ODR has been growing because of the advantage in speed and convenience of internet to resolve disputes.<sup>229</sup> Due to its relatively low economic entry barrier, the need for ODR is especially striking for SMEs with limited access to finance.<sup>230</sup> However, the experience of the European Union ODR platform,<sup>231</sup> launched in 2016, which offers a B2B service, confirms the New Zealand and Austrian research findings that SMEs have not taken up the service.<sup>232</sup> This suggests that more research is needed to ascertain how to design an ODR platform that emulates the core tenets of SME contracting and dispute resolution management, i.e. trust and negotiation.

The importance of ODR has been recognised and promoted by numerous international organisations and several legal systems. Countries such as Canada and the United Kingdom have launched judicial ODR systems.<sup>233</sup> The UNCITRAL recognised its potential and established a working group on ODR back in 2010 which concluded with publishing notes on the use of ODR. The OECD has addressed this issue since 1999, starting with 'Guidelines for Consumer Protection in the Context of Electronic Commerce'.<sup>234</sup>

There are a number of advantages that the use of ODR can bring to enhancing the use of international arbitration across the Commonwealth:

- a. **Cost-effective:** ODR reduces costs and increases access to justice because distance communications are used.<sup>235</sup> This is a major benefit from a business perspective. Costs of international disputes are disproportionately high because of travel expenses, among other things. This is especially true in the Commonwealth as member jurisdictions are located in Asia, Africa, North America, South America, Europe, and Oceania. ODR will cut some of those costs, in particular travel and hearing venue expenses, and therefore will enhance the access to an effective dispute resolution regime for SMEs and low-value disputes.<sup>236</sup>
- b. **Time efficient:** Another advantage of ODR that attracts many parties is speed. Because scheduling meetings, planning travel and finding space is no longer necessary in ODR, it provides enormous flexibility to parties to conduct their dispute.<sup>237</sup> This may be of particular benefit for disputes involving parties from Commonwealth jurisdictions considering the numerous time zones.
- c. **Convenience of the procedure:** Another advantage of ODR is its convenience. ODR can reduce costs, including the time, money, and energy required to resolve a dispute. Ponte and Cavenagh explain that ODR often uses confidential procedures, which encourage parties to be more honest in a trusting environment that fosters settlement than a face-to-face process.<sup>238</sup> Parties do not need to take time off from work and travel long distances with ODR.

- d. Increasing trade: ODR enables the resolution of lesser-value and cross-border disputes that cannot easily be resolved otherwise and, therefore, improves confidence in the viability of international transactions. Businesses also benefit from ODR through the ability to address disputes much earlier than is possible in traditional dispute resolution.<sup>239</sup> ODR creates feedback mechanisms that help businesses continuously improve their transaction models and customer service and, ultimately, compete more effectively.<sup>240</sup>
- e. Lowering the carbon footprint: ODR enables the parties and the decision-maker to stay at their place of residence, i.e. no travel is necessary to resolve the dispute. In addition, no bundles need to be produced. Even though to conduct ODR energy will be necessary which might not be carbon neutral, the overall carbon footprint is considerably lower than for a conventional international arbitration.<sup>241</sup>

The use of ODR does, however, also raise some difficulties which must be considered in developing an effective framework:

- a. Technological difficulties: A threshold requirement of ODR (and indeed many other technologies that facilitate dispute resolution) is a stable internet connection. Without reliable and affordable access to high-speed internet ODR will not provide a reliable and trustworthy dispute resolution option. Not every Commonwealth jurisdiction has the same levels of technical knowledge and skill.<sup>242</sup> The feasibility of ODR would also be affected in member jurisdictions where there is a lack of stable electricity.
- b. Party consent: ODR is based on the consent of both parties. While in cross-border litigation and international commercial arbitration a party has certain means at its disposal to compel the other party to participate in the dispute resolution, that is not the case to date in ODR.
- c. Legal difficulties: The absence of clear legal standards for ODR creates a number of difficulties, particularly if the need for enforcement arises.<sup>243</sup>
- d. Data privacy: Member jurisdictions will need to have regulations and protocols in place to protect the parties from data piracy. In addition, member jurisdictions must have the necessary technology to prevent cyber-attacks on the ODR platform.

#### 4.7.2 Commonwealth cross-border commercial dispute resolution scheme

The Commonwealth Secretariat may wish to develop a cross-border dispute resolution scheme for business-to-business disputes based on international commercial arbitration.

The majority of respondent governments to the survey indicated a preference for a specialised regional business-to-business (B2B) cross-border dispute resolution mechanism. Ninety-four per cent of respondents to the university survey thought that a regional dispute resolution regime for B2B disputes would be valuable.<sup>244</sup> The majority of respondents to the judges,<sup>245</sup> arbitrator,<sup>246</sup> and counsel<sup>247</sup> surveys also indicated a preference for a specialised regional B2B cross-border dispute resolution regime. There is also considerable support by arbitral institutions for such a regime.<sup>248</sup> Hence there appears to be significant interest across stakeholders in establishing a specialised framework for B2B cross-border dispute resolution.

One solution for such a framework is for member jurisdictions to enter into a B2B agreement (B2BA) (or, where multiple jurisdictions are involved, a multilateral arbitration treaty or MAT).<sup>249</sup> In broad terms, under a B2BA, arbitration becomes the default dispute resolution mechanism for certain categories of disputes. In particular, the treaty would apply to (i) commercial contractual disputes and (ii) between entities and nationals of the signatory states.<sup>250</sup> Member countries to the B2BA could expand or restrict the categories of disputes that would be subjected to the B2BA (for instance, by limiting the value of disputes to a certain monetary threshold or to disputes between corporate entities alone). Member countries can also clarify and exclude certain subject matters that involve issues of public interest, such as employment disputes, consumer disputes, and other domestic non-commercial disputes.<sup>251</sup>

In terms of the applicable default mechanism, the B2BA would typically provide the default rules of arbitration,<sup>252</sup> the number of arbitrators, and the appointing mechanism for the tribunal.<sup>253</sup> The B2BA may also regulate other procedural aspects of the arbitration, such as the confidentiality of proceedings or the choice of the seat.<sup>254</sup>

Importantly, the default mechanism under a B2BA would not be mandatory. Commercial parties can opt out of the default mechanism in the treaty by providing for an alternative method of dispute resolution – such as litigation or expert determination – in their contracts.<sup>255</sup>

B2BAs could bring a number of valuable benefits should they be adopted within the Commonwealth:

- a. Cost-effectiveness: Disputes arising from international transactions are often expensive and time consuming to resolve because you need lawyers from different jurisdictions. Arbitration has become the preferred mechanism for resolution of international commercial disputes by businesses around the world because arbitration resolves international commercial disputes more quickly, efficiently, expertly, and neutrally compared to traditional international litigation.<sup>256</sup>
- b. Increase trade: An effective mechanism for resolving disputes is a prerequisite in attracting foreign investment and international commerce. Given the huge potential for trade within the Commonwealth countries,<sup>257</sup> providing a more efficient dispute settlement method would benefit trade throughout the Commonwealth.
- c. Benefits for small states: Default arbitration under a B2BA can contribute to the growth of developing small states by making them a more attractive destination to do business.<sup>258</sup> Disputes will be decided by arbitrators who are chosen for their individual expertise.<sup>259</sup> B2BAs would ensure the enforcement of awards under the New York Convention and therefore provide assurance to small states' investors.<sup>260</sup>
- d. Benefit for SMEs: The need for B2BA is particularly striking for SMEs that do not engage in trade because they are not familiar with judicial procedures when disputes arise. B2BA could allow SMEs greater access to justice in the international space by reducing cost, complexity, rigidity, and uncertainty of international litigation.<sup>261</sup> This enhanced access to justice would support SMEs to engage more extensively in international trade.<sup>262</sup>

Adopting the philosophy of the B2BA, an even broader approach may be for the Commonwealth to draft a Commonwealth model arbitration treaty which member jurisdictions are able to adopt.

Q 51: What role could the Commonwealth play to strengthen international commercial arbitration in the Commonwealth?

'Creation of something like the BATs [B2BAs] with in the Commonwealth for fostering arbitration within the Commonwealth nations'

Respondent, counsel survey

#### 4.7.3 Commonwealth association of arbitral institutions and organisations

The Commonwealth Secretariat may wish to consider the establishment of a Commonwealth Association of Arbitral Institutions and Organisations to serve as a platform for the exchange and development of best practices in international commercial arbitration.

According to the survey responses from arbitral institutions that administer cases, such as the ICC, SIAC, HKIAC, the LCIA, and the MCIA, nine out of the eleven institutions that responded to the question whether they 'co-operate with other arbitral institutions' do so. Methods of co-operation range from co-organising events to information sharing, as well as being members of the same associations.

Establishing an association for Commonwealth arbitral institutions could help enhance co-operative efforts by providing a platform where discussions can be conducted and formalised. Apart from co-operation between arbitral institutions, the association would be able to foster interactions between other organisations and associations engaged in arbitration, including entities that engage in developing best practices and providing capacity-building (such as CIArb and the IBA) or that draft rules and procedures for disputes in specialised sectors (such as the LMAA and GAFTA). The association would serve as the medium through which the arbitration institutions and organisations can work together to build capacity and develop best practices and guidelines on matters such as the role of institutions in case administration, the development of more effective arbitral rules and procedures, the appointment of arbitrators by institutions, and accreditation of arbitrators.

#### 4.7.4 Regional arbitration institution(s)

Commonwealth member jurisdictions may wish to consider co-operating to establish a regional arbitration institution.

One solution which was mooted by survey and interview responses<sup>263</sup> is the establishment of a regional arbitrational institution or institutions. Such an institution would be able to provide a framework in which independent and impartial dispute resolution services within a particular region would be offered. Such an institution would also be able to tailor its institutional rules to suit the particular legal and cultural background as well as specific subjects appropriate to the region.<sup>264</sup> A regional institution could also contribute to ameliorating the challenges posed by the lack of capacity and diversity as it would enable resources to be channelled more efficiently.

Additionally, regional arbitration institutions tend to provide a cheaper way to arbitrate disputes than major international institutions. Take, for example, a dispute involving a claim of US\$100,000 with a sole arbitrator. The costs of arbitration (excluding lawyers' fees) would be: US\$3,750 under the Cairo Regional Centre for International Commercial Arbitration; US\$4,960 at the International Commercial Arbitration Court of Ukraine; or US\$5,449 under CIETAC. However, the costs would be US\$11,320 under SIAC; US\$15,825 under ICC; and US\$18,309 under SCC arbitration.<sup>265</sup>

Further studies should be conducted to determine the seat of any such regional arbitration institution, taking into account the geographical location, national legal framework, availability of facilities, and other relevant considerations.

#### 4.7.5 Commonwealth arbitral institution and Commonwealth panel of arbitrators

Commonwealth jurisdictions should consider mandating the Commonwealth Secretariat to explore the feasibility of a Commonwealth arbitral institution and the establishment of a Commonwealth panel of arbitrators.

International arbitration specialists practising in smaller Commonwealth jurisdictions as well as citizens from smaller or less arbitration developed jurisdictions expressed a certain appetite for a Commonwealth arbitral institution. However, that appetite was subject to the institution having a particular purpose, i.e. as distinct from the existing arbitral institutions in the Commonwealth. The call for a Commonwealth arbitral institution was also made in the counsel survey when the question of what role the Commonwealth could play in strengthening international arbitration was asked. One respondent stated: 'Providing an institution that administered Commonwealth disputes quickly and economically, and which maintained a broad roster of arbitrators from across the Commonwealth.'<sup>266</sup>

I think there is a place for it [a Commonwealth Arbitral Institution], but I think it has to be distinctively different if it is going to succeed. I think the Commonwealth matters to its members. There is a level of community there. It does draw together these very diverse parts of the world in a way that has a positive outlook and framing ... I think [an Institution] that had a transnational

sponsorship from this sort of super-national body [the Commonwealth] could be distinctly different and provide a level of reassurance. But its mission and its approach would have to be distinct from the local institutions, e.g. making part of its mission a degree of improving diversity, having a slightly different approach to case management. [It could be] more prescriptive in a way that it is helpful to users from developing countries so that they have some certainty regarding the process they are getting into and to counter the power imbalance that often exists for parties coming from developing countries. And that would make it very different to most of the other institutions.

Partner, law firm, UK

Proponents of the idea of a Commonwealth arbitral institution agreed that there was a need and a marked gap for an institution that had 'slick, efficient rules – real minimum rules, i.e. were consumer friendly, and that did not have heavy administration for small claims'.<sup>267</sup> As one interviewee referred to it: 'the Mazda 3 – absolute simplicity'.<sup>268</sup> An arbitrator described the value of a Commonwealth institution as 'an institute that deals with small to medium commercial disputes' since the costs of larger institutions may be prohibitive.<sup>269</sup>

However, there was also some resistance to the idea of a Commonwealth arbitral institution. Opponents thought that such an institution would not add anything, and that the Commonwealth Secretariat should instead support the existing institutions. They also pointed out that establishing and maintaining a well-functioning institution was expensive and that the member jurisdictions would need to agree where the institution would be located.<sup>270</sup>

Related to a Commonwealth arbitral institution is the proposal to establish and maintain a Commonwealth panel of arbitrators. Such a panel would be a measure to ensure that a diverse pool of arbitrators would be available. The idea of a panel was generally met with approval.<sup>271</sup> However, some interviewees suggested that a certain degree of quality control should be exercised.<sup>272</sup>

My concern is that what you get is just the same names that you see on the LCIA or the SIAC lists and that's not who I think should be on this kind of panel, if you are focusing on small and medium businesses, small to medium-sized disputes, then you should be spreading the net a little wider.

Barrister, Oceania

## Notes

- 1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 330 U.N.T.S. 38.
- 2 See below, 'Benefits to acceding to the New York Convention'; Myburgh, A & J Paniagua (2016), 'Does international commercial arbitration promote Foreign Direct Investment?', *The Journal of Law and Economics*, Vol. 59 No. 3, 597–627.



- 3 Compare Section 3.3.2, Section 4.3; The Commonwealth members may also consider whether they want to develop just the international arbitration policy, or whether they want to also develop a broader international commercial law policy, including the accession to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention). Furthermore, Commonwealth members may also want to consider whether they might modernise their domestic as well as international arbitration laws at the same time, including modernising their arbitration laws if based on the UNCITRAL Model Law 1985 to incorporate the 2006 changes.
- 4 See findings of a survey conducted among businesses: Ministry of Law, Singapore (2019), 'Ability to Enforce Outcomes Top Consideration in Choice of Dispute Resolution Mechanism', para 2, available at: <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/Ability-to-Enforce-Outcomes-Top-Consideration-in-Choice-of-Dispute-Resolution-Mechanism.html> (accessed 18 Aug 2019).
- 5 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 103; see also UNCITRAL (1958), 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards', available at: [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2) (accessed 29 Sept 2019). It should be noted that the Commonwealth 'hosts' many of the remaining non New York Convention member states.
- 6 Compare UNCITRAL at [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2) (accessed 30 August 2019).
- 7 Myburgh, A & J Paniagua (2016), 'Does international commercial arbitration promote Foreign Direct Investment?', *The Journal of Law and Economics*, Vol. 59 No. 3, 603–4.
- 8 *Ibid.*, 614.
- 9 *Ibid.*, 603.
- 10 *Ibid.*, 604.
- 11 Leeson, P (2008), 'How Important is State Enforcement for Trade', *American Law and Economics Review*, Vol. 10 No. 1, 61.
- 12 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 945.
- 13 *Ibid.*
- 14 *Ibid.*, 537–40, 630–31.
- 15 *Ibid.*, 943–75.
- 16 *Ibid.*
- 17 *Ibid.*, 763.
- 18 *Ibid.*, 763–818.
- 19 The New York Convention (1958), art. I (1). The New York Convention also stipulates that it applies only to arbitration awards and agreements which arise from 'defined legal relationship[s]', but this requirement is not limited to contractual relationships and has been consistently interpreted broadly.
- 20 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 2721–22.
- 21 *Ibid.*, 3661–66; see regarding custom/kastom: Butler, P & C Katerndahl (2018), 'Kastom – A Public Policy Exception Under The New York Convention on The Recognition And Enforcement Of Foreign Arbitral Awards', *Indian Journal of Arbitration Law*, Vol. 7 No. 1, 104.
- 22 Article 2060(1) of the French Civil Code, for instance, provides that '[o]ne may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or to disputes concerning public bodies and institutions and more generally in all matters in which public policy is concerned.' More generically, article 177(1) of the Swiss Law on Private International Law provides that the disputes which can be subjected to arbitration are 'of financial interest'. In



- 34 See UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', art. 2A; Born, G B (2014), *International Commercial Arbitration*, 1631.
- 35 See UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', arts 19, 20, 22.
- 36 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', art. 18. Another example can be found in article 11: article 11(2) provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5). Thus paragraphs (4) and (5) of article 11 are mandatory.
- 37 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', Explanatory Note.
- 38 UNCITRAL website, available at: [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration) (accessed 27 August 2019).
- 39 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', at para. 2. See also overview of the provisions of the Model Law in UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', Explanatory Note, paras. 5–9.
- 40 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', Explanatory Note, paras. 5–9.
- 41 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006'.
- 42 See generally Born, G B (2014), *International Commercial Arbitration*, 1566 *et seq.*
- 43 See UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', art. 1(2); see also Born, G B (2014), *International Commercial Arbitration*, 1566.
- 44 See UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', arts 11, 13, 16, 27 and 34.
- 45 See White & Case and Queen Mary University of London (2018), '2018 International Arbitration Survey: The Evolution of International Arbitration', available at: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF) (accessed 20 August 2019).
- 46 Born, G B (2014), *International Commercial Arbitration*, 93–97.
- 47 See, for instance, the 2018 ICC arbitration figures reporting that whereas European parties and cases remain consistent, Central and West Asia experienced a case boost. Available at: <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/> (accessed 15 August 2018).
- 48 Gerbay, R (2016), *The Functions of Arbitral Institutions*, International Arbitration Law Library, Vol. 38, Kluwer Law International, 29–54.
- 49 See, for instance, the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, the 2013 IBA Guidelines on Party Representation in International Arbitration. Some institutions have also amended their rules to include specific provisions in relation to ethical standards, see 2014 LCIA Rules, Annex setting out the general guidelines for the parties' Legal representatives; ACICA Rules, Rule 8.2; and the Lagos Chamber of Commerce International Arbitration Centre (LACIAC) Rules, article 1.3.
- 50 Such as emergency arbitrators and expedited proceedings, to name a couple.
- 51 See generally Born, G B (2014), *International Commercial Arbitration*, 2424–28.
- 52 AMINZ Rules, art. 5.
- 53 ACICA Rules, Schedule 1.
- 54 ICC Rules of Arbitration 2012, art. 29.
- 55 SCC Rules 2017, Appendix II.
- 56 SIAC Rules 2016, Schedule 1.

- 57 Act 12 of 2012 wef 01/06/2012 amended s 2(1) of the Singapore International Arbitration Act 1994 to include 'emergency arbitrator'; *compare* also Fiji, International Arbitration Act (2017), s. 2; and Malaysia, Arbitration Act (2005 (as amended 2018)), s. 2, with identical wording.
- 58 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', art. 7 Option I.
- 59 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', art. 7 Option II.
- 60 UNCITRAL (2006), 'UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006', art. 7(3) (Option I).
- 61 See Herbert Smith Freehills (2017), 'Fiji's International Arbitration Act 2017', available at: <https://hsfnotes.com/arbitration/2017/10/18/fjis-international-arbitration-act-2017/> (accessed 26 August 2019) ('[The Act] also adopts some elements of "best practice" from the laws of other leading pro-arbitration jurisdictions, including Australia, Singapore and Hong Kong.')
- 62 A *Scott v Avery* ((1855) 5 HL Cas 811) clause is one which provides that obtaining an arbitral award is a condition precedent to the right to bring legal proceedings. *Scott v Avery* clauses are commonly included in the arbitration clauses of commodity associations' standard forms, including those of the Federation of Oilseeds and Fats Associations (FOSFA) and the Grain and Feed Trade Association (GAFTA). The arbitration clause contained in the FOSFA 54 standard form includes, in its second paragraph, a *Scott v Avery* clause as follows:  
 '29. ARBITRATION: Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant.  
 Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.'
- 63 See also Hong Kong, Arbitration Ordinance (Cap. 609) (2019), ss 26(3), 26(4).
- 64 See Born, G B (2014), *International Commercial Arbitration*, 2781–83.
- 65 Jolles, A, Stark-Traber, S & M Canals de Cedie (2013), 'Confidentiality', in E Geisinger, N Voser, A M Pett (eds), *International Arbitration in Switzerland – A Handbook for Practitioners*, Kluwer Law International, Hague, Zurich, Chapter 7; see also Garimella, S R (2016) 'Revisiting Arbitration's Confidentiality Feature', in M Ramaswamy & J Ribeiro (eds), *Harmonising Trade Law to Enable Private Sector Regional Development*, CLJP Hors Serie Volume XX, Chapter 5
- 66 See Born, G B (2014), *International Commercial Arbitration*, 2781.
- 67 See e.g. *Emmott v. Michael Wilson & Partners* (2008) EWCA (Civ) 184.
- 68 See e.g. *Esso Austl. Resources Ltd v. Plowman* (1994) 1 VR 1.
- 69 See SIAC Rules, 24.4
- 70 See Australia, International Arbitration Act (1974), s 23E.
- 71 See Hong Kong, Arbitration Ordinance (Cap. 609) (2019), s. 18.
- 72 See Australia, International Arbitration Act (1974), ss 23F and 23G.
- 73 Born, G B (2014), *International Commercial Arbitration*, 2026.
- 74 See Australia, International Arbitration Act (1974), s 28(1).

- 75 See Singapore, International Arbitration Act, s 25A.
- 76 See Born, G B (2014), *International Commercial Arbitration*, 2835.
- 77 Ibid., 2836; see also Revised Uniform Arbitration Act (2000), §16 ('A party to an arbitration proceeding may be represented by a lawyer.');
- Germany, Zivilprozessordnung, §1042 ('Lawyers cannot be excluded as representatives.');
- Belgium, Judicial Code (1998), art. 1694(4) ('Each party shall have the right to be represented by a lawyer or by a representative, in possession of a special power of attorney in writing, approved by the arbitral tribunal. Each party may be assisted by a lawyer or any person of his choice, approved by the arbitral tribunal. Parties may not be represented or assisted by an agent d'affaires.')(repealed);
- Fiji, International Arbitration Act (2017), s. 35 ('Unless otherwise agreed by the parties, a party may appear in person before an arbitral tribunal and may be represented— (a) by himself or herself; or (b) by any other person of that party's choice');
- Hong Kong, Arbitration Ordinance (2013), art. 63 (restrictions on legal practitioners do not apply in arbitral proceedings);
- Australia, International Arbitration Act (2011), s.29(2) ('A party may appear in person before an arbitral tribunal and may be represented: (a) by himself or herself; (b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or (c) by any other person of that party's choice.');
- New Zealand, Arbitration Act (1996), s. 24(4) ('parties may appear or act in person or may be represented by any other person of their choice');
- Brazil Law No. 9.307/96, Arbitration Act (1996), art. 21(3) ('The parties may be represented by legal counsel, and may always be free to choose their representative or assistant at the arbitral procedure.').
- 78 See Born, G B (2014), *International Commercial Arbitration*, 2845–46.
- 79 It is noted that the recommendations advanced in these sections conflict with the recommendations regarding privacy and confidentiality of arbitral proceedings set out in paras 190-193. Commonwealth jurisdictions have to make a policy choice regarding the importance of confidentiality.
- 80 See Lew, J D M (1982), 'The case for the publication of arbitration awards', in Sanders, P (ed.), *The Art of Arbitration: Essays on International Arbitration Liber Amicorum*, Springer Netherlands, 223; Karton, J (2012), 'A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitration Awards', *Arbitration International*, Vol. 28 No. 3, 447 at 454; Wimalasena, P (2016), *Die Veröffentlichung von Schiedssprüchen als Beitrag zur Normbildung*, 2016 XVIIIm 360 Seiten, Veröffentlichungen zum Verfahrensrecht 128; Comrie-Thomson, P (2017), 'A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards', *Journal of International Arbitration*, Vol. 34, Issue 2, 275–301; UNCITRAL Rules of Transparency, art. 3.1 and 7; see also *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v Bolivia* (2015) (PCA Case no. 2015-05); *BSG Resources Limited v Republic of Guinea* (ICSID Case No. ARB/14/22); ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ('ICC Note') published on 1 January 2019 (indicating that the ICC would publish information regarding the arbitral tribunals and awards under the ICC Rules. ICC awards made as of 1 January 2019 would be published on the ICC website for two years after the date of notification by the Secretariat of the final award. Parties may agree to a longer or a shorter time period for publication and may object to publication or require that any award be in all or part anonymized. Publication of any award would also be subject to any confidentiality agreements or data protection regulations.); PCA Rules, art. 34(5); DIS Arbitration Rules 2018, art. 44.3; SIAC Rules, art. 38; LCIA Rules, art. 30.3; Arbitration Institute of the Stockholm Chamber of Commerce (2015), 'SCC Practice Note: Challenges to Arbitrators 2013-2015', available at: <https://sccinstitute.com/about-the-scc/news/2017/scc-practice-note-challenges-to-arbitrators-2013-2015/> (accessed 27 August 2019); HKIAC Administered Arbitration Rules 2018, art. 45.5; see also HKIAC Administered Arbitrations FAQs, Question 50: 'Does HKIAC publish arbitral awards?', available at: <http://www.hkiac.org/arbitration/why-choose-hkiac/hkiac-administered-arbitration-faqs#050> (accessed 27 August 2019).

- 81 Under s 70(2) and (3) of the English Arbitration Act 1996, '(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted (a) any available arbitral process of appeal or review, and (b) any available recourse under 57 (correction of award or additional award). (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.' The Commonwealth States are well advised to consider whether to adopt these limitations as well.
- 82 English Arbitration Act (1996), s. 69(1).
- 83 See e.g. LCIA Arbitration Rules 2014, art. 26.8; ICC Rules 2017, art. 35(6).
- 84 See Miles, W & J Li (2014), 'Do England's expansive grounds for recourse increase delay and interference in arbitration?', *Arbitration*, Vol. 35, 42 ('In relation to the year to June 2013 in particular, ... 15 of the 23 reported applications under s.69 arise out of known shipping disputes. ... Unsurprisingly, the predominance of LMAA arbitration in June 2012 to 2013 (and in the four years leading up to June 2013) reflects the findings in Lord Mance's report on s.69 since the enactment of the Act. In the three years 2006, 2007 and 2008, LMAA awards averaged 75 per cent, 61.5 per cent and 78 per cent respectively of all maritime awards related to s.69 applications.').
- 85 Hong Kong, Arbitration Ordinance (Cap. 609), s. 99 and Schedule 2, s. 5.
- 86 Four per cent of the respondent arbitrators and 5 per cent respondent counsels identified the lack of awareness as an issue that needs to be resolved to strengthen international arbitration in their respective countries. Even though awareness was not identified as one of the most pressing issues aggregated with the interconnected need for capacity-building awareness-raising is an important concern. Ten per cent of respondent arbitrators and 17 per cent of respondent counsels identified awareness-raising as one of the areas of Commonwealth support to aid international commercial arbitration. Oceanian Governments also identified awareness-raising as an important issue.
- 87 It should be noted that there is an abundance on international (commercial) arbitration conferences, seminars, workshops, webinars etc for (emerging) international arbitration practitioners, e.g. biannual International Council of Commercial Arbitration (ICCA) conference which brings together international arbitration specialists from around the world, the International Chamber of Commerce (ICC) offers international arbitration conferences and training workshops, so do universities and arbitral institutions. While some of these conferences may require an attendance fee, which may make them prohibitive, there are also a number of free conferences (including events focused on young arbitration practitioners and students and events by law firms) accessible to members of the legal profession, students and businesses alike.
- 88 See for example Backhausen, P & C von Hirsch (Wilmer Cutler Pickering Hale & Dorr LLP) (2017) 'International Financial Services and Small States: Conference Report', *Kluwer Arbitration Blog*, available at: <http://arbitrationblog.kluwerarbitration.com/2017/02/26/international-financial-services-and-small-states-conference-report/> (accessed 27 August 2019); and BIICL (2019), 'Conference: Small States, International Law & the Realisation of Rights', event information available at: <https://www.biicl.org/events/11317/small-states-international-law-and-the-realisation-of-rights> (accessed 27 August 2019), which explore(d) issues facing small states but include an international commercial arbitration angle.
- 89 Also, the business community already has conferences that provide a platform where contracting and dispute resolution are discussed (e.g. FIDIC Asia Pacific Contract Users' Conference), however, the need lies in raising awareness among SMEs and businesses that do not belong to an organised sector.
- 90 See Sections 3.4, 4.2.1 and 4.2.2 of this report; a New Zealand SME owner observed: 'I wouldn't have a clue where to start [drafting a cross-border contract] and I also probably would fear that if I went to my usual lawyer he wouldn't have a clue either...'

- 91 Asian Development Bank, 'Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific', available at <https://www.adb.org/projects/50114-001/main#project-overview> (accessed 27 August 2019) & 'Second South Pacific International Arbitration Conference', available at: <https://www.adb.org/news/events/second-south-pacific-international-arbitration-conference> (accessed 27 August 2019).
- 92 Compare, Wendy Miles (ed), *Dispute Resolution and Climate Change: The Paris Agreement and Beyond* (ICC, Paris, 2017); Arbitration Institute of the Stockholm Chamber of Commerce, *Bridging the Climate Change Policy Gap: The Role of International Law and Arbitration* (conference report, Stockholm, 2017).
- 93 Twenty-three per cent of respondents to the counsel survey saw it as most useful for the Commonwealth Secretariat to engage in capacity-building to foster international arbitration in the Commonwealth, followed by 18 per cent who thought the Commonwealth was best placed to foster collaboration among Member countries and stakeholders regarding an international commercial arbitration framework, including proposing 'best standards in international arbitration' and a specialised B2B cross-border dispute resolution mechanism based on international arbitration. Promotion of international arbitration was seen by 17 per cent of respondent counsel as an important Commonwealth task. For 8 per cent of respondent counsel the Commonwealth should be tasked to make the Commonwealth international arbitration specialists more diverse (diversity ranked fifth and equal with 'enforcement').
- Thirty-three per cent of respondents to the arbitrator survey agreed with respondent counsels in seeing the Commonwealth best placed to facilitate capacity-building. For 12 per cent of respondent arbitrators the Commonwealth should establish an Association of Arbitral Institutions and a central register of arbitrators, provide generally networking and cross-fertilisation opportunities. Equally 12 per cent of respondent arbitrators thought that the Commonwealth was best placed to embark on tackling the diversity issue.' The promotion of international arbitration was thought by 10 per cent of respondents to be something the Commonwealth should engage in.
- For the majority of the respondents (50%) of the judiciary survey making training available for the judiciary was the most important role for the Commonwealth to play to strengthen international arbitration.
- 94 Austrian SMEs have stated that their attitude towards contracting with German SMEs was different than with other contract partners within the EU, suggesting that language and historical ties play a role in B2B relationships. This suggest that the Commonwealth is the ideal supportive environment for businesses to experience international commercial arbitration.
- 95 See Section 4.3. The need for the judiciary to have an in in-depth understanding of international commercial arbitration was identified in the responses to the arbitrator and the counsel survey.
- 96 <https://vismoot.pace.edu/> (accessed 28 August 2019).
- 97 Forty-two per cent of respondents stated that international arbitration is taught at undergraduate level at least 20 hours, if it is taught, and 50 per cent of respondents stated the same at postgraduate level.
- 98 An example are the construction law and media and entertainment law LLMs at De Montfort University, Leicester, United Kingdom where a subject-specific international arbitration module is taught as part of the those LLMs (<http://www.courses.knect365-learning.com/event/international-construction-law-llm-by-distance-learning-de-montfort-university-dmu/agenda-> accessed 27 Aug 2019).
- 99 The Association of Commonwealth Universities, <https://www.acu.ac.uk/> (accessed 27 August 2019).

100 For example, the Postgraduate Diploma in International Dispute Resolution (Arbitration) offered by Queen Mary University London (<https://www.qmul.ac.uk/postgraduate/taught/coursefinder/courses/121505.html>) (accessed 28 August 2019).

The provision of scholarships to attain a postgraduate qualification was the singly prevailing response in the student survey: 26 per cent of students thought that this was most important support the Commonwealth Secretariat could provide, followed by 19 per cent of students who would like Commonwealth Secretariat support in finding an internship.

101 See Section 3.4 of this report.

102 See Section 3.5.

103 See Training at CI Arb, available at <https://www.ciarb.org/training/>.

104 See, for example, <https://iccwbo.org/media-wall/news-speeches/tag/arbitration-training/> (accessed 28 August 2019).

105 Ballantine, C (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', available at: [https://www.uncitral.org/pdf/english/congress/Papers\\_for\\_Programme/100-BALLANTINE-Arbitration\\_Regimes\\_Across\\_the\\_Pacific\\_Islands.pdf](https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/100-BALLANTINE-Arbitration_Regimes_Across_the_Pacific_Islands.pdf) (accessed 22 August 2019).

106 Sixty-four per cent of respondent arbitral institutions indicated that they offer an internship programme. Some are more informal where there is 'an understanding with local law firms that, depending on workload, we would provide experience to junior lawyers in the territory to help specific cases'; others have established programmes, eg SIAC (which offers internship possibilities for law students as well as young lawyers) and LCIA.

107 See Section 3.2..

108 See Section 4.3.1.

109 Since 2012 ICCA (International Council for Commercial Arbitration) has launched a series of colloquia for judges on the New York Convention known as the 'New York Convention Roadshow'. This initiative recognises the dependence of international arbitration practice on the critical role of national court judges in applying the New York Convention. With 161 contracting States the Convention is rightly regarded as the backbone of international commercial arbitration. Judicial workshops on the New York Convention are led by the ICCA Judiciary Committee and organised with the assistance of Young ICCA. Each event is adapted to take account of the specific challenges faced by judges in applying the Convention in a particular region or jurisdiction and includes an article-by-article review of the Convention, as well as extensive dialogue with judges.

110 Kayihura, M D (2013), Chapter 3.6: 'Rwanda', in Bosman, L (ed.), *Arbitration in Africa: A Practitioner's Guide*, 226–27. The combination of an adequate legal framework and good court structure appears to have directly impacted the arbitration practice in the country. KIAC, the only arbitration institution of Rwanda, stated that whereas in June 2017 the institution had administered 66 cases filed since 2012, in 25 January 2019, the number of cases administered by KIAC soared to 100 in total. This increase in the number of procedures confirm the perception of Rwanda as a new arbitration friendly jurisdiction. See Ross, A (2009), 'Rwanda pushes for arbitration centre', available at: <https://globalarbitrationreview.com/article/1028667/rwanda-pushes-for-arbitration-centre> (accessed 27 August 2019); Masengo, F (2018), 'Chapter 12: Attitude of Rwandan Courts Towards Arbitration', in E Onyema (ed.), *Rethinking the Role of African National Courts in Arbitration*, Kluwer Law International, 327, 334–35.

111 See for example Ministry of Business, Innovation, and Employment (MBIE), New Zealand: <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/guidance-on-dispute-resolution-clauses-in-contracts/> (accessed 28 August 2019).

112 See Butler, P, '40 Years Convention on the International Sale of Goods (CISG) – Even More Important Today than 40 Years Ago to Encourage Trade?', (2019) ZVglRWiss 118, 231



- 113 <https://uncitral.un.org/en/texts/arbitration> (last accessed 19 Sept 2019); <http://www.newyorkconvention.org/> (accessed 19 Sept 2019); <http://www.arbitration.qmul.ac.uk/> (accessed 19 Sept 2019).
- 114 Kluwer Arbitration, available at: <http://www.kluwarbitration.com/> (accessed 22 August 2019); International chamber of Commerce Digital Library on Dispute Resolution, available at: <https://library.iccwbo.org/dr.htm> (accessed 22 August 2019); Global Arbitration Review, available at: <https://globalarbitrationreview.com/> (accessed 22 August 2019); Arbitrator Intelligence, available at: <https://arbitratorintelligence.com/> (accessed 22 August 2019); Arbitration International by Oxford Academic, available at: <https://academic.oup.com/arbitration> (accessed 22 August 2019); HeinOnline, available at: <https://heinonline.org/HOL/Welcome> (accessed 22 August 2019); Practical Law by Thomson Reuters, available at: [https://uk.practicallaw.thomsonreuters.com/Browse/Home/PracticalLaw?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/Browse/Home/PracticalLaw?contextData=(sc.Default)&transitionType=Default&firstPage=true) (accessed 22 August 2019).
- 115 Some countries might explicitly state issues which are not arbitrable.
- 116 See Karis, T & Kapoor, et al. (2016), 'Post Amendments: What Plagues Arbitration in India?', *Indian Journal of Arbitration Law*, 230, 231. The reason identified why ad hoc arbitrations are costly and not timely is that they resemble Indian court proceedings. The majorities of Indian arbitrators are retired judges (Naren Karunakaran (9 Sept 2015) 'How India Inc is coping with ineffective ad-hoc arbitration and paving way for a new trend', *The Economic Times*).
- 117 See Section 4.1.2.
- 118 India, The Arbitration and Conciliation Act (1996), s 29A (1).
- 119 India, The Arbitration and Conciliation Act (1996), s 29A (3).
- 120 India, The Arbitration and Conciliation Act (1996), s 29A (2).
- 121 India, The Arbitration and Conciliation Act (1996), s 29A (4).
- 122 India, The Arbitration and Conciliation Act (1996), s 29A (4). See also a discussion on the s 29A in Brar, M (2016), 'Implications of the New Section 29A of the Amended Indian Arbitration and Conciliation Act, 1996', *Indian Journal of Arbitration Law*, 113.
- 123 Partner, law firm, London.
- 124 Arbitration And Conciliation (Amendment) Act, 2019, 6. In section 29A of the principal Act,— (a) for sub-section (1), the following sub-section shall be substituted, namely:— '(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23: Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.'
- 125 See English Civil Procedure Rules, Parts 27–29.
- 126 <https://www.gafta.com/arbitration> (accessed 28 August 2019)
- 127 <http://lmaa.org.uk/> (accessed 28 August 2019)
- 128 <https://www.ica-ltd.org/arbitration/arbitration-process/> (accessed 28 August 2019).
- 129 See above, at para 117; an interview with one of the leading commodity arbitrators confirmed that arbitration under GAFTA, for example, is cost (on average GBP10,000), time (on average 9 months) efficient.
- 130 See country report Section VII.A.
- 131 See country report Section VII.A.
- 132 See country report Section VII.A.
- 133 Whether 'arbitration' includes international commercial arbitration could not be ascertained. However, important for the purpose of this study is that those countries recognised that arbitration, as an alternative, to litigation is worthwhile to fund through legal aid.

- 134 Legal Aid Act 1990, s 19: 'Where in any proceedings or contemplated proceedings all the parties thereto apply for legal aid in terms of this Act, and the Director is of the opinion that the dispute is of a nature which could properly be the subject of arbitration, the Director may, as a condition of the granting of legal aid, require the parties to submit the dispute to arbitration and may make such arrangements for the purpose of such arbitration proceedings as the Director may deem fit.'
- 135 See *Financial Times* (2018), 'Litigation finance industry opens up to private investors, available at: <https://www.ft.com/content/03921f5e-a49a-11e8-926a-7342fe5e173f> (accessed 27 August 2019). See regarding the definition of third-party funding and a comprehensive discussion on third-party funding in Bench Nieuwveld, L & V Sahani, *Third-Party Funding in International Arbitration*, 2nd edn, Wolters Kluwer, 2017, and ICCA–Queen Mary Taskforce on Third Party Funding, Report Of The ICCA-Queen Mary Task Force On Third-Party Funding In International Arbitration (April 2018) available at [https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf) (accessed 28 August 2018).
- 136 See <https://www.augustaventures.com/what-we-do/for-lawyers/> 'Is there a minimum case value Augusta will consider?'
- 137 See discussion of the torts by Elliot, C B (1881), *13 Central Law Journal*, 368.
- 138 The rules originated in medieval times and were intended to prevent abuses of justice by corrupt nobles and royal officials who associated themselves with fraudulent and vexatious claims, strengthening the credibility of the claims in return for a share of the profits.
- 139 Re *Trepca Mines* (No. 2) [1963] Ch 199.
- 140 Lord Neuberger, 'From Barretery, Maintenance and Champerty to Litigation Funding', Harbour Litigation Funding First Annual Lecture, Gray's Inn (8 May 2013) <https://www.supremecourt.uk/docs/speech-130508.pdf> (access 28 August 2019).
- 141 See Bench Nieuwveld, L & V Sahani, *Third-Party Funding in International Arbitration* (2nd edn, Wolter Kluwer, 2017) chapters 4 (Australia), 5 (United Kingdom), 6 (United States), 9 (Canada).
- 142 Singapore: Civil Law Act 1999, s 5A & Civil Law (Third Party Funding) Regulations 2017; Hong Kong: Arbitration Ordinance (Chapter 609) 'Code of Practice for Third Party Funding of Arbitration' GN 9048 (7 Dec 2018)
- 143 According to the information available the rules of maintenance and champerty regarding third-party funding in international arbitration has been only abolished in only 11 of the 54 Commonwealth jurisdictions. In the majority of the Commonwealth jurisdictions the rules of maintenance and champerty are at least residually applicable in a public policy inquiry.
- 144 ICCA–Queen Mary Taskforce on Third Party Funding, Report of the ICCA-Queen Mary Task Force On Third-Party Funding In International Arbitration' (April 2018), 17.
- 145 See regarding an exception to the tort of maintenance and champerty for international arbitration, Singapore Civil Law Act 1999, ss 5A, 5B and Legal Profession Act 1966, ss 107(3), 107(3A); Hong Kong
- 146 Information was available for 37-member countries, 18 of which prohibit contingency fee agreements. Contingency fee arrangements are allowed in: Australia, Belize, Brunei Darussalam, St Vincent and the Grenadiers, Dominica, Fiji, Grenada, Guyana, Jamaica, Mozambique, Pakistan, Papua New Guinea, St Kitts and Nevis, St Lucia, South Africa, Tanzania, England & Wales, Canada, New Zealand.
- 147 There was only very limited information available whether legal expense insurance was available in Member countries, Countries where legal expense insurance is offered are: Australia, Botswana, Canada, India (limited), Kenya, Lesotho, Malta, Namibia, New Zealand, Papua New Guinea, Sierra Leone, Singapore, South Africa, Sri Lanka, Tanzania, Uganda, United Kingdom, Zambia.

- 148 Trinidad Alonso, 'Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue of Regulation' <http://arbitrationblog.kluwerarbitration.com/2017/08/31/third-party-fundings-older-sibling-legal-costs-insurance-issue-regulation/> (accessed 28 August 2019).
- 149 See 'Britannia P&I Club: FD&D' <<https://britanniapandi.com/wp-content/uploads/2019/06/FDD-02-2019.pdf>>
- 150 See 'What is the Freight, Demurrage & Defence Insurance Really About?', <<https://www.swedishclub.com/upload/12/Extract%20from%20TSCCL%202005-1.pdf>>
- 151 See note 2 above.
- 152 'UK Defence Club: Independent F&D insurance' <<https://www.ukdefence.com/defence-cover/>>
- 153 BTE insurance is relatively affordable: for UK businesses, for example, legal cost insurance is available from £48 a year.
- 154 The importance of legal expense insurance has been the subject of an International Bar Association working group. Its findings are published in McNee, A (2019), *Legal Expenses Insurance and Access to Justice*, International Bar Association.
- 155 Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996, August 2014, at paras. 5–10.
- 156 Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996, August 2014, at para. 5.
- 157 Arbitrations under GAFTA are to a certain degree administered or 'supervised' whereas the LMAA merely is an association of maritime arbitrators and does not provide any facilitative services.
- 158 *Perception of Arbitration Services in Rwanda*, Endline Survey (2015) <<http://www.kiac.org.rw/IMG/pdf/-28.pdf>> (accessed 27 August 2019) 7. The research interviewed 500 different respondents, amongst which 275 arbitration users (construction industry, including contractors, architectures, engineers, energy developers, mining, manufacturing, other businesses, government institutions, non-governmental organisations), 30 financial institutions (users and advisers) and 195 legal professional bodies (only lawyers and judges). The respondents were mostly men (83%), around 41 years old (although the full age range varied from 25 to 79 years), and they are highly educated (91.2% have at least one degree). Based on this latter information, the survey also assumed that 'they are also relatively wealthy'. Of the respondents, 45.4 per cent work on legal professional bodies, and the other 54.6 per cent were considered users. 35.2 per cent of the Respondents are members of Rwanda Bar Association (35.2%) followed by the construction industry (18.2%), government institutions (18.0%), finance institutions/banking/insurance (6.2%), manufacturing industry (6.0%), judiciary (4.4%), energy developers (3.4%), and mining (3.2%). Only 31 per cent of respondents were lawyers/advocates, and 13 per cent legal advisers. Interestingly, 38 per cent stated they hold a senior position in the institution they work for (such as 'permanent secretary, executive secretary, director general, mayor, managing partner, CEO, judge').
- 159 One Asian arbitral institution identified the lack of a procedure dealing with multiple parties as one of the most pressing issues in the Commonwealth.
- 160 ICC Rules, art. 10.
- 161 LCIA Rules, art. 22.1(ix) and (x); SCC Rules, art. 15; SIAC Rules, Rule. 8; CIETAC Rules, art. 19.1; HKIAC Rules, art. 28.1; LMAA Rules, art. 16.
- 162 Forty-seven per cent of respondent arbitrators stated that they had experience with an expedited arbitration process. Of the respondent arbitrators who had experience with expedited arbitral procedures 77 per cent stated that the experience has been satisfactory to excellent.
- 163 UNCITRAL (2018), 'Report of UNCITRAL Working Group II (Dispute Settlement) on the work of its 68th Session, dated 5-9 February 2018, A/CN.9/934', paras. 152–56.

- 164 70th session 23–27 September 2019, Vienna. UNCITRAL conducted a survey among arbitral institutions regarding whether their rules provided for expedited procedures. The survey, the result, and paper published by the International Council for Commercial Arbitration can be found here: [https://uncitral.un.org/en/working\\_groups/2/arbitration](https://uncitral.un.org/en/working_groups/2/arbitration) (accessed 3 Sept 2019).
- 165 SIAC (2019), 'The SIAC Expedited Procedure', available at: <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-31-29/archive-2012/240-the-siac-expedited-procedure> (accessed 27 August 2019).
- 166 SIAC Rules, Rule 5.1(a).
- 167 SIAC Rules, Rule 5.1(b) and (c).
- 168 ICC (2019), 'Expedited Procedure Provisions', available at: <https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/> (accessed 27 August 2019).
- 169 LMAA Small Claims Procedure Rules, art. 1.
- 170 LMAA (2019), 'Fees and Costs as from 1 January 2019', available at <http://lmaa.org.uk/notes-on-fees.aspx> (accessed 29 August 2019).
- 171 LMAA Small Claims Procedure Rules, Arts. 3 and 6.
- 172 Born, G B (2014), *International Commercial Arbitration*, 2nd edn, Kluwer Law International, 2243; Blackaby, N et al (2015), *Redfern and Hunter on International Arbitration*, 6th edn, OUP, para 5.116.
- 173 Born, G B (2014) *International Commercial Arbitration*, 2243; Blackaby, N et al (2015), *Redfern and Hunter on International Arbitration*, 6th edn, OUP, para 6.47; Waincymer, J M (2012), *Procedure and Evidence in International Arbitration*, Kluwer Law International, 613.
- 174 Born, G B (2014), *International Commercial Arbitration*, 2244; Waincymer, J M (2012), *Procedure and Evidence in International Arbitration*, 434–35.
- 175 Waincymer, J M (2012), *Procedure and Evidence in International Arbitration*, 434.
- 176 See *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited (formerly known as Essar Global Limited)* (2014) EWHC 2510 (Comm) where the arbitration agreement included such a provision: ('The arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part...').
- 177 SCC Rules, art. 39(3).
- 178 SCC Rules, art. 39(4).
- 179 ICSID Rules, art.41(5).
- 180 HKIAC Rules, art .43.
- 181 SIAC Rules, Rule 29.1.
- 182 ICC Rules, art. 22.2; LCIA Rules, art. 14; UNCITRAL Arbitration Rules, art. 17; ICDR Rules, art. 20.3.
- 183 Sullivan, R (2010), 'Barriers to the Legal Profession', available at: <https://research.legalservicesboard.org.uk/wp-content/media/2010-Diversity-literature-review.pdf> (accessed 27 August 2019).
- 184 Anderson, G & R Jerman (2019), 'Diversity in International Arbitration', in Sheppard, A et al. (eds), *Arbitration Global Guide*, available at: <https://uk.practicallaw.thomsonreuters.com/w-019-5028?comp=pluk&transitionType=Default&contextData=%28sc.Default%29> (accessed 27 August 2019).
- 185 The priority, according to the respondents of the arbitrator survey, should be capacity-building (33%). Equal to diversity was facilitating collaboration among member countries and the establishment of a Commonwealth Association of Arbitral Institutions.
- 186 ICC (2019), 'ICC Dispute Resolution 2018 Statistics, ICC Publication No.: 898E', available at: <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018> (accessed 22 August 2019), 11, 12.
- 187 *Ibid.*, 4.

- 188 London Court of International Arbitration (2019), '2018 Annual Casework Report', available at: <https://www.lcia.org/News/2018-annual-casework-report.aspx> (accessed 27 August 2019), 13, 14.
- 189 Arbitration Institute of the Stockholm Chamber of Commerce, 'SCC Statistics 2018', available at: <https://sccinstitute.com/statistics/> (accessed 22 August 2019); SIAC (2019), 'Annual Report 2018', available at: [http://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_AR2018-Complete-Web.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR2018-Complete-Web.pdf) (accessed 27 August 2019); HKIAC (2019), '2018 Statistics', available at: <https://www.hkiac.org/2018-statistics/> (accessed 22 August 2019).
- 190 <https://www.arbitratorintelligence.org/>.
- 191 <https://www.arbitralwomen.org/>.
- 192 See, for instance, the GAR Arbitrator Research Tool available at <https://globalarbitrationreview.com/arbitrator-research-tool>.
- 193 <http://www.arbitrationpledge.com/>.
- 194 <https://www.allianceequality.com/>.
- 195 [https://secure.avaaz.org/en/community\\_petitions/Governments\\_international\\_organizations\\_tribunals\\_bodies\\_To\\_fix\\_the\\_underrepresentation\\_of\\_women\\_in\\_international\\_bodies/](https://secure.avaaz.org/en/community_petitions/Governments_international_organizations_tribunals_bodies_To_fix_the_underrepresentation_of_women_in_international_bodies/).
- 196 <https://women.debevoise.com/>.
- 197 See Section 3.9. Fifty-four per cent of respondent arbitrators that had experienced regulatory chill reported that they had faced issues in respect of the ability to sit as an arbitrator in certain jurisdictions. Twenty-three per cent of respondents had experienced tax issues.
- 198 See e.g. Germany, Zivilprozessordnung, § 1042; Belgium, Judicial Code (1998), art. 1694(4); Netherlands, Code of Civil Procedure, arts 1038(1), (2); Brazil Law No. 9.307/96, Arbitration Act (1996), art. 21(3).
- 199 Australia, International Arbitration Act (2011), s 29(2); Fiji, International Arbitration Act (2017), s. 35; see also New Zealand, Arbitration Act, s 24(4) ('parties may appear or act in person or may be represented by any other person of their choice').
- 200 Singapore, Legal Profession Act, s 35; Hong Kong Arbitration Ordinance Cap. 609, s 63.
- 201 *Turner (E. Asia) Pte Ltd v Builders Fed. (H.K.) Ltd* (Singapore H. Ct.1988), *Journal of International Arbitration*, Vol. 5 No.3.
- 202 Singapore, Legal Profession (Amendment) Act (1992), s 2.
- 203 Singapore, Legal Profession (Amendment) Act (2004), ss 5, 6.
- 204 General Data Protection Regulation (EU) 2016/679.
- 205 Paisley, K (2018), 'It's All about the Data: The Impact of the EU General Data Protection Regulation on International Arbitration', *41 Fordham International Law Journal*, 841, 856 et seq, Zahariev, M (2019), 'GDPR Issues in Commercial Arbitration and How to Mitigate Them', *Kluwer Arbitration Blog*, <http://arbitrationblog.kluwerarbitration.com/2019/09/07/gdpr-issues-in-commercial-arbitration-and-how-to-mitigate-them/> (accessed 10 Sept 2019).
- 206 GDPR, art. 4(1) ("personal data' means any information relation to an identified or identifiable natural person ... ; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person").
- 207 GDPR, art. 4(2) ("processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction").
- 208 GDPR, art. 6(1)(c).

- 209 Paisley, K (2018), 'It's All about the Data: The Impact of the EU General Data Protection Regulation on International Arbitration', 41 *Fordham International Law Journal*, 841, 861.
- 210 <http://arbitrationblog.practicallaw.com/the-gdpr-and-disclosure-of-documents-in-arbitration/>
- 211 GDPR, arts. 23(1)(f) and (j). Ireland has relied on art. 23 to exempt certain data subject rights, to the extent that the restrictions are 'necessary and proportionate,' for the processing of personal data 'in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings whether before a court, statutory tribunal, statutory body or an administrative or out-of-court procedure.' The references to 'out-of-court procedure' covers arbitration.
- 212 Sixty per cent of respondent arbitral institutions have hearing room technology (e.g. multimedia presentations, real time electronic transcripts) available and 66 per cent can accommodate video conferencing. However, only the most recently established arbitral institutions offer virtual hearing room technology (27%). Twenty-six per cent of respondent students stated that they believed that technology will have a crucial impact on international commercial arbitration and 38 per cent see the role of technology as aiding the arbitral process.
- 213 Six island judiciaries were represented in the judiciary survey and seven judiciaries situated in non-island countries. For example, of the six island jurisdictions, from all parts of the Commonwealth, three had real-time electronic transcripts whereas none of the respondents from larger, non-island jurisdictions stated that the technology was available to them. Two of the island judiciaries could rely on real-time electronic transcripts whereas only one non-island judge stated that this technology was available.
- 214 Commonwealth Heads of Government Meeting, 'Declaration on the Commonwealth Connectivity Agenda for Trade and Investment' (London, 16–20 April 2018) <http://thecommonwealth.org/declaration-commonwealth-connectivity-agenda-trade-and-investment> (accessed 29 August 2019).
- 215 UNCITRAL (2017), 'Technical Notes on Online Dispute Resolution', Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 24.
- 216 Carneiro, D et al. (2014), 'Online dispute resolution: an artificial intelligence perspective', *Artificial Intelligence Review*, Vol. 41 No. 2, 211, 214.
- 217 Lodder, A R & J Zeleznikow (2011), 'Artificial Intelligence in Online Dispute Resolution', in Wahab, M S A et al. (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution*, Eleven International Publishers, The Hague, 81.
- 218 UNCITRAL (2017), 'Technical Notes on Online Dispute Resolution', Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), annex I, available at: [https://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf) (accessed 22 August 2019), para. 2.
- 219 United States (2018), 'Vision for APEC Online Dispute Resolution Part I: Leveraging Technology to Increase Access to Justice', 2018/SOM1/EC/WKSP2/013, available at: [http://mddb.apec.org/Documents/2018/EC/WKSP2/18\\_ec\\_wksp2\\_013.pdf](http://mddb.apec.org/Documents/2018/EC/WKSP2/18_ec_wksp2_013.pdf) (accessed 9 August 2019).
- 220 See Müller, H & G Broscheit (2006), 'Das Internationale Online-Schiedsgericht JustFair – Ein Bericht. Eine Ankündigung. Oder ein Nachruf?', 4 *SchiedsVZ | German Arbitration Journal*, 197, 198; but also with a general review Montoya Zorrilla, E (2018), 'Towards a Credible Future: Uses of Technology in International Commercial Arbitration', 16 *SchiedsVZ | German Arbitration Journal*, 106, 108 et seq.
- 221 See <https://www.econstor.eu/bitstream/10419/181972/1/391038.pdf> (accessed 27 August 2019), 54.
- 222 See <https://www.paypal.com/us/smarthelp/article/what-is-the-resolution-center-faq3327> (accessed 27 August 2019); Cooper, B T (2009), 'Online Dispute Resolution Comes of Age', *The Practical Litigator*, 33, 35.

- 223 <https://www.gov.uk/make-money-claim>; <https://www.moneyclaim.gov.uk/web/mcol/welcome>; Sela, A (2018), 'Can Computers Be Fair: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration', 33 *Ohio State Journal on Dispute Resolution*, Vol. 91, 93.
- 224 <http://www.oecd.org/cfe/smes/31919270.pdf>; <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>.
- 225 Rule, C (2002), *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, John Wiley & Sons; Wahab, MSA et al. (2012), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, Eleven International Publishing.
- 226 Twenty-nine per cent of respondent businesses negotiated a dispute; a finding that was corroborated by the New Zealand and Austrian research findings and the Australian research conducted for the Australian Small Business and Family Enterprise Ombudsman which found that 9 times out of 10 small businesses resort to negotiation should an issue in the contractual relationship occur.
- 227 Sela, A (2018), 'Can Computers Be Fair: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration', 33 *Ohio State Journal on Dispute Resolution*, Vol. 91, 93; note 2018 HKIAC, Rules, art. 13.1 directs that when determining how an arbitration is to be conducted, arbitral tribunals consider how technology can be effectively used to avoid unnecessary delay or expense. Similarly, art. 3.1(e) allows written communications to be submitted by uploading them to a secured online repository, reflecting industry practice for the transmission of large files. The HKIAC has also indicated that it is willing to provide such repositories.
- 228 OECD (2004), 'Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation', paper presented to 2nd OECD Conference of Ministers Responsible for Small and Medium-Sized Enterprises (SMEs) in Istanbul, Turkey between 3-5 June 2004, available at: <http://www.oecd.org/cfe/smes/31919270.pdf> (accessed 23 August 2019), 5.
- 229 Ng, I & Benedetti del Rio, V (2016), 'The Use of Online Dispute Resolution in the Realm of Investment Arbitration in the European Union', *European Investment Law and Arbitration Review Online*, available at: [https://brill.com/abstract/journals/eilo/1/1/article-p133\\_8.xml](https://brill.com/abstract/journals/eilo/1/1/article-p133_8.xml) (accessed 23 August 2019).
- 230 OECD (2004), 'Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation', 5; van den Heuvel, E (2000), 'Online Dispute Resolution as a Solution to Cross-border E-disputes: An introduction to ODR', available at: <http://www.oecd.org/internet/consumer/1878940.pdf> (accessed 23 August 2019).
- 231 Ng, I & Benedetti del Rio, V (2016), 'The Use of Online Dispute Resolution in the Realm of Investment Arbitration in the European Union', *European Investment Law and Arbitration Review Online*.
- 232 Tina Astola (2017), 'The Courts and Alternative Dispute Resolution' ELI Conference Vienna, 7 Sept 2017, Richard Susskind observed: 'We should be careful not to place too much emphasis on what current users think about possible future systems. To paraphrase Steve Jobs, people don't know what they want until you show them. I have been told categorically over the years that lawyers and clients will never communicate by email, that lawyers and judges would never look up the law online, that the legal profession would never use smartphones, and so forth.' Email to Petra Butler, 24 August 2019.
- 233 See, e.g., Canada, British Columbia, Civil Resolution Tribunal Act (2012), Chapter 25, available at: [http://www.bclaws.ca/civix/document/id/complete/statreg/12025\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/12025_01) (accessed 27 August 2019) (instituting ODR for small claims, traffic cases, and certain property cases); the Money Claim Online judicial ODR platform (discussed below)).

- 234 <https://www.oecd.org/sti/consumer/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm> (accessed 12 Sept 2019).
- 235 Rule, C (2002), *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, John Wiley & Sons, 77.
- 236 Cortés, P (2010), *Online Dispute Resolution for Consumers in the European Union, Routledge Research in IT and E-commerce Law*, Routledge, Taylor & Francis Group, London, available at: <https://www.econstor.eu/bitstream/10419/181972/1/391038.pdf> (accessed 27 August 2019), 57
- 237 Rule, C (2002), *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, 69.
- 238 Ponte, L M & T D Cavenagh (2005), *Cyberjustice, Online Dispute Resolution for E-Commerce*, New Jersey: Parson Prentice Hall, 24.
- 239 Rule, C (2002), *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, 62.
- 240 Ibid.
- 241 See the green pledge for international arbitration by Lucy Greenwood: <https://www.greenwoodarbitration.com/greenpledge> (accessed 30 August 2019).
- 242 Cortés, P (2010), *Online Dispute Resolution for Consumers in the European Union, Routledge Research in IT and E-commerce Law*, Routledge, 58.
- 243 Ibid.
- 244 Respondents saw the value, for example, in the fact that there would be one set of rules which would lead to consistency and certainty, that such a regime would allow for cross-cultural and multicultural inclusiveness and that the regime could include a cost schedule.
- 245 Seventy-six per cent of respondent judges saw value in such a regime, especially if such a regime would 'provide low cost dispute resolution and would be accessible to SMEs wherever they were and the procedure would be simple enough so that a lawyer was not required for the smaller claims' [judge, England & Wales]. A Scottish respondent would see the regime's most important features as being 'active case management, avoidance of unnecessary expense on discovery of documents.'
- 246 Fifty-one per cent of respondents to the arbitrator survey indicated that they saw value in such a regime.
- 247 Fifty-one per cent of counsel indicated that they saw value in such a regime.
- 248 Forty-one per cent of the respondent arbitration institutions indicated that they saw value in a B2B cross-border dispute resolution regime. One Oceanian arbitral institution stated that it saw the value in such a regime that it would 'promote arbitration and make it more accessible.'
- 249 The proposed scheme is based on the idea of a bilateral or multilateral arbitration treaty regime which was first proposed in 2012 by Gary Born, one of the members of the Expert Group of this study.
- 250 Born, G B & P Butler, 'Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution', available at: [https://www.uncitral.org/pdf/english/congress/Papers\\_for\\_Programme/104-BORN\\_and\\_BUTLER-BATs\\_An\\_Improved\\_Means\\_of\\_International\\_Dispute\\_Resolution.pdf](https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/104-BORN_and_BUTLER-BATs_An_Improved_Means_of_International_Dispute_Resolution.pdf) (accessed 26 August 2019), 4
- 251 Ibid., 5
- 252 The UNCITRAL Arbitration Rules (2013) provide international best practice and the Permanent Court of Arbitration (PCA) could be designated as a neutral appointing authority (unless the Commonwealth member countries would agree on a Commonwealth solution, e.g. establishing an appointing panel).
- 253 Draft BAT, art. 4(1).
- 254 Draft BAT, art. 4(2) and art. 4(1)(d) which suggests that the seat will be chosen by the arbitral tribunal.



- 255 Born, G (2015), 'BITS, BATS and Buts: Reflections on International Dispute Resolution', available at: [https://www.wilmerhale.com/-/media/files/Shared\\_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf](https://www.wilmerhale.com/-/media/files/Shared_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf) (accessed 27 August 2019), 5.
- 256 Ibid., 8, also see Section 3.3.2.
- 257 The Commonwealth (2018), 'Commonwealth Trade Review 2018: Strengthening the Commonwealth Advantage: Trade, Technology and Governance', available at: [http://thecommonwealth.org/sites/default/files/inline/Strengthening\\_the\\_Commonwealth\\_9781849291798\\_UPDF.pdf](http://thecommonwealth.org/sites/default/files/inline/Strengthening_the_Commonwealth_9781849291798_UPDF.pdf) (accessed 27 August 2019). Intra-Commonwealth trade and greenfield investment is projected to exceed US\$1 trillion by 2020.
- 258 Born, G B & P Butler (2017), 'Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution', 8.
- 259 Ibid., 7.
- 260 Ibid.
- 261 Butler, P & C Herbert (2014), 'Access to justice vs access to justice for small and medium-sized enterprises: The case for a bilateral arbitration treaty', *New Zealand Universities Law Review*, Vol. 26, 186.
- 262 Born, G B & P Butler (2017), 'Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution', 10, 11, 15.
- 263 Five per cent of respondent counsels thought that the Commonwealth could strengthen international commercial arbitration by supporting the creation of a regional arbitration hub. In interviews with counsels and arbitrators in the Caribbean and Oceania the need for a regional approach, albeit not necessarily a regional institution, was emphasised (for example, summary of Caribbean international arbitration practitioner round-table; arbitrator, Oceania).
- 264 One such initiative is currently underway involving Sierra Leone, Ghana, Guinea and Cote d'Ivoire, according to a partner, law firm, West Africa.
- 265 Global Arbitration Review (2019), 'Arbitration costs compared' <https://globalarbitrationreview.com/editorial/1178433/arbitration-costs-compared> (accessed 9 March 2020).
- 266 Overall 6 per cent of respondent counsels saw a role for the Commonwealth in setting up and administering a Commonwealth arbitral institution.
- 267 Partner, law firm, Oceania and along the same lines, arbitrator, Caribbean, arbitrator, London, arbitrator Oceania.
- 268 Partner, law firm, Oceania.
- 269 Arbitrator, Oceania
- 270 Partner, law firm, London; arbitrator, Oceania,
- 271 For example, officer of an arbitral institution; arbitrator, Oceania; partner, law firm, Oceania; arbitrator Oceania.
- 272 For example, arbitrator, Oceania.

# 5

## Concluding Remarks

This report has sought to identify the challenges and solutions to the effective use of international arbitration within the Commonwealth. While the mandate of the expert group was to assess the landscape of international commercial arbitration, it is worth emphasising that a robust international arbitration framework is only one part of a canon of instruments on the substantive laws and dispute resolution mechanisms that regulate international commerce. Commonwealth member countries may therefore also wish to consider extending their policy development to include other international commercial instruments, such as the United Nations Convention on International Settlement Agreements Resulting from Mediation (2019) (Singapore Convention), the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG), the UNCITRAL Model Law on E-Commerce (1996), or the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

Based on the available information, the Commonwealth countries together have signed 865 bilateral investment treaties (BITs)<sup>1</sup> and each one is on average a member of five free trade agreements (FTAs). The reason for countries to become a member of a BIT or FTA is to reduce trade barriers so that businesses can more easily trade in the other member country or countries of the trade agreement. A natural consequence of increased trade is more business-to-business (B2B) disputes. Despite the obvious relationship between successful trade agreements and increased business-to-business disputes, to date trade agreements have not incorporated a comprehensive business-to-business

dispute resolution mechanism.<sup>2</sup> Commonwealth member countries might want to consider negotiating in the future the inclusion of dedicated B2B dispute resolution mechanisms, such as, for example, discussed in Section 4.7.2 above, in trade agreements.

Although rich in diversity, the Commonwealth member countries share a common history, a largely common legal system and a common trade language in English. This creates a unique 'Commonwealth factor' that creates opportunities for member countries to foster increased trade and build relationships.<sup>3</sup> Developing an effective international arbitration framework across the Commonwealth is one facet of that exercise, which the institution of the Commonwealth hopes can be achieved through the analysis and recommendations in this study. While reaping the benefits of a supportive Commonwealth environment that has the potential to create a unique Commonwealth-wide international commercial arbitration ecosystem, one should not lose sight of the fact that the Commonwealth is part of the international community. As a respondent to the university survey warned: 'In my view, regionalism often detracts from addressing the real problem – global harmonisation.' This is a warning reiterated by an interviewee who is part of an international institution. In same vein, a number of responses to the counsel survey and an interviewee separately implored that the Commonwealth jurisdictions and the Commonwealth should not be hostile to civil law and should consider carefully whether the civil law provides preferable solutions.

## Notes

- 1 Six Commonwealth member countries are not a member of any bilateral investment treaty (BIT) whereas nine Commonwealth members have signed thirty or more BITs. Not all BITs signed are also in force. See also for Africa: African Institute of International Law (2019), 'Study on Investor-State Dispute Settlement in Africa', which provides an overview of the landscape of investment arbitration in Africa.
- 2 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 28.23(1) acknowledges the increased potential for business-to-business disputes and urges member states 'to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area'.
- 3 As one interviewee from a small state urged: 'The Commonwealth needs to work with the existing associations, whether they are loose or strong, of arbitration professionals and experts across the region.'

# 6

## Recommendations

Law Ministers and Attorneys-General are invited to consider:

Recommending their Countries accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958);

Recommending their Countries adopt modern international commercial arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration (2006);

Developing, in consultation with stakeholders, a strategy to build national capacity to host, conduct, and access international commercial arbitration;

Recognising the particular need of small and medium-sized enterprises to access cross-border commercial justice, and the interest demonstrated by stakeholders in developing a business-to-business cross-border dispute resolution regime;

Recognising the potential for co-operation and knowledge-sharing to promote and strengthen international commercial arbitration throughout the Commonwealth, including through the exchange and secondment of professionals;

Promoting the teaching of international commercial arbitration to universities, law schools, and business schools;

Providing all arbitral awards and decisions, and all legislation, regulations and government policy papers regarding international commercial arbitration, freely and online;

Collecting and analysing data, on an ongoing basis, concerning the number of institutional and ad hoc arbitrations, diversity in international commercial arbitration practice and access, and the number and the nature of judgments dealing with international commercial arbitration issues; and

Removing legal and, where possible, economic barriers to accessing international commercial arbitration.

# 7

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# 8

## Annex: Country Reports

# ANTIGUA AND BARBUDA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Antigua and Barbuda gained independence on 1 November 1981.<sup>2</sup> The state legal system is still heavily based on the English common law.<sup>3</sup>

The arbitral legislation of Antigua and Barbuda is composed only by the Arbitration Act 1975.<sup>4</sup> The Arbitration Act is based on the English Arbitration Act 1950<sup>5</sup> and is applicable to both domestic and international arbitrations.

### B. *Description of prior legislation and reasons for its replacement*

The Antigua and Barbuda arbitral legislation has not changed since its enactment.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act was enacted on 15 August 1975.

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act governs both domestic and international arbitration proceedings.

### C. *Details and/or relevant amendments and modifications*

As described above, the arbitration legislation of Antigua and Barbuda has not changed since its enactment.

One article discusses generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and harmonise the Commonwealth Caribbean countries' legislation.<sup>6</sup>

The author reports that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes that occurred in the international arbitration legal framework in the second half of the twentieth century – such as the establishment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law').

After years of discussion and analysis, the Committee presented two drafts proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth, as well as the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.'<sup>7</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions recommended by the Committee

were never implemented. As a result, the Antigua and Barbuda Arbitration Act 1975, as with many other arbitration acts of the Commonwealth Caribbean countries, does not reflect modern trends and best practices. Certain commentators,<sup>8</sup> in an attempt to identify why the proposals of the Project were never implemented, speculate that the project was too ambitious. They also highlight that implementing the legislative reforms in all countries would be too burdensome and time-consuming. Besides these reasons, some other opinions collected by them pointed out that:

[M]ost of the individuals ... were apathetic toward the concept of harmonization of arbitral legislation in the region. The general feeling, according to Ms. Straker, was that there were many other more important matters that had to be addressed first by the Commonwealth Caribbean territories.<sup>9</sup>

[T]he business community of the Commonwealth Caribbean [held] that the process of arbitration was deemed to be neither speedier nor less expensive than the adjudicatory process, especially in view of the fact that in most cases the parties had to go to court to enforce awards in their favour. Commercial disputants, according to Mr Thompson, felt more comfortable with the courts in the islands.<sup>10</sup>

Hence, the Antigua and Barbuda arbitral legislation is still based on the 1950 English Arbitration Act. There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of CARICOM. It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>11</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The Arbitration Act is not based on the UNCITRAL Model Law, but on the English Arbitration Act 1950.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The Arbitration Act differs considerably from the UNCITRAL Model Law.

Although no literature is available commenting on Antigua and Barbuda's current arbitration legislation, the analysis of the provisions of the Arbitration Act shows remnants of provisions no longer present in modern legislations.

Some noteworthy differences between the Arbitration Act and the UNCITRAL Model Law are, for example (i) the inclusion of umpires; (ii) the right of the two party-appointed arbitrators to indicate an umpire, in cases in which the arbitral agreement only refers to two arbitrators; (iii) the power granted to the parties, in certain cases, to supply vacancies of arbitrators; (iv) the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures; and (v) lack of provisions on separability of the arbitral agreement.

#### *F. Powers and duties of arbitrators*

Section 13(3) of the Arbitration Act determines that, unless otherwise agreed by the parties, arbitrators and umpires have the right to administer the oath to, and take the affirmation of, any party or witness on a reference under the agreement. In relation to awards, section 14(1) sets out that arbitrators and umpires have the power to make an award at any time; section 17 determines that, by default, this arbitration award shall be final and binding on the parties and the persons claiming under them respectively; and section 18 empowers the arbitrator or umpire with the right to correct any clerical mistake or error arising from any accidental slip or omission in an award.

Furthermore, section 16 sets forth that:

[U]nless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the High Court to order specific performance of any contract other than a contract relating to land or any interest in land.

*G. Arbitrator immunity*

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Antigua and Barbuda became a party to the New York Convention on 2 February 1989.<sup>12</sup>

*B. Reservations to the New York Convention*

Antigua and Barbuda acceded to the New York Convention with the commercial and reciprocity reservations.<sup>13</sup>

*C. Method of domestic implementation of the New York Convention*

The state did not take steps to amend its national legislation to give effect to the Convention.<sup>14</sup> As a result, the Arbitration Act still refers to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927, with the reciprocity and commercial reservations.<sup>15</sup>

*D. Other international/regional treaties*

Under the UK Arbitration (International Investment Disputes) Act 1966, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention') was given effect in former British colonies. However, considering that Antigua and Barbuda repealed this legislation,<sup>16</sup> the country is not listed as a party to the ICSID Convention.<sup>17</sup>

The state is a party of the Caribbean Community (CARICOM),<sup>18</sup> and of the Organization of the Eastern Caribbean States (OECS).<sup>19</sup> Antigua and Barbuda has signed three bilateral investment treaties, two of which are in force (Germany and the United Kingdom).<sup>20</sup>

### IV. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

The approach of the courts leans generally towards recognition and enforcement, and such enforcement is governed by Cap. 33 sections 27 and 34 of the Arbitration Act.

In *VT Leaseco v Fast Ferry Leasing Limited, Rapid Explorer Operations Inc.* the High Court of Antigua was asked to exercise jurisdiction to grant summary judgment in a matter governed by an arbitration agreement. The High Court declined jurisdiction to entertain the application.<sup>21</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Part IX, section 35 of the Arbitration Act sets forth the requirements for enforcement of foreign arbitral awards, and paragraph 1 of this section, more specifically, lists the requirements an award must have in order to be enforced. This paragraph includes expressly that 'the enforcement thereof must not be contrary to public policy or the laws of Antigua and Barbuda'.

No commentaries or decisions discussing the public policy threshold in international arbitration were located.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Although no cases of international relevance were located, two precedents from the Eastern Caribbean Supreme Court (ECSC), in the High Court of Justice Commonwealth of Antigua and Barbuda, are worth noting.

The two relevant cases discussing arbitration in Antigua and Barbuda are (i) *VT Leaseco Limited v Fast Ferry Leasing Limited, Rapid Explorer Operations Inc*<sup>22</sup> and (ii) *Canisby Limited v Flat Point Development Limited*.<sup>23</sup> In the first case, the ECSC High Court of Justice (Civil) analysed the jurisdiction of the Antigua and Barbuda courts to hear a contractual dispute, in which the contract had an arbitral agreement. The ECSC recognised that the dispute should be decided by an arbitral tribunal seated in London.<sup>24</sup> In the second case, the ECSC, in the Court of Appeal, affirmed a judgment from the Antigua and Barbuda courts which had granted a stay of a court procedure because the dispute was subjected to an arbitral agreement.

In *Canisby Limited v Flat Point Development Limited*, the ECSC clarified the interpretation of section 5 of the Antigua and Barbuda Arbitration Act as to the requirements to grant a stay of court proceedings when the parties have agreed in arbitration:

In *Ocean Conversion Limited v Attorney General of the Virgin Islands* at paragraph 17, this Court adopted the approach of the House of Lords in *Heyman and Another v Darwins Limited* that, firstly, the precise nature of the dispute should be ascertained; secondly, it should be determined whether the dispute is one that falls within the arbitration clause; and thirdly the court should determine whether there is a sufficient reason why the matter in dispute should not be referred to arbitration. The onus on the second and third matters is on the party resisting the referral to arbitration.

In determining the precise nature of the dispute, the Court must have regard firstly to the statement of claim, as this is where the grounds which the claimant advances for seeking relief should be laid out. These grounds will only mature into disputes, i.e. issues for determination by the relevant tribunal, so far as they are traversed by the defendant. Where a defendant is seeking to stay court proceedings, he must do so before he files his defence to the statement of claim. It is therefore in his evidence in support of the application for a stay that the precise nature of the dispute should take form.<sup>25</sup>

These precedents are relevant because they demonstrate a good understanding and respect for arbitration principles by the Antigua and Barbuda national courts, and also by the ECSC. It is important to note that decisions of the ECSC affect all the state members of OECS.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Antigua and Barbuda does not have an arbitral institution, and no statistical data is available regarding the arbitration practice in the country. The literature commenting on (international) arbitration is also scarce,<sup>26</sup> and only a few cases discussing arbitration practice were located (discussed below).

### B. Measures to strengthen institutional arbitration capabilities

In May 2002, the Organization of Eastern Caribbean States and the Canadian International Development Agency (OECS-CIDA) initiated the Judicial and Legal Reform Project. This project was designed to improve the administration of law and support programmes such as legal aid and alternative dispute resolution mechanisms. The report advocated for arbitration to be offered on a wider scale, in addition to establishing a formal ADR system, with the government as the primary source of funding.<sup>27</sup>

### C. Submission of disputes to arbitration vs. litigation

No information was found.

### D. Participation by foreign counsel in international arbitrations

The Arbitration Act is silent on the participation by foreign counsel in international arbitration and no additional information was found discussing this matter.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

No information was available. As stated above, arbitration does not seem to be routinely used in Antigua and Barbuda.

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 476 days to resolve a commercial dispute in a first-instance court in Antigua and Barbuda – 21 days for filing and service of court processes, 365 days for trial and judgment and 90 days for enforcement of judgment.<sup>28</sup> Antigua and Barbuda ranks below the Latin America and the Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>29</sup> In terms of overall ease of enforcing contracts, Antigua and Barbuda scored 59.48 of 100 and ranked 112 of 190.<sup>30</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

Additionally, in terms of the judiciary structure and reported caseload, according to the ECSC Annual Report 2017–2018, the Registry of the Court of Appeal staff has 14 people in charge of the case management department.<sup>31</sup> The report mentions that, in 2017, 441 appeals in total were filed in the Court, considering all the nine member countries of the OECS. In the same year, 20 full court sittings were scheduled, of which three court sittings were originated

from Antigua and Barbuda judgments. The report states that 67 written judgments were delivered, of which 18 originated from Antigua and Barbuda courts. This sets Antigua and Barbuda, together with Virgin Islands, as the state with the highest number of written judgments in the period analysed. Finally, the report also points out that 814 oral judgments were given, although no specific data is available for the number of cases related to each member country. None of the significant cases reported discuss arbitration-related issues.<sup>32</sup>

#### G. *Statistics on judges and lawyers per capita*

According to the OECS Bar Association,<sup>33</sup> there are 40 lawyers acting in Antigua and Barbuda.<sup>34</sup> No information was located regarding the total number of judges in the country, which has a population of 102,012.<sup>35</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for businesses in Antigua and Barbuda and there is no information to indicate that legal aid is provided for arbitration. Legal aid is provided by the government, through the Legal Aid and Advice Centre (LAAC).<sup>36</sup> The assistance is provided mainly to women and children, but elderly people normally also qualify for both advice and assistance. Furthermore, the legal aid is restricted to certain legal issues, related to family matters (domestic violence, child support, custody of children, adoption and divorce), or with more ordinary civil matters, such as tenancy agreements, consumer law, deeds poll, citizenship and others.<sup>37</sup> This restriction means that there is no legal aid available to businesses for commercial dispute resolution.

The LAAC is a government initiative that was implemented following the above-mentioned OECD-CIDA Judicial and Legal Reform Project, which created the report on the National Consultation on Justice Issues in May 2002. Although the Project discussed the emerging areas of need for legal aid services, business-to-business dispute resolution was not one of them.<sup>38</sup> Other than establishing the LAAC, there is no indication that other reforms were implemented, such as the establishment of a formal ADR system.

### B. *Third-party funding*

Specific information discussing the current applicability of the doctrines of champerty and maintenance in Antigua and Barbuda could not be found, and the same goes for information regarding the availability of third-party funding in the country. However, given that Antigua and Barbuda has a legal system based on English common law,<sup>39</sup> and the rule of maintenance and champerty applied at the time of independence, it is reasonable to assume that the rule of maintenance and champerty is still applicable.

This is confirmed by the jurisprudence of the Eastern Caribbean Supreme Court. In *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited*, the Court was required to decide whether a funding agreement was disclosable on the basis that it was champertous.<sup>40</sup> In reaching its decision, the Court indicated that the doctrines of champerty and maintenance apply in the Eastern Caribbean jurisdictions but that funding agreements may not necessarily fall foul of the doctrines. The issue in each case is whether 'a funding agreement has a tendency to corrupt justice'.<sup>41</sup> As the Court explained:



The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.<sup>42</sup>

It appears therefore that while the doctrines of champerty and maintenance apply, funding agreements may, in the appropriate circumstances, still be permissible.

#### C. Contingency fees

In accordance with the OECS Bar Association Code of Ethics contingency fee agreements are expressly permitted: '[a]n attorney-at-law may, with the prior agreement of the client, charge a contingency fee not exceeding twenty percent and reasonable commissions on collection of liquidated claims.'<sup>43</sup> This will apply where the state either does not have a Legal Profession Act or does have a Legal Profession Act that does not provide for contingency fees.

#### D. Insurance for legal expenses

Legal insurance is available for both natural and legal persons and there are insurance providers located in the region. Legal expense insurance seems to be available.<sup>44</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 The Commonwealth, 'Antigua and Barbuda: History' <<http://thecommonwealth.org/our-member-countries/antigua-and-barbuda/history>> accessed on 28 August 2019.
- 3 Robert B. Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117 Vol. 63 No. 1, 120.
- 4 EPDF, Arbitration Act 1975, Act n.12 (Cap. 33), 15 August 1975.
- 5 EPDF (2004), 'Alternative Dispute Resolution: A Developing World Perspective', Albert K Fiadjoe, Cavendish, 76–77 <<https://epdf.tips/alternative-dispute-resolution-a-developing-world-perspective.html>> accessed 14 August 2019.
- 6 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
- 7 *Ibid.*, 123.
- 8 *Ibid.*

- 9 Ibid., 124.
- 10 Ibid.
- 11 Caribbean Radio, 'Draft model arbitration bill for CARICOM states being reviewed by committee', <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>> accessed on 12 Sept 2019.
- 12 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed on 14 September 2019.
- 13 Jan Paulsson, Nigel Rawding et al. (eds) (2010), 'Appendix 6: New York Convention and UNCITRAL Model Law countries and the top 20 places of ICC arbitration (2000–2009)', in *The Freshfields Guide to Arbitration Clauses in International Contracts*, Kluwer Law International.
- 14 Global Arbitration Review (2016), 'Enforcement of Foreign Arbitral Awards in Central America and the Caribbean', Angeline Welsh and Luiz González Garcia <<https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2017/1067591/enforcement-of-foreign-arbitral-awards-in-central-america-and-the-caribbean>> accessed on 29 August 2019.
- 15 'In accordance with Article I, the Government of Antigua and Barbuda declares that it will apply the Convention on the basis of reciprocity only to the recognition and enforcement of awards made in the territory of another contracting state. The Government of Antigua and Barbuda also declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Antigua and Barbuda' – Arbitration Act, Second Schedule, section 33, Article 1.
- 16 Global Arbitration Review (2016), 'Enforcement of Foreign Arbitral Awards in Central America and the Caribbean', Angeline Welsh and Luiz González Garcia.
- 17 See ICSID, 'Member States' <[icsid.worldbank.org](https://icsid.worldbank.org)> accessed on 29 August 2019.
- 18 CARICOM website available at <<https://www.caricom.org/>> accessed on 13 August 2019.
- 19 OECS website available at <<https://www.oecs.org/>> accessed on 13 August 2019. The other OECS state members are Dominica, St Kitts and Nevis, Montserrat, Anguilla, the British Virgin Islands, Grenada, St Lucia, St Vincent, the Grenadines and Martinique.
- 20 UNCTAD Investment Policy Hub, 'Antigua and Barbuda' <[investmentpolicy.unctad.org](https://investmentpolicy.unctad.org)> accessed 31 August 2019.
- 21 *VT Leaseco Limited v Fast Ferry Leasing Limited, Rapid Explorer Operations Inc.*, ECSC, High Court of Justice (Civil), Claim No. ANUHCV 0312/2005, 13 July 2007, in Albert Jan Van den Berg (ed.) (2009), *Yearbook Commercial Arbitration*, Volume 34, ICCA & Kluwer Law International, 399–403.
- 22 Ibid.
- 23 *Canisby Limited v Flat Point Development Limited*, ECSC, Court of Appeal, Claim No. ANUHCV 0312/2005, 13 February 2017, available at <<https://www.eccourts.org/canisby-limited-v-flat-point-development-limited/>> accessed on 29 August 2019.
- 24 *VT Leaseco Limited v Fast Ferry Leasing Limited, Rapid Explorer Operations Inc.*, ECSC, High Court of Justice (Civil), Claim No. ANUHCV 0312/2005, 13 July 2007, in Albert Jan Van den Berg (ed.) (2009), *Yearbook Commercial Arbitration*, 399–403.
- 25 *Canisby Limited v Flat Point Development Limited*, ECSC Court of Appeal, Claim No. ANUHCV 0312/2005, 13 February 2017, available at <<https://www.eccourts.org/canisby-limited-v-flat-point-development-limited/>> accessed on 29 August 2019, paras 22 and 23.
- 26 Most articles only briefly mention Antigua and Barbuda when describing the context of arbitration in the Caribbean, but no comprehensive analysis was found discussing international arbitration in Antigua and Barbuda.
- 27 OECS–CIDA Judicial and Legal Reform Project (2002), 'National Consultation on Justice Issues: Antigua and Barbuda' <[http://biblioteca.cejamericas.org/bitstream/handle/2015/2929/ant\\_barbuda.pdf?sequence=1&isAllowed=y](http://biblioteca.cejamericas.org/bitstream/handle/2015/2929/ant_barbuda.pdf?sequence=1&isAllowed=y)> accessed on 14 September 2019 at pages 7–9.

- 28 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreconomies/antigua-and-barbuda>> accessed on 29 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 29 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 30 Ibid.
- 31 Eastern Caribbean Supreme Court (2019), 'ECSC Annual Report 2017–2018' <<https://www.eccourts.org/annual-report-2017-2018/>> accessed 13 August 2019.
- 32 Ibid.
- 33 'OECS Bar Association is an organization of legal practitioners and representative Bar Associations all functioning within and under the jurisdiction of the ECSC a superior Court of record of the Eastern Caribbean.' See at OECS Bar Association website, available at <<http://www.oecsbar.org/index.php/en/about-us>> accessed on 29 August 2019.
- 34 Ibid.
- 35 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 36 Government of Antigua and Barbuda, Ministry of Justice and Legal Affairs, 'What you need to know about legal aid and advice centre' <[http://legalaffairs.gov.ag/detail\\_page.php?page=legal\\_aid.php](http://legalaffairs.gov.ag/detail_page.php?page=legal_aid.php)> accessed on 29 August 2019.
- 37 Ibid.
- 38 OECS–CIDA Judicial and Legal Reform Project (2002), 'National Consultation on Justice Issues: Antigua and Barbuda', 5–7.
- 39 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 40 *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153.
- 41 Ibid.
- 42 Ibid., 153–54.
- 43 OECS Bar Association, 'Code of Ethics, Part B: Mandatory Provisions and Specific Prohibitions' <<http://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/code-of-ethics>> accessed on 14 August 2019.
- 44 Antigua at St Augustine Community Development District, *Proposed General and Procedural Rules*, 1.12 available at <<http://www.antiguacdd.com/downloads-5/files/Rules%20of%20Procedure.pdf>> accessed on 30 Aug 2019.

# AUSTRALIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

On 11 December 1931, the Statute of Westminster was passed to recognition to the de facto independence of the dominions including Australia.<sup>2</sup> Australia adopted it in 1942.<sup>3</sup> Being a former British colony, the legal system of Australia is influenced by the English common law and legal system.<sup>4</sup>

The state Commercial Arbitration Acts (CAAs) were based on the English Arbitration Act 1979.<sup>5</sup>

### B. *Description of prior legislation and reasons for its replacement*

The CAAs, governing domestic arbitration and based on superseded English legislation, had caused significant problems, resulting in an arbitration regime that was costly, time consuming, and uncertain.<sup>6</sup> A Model Commercial Arbitration Bill (MCAB) was introduced in 2010 to replace the CAAs and remedy these defects.<sup>7</sup> The MCAB also adopted the 2006 UNCITRAL Model Law on International Commercial Arbitration ('Model Law').

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The international arbitration regime is governed by a federal statute, the International Arbitration Act 1974 (Cth) (IAA). The IAA entered into force on 9 December 1974.<sup>8</sup>

### B. *Scope of application to domestic and international arbitrations*

Australia has a federal system, but the competence lies with the Federation regarding international arbitration. International commercial arbitration is governed by the IAA, which gives effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') (s 2D(d)) and the UNCITRAL Model Law.

Prior to 2010, all the states and territories had their own domestic legislation regarding arbitration in Australia.<sup>9</sup> In 2010, the MCAB was agreed upon by the Standing Committee of General Attorneys to form a uniformed domestic arbitration law.<sup>10</sup> All states and territories have enacted uniform legislation regulating domestic arbitration based on the 2006 UNCITRAL Model Law.

### C. *Details and/or relevant amendments and modifications*

In 2015, the Civil Law and Justice (Omnibus Amendments) Act 2015 came into force. It provided minor amendments concerning confidentiality and the enforcement of foreign arbitral awards.<sup>11</sup> Regarding the former, the 2015 legislation turned the confidentiality requirement into an opt-out feature rather than an opt-in. Regarding the latter, this change allowed for international arbitral awards made in countries that are not party to the New York Convention to be enforced in Australia.<sup>12</sup> The 2015 amendment also allowed parties to resist the enforcement of an award if one of the parties to the arbitration lacked legal capacity when the arbitration agreement was made.<sup>13</sup>

In 2018, the Civil Law and Justice Legislation Amendment Act (CLJLA) amended the IAA in a minor way. The CLJLA clarified the procedural requirements for enforcement of foreign arbitral awards and for opt-out procedure regarding confidentiality.<sup>14</sup> It also modernised certain provisions on arbitrators' powers and defined the notion of a 'competent court'.<sup>15</sup>

#### *D. Relationship to the UNCITRAL Model Law*

Australia was one of the first countries to wholly adopt the Model Law.<sup>16</sup> On a domestic level, each of the states and territories have enacted uniform legislation regulating domestic arbitration based on the 2006 Model Law after the Model Commercial Arbitration Bill in 2010. On an international level, the IAA designates the Model Law as 'the exclusive, mandatory procedural law for all international arbitrations seated in Australia'.<sup>17</sup> The IAA even explicitly states that the Model Law 'covers the field', meaning if the Model Law is applied, state or territory laws relating to the arbitration cannot apply.<sup>18</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The IAA was amended to give effect to the 2006 revisions to the Model Law. In 2010, the IAA implemented the 2006 Model Law to replace the 1985 version and added additional provisions to enhance the interim measures mechanism.<sup>19</sup> Additions to the IAA included a provision on the consolidation of proceedings subject to the parties' consent,<sup>20</sup> a provision dealing with one of the parties' deaths, and a provision detailing the parties' right to seek subpoenas.<sup>21</sup>

#### *F. Powers and duties of arbitrators*

The IAA obliges arbitrators:

- a. To disclose any situations that could give rise to justifiable doubts as to an arbitrator's independence or impartiality;<sup>22</sup>
- b. To determine the procedure in such a manner as the arbitral tribunal considers appropriate;<sup>23</sup>
- c. To give parties a reasonable opportunity to present their cases;<sup>24</sup>
- d. To determine the dispute in accordance with the rules of law chosen by the parties;<sup>25</sup> and
- e. To provide an award with reasons, unless otherwise agreed by the parties.<sup>26</sup>

#### *G. Arbitrator immunity*

Section 28 of the IAA provides for arbitrator immunity. Arbitrators are not liable in respect to 'anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator'.<sup>27</sup> Fraud is an exception.<sup>28</sup>

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Australia became a party to the New York Convention on 26 March 1975.<sup>29</sup>

#### *B. Reservations to the New York Convention*

Australia has not made any reservations to the New York Convention.<sup>30</sup>

#### *C. Method of domestic implementation of the New York Convention*

The IAA's Part II implements the international obligations arising out of the New York Convention.<sup>31</sup>

#### D. Other international/regional treaties

Australia is a contracting state to the Convention on the settlement of Investment Disputes between States and nationals of other States ('ICSID Convention'),<sup>32</sup> and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ('Mauritius Convention').<sup>33</sup>

According to UNCTAD, Australia has signed 24 bilateral investment agreements with different states, of which 18 are in force (Uruguay, Turkey, Sri Lanka, Egypt, Lithuania, Pakistan, Peru, Argentina, Philippines, Lao People's Democratic Republic, Czech Republic, Hong Kong, Romania, Indonesia, Hungary, Poland, Papua New Guinea, China).<sup>34</sup>

Australia has signed 15 free trade agreements with different states, of which 12 are in force (Singapore, Thailand, United States, Chile, New Zealand, Papua New Guinea, Malaysia, Republic of Korea, People's Republic of China, Association of South East Asian Nations Australia and New Zealand, South Pacific Regional Trade and Economic Cooperation Agreement, and Comprehensive and Progressive Agreement for Trans-Pacific Partnership).<sup>35</sup>

### IV. RELEVANT CASE LAW

#### A. Approach of the national courts to the enforcement of arbitration agreements

Australian courts are considered pro-enforcement of arbitral awards and have a strong history of supporting the autonomy of arbitral proceedings.<sup>36</sup>

#### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

International arbitration awards can be enforced or set aside under Part II of the IAA.<sup>37</sup> The IAA adopted the Model Law and its public policy clause. The IAA's sections 8(7A) and 19 provide further details on circumstances where an award is contrary to public policy; for instance, if an award was induced by fraud or corruption or if it was a breach of natural justice.<sup>38</sup>

In *TCL Air Conditioner*,<sup>39</sup> the Full Federal Court held that a breach of natural justice would only be applicable if 'there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness'.<sup>40</sup> The establishment of minor or technical breaches of the natural justice rules would not suffice to set aside an award.<sup>41</sup> TCL also challenged the constitutional validity of the IAA in the original jurisdiction of the High Court of Australia where the High Court unanimously rejected TCL's argument.<sup>42</sup>

In the *Uganda Telecom* case, the Federal Court held that public policy grounds should be interpreted narrowly.<sup>43</sup>

In *William Hare v Aircraft Support Industries*, the New South Wales Supreme Court held that where a part of an award is affected by a breach of natural justice rules, that part could be severed from the award. The rest of the award could then be enforced.<sup>44</sup>

#### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

In 2013, the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor* confirmed that the Federal Court has jurisdiction to enforce international arbitral awards and that

the powers exercised by an arbitral tribunal are not in contravention of the Australian Constitution.<sup>45</sup>

The Full Federal Court of Australia in *Hancock Prospecting Pty Ltd v Rinehart* confirmed that arbitration agreements are to be interpreted liberally on the presumption that parties choosing arbitration intend for all of their disputes to be dealt with in that way.<sup>46</sup>

The Federal Court of Australia in *Samsung C & T Corporation, Re Samsung C & T Corporation* found that the Federal Court does not have jurisdiction under the IAA to grant leave to issue subpoenas for foreign-seated arbitrations.<sup>47</sup>

In *Re Infinite Plus Pty Ltd*,<sup>48</sup> the New South Wales Supreme Court ordered that court proceedings between shareholders be stayed in favour of arbitration pursuant to section 7(2) of the IAA. The decision demonstrates that Australian courts will stay court proceedings where there is a valid arbitration agreement, even where the dispute is in relation to rights conferred under statute and potentially even where a third party who is not bound by an arbitration agreement is a party to the stayed proceedings.

In *Trina Solar (US), Inc v Jasmin Solar Pty Ltd*,<sup>49</sup> the Full Federal Court provided guidance for the applicable choice of law in determining whether a party is a party to an arbitration agreement. It held that the law of the forum should be applied in determining the question of whether an arbitration agreement was reached and whether a party is a party to that agreement, while the governing law of the arbitration agreement is applied to determine questions of validity, performance, and breach.<sup>50</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Institutional arbitration is common in Australia and there are a number of well-established arbitral institutions.

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's premier international arbitral institution.<sup>51</sup> In 2018, ACICA administered 20 arbitrations, mediations, and requests to act as an appointing authority under the IAA.<sup>52</sup>

The Australian International Disputes Centre (AIDC), formerly registered as the Australian Commercial Disputes Centre (ACDC), is an independent non-profit organisation and offers a full range of dispute resolution services including mediation and international arbitration.<sup>53</sup> It includes a full case management service using the ADC Rules for Domestic Arbitration 2019.<sup>54</sup> It also provides venue hire for international arbitration proceedings.<sup>55</sup>

The Chartered Institute of Arbitrators Australia (CI Arb Australia) provides education, training and accreditation for arbitrators.<sup>56</sup>

Other institutions include the Australian Maritime and Transport Arbitration Commission (AMTAC),<sup>57</sup> Resolution Institute,<sup>58</sup> the Perth Centre for Energy and Resources Arbitration (PCERA),<sup>59</sup> and the Melbourne Commercial Arbitration and Mediation Hub (MCA MH).<sup>60</sup>

### B. Measures to strengthen institutional arbitration capabilities

The Attorney-General's Department (AGD) is actively supporting and improving arbitration in Australia through regular and informed legislative

updates.<sup>61</sup> For example, following a submission from the ACICA and the CIArb, the government implemented further improvements to the International Arbitration Act.<sup>62</sup> These amendments promote commercial certainty for Australian businesses operating abroad and for foreign businesses investing in Australia.<sup>63</sup> AGD also supports government initiatives by continuing to work with stakeholders to ensure that Australia remains adaptable and receptive to the needs of the national and international arbitration communities.<sup>64</sup>

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

Section 29 of the IAA allows the parties to appoint a legal practitioner from any legal jurisdiction or any other person.<sup>65</sup> It also states that appearing before an arbitral tribunal does not breach any law regulating admission to the profession of the law.<sup>66</sup>

Section 24A of the MCAB for domestic arbitration also provides that no offence under the Legal Profession Uniform Law is committed by a non-Australian lawyer by representing a party in arbitration proceedings.<sup>67</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

Traditionally, arbitration in Australia was largely confined to disputes in areas such as building and construction.<sup>68</sup> Steady growth over the last two decades and the opening of Asian markets have accelerated the use of arbitration in other areas, particularly in the energy and trade sectors.<sup>69</sup>

2. Time taken for enforcement/annulment proceedings

The enforcement process for domestic award is likely to be completed within three months if there is no opposition.<sup>70</sup> For international award, it must be within 28 days unless extensions apply.<sup>71</sup>

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 402 days to resolve a commercial dispute in a first-instance court in Australia – 14 days for filing and service of court processes, 328 days for trial and judgment and 60 days for enforcement of a judgment.<sup>72</sup> Australia ranks above the OECD high income region, in which it takes an average of 582.4 days to resolve commercial disputes in first-instance courts.<sup>73</sup> In terms of overall ease of enforcing contracts, Australia scored 79 of 100 and ranked 5 of 190.<sup>74</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>75</sup>

*G. Statistics on judges and lawyers per capita*

While there is no general information available, according to the Law Council of Australia, there were 66,211 practising solicitors in Australia as at October 2014.<sup>76</sup> This shows roughly a 1:381 ratio. The judicial system consists of 884 magistrates and judges.<sup>77</sup>



## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for businesses and for arbitration in Australia. Australia offers a number of free or low-cost legal assistance services for small businesses through the Australian Small Business and Family Enterprise Ombudsman.<sup>78</sup> Various organisations in the states and territories, in particular law societies, also provide assistance for businesses. For example, in the Australian Capital Territory the University of Canberra, in conjunction with Legal Aid ACT, runs the Small Business Legal Advice Clinic,<sup>79</sup> while the Legal Aid Commission of Tasmania runs a telephone advice service.<sup>80</sup> This service provides free initial legal advice and is available to everyone, including small businesses. Victoria's Legal Aid Act 1978 extends legal aid to body corporates in accordance with section 24.<sup>81</sup>

Australia also specifically provides legal assistance for arbitration and mediation. ADR mechanisms are listed in the definition of legal aid and given specific Parts in Victoria's Legal Aid Act 1978 and the New South Wales Legal Aid Commission Act 1979.<sup>82</sup>

### B. *Third-party funding*

In 1993, legislation was introduced in New South Wales and Victoria to abolish champerty and maintenance as common law torts and crimes.<sup>83</sup> Some other Australian states have followed suit with similar legislation, and in any event, case law suggests that champerty and maintenance are now obsolete as crimes under the common law of Australia.<sup>84</sup>

In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, the High Court held that third-party litigation funding was not an abuse of process or contrary to public policy and noted the access to justice benefits that can flow from litigation funding.<sup>85</sup> The court stated that notions of maintenance and champerty could not be used to challenge proceedings simply because they were funded by a litigation funder. The Court confirmed that litigation funding is not prohibited in jurisdictions where the torts of maintenance and champerty have been abolished (e.g. New South Wales and Victoria).<sup>86</sup>

Third-party funding is allowed and 'has proven to be the life-blood of much of Australia's representative proceeding litigation at federal and state level',<sup>87</sup> especially after the Federal Court's determination that litigation funding should be treated as a managed investment scheme.<sup>88</sup> Third-party funders are not obligated to have a licence and are unsupervised.<sup>89</sup> However third-party litigators are required by law to manage conflicts of interest.<sup>90</sup>

In late 2017, the Australian Law Reform Commission (ALRC) opened an inquiry to consider whether and to what extent third-party funders should be subject to Commonwealth regulations.<sup>91</sup> The report made recommendations to the government, which included that courts should exercise greater supervision over funding agreements and would have 'the power to reject, vary or amend' the agreement's terms.<sup>92</sup> The ALRC also suggested that third-party funders should report to the Australian Securities Investments Commission to ensure compliance with the conflicts of interest.<sup>93</sup> On 24 January 2019, the Attorney-General tabled the report and approval will be sought from the incoming government to undertake further consultation.<sup>94</sup>

Recognised third-party funders, such as Burford Capital, IMF Bentham, and Vannin Capital, as well as Augusta Ventures and Balance Legal Capital, are well known in Australia.

### C. Contingency fees

Conditional cost agreements such as 'no win, no fee' policies are allowed in Australia. Limitations on fee structures are not uniform throughout Australia's states and territories.<sup>95</sup>

For contentious cases, there is a 25 per cent cap fee for uplift fee over the regular legal costs payable excluding disbursements. According to a draft report by the Australian Government, the reasoning behind the limit is to 'prevent lawyers from inflating fees to unreasonable levels and provide a threshold for the amount of risk lawyers accept. The level of risk a lawyer will tolerate should increase with the size of the uplift, as this increases their expected return.'<sup>96</sup>

### D. Insurance for legal expenses

Insurance of legal issues is common in Australia and a number of companies provide these services.<sup>97</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
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- 4 The Commonwealth, 'Judicial System of Australia' <<http://www.commonwealthgovernance.org/countries/pacific/australia/judicial-system/>> accessed on 29 August 2019.
- 5 CI Arb, Australia Branch, 'Understanding Australia's New Domestic Arbitration Regime: A Comparison Of The Australian State Commercial Arbitration Acts And The New Model Commercial Arbitration Bill' <<https://www.ciarb.net.au/resources/domestic-arbitration-archive/understanding-australias-new-domestic-arbitration-regime-a-comparison-of-the-australian-state-commercial-arbitration-acts-and-the-new-model-commercial-arbitration-bill/>> accessed on 30 August 2019.
- 6 The Commonwealth, 'Statute of Westminster', citing from New South Wales, Legislative Council, *Hansard* (The Hon John Hatzistergos, 12 May 2010) 22432.
- 7 The Commonwealth, 'Statute of Westminster'.
- 8 Michael Pryles (2019), 'National Report for Australia (2018)', in Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International.
- 9 ACICA (2019), 'International Arbitration Act 1974' <<https://acica.org.au/international-arbitration-act-1974/>> accessed on 29 August 2019.
- 10 Ibid.
- 11 Elizabeth Macknay (2015), 'Australia gets in line: recent amendments to the International Arbitration Act', Herbert Smith Freehills <<https://www.herbertsmithfreehills.com/latest-thinking/australia-gets-in-line-recent-amendments-to-the-international-arbitration-act>> accessed on 1 May 2019.
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- 13 Nottage (2017), 'Australia's International Arbitration Act Amendments: Rejuvenation by a Thousand Cuts?
  - 14 Parliament of Australia, 'Civil Law and Justice Legislation Amendment Bill 2018' <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s1057](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1057)> accessed on 1 May 2019.
  - 15 Ibid.
  - 16 Kluwer Arbitration Blog (2017), 'Australia's International Arbitration Act Amendments: Rejuvenation by a Thousand Cuts?', Luke Nottage.
  - 17 Australian Centre for International Commercial Arbitration, 'Commercial Arbitration Acts: Section 16' <<https://acica.org.au/international-arbitration-act-1974/>> accessed on 1 May 2019.
  - 18 IAA, Section 21.
  - 19 Kluwer Arbitration Blog (2017), 'Australia's International Arbitration Act Amendments: Rejuvenation by a Thousand Cuts?', Luke Nottage.
  - 20 IAA, Division 3, section 23C and 23D.
  - 21 IAA, Division 3, section 23.
  - 22 IAA, article 12.
  - 23 IAA, article 19(2).
  - 24 IAA, article 18.
  - 25 IAA, article 28(1).
  - 26 IAA, article 31.
  - 27 ACICA (2019), 'International Arbitration Act 1974', section 28.
  - 28 Global Arbitration Review (2018), 'Australia', Doug Jones, Frank Bannon, Dale Brackin, Steve O'Reilly and Clive Luck <<https://globalarbitrationreview.com/chapter/1170031/australia>> accessed on 2 May 2019.
  - 29 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed on 31 July 2019.
  - 30 Ibid.
  - 31 IAA, Part II.
  - 32 International Centre for Settlement of Investment Disputes, 'ICSID Documents Overview' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed on 28 August 2019.
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  - 37 International Arbitration Act 1974, sections 8(5) and 8(7) which replicate article V of the New York Convention <<https://www.legislation.gov.au/Details/C2018C00439>> accessed on 1 May 2019.
  - 38 International Arbitration Act 1974, sections 8(7A) and 19.
  - 39 *TCL Air Conditioner (ZhongShan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, <[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2014/83.html?stem=0&synonyms=0&query=title\(%222014%20FCAFC%2083%22\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2014/83.html?stem=0&synonyms=0&query=title(%222014%20FCAFC%2083%22))> accessed on 1 May 2019.

- 40 *TCL Air Conditioner (ZhongShan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387.
- 41 Ibid.
- 42 *TCL Air Conditioner (ZhongShan) Co Ltd v Castel Electronics Pty Ltd* (2013) 295 ALR 596 (TCL).
- 43 *Uganda Telecom Pty Ltd v Hi Tech Telecom Pty Ltd* [2011] FCA 131, paragraph 132, <[https://arbitrationlaw.com/sites/default/files/free\\_pdfs/uganda\\_telecom\\_limited\\_v\\_hi-tech\\_telecom\\_pty\\_ltd\\_2011\\_fca\\_131.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/uganda_telecom_limited_v_hi-tech_telecom_pty_ltd_2011_fca_131.pdf)> accessed on 1 May 2019.
- 44 Bronwyn Lincoln (2014), 'New South Wales Supreme Court orders partial enforcement of foreign arbitral award where breach of natural justice found in relation to one claims', Herbert Smith Freehills, <<https://hsfnotes.com/arbitration/2014/10/22/new-south-wales-supreme-court-orders-partial-enforcement-of-foreign-arbitral-award-where-breach-of-natural-justice-found-in-relation-to-one-claim/>> accessed on 1 May 2019. It cites paragraphs 129 and 130 of the case *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403: 'In my opinion, s 8 of the Act should be construed so as to allow enforcement (pursuant to s 8(2) or s 8(3)) of a part of an award, and allow refusal of enforcement (pursuant to s8(7)) of part of an award, where severance of the award is possible. That is to say, "the award" as it appears in those sub-sections should be construed as including part of the relevant award. It seems to me that this construction is not only available as a matter of language, it is consistent with the objects of the Act, and promotes rather than hinders the efficient and fair enforcement of international arbitral awards. Further, it accords with the approach taken internationally in relation to similar legislation.'
- 45 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor* [2013] HCA 5.
- 46 *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170.
- 47 *Samsung C & T Corporation, Re Samsung C & T Corporation* [2017] FCA 1169.
- 48 *Re Infinite Plus Pty Ltd* [2017] NSWSC 470.
- 49 *Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6.
- 50 Ibid.
- 51 Australian Centre for International Commercial Arbitration <<https://acica.org.au/>> accessed on 1 May 2019.
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- 53 ADC, 'Australian Disputes Center' <<https://www.disputescentre.com.au/>> accessed on 1 May 2019.
- 54 Ibid.
- 55 Ibid.
- 56 CI Arb, Australian Branch <<https://www.ciarb.net.au/>> accessed on 29 August 2019.
- 57 Australian Maritime And Transport Arbitration Commission, 'Introduction' <<https://amtac.org.au/>> accessed on 29 August 2019.
- 58 Resolution Institute, 'About Resolution Institute' <<https://www.resolution.institute/>> accessed on 29 August 2019.
- 59 Perth Centre for Energy & Resources Arbitration, 'Focused Dispute Resolution for the Energy and Resources Industries' <<https://pcera.org/>> accessed on 1 May 2019.
- 60 Melbourne Commercial Arbitration and Mediation Hub, 'Melbourne Commercial Arbitration and Media Centre' <<https://www.mcamh.com.au/venue/melbourne-commercial-arbitration-and-mediation-centre/>> accessed on 1 May 2019.
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- 63 Ibid.
- 64 Ibid.
- 65 IAA, section 29(2).

- 66 IAA, section 29(3).
- 67 MCAB, section 24A(2).
- 68 Global Arbitration Review (2018), 'Australia'.
- 69 Ibid.
- 70 Thomson Reuters Practical Law (2015), 'Enforcement of arbitral awards in Australia: overview', Derek Luxford <<https://uk.practicallaw.thomsonreuters.com/3-619-1718?transitionType=Default&contextData=%28sc.Default%29>> accessed on 2 May 2019.
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- 73 World Bank (2019), The World Bank Doing Business, 'Enforcing Contracts'.
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- 75 Ibid.
- 76 Law Council of Australia, 'How many lawyers are there in Australia?', available at: <<https://www.lawcouncil.asn.au/resources/faqs/how-many-lawyers-are-there-in-australia>> accessed 2 May 2019.
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- 78 Australian Government, Australian Small Business and Family Enterprise Ombudsman, 'How we help', <<https://www.asbfeo.gov.au/assistance/how-we-help>> accessed on 16 September 2019.
- 79 Correspondence with Legal Aid ACT, 16 September 2019: a representative confirmed that while small businesses are not eligible for free legal assistance, the organisation does offer a Small Business Clinic for one-off legal advice.
- 80 Australian Government, Australian Small Business and Family Enterprise Ombudsman, 'Legal assistance' <<https://www.asbfeo.gov.au/assistance/legal-assistance>> accessed on 16 September 2019.
- 81 Legal Aid Act 1978, No. 9245 of 1978 at ss 2 and 24.
- 82 Legal Aid Act 1978, No. 9245 of 1978 at ss 2 and Pat VIB; Legal Aid Commission Act 1979 (NSW) No. 78 at Part 3A.
- 83 *Clyne v NSW Bar Association* (1960) 104 CLR 186, 203: 'It may be necessary some day to consider whether maintenance as a crime at common law ought not now to be regarded as obsolete' <<https://jade.io/article/65457>> accessed on 1 May 2019; New South Wales' Government, Maintenance, Champerty and Barratry Abolition Act 1993 No 8 <<https://www.legislation.nsw.gov.au/#/view/act/1993/88/full>> accessed on 1 May 2019. See also United Kingdom's Criminal Law Act 1967, section 14, 'No person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect. (2)The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.' <<https://www.legislation.gov.uk/ukpga/1967/58/section/14>> accessed on 1 May 2019.
- 84 Lexology (2016), 'The court steps in: recent developments in the regulation of litigation funding in Australia' T MacDonald <https://www.lexology.com/library/detail.aspx?g=ec12dc90-e8ab-45a7-9bfb-af534e4558fb> accessed on 12 September 2019.
- 85 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 paras 84 et seq, 145.
- 86 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 paras 84 et seq.

- 87 Law Council and Federal Court of Australia, 'Case Management Handbook' Para. 13.12, <<https://www.lawcouncil.asn.au/federal-litigation-dispute-resolution/fldrs-publications/case-management-handbook>> accessed on 1 May 2019.
- 88 *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147
- 89 Australian Government: Australian Law Reform Commission (2018), 'Inquiry into Class Action Proceedings and Third-Party Litigation Funders', 43; See also S Morris et al. (2019), 'Litigation Funding: Australia' <<https://gettingthedealthrough.com/area/94/jurisdiction/5/litigation-funding-australia/>> accessed on 1 May 2019.
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- 92 Australian Government: Australian Law Reform Commission (2019), 'Integrity, Fairness and Efficiency – An Inquiry into Class action Proceedings and Third-Party Litigation Funders, Final Report'.
- 93 Ibid.
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- 95 Lexology, 'Dispute Resolution', Clayton Utz <<https://www.lexology.com/gtdt/tool/workareas/report/dispute-resolution/chapter/australia>> accessed on 1 May 2019.
- 96 Australian Government Productivity Commission (2014), *Access to Justice Arrangements*; Productivity Commission Inquiry Report, Vol. 2, paragraph 18.1 at page 603, available at <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf>> accessed on 1 May 2019.
- 97 Thomson Reuters Practical Law (2015), 'Arbitration procedures and practice in Australia: overview', Leon Chung, Elizabeth Macknay and Elizabeth Poulos <<https://uk.practicallaw.thomsonreuters.com/1-618-2164?transitionType=Default&contextData=%28sc.Default%29>> accessed 29 August 2019. See also CBD Insurance Services, 'Litigation Protection Cover Australia' <<https://cbdinsuranceservices.com.au/litigation-protection-cover-australia/>> accessed on 1 May 2019.

# THE BAHAMAS<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The legal system of the Commonwealth of The Bahamas is based on English common law.<sup>2</sup> Following its independence from the United Kingdom in 1973, The Bahamas introduced its first constitution.<sup>3</sup> The influence of the English system is evident in many ways. For example, one of the qualifications required from magistrates is to be members of the 'English, Irish, Scottish or Bahamian Bar'. Further, while the highest court which sits in The Bahamas is the Court of Appeal, the ultimate appellate court where all matters of appeal can be referred to is the Privy Council.<sup>4</sup>

The Judiciary of The Bahamas consists of Magistrates' Courts, the Supreme Court and the Court of Appeals. Final appeals can be made to the Privy Council.

### B. *Description of prior legislation and reasons for its replacement*

The first Arbitration Act of The Bahamas was passed at the end of the nineteenth century, and was based on the English Arbitration Act 1889.<sup>5</sup> The Act was subsequently updated by the ratification of the Arbitration Clause (Protocol) 1931<sup>6</sup> which was enacted in the domestic legislation of The Bahamas under Chapter 181 of the Statute Law.<sup>7</sup> With the Arbitration (Foreign Awards) Act 1931, The Bahamas ratified the Geneva Convention on the Execution of Foreign Arbitral Awards.<sup>8</sup>

However, both the Protocol and the Geneva Convention were superseded by the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (New York Convention), as explained below.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

At present there are two Acts that govern the arbitration in The Bahamas: The Arbitration Act 2009, which applies to arbitrations seated in The Bahamas,<sup>9</sup> and the Arbitration (Foreign Arbitral Awards) Act 2009 in which the New York Convention is incorporated, and which provides a regime for the enforcement of foreign arbitral awards.<sup>10</sup> Those Acts are considered the result of The Bahamas' effort and commitment to comply with the United Nations Commission on International Trade Law (UNCITRAL) recommendations in order to develop uniformity and harmonisation concerning its domestic arbitral legislation, as well as to be able to address the needs of the international arbitration practice.

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act 2009 applies to both domestic and international arbitration proceedings.

### C. *Details and/or relevant amendments and modifications*

The 2009 Act was further amended in 2011 with the Trustee (Amendment) Act 2011 (TAA), which expanded the scope of arbitrable disputes under the Act, by including trust disputes.<sup>11</sup> Under section 18 of the TAA, subsequently

section 91A of the Arbitration Act 2009, any dispute or administration question related to a trust can be submitted to arbitration in accordance with the provision of the trust instrument.<sup>12</sup> Furthermore, it was provided that any provision in a trust instrument referring a matter to arbitration shall operate as an arbitration agreement between the parties. It should also be noted that, under section 18 of the TAA, the arbitral tribunal, in a trust arbitration, is accorded all the powers of the court in relation to administration, variation, execution, or the exercise of any other power under a trust.<sup>13</sup>

#### *D. Relationship to the UNCITRAL Model Law*

Although The Bahamas is one of the few countries in the Caribbean that has not adopted the UNCITRAL Model Law,<sup>14</sup> the Arbitration Act 2009 is based on it and purports to draw on lessons from other modern legislation, notably the English Arbitration Act 1996.<sup>15</sup> The scope of the 2009 Arbitration Act is quite comprehensive given that it consists of 106 sections.<sup>16</sup>

The government's purpose for the enactment of the new Acts and the ratification of the New York Convention was to 'restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for other matters related thereto'.<sup>17</sup> This was also provoked by The Bahamas' developed maritime sector and its standing as a leading ship-registry in the world. Ratifying the New York Convention was imperative for The Bahamas to allow awards to be automatically enforceable in signatory states.<sup>18</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

Some examples of departures of the 2009 Arbitration Act from the UNCITRAL Model Law are as follows: First, the 2009 Arbitration Act does not differentiate between international and domestic arbitration, but its extent of application is instead based on where an arbitration is seated.<sup>19</sup> The Act as a whole applies to all arbitrations seated in The Bahamas, while certain portions of the Act (for instance, those relating to stay of legal proceedings) are expressly stated to be applicable even where an arbitration is seated outside The Bahamas or where no seat has been determined.<sup>20</sup> Second, the 2009 Arbitration Act sets out a detailed regime relating to confidential information in relation to arbitral proceedings, how they should be handled, and when they may be disclosed.<sup>21</sup> Such provision is not present in the UNCITRAL Model Law. Third, the 2009 Arbitration Act contemplates arbitral tribunals comprising two arbitrators or two arbitrators and an umpire. These two forms of tribunal composition are foreign to the UNCITRAL Model Law, which only expressly contemplates tribunals of either one or three arbitrators (which are also permitted under the 2009 Arbitration Act).<sup>22</sup> Fourth, the 2009 Arbitration Act contemplates challenges to awards on the basis of 'serious irregularity', which can include circumstances where there is, for instance, 'uncertainty or ambiguity as to the effect of an award' or 'irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award'.<sup>23</sup> Such provision is not present in the UNCITRAL Model Law.

#### *F. Powers and duties of arbitrators*

Section 44 of the Arbitration Act 2009 stipulates general duties of the arbitral tribunal, inter alia to act fairly and impartially and adopt procedures



suitable to the circumstances of the case. Pursuant to section 41 of the Arbitration Act 2009 the arbitral tribunal may rule on its own jurisdiction (competence-competence).

According to section 45 of the Arbitration Act 2009 'it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter'. Unless the parties agree otherwise, the tribunal has no power to order consolidation of proceedings or concurrent hearings; section 46(2) of the Arbitration Act 2009. The arbitrators may appoint experts or legal advisers; section 48(1) of the Arbitration Act 2009. section 49 of the Arbitration Act 2009 stipulates general powers exercisable by the tribunal, inter alia to order the claimant to provide security for costs or to direct that a party or witness shall be examined on oath. The parties may confer to the tribunal the power to make provisional awards; section 50 of the Arbitration Act 2009. The arbitral tribunal may, at the request of a party, grant interim measures; section 57.

#### G. Arbitrator immunity

Article 40 of the Arbitration Act 2009 provides for the immunity of the arbitrator.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

The Bahamas is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 ('the New York Convention') and ratified it on 20 December 2006.<sup>24</sup>

#### B. Reservations to the New York Convention

The Bahamas does not appear to have made any reservations to the New York Convention.<sup>25</sup>

#### C. Method of domestic implementation of the New York Convention

The New York Convention is incorporated into the Arbitration (Foreign Arbitral Awards) Act 2009.<sup>26</sup>

#### D. Other international/regional treaties

Until its independence in 1973, The Bahamas was one of the states in which an effect to the ICSID Convention was given domestically under the UK Arbitration (International Investment Disputes) Act 1966.<sup>27</sup> Following its independence The Bahamas signed the ICSID Convention as an independent state in 1995.<sup>28</sup>

In addition, The Bahamas is also a member of the Multilateral Investment Guarantee Agency (MIGA),<sup>29</sup> which 'insures investors against current transfer restrictions, expropriation, war and civil disturbances, and breach of contract by member countries'. Those two agreements provide investors with some assurance that they will have recourse for their investment-related disputes in The Bahamas.

The Bahamas also forms part of the CARICOM (Caribbean Community).<sup>30</sup> The State joined the Community on 4 July 1983.<sup>31</sup> Consequently, the Trade and Investment Framework Agreement concluded between the Government of the United States of America and the Caribbean Community, concluded and enforced on 28 May 2013, also applies to The Bahamas.<sup>32</sup> The same applies to

the agreement concluded between CARICOM and the Dominican Republic, establishing the Free Trade Area.<sup>33</sup>

In terms of bilateral investment treaties, The Bahamas has only signed one, with China on 4 September 2009, which is still not in force.<sup>34</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

As previously noted, the Caribbean in general, and The Bahamas in particular, closely follow English law which is widely regarded as modern in its approach to enforcement of foreign arbitral awards.<sup>35</sup> As stated above, The Bahamas has adopted the New York Convention. As such, the grounds for setting aside an award or refusing recognition mirror those of article V of the New York Convention. Additionally, the courts seem to support arbitration.

*Abaco Towns by the Sea Limited v O'Neil and Wagno Construction Company Ltd*,<sup>36</sup> was a case decided under the old Arbitration Act 1889. Nevertheless, it deserves a mention because it indicates The Bahamas' pro-arbitration approach since its very first arbitration act. In that case, the respondents sought to enforce an award rendered by a sole arbitrator. However, the claimant resisted enforcement and instead sought to set it aside under section 12(2) of the old Act, claiming an arbitrator or umpire misconducted himself, or an arbitrator or award has been improperly procured.

The court rejected the claimant's argument to set aside the award under section 12 of the Act based on a lack of sufficient evidence proving misconduct. The court reasoned that a letter from the arbitrator demanding payment of costs did not manifest a bias against Abaco Towns. Thus, the court granted leave for enforcement of the award.

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

The Bahamas has enacted the New York Convention into its legislation. Thus, the Bahamas' Act not only mirrors the grounds for refusal of enforcement and recognition of an award, but also appear to mirror the standard of public policy ground. There do not appear to be any reported cases on how the courts would deal with public policy challenges to arbitration awards.

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

There are no decisions interpreting the New York Convention per se, but there is a decision which has discussed the Bahamas' 2009 Arbitration Act which incorporates the New York Convention.

In 2012, the new Bahamas Arbitration Act was analysed in *Lewis v Capo Group and RAV Bahamas* in the United States.<sup>37</sup> The claimant was defrauded by developers, the Capo Group and RAV Bahamas (a subsidiary of the Capo Group) regarding a property in The Bahamas. As such, Lewis claimed that the developers made false misrepresentations to him, having promised in the contract to provide certain facilities, but having failed to provide them. However, instead of commencing arbitration pursuant to the arbitration clause in the agreement, Lewis started court proceedings in the Massachusetts court arguing that the arbitration clause does not apply since his claims concern misrepresentation, fraud, unjust enrichment and

racketeering, and those do not fall within the scope of the arbitration clause. RAV argued the opposite, supporting its statement by the fact that the parties had specifically referred to the Bahamas' Arbitration Act in their arbitration clause.<sup>38</sup>

Judge Rya Zobel did not agree with claimant's argument. He stated that the Arbitration Act of The Bahamas gave arbitrators jurisdiction to determine 'what matters have been submitted to arbitration in accordance with the arbitration agreement'. He was referring to section 41.1(c) of the Act and the principle of competence-competence under which the tribunal determines its own jurisdiction.<sup>39</sup> The court stayed the proceedings in favour of arbitration stating that, while it was unclear whether all of Lewis's claims were covered by the arbitration clause or not, this is a matter to be resolved by The Bahamas arbitral tribunal itself.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

There is no information as to whether institutional arbitration is common place, but there are some arbitral institutions in place.

The Chartered Institute of Arbitrators (CIArb) has a branch located in The Bahamas. The purpose of the Institute is to promote and develop arbitration in the state through the organisation of trainings, conferences and summits.<sup>40</sup>

There is also an Alternative Dispute Resolution Centre established in The Bahamas which provides for the mediation and arbitration of all kinds of disputes, from family to commercial ones.<sup>41</sup>

The two arbitral institutions that are most frequently used for international arbitration sited in The Bahamas appear to be the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC).<sup>42</sup> The Insurance Commission of The Bahamas has also begun to regularly arbitrate insurance disputes.<sup>43</sup>

### B. Measures to strengthen institutional arbitration capabilities

The Government of The Bahamas has taken some measures to develop the country as an arbitration hub.

In 2012, after several consultations took place between the Executive Committee of The Bahamas and the Minister of Financial Services & Investments (who has governmental responsibility for international commercial arbitration), it was agreed that an arbitration commission, composed of key stakeholders and international commercial and maritime arbitrators, will be established.<sup>44</sup>

A year later, in 2013, the government established the Arbitration Council, comprising members from both the public and private sectors. The Council's mandate is to provide an 'action plan': for the development of the state as a 'leading arbitration hub and gateway to investment in the region', as well as establishing commercial and maritime arbitration centres and promoting the resolution of disputes through arbitration.

In 2016, The Bahamas became a member state of the Permanent Court of Arbitration. In 2018, the Minister of Financial Services announced that 'the government remains committed to the establishment of the country as a modern and sophisticated international arbitration centre'.<sup>45</sup> He also stated that

to achieve this, the government will implement a few measures and initiatives to improve the ease with which business in The Bahamas is conducted.<sup>46</sup>

In March 2018, the Minister further announced that there was a forthcoming International Commercial Arbitration Bill 2018, the purpose of which would be to facilitate international commercial arbitration in The Bahamas in many ways. One of the given examples was that the government planned on incorporating the UNCITRAL Model Law into its domestic legislation. The Minister explained that this is needed for The Bahamas to open itself to opportunities to generate new business and facilitate additional foreign investment, and thus become competitive and a preferred centre for international commercial arbitration.<sup>47</sup>

#### *C. Submission of disputes to arbitration vs. litigation*

Currently, there is no information available as to whether institutional arbitration is common place. Likewise, the information on the percentage of disputes submitted to arbitration as opposed to court litigation is limited as well.

#### *D. Participation by foreign counsel in international arbitrations*

Foreign lawyers could be allowed to appear before a domestic court in The Bahamas. However, prior to that they would be required to apply to The Bahamas Bar Association, which is also referred to as 'special submission to the Bahamas Bar'.<sup>48</sup>

According to the requirements set forth by The Bahamas Bar, an applicant needs to provide 10 copies of the following documents to the Bar Council: a letter of application, an affidavit by local counsel indicating the parties to the case, dispute matter, complexity, stage of the proceedings and other relevant details of the case; two character references, a certificate of good standing from the applicant's Bar, a curriculum vitae, copies of all professional certificates, a non-refundable fee of one thousand dollars, and evidence that counsel involved on the other side have been informed of the applicant's intention to make such application.<sup>49</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

There are no statistics showing in which sectors arbitration is used but it is noted that there is an increase in international arbitration activity in the areas of construction, insurance and reinsurance,<sup>50</sup> and real estate resort development. An illustrative case is reported to be a claim brought by a Malaysian resort developer over interference with the lease and operation of the foreign-owned Sakara Beach Club on the Resorts World Bimini Bay property.<sup>51</sup> Arbitration has also been the preferred method for resolving maritime disputes.<sup>52</sup>

##### 2. Time taken for enforcement/annulment proceedings

No information was available.

##### 3. Percentage of awards annulled/not enforced

No information was available.

#### *F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 545 days to resolve a commercial dispute in a first-instance court in The

Bahamas – 20 days for filing and service of court processes, 345 days for trial and judgment and 180 days for enforcement of judgment.<sup>53</sup> The Bahamas ranks above the Latin America & Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>54</sup> In terms of overall ease of enforcing contracts, The Bahamas scored 59.07 of 100 and ranked 84 of 190.<sup>55</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>56</sup>

*G. Statistics on judges and lawyers per capita*

The Bahamas Bar Association had 991 members by the end of 2008. In The Bahamas there is one lawyer for every 500 citizens.<sup>57</sup>

The Bahamas Court of Appeal comprises a President, the Chief Justice by virtue of his office as Head of the Judiciary, three resident Justices of Appeal and one non-resident Justice of Appeal.<sup>58</sup> There are 12 judges on the bench of The Bahamas Supreme Court, including the Chief Justice.<sup>59</sup> Excluding magistrates, there are thus 17 judges in The Bahamas. Given a population of approximately 400,000 persons, this works out to approximately 1 judge per 23,500 citizens.

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for businesses, but not arbitration, in The Bahamas. The Bahamas does not have a centralised, government-funded legal aid system. Legal aid and ADR clinics are offered through the Eugene Dupuch Law School, located in the country's capital, Nassau. The clinics are offered to 'members of the public who, in the opinion of the Director, are entitled to legal aid'.<sup>60</sup> The focus of the ADR clinic is on negotiation and mediation, not arbitration. The Law School also runs a Commercial Law Clinic, which includes practice areas such as company formation, management, litigation, and arbitration.<sup>61</sup> It is not specified which type of clients are able to access these services and the primary purpose of these clinics seems to be student education, rather than community service.

*B. Third-party funding*

The law of The Bahamas is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished in the United Kingdom by statute in 1967<sup>62</sup> but a champertous agreement may still be treated as contrary to public policy and unlawful. As this was the law applied at the time of independence it is likely still applicable in the Bahamas. However, in line with other Caribbean islands that have encountered third-party funding The Bahamas generally appears to permit the practice. In The Bahamas champerty and maintenance seem to be diminishing as doctrines, although there have been no reported cases addressing third-party funding directly.<sup>63</sup>

*C. Contingency fees*

The Bahamas Legal Profession Act 2006 is silent as to whether contingency fees are allowed. The only provision related to fees in the Act is section 28, which prohibits the imposition or sanction of a minimum scale of fees for services rendered by a counsel and attorney by the Bar Association or the Bar Council.<sup>64</sup>

However, contingency fees are expressly forbidden by Rule X of The Bahamas Bar (Code of Professional Conduct) Regulations, according to which attorneys should not 'enter into any agreement or stipulate payment only in the event of success in any suit, action or other contentious proceedings for which he is retained or employed to prosecute'.<sup>65</sup>

#### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Lex Bahamas: Bahamian Online Legal Resource Centre (2009), 'Overview of the Bahamian Legal System' <[http://www.lexbahamas.com/overview\\_of\\_the\\_bahamian\\_legal\\_s.htm](http://www.lexbahamas.com/overview_of_the_bahamian_legal_s.htm)> accessed on 15 March 2019.
- 3 The Constitution of the Commonwealth of The Bahamas 1973.
- 4 Global Arbitration Review (2016), 'Enforcement of Foreign Arbitral Awards in Central America and the Caribbean', Angeline Welsh and Luis G Garcia <<https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2017/1067591/enforcement-of-foreign-arbitral-awards-in-central-america-and-the-caribbean>> accessed on 15 March 2019.
- 5 Arbitration Act dated 26 August 1889, available at <<http://gmjones.org/pdfs/bahamian-arbitration-act-1899-abitrator-expert-determination-accountant.pdf>> accessed on 11 July 2019; see also Peter D. Maynard (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?', *Caribbean Law Review*, Vol. 20, 36–52.
- 6 United Nations Treaty Collection, 'Depositary: 6. Protocol on Arbitration Clauses' <[https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=548&chapter=30&clang=\\_en](https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=548&chapter=30&clang=_en)> accessed on 15 March 2019.
- 7 Arbitration Clauses (Protocol), Statute Law of the Bahamas, CH.181.
- 8 United Nations Treaty Collection, 'Depositary: 7. Convention on the Execution of Foreign Arbitral Awards' <[https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=549&chapter=30&clang=\\_en](https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=549&chapter=30&clang=_en)> accessed on 15 March 2019; Arbitration (Foreign Awards) Act 2009, Statute Law of the Bahamas, CH.182.
- 9 The Arbitration Act 2009, available at <<https://bfsb-bahamas.com/legislation/ArbitrationAct2009.pdf>> accessed on 15 July 2019.
- 10 New York Arbitration Convention, 'National Arbitration Law – Bahamas' <<http://www.newyorkconvention.org/national+arbitration+law+-+bahamas>> accessed on 15 March 2019.
- 11 Trustee (Amendment) Act 2011.
- 12 *Ibid.*, s 18.
- 13 *Ibid.*
- 14 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24.I.L.M. 1302.
- 15 See Country Report for England for an explanation of the relationship between the English Arbitration Act 1996 and the UNCITRAL Model Law.
- 16 Arbitration Act 2009 available at <<https://bfsb-bahamas.com/legislation/ArbitrationAct2009.pdf>> accessed on 11 July 2019.
- 17 Arbitration Act 2009, p. 5.

- 18 Maynard (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?'
- 19 Arbitration Act 2009, s 4.
- 20 Arbitration Act 2009, s 4.
- 21 Arbitration Act 2009, ss 15–25.
- 22 Arbitration Act 2009, s 27.
- 23 Arbitration Act 2009, s 90.
- 24 See New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed on 31 August 2019.
- 25 Ibid.
- 26 New York Arbitration Convention, 'National Arbitration Law – Bahamas' <<http://www.newyorkconvention.org/national+arbitration+law+-+bahamas>> accessed on 15 March 2019.
- 27 Arbitration (International Investment Disputes) Act 1966, s 6; Welsh and Garcia (2016), 'Enforcement of Foreign Arbitral Awards in Central America and the Caribbean'.
- 28 International centre for Settlement of Investment Disputes, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed on 15 March 2019.
- 29 Multilateral Investment Guarantee Agency, 'Member Countries' <<https://www.miga.org/member-countries>> accessed on 15 March 2019.
- 30 CARICOM, 'The Bahamas' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/bahamas>> accessed on 15 March 2019.
- 31 Ibid.
- 32 Trade and Investment Framework Agreement between the Government of the United States of America and the Caribbean Community (signed 28 May 2013, entered into force 28 May 2013).
- 33 Agreement Establishing the Free Trade Area between the Caribbean Community (CARICOM) and the Dominican Republic (signed 22 August 1998, entered into force 5 February 2002).
- 34 UNCTAD, 'Investment Policy Hub', 'Bahamas' <<https://investmentpolicy.unctad.org/country-navigator/16/bahamas>> accessed on 31 August 2019.
- 35 Global Arbitration Review (2016), 'Enforcement of Foreign Arbitral Awards in Central America and the Caribbean'.
- 36 *Abaco Towns by The Sea Ltd v O'Neil and Wagno Construction Company Ltd* BS 2011 SC 94, No. CLE/GEN/ 1621 of 2009, Supreme Court (The Bahamas).
- 37 *John Lewis v The Capo Group, Inc. RAV Bahamas, Ltd. And Bimini Bay Resort And Casino*, Memorandum and Order, (2012), Civil Action, No. 12-10965-RWZ.
- 38 Ibid.
- 39 Ibid.
- 40 BahamasLocal (2019), 'Bahamas Arbitration Branch Gear Up for Arbitration and Investment Summit in The Bahamas' <[https://www.bahamaslocal.com/newsitem/214693/Bahamas\\_Arbitration\\_Branch\\_Gear\\_Up\\_for\\_Arbitration\\_and\\_Investment\\_Summit\\_in\\_The\\_Bahamas.html](https://www.bahamaslocal.com/newsitem/214693/Bahamas_Arbitration_Branch_Gear_Up_for_Arbitration_and_Investment_Summit_in_The_Bahamas.html)> accessed on 15 March 2019.
- 41 Alternative Dispute Resolution Bahamas <<http://www.adrbahamas.org/>> accessed on 15 March 2019.
- 42 Gail Lockhart Charles and Tracy A Wells (2018), 'Bahamas: Law and Practice' (Chambers and Partners) <<https://practiceguides.chambers.com/practice-guides/international-arbitration-2019/bahamas/1-general>> accessed on 15 March 2019.
- 43 Insurance Commission of the Bahamas <<https://insurancecommissionbahamas.com/>> accessed 31 August 2019.
- 44 *The Bahamas Investor* (2013), 'The Bahamas to train arbitrators' <<http://www.thebahamasinvestor.com/2013/bahamas-to-train-arbitrators/>> accessed on 15 March 2019.

- 45 The Government of The Bahamas (2018), 'Press Release: Symonette Discusses Bahamas as Commercial Arbitration Centre', Betty Vedrine <<https://www.bahamas.gov.bs/wps/portal/public/gov/government/news/symonette%20discusses%20bahamas%20as%20commercial%20arbitration%20centre/>> accessed on 15 March 2019
- 46 Ibid.
- 47 Theominique Nottage (2018), 'The Opportunity of a Lifetime: The Bahamas as a Centre for International Commercial Arbitration' (Higgs & Johnson, 13 July 2018) <<https://higgsjohnson.com/the-opportunity-of-a-lifetime-the-bahamas-as-a-centre-for-international-commercial-arbitration/>> accessed on 15 March 2019.
- 48 Bahamas Bar Association, 'How do I apply to Join the Bahamas Bar?' <<http://www.bahamasbarassociation.com/applicationinformation.asp>> accessed on 15 March 2019.
- 49 Bahamas Bar Association, Application for Special Admission to the Bahamas Bar <<http://www.bahamasbarassociation.com/SpecialApplication.asp>> accessed on 15 March 2019.
- 50 Ryan Pinder, 'Legal Update: Investment Funds in the Bahamas' (Graham Thompson Attorneys) <<https://grahamthompson.com/wp-content/uploads/2019/07/GT-News-Insights-RPinder-Investments-Funds-in-The-Bahamas-Vol-1-Issue-4.pdf>> accessed on 31 August 2019.
- 51 Charles and Wells (2018), 'Bahamas: Law and Practice'.
- 52 Francois Lassalle (2018), 'The Rise of Arbitration in the Caribbean-Bahamas', The Arbitration Review of the Americas 2018, Global Arbitration Review, 2019.
- 53 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/bahamas#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/bahamas#DB_ec)> accessed on 27 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 54 The World Bank Doing Business, 'Enforcing Contracts'.
- 55 Ibid.
- 56 Ibid.
- 57 Bahamas Bar Association, 'About Us' <http://www.bahamasbarassociation.com/aboutus.asp> accessed on 15 March 2019.
- 58 Government of the Bahamas, 'The Judicature of the Commonwealth of the Bahamas' <<https://www.bahamas.gov.bs>> accessed on 31 August 2019.
- 59 Ibid.
- 60 Eugene Dupuch Law School, 'Legal Aid Clinic' <<http://eugenedupuchlaw.edu.bs/programmes/clinical/legalaidclinic/>> accessed on 14 September 2019.
- 61 Ibid.
- 62 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 63 Nick Rowles-Davies (2014), *Third Party Litigation Funding*, Oxford: Oxford University Press, 84; see also *Massai Aviation Services and Aerostar Limited v Attorney General and Bahamasair Holdings Limited* [2007] UKPC 12.
- 64 Legal Profession Act 2006, s 28.
- 65 The Bar Practice Regulations, CH.64.



# BANGLADESH<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Bangladesh's first legislation on arbitration was the Arbitration (Protocol and Convention) Act 1937 which was subsequently repealed by the Arbitration Act 1940. Both these laws were based on the English Arbitration Act 1889.<sup>2</sup> They were subsequently repealed by section 59 of the Arbitration Act 2001.<sup>3</sup>

### B. *Description of prior legislation and reasons for its replacement*

Historically, arbitration was regulated by the Arbitration Act 1940 and the Arbitration (Protocol and Convention) Act 1937.<sup>4</sup>

The Arbitration Act 2001 ('2001 Act'), which replaced the prior legislation, was based on the UNCITRAL Model Law 1985.<sup>5</sup> It is suggested that the reason for the replacement was because under the old Act, enforcement of foreign awards in Bangladesh was 'extremely difficult', mainly because the 1940 Act did not provide for any provisions dealing with foreign arbitral awards.<sup>6</sup> Also, the courts used to have 'an extensive supervisory power' over the arbitral process which in turn also affected the enforcement of awards.<sup>7</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act 2001 was enacted on 24 January 2001 and came into force on 10 April 2001.

### B. *Scope of application to domestic and international arbitrations*

The 2001 Act governs both domestic and international arbitration. However, the 2001 law distinguishes between domestic and international arbitration.<sup>8</sup> Section 2(c) of the 2001 Act defines 'international commercial arbitration' as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is: a) an individual who is a national of or habitually resident in, any country other than Bangladesh; b) a body corporate that is incorporated in any country other than Bangladesh; c) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or d) the government of a foreign country.<sup>9</sup>

### C. *Details and/or relevant amendments and modifications*

The 2001 Act was amended in 2004.<sup>10</sup> The amendments were made on an urgent basis as a result of increasing foreign investment in several sectors, notably the natural gas and power sectors, and a growing export trade with several other countries.<sup>11</sup>

In 2011, the Bangladesh Law Commission was considering further amendments to the 2001 Act; however, no formal proposals have been made thus far.<sup>12</sup>

### D. *Relationship to the UNCITRAL Model Law*

The 2001 Act adopted the UNCITRAL Model Law of 1985 but does not incorporate the 2006 revisions to the Model Law as the last Amendment

(2004) pre-dates these revisions. It contains some unique provisions derived from the Indian Arbitration and Conciliation Act 1996 and from the English Arbitration Act 1996.<sup>13</sup>

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The 2001 Act departs from the Model Law in the following ways:<sup>14</sup>

- i. international arbitration is determined based on the nationality of parties instead of the location of parties to the dispute;
- ii. the 2001 Act permits parties to modify or exclude the ability of the tribunal to rule on its own jurisdiction;
- iii. the 2001 Act does not permit Bangladeshi courts to issue interim relief in respect of foreign arbitration proceedings;
- iv. under the 2001 Act where an arbitrator is challenged the tribunal may not proceed with the proceedings until all appeals from such a determination have been finally decided; and
- v. the 2001 Act permits annulment of an award on the basis that 'the law under which the parties entered into the arbitration agreement was not a valid law', as opposed to the standard set out in the New York Convention and UNCITRAL Model Law.

*F. Powers and duties of arbitrators*

As per the 2001 Act, an arbitrator always has to be independent and impartial. An arbitrator shall from the time of his appointment and throughout the arbitral proceedings, without delay, 'disclose [to the parties] any circumstances likely to give rise to justifiable doubts as to his independence or impartiality', and may be challenged if 'circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or [if] he does not possess the qualifications agreed to by the parties'.<sup>15</sup>

The 2001 Act also gives the power to arbitrators to rule on its own jurisdiction, unless otherwise agreed by the parties, on matters of validity of the agreement, constitution of the tribunal, compliance of agreement with public policy, possibility of performance, and subject matter jurisdiction.<sup>16</sup>

The 2001 Act empowers the tribunal to make interim orders upon request by parties and provide security in connection with such interim measures.<sup>17</sup>

The 2001 Act also empowers the tribunal to use settlement facilitation methods such as mediation, conciliation, or any other such procedures, with the agreement of all parties.<sup>18</sup>

The 2001 Act empowers the tribunal to appoint experts, legal advisers or assessors to the case.<sup>19</sup>

*G. Arbitrator immunity*

The laws are silent on arbitrator immunity.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Bangladesh became a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') on 6 May 1992.<sup>20</sup>

### B. Reservations to the New York Convention

Bangladesh has not made any reservations under the New York Convention.<sup>21</sup>

### C. Method of domestic implementation of the New York Convention

The provisions of the New York Convention are given effect to through the 2001 Act.<sup>22</sup>

### D. Other international/regional treaties

Bangladesh ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') on 27 March 1980.<sup>23</sup> Bangladesh has also signed 30 bilateral investment agreements, 24 of which are currently in force (Denmark, India, Singapore, Thailand, Islamic Republic of Iran, Austria, Switzerland, Uzbekistan, Democratic People's Republic of Korea, Japan, Indonesia, Philippines, Poland, China, Netherlands, Malaysia, Italy, Turkey, Romania, United States of America, France, Belgium-Luxembourg Economic Union, Germany and the United Kingdom).<sup>24</sup>

Bangladesh has also entered into four FTAs, three of which are in force (Asia Pacific Trade Agreement, Preferential Tariff Arrangement–Group of Eight Developing Countries, and the South Asian Free Trade Area).<sup>25</sup>

## IV. RELEVANT CASE LAW

### A. Approach of the national courts to the enforcement of arbitration agreements

It is clearly stated under section 7 of the Act that where any of the parties to the arbitration agreement files a legal proceeding in a court against the other party, no judicial authority shall hear the legal proceedings. This is the legal position of Bangladesh and also accepted by the courts of Bangladesh. It was stated under *Nurul Islam (Md) and others v Government of Bangladesh and others*<sup>26</sup> that:

19. In the given facts and circumstances of the case and the decision of the highest Court as cited above as well as the above submission of the learned Advocate for the appellants, we have no hesitation to hold that there is no legal scope to allow the application under Order VII, rule 11 of the Code of Civil Procedure for rejection of the plaint on the ground that the suit is barred by section 7 of the Arbitration Act.... (Emphasis added)

The decision evidences that the courts of Bangladesh respect the arbitration agreement in accordance with section 7 of the Act. Moreover, in *Uzbekistan Airways and another v Air Spain Ltd*,<sup>27</sup> the High Court Division reiterated the general rule that a foreign arbitral award can be enforced in Bangladesh pursuant to section 3(2) read with sections 45–47 of the Act. *Canada Shipping and Trading SA v TT Katikaayu and another* held that:<sup>28</sup>

7. ... It means that once an arbitration proceeding in a foreign country is completed, the arbitral award, on an application by any party, will be enforced by execution by a court, of this country under the Civil Procedure Code, in the same manner as if it were a decree of the court...

A similar position was taken by the High Court in the case of *Smith Co-Generation (BD) Pvt Ltd v Bangladesh Power Development Board*,<sup>29</sup> where it was held that sections 45 and 46 of the Act provide the appropriate forum for seeking remedy against the execution of an arbitral award. The court,

reiterating the statutory jurisdiction vested in the courts, upheld the spirit and ethos of New York Convention, article V regarding challenges for enforcement of foreign arbitral awards. These cases reflect the principle of minimal court intervention and the positive attitude shown by Bangladeshi courts towards the concept of arbitration.<sup>30</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The High Court Division of Bangladesh can, as per section 43(b) of the Arbitration Act 2001, set aside an arbitral award if it is satisfied that the arbitral award is in conflict with the public policy of Bangladesh. Public policy has not been defined in the Act and the concept can be given a wide interpretation by Bangladeshi courts. For instance, in the case of *Maisha Corporation (Pvt) Ltd v BSMMU (Civil)*,<sup>31</sup> the Bangladesh High Court stated 'it is against the Public Policy meaning thereby that Public Fund cannot be misused by granting such Award' (apparently meaning that it is against Bangladeshi public policy for award enforcement to be granted where the compensation payout will have to come from public funds).

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The legislature, through the Arbitration Act 2001, substantially incorporated the New York Convention. Section 45 of the Act makes a foreign arbitral award binding for all purposes on parties to the arbitration agreement and such an award can be executed by the local courts as if it was a decree of the local court. This principle has been upheld in the case of *Canada Shipping and Trading SA v TT Katikaayu and another*,<sup>32</sup> where it was held that:

7. ... It means that once an arbitration proceeding in a foreign country is completed, the arbitral award, on an application by any party, will be enforced by execution by a court, of this country under the Civil Procedure Code, in the same manner as if it were a decree of the court...

Generally, the legal position is that the courts in Bangladesh apply the New York Convention and, except for rare cases or unless there is a direct conflict with the Act, the courts do not deviate from the spirit of the New York Convention.

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

Arbitration proceedings are predominantly conducted on an ad hoc basis. The primary arbitral institution is the Bangladesh International Arbitration Centre (BIAC).<sup>33</sup> It is a privately owned arbitration institution established in 2011.<sup>34</sup> Its rules are intended to regulate the conduct of both domestic and international arbitration proceedings.<sup>35</sup>

The Bangladesh Council of Arbitration (BCA) is another popular arbitral institution in Bangladesh.<sup>36</sup>

Bangladesh also has a special 'arbitration unit' established in the Energy Regulatory Commission that handles disputes related to energy.<sup>37</sup>

*B. Measures to strengthen institutional arbitration capabilities*

In 2004 the Bangladeshi Chambers of Commerce established the Bangladesh Council of Arbitration (BCA) in order to strengthen institutional arbitration in the country.<sup>38</sup>

*C. Submission of disputes to arbitration vs. litigation*

There are no official statistics of the percentage of disputes being referred to arbitration. Practitioners agree that there is widespread support for arbitration over domestic litigation.<sup>39</sup>

*D. Participation by foreign counsel in international arbitrations*

As per the Bangladesh Legal Practitioner's and Bar Council Order 1972, only lawyers who are citizens of Bangladesh can practise law in the country.<sup>40</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

No statistics are available; however, some authors claim that contractual disputes involving government contracts 'relating to construction, engineering and infrastructure' are gradually being settled through arbitration.<sup>41</sup> Based on anecdotal evidence, arbitration is used routinely in the power and real estate/ construction sectors.<sup>42</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced.

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 1,442 days to enforce a contract using the state court system. Average dispute resolution time in Civil (Appeal and Revision) cases is 15.3 years, in Writ cases is 3.6 years, and in Civil (Original Jurisdiction) cases is 5.8 years.<sup>43</sup> In terms of overall score, Bangladesh scored 22.21 of 100 and ranked 189 of 190. The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>44</sup>

The number of cases pending with the courts stood at 3,109,173 as of December 2015.<sup>45</sup> As of March 2016, there were over 85,000 pending civil cases in the High Court of Bangladesh according to the Law Minister of Bangladesh.<sup>46</sup> These large pendency numbers make arbitration an attractive alternative.

*G. Statistics on judges and lawyers per capita*

As per latest reported statistics, there is 1 judge per >100,000 citizens in Bangladesh and as per the estimates of the Chairman of the Bangladesh Law Commission, around 4,000 judges are required to deal with the existing case backlog.<sup>47</sup> There is no similar data available for lawyers.

## **VI. FUNDING FOR LEGAL CLAIMS**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for arbitration in Bangladesh, but not for businesses. The Constitution of Bangladesh recognises a right to legal aid through article 27 (equality before the law) and article 31 (right to protection of law).<sup>48</sup>

The National Legal Aid Services Organization (NLASO), established by section 3 of the Legal Aid Services Act, implements government-led legal aid programmes throughout the country.<sup>49</sup> The functions of a government legal aid officer include offering alternative dispute resolution assistance, with a focus on mediation, prior to resorting to litigation.<sup>50</sup> The NLASO also offers a government-supported national phone line for legal aid.<sup>51</sup> There is no clarification on the type of disputes the NLASO programmes undertake.

In defining legal aid, the Legal Aid Services Act specifies that assistance may be in the form of remuneration for mediators or arbitrators for resolving a case through these alternative dispute resolution (ADR) mechanisms.<sup>52</sup> A litigant is defined as 'any person who is or is likely to be the plaintiff or defendant of a civil or family suit or complainant or accused of a criminal case filed or to be filed in any Court'.<sup>53</sup> A 'person' is not further defined, leaving open the possibility that the Act can apply to businesses.

The Bangladesh Legal Aid and Services Trust (BLAST) is one of the largest legal services organisations in the country. The organisation facilitates ADR mechanisms, specifically mediation, in the areas of family, land, financial, petty criminal, and labour law.<sup>54</sup> It is unclear whether this is a closed list. BLAST provides litigation services to matters that cannot be solved through mediation or that involve victims of criminal offences or human rights violations.<sup>55</sup>

#### *B. Third-party funding*

Third-party funding is not regulated either under the 2001 Act or other legislative enactments.<sup>56</sup> Since Bangladesh's legal system is based on English common law, and the rule of maintenance and champerty applied at the time of independence in 1971,<sup>57</sup> it is reasonable to assume that the rule of maintenance and champerty is still applicable. The legality of third-party funding therefore will be assessed on the basis of whether it violates public policy. That is in line with section 23 of the Contract Act 1872 (CA), which provides that contracts can be rendered unlawful and void if they contravene public policy. Anecdotal evidence suggests that third-party funding is not encouraged. Local law firms are not aware of any third-party funder operating in Bangladesh.<sup>58</sup>

#### *C. Contingency fees*

The fees of the lawyers in Bangladesh are mainly regulated by the Legal Practitioners (Fees) Act 1926 (LPFA) and the code of conduct for advocates set out by the Bangladesh Bar Council under the heading of 'Canons of Professional Conduct and Etiquette'. There is no express prohibition, but contingency fees are not common in Bangladesh. Similar to the approach in India (which is persuasive in Bangladesh), courts view contingency fee arrangements as contrary to public policy because they may compromise the integrity of the profession and the requirement for counsel to operate without conflicts of interest. The legality of contingency fee agreements would be assessed under the public policy exception in section 23 of the Contract Act described above.

#### *D. Insurance for legal expenses*

Legal expense insurance is a foreign concept in Bangladesh and there is no known insurance provider in the market.<sup>59</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Abdul F Munir Maniruzzaman (2003), 'The New Law of International Commercial Arbitration in Bangladesh: A Comparative Perspective', *American Review of International Arbitration*, Vol. 14, 139, 140.
- 3 Arbitration Act 2001 (Bangladesh), s 59.
- 4 Maniruzzaman (2003), 'The New Law of International Commercial Arbitration...'
- 5 Mohammad Hasan Habib (2019), 'Bangladesh', in James H. Carter (ed), *The International Arbitration Review*, Vol. 10; Fahad Bin Qader (2018), 'Chapter 2: Bangladesh', in Damina Taylor (ed.), *The Dispute Resolution Review*, Law Business Research Ltd., 14.
- 6 Habib (2019), 'Bangladesh'; Bin Qader (2018), 'Chapter 2: Bangladesh', 14.
- 7 Sameer Sattar (2016), 'Arbitration in Bangladesh: Looking Ahead,' *The Daily Star*, 28 June 2016, <<https://www.thedailystar.net/law-our-rights/arbitration-bangladesh-looking-ahead-1246573>> accessed 22 August 2019.
- 8 Habib (2019), 'Bangladesh'.
- 9 Arbitration Act 2001 (Bangladesh), s 2(c).
- 10 Abdul F Munir Maniruzzaman (2005), 'The Bangladeshi Arbitration Act 2001 – Some Reflections', *Asian Dispute Review*, Vol. 7 No. 3, 73.
- 11 Abdul F. Munir Maniruzzaman (2005), 'The New Arbitration Act and Some Afterthoughts', *The Daily Star*, 15 October 2005 <<https://www.thedailystar.net/law/2005/10/03/index.htm>> accessed on 22 August 2019 (the specifics of these amendments were however not set out in English-language literature).
- 12 Kamal Hossain et al. (2019), 'National Report for Bangladesh (2018 through 2019)', in Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, Kluwer, 2.
- 13 *Ibid.*, 1; See also Habib (2019), 'Bangladesh'; The PRS Group, 'Bangladesh Country Report', December 2018. For detailed comparison see Raushan Ara and Sikder Mahmudur Razi (2007), 'UNCITRAL Model Law and Arbitration Law in Bangladesh: An Analytical Study of Major Disparities', *Dhaka University Law Journal*, Vol. 18 No. 2, 134, 149–61. <<http://journal.library.du.ac.bd/index.php?journal=DULJ&page=article&op=download&path%5B%5D=1593&path%5B%5D=1501>> accessed on 27 August 2019.
- 14 Hossain et al. (2019), 'National Report for Bangladesh (2018 through 2019)', 1–2.
- 15 Arbitration Act 2001 (Bangladesh), s 13.
- 16 *Ibid.*, s 17.
- 17 *Ibid.*, s 21.
- 18 *Ibid.*, s 22.
- 19 *Ibid.*, s 32.
- 20 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed on 31 July 2019.
- 21 See New York Arbitration Convention, 'Contracting States', 'Declarations and Reservations' <<http://www.newyorkconvention.org/countries>> accessed on 22 August 2019.
- 22 Arbitration Act 2001 (Bangladesh), Chapter X <<https://www.international-arbitration-attorney.com/wp-content/uploads/2017/02/Bangladesh-Arbitration-Law.pdf>> accessed on 22 August 2019.
- 23 ISCID, 'List of Contracting States and other Signatories of the Convention' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed on 31 August 2019.
- 24 See UNCTAD, 'Investment Policy Hub', Bangladesh <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh?type=bits>> accessed on 22 August 2019.

- 25 See Asian Regional Integration Center, 'Free Trade Agreements: Bangladesh' <aric.adb.org> accessed on 31 August 2019.
- 26 21 BLC (2016) 284.
- 27 10 BLC 614.
- 28 54 DLR (2002) 93
- 29 15 BLC (HCD) 704.
- 30 Confirmed by interview with local law firm.
- 31 18 BLC (2013)-HCD-194.
- 32 54 DLR (2002) 93.
- 33 Hossain et al. (2019), 'National Report for Bangladesh (2018 through 2019)', 3.
- 34 Habib, 'Bangladesh', 2019.
- 35 Ibid.
- 36 Moin Ghani and Dr Kamal Hossain (2011), 'Bangladesh', in Michael Moser & John Choong (eds) *Asia Arbitration Handbook*, OUP, 951.
- 37 Habib (2019), 'Bangladesh'.
- 38 Edward Machin (2011), 'Bangladesh opens International Arbitration Centre', *Commercial Dispute Resolution News*, 18 April 2011 <<https://www.cdr-news.com/categories/arbitration-and-adr/bangladesh-opens-first-international-arbitration-centre>> accessed on 22 August 2019.
- 39 Ghani & Hossain (2011), 'Bangladesh', 941, 945.
- 40 Legal Practitioner's and Bar Council Order 1972 (Bangladesh), s 27.
- 41 Ghani & Hossain (2011), 'Bangladesh', 941, 946.
- 42 Interview with local law firm.
- 43 Muhammad A Ali (2016), 'Alternative Dispute Resolution (ADR): A Critical Need for Bangladesh', in Bangladesh International Arbitration Centre, *ADR: A Business Development Priority for Bangladesh*, BIAC, 32–33 <<https://rahmansc.com/BIAC%205th%20Anniversary%20Souvenir.pdf>> accessed on 22 August 2019.
- 44 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/st-lucia#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/st-lucia#DB_ec)> accessed on 22 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 45 Muhammad A Ali (2016), 'Chief Executive Officer's Report', in Bangladesh International Arbitration Centre, *ADR: A Business Development Priority for Bangladesh*, BIAC, 1.
- 46 Bin Qader (2018), 'Chapter 2: Bangladesh', 14.
- 47 Ali (2016), 'Alternative Dispute Resolution (ADR): A Critical Need for Bangladesh', 1, citing Ashutosh Sarkar, 'Case backlog falls greatly', *The Daily Star* (Bangladesh, 14 February 2016) <<https://www.thedailystar.net/frontpage/case-backlog-falls-greatly-510775>> accessed on 22 August 2019. The development seems to be positive: As of 9 September 2017, it was stated that each lower court judge, on average, was overburdened with around 2,000 cases for their hearing and disposal. A total of 1,397 judges have been dealing with more than 27.5 lakh cases across the country. That is one judge for 2,000 cases. See <<https://www.thedailystar.net/backpage/one-judge-2000-cases-1459525>> accessed 22 August 2019.
- 48 The Constitution of the People's Republic of Bangladesh, 1972 at ss 27 and 31.
- 49 Legal Aid Services Act, Act No. VI of 2000 at s 3.
- 50 National Legal Aid Services Organization, 'Services of Government Legal Aid' <<http://www.nlaso.gov.bd/site/page/68c74afb-a524-47a1-b5b7-e94772f37769/>> accessed 14 September 2019.
- 51 National Legal Aid Services Organization, 'National Helpline for Government Legal Aid Services – 16430' <<http://www.nlaso.gov.bd/site/page/18b43cf7-03d1-4faa-8667-8aebde7e71b2/>> accessed 14 September 2019.



- 52 Legal Aid Services Act, Act No. VI of 2000 at s 2.
- 53 Ibid.
- 54 Bangladesh Legal Aid and Services Trust, 'Legal Aid' <<https://www.blast.org.bd/whatwedo/our-programmes/legal>> accessed 14 September 2019.
- 55 Ibid.
- 56 Md. Mamonor Rashid (2017), 'Third Party Funding in International Commercial Arbitration: Prospects of Bangladesh'.
- 57 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 58 Interview with local law firm.
- 59 Interview with local law firm.

# BARBADOS<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Barbados is one of the countries forming part of the English-speaking Caribbean.<sup>2</sup> It gained its independence as a sovereign state within the Commonwealth on 30 November 1966.<sup>3</sup> Barbados's legal system is based on English common law. Thus, English court decisions as well as judgments from other Commonwealth jurisdictions are of a persuasive authority in Barbados.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

The first Arbitration Act of Barbados was adopted on 15 August 1958. It applies to domestic arbitration and non-commercial international arbitration in Barbados. However, instead of being replaced, the state adopted a new Act in 2007 which specifically governs international commercial arbitration.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Barbados arbitration legislation consists of three main acts: the 1958 Arbitration Act, the Arbitration (Foreign Arbitral Awards Act) 1980 and the International Commercial Arbitration Act 2007, which came into force on 19 January 2009. Where the 2007 Act applies, the 1958 Act does not apply.<sup>5</sup> The Foreign Arbitral Awards Act 1980 and the International Commercial Arbitration Act 2007 are based on the English Arbitration Act 1950 while the International Commercial Arbitration Act 2007 is based on the UNCITRAL Model Law on International Commercial Arbitration.<sup>6</sup>

As explained above, the 1958 Act applies only to domestic and non-commercial international arbitration in Barbados.

In contrast, the 2007 Act governs international commercial arbitration as its name suggests. The 2007 Act aims to promote Barbados as an 'internationally recognised centre for international commercial arbitration'.<sup>7</sup>

### B. *Scope of application to domestic and international arbitrations*

There are two different acts governing domestic and international arbitration.

### C. *Details and/or relevant amendment and modifications*

The 2007 Act contains 'saving provisions'. These saving provisions stipulate that the Act shall not affect any other law of Barbados which: (i) either prohibits the submission of certain disputes to arbitration, or (ii) imposes disputes to be submitted to arbitration only in compliance with other statutory provisions.<sup>8</sup>

Further, the Constitution of Barbados is the highest law in Barbados to which all laws, including the arbitration legislation have to conform.<sup>9</sup> Chapter I provides:

This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail, and the other law shall, to the extent of the inconsistency, be void.<sup>10</sup>

*D. Relationship to the UNCITRAL Model Law*

Barbados has adopted the original 1985 Model Law version accepting all amendments brought by the 2006 version with two exceptions: those related to articles 7<sup>11</sup> and 35(2)<sup>12,13</sup> The 2007 Act also specifies the High Court or the Court of Appeal of Barbados as the courts competent to perform 'certain functions of arbitration assistance and supervision' as specified in the Model Law.<sup>14</sup>

*E. Departure(s) (if any) from the UNCITRAL Model Law*

There is a departure from the Model Law. Unlike the Model Law, the 2007 Act contains:

- a. References to Barbados' other statutes and Acts such as the Telecommunications Act<sup>15</sup>, the Legal Profession Act<sup>16</sup> and others;
- b. A statement of its objectives, which are to 'establish in Barbados a comprehensive, modern and internationally recognized framework for international commercial arbitration by adopting the UNCITRAL Model Law on International Commercial Arbitration' and to 'provide the foundation for the establishment in Barbados of an internationally recognized centre for international commercial arbitration';<sup>17</sup>
- c. Provisions devolving, to the minister with responsibility for legal affairs, responsibility for the general administration of the Act and for making rules for giving effect to the Act;<sup>18</sup>
- d. That the Act shall apply to any arbitral proceedings commenced after the Act's commencement under any agreement made before its commencement;<sup>19</sup> and
- e. Provision that the Act binds the Crown; provision for the Act to come into operation on a day fixed by Proclamation.

With respect to the differences between the provisions of both instruments, the following should be noted.

The 2007 Act follows closely the wording of article 2A(2) of the Model Law regarding the applications of 'general principles' to unsettled or unclear matters. However, while the Model Law does not specify what those principles are, the 2007 Act sets out a non-exclusive list in section 2(7): the preservation of party autonomy, the separability principle, and the preservation of due process in the conduct of the arbitral proceedings, among others. One such is the 'separability principle', explained as meaning 'that an arbitration clause shall be treated as an agreement independent of the other terms of the contract'. The UNCITRAL Secretariat helpfully supplied to those responsible for drafting the Act the concise list of principles that appear in the Act.

Another difference lies in the definition of the arbitration agreement. As explained above, the 2007 Act has adopted the old 1985 Model Law version accepting some, but not all, of the 2006 amendments. One such exception is the definition of the arbitration agreement set out in article 7 or also known as Option 1. According to that option, an arbitration agreement shall be in writing and may be in the form of an arbitration clause in a contract or in a separate agreement, but it also provides that 'An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by any other means'.<sup>20</sup>

The requirement of a written arbitration agreement is considered to be met by an electronic communication 'if the information contained therein is accessible so as to be useable for subsequent reference'.<sup>21</sup> This represents a more restrictive reading of what shall constitute an arbitration agreement than the amended 2006 Model Law version, which is more 'liberal', leaving the possibility of having an oral contract incorporating by reference a document containing an arbitration clause to be a valid arbitration agreement.

#### *F. Powers and duties of arbitrators*

Considering that the International Commercial Arbitration Act 2007 is a direct adoption of the UNCITRAL Model Law, powers and duties of arbitrators under that legislation are the same as that accorded by the Model Law.

#### *G. Arbitrator immunity*

The Barbados arbitration law, both domestic and international acts, is silent as to whether immunity is accorded to arbitrators.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Barbados became a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') on 16 March 1993.<sup>22</sup>

#### *B. Reservations to the New York Convention*

Barbados has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>23</sup>

#### *C. Method of domestic implementation of the New York Convention*

The New York Convention is given effect through the Arbitration (Foreign Arbitral Awards) Act Cap 110A.<sup>24</sup>

#### *D. Other international/regional treaties*

Barbados has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the 'Washington Convention 1965').<sup>25</sup>

Barbados also participates in the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, signed on 23 June 2000. The purpose of this Agreement is to strengthen the cooperation between the signatories who shall support development and modernisation of mediation and arbitration systems.<sup>26</sup>

The state has also been a party of the CARICOM (Caribbean Community) since 1973.<sup>27</sup> As part of it, the Revised Treaty of Chaguaramas establishing the CARICOM Single market and Economy, providing investment provisions, applies to Barbados as well.<sup>28</sup>

With respect to bilateral investment treaties (BITs), Barbados has signed eleven, with nine BITs currently in force with the following countries: Canada, China, Cuba, Germany, Italy, Mauritius, Switzerland, the United Kingdom and Venezuela.<sup>29</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

The Barbadian courts have had opportunity to treat the enforcement of arbitration agreements and have generally acted in a pro-enforcement manner. For example, the court has respected the method by which arbitrators are to be appointed, in accordance with the arbitration agreement;<sup>30</sup> and has granted stays of court proceedings on the basis that the parties had agreed to refer a dispute to arbitration.<sup>31</sup>

##### B. Standard for refusing enforcement of an arbitral award on the grounds of public policy

The Arbitration Act 110A adopts the same grounds on recognition and enforcement of awards, as well as on setting aside of awards, as provided for in the New York Convention.<sup>32</sup> Commentary from the jurisdiction indicates that examples of contracts that would contradict public policy include contracts entered into under duress, contracts to trade with the enemy, contracts in restraint of trade, and contracts to procure a divorce.<sup>33</sup>

##### C. Key judicial decisions on the applicable arbitration legislation or the New York Convention

There do not appear to be any Barbadian judgments which have interpreted the Barbados Arbitration (Foreign Arbitral Awards) Act, which incorporates the New York Convention. However, the Caribbean Court of Justice (CCJ), the final Court of Appeal for the Caribbean region as recognised by Barbados,<sup>34</sup> has interpreted the public policy exception under the New York Convention on two occasions. First, in its 2013 judgment in *BCB Holdings Limited & Another v The Attorney General of Belize* ('*BCB Holdings*')<sup>35</sup> and more recently in November 2017 in *The Belize Bank Limited v The Attorney General of Belize* ('*Belize Bank*').<sup>36</sup> In both cases, the Government of Belize ('the GoB') sought to resist enforcement of an LCIA award on public policy grounds.

1. The argument in both cases was essentially the same, i.e. that the underlying agreement was illegal notwithstanding the arbitral tribunal's determination to the contrary. According to the GoB, it was never bound by the agreement because the agreement was not subject to parliamentary approval, which violated the separation of powers and the constitution. While the CCJ refused to enforce the LCIA award in the *BCB Holdings* case, it upheld the award in the more recent *Belize Bank* case. The difference in outcome is based on the differing facts in the two cases. *BCB Holdings* concerned a settlement agreement conferring tax concessions and the CCJ deemed that legislative approval was required for the agreement but not obtained. The *Belize Bank* case concerned a promissory note, which the Privy Council (the then final court of appeal for Belize) had already determined, in the context of another case, that the GoB did not require legislative approval to issue.

In *BCB Holdings*, the CCJ had been asked for the first time to formulate its own test in relation to the public policy exception. The CCJ began by recognising that the public policy in play was the public policy of Belize, the jurisdiction in which the arbitral award was being enforced. It went on to say that in the context of enforcement of an arbitral award, domestic public policy was influenced by the international approach under the New York Convention; specifically, the court adopted a pro-enforcement approach and thus a more restrictive approach to the public policy exception than

would otherwise be the case in the domestic context. The court therefore concluded that 'to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must present an unacceptable violation of those principles'.

In *Belize Bank* the CCJ clarified more precisely the nature of the illegality required: 'the court conducts a balancing exercise weighing the interest of guaranteeing the finality of the award against the competing interest of ensuring respect for fundamental principles of its legal system such as the rule of law.' The court went on to describe *BCB Holdings* as 'exceptional'; the 'uncontested' facts revealing 'clear and credible evidence of illegality' in the creation of a unique tax regime without legislative sanction which violated the separation of powers and the constitutional order of Belize.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

There is no information on whether institutional arbitration is common, but there are a number of institutions established in the state.

In 2007 Barbados initiated discussions with the London Court of International Arbitration (LCIA) for the establishment of an LCIA office on the island.<sup>37</sup> The goal was to promote Barbados's reputation as an arbitration hub and from this location to service arbitrations for Latin America and the Caribbean. Cases would have been managed through that regional office, where actual hearings could have taken place as well. However, after the signing of an intent letter and exchange of memoranda between the state and the court, this project appears not to have materialised. It is suggested that one of the reasons for this is the change of government, which subsequently affected the already concluded negotiations and agreements reached,<sup>38</sup> at least for the present.

This has led to the establishment of Barbados' own home-grown dispute resolution centre. In 2017, the Government of Barbados established an independent, non-profit organisation. The Arbitration & Mediation Court of the Caribbean (AMCC) is an international commercial dispute resolution institution which provides a number of dispute settlement services such as: arbitration, mediation, conflict managing and other alternative dispute resolution services.<sup>39</sup>

Another institution providing alternative dispute resolution services is the Caribbean ADR Chambers. It provides both litigation and ADR services in domestic and international disputes across the Commonwealth Caribbean.<sup>40</sup> The Chambers have a leading set of professionals (both lawyers and judges) who handle disputes across a broad spectrum of business.<sup>41</sup>

### B. Measures to strengthen institutional arbitration capabilities

The government has taken a number of measures to create and develop Barbados as an arbitration hub and preferred place for dispute settlement. For instance, conferences are routinely held in the region: the ICC YAF further created its 'Caribbean series', a special set of events in the region to contribute to growing regional dialogue on the usefulness of international commercial arbitration. Furthermore, the International Chamber of Commerce (ICC) worked closely with the Cuban Court of Arbitration to organise the conferences that took place in 2016 and 2017 in Havana and Santo Domingo.

C. *Submission of disputes to arbitration vs. litigation*

There is no data on the percentage of disputes submitted to arbitration as opposed to litigation. In fact, according to sources the 'default method' of solving commercial disputes in Barbados is through litigation brought before the High Court of Barbados.<sup>42</sup>

However, in recent years, while litigation remains the preferred dispute resolution method, the use of arbitration has become more attractive. This is evident through the numerous arbitration clauses incorporated into contracts governed by the law of Barbados which provide solely for arbitration.<sup>43</sup> The rise of arbitration is further recognised by the establishment of the Arbitration and Mediation Court of the Caribbean in Barbados in 2017.<sup>44</sup>

D. *Participation by foreign counsel in international arbitrations*

Section 50 of the International Commercial Arbitration Act 2007 excludes the Legal Profession Act 1973, and foreign lawyers are therefore able to participate in arbitration, though not domestic court proceedings.

E. *Relevant statistical data*

1. Sectors where arbitration is routinely used

Based on anecdotal evidence, the key sectors where arbitration is routinely used are construction, insurance, sports, foreign investment, employment, and property matters.

2. Time taken for enforcement/annulment proceedings

No information available.

3. Percentage of awards annulled/not enforced

No information available.

F. *Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 1,340 days to resolve a commercial dispute in a first-instance court Barbados – 20 days for filing and service of court processes, 1,020 days for trial and judgment and 300 days for enforcement of judgment.<sup>45</sup> Barbados ranks below the Latin America & Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>46</sup> In terms of overall ease of enforcing contracts, Barbados scored 38.02 of 100 and ranked 170 of 190.<sup>47</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

Hence, the slow court system and bureaucracy are widely seen as the main hindrances to timely resolution of commercial disputes. In fact, the Barbados judicial system has acknowledged that for the past 20 years there has been a backlog of undecided cases that were prolonged for one reason or another. In recognition of this, in 2006 the judicial system initiated 'The Backlog Reduction Project'. The purpose of the Project is to identify the backlog cases filed between 1990 and 2009 which had not been decided prior to the commencement of the Civil Procedure Rules, in order for those cases to be disposed.<sup>48</sup>

This indicates that while Barbados's national courts may, in general, take a long time to render a decision, the government has taken measures to address this and improve the situation.

### G. *Statistics on judges and lawyers per capita*

The Barbados Bar Association lists out approximately 850 lawyers in the country.<sup>49</sup> With regard to judges, there are six judges at the Barbados Court of Appeal and eight judges at the High Court of Barbados.<sup>50</sup> Given a population of approximately 300,000 persons, this works out to a ratio of approximately 1 lawyer per 350 persons and 1 superior court judge per 21,500 persons.

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for businesses or for arbitration in Barbados. The legal aid scheme in Barbados is governed by the Community Legal Services Act 1981 (the Act) Cap 112A. People are able to get access to the scheme through a legal aid certificate. Legal aid is provided by the government, which includes paying all disbursements and legal fees for the beneficiary.<sup>51</sup> However, this scheme does not apply to arbitration but only to the following types of litigation disputes, set out in the First Schedule to the Act: (i) any capital offence, (ii) manslaughter, (iii) infanticide, (iv) concealment of birth, (v) rape, (vi) all indictable offences where the person charged is a minor, (vii) all family matters with the exception of divorce, (viii) matters arising under the Tenancies Freehold Purchase Act 1980, Security of Tenure of Small Holdings Act 1986 and tenancies control, (ix) applications under section 24 of the Constitution, (x) applications for writ of Habeas Corpus ad Subjiciendum.<sup>52</sup> Section 39 of the Act gives the minister the power to amend the First Schedule on the recommendation of the Director of Community Legal Services ('the Commission').<sup>53</sup>

Sections 19–21 of the Act allow a court to grant a legal aid certificate, where it thinks appropriate, to an applicant who does not have a legal dispute listed in the First Schedule. That said, this exception only applies to litigation matters and there are no commercial-related matters listed in the First Schedule. Finally, the Commission must be satisfied that the applicant has insufficient disposable income in order to issue a legal aid certificate.<sup>54</sup>

Hence, in order for the legal aid to be granted, the person(s) applying for it needs to prove that their case falls within one of the categories described above and prove that they have insufficient disposable income. To this end, prior to issuing the legal aid certificate the government is allowed to inquire into whether those two requirements are met.<sup>55</sup>

### B. *Third-party funding*

Specific information on the doctrines of champerty and maintenance and third-party funding in Barbados does not appear to exist. Given that Barbados has a legal system based on English common law, and the crimes and torts of maintenance and champerty applied at the time of independence in 1966, it is reasonable to assume that in the absence of statutory or regulatory provisions to the contrary the rule of maintenance and champerty is still applicable.

Furthermore, the Eastern Caribbean Supreme Court (ECSC), whose decisions are binding in the country, has indicated that champerty is still a matter of public policy applicable in Eastern Caribbean countries. Particularly in relation to third-party funding, the Court clarified that:



The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.

It seems, therefore, that although the rule of maintenance and champerty is still applicable in Barbados, and third-party funding would not necessarily be considered illegal. Pending a final determination by the courts, however, it is difficult to definitely conclude that third-party funding agreements will not contravene public policy.

#### C. *Contingency fees*

With regard to legal fees, charging contingency fees, where the payment of fees is dependent on the claim's success, is not permitted in Barbados.<sup>56</sup> Contingency fee arrangements are invalid and unenforceable on public policy grounds.<sup>57</sup> It appears that in specific non-contentious matters lawyers are allowed to charge fixed scale fees. In contrast, in contentious matters, they are given a wide discretion to determine this matter based on the time spent by each person with reference to their hourly rate.<sup>58</sup>

Another common way is if the attorney and the client agree on their terms of remuneration, provided that the fees chargeable remain reasonable. However, this agreement must be in writing and signed by the party against whom it will be enforced.<sup>59</sup>

#### D. *Insurance for legal expenses*

There is no information whether the cost of arbitration can be insured or not. However, it appears that as far as litigation is concerned, legal expense/ cost insurance is not readily available in Barbados.<sup>60</sup> The International Association of Legal Protection Insurers and Service Providers' website does not list any providers as being active in Barbados.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 LRO 1985 Arbitration (Foreign Arbitral Awards) Cap. 110A (Barbados). See also Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117 Vol. 63 No. 1.

- 3 The Commonwealth, 'Barbados: History' <<http://thecommonwealth.org/our-member-countries/barbados/history>> accessed on 15 March 2019.
- 4 Thomson Reuters Practical Law, 'Enforcement of judgments and arbitral awards in Barbados: overview' Kevin J Boyce, Michael J Koeiman and Shena-Ann Y Ince <<https://uk.practicallaw.thomsonreuters.com/w-007-6475>> accessed on 15 March 2019.
- 5 International Commercial Arbitration Act 2007, s 3(6)(a).
- 6 See International Commercial Arbitration Act 2007, s 4(a) ('the objectives of this Act are to establish in Barbados a comprehensive, modern and internationally recognized framework for international commercial arbitration by adopting the UNCITRAL Model Law on International Commercial Arbitration').
- 7 International Commercial Arbitration Act 2007, s 4(b).
- 8 International Commercial Arbitration Act 2007, s 3(5).
- 9 LRO 2002 The Constitution of Barbados.
- 10 The Constitution of Barbados, Ch I.
- 11 UNCITRAL Model Law on International Commercial Arbitration 1985 article 7, Definition of arbitration agreement.
- 12 UNCITRAL Model Law on International Commercial Arbitration 1985 article 35(2), Recognition and enforcement of awards.
- 13 See International Commercial Arbitration Act 2007, s 4(a) ('the objectives of this Act are to establish in Barbados a comprehensive, modern and internationally recognized framework for international commercial arbitration by adopting the UNCITRAL Model Law on International Commercial Arbitration').
- 14 International Commercial Arbitration Act 2007, s 9. See also UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302, art 6.
- 15 International Commercial Arbitration Act 2007, s 2.
- 16 *Ibid.*, s 50.
- 17 *Ibid.*, s 4.
- 18 *Ibid.*, ss 5 and 51.
- 19 *Ibid.*, ss 52(1)(b).
- 20 UNCITRAL Model Law with 2006 amendments, Option 1 article 7(3).
- 21 UNCITRAL Model Law with 2006 amendments, Option 1 article 7(4).
- 22 See New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed on 31 July 2019.
- 23 See 'New York Convention Guide' <<http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=581&opacview=-1>> accessed on 31 July 2019.
- 24 Arbitration (Foreign Arbitral Awards) Cap. 110A.
- 25 See ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/MemberStates.aspx>> accessed on 31 August 2019.
- 26 UNCTAD Investment Policy Hub, Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (adopted 23 June 2000, entered into force 1 April 2003) art. 21.
- 27 CARICOM, 'The Caribbean Community' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/barbados>> accessed on 22 March 2019.
- 28 Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy <<https://investmentpolicyhub.unctad.org/IIA/country/17/treaty/3151>> accessed on 22 March 2019.
- 29 UNCTAD, 'Investment Policy Hub' 'Barbados' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed on 31 August 2019.
- 30 *Needham's Point Holdings Ltd v Johnston International Ltd* BB 2005 CA 21.
- 31 *Madj. Investments Ltd v Tropic ICE Unlimited* BB 2008 HC 15; *Nasser v Caribbean Broadcasting Corporation* BB 1978 HC 6.
- 32 LRO 1985 Arbitration (Foreign Arbitral Awards) Cap. 110A (Barbados)

- 33 Thomson Reuters Practical Law, 'Enforcement of judgments and arbitral awards in Barbados: overview'.
- 34 The Law of Nations (2018), 'Framing the Public Policy Exception: view from the Caribbean', Angeline Welsh <<https://lawofnationsblog.com/2018/01/25/framing-public-policy-exception-view-caribbean/>> accessed on 21 April 2019.
- 35 *BCB Holdings Limited & Another v The Attorney General of Belize* [2013] CCJ 5 (AJ) <[www.caribbeancourtsofjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf](http://www.caribbeancourtsofjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf)> accessed on 21 April 2019.
- 36 *The Belize Bank Limited v The Attorney General of Belize* [2017] CCJ 18 (AJ) <[www.caribbeancourtsofjustice.org/wp-content/uploads/2017/11/2017-CCJ-18-AJ-1.pdf](http://www.caribbeancourtsofjustice.org/wp-content/uploads/2017/11/2017-CCJ-18-AJ-1.pdf)> accessed on 21 April 2019.
- 37 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', 125.
- 38 Peter D Maynard (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?', *Caribbean Law Review* 20, 36–52.
- 39 'Branch Patron Supports the Launch of AMCC', *CIArbbean News Quarterly Newsletter*, Vol. 1 No. 2 (2018) <<http://ciarbcaribbean.org/resources/newsletters/1.2.pdf>> accessed on 22 March 2019.
- 40 Caribbean ADR Chambers, 'Our Services' <<http://caribbeanadrchambers.com/index.php/our-services>> accessed on 15 March 2019.
- 41 Caribbean ADR Chambers, 'About us' <<http://caribbeanadrchambers.com/index.php/our-services/>> accessed on 15 March 2019.
- 42 Thomson Reuters Practical Law, 'Litigation and enforcement in Barbados: overview', Tammi Pilgrim and Taylor Laurayne, Lex Caribbean <<https://uk.practicallaw.thomsonreuters.com/w-017-2963?transitionType=Default&contextData=%28sc.Default%29>> accessed on 15 March 2019.
- 43 Interview with local lawyer.
- 44 Ibid.
- 45 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/barbados#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/barbados#DB_ec)> accessed on 15 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 46 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 47 Ibid.
- 48 Barbados Judicial System, 'The Backlog Reduction Project' <[http://www.barbadoslawcourts.gov.bb/?page\\_id=355](http://www.barbadoslawcourts.gov.bb/?page_id=355)> accessed on 15 March 2019.
- 49 The Barbados Bar Association, 'Attorneys-at-Law' <[http://barbadosbarassociation.com/members\\_directory.cfm](http://barbadosbarassociation.com/members_directory.cfm)> accessed on 15 March 2019.
- 50 The Barbados Bar Association, 'Judges' <<http://barbadosbarassociation.com/judges.cfm>> accessed on 15 March 2019.
- 51 The Barbados Bar Association, 'Frequently Asked Questions' <<http://barbadosbarassociation.com/faqs.cfm?FAQID=10&ActionDetails=true>> accessed on 15 March 2019.
- 52 *Community Legal Services Act* (Barbados), Cap. 112A, SI 1981/180 at First Schedule.
- 53 *Community Legal Services Act* (Barbados), Cap. 112A, SI 1981/180 at s 39.
- 54 *Community Legal Services Act* (Barbados), Cap. 112A, SI 1981/180 at ss 19–21.
- 55 The Barbados Bar Association, 'Frequently Asked Questions'.
- 56 Thomson Reuters Practical Law, 'Litigation and enforcement in Barbados: overview'.
- 57 Code of Ethics, Part VII Rule 65(2).
- 58 Thomson Reuters Practical Law, 'Litigation and enforcement in Barbados: overview'.
- 59 Ibid.
- 60 Ibid.

# BELIZE<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Being a former British colony, Belize's judicial system is largely based on English common law.<sup>2</sup> The state is governed by a 'Westminster' style parliamentary democracy on the basis of a written constitution.<sup>3</sup> The arbitration law of Belize is based on the English Arbitration Act of 1889.

### B. *Description of prior legislation and reasons for its replacement*

Arbitration in Belize is governed by the Belize Arbitration Act 1932,<sup>4</sup> which was last amended in 1980 (1980 Ordinance).<sup>5</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Belize Arbitration Act was enacted on 23 April 1932.<sup>6</sup>

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act 1932 governs both domestic arbitration (Part II 'Local Awards') and international arbitration (Part III 'Protocol and Foreign Awards').

### C. *Details and/or relevant amendments and modifications*

As per the information contained in the Arbitration Act, revised edition 2011, the Belize Arbitration Act had at least two amendments, in 1958, and in 1980. However, no sources discussing these amendments were located.

Importantly, the 2017 amendments to the Crown Proceedings Act 2000 (CPA) Chapter 167 set forth that for the purposes of the Act, 'judgment' also encompasses 'an award in proceedings on an arbitration' in the Crown Proceedings (Amendment) Act 2017 (CPAA).<sup>7</sup>

Furthermore, the amendments introduced two new provisions, 29A, and 29B. Section 29A sets out that where there is a foreign judgment rendered against the Government of Belize declared to be 'unlawful, void, or otherwise invalid by any court in Belize', this judgment is prevented from being enforced in or outside Belize.<sup>8</sup> Section 29B, in its turn, has criminalised any enforcement attempt of the aforementioned judgment, providing that any such attempt would be penalised with sanctions varying depending on the person committing it.<sup>9</sup> The Act goes even further by specifying that even persons who have acted in an 'official capacity' on behalf of an legal entity would become liable.<sup>10</sup>

The consequence of these amendments for the enforcement of foreign arbitral awards was that if a foreign award is declared by 'any' Belizean court to be unlawful, void, or otherwise invalid, the award cannot in any way be enforced against the government. In fact, any attempt at enforcement – be it by an individual, legal entity or an official representative on behalf of any of the two, including a law firm – would be considered criminally liable for committing such 'an offence'. It is even considered that the staff in a law firm that has assisted the lawyers in carrying out 'the offence' would also be held liable.

The second piece of legislation amended in 2017 is the Central Bank of Belize (International Immunities) Act 2017 (CBBIIA).<sup>11</sup> The purpose of the

amendment is to 'restate for greater certainty the immunity of the Central Bank of Belize from legal proceedings in other States'. To this end, section 3 accords immunity to the Bank in two respects: (1) the Bank is immune from the jurisdiction of any 'foreign' courts and tribunals, where 'foreign' is considered to be any court or tribunal based outside Belize;<sup>12</sup> and (2) any property of the Bank, regardless of whether it is located in or outside Belize, is also considered immune from any types of proceedings, and thus cannot be 'attached, arrested or executed' in any foreign state.<sup>13</sup> This immunity can be lifted only by the Bank itself and no one else.<sup>14</sup>

Additionally, section 4 of the CBBIA resembles section 29 of the amended Act. In particular, it criminalises any attempt, be it by an individual, legal entity, or an official representative acting on behalf of any of the two, to initiate, or even participate in proceedings against the Bank. This includes proceedings instituted in or outside Belize, regardless of whether those were instituted before or after the CBBIA came into effect.<sup>15</sup> Similar to the amended Act, the CBBIA also provides for two kinds of penalties: a monetary fine up to BZ\$150,000 and imprisonment up to one year.

Additionally, some articles discuss generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and unify the Commonwealth Caribbean countries' legislation. One author reports that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes that occurred in the international arbitration legal framework in the second half of the twentieth century – such as the enactment of the New York Convention,<sup>16</sup> the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration 1985.

After years of analysis, the Committee concluded two drafts, proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth, as well the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom 'which permitted judicial interference in the arbitration proceeding'.<sup>17</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions by the Committee were never implemented. As a result, Belize's Arbitration Act, as with many other arbitral legislations of Commonwealth Caribbean countries, has remained the same until today.<sup>18</sup> There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of CARICOM. It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>19</sup>

#### *D. Relationship to the UNCITRAL Model Law*

Belize has not adopted the UNCITRAL Model Law on International Commercial Arbitration.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The Arbitration Act differs considerably from the Model Law.

Although little literature was located commenting on Belize's current arbitration legislation, the analysis of the provisions of the Arbitration Act evidences that this legislation does not reflect modern trends and best practices.

Some noteworthy differences between the Arbitration Act and the UNCITRAL Model Law are, for example, (i) the inclusion of umpires; (ii) the power granted to the parties, in certain cases, to supply vacancies of arbitrators; (iii) the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures; and (iv) lack of provisions on separability of the arbitral agreement.

#### *F. Powers and duties of arbitrators*

Section 8 of the Belize Arbitration Act empowers the arbitrators or umpires, acting under a submission, to:

- administer oaths to or take the affirmations of the parties and witnesses appearing;
- state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and
- correct in an award any clerical mistake or error arising from any accidental slip or omission.

The act further specifies that those powers are subject to the wording of the submission. In other words, the submission would prevail in case of a conflict or disagreement.

#### *G. Arbitrator immunity*

There is no information whether arbitrators are accorded immunity in Belize. Given that the Arbitration Act, the Legal Profession Act 2011 and the constitution are all silent on this issue, the answer is likely to be negative.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Before the independence of Belize, the effect of the New York Convention used to apply to it by virtue of that circumstance. However, once Belize gained its independence, this 'effect' was terminated.

Currently, Belize is neither a signatory nor a contracting party to the New York Convention.<sup>20</sup> Despite this, the Caribbean Court of Justice, which is Belize's court of highest instance, has held that although Belize is not a signatory to the New York Convention, the provisions of it have been incorporated in the Act through the 1980 Ordinance.<sup>21</sup>

Hence, foreign arbitral awards can be and are recognised and enforced in Belize on the basis of three international conventions. These are the 1923 Geneva Protocol: Protocol on Arbitration Clauses, the Convention on the Execution of Foreign Arbitral Awards and the New York Convention. Those international instruments are inserted into Belize's Arbitration Act as schedules.

*B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction.

*D. Other international/regional treaties*

Belize has signed, but not ratified, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention').<sup>22</sup>

Belize also forms part of the Caribbean Community (CARICOM).<sup>23</sup> The state joined the Community on 1 May 1974.<sup>24</sup> Consequently, the Trade and Investment Framework Agreement concluded between the Government of the United States of America and the Caribbean Community, concluded, and enforced on 28 May 2013, also applies to Belize. The same applies to the agreement concluded between CARICOM and Costa Rica establishing the free trade area, as well as with Cuba and the Dominican Republic respectively.

Belize is also a member of the Multilateral Investment Guarantee Agency (MIGA), which 'insures investors against current transfer restrictions, expropriation, war and civil disturbances, and breach of contract by member countries'.<sup>25</sup>

With regard to its bilateral investment treaties (BITs), Belize has signed eight BITs, of which only five are in force.<sup>26</sup> Those are the BITs concluded with Austria, Cuba, the Netherlands, the United Arab Emirates, and the United Kingdom.<sup>27</sup>

#### IV. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

No information is available. However, given the newly enacted legislations – which the courts would be bound to comply with when determining an enforcement request – it is hard to say what approach they would take.

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The case of *BCB Holdings Ltd and the Belize Bank v the Government of Belize*<sup>28</sup> is representative of the public policy threshold prevailing in Belize courts.

In *BCB Holdings* an award was refused enforcement by the Belizean courts on grounds of public policy. In that case a dispute arose between BCB Holdings, which is the parent company of the Belize Bank Ltd and the Minister of Finance of Belize, and Attorney General which acted on behalf of the Government of Belize. The two parties had concluded a settlement deed which, as alleged by claimants, was creating a favourable tax treatment. The said tax treatment entailed a way for the claimants to discharge their statutory tax obligations. Although this tax regime was not legislated or approved by the parliament, the government honoured it for two years, after which it stopped.

Consequently, the claimants commenced arbitration proceedings before the London Court of International Arbitration (LCIA) in London, alleging breach of the settlement deed concluded between the parties. Following the LCIA's decision in favour of claimants and ordering the government to pay damages

for its breach, the claimants tried to enforce the award in Belize. However, the government resisted enforcement, arguing that it was never actually bound by the said agreement due to the lack of parliamentary validation. The implementation of that agreement absent the said validation would be contrary to Belize's 'fundamental economic, social, political, legal, or foreign affairs of the State'.<sup>29</sup>

In examining the question, and more precisely whether the enforcement was against public policy, Honourable Justice Saunders clarified that when reviewing foreign or conventional awards, courts should apply the public policy exception in a more restrictive manner, in comparison to domestic awards. The rationale for this was the fact that such foreign or conventional awards should be reviewed in light of international comity considerations in order to respect the decisions of foreign tribunals.

According to the Honourable Justice Saunders, 'only where enforcement would violate the forum state's most basic notions of morality and justice would a court be justified in declining to enforce a foreign award based on public policy grounds'.<sup>30</sup> He further emphasised that the public policy 'threshold' should be very high, such as to require it to be proved that the dispute matter lies in the heart of fundamental principles of justice or the rule of law, and constitutes 'unacceptable violation' thereof.<sup>31</sup>

Given the importance of tax laws ascribed by the constitution, the court determined that the facts of this case justified the court's exercise of its power to refuse the enforcement of the award,<sup>32</sup> because it found that the grounds for not enforcing the award were 'compelling' and that the 'sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value'.<sup>33</sup>

A similar case was decided by the Caribbean Court of Justice (CCJ), which, after it replaced the UK Privy Council, is the highest judicial authority in Belize.<sup>34</sup> It involved a dispute between the Belize Bank and the Attorney General of Belize over a promissory loan note.<sup>35</sup> The dispute, similar to the aforementioned case, was brought before the London Court of International Arbitration (LCIA), which rendered an award in favour of the claimant, and which was opposed by respondent in the enforcement proceedings.

The CCJ discussed the 'public policy' argument as a ground for refusal of enforcement. In doing so, the court emphasised that although Belize has not adopted the New York Convention, Part IV of the Arbitration Act mirrors its grounds for refusal of enforcement.<sup>36</sup>

In determining whether the award should be enforced or refused enforcement, the CCJ clarified that a balanced view must be obtained. In particular, there should be a 'pro-enforcement' attitude given that it is a 'conventional' award, and that enforcement should be refused only if there is 'strong and compelling evidence that there has been an unacceptable violation of [the fundamental legal principles]'.<sup>37</sup>

The CCJ continued by referring to the *BCB Holdings v Belize* decision, qualifying it as 'exceptional circumstances warranting non-enforcement of the foreign arbitral award', because the said deed in that case was never legislated by the Parliament. Hence, the whole act was illegal.

The CCJ decided that the LCIA's award does not involve 'illegality' and 'would not be contrary to public policy of Belize', and as such it should be enforced.<sup>38</sup>



C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

No information is available.

## V. ARBITRATION LANDSCAPE

A. *Institutional arbitration*

Belize has one arbitral institution, but no statistical data is available regarding the arbitration practice in the country to determine whether institutional arbitration can be considered common. The literature commenting on international arbitration is also scarce,<sup>39</sup> and only a few cases discussing arbitration practice were located.

The Belize Chamber of Commerce and Industry (BCCI), founded in 1920, is the biggest private sector membership organisation located in Belize.<sup>40</sup> Along with its main functions, i.e. to foster economic growth and the social wellbeing of the nation, it also offers alternative dispute resolution services, which are open to any business and industry. However, this service is only accessible for the BCCI's members.<sup>41</sup>

B. *Measures to strengthen institutional arbitration capabilities*

The government has taken measures to foster arbitration. In 2016 a Court-Connected Arbitration was introduced under the initiative of Hon Mr Justice Abel and the National Mediation Committee. In the same year, the first lawyers were trained under the auspices of the University of the West Indies Open Campus Belize and with the help of representatives of the Caribbean Branch of the Chartered Institute of Arbitrators. The purpose of this training was to provide legal practitioners with the necessary skills and knowledge in order to be able to take part in arbitration cases, as well as to establish Belize as a world-renowned centre for arbitration.<sup>42</sup>

C. *Submission of disputes to arbitration vs. litigation*

No information is available.

D. *Participation by foreign counsel in international arbitrations*

No information was found regarding specific restrictions to foreign lawyers practising in international arbitration cases, and the arbitration law is also silent on this matter.

However, the Legal Professions Act 2011 of Belize clarifies who is able to practise law in Belize. According to section 6, a person who wants to practise law in Belize needs to apply to the Supreme Court and must:

- a. Be qualified to practise law in any country which the Chief Justice deems as having an analogous system of laws;
- b. Be of good character; and
- c. Pay the appropriate registration fee.<sup>43</sup>

E. *Relevant statistical data*

1. Sectors where arbitration is routinely used

No information is available.

2. Time taken for enforcement/annulment proceedings

No information is available.

### 3. Percentage of awards annulled/not enforced

No information is available.

#### F. *Statistics/information on the length of court proceedings in commercial cases*

There is no official statistical data on the length of court proceedings. However, it is suggested that the length of a case heard before the Court of Appeal of Belize is approximately three weeks. Nevertheless, it is noted that the length of the proceedings depends on a number of factors such as 'the number of matters scheduled for hearing' in the said session.<sup>44</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 892 days to resolve a commercial dispute in a first-instance court in Belize – 30 days for filing and service of court processes, 562 days for trial and judgment and 300 days for enforcement of judgment<sup>45</sup>. Belize ranks above the Latin America and the Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>46</sup> In terms of overall ease of enforcing contracts, Belize scored 50.11 of 100 and ranked 133 of 190.<sup>47</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

#### G. *Statistics on judges and lawyers per capita*

No information was found. However, according to a public source, in 2017, 39 arbitrators were sworn in as court-connected arbitrators after the completion of an arbitration training by regional experts.<sup>48</sup> This training is seen as means of improving Belize's legal practitioners' arbitration knowledge and skills.

#### H. *Powers and duties of arbitrators*

Section 8 of the Belize Arbitration Act empowers the arbitrators or umpires, acting under a submission, to:

- a. Administer oaths to or take the affirmations of the parties and witnesses appearing; and
- b. State an award as to the whole or part thereof in the form of a special case for the opinion of the court; and
- c. Correct in an award any clerical mistake or error arising from any accidental slip or omission.

The Act further specifies that those powers are subject to the wording of the submission. In other words, the submission would prevail in case of a conflict or disagreement.<sup>49</sup>

#### I. *Arbitrator immunity*

There is no information on whether arbitrators are accorded immunity in Belize. Given that the Arbitration Act, the Legal Profession Act 2011 and the Constitution are all silent on this issue, the answer is likely to be negative.

## VI. FUNDING FOR LEGAL CLAIMS

#### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for businesses in Belize and there is no information to indicate that legal aid is provided for arbitration. The Legal Aid Center in Belize City, currently funded by the Bar Association of Belize

('the Association'), explicitly excludes from its jurisdiction company and other commercial matters. The Center specifically states that they provide legal assistance to individual clients, not businesses.<sup>50</sup> Yet, section 40(3) (g) of the Legal Profession Act 2011 calls on the Association 'to provide legal representation whenever the interests of justice demand it'.<sup>51</sup> The Association has increased its outreach in recent years by hosting free legal clinics throughout the country, indicating a possible expansion of the legal aid mandate beyond the services offered at the Legal Aid Center.<sup>52</sup>

The Belize Chamber of Commerce & Industry (BCCI) has introduced ADR mechanisms as a service to its members that do not require representation by a lawyer.<sup>53</sup> It is unclear what kind of assistance a member will receive from the BCCI throughout the dispute resolution process. Additionally, in cases involving capital murder, the Supreme Court's Registrar offers legal aid by funding an attorney appointed in favour of the accused, up to \$1,000.00.<sup>54</sup>

#### B. *Third-party funding*

The law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967<sup>55</sup> but a champertous agreement may still be treated as contrary to public policy and unlawful.

These rules were reaffirmed as a matter of public policy in the *RF&G Insurance Company Ltd v Jody Reneau and Dindsdale Thompson*,<sup>56</sup> where the Supreme Court of Belize (Civil) stated:

The assignment of a cause of action in tort, was and remains unlawful as being against public policy by reason of offending against the law 'maintenance' and 'champerty'. That is, in the barest of terms – interfering in the disputes of others where one has absolutely no interest. The prohibition against assignment of bare rights of action is subject to the exception of the assignee possessing a commercial interest in the subject matter of the assignment. The interest of an insurer who has paid out a claim against a third party legally liable for the claim, is one such instance of a viable commercial interest. This position was acknowledged by both counsel and is acknowledged as the correct one.<sup>57</sup>

Hence, given the rule of maintenance and champerty is still applicable in Belize, third-party funding might therefore be not possible on public policy grounds.

#### C. *Contingency fees*

Contingency fees in Belize are expressly permitted by statute, i.e. section 33 of the Legal Profession Act. According to this provision, the general rule is that the client and the attorney may reach an agreement regarding the manner and amount of fee to be paid for the whole or part of the legal 'business'. Under the 'manner' of payment, the two parties are allowed to agree on the following methods: 'gross, percentage, commission, retainer, contingency fee or otherwise at a greater or lesser rate than that at which he would otherwise have been entitled to charge [...]'.<sup>58</sup> In order for such agreement to be valid, however, it must be in writing and signed by the client or his agent.<sup>59</sup>

Additionally, in order to safeguard the abuse of contingency fees, the Act specifies that such agreements can be 'sued and recovered on or set aside in like manner and on like grounds as an agreement not relating to the remuneration of an attorney-at-law [...]'. Further, the Act empowers the court

to decide whether or not to terminate the 'remuneration' agreement as a whole given that it finds it 'unfair and unconscionable'.<sup>60</sup>

#### D. Insurance for legal expenses

No information was located regarding the availability of insurance for legal issues. According to the Commonwealth Network website, the insurance industry in the country is small, and there are only 14 insurance companies active in the market, of which the major sectors are property, motor, accident and sickness insurance.<sup>61</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 14 September 2019.
- 2 Commonwealth Governance, 'Judicial System of Belize' <<http://www.commonwealthgovernance.org/countries/americas/belize/judicial-system/>> accessed on 30 August 2019.
- 3 The Law Reviews (October 2018), 'Belize' in The Asset Tracing and Recovery Review – edition 6, Nigel Ebanks <<https://thelawreviews.co.uk/edition/the-asset-tracing-and-recovery-review-edition-6/1174573/belize>> accessed on 30 August 2019.
- 4 The Arbitration Act of 23 April 1932 is now part of Chapter 125 of the Substantive Laws of Belize, Revised Edition 2011.
- 5 Eamon, H, Courtenay S C and Stacey N Castillo, 'Belize', *The International Arbitration Review – edition 10* <<https://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-10/1195850/belize>> accessed on 30 August 2019.
- 6 The Arbitration Act <<http://www.belizejudiciary.org/download/LAWS%20of%20Belize%20rev2011/Law%20s%20Update%202011/Data/VOLUME%206B/Cap%20125%20Arbitration%20Act.pdf>> accessed on 30 August 2019.
- 7 CPAA, Amendment of section, definition of 'judgment'; see also The Crown Proceedings (Amendment) Act 2017 (CPAA) <<https://nationalassembly.gov.bz/wp-content/uploads/2017/04/Act-No.-2-of-2017-Crown-Proceedings-Amendment-Act-2017.pdf>> accessed on 30 August 2019.
- 8 CPAA, section 29A.
- 9 If the 'crime' is committed by an individual, the individual is liable to pay a fine of not more than BZ\$150,000, and/or subject to imprisonment of up to two years (CPAA 29B(1)). The penalty for legal entities is less harsh. Section 29B(1) provides that the entity would be subject to a fine up to BZ\$250,000.
- 10 CPAA, section 29B(4).
- 11 Central Bank of Belize (International Immunities) Act 2017 <<https://nationalassembly.gov.bz/wp-content/uploads/2017/04/Act-No.-1-of-2017-Central-Bank-of-Belize-International-Immunities-Act-2017.pdf>> accessed on 30 August 2019.
- 12 CBBIA, section 3(a).
- 13 Ibid., section 3(b).
- 14 Ibid., section 3(c).
- 15 Ibid., section 4.
- 16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 17 Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117 Vol. 63 No. 1.
- 18 Ibid.

- 19 The Caribbean Radio, 'Draft Model Arbitration Bill for CARICOM States being reviewed by Committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>> accessed on 12 September 2019.
- 20 New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed on 30 August 2019.
- 21 *BCB Holdings and the Belize Bank Limited v the Attorney General of Belize* [2013] CCJ 5 (AJ) CCJ Appeal No. CV7 of 2012 Bz Appeal No 4 of 2011. See also *Attorney General of Belize v Carlisle Holdings* No. 15 of 2005.
- 22 International centre for Settlement of Investment Disputes, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>>
- 23 CARICOM, 'Caribbean Community' <<https://www.caricom.org/>> accessed on 13 August 2019.
- 24 CARICOM, 'Belize' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/belize>> accessed on 30 August 2019.
- 25 'Multilateral Investment Guarantee Agency' website <<https://www.miga.org/>> accessed on 30 August 2019.
- 26 Those that are signed but not in force are concluded with El Salvador, Italy and Taiwan Province of China. See UNCTAD, 'Investment Policy Hub' 'Belize' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed on 31 August 2019.
- 27 Ibid.
- 28 *BCB Holdings and the Belize Bank Limited v the Attorney General of Belize* [2013] CCJ 5 (AJ) CCJ Appeal No. CV7 of 2012 Bz Appeal No 4 of 2011.
- 29 Ibid.
- 30 *BCB Holdings and the Belize Bank Limited v the Attorney General of Belize* [2013] CCJ 5 (AJ) CCJ Appeal No. CV7 of 2012 Bz Appeal No 4 of 2011, 26; *Parsons & Whittemore Overseas Co. Inc v Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America* 508 F.2d 969 (2d Cir. 1974).
- 31 *BCB Holdings and the Belize Bank Limited v the Attorney General of Belize* [2013] CCJ 5 (AJ) CCJ Appeal No. CV7 of 2012 Bz Appeal No 4 of 2011, 26, 44.
- 32 *BCB Holdings and the Belize Bank Limited v the Attorney General of Belize* [2013] CCJ 5 (AJ) CCJ Appeal No. CV7 of 2012 Bz Appeal No 4 of 2011, 26, 59.
- 33 Ibid.
- 34 *The Belize Bank Limited v The Attorney General of Belize* [2017] CCJ 18 (AJ) CCJ Application No. BZCV2017/001 BZ Civil Appeal No. 4 of 2015.
- 35 Ibid.
- 36 *The Belize Bank Limited v The Attorney General of Belize* [2017] CCJ 18 (AJ) CCJ Application No. BZCV2017/001 BZ Civil Appeal No. 4 of 2015, 7.
- 37 *The Belize Bank Limited v The Attorney General of Belize* [2017] CCJ 18 (AJ) CCJ Application No. BZCV2017/001 BZ Civil Appeal No. 4 of 2015, 8.
- 38 *The Belize Bank Limited v The Attorney General of Belize* [2017] CCJ 18 (AJ) CCJ Application No. BZCV2017/001 BZ Civil Appeal No. 4 of 2015, 38.
- 39 Most articles mention Belize only briefly when describing the context of arbitration in the Caribbean.
- 40 The BCCI website is <<https://www.belize.org/about-bcci/>> accessed on 30 August 2019.
- 41 BCI, 'Mediation & Alternative Dispute Resolution' <<https://www.belize.org/mediation-alternative-dispute-resolution/>> accessed on 30 August 2019.
- 42 Belize Judiciary, '2015-2016 Belize Report', 9 (Supreme Court of Belize, 2016) <<http://www.belizejudiciary.org/2015-2016-report/>> accessed on 30 August 2019.
- 43 Belize Legal Professions Act, Part II, section 6. <[http://www.belizebar.bz/downloads/legal\\_profession\\_act\\_cap320.pdf](http://www.belizebar.bz/downloads/legal_profession_act_cap320.pdf)> accessed on 30 August 2019.

- 44 Belize Judiciary, 'Jurisdiction (Supreme Court of Belize)' <<http://www.belizejudiciary.org/court-of-appeal-2/jurisdiction/>> accessed on 30 August 2019.
- 45 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreeconomies/belize>> accessed on 30 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 46 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 47 Ibid.
- 48 7 News (2017), '39 Court Arbitrators Sworn In' <<http://www.7newsbelize.com/sstory.php?nid=42136>> accessed on 30 August 2019.
- 49 Arbitration Act, s 8.
- 50 Belize Law (2007), 'Legal Aid Center' <[http://www.belizelaw.org/web/legal\\_aid.html](http://www.belizelaw.org/web/legal_aid.html)> accessed on 14 September 2019.
- 51 Legal Profession Act, Cap. 320, Revised Edition 2011 at s 40(3)(g).
- 52 Belize Law, 'Legal Aid Center' (2007) <[www.belizelaw.org/web/legal\\_8.html](http://www.belizelaw.org/web/legal_8.html)> accessed on 30 August 2019.
- 53 Bar Association of Belize, 'Conferences & Events' <<http://belizebar.bz/conferences-events/>> accessed on 14 September 2019.
- 54 Belize Law (2007), 'Legal Aid Center'.
- 55 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 56 [2016] BZSC 9 (27 January 2016).
- 57 [2016] BZSC 9 (27 January 2016), 10.
- 58 Legal Profession Act of Belize, section 33 <[http://www.belizebar.bz/downloads/legal\\_profession\\_act\\_cap320.pdf](http://www.belizebar.bz/downloads/legal_profession_act_cap320.pdf)> accessed on 30 August 2019.
- 59 Legal Profession Act of Belize, section 33(5).
- 60 Legal Profession Act of Belize, section 33(6).
- 61 Nexus Commonwealth Network, Belize: 'Find Insurance and Reinsurance Expertise in Belize' <[http://www.commonwealthofnations.org/sectors-belize/business/insurance\\_and\\_reinsurance/](http://www.commonwealthofnations.org/sectors-belize/business/insurance_and_reinsurance/)> accessed on 30 August 2019.

# BOTSWANA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Historically, Botswana was a British protectorate from March 1885 to 30 September 1966, the date of its independence.<sup>2</sup> The origins of its laws date to 1891, with the establishment of a formal administration of the protectorate, which brought about the administration of justice in the protectorate through the application of the common law and statutory law in force at the Cape of Good Hope (now South Africa) on 10 June 1891.<sup>3</sup> The common law in force in the Cape of Good Hope was Roman-Dutch law.

Therefore, Botswana is considered to operate a dual legal system comprising Roman-Dutch law and customary law.<sup>4</sup> Roman-Dutch Law is considered to be the common law of Botswana.<sup>5</sup> Further, Roman-Dutch Law is stated to have been influenced over the years by English common law.<sup>6</sup>

The two main pieces of legislation regulating arbitration in Botswana are the Arbitration Act 1959 (BAA)<sup>7</sup> and the Recognition and Enforcement of Foreign Arbitral Awards Act 1971 (REFAA).<sup>8</sup>

The BAA was enacted on 27 November 1959, and it is based on the 1950 English Arbitration Act, although the 1889 English Arbitration Act has also largely influenced the BAA.<sup>9</sup> The Act has not been modernised since 1959 and in one author's words '[t]he Act as it stands is a colonial relic that is not suitable for modern arbitration'.<sup>10</sup>

In response to the calls for modernisation of the existing legal framework for arbitration in Botswana, an Alternative Dispute Resolution Bill, partially based on the UNCITRAL Model Law on International Commercial Arbitration, has been proposed but it has not yet been approved.<sup>11</sup> It is unclear whether the draft bill includes the 2006 amendments to the UNCITRAL Model Law.

### B. *Description of prior legislation and reasons for its replacement*

As stated above, Botswana still carries the same arbitral legislation enacted after its independence, and no amendments or replacements have taken place so far.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The BAA was enacted on 27 November 1959 and the Recognition and Enforcement of Foreign Arbitral Awards Act 1971 (REFAA) was enacted on 31 December 1971.

### B. *Scope of application to domestic and international arbitrations*

The BAA adopts a monist system, conferring the same treatment to both domestic and international arbitral proceedings.<sup>12</sup> The enforcement of domestic arbitration awards can be executed as with any other judicial decision, while international arbitration awards shall respect the REFAA requirements.

*C. Details and/or relevant amendments and modifications*

As stated above, the BAA has not been amended to date. However, an Alternative Dispute Resolution Bill, partially based on the UNCITRAL Model Law, is currently before the Botswana parliament and has not yet been passed.<sup>13</sup>

*D. Relationship to the UNCITRAL Model Law*

The BAA predates the UNCITRAL Model Law.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The BAA departs from the UNCITRAL Model Law in a number of provisions; for instance, by not expressly granting powers to the arbitral tribunal to rule on its own jurisdiction or to order interim measures. Conversely, with respect to certain interim measures such as discovery and urgent relief, the BAA sets out that the national courts are competent to rule on these matters, which results in a restriction to the parties' autonomy, given that the scope of the courts' jurisdiction secured by the BAA cannot be ousted by the parties' agreement.<sup>14</sup>

Other noteworthy differences between the BAA and the UNCITRAL Model Law are (i) the right of the two party-appointed arbitrators to indicate an umpire where the arbitral agreement refers to only two arbitrators,<sup>15</sup> and (ii) the power to the parties in certain cases to supply vacancies of arbitrators.<sup>16</sup>

*F. Powers and duties of arbitrators*

The powers of arbitrator or umpire are described in section 15 of the BAA. Their powers include to administer oaths and take witness statements; to correct clerical mistakes or errors in awards; and to order the taking of evidence, including evidence provided by someone outside Botswana, as well as to attend requests for taking of evidence from other arbitrators in the same way.

Section 12 of the BAA provides the duties of arbitrators and umpires under the BAA. It determines that they must be, and continue to be throughout the proceedings, 'disinterested with reference to the matters referred and the parties to the reference'. Arbitrators and the umpire also have to provide an arbitral award in writing, and 'if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively'.<sup>17</sup>

*G. Arbitrator immunity*

The BAA is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Botswana became a party to the New York Convention on 20 December 1971.<sup>18</sup>

*B. Reservations to the New York Convention*

Botswana has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>19</sup>



### C. *Method of domestic implementation of the New York Convention*

The Convention was implemented in the national legislation through the REFAA.<sup>20</sup> The REFAA was enacted 'to enable effect to be given in Botswana to the [New York Convention]'.<sup>21</sup> Pursuant to section 4 of the REFAA, only the provisions of sections 2 and 3 of Article II and Articles III, IV, V, and VI shall have the force of law in Botswana.<sup>22</sup>

### D. *Other international/regional treaties*

Botswana is also a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention), which entered into force in the country on 14 February 1970.<sup>23</sup>

Botswana has signed ten bilateral investment treaties with different countries, only two of which are in force (Germany and Switzerland).<sup>24</sup> Botswana has also entered into three FTAs, only one of which is in force (EFTA–SACU FTA 2006).<sup>25</sup>

Finally, it is worth mentioning that Botswana did not sign the 'Organisation pour l'harmonisation en Afrique du droit des affaires' (OHADA Convention), which aims to 'provide a secure and harmonised legal framework for the conduct of business in Africa through the adoption of uniform legal rules (including arbitration rules) that are applicable throughout the OHADA Member States'.<sup>26</sup>

## IV. RELEVANT CASE LAW

### A. *Approach of the national courts to the enforcement of arbitration agreements*

Section 6(1) of the BAA provides that 'any party to a submission ... may apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings subject to terms and conditions as may be just'.

Botswana courts have on occasion enforced the terms of arbitration agreements and compelled parties to arbitration. In *BM Packaging (Pty) v PPC Botswana (Pty) Ltd*,<sup>27</sup> the High Court held that that if either party required that a dispute should be referred to arbitration, the other party must accede to it since the parties had agreed to do so in advance in terms of the contract. The court further held that a party to the agreement could not unilaterally elect to proceed to court for the purpose of resolving any dispute and thereby deprive the other party of its contractual right to arbitration.

Further, the courts generally exercise their discretion, pursuant to section 6 of the BAA, to stay proceedings pending the outcome of arbitration, where the dispute comes within the scope of the arbitration agreement. They generally require a strong case to be made out before relieving a party of its obligation to arbitrate.<sup>28</sup>

### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

No information was available.

C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The BAA is, in general, considered to be a first-generation arbitration law, and thus, the arbitral procedure is heavily dependent on the assistance of the national courts.<sup>29</sup> The courts have power to intervene in the arbitral procedure in certain circumstances, among which are allegations of violation of the BAA.<sup>30</sup> Other examples are the national courts' powers to determine whether an arbitral tribunal has jurisdiction over a matter, to appoint umpire or arbitrators in determined situations, and to rule on cases discussing misconduct of arbitrators.<sup>31</sup>

For instance, in *Fencing Centre (Pty) Ltd v Murray and Roberts Construction and Others*, the Lobatse High Court denied the competence-competence principle and concluded that an arbitrator does not have jurisdiction to rule on the validity of the arbitral agreement. The judgment states that 'a stay of proceedings ... had to be refused because it was not the function of an arbitrator to determine whether or not the parties agreed to an arbitration clause: that was the function of the court'.<sup>32</sup>

In addition, in *BCL v Tengrove*,<sup>33</sup> the Lobatse High Court decided that under Article 16(f) of the BAA<sup>34</sup> a party was entitled to seek a stay of the arbitration proceedings, and the court had the power to grant such measure, even though the arbitrator had already decided this request and opted to refuse the stay. The court denied the application, but it did so after concluding that the applicant's allegations were insufficient to result in the requested stay. In one author's opinion:

The downside of the case is that not only did the court demonstrate its willingness to exercise its powers to stay arbitral proceedings; the principle of separability of the arbitration clause was not considered. Had the Applicant adduced sufficient evidence that the main contract was fraudulently obtained then the court would have stayed the arbitral proceedings, and this is not in accord with the principle of separability.<sup>35</sup>

## V. ARBITRATION LANDSCAPE

A. *Institutional arbitration*

The only arbitral institution in Botswana is the Botswana Institute of Arbitrators (BIA). The institution was founded in 1987 and has its own arbitration rules<sup>36</sup> which resemble the arbitration rules of the Association of Arbitrators (Southern Africa), but they are not based on the UNCITRAL rules.<sup>37</sup> No data is available in relation to the caseload of the BIA, and/or statistics relating to the administered disputes under BIA rules.

B. *Measures to strengthen institutional arbitration capabilities*

No information was available.

C. *Submission of disputes to arbitration vs. litigation*

No information was available.

D. *Participation by foreign counsel in international arbitrations*

In order to practise law in Botswana, foreign lawyers must satisfy the High Court that (i) they are suitable; (ii) they hold an LLB degree and (iii) they have passed the bar exam. These requirements can be waived by the High Court if

the foreign lawyer is qualified to practise in a Commonwealth country with has a similar legal system to Botswana.<sup>38</sup> It is unclear if such restrictions extend to arbitrations.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used.

The use of arbitration in Botswana is still very much linked to employment disputes<sup>39</sup> and construction and civil engineering disputes.<sup>40</sup> Nevertheless, the use of arbitration for corporate matters is increasing, and some local practitioners have noted a higher number of legal entities opting for arbitration in their contracts.<sup>41</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced.

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

Although statistics related to the use of arbitration and litigation in Botswana are scarce, and the number of discussed precedents on arbitration is small, Botswana was recently recognised as the 45th country in the World Justice Project's 2017/2018 Rule of Law Index, which measures adherence of countries to the rule of law worldwide.<sup>42</sup> This position, places Botswana before countries such as Brazil, Argentina, and Hungary.<sup>43</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 660 days to resolve a commercial dispute in a first-instance court in Botswana – 30 days for filing and service of court processes, 550 days for trial and judgment and 80 days for enforcement of judgment.<sup>44</sup> Botswana ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>45</sup> In terms of overall ease of enforcing contracts, Botswana scored 49.99 of 100 and ranked 134 of 190.<sup>46</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

*G. Statistics on judges and lawyers per capita*

Although the population of Botswana is over 2.29 million,<sup>47</sup> Botswana's judiciary has only 16 judges in total, and 59 magistrates.<sup>48</sup> There is no available data discussing the caseload of the Botswana courts, or comparing the number of judges and magistrates to the number of acting arbitrators and lawyers.

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for arbitration in Botswana, but it is unclear whether it is available for businesses. Legal Aid Botswana was established following the passing of the Legal Aid Act in 2015. Alternative dispute resolution services are provided for by Legal Aid Botswana.<sup>49</sup> The organisation also covers contract disputes, which opens the possibility for their services to extend to businesses.<sup>50</sup> Additionally, a 'person' includes a body corporate

and unincorporated.<sup>51</sup> The only areas of law that are not covered by legal aid are criminal trials for those over 18, money claims in the jurisdiction of the small claims court, representation in customary court, adultery, preliminary industrial mediation, and maintenance claims where the other party is not represented.<sup>52</sup>

#### *B. Third-party funding*

No jurisprudence or literature appears to be available on the doctrines of champerty and maintenance in Botswana or on the availability of third-party funding in the country. Further, considering that Botswana is based on Roman-Dutch law (albeit influenced by English common law) and not the English common law, it is unlikely that rules of maintenance and champerty were received or applicable in Botswana at the time of its independence. Third-party funding may therefore not be lawful. Indeed, one commentary, without referring to champerty, and maintenance, suggests that third-party funding is an issue of contract, and it is possible for litigation to be funded by a third party in Botswana.<sup>53</sup>

In a macro perspective, the future scenario for third-party funding is generally described as promising in Africa, especially in South Africa. This fact may be beneficial to the development of third-party funding also in Botswana both because of the geographic proximity and legal similarities between the two countries.<sup>54</sup> Thus, it is reasonable to conclude that advances in South African regulation of third-party funding may positively influence Botswana to adopt legislation regulating this matter.<sup>55</sup>

#### *C. Contingency fees*

A commentator suggests that although contingency fees agreements are considered 'highly unethical if not outright illegal', he would not speculate 'whether contingency fees are altogether unknown by practitioners in Botswana'. In this sense, it seems that contingency fees are likely to be considered illegal in Botswana, although it is possible that contingency fees contracts are concluded in practice.<sup>56</sup> Another commentator has suggested that Botswana does not have the necessary legal framework for contingency fees.<sup>57</sup>

#### *D. Insurance for legal expenses*

A commentary discusses the rise of private companies providing legal insurance cover in Botswana and mentions at least four active companies in the sector.<sup>58</sup> According to the author:

The legal insurance companies have limitations in that they do not cover all cases, and their clients do not have the option to appoint attorneys of their choice to represent them. In most cases when dealing with divorce matters, the legal insurance companies tend to cover their clients if the divorce is uncontested.<sup>59</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019

- 2 GlobalLex (2006), 'Botswana's Legal System and Legal Research', Lubabalo Booii <<https://www.nyulawglobal.org/globalex/Botswana.html>> accessed 31 August 2019.
- 3 Ibid.
- 4 Republic of Botswana, 'Administration of Justice (AOJ)' <<http://www.gov.bw/en/Ministries--Authorities/Ministries/Administration-of-Justice-AOJ/Background-Traditions-Court/Background-of-the-Judiciary/>> accessed 31 August 2019; Booii (2006), 'Botswana's Legal System and Legal Research'.
- 5 GlobalLex (2006), 'Botswana's Legal System and Legal Research'.
- 6 Ibid.
- 7 The Commonwealth Network, Botswana, 'Find Legal expertise in Botswana' <<http://www.commonwealthofnations.org/sectors-botswana/business/legal/>> accessed 30 August 2019.
- 8 BAA is in Chapter 6:01 of the Laws of Botswana Act 49; REFAA is in Chapter 6:02 of the Laws of Botswana.
- 9 'Botswana introduced an arbitration statute in 1959, shortly before independence. Although this law was enacted after the English Arbitration Act of 1950, it arguably had more in common with the English Arbitration Act of 1889, especially as regards its layout, probably under the influence of the Swaziland legislation .... It does, however, have some characteristics of its own, not found in the English and Southern African legislation. It is therefore probably more correct to classify this statute as a first-generation statute.' David Butler (2004), 'The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress', *Journal of International Arbitration*, Vol. 21. No 2, 169, 171. See also Baboki Dambe (2014), 'The Doctrine of Competence-Competence and the Botswana Arbitration Act of 1959: The Need for Reform', *University of Botswana Law Journal*, Vol. 18 No. 1.
- 10 Dambe (2014), 'The Doctrine of Competence-Competence...', 2; Carr-Hartley (2013), 'Chapter 1.2: Botswana', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 33.
- 11 Sources from 2016 had already mentioned the legislative impulse to modernise the arbitration legislation in Botswana, and that the new proposal for the arbitration act had been submitted for approval. However, more recent sources from 2018 confirm the bill status as not approved. Compare Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell, 190–91, with Global Arbitration Review (2016), 'Botswana', Edward Fashole-Luke II and Q. Letshabo <<https://globalarbitrationreview.com/chapter/1036975/botswana>> accessed 12 August 2019; and ICGL, 'Botswana: International Arbitration 2018', Edward Fashole-Luke II and Tendai Paradza <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/botswana>> accessed 13 August 2019.
- 12 Lise Bosman (2013), 'Part I Southern Africa – Chapter 1: The Southern African Development Community and the UNCITRAL Model Law', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 17.
- 13 ICGL, 'Botswana: International Arbitration 2018'.
- 14 'An agreement would be arbitrary if it precluded the courts from granting a party relief allowed by the Act.' See Miles et al. (2016), *An Introduction to Arbitration in Africa*, 190–91, 191–92.
- 15 BAA, s 9; Carr-Hartley (2013), 'Chapter 1.2: Botswana', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 33.
- 16 '(2) if ... one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed

- by consent.', Section 8 BAA. See also Cole, R J V (2007), 'Botswana's Arbitration Legislation: The Path for Future Reform', *University of Botswana Law Journal*, Vol. 5, 77, 82.
- 17 BAA, section 4, item 13.
  - 18 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 August 2019.
  - 19 Ibid.; See also REFAA, Ss 3(2) and (3).
  - 20 New York Arbitration Convention, 'Implementing Act – Botswana' <<http://www.newyorkconvention.org/implementing+act+-+botswana>> accessed 31 August 2019.
  - 21 REFAA, preamble.
  - 22 REFAA, s 4.
  - 23 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 31 August 2019.
  - 24 UNCTAD Investment Policy Hub, 'Botswana' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 August 2019.
  - 25 See EFTA, 'Southern African Customs Union (SACA)' <<https://www.efta.int/free-trade/free-trade-agreements/sacu>> accessed 31 August 2019.
  - 26 See Mohamed S. Abdel Wahab (2017), 'Glocalizing Africa in a Globalized World: Trade, Investment and the Changing Landscape of International Arbitration – A Promise to Fulfill?', in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series Volume 19, Kluwer Law International, 909, 922.
  - 27 1998 BLR 309 (HC).
  - 28 See e.g., *Maqbool v Mphoyakgosi*, 2012 2 BLR 369 HC.
  - 29 Dambe (2014), 'The Doctrine of Competence-Competence...'; Butler (2004), 'The State of International Commercial Arbitration in Southern Africa', 169, 170, 171.
  - 30 Miles et al. (2016), *An Introduction to Arbitration in Africa*, 190–91.
  - 31 BAA, Section 11.
  - 32 *Fencing Centre (Pty) Ltd v Murray and Roberts Construction and Others*, [2002] BLR 269, 270.
  - 33 *BCL v Tengrove NO and Others* [2002] (1) BLR 221.
  - 34 '(2) Any party to a submission is entitled, subject to the law relating to procedure of the Court, to obtain from the Court an order, (f) for an interim injunction or similar relief;'
  - 35 Dambe (2014), 'The Doctrine of Competence-Competence...', 9.
  - 36 See 'Botswana Institute of Arbitrators' <<http://www.biarb.org/>> accessed on 13 August 2019. See also Butler (2004), 'The State of International Commercial Arbitration in Southern Africa', 169, 171, 202.
  - 37 Carr-Hartley (2013), 'Chapter 1.2: Botswana', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 33, 34.
  - 38 See Herbert Smith Freehills (2016), *Guide to Dispute Resolution in Africa*, 33 <<https://www.herbertsmithfreehills.com/latest-thinking/guide-to-dispute-resolution-in-africa>> accessed 13 August 2019.
  - 39 Carr-Hartley (2013), 'Chapter 1.2: Botswana', 33, 34. See also the Botswana Trade Disputes Act, which provides for arbitration.
  - 40 Ibid.
  - 41 Global Arbitration Review (2016), 'Botswana'.
  - 42 World Justice Project, Rule of Law Index (2017–2018) <[https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf)> accessed 13 August 2019.
  - 43 Ibid.
  - 44 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreeconomies/botswana>> accessed 13 August 2019. The methodology used to obtain this information includes a study of the codes of civil

- procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 45 World Bank (2019), *Doing Business*, 'Enforcing Contracts'.
- 46 *Ibid.*
- 47 *Ibid.*
- 48 Administration of Justice (Republic of Botswana), <http://www.gov.bw/en/ministries-authorities/ministries/administration-of-justice-aoj/about-aoj/the-judiciary-judicature/> accessed on 13 August 2019.
- 49 Legal Aid Botswana, 'Alternative Dispute Resolution' <<http://www.labbw.net/alternative-dispute-resolution/>> accessed 15 September 2019.
- 50 Legal Aid Botswana, 'Contract Claims' <<http://www.labbw.net/contract-claims/>> accessed 15 September 2019.
- 51 Interpretation Act 1984, c 1 at s 49.
- 52 Legal Aid Botswana, 'What Is Not Covered?' <<http://www.labbw.net/contract-claims/>> Accessed 15 September 2019.
- 53 Bowmans Law, 'Africa Guide – Litigation – Botswana' <<https://www.bowmanslaw.com/wp-content/uploads/2017/01/Guide-Litigation.pdf>> accessed 31 August 2019.
- 54 See Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017), *Third-Party Funding in International Arbitration*, Kluwer Law International, 256. See also Aleks Vickovich (2012), 'African litigation funding market a hot potato', *African Law & Business* <<https://www.africanlawbusiness.com/news/african-litigation-funding-market-a-hot-potato>> accessed 13 August 2019.
- 55 Nieuwveld and Sahani (2017), *Third-Party Funding in International Arbitration*, 256. See also Vickovich (2012), 'African litigation funding market: a hot potato'.
- 56 M L Mothobi (2008), 'The High Cost of Litigation and Restructuring', *Sunday Standard*, 24 May 2008 <<http://www.sundaystandard.info/high-cost-litigation-and-restructuring>> accessed on 13 August 2019.
- 57 Bowmans Law, 'Africa Guide – Litigation – Botswana'.
- 58 Loreen Bonner (2017), 'Botswana', in Michael Madden (ed.), *Litigation and Dispute Resolution*, 37 <[https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1470559\\_1.pdf](https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1470559_1.pdf)> accessed 13 August 2019.
- 59 *Ibid.*

# BRUNEI DARUSSALAM<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Brunei has a comparatively short history of arbitration and has predominantly used it in the oil and natural gas industry.<sup>2</sup> Brunei's short history of arbitration arises also because of a well-staffed judicial system comprising expatriate judges of British and Hong Kong origin.<sup>3</sup> As such, Brunei's arbitration legislation is based on the English Arbitration Acts 1950 and 1979, as well as the Hong Kong Arbitration Ordinance (Cap. 341).<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

Brunei's previous arbitral legislation was the Arbitration Act 1994 (Cap. 173) ('1994 Act'). The 1994 Act provided a unitary system for governing both domestic and international arbitration.<sup>5</sup> The 1994 Act was based on the English Arbitration Acts 1950 and 1979 as well as the Hong Kong Arbitration Ordinance (Cap. 341).<sup>6</sup> The 1994 Act was outdated and provided for unnecessary judicial intervention and was therefore reformed and updated in 2009.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Brunei's current arbitral legislation includes the Arbitration Order (AO) (governing domestic arbitration) and the International Arbitration Order (IAO) (governing international arbitration). Both the AO and the IAO were enacted on 28 July 2009<sup>7</sup> and came into effect on 10 February 2010.<sup>8</sup>

### B. *Scope of application to domestic and international arbitrations*

Brunei has two different Acts regulating domestic and international arbitration (see above). While the term 'domestic' is not defined under the AO, section 5(2) of the IAO provides specific criteria according to which it can be determined whether a matter is to be deemed an international arbitration. Parties to a domestic arbitration may opt in to the IAO by express agreement.<sup>9</sup> The opposite is possible too.<sup>10</sup>

### C. *Details and/or relevant amendments and modifications*

The current arbitral legislation has neither been amended nor modified.

### D. *Relationship to the UNCITRAL Model Law*

The AO and IAO are based on the UNCITRAL Model Law on International Commercial Arbitration 1985 and include the revisions introduced in 2006. The IAO has adopted the UNCITRAL Model Law in its First Schedule.<sup>11</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

Although the AO and IAO are based on the UNCITRAL Model Law, there are certain notable differences from it.

First, the AO contemplates greater court intervention when compared to the IAO and the UNCITRAL Model Law. Specifically, the AO unlike the IAO permits an appeal against an arbitral award, in limited circumstances.<sup>12</sup>



Second, under the IAO the default number of arbitrators is one, whereas Article 10 of the UNCITRAL Model Law contemplates three arbitrators by default.<sup>13</sup>

Third, the AO contemplates two additional grounds for annulment of awards – (i) where the making of the award was induced or affected by fraud or corruption and (ii) where a breach of natural justice occurred in connection with the making of the award by which the rights of any part have been prejudiced.<sup>14</sup>

#### F. Powers and duties of arbitrators

Since Brunei has adopted the UNCITRAL Model Law, the powers and duties imposed on arbitrators are the same as the ones provided by the UNCITRAL Model Law.

#### G. Arbitrator immunity

Both arbitrators and appointing authorities are accorded immunity in Brunei. Section 20 of the AO and section 37 of the IAO provide that 'an arbitrator shall not be liable for: (a) negligence in respect of anything done or omitted to be done in the capacity of an arbitrator, and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award'.<sup>15</sup>

With respect to appointing authorities, according to section 59 of the AO and section 38 of the IAO, the appointing authority shall have no responsibility or be held liable for 'anything done or omitted' in the discharge of their functions or 'anything done or omitted' by an arbitrator that they have appointed in the purported discharge of his functions as an arbitrator.<sup>16</sup>

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Brunei became a party to the New York Convention on 25 July 1996.<sup>17</sup>

#### B. Reservations to the New York Convention

Brunei has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>18</sup>

#### C. Method of domestic implementation of the New York Convention

The New York Convention is given effect to through the IAO. The contents of the New York Convention form part of the Second Schedule to the IAO.

#### D. Other international/regional treaties

Brunei is a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('ICSID Convention').<sup>19</sup> The ICSID Convention entered into force on 16 October 2002.<sup>20</sup> No reservations have been made.<sup>21</sup>

Brunei has signed eight bilateral investment treaties (BITs) in total; however, only six of these are currently in force (Kuwait, India, Bahrain, Ukraine, Korea, and Germany).<sup>22</sup>

Brunei has also entered into 10 free trade agreements or FTAs (Trans-Pacific Strategic economic Partnership Agreement; ASEAN Free Trade Area; ASEAN–Republic of Korea Comprehensive Economic Cooperation

Agreement; ASEAN–Japan Comprehensive Economic Partnership; ASEAN–India Comprehensive Economic Cooperation Agreement; ASEAN–Hong Kong, China Free Trade Agreement; ASEAN–People’s Republic of China Comprehensive Economic Cooperation Agreement; ASEAN–Australia and New Zealand Free Trade Agreement; Comprehensive and Progressive Agreement for Trans-Pacific Partnership; Brunei Darussalam–Japan Free Trade Agreement).<sup>23</sup>

Additionally, Brunei has also signed the ASEAN Agreement on the Protection and Promotion of Investment, which applies to all ASEAN countries. However, the agreement has still not entered into force.<sup>24</sup>

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

Brunei has, through section 6 of the IAO and section 8 of the AO, made provision for the stay of court proceedings in order to enforce arbitration agreements.<sup>25</sup> Thus, if a party to an arbitration agreement commences court proceedings in respect of a dispute which is subject to an arbitration agreement, the other party may apply to the Brunei High Court to seek an order to stay those proceedings. The only significant limitations on a defendant’s right to obtain a stay of court proceedings are that: (a) the defendant should not have undertaken any steps in the court proceedings that may deprive it of its right to apply for a stay; and (b) the court is entitled to refuse to grant a stay if it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.<sup>26</sup> If the defendant files a defence in the court proceedings, without at the same time requesting a stay in favour of arbitration, it will be unable to stay the court proceedings at a later stage. Otherwise, the court in an application under section 6 of the IAO ‘shall’ order a stay.<sup>27</sup> In an application under section 8 of the AO, the court ‘may’ order a stay.<sup>28</sup>

A decision of the court to refer the parties to arbitration is not subject to appeal, but where the court refuses to refer the parties to arbitration, then an appeal is allowed, with the leave of the court.<sup>29</sup>

##### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Brunei has set a very high threshold in order for an award to be set aside on grounds of public policy. In particular, for an award to be challenged, the party seeking the setting aside would have to, first, set out the specific public policy ground which has allegedly been breached, and second, prove that the error was ‘one of a nature that enforcement of the award would injure the public or would contravene fundamental principles of justice and fair play’.<sup>30</sup>

##### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

##### D. *There do not appear to be any decisions or judgments that have interpreted the New York Convention.*<sup>31</sup>

#### V. ARBITRATION LANDSCAPE

##### A. *Institutional arbitration*

The Brunei Darussalam Arbitration Centre (BDAC) appears to be the most prominent arbitral institution. The BDAC Rules are a modification of the

UNCITRAL Rules and as such draw upon international best practice contained in the latter.<sup>32</sup>

*B. Measures to strengthen institutional arbitration capabilities*

In Brunei, the power to appoint arbitrators where the parties disagree has been conferred on an arbitral institution, i.e. the appointing authority is an arbitral institution, not the courts.<sup>33</sup> Arbitral institutions also play other important roles in Brunei. For instance, the AABD renders advisory services to the government to introduce measures to strengthen and further develop arbitration in Brunei. The AABD has also undertaken measures to ensure that arbitration is conducted in a time- and cost-efficient manner.<sup>34</sup>

*C. Submission of disputes to arbitration vs. litigation*

There are no official statistics on the number of disputes being referred to arbitration.

Arbitration has not historically been a popular means of resolving disputes, since litigation before national courts has not been especially cumbersome.<sup>35</sup> However, in 2004 the Brunei Constitution was amended and granted the government complete immunity from being sued before national courts. As a result of such immunity, contracts with the government now often include an arbitration clause.<sup>36</sup> The Brunei Government enters into a range of commercial contracts, which has resulted in an indirect increase in the use of arbitration.<sup>37</sup>

*D. Participation by foreign counsel in international arbitrations*

There does not appear to be any specific restriction against foreign counsel appearing in international arbitrations seated in Brunei.<sup>38</sup>

From the general perspective of the legal profession, Part II of the Brunei Legal Profession Act 2006 regulates the appearance of both 'national' and 'foreign' lawyers in Brunei. In some restricted circumstances, set out below, Brunei can consider foreign lawyers to be 'qualified persons' for the purpose of admission practice of law in Brunei.<sup>39</sup> These circumstances are where a person:<sup>40</sup>

- a. is a barrister-at-law of England or Northern Ireland or a member of the Faculty of Advocates of Scotland;
- b. is a solicitor in England or Northern Ireland or a Writer to the Signet, law agent or solicitor in Scotland;
- c. has been in active practice as an advocate and solicitor in Singapore or in any part of Malaysia; or
- d. is a barrister, solicitor or who is a barrister and solicitor of a Supreme Court of any Australian State or Territory.

The Brunei Legal Profession Act further empowers a judge, in his/her own discretion, to decide whether or not to admit any person who satisfies one of the two following requirements to practice in Brunei:<sup>41</sup>

- a. A person who holds her Britannic Majesty's Patent as Queen's Counsel and who does not ordinarily reside in Brunei but has intent to come to Brunei for the purpose of appearing in a case and possesses special skill and qualifications for the purpose of the case, regardless of whether such skills are available in Brunei;
- b. A person who is entitled to practise before the High Court in Malaysia, Singapore or Hong Kong or in such other Commonwealth country as the Chief of Justice may specify.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

Arbitration continues to be primarily employed in the oil and natural gas sector, as well as in foreign direct investment disputes and disputes arising out of agreements where the Brunei Government is a counterparty.<sup>42</sup>

#### 2. Time taken for enforcement/annulment proceedings

No information is available.

#### 3. Percentage of awards annulled/not enforced

No information is available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 540 days to resolve a commercial dispute in a first-instance court in Brunei – 50 days for filing and service of court processes, 400 days for trial and judgment and 90 days for enforcement of judgment.<sup>43</sup> Brunei ranks above average in the East Asia & Pacific region, where it takes an average of 581.1 days to resolve commercial disputes in first-instance courts.<sup>44</sup> In terms of overall ease of enforcing contracts, Brunei scored 60.95 of 100 and ranked 67 of 190.<sup>45</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

### G. Statistics on judges and lawyers per capita

There is no information as to how many judges per capita Brunei has, but current data shows that there are 126 advocates and solicitors in private legal practice.<sup>46</sup> Given that the country has a population of approximately 430,000 people, this works out to approximately 1 lawyer per 3,400 persons.

## VI. FUNDING FOR LEGAL CLAIMS

### A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)

There is currently no legal aid for businesses or for arbitration in Brunei. Since the Government of Brunei only administers legal aid for offences that carry the death penalty, the country's Law Society recently created a legal aid fund to assist impoverished persons with other legal issues. In 2018, the President of the Law Society stated that the fund will be used to help defendants in five specific areas: theft, attempted suicide, infanticide, offences involving minors, and defendants that suffer from mental illness. Therefore businesses are excluded from receiving assistance from this newly developed fund. The Law Society will only be assisting in cases in which the defendant wishes to enter a guilty plea, or requires assistance in mitigation or plea-bargaining. The Society does not provide aid for litigation or arbitration.<sup>47</sup>

The Brunei Council on Social Welfare has operated a Legal Aid and Advisory Clinic, which provides assistance to those whose monthly household income is less than \$500 after dividing by the number of household members. The Centre has brought cases to the Court of Appeal, Civil Court, and Syariah Court.<sup>48</sup> No information is available regarding the type of matters the Centre undertakes, nor the type of assistance provided.

### B. *Third-party funding*

Third-party funding is not regulated under the AO or the IAO. The law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished by statute in 1967 but a champertous agreement may still be treated as contrary to public policy and unlawful. As this was the law applied at the time of independence, it is likely still applicable in Brunei.

Commentators note that there is no prohibition on third-party funders from operating in conjunction with lawyers, although no such funders currently exist.<sup>49</sup> It is notable that, according to Rule 20 of the Brunei Legal Profession (Contingency Fees) Rules, the doctrines of maintenance and champerty shall not apply to agreements for the payment of contingency fees between an advocate and his client made pursuant to the Rules, or to proceedings connected to or arising out of them.<sup>50</sup> The implication of this is that the common law rules of maintenance and champerty will still apply outside of this situation. General third-party funding arrangements not made through the conduit of a Brunei advocate, and therefore by definition not falling under the rubric of contingency fee arrangements permissible under the Brunei Legal Profession (Contingency Fees) Rules, may therefore not be legally permitted.

### C. *Contingency fees*

Under the Brunei Legal Profession (Contingency Fees) Rules, contingency fees may be agreed upon between a lawyer and the client.<sup>51</sup> Brunei allows attorneys to make contingency fee arrangements to receive up to 30 per cent of the damages recovered at the trial court level or 40 per cent of the damages recovered after a successful appeal.<sup>52</sup> In addition Brunei has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, including the 2006 amendments.

### D. *Insurance for legal expenses*

No information pertaining to legal insurance is available for Brunei.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 4 September 2019.
- 2 Colin Ong (2011), 'Brunei', in M Moser & J Choong (eds), *Asia Arbitration Handbook*, 745–85, 748.
- 3 *Ibid.*, 745–85.
- 4 A Rahman (2014), 'Developments in Arbitration and Mediation as Alternative Dispute Resolution Mechanisms in Brunei Darussalam – Part 1: Arbitration', *Asian Dispute Review*, Vol. 16 No. 2, 68, 69.
- 5 *Ibid.*
- 6 *Ibid.*
- 7 A J van den Berg (ed) (2010), 'Recent Developments in Arbitration Law and Practice: Brunei', in *XXXV Yearbook Commercial Arbitration*, 23–24.
- 8 Ong (2011), 'Brunei', in Moser & Choong, *Asia Arbitration Handbook*, 745–85, 752.
- 9 International Comparative Legal Guide, 'Brunei' <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/brunei>> accessed 4 September 2019.

- 10 Ibid.
- 11 Ibid.
- 12 Brunei AO, s 49.
- 13 Brunei IAO, s 10.
- 14 Brunei AO, s 48(1)(a)(vi)-(vii).
- 15 Brunei AO, s 20; Brunei IAO, s 37.
- 16 Brunei AO, s 59, Brunei IAO, s 38.
- 17 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 18 Ibid.
- 19 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 4 September 2019.
- 20 ICSID, 'Brunei Darussalam' <<https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST20>> accessed 4 September 2019.
- 21 Ibid.
- 22 UNCTAD Investment Policy Hub, 'Brunei' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 4 September 2019.
- 23 Asian Regional Integration Center, 'FTAs: Brunei Darussalam' <[aric.adb.org/database/fta](http://aric.adb.org/database/fta)> accessed 4 September 2019.
- 24 UNCTAD Investment Policy Hub, 'Brunei'.
- 25 Brunei IAO, s 6; Brunei AO, s 8.
- 26 Brunei IAO, s 6; Brunei AO, s 8.
- 27 Brunei IAO, s 6.
- 28 Brunei AO, s 8.
- 29 Ong (2011), 'Brunei', in Moser & Choong, *Asia Arbitration Handbook*, 745–85, 761.
- 30 International Comparative Legal Guide, 'Brunei' <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/brunei>> accessed 4 September 2019.
- 31 See New York Convention, 'Court Decisions – Decisions per Country' <<http://www.newyorkconvention.org/court+decisions/decisions+per+country>> accessed 4 September 2019.
- 32 Brunei Darussalam Arbitration Centre Arbitration Rules.
- 33 Brunei AO, s 13(8)–(9); Brunei IAO, s 8(2)–(3).
- 34 International Comparative Legal Guide, 'Brunei'.
- 35 Ong (2011), 'Brunei', in Moser & Choong, *Asia Arbitration Handbook*, 745–85, 748.
- 36 Ibid., 745–85, 749.
- 37 Ibid., 745–85, 748.
- 38 International Comparative Legal Guide, 'Brunei'.
- 39 Brunei Legal Profession Act, s 3.
- 40 Brunei Legal Profession Act, s 3.
- 41 Brunei Legal Profession Act, s 7.
- 42 Ong (2011), 'Brunei', in Moser & Choong, *Asia Arbitration Handbook*, 745–85, 748–49.
- 43 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/brunei#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/brunei#DB_ec)> accessed on 4 September 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 44 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 45 Ibid.
- 46 The Law Society of Brunei Darussalam, 'List of Practitioners' <<http://www.bruneilawsociety.com/list-of-practitioners/>> accessed 4 September 2019.
- 47 The Law Society of Brunei Darussalam, 'Law Society launches Brunei's first legal aid fund' <[bruneilawsociety.com](http://bruneilawsociety.com)> accessed 15 September 2019.

- 48 Business Brunei, 'MKM Legal Advice & Advisory Clinic resumes' <business.gov.bn> accessed 15 September 2019.
- 49 International Comparative Legal Guide, 'Brunei' <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/brunei>> accessed 4 September 2019.
- 50 Brunei Legal Profession (Contingency Fees) Rules (S 17/94), r 20.
- 51 Brunei Legal Profession (Contingency Fees) Rules (S 17/94).
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# CAMEROON<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Cameroon was partially under French and partially under British colonial administration in the eighteenth century. As a result, 'French Commercial laws were applied in the French part and pre-1900 English laws and English common law were applied in the English part of Cameroon'.<sup>2</sup> Currently, '[t]he legal system is a bijural system between the English common law system operating in the two Anglophone regions in the North West and South West, and the French Civil Law operating in the eight Francophone regions'.<sup>3</sup> Article 68 of the Constitution of Cameroon provides that '[t]he legislation applicable in the Federal State of Cameroon and in the Federated States on the date of entry into force of this Constitution shall remain in force insofar as it is not repugnant to this Constitution, and as long as it is not amended by subsequent laws and regulations'.<sup>4</sup>

Arbitration in Cameroon is currently governed by the Uniform Act on Arbitration of 2018 (2018 UAA) as enacted by the Organisation for the Harmonisation of Business Law in Africa (OHADA) pursuant to its foundational treaty (the OHADA Treaty). The 2018 UAA replaced (but is largely similar to) the Uniform Act on Arbitration enacted by OHADA in 1999 (1999 UAA). Neither the 1999 UAA nor the 2018 UAA appear to have been borrowed or particularly influenced by any UK arbitration act.

### B. *Description of prior legislation and reasons for its replacement*

The 2018 UAA replaced the 1999 UAA, which was the first uniform arbitration law enacted pursuant to the OHADA Treaty. The OHADA Treaty was initially signed by 14 central and western African nations (including Cameroon) in 1993. The OHADA Treaty created the OHADA, an international organisation headquartered in Yaoundé, Cameroon. The goal of OHADA (which now has 17 members) was to provide uniform business laws across its member countries. To that effect, OHADA has promulgated uniform laws in various areas. In 1999, OHADA adopted the 1999 UAA, which was largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985.<sup>5</sup> Based on the experience of almost 20 years, and the perceived deficiencies in the existing regime, after a lengthy consultation process OHADA adopted a new uniform arbitration act, which came into effect in all 17 member countries in 2018. As explained in greater detail in section III.C below, the new law maintained the basic structure of the 1999 UAA but implemented a few changes to remedy perceived deficiencies in the prior regime.<sup>6</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The 2018 UAA entered into force in all OHADA member countries (including Cameroon) on 15 March 2018.<sup>7</sup> The 2018 UAA replaced the 1999 UAA in all OHADA member countries. The 2018 UAA applies only to arbitral proceedings commenced after its entry into force.<sup>8</sup> Arbitration in Cameroon is also regulated by Law No. 2007/001 of 19 April 2007 (providing for the enforcement



of foreign awards) and Law No. 2003/009 of 10 July 2003 (determining the competent authorities referred to in the OHADA Uniform Act on Arbitration).

*B. Scope of application to domestic and international arbitrations*

As noted above, the 2018 UAA (like the 1999 UAA) applies to domestic and international arbitrations seated in OHADA and non-OHADA member countries. The 2018 UAA makes no distinction between arbitrations seated in Cameroon and arbitrations seated in any other OHADA member country. Awards in arbitrations seated outside OHADA member countries may be recognised and enforced in Cameroon in the terms provided by 'the relevant international agreements' or, failing that, the 2018 UAA and other supplementary legislation, i.e. Law No. 2003/009 of 10 July 2003.<sup>9</sup>

*C. Details and/or relevant amendments and modifications*

The 2018 UAA is substantively similar to the 1999 UAA. As explained below, Cameroon has not adopted the Model Law, but both the 2018 UAA and the 1999 UAA are largely based on the Model Law 1985. The main differences between the 2018 and the 1999 UAA include:

1. New provision for investment arbitration (including that state entities may now be parties to arbitration proceedings);<sup>10</sup>
2. Express definition of arbitration agreement;<sup>11</sup>
3. Ability of tribunals to issue interim relief and conservatory measures;<sup>12</sup>
4. Provisions regarding a party's failure to participate in whole or in part;<sup>13</sup>
5. Strict deadlines for courts acting in support of arbitration (including for appointing arbitrators,<sup>14</sup> deciding on arbitrator challenges,<sup>15</sup> assessing existence of arbitration agreement;<sup>16</sup> annulment;<sup>17</sup> and enforcement and recognition).<sup>18</sup>

*D. Relationship to the UNCITRAL Model Law*

As noted above, Cameroon has not adopted the Model Law,<sup>19</sup> but the 2018 UAA is based on the Model Law 1985.<sup>20</sup> See below for a discussion of relevant differences.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

There are a few differences between the Model Law and the 2018 UAA:

1. *Scope*: The 2018 UAA makes no distinction between international and domestic arbitrations or between commercial and other types of arbitration. By contrast, article 1 of the Model Law limits its scope to 'international commercial arbitration'.<sup>21</sup>
2. *Competence-competence*: The 2018 UAA provides that '[t]he arbitral tribunal alone is competent to rule on its own jurisdiction', whereas the Model Law provides that the tribunal 'may rule on its own jurisdiction', but does not say whether others (e.g., courts) may do so as well.<sup>22</sup>
3. *Reasoned awards*: Article 20 of the 2018 UAA provides that an 'arbitral award must state the reasons on which it is based', without exceptions. By contrast, the Model Law provides a default rule that awards must state the reasons, but it allows parties to agree 'that no reasons are to be given'.<sup>23</sup>
4. *Grounds for recognition and enforcement*: The 2018 UAA provides only one ground for refusing recognition and enforcement of awards.<sup>24</sup> Under section 31(4), 'recognition and exequatur shall be denied when the award

is manifestly contrary to a rule concerning international public policy'. By contrast, article 36 of the Model Law provides seven grounds to deny recognition or enforcement of awards (party incapacity, lack of proper notice, invalid arbitration agreement, inability to present one's case, dispute falling outside the scope of submission to arbitration, tribunal composition not in accordance with arbitration agreement, award not yet binding or has been set aside or suspended, non-arbitrable subject matter, state public policy).

5. *Grounds for annulment or setting aside:* There are a few differences with respect to the grounds for setting aside or annulling awards. The grounds for setting aside under the Model Law largely track the grounds for non-recognition or non-enforcement mentioned above.<sup>25</sup> Some of these grounds are also covered by the 2018 UAA (i.e., lack of valid arbitration agreement, irregular tribunal composition, decision beyond the tribunal's mandate). In addition, the 2018 UAA provides that an award may be annulled 'if the principle of due process has not been respected'<sup>26</sup> or 'if the award fails to state the reasons on which it is based'.<sup>27</sup> None of these grounds is expressly mentioned in the Model Law (although due process may of course be part of a state's public policy and impose obligations of notice and opportunity to present a case similar to those under the Model Law). With respect to public policy, note that the 2018 UAA refers to 'international public policy' whereas the Model Law refers to 'the public policy of this State'.<sup>28</sup> The 2018 UAA, unlike the Model Law, does not mention party incapacity or non-arbitrable subject matter under domestic law as grounds for annulment.<sup>29</sup>
6. Under the 2018 UAA, annulment decisions by the competent courts of the relevant OHADA member country may be appealed (but only on points of law) to OHADA's Common Court of Justice and Arbitration (CCJA). No similar provision for appeal to an international body exists under the Model Law. Under the 2018 UAA, parties may waive annulment actions (unless this is contrary to international public policy).
7. *Interim measures:* The 2018 UAA provides that '[t]he arbitral tribunal may also, upon the request of either party, order interim or conservatory measures'.<sup>30</sup> It appears from the text of the statute that, unlike under the Model Law,<sup>31</sup> parties may not deprive the tribunal of such power. The 2018 UAA limits a tribunal's ability to order certain forms of interim relief (conservatory seizures and judicial sureties) reserved to the courts. No similar limitation exists under the Model Law. Unlike the Model Law, the 2018 UAA does not define 'interim measures'<sup>32</sup> and does not provide the substantive test to be used by tribunals when determining whether to grant interim measures.<sup>33</sup>

#### F. *Powers and duties of arbitrators*

The 2018 UAA provides that the 'duties of an arbitrator may only be performed by a natural person'.<sup>34</sup> Once an arbitrator accepts his mandate, he 'must complete his mandate until the end, unless he justifies of an impediment or legitimate reason for abstention or resignation'.<sup>35</sup> The 2018 UAA also provides that '[t]he arbitrator shall enjoy full exercise of his civil rights and shall remain independent and impartial vis-à-vis the parties'.<sup>36</sup> Any prospective arbitrator 'shall inform the parties of any circumstance likely to create in their minds a legitimate doubt about his independence and impartiality, and may only accept his appointment with their unanimous and written consent'.<sup>37</sup> If already appointed, an arbitrator shall inform the parties of any such circumstances.<sup>38</sup>

As noted above, the 2018 UAA provides that the 'arbitral tribunal alone is competent to rule on its own jurisdiction, as well as on any issues concerning the existence or validity of the arbitration agreement'.<sup>39</sup> Arbitral tribunals are also empowered to decide 'incidental claims concerning the verification of the authenticity of documents or forgery', appoint experts, and order interim or conservatory measures (except for certain measures reserved to courts).<sup>40</sup> The 2018 UAA also provides that arbitral tribunals shall apply the substantive rules chosen by the parties and, absent such a choice, the rules they deem 'the most appropriate, by taking into consideration, as the case may be, international trade practices'.<sup>41</sup> If authorised by the parties, an arbitral tribunal 'may also decide as *amiable compositeur*'.<sup>42</sup>

The 2018 UAA limits the mandate of the arbitral tribunal to six months (from last arbitrator appointment acceptance date), unless otherwise agreed by the parties.<sup>43</sup>

#### G. *Arbitrator immunity*

The 2018 UAA is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*<sup>44</sup>

Cameroon became a party to the New York Convention on 19 February 1988.<sup>45</sup>

#### B. *Reservations to the New York Convention*

Cameroon has not made any reservations to the New York Convention.

#### C. *Method of domestic implementation of the New York Convention*

Law No. 2007/001 of 19 April 2007 provides that '[f]oreign arbitral awards are *res judicata* and may be recognised and made enforceable in Cameroon ... in accordance with the conditions provided for by relevant international agreements or, in default, in conformity with similar conditions provided for by the OHADA Uniform Act on arbitration and Law No. 2003/009 of 10 July 2003'.<sup>46</sup> Similarly, as noted above, article 34 of the 2018 UAA provides for recognition of awards rendered in arbitrations not governed by the terms of the 2018 UAA 'in accordance with any international conventions that may be applicable and, failing any such conventions, in accordance with the provisions of this Uniform Act'.

#### D. *Other international/regional treaties*

Cameroon ratified the ICSID Convention on 3 January 1967.<sup>47</sup> Cameroon is also party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention).<sup>48</sup>

Cameroon has also entered in 18 bilateral investment treaties, 11 of which are in force (Canada, Republic of Korea, Italy, China, United States of America, United Kingdom, Romania, Belgium-Luxembourg Economic Union, Netherlands, Switzerland, and Germany).<sup>49</sup>

8. Cameroon has entered into one Free Trade Agreement which is currently in force (EU-Cameroon FTA 2009).<sup>50</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

The 'usual approach' of the Cameroonian courts appears to be to decline jurisdiction when the parties have signed an arbitration agreement.<sup>51</sup> According to the World Bank's Investing Across Borders (IAB) 2010 report, in such circumstances, courts refer parties to arbitration '[i]n all or nearly all cases'.<sup>52</sup>

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

For awards rendered in OHADA countries, enforcement may be granted only 'by virtue of an exequatur decision issued by the competent jurisdiction in the Member country'.<sup>53</sup> Such 'exequatur shall be denied when the award is manifestly contrary to a rule concerning international public policy'.<sup>54</sup> For awards rendered in member countries of the New York Convention, the relevant standard is the one in the New York Convention itself<sup>55</sup> (i.e., whether 'recognition or enforcement of the award would be contrary to the public policy' of the country in which recognition or enforcement is sought).<sup>56</sup> There appears to be no known court decision in Cameroon interpreting this standard.<sup>57</sup>

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

There do not appear to be any decisions or judgments that have interpreted the 1999 or 2018 UAA, or the New York Convention.<sup>58</sup>

#### V. ARBITRATION LANDSCAPE

##### A. Institutional arbitration

There are two arbitral institutions in Cameroon: the Centre d'Arbitrage du GIGAM (Groupement Interpatronal du Cameroun) in Douala and the Centre Permanent d'Arbitrage et de Médiation du CADEV (CPAM) in Yaoundé. In addition, the CCJA (headquartered in Abidjan, Ivory Coast) may act as an arbitral institution and presumably does so for many arbitrations seated in OHADA countries. The CCJA is considered the 'leading arbitral institution in Francophone Western and Central Africa'.<sup>59</sup> CCJA has its own set of institutional rules.<sup>60</sup> No information is available for any of these institutions. In 2017, 11 Cameroonian entities were parties in ICC arbitrations.<sup>61</sup>

##### B. Measures to strengthen institutional arbitration capabilities

There are no known recent measures.

##### C. Submission of disputes to arbitration vs. litigation

No information is available. Two commentators noted a few years ago that 'despite Cameroon's ratification of several international conventions on arbitration, litigation remains the dominant form of dispute resolution'.<sup>62</sup> Those commentators also noted that 'resort to arbitration in Cameroon [was] becoming more common' and 'expressed their belie[f] that resort to arbitration w[ould] become more popular in Cameroon in the near future'.<sup>63</sup> According to IAB Report, private parties in Cameroon 'rarely' agree to arbitrate their disputes.<sup>64</sup>

#### D. *Participation by foreign counsel in international arbitrations*

Under Law No. 90/059 of 19 November 1990, only Cameroonian citizens may practise as lawyers.<sup>65</sup> In addition, to be able to practise, lawyers must have a valid law degree recognised by the competent authorities.<sup>66</sup> The rules of the Cameroon Bar Association, however, provide that non-citizens may be admitted to practise if they are citizens of a country that has concluded a reciprocity agreement with Cameroon.<sup>67</sup> It is not clear whether such restrictions apply to arbitration proceedings seated in Cameroon.

#### E. *Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

Arbitration is used in the construction sector.<sup>68</sup>

##### 2. Time taken for enforcement/annulment proceedings

According to the IAB Report, 'it takes around 15 weeks to enforce an arbitration award rendered in Cameroon, from filing an application to a writ of execution attaching assets (assuming there is no appeal), and 24 weeks for a foreign award'.<sup>69</sup> There does not appear to be more recent data available.

##### 3. Percentage of awards annulled/not enforced

The IAB Report provides that awards are enforced '[i]n all or nearly all cases' if no objection to enforcement is filed.<sup>70</sup>

#### F. *Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 800 days to resolve a commercial dispute in a first-instance court in Cameroon – 30 days for filing and service of court processes, 410 days for trial and judgment and 360 days for enforcement of judgment.<sup>71</sup> Cameroon ranks below the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>72</sup> In terms of overall ease of enforcing contracts, Cameroon scored 39.91 of 100 and ranked 166 of 190.<sup>73</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>74</sup>

#### G. *Statistics on judges and lawyers per capita*

The roll of the Cameroon Bar Association lists 2,538 members.<sup>75</sup> The estimated population of Cameroon as of July 2018 was 25,640,965, which means there was approximately 1 lawyer per 10,100 people. No information is available on specific numbers of judges.

At the apex of the Cameroonian judicial pyramid is the Supreme Court, which is the only court specifically mentioned in detail in the Cameroonian Constitution. The organisation, functioning, composition and duties of all the other courts mentioned in Part V of the constitution are left to be determined by subsequent legislation. The courts in the country fall into three main categories: courts with original jurisdiction – otherwise known as courts of first instance or trial courts, appellate courts and courts with special jurisdiction.

The courts with original jurisdiction are:

- Customary courts (which consist of the Customary courts and Alkali Courts in the Anglophone region and the Tribunal de Premier Degré and Tribunal Coutumier in the Francophone regions);

- Courts of first instance (which have jurisdiction over divisions but most of them cumulate as High Courts);
- High Court (which have jurisdiction over divisions but most of them cumulate as Courts of First Instance);
- Military Courts (which have jurisdiction over regions);
- Lower Audit Court (which are yet to be set up but should have regional competence);
- Special Criminal Court (which is supposed to have regional competence but only one has been set up in Yaoundé with national competence);
- Administrative Court (which has regional competence).

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for commercial dispute resolution. In Cameroon, Law No. 2009/004 of 14 April 2009 establishes a government funding regime for legal aid in order to enhance the equality of all before the law. Legal aid may be granted before all courts of the judicial and administrative order. It is granted to natural and legal persons whose resources are insufficient to be able to remain in court either upon request after investigation by the commissions or as of right.<sup>76</sup>

In accordance with this law, both defendant and claimant might apply to the secretary of the Legal Aid Commission in the appropriate court whether orally or in writing. The secretary then sends the petition to the chairperson of the Legal Aid Commission. A decision on whether the applicant qualifies for aid is made after consulting with the counsel.<sup>77</sup>

The Legal Aid Commission has discretionary power to decide the extent of the legal aid to be granted to an applicant, whether in terms of proceedings or cost. Further, the Legal Aid Commission may decide to withdraw legal aid if the recipient becomes able to pay for his own legal representation or if it is proven that the recipient provided false information in order to secure legal aid.<sup>78</sup> There is no indication that legal aid programmes cover commercial arbitrations and ADR mechanisms.

### B. *Third-party funding*

No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Cameroon or the availability of third-party funding in that jurisdiction. However, given that Cameroon's legal system is partially based on English common law, and the crimes and tort of maintenance and champerty applied at the time of its independence, the rule of maintenance and champerty might still apply in parts of Cameroon.

### C. *Contingency fees*

Contingency fees are not allowed, and lawyers may not acquire any interest in a dispute in which they are representing a party.<sup>79</sup>

### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 15 September 2019.
- 2 Martha Simo Tumnde née Njikam and Justin Melong (2013), 'Chapter 5.3: Cameroon', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 341–42.
- 3 The National Law Review, 'Cameroon' <<https://www.natlawreview.com/jurisdiction/all-international/cameroon>> accessed 14 May 2019.
- 4 Constitution of Cameroon 1972, art. 68.
- 5 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 6 See generally Michael Bühler (2018), 'Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform', *Journal of International Arbitration*, Vol. 35 No. 5, 517.
- 7 Note that, per the OHADA Treaty, Art. 10, uniform acts are directly applicable and prevail over any inconsistent domestic law.
- 8 Uniform Act of Arbitration (UAA) 2018, article 35.
- 9 See Law No. 2007/001 of 19 April 2007, section 11; UAA 2018, article 34. There is no compiled list of the 'relevant agreements' but these are likely to be the New York Convention and the Convention on the Settlement of Disputes between States and nationals of other States (ICSID).
- 10 Uniform Act of Arbitration (UAA) 2018, Article 2(2) ('States, other public territorial bodies, public entities and any other legal person under public law may also be a party to an arbitration') and Article 3 ('An arbitration may be based on an arbitration agreement or on an instrument regarding an investment, in particular an investment code or a bilateral or multilateral investment treaty.').
- 11 Uniform Act of Arbitration (UAA) 2018, article 3(1).
- 12 *Ibid.*, article 14.
- 13 *Ibid.*, article 14.
- 14 *Ibid.*, article 6(8).
- 15 *Ibid.*, article 8(1).
- 16 *Ibid.*, article 13(2).
- 17 *Ibid.*, article 27(2) (3 months).
- 18 *Ibid.*, article 31(5) (15 days).
- 19 UNCITRAL, 'Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 9 July 2019.
- 20 Tumnde and Melong (2013), 'Chapter 5.3: Cameroon', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 341–42, referring to the 1999 UAA. The 2018 UAA largely follows the same structure.
- 21 UNCITRAL Model Law, article 1.
- 22 Compare Uniform Act of Arbitration (UAA) 2018, article 11(1) with UNCITRAL Model Law, article 16(1).
- 23 UNCITRAL Model Law, article 31(2).
- 24 Tumnde and Melong (2013), 'Chapter 5.3: Cameroon', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 342.
- 25 Compare UNCITRAL Model Law, article 34 with UNCITRAL Model Law, article 36.
- 26 Uniform Act of Arbitration (UAA) 2018, article 26(d).
- 27 Uniform Act of Arbitration (UAA) 2018, article 26(e).
- 28 Compare Uniform Act of Arbitration (UAA) 2018, article 26(e) with UNCITRAL Model Law, article 34(2)(b)(ii).
- 29 See UNCITRAL Model Law, article 34(2)(a)(i); article 34(2)(b)(i).

- 30 Uniform Act of Arbitration (UAA) 2018, art. 14(12).
- 31 See UNCITRAL Model Law, Art. 17(1) ('Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.') (emphasis added).
- 32 Compare Uniform Act of Arbitration (UAA) 2018, art. 14(12) with UNCITRAL Model Law, Art. 17(2).
- 33 See UNCITRAL Model Law, art. 17A.
- 34 Uniform Act of Arbitration (UAA) 2018, article 5.
- 35 Ibid., article 7(2).
- 36 Ibid., article 7(3).
- 37 Ibid., article 7(4).
- 38 Ibid., article 7(5).
- 39 Ibid., article 11(1).
- 40 Ibid., article 14.
- 41 Ibid., article 15(1).
- 42 Ibid., article 15(2).
- 43 Ibid., article 12.
- 44 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 45 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 46 Law No. 2007/001 of 19 April 2007, section 11.
- 47 ICSID, 'Member States' <[icsid.worldbank.org](http://icsid.worldbank.org)> accessed 9 July 2019.
- 48 UNCITRAL (2014), 'Status United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html)> accessed 9 July 2019.
- 49 UNCTAD Investment Policy Hub, 'Cameroon' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 15 September 2019.
- 50 Thierry Belinga (2015), 'A Gravity Model Analysis for Trade between Cameroon and Twenty-Eight European Union Countries', *Open Journal of Social Science*, Vol. 3.
- 51 Tumnde and Melong (2013), 'Chapter 5.3: Cameroon', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 345 (citing *Shell-Cameroon v SODECAO*, High Court of Youandé, Civil Judgment No. 407 of 24 May 1995).
- 52 World Bank Group, 'Cameroon Arbitrating Commercial Disputes'.
- 53 Uniform Act of Arbitration (UAA) 2018, article 30.
- 54 Uniform Act of Arbitration (UAA) 2018, article 31(4).
- 55 See Law No. 2007/001 of 19 April 2007 and Uniform Act of Arbitration (UAA) 2018, article 34.
- 56 New York Convention, article V(2)(b).
- 57 New York Arbitration Convention, 'Court Decisions – Decision per Country' <<http://www.newyorkconvention.org/court+decisions/decisions+per+country>> accessed 9 July 2019.
- 58 Ibid.; Herbert Smith Freehills (2016), *A Multi-Jurisdictional Review, Dispute Resolution in Africa* (Legal Guide, 2nd edn).
- 59 Kluwer Arbitration Blog (2016), 'A Step Back for OHADA Arbitrations?', Maguelonne De Brugiere <<http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/>> accessed 9 July 2019.
- 60 Arbitration Rules of the Common Court of Justice and Arbitration (in effect since 15 March 2018).
- 61 ICC (2018), 'Extract' 2 ICC Dispute Resolution <<https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>> accessed 9 July 2019.
- 62 Tumnde and Melong (2013), 'Chapter 5.3: Cameroon', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 343.



- 63 Ibid., 343–44.
- 64 World Bank Group, 'Cameroon Arbitrating Commercial Disputes' <<http://iab.worldbank.org/Data/ExploreEconomies/cameroon/arbitrating-commercial-disputes#arblaws>> accessed 9 July 2019.
- 65 Law No. 90/059 of 19 November 1990, article 5(1).
- 66 Law No. 90/059 of 19 November 1990, article 5(3).
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# CANADA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Prior to the enactment of present-day federal and provincial arbitration legislation in Canada in 1986–88, the individual provinces had their own arbitration legislation. The majority of the common law provinces, including British Columbia, Saskatchewan, Nova Scotia, and others drew their arbitration procedures from the law of England, specifically the 1889 English Arbitration Act.<sup>2</sup>

For example, arbitration first came to the province of British Columbia in 1869 with the enactment of the Civil Procedure Ordinance, which largely drew arbitration procedures from the 1854 Common Law Procedure Act of England.<sup>3</sup> Saskatchewan followed the same method. Nova Scotia originally based its arbitration act on the United Kingdom's Arbitration Act of 1889.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

Canada's prior arbitration legislation did not favourably promote arbitration.<sup>5</sup> In many ways Canada lagged behind most of the large trading nations, as demonstrated by its late adoption of the New York Convention in 1986.<sup>6</sup> Most of the legislation failed to inspire trust in arbitration and contained a distrust of private tribunals.<sup>7</sup> The statutes enacted by the common law provinces, which were inspired by England's 1889 Arbitration Act, did not provide for the recognition of foreign arbitral awards.<sup>8</sup> Similarly, Québec and its civil law tradition demonstrated equal hostility towards foreign awards in its Code of Civil Procedure by requiring awards to go through an 'exemplification' process that required rehearing the merits of the case, and thus risked the court revising the award.<sup>9</sup>

Moreover, arbitration suffered from the lack of harmony at the federal level. Arbitration legislation fell within the jurisdiction of the provinces, which resulted in differences among the provinces and difficulties in collectively adopting modern arbitration statutes, legislation, and conventions like the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>10</sup>

Antipathy towards arbitration and the lack of harmonisation in provincial arbitration legislation created a difficult environment for international investment and business in Canada.<sup>11</sup> Accordingly, the federal and provincial governments, with leadership from the federal government, in the 1980s began to adjust their perception of arbitration and sought to reform the Canadian arbitration system with an eye towards attracting international business.<sup>12</sup>

The impetus for reform arose from an acknowledgement and increased understanding in business, commercial, and legal industries that civil litigation did not always meet the needs for adequately resolving commercial disputes.<sup>13</sup> Problems with civil litigation include procedural complexity, expense, publicity, and a reliance upon lawyers.<sup>14</sup>

Reform came by way of uniform provincial statutes in two steps.<sup>15</sup> First, upon the initiative of the federal government the provinces simultaneously ratified the New York Convention.<sup>16</sup>

Second, from 1986 to 1988 the Canadian provinces each passed the International Commercial Arbitration Act(s).<sup>17</sup> These statutes adopted in full the 1985 UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law').<sup>18</sup> In the years that followed the 1986 enactments, various provinces enacted even more progressive domestic arbitration laws based on both the Model Law and the Uniform Law Conference of Canada's Uniform Arbitration Act.<sup>19</sup> British Columbia and Ontario each updated their arbitration laws to include the 2006 amendments to the 1985 UNCITRAL Model Law. With these political and legislative decisions, Canada went from being one of the last large trading countries to ratify the New York Convention, to the first country to adopt the Model Law.<sup>20</sup> The Canadian courts since remain supportive of domestic and international arbitration.<sup>21</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

On 10 August 1986, Canada was the first country in the world to adopt the UNCITRAL Model Law with the federal Commercial Arbitration Code.<sup>22</sup>

The Canadian provinces enacted arbitration laws based on the UNCITRAL Model Law between 1986 and 1988.

### B. *Scope of application to domestic and international arbitrations*

Canada enacted arbitration legislation at both the federal and provincial level for both domestic and international arbitration. Typically, provincial legislation regulates arbitrations seated in Canada.<sup>23</sup>

The federal Commercial Arbitration Code – an adoption of the UNCITRAL Model Law – applies to all international or domestic arbitrations.<sup>24</sup> The federal Commercial Arbitration Code applies when one of the parties to the arbitration is the federal government, one of its agencies, or a federal crown corporation.<sup>25</sup> The Commercial Arbitration Code also applies where the subject matter of the dispute concerns a matter of exclusive federal jurisdiction, such as maritime or admiralty.<sup>26</sup>

The common law provinces and territories adopted domestic and international arbitration laws, with both based on the UNCITRAL Model Law.<sup>27</sup> These provinces and territories enacted 'Arbitration Acts' or 'Commercial Arbitration Acts' for domestic arbitration and 'International Commercial Arbitration Acts' for international arbitration.<sup>28</sup> While domestic arbitration legislation in these provinces and territories largely incorporates the UNCITRAL Model Law, some minor variations exist among the provinces, inter alia with respect to the power of courts to stay proceedings in favour of arbitration, consolidation of arbitration proceedings, the right to appeal, contracting out of procedural provisions, and the relationship between mediation and arbitration.<sup>29</sup> In contrast, the international arbitration legislation incorporates the New York Convention and UNCITRAL Model Law in full.<sup>30</sup>

The Québec Code of Civil Procedure provisions for arbitration apply to both domestic and international arbitration and contain provisions consistent with the UNCITRAL Model Law.<sup>31</sup>

### C. *Details and/or relevant amendments and modifications*

Canada generally applies the UNCITRAL Model Law with minor variations at both the federal and provincial levels.

Ontario and British Columbia updated their International Commercial Arbitration Acts to include the 2006 amendments to the Model Law.<sup>32</sup> Additionally, Ontario adopted Option 1 of article 7 of the 2006 Model law, which provides that arbitration agreements may be concluded 'orally, by conduct, or by other means'.<sup>33</sup>

#### *D. Relationship to the UNCITRAL Model Law*

Canadian federal and provincial arbitration legislation is largely based on the UNCITRAL Model Law.<sup>34</sup> The federal Commercial Arbitration Code and the provincial domestic Arbitration Acts and international Commercial Arbitration Acts incorporate most of the UNCITRAL Model Law with minor variations.<sup>35</sup> The Québec Civil Code and its Code of Civil Procedure include provisions that incorporate the substance of the UNCITRAL Model Law and apply to both domestic and international arbitrations.<sup>36</sup> British Columbia and Ontario updated their International Commercial Arbitration Acts to include the 2006 amendments to the UNCITRAL Model Law.<sup>37</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

Although some minor variations exist in some of the Canadian provinces, there is no significant departure from the UNCITRAL Model Law.

#### *F. Powers and duties of arbitrators*

All Canadian jurisdictions require arbitrators to be independent and impartial, and for the parties to be treated with equality and to be given an adequate opportunity to present their case. Aside from these fundamental requirements, tribunals generally have broad discretion to decide on the applicable procedure absent an agreement of the parties. In Québec, the Civil Procedure Code reiterates the importance of the principle of proportionality, which governs civil procedure.<sup>38</sup>

The only additional requirement exists in British Columbia where a court-appointed sole arbitrator, or third arbitrator, cannot hold the same nationality as one of the parties without the agreement of the parties themselves.<sup>39</sup>

#### *G. Arbitrator immunity*

Arbitrators in arbitrations seated in Canada are generally immune from civil liability, unless they conduct fraud or act in bad faith.<sup>40</sup> In the common law provinces, no specific legislation grants arbitrators immunity, but court decisions take the position that arbitrators receive immunity from civil liability absent fraud or bad faith.<sup>41</sup> Equally, in Québec the Code of Civil Procedure grants arbitrators immunity unless they act in bad faith or commit an intentional or gross fault.<sup>42</sup> Canadian law places a few general requirements on the arbitrator to receive the civil immunity:

- a. The parties must submit an existing dispute to the arbitrator;
- b. The arbitrator acts in a judicial or quasi-judicial capacity; and
- c. The arbitrator fulfilled his or her function as an independent party in compliance with the relevant applicable legislation.<sup>43</sup>

Canadian arbitral institutions also provide for the arbitrator's immunity in their institutional rules.<sup>44</sup>

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*

Canada became a party to the New York Convention on 12 May 1986.<sup>45</sup>

#### B. *Reservations to the New York Convention*

Canada has made one reservation to the New York Convention, in particular, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law, except in the case of the Province of Québec where the law does not provide for such limitation (i.e. the reservation on 'commercial' subject matters).<sup>46</sup>

#### C. *Method of domestic implementation of the New York Convention*

All the Canadian provinces and territories enacted statutes to which they attached or otherwise incorporated the full text of the convention.<sup>47</sup> The method depends on the province. Some provinces adopted the New York Convention and the UNCITRAL Model Law as a schedule in the same statute, while others adopted them in separate statutes.<sup>48</sup> In Québec the Code of Civil Procedure contains provisions that instruct the courts to take the New York Convention into consideration.<sup>49</sup>

#### D. *Other international/regional treaties*

Canada is a contracting state of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 ('ICSID Convention').<sup>50</sup> Canada ratified the ICSID Convention on 1 November 2013.<sup>51</sup>

Canada has entered into 39 bilateral investment treaties, 35 of which are in force (Mongolia, Hong Kong, Guinea, Burkina Faso, Cote d'Ivoire, Mali, Senegal, Serbia, Cameroon, United Republic of Tanzania, Benin, China, Kuwait, Slovakia, Jordan, Romania, Czech Republic, Latvia, Peru, Costa Rica, Uruguay, Armenia, Lebanon, Croatia, Thailand, Egypt, Panama, Venezuela, Barbados, Philippines, Trinidad and Tobago, Ukraine, Hungary, Poland, and the Russian Federation).<sup>52</sup>

Canada has also entered into 14 free trade agreements (Chile, Colombia, Costa Rica, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, European Free Trade Association, Honduras, Israel, Jordan, Korea, Panama, Peru, Ukraine, the North American Free Trade Agreement, and the Comprehensive Economic and Trade Agreement).<sup>53</sup>

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

Canadian courts readily support arbitration.<sup>54</sup> While in the eyes of some, the Canadian arbitration regime lags roughly 15 years behind that of the United States, the Canadian courts nonetheless regularly enforce awards without much interference and defer to arbitral tribunals.<sup>55</sup>

Canadian courts typically enforce arbitration agreements and defer to parties' agreement and the arbitral tribunal's interpretation of the parties' agreement to arbitrate.<sup>56</sup> Courts will restrict their intervention to those arbitration agreements that they regard as void, inoperative, or incapable of being performed.<sup>57</sup> In this respect, Canadian courts give a wide interpretation to the competence-competence principle.<sup>58</sup>

Both Ontario and British Columbia's arbitration statutes allow for the parties to conclude arbitration agreements orally, by conduct or other means as long as the content is ultimately recorded in some sort of writing.<sup>59</sup> However, not all Canadian provinces allow for oral arbitration agreements.

Furthermore, Canadian courts, in accordance with article 27 of the UNCITRAL Model Law, support arbitrations by permitting arbitral tribunals and parties to request assistance from the courts, obtain evidence, and compel witnesses to attend hearings or to provide evidence in their possession.<sup>60</sup>

Canadian courts take a restrictive interpretation to the grounds for refusing enforcement of awards in both the UNCITRAL Model Law and the New York Convention.<sup>61</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Canadian courts hold the power to refuse the enforcement of awards rendered in arbitrations seated in Canada or those made abroad and seeking enforcement in Canada pursuant to the grounds found in the UNCITRAL Model Law and the New York Convention.<sup>62</sup> Among the various grounds contained in these instruments, Canadian courts may refuse to enforce an award based on the ground of public policy.<sup>63</sup> Canadian courts interpret the grounds for refusing enforcement narrowly and thus refuse enforcement on public policy grounds reluctantly.<sup>64</sup>

In *Corporacion Transnacional de Inversiones S.A. de C.V. v Stet International S.p.A.*, the court held that it would refuse enforcement on public policy grounds where the award offends the most basic and explicit principles of justice and fairness.<sup>65</sup> Specifically, the court stated that such an offence would require evidencing, inter alia, 'intolerable ignorance or corruption on the part of the arbitral tribunal'.<sup>66</sup>

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

As mentioned above, Canadian legislation and courts strongly support international arbitration. The recent decisions by the Court of Appeal for Ontario in *Joseph Popack v Moshe Lipszyc et al.* demonstrate this pro-arbitration regime, while the decision of the Supreme Court of Canada in *Yugraneft Corp. v Rexx Management Corp* demonstrates that even in pro-arbitration jurisdictions parties must pay close attention to limitation periods.

In *Joseph Popack v Moshe Lipszyc et al.*<sup>67</sup> the Court of Appeal for Ontario reversed a lower court decision and granted the recognition and enforcement of an arbitral award rendered by a New York rabbinical court (the Beth Din).<sup>68</sup>

The appeal concerned the question of when an international commercial arbitration award becomes 'binding' on the parties for the purposes of recognition and enforcement. In Ontario, the 2019 International Commercial Arbitration Act (ICAA) governs recognition and enforcement of international commercial arbitration awards by making reference to the New York Convention and the UNCITRAL Model Law as amended in 2006.<sup>69</sup>

In 2013, Popack, the appellants, obtained an arbitration award against Lipszyc, the respondents, in an amount much lower than Popack sought in the arbitration and subsequently sought to set aside the award under article 34 of the UNCITRAL Model Law.<sup>70</sup> Popack challenged the award on the basis

that the arbitrators followed an improper procedure.<sup>71</sup> The Court of Appeal of Ontario affirmed the lower court decision to dismiss Popack's set-aside application. Now, Popack sought recognition and enforcement of the award based on article 35 and 36 of the Model Law. The lower court judge refused recognition and enforcement, arguing that the award had not yet become binding because Lipszyc sought to raise further issues in the arbitration and the arbitral panel expressed a willingness to consider further issues.<sup>72</sup> The Court of Appeal reversed the lower court's decision to set aside the award.<sup>73</sup>

Popack and Lipszyc jointly invested in commercial real estate in the Greater Toronto Area until a dispute arose between them in 2005, which they sought to resolve by submitting the disputes to arbitration before the Beth Din – a rabbinical court in New York – pursuant to an Agreement to Submit to Arbitration dated 10 November 2010.<sup>74</sup> The arbitration agreement subjected the Beth Din to the ICAA and allowed the arbitral panel to choose the appropriate procedures for the arbitration. After an eight-week arbitration, the Beth Din found in favour of Popack in the amount of \$400,000.<sup>75</sup>

After Popack's attempt to set aside the award in 2014 failed, Popack sought recognition and enforcement of the Beth Din award in the amount of US\$400,000 under articles 35 and 36 of the Model Law.<sup>76</sup> However, Lipszyc argued that the amount should be in Canadian dollars and not US dollars. By letter dated 18 September 2016 the Beth Din confirmed that it was under the impression that the amount was represented in Canadian dollars and that the parties did not raise the issue of US dollars during the proceedings.<sup>77</sup> The Beth Din wrote a subsequent letter dated 7 June 2017 stating that the award is stayed until Popack returns to the Beth Din for a hearing to determine whether Popack breached the arbitration agreement.<sup>78</sup>

The lower court judge refused to recognise and enforce the award on the basis that the award had not yet become 'binding' on the parties within the meaning of article 36(1)(a)(v) of the UNCITRAL Model Law and article V(1)(e) of the New York Convention.<sup>79</sup> The judge provided three reasons: (i) he disagreed with Popack that there were no pending appeals to the award, (ii) he found that Lipszyc expressed an intention to continue proceedings as to the subject matter arbitrated, and (iii) that the Beth Din made two statements which indicated that the arbitral tribunal was not *functus officio*.<sup>80</sup>

Popack appealed to the Court of Appeal for Ontario, arguing that the lower court judge erred in (i) ignoring the mandatory rules in articles 32 and 33 of the UNCITRAL Model Law, (ii) improperly deferred to the Beth Din's view of the award, and (iii) failed to recognise that the issues raised by Lipszyc were new matters and did not affect the binding nature of the award.<sup>81</sup>

Lipszyc contended that the lower court properly decided the issue as the parties requested an interpretation from the Beth Din and that 'an award cannot be binding when it is ambiguous and the tribunal has not yet declared the proceedings terminated'.<sup>82</sup>

The Court of Appeal for Ontario began its analysis by emphasising Ontario's 'pro-enforcement legal regime' and that the 'grounds for refusal of enforcement are to be construed narrowly'.<sup>83</sup> The Court of Appeal then engaged in an extensive review of scholarly and case law regarding the meaning of 'binding' and settled on the definition produced by the Supreme Court of Canada, in the *Yugraneft Corp. v Rexx Management Corp.* case stating that 'an award is "not [...] binding" under art. V(1)(e) of the Convention (or art.

36(1)(a)(v) of the Model Law) if it is open to being set aside under art. 34 of the Model Law, either because the three-month period in which to bring a motion to set aside has not expired or the set aside proceedings have not yet come to an end'.<sup>84</sup> Moreover, the Court of Appeal noted that the Arbitration Agreement stated that the arbitral tribunal's 'decision [was] not open for appeal neither in any religious court nor in any secular court'.<sup>85</sup>

The Court of Appeal then addressed the lower court's reasoning, taking the three reasons in order. First, the Court of Appeal found no pending appeals to the award as the lower court judge committed a 'palpable and overriding error' in finding that Lipszyc sought to set aside the award, because Lipszyc did not attempt to set aside the award and nor did the arbitration agreement allow for appeals.<sup>86</sup>

Second, the Court of Appeal's examination of the lower court's second and third reasons for setting aside the award required a review of the UNCITRAL Model Law. Furthermore, Lipszyc advanced two additional arguments: (i) the request for the tribunal to consider new issues falls within the procedure under art. 33 of the UNCITRAL Model Law enabling a tribunal to correct or interpret an award or make an additional award, and (ii) the request falls within the continuing jurisdiction of the Beth Din under the UNCITRAL Model Law and the language of the arbitration agreement.<sup>87</sup>

The Court of Appeal quickly disposed of Lipszyc's first argument by stating that all parties agreed at the hearing that the award is denominated in Canadian dollars.<sup>88</sup> Additionally, Lipszyc's argument that reducing the award by the amount of money 'wasted' by responding to Popack's submissions also did not represent a clerical error or request for an additional award, but rather a new claim and thus art. 33 of the UNCITRAL Model Law does not apply.<sup>89</sup>

Finally, the Court of Appeal addressed the argument that the arbitration proceedings did not cease, as reflected in the Beth Din's letters. The Court of Appeal reasoned that the lower court made an error in ignoring art. 32 of the UNCITRAL Model Law, which states that the rendering of a final award terminates the arbitral proceedings.<sup>90</sup> Lipszyc argued that arbitral tribunals can order costs awards and their request to deduct their legal costs from the award represents a continuation of the arbitral proceedings.<sup>91</sup> However, the Court of Appeal noted that the arbitration agreement does not detail the arbitral tribunal's mandate to issue costs, nor did either party mention costs at the appeal hearing, and in any event Lipszyc failed to make any request for costs within 30 days of the receipt of the award.<sup>92</sup> The Court of Appeal concluded that the costs argument represented a new issue. Finally, the question of whether the award is binding rests with the court and not with the arbitral tribunal; thus, the Beth Din's willingness to entertain new issues set out in its letter does not affect the binding nature of the award for the purposes of articles 35 and 36 of the UNCITRAL Model Law.<sup>93</sup> Accordingly, the Court of Appeal reversed the lower court's decision to set aside the award and substituted an order recognising and enforcing the award.<sup>94</sup>

In *Yugraneft Corp. v Rexx Management Corp.* the Supreme Court of Canada refused an appeal to recognise and enforce an award on the basis that Yugraneft sought to recognise and enforce the arbitral award after the expiration of the limitation period.<sup>95</sup>

As background to the dispute, Yugraneft Corporation, a Russian corporation, develops and operates oil fields in Russia and Rexx Management Corporation,



an Alberta corporation, supplied materials to Yugraneft for its oil field operations.<sup>96</sup> Due to a contractual dispute, Yugraneft commenced arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (Russian ICAC).<sup>97</sup>

On 6 September 2002, the arbitral tribunal issued a final award in favour of Yugraneft in the amount of US\$954,614.43. On 27 January 2006, Yugraneft applied to the Alberta Court for recognition and enforcement of the award – three years after the award was rendered.<sup>98</sup> Rexx challenged the recognition and enforcement of the award on two grounds: (i) the application to enforce the award was time-barred under the Alberta Limitations Act; and (ii) the court should stay the enforcement proceedings until the resolution of a criminal case in the United States, which Rexx contended would demonstrate that Yugraneft obtained the arbitral award through fraudulent activity.<sup>99</sup> Both the Alberta Court of Queen's Bench and the Alberta Court of Appeal agreed with Rexx that Yugraneft's request to enforce the award was time-barred and therefore dismissed Yugraneft's application.<sup>100</sup>

Yugraneft argued that the foreign arbitral award should be treated as a domestic judgment under section 11 of the Limitations Act, which would thus grant a 10-year limitation period. Rexx, instead, argued that the 2-year limitation period in section 3 of the Limitations Act should apply.<sup>101</sup>

The Supreme Court of Canada began by noting that in Alberta the recognition and enforcement of foreign arbitral awards is governed by the International Commercial Arbitration Act, which incorporates both the New York Convention and the UNCITRAL Model Law.<sup>102</sup> Specifically, the Supreme Court noted that the UNCITRAL Model Law represents 'a codification of international "best practices"'.<sup>103</sup>

The Supreme Court commented that both the New York Convention and the UNCITRAL Model Law do not impose limitation periods, but that article III of the New York Convention states that recognition and enforcement shall be 'in accordance with the rules of procedure of the territory where the award is relied upon'.<sup>104</sup> The question then becomes whether limitation periods fall under 'rules of procedure', to which the Supreme Court found that they do indeed. Accordingly, the Supreme Court found that article III of the New York Convention allows the contracting state to subject the recognition and enforcement of foreign arbitral awards to time limits, notwithstanding the exhaustive list of grounds for non-recognition and non-enforcement in article V.<sup>105</sup>

The Supreme Court arrived at this conclusion by (i) interpreting the treaty in accordance with the 'ordinary meaning' of its terms – as set out in the Vienna Convention on the Law of Treaties (VCLT); (ii) considering that interpretation under article 31(3) of the VCLT further requires examining the practice of contracting states, where the Supreme Court found that 53 contracting states apply limitation periods to the recognition and enforcement of foreign arbitral awards; and (iii) considering that leading scholars agree that Art. III of the New York Convention allows for local limitation periods to recognition and enforcement proceedings.<sup>106</sup> The Supreme Court found that it makes no difference whether limitation periods are considered substantive or procedural, only that they qualify as 'rules of procedure' as understood in the New York Convention.<sup>107</sup>

ADR Chambers, a domestic Canadian arbitration services provider, raised the argument that while domestic limitation periods can apply to the recognition

or enforcement of foreign arbitral awards, the limitation period must be no more restrictive than the most permissive limitation period in the country.<sup>108</sup> To this end, both Québec and British Columbia provide 10-year limitation periods for the recognition or enforcement of foreign arbitral awards.<sup>109</sup> The Supreme Court disagreed with ADR Chambers by arguing that under Canada's Federal Constitution, questions of recognition and enforcement of arbitral awards fall within provincial jurisdiction.<sup>110</sup> Furthermore, the Supreme Court noted that article XI of the New York Convention expressly allows for jurisdiction over the subject matter of the treaty to lie with a sub-national entity (i.e. the provinces) in federal states.<sup>111</sup>

The Supreme Court then turned to the Limitations Act 2002 itself to determine what limitations period applied to Yugraneft's award. The Supreme Court began by noting that the purpose of the Limitations Act 2002 was to streamline the law of limitations by limiting the number of exceptions and providing a uniform limitation period for most actions.<sup>112</sup> Section 12 of the Limitations Act 2002 provides that it applies even to claims subject to foreign law and that this, in conjunction with very specific exceptions, suggests that the Limitations Act 2002 applies to all claims for a remedial order not expressly excluded by the statute.<sup>113</sup> Therefore, the recognition and enforcement of foreign arbitral awards is subject to the Limitations Act 2002.

This conclusion runs contrary to the submissions of the London Court of International Arbitration, which contended that only a 'clear expression of legislative intent can subject the recognition and enforcement of a foreign arbitral award to procedural requirements not contained in the Model Law and that the Limitations Act is not sufficiently explicit in this regard'.<sup>114</sup> Nevertheless, the Supreme Court found the legislative history and intentions of the Alberta legislature sufficiently clear to include foreign arbitral awards within the Limitations Act 2002.<sup>115</sup>

The final analysis required determining whether the 10-year limitation period for remedial orders based on a judgment or order for the payment of money applied to the foreign arbitral award and whether the discoverability rule applied in this specific circumstance. First, the Supreme Court held that an arbitral award is not a judgment or a court order and thus not subject to the 10-year limitation period, but instead the 2-year limitation period.<sup>116</sup>

Second, the Supreme Court analysed the discoverability requirements. Under section 3 of the Limitations Act 2002, the limitation period only begins to run upon meeting the requirements of discoverability. The Supreme Court noted that Russia is a UNCITRAL Model Law jurisdiction and, thus, under article 34 of the UNCITRAL Model Law, the parties receive three months from the time the award is rendered to challenge the award.<sup>117</sup> The limitations period cannot begin until after these three months elapse. Accordingly, Yugraneft had two years after 6 December 2002 to commence proceedings against Rexx in Alberta. Yugraneft brought its recognition and enforcement action on 27 January 2006 and, thus, the Supreme Court held that the action was clearly time-barred.<sup>118</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Arbitration in Canada follows a long tradition of ad hoc arbitration; nonetheless, parties regularly use institutional arbitration and the trend continues to increase.<sup>119</sup> Indeed, parties to international arbitrations seated in Canada use the services of international arbitral institutions.<sup>120</sup>

Traditionally, no truly national arbitral institutions existed; however, in recent years domestic arbitral institutions have appeared.<sup>121</sup> These domestic arbitral institutions provide their own set of procedural rules and administer both domestic and international arbitrations.<sup>122</sup> New market entrants include ADR Chambers International, the ADR Institute of Canada, the British Columbia International Commercial Arbitration Centre and the Canadian Commercial Arbitration Centre.

Additionally, Canadian establishments such as Arbitration Place and ADR Chambers provide hearing facilities and rosters of arbitrators.<sup>123</sup>

International arbitrations seated in Canada also typically use the services provided by international arbitration institutions such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for Dispute Resolution (ICDR).<sup>124</sup>

Parties to ad hoc arbitration seated in Canada typically use standard rules of procedure such as the UNCITRAL Model Law Rules.<sup>125</sup>

#### *B. Measures to strengthen institutional arbitration capabilities*

Institutional arbitration in Canada derives support from the provinces. Recent updates to provincial arbitration laws in both Ontario and British Columbia brought their arbitration laws in line with the 2006 UNCITRAL Model Law, including provisions on interim measures, third-party funding and confidentiality.<sup>126</sup> Modern arbitration laws allow domestic arbitral institutions to provide services competitive with leading international arbitral institutions.

While pinpointing the roots of industry support for arbitration in Canada may present difficulties, the success of such support readily displays itself by the fact that the numbers of arbitrations seated in Canadian cities such as Vancouver, Calgary, Toronto and Montreal have noticeably increased in recent years.<sup>127</sup>

#### *C. Submission of disputes to arbitration vs. litigation*

No information was available.

#### *D. Participation by foreign counsel in international arbitrations*

Non-Canadian nationals commonly serve as arbitrators in arbitrations seated throughout Canada.<sup>128</sup> Federal and provincial arbitration laws do not provide immigration or nationality restrictions for foreign lawyers participating in arbitrations seated in Canada.<sup>129</sup> Quite the inverse, some provinces such as Québec, Ontario, and British Columbia adopted specific regulations and issued directives allowing foreign counsel to act without obtaining a licence from the respective law societies.<sup>130</sup> Foreign lawyers acting as counsel or arbitrators in arbitrations seated in Canada thus must abide by the codes of their home jurisdiction bars or law societies.<sup>131</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

No information was available.

##### 2. Time taken for enforcement/annulment proceedings

No information was available.

##### 3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

Canadian courts presently struggle to decide civil cases in a timely manner due to the requirement of prioritising criminal cases. A 2016 decision by the Supreme Court of Canada placed a requirement upon provincial courts to try criminal offences within 18 months of the charge, and Superior Court charges within 30 months.<sup>132</sup> One can readily understand and appreciate the criminal justice benefits of the Supreme Court's decision; however, the consequence of the decision also means that Canadian courts must prioritise deciding criminal cases over civil cases. Accordingly, since the Supreme Court's decision, a substantial backlog of civil and commercial cases has arisen.<sup>133</sup>

While national statistics are not readily available, some reports indicate that in 2016 a civil case in Calgary would arrive at the trial phase in approximately 92 weeks, whereas in 2019 it would take roughly double (180 weeks) for the civil case to arrive at the trial phase.<sup>134</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 910 days to resolve a commercial dispute in a first-instance court in Toronto, Canada – 30 days for filing and service of court processes, 730 days for trial and judgment and 150 days for enforcement of judgment.<sup>135</sup> Toronto ranks below the OECD high income regional average, where it takes an average of 582.4 days to resolve commercial disputes in first-instance courts.<sup>136</sup> In terms of overall ease of enforcing contracts, Toronto scored 57.13 of 100 and ranked 96 of 190.<sup>137</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

*G. Statistics on judges and lawyers per capita*

Federally appointed judges numbered 1,224 as of 1 August 2019.<sup>138</sup> There are approximately 1,140 provincial judges.<sup>139</sup>

As of 2017, lawyers in Canada numbered 127,707 – total law society membership as of 2017.<sup>140</sup>

## **VI. FUNDING FOR LEGAL CLAIMS**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for commercial dispute resolution. Set up by the Act Respecting legal aid and the provision of certain other legal services (2010, c.12, s. 1),<sup>141</sup> Canada provides legal aid services at the federal and provincial level in criminal or penal matter. A proceeding or financial aid may be provided to economically disadvantaged persons, complex criminal proceedings facing incarceration, and for young individuals charged under the Youth Criminal Justice Act.<sup>142</sup>

There is no indication that legal aid programmes cover arbitrations. In Québec, the 'Commission des services juridiques' has discretionary power to grant a legal aid in matters other than criminal or penal. Cases that threaten a person's ability to provide their essential needs may be provided with legal aid.<sup>143</sup> In an Small and Medium Enterprises alternative dispute settlement, the question is open whether the 'Commission des services juridiques' may provide legal aid.

### B. Third-party funding

Canada does not prohibit third-party funding agreements.<sup>144</sup> Many cases receive third-party funding; however, few court decisions or statements exist that specifically support funding arrangements.<sup>145</sup> Most judicial statements about third-party funding relate to class action cases, where the courts reserve more power to intervene than in international arbitration matters.<sup>146</sup> Some questions persist whether third-party funding arrangements are champertous; indeed, courts may review the terms of the funding arrangement in certain situations.<sup>147</sup> The province of British Columbia recently amended its legislation to specifically provide that third-party funding does not contravene public policy in British Columbia.<sup>148</sup>

Most of the known international third-party funders actively provide funding in the Canadian market.

### C. Contingency fees

Contingency fees are permitted in Canada.<sup>149</sup> Federal and provincial courts consistently provide favourable statements in support of contingency fees as a method to provide access to justice for those who could not otherwise afford to uphold their legal rights.<sup>150</sup> Courts emphasise that contingency fees must be fair and reasonable.<sup>151</sup>

### D. Insurance for legal expenses

Insurance for legal expenses is available in Canada and provided by various companies.<sup>152</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
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- 4 Heather de Berdt Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia: "The Commercial Arbitration Act"', *The Nova Scotia Law News*, Vol. 25, 1.
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- 7 Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia', 1; Alvarez (1987), 'The Role of Arbitration in Canada – New Perspectives', 247, 249.
- 8 Fouchard, Gaillard & Goldman (1999), *On International Commercial Arbitration*, para. 170.
- 9 *Ibid.*
- 10 *Ibid.*
- 11 Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia', 1.

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- 13 Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia', 24.
- 14 Ibid.
- 15 Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia', 1; Fouchard, Gaillard & Goldman (1999), para 170.
- 16 Fouchard, Gaillard & Goldman (1999), *On International Commercial Arbitration*, para 170.
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- 18 Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia', 24; Hamilton (2003), 'The Impact of International Commercial Arbitration...', 12.
- 19 Romilly (2000), 'New Directions for Arbitration and Mediation in Nova Scotia', 24.
- 20 Hamilton (2003), 'The Impact of International Commercial Arbitration...', 14.
- 21 Ibid., 16.
- 22 Lexology, 'Arbitration in Canada', Robert Deane, Craig Chiasson and Hugh Meighen <<https://www.lexology.com/library/detail.aspx?g=efbaad02-73be-42de-a87c-f384ecb0ec28>> accessed 31 August 2019.
- 23 Thomson Reuters Practical Law (2013), 'Arbitration Procedures and Practice in Canada: Overview', Lawrence Thacker [https://uk.practicallaw.thomsonreuters.com/0-502-1672?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-502-1672?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 31 August 2019.
- 24 Global Arbitration Review (2019), 'Canada' <https://globalarbitrationreview.com/jurisdiction/1004963/canada>> accessed 31 August 2019.
- 25 Ibid.
- 26 Ibid.
- 27 Ibid.
- 28 Lexology, 'Arbitration in Canada'.
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- 30 Ibid.
- 31 Hamilton (2003), 'The Impact of International Commercial Arbitration...', 16; Global Arbitration Review, 'Canada'; Lexology, 'Arbitration in Canada'; Thomson Reuters Practical Law (2013), 'Arbitration Procedures and Practice in Canada: Overview'.
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- 37 Global Arbitration Review, 'Canada'.
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- 39 Global Arbitration Review, 'Canada'.
- 40 Global Arbitration Review, 'Canada'; Lexology, 'Arbitration in Canada'.
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- 42 Global Arbitration Review, 'Canada'.
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- 62 Global Legal Insights (2019), 'International Arbitration 2019: Canada'.
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- 65 *Corporacion Transnacional de Inversiones S.A. de C.V. v Stet International S.p.A.*, 45 O.R. (3d) 183, 22 September 1999; Global Legal Insights (2019), 'International Arbitration 2019: Canada'.
- 66 *Corporacion Transnacional de Inversiones S.A. de C.V. v Stet International S.p.A.*, 45 O.R. (3d) 183, 22 September 1999; Global Legal Insights (2019), International Arbitration 2019: Canada.
- 67 *Popack v Lipszyc*, 2018 ONCA 635.
- 68 See generally Canada No. 2019-1, *Joseph Popack v Moshe Lipszyc et al.*, Court of Appeal for Ontario, Docket No. C64359, 12 July 2018 in Schill (ed.), *Yearbook Commercial Arbitration 2019 – Volume XLIV* (Dec. 2019).
- 69 *International Commercial Arbitration Act 2017*, S.O. 2017, c. 2, Sched. 5.
- 70 *Popack v Lipszyc*, 2018 ONCA 63, para 4.
- 71 Ibid.
- 72 Ibid., paras 5–6.
- 73 Ibid., para 7.
- 74 Ibid., para 9.
- 75 Ibid., para 14.
- 76 Ibid., para 19.
- 77 Ibid., para 22.
- 78 Ibid., para 23.
- 79 Ibid., para 25.
- 80 Ibid., para 26.
- 81 Ibid., para 28.
- 82 Ibid., para 30.
- 83 Ibid., paras 35–40.

- 84 Ibid., paras 41–51.
- 85 Ibid., para 52.
- 86 Ibid., para 58.
- 87 Ibid., para 61.
- 88 Ibid., para 64.
- 89 Ibid., paras 65–69.
- 90 Ibid., para 75.
- 91 Ibid., para 78.
- 92 Ibid., para 80.
- 93 Ibid., paras 84–85.
- 94 Ibid., para 88.
- 95 *Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19.
- 96 *Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19, para 2.
- 97 Ibid.
- 98 Ibid., para 3.
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- 105 Ibid., para 18.
- 106 Ibid., paras 19–23.
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- 108 Ibid., para 30.
- 109 Ibid., para 31.
- 110 Ibid., para 32.
- 111 Ibid., para 32.
- 112 Ibid., para 36.
- 113 Ibid., para 39.
- 114 Ibid., para 40.
- 115 Ibid., para 41.
- 116 Ibid., paras 44–49.
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- 118 Ibid., para 56.
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- 134 Ibid.
- 135 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/canada#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/canada#DB_ec)> accessed on 31 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
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# CYPRUS<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

As a result of British rule in Cyprus from 1878 until 1960, the country's legal system is strongly influenced by the English common law tradition.<sup>2</sup> The Cyprus Arbitration Law 1944 (1944 Law) bears very strong similarities to the English Arbitration Act 1889.<sup>3</sup>

### B. *Description of prior legislation and reasons for its replacement*

Cyprus had no arbitration law prior to 1944.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Cyprus has two arbitration acts that operate in parallel: (i) the 1944 Law, which governs domestic arbitral proceedings and (ii) the Cyprus International Commercial Arbitration Law 101/1987 (ICA Law 1987), which applies if the arbitration is of international commercial nature.<sup>4</sup> The provisions of the ICA Law 1987, except ss 8, 9, 35 and 36, are applicable only in cases where the arbitration proceedings are held in Cyprus. The ICA Law 1987 is modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985.<sup>5</sup>

### B. *Scope of application to domestic and international arbitrations*

Arbitrations of a domestic nature are governed by the 1944 Law.<sup>6</sup> If the arbitration is of an international commercial nature, it is governed by the ICA Law 1987.<sup>7</sup> Finally, if the arbitration agreement concerns a matter within the admiralty jurisdiction, the law applicable will be the English Arbitration Act 1950.<sup>8</sup>

The arbitration is international if: (a) the parties to an arbitration agreement have their places of business in different countries; or (b) the place of arbitration or a substantial part of the obligations is situated outside the state in which the parties have their places of business.<sup>9</sup>

### C. *Details and/or relevant amendments and modifications*

In 1987 Cyprus enacted its ICA Law 1987, which was modelled on the UNCITRAL Model Law 1985.

### D. *Relationship to the UNCITRAL Model Law*

The ICA Law 1987 is the Cypriot adaptation of the 1985 UNCITRAL Model Law.<sup>10</sup> The UNCITRAL Model Law was largely adopted verbatim.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

All the mandatory provisions contained in the UNCITRAL Model Law were adopted verbatim in the ICA Law 1987. The difference between the two lies in that the ICA Law 1987 goes further and provides an express definition of the term 'commercial' arbitration, stating that it 'refers to matters arising from relationships of a commercial nature, whether contractual or not'.<sup>11</sup>

### F. *Powers and duties of arbitrators*

According to the ICA Law 1987, arbitrators have the power:

- to rule on their own jurisdiction;<sup>12</sup>
- to grant interim measures and preliminary orders at the request of a party, unless otherwise agreed by the parties;<sup>13</sup> and
- to appoint experts and require a party to give the expert any relevant information.<sup>14</sup>

#### G. Arbitrator immunity

The ICA Law 1987 is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Cyprus became a party to the New York Convention on 29 December 1980.<sup>15</sup>

#### B. Reservations to the New York Convention

Cyprus has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>16</sup>

#### C. Method of domestic implementation of the New York Convention

The Convention has been ratified and implemented in Cyprus by the Cyprus Ratification Law 84/1979.<sup>17</sup>

#### D. Other international/regional treaties

Cyprus has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') of 1965,<sup>18</sup> and has signed the Convention on Conciliation and Arbitration within the Organization for Security and Cooperation in Europe (OSCE) of 1992.<sup>19</sup>

Cyprus is also a party to the Energy Charter Treaty,<sup>20</sup> and the country has also entered in 25 free trade agreements through the EU mechanisms.<sup>21</sup>

Cyprus has entered into 25 bilateral investment treaties, 24 of which are in force (Albania, Jordan, Islamic Republic of Iran, Qatar, Syrian Arab Republic, Moldova, San Marino, Montenegro, Serbia, Libya, Malta, Czech Republic, Lebanon, China, Egypt, Israel, Belarus, Seychelles, Armenia, Greece, Romania, Belgium-Luxembourg, Hungary, and Bulgaria).<sup>22</sup>

### IV. RELEVANT CASE LAW

#### A. Approach of the national courts to the enforcement of arbitration agreements

With regard to the enforcement of arbitration agreement, the World Bank Doing Business 2019 Report indicates that valid arbitration clauses or agreements are usually enforced by the courts in Cyprus.<sup>23</sup>

The national courts in Cyprus will only grant stay of proceedings in favour of arbitration if one of the parties applies for it and actually proves that the said dispute falls within the scope of arbitration agreement. They have made clear that a mere reference to a dispute is insufficient.<sup>24</sup>

According to some commentators, the courts' attitude does not reveal any 'enmity towards arbitration proceedings'.<sup>25</sup> One setback that may be identified is that in some of the cases the court of first instance tends to wrongly refuse stay of proceedings; however, as shown below, this has easily been remedied by the Court of Appeal.<sup>26</sup>

The judicial attitude can be observed in the *Bienvenito Steamship Co Ltd v Georghios Chr Georhiou and Another*,<sup>27</sup> decided before the establishment of the Republic of Cyprus, but adopted by the Supreme Court of Cyprus.<sup>28</sup> In that case, although there was an arbitration agreement in place, one of the parties initiated court proceedings.

The arbitration clause provided that 'all disputes which may arise under this agreement shall be referred to arbitration'. In analysing this wording along with article 8 of the 1944 Law (stay of proceedings), the court adopted the following three principles:

1. The dispute in question falls within the scope of application of the arbitration clause
2. The courts have discretionary power when deciding whether or not to stay proceedings
3. In order for the court to deny the 'effect' of the arbitration agreement, there must be a 'substantial reason' to that end, regardless of whether it is fact or law or both.

The District Court in this case had decided not to stay proceedings although it acknowledged that the dispute fell within the scope of the arbitration clause.<sup>29</sup> The court was not satisfied that the ship-owners wanted to go to arbitration due to the initiation of court proceedings by the charters. This decision was, however, reversed by the Court of Appeal, which stayed the proceedings. The Court of Appeal took this decision even though neither of the parties challenged the District Court's decision with regard to its determination on the scope of the arbitration clause. In fact, the Court of Appeal stated:

It is well established by English authorities dealing with the corresponding provisions of the English Arbitration Act, 1889, section 4, that when a court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties, the power of the court to stay the proceedings is discretionary. In considering this appeal we have therefore tried to bear constantly in mind the principles upon which a superior court should act in an appeal from the exercise of a discretion given to a lower court: (See the case of *Osenton v Johnston*, (1941) 2 All E.R. 245). Those principles have a special application when the exercise of the discretion given to the lower court rests partly on the court's view on a question of fact. Nevertheless, we feel compelled to examine the grounds upon which the District Court came to the conclusion that they were not satisfied that the ship-owners were willing to go to the arbitration at the commencement of the action by the charterers.

In another case, *Yiola A. Skaliotou v Christoforos Pelekanos*,<sup>30</sup> the principles above were reaffirmed by the Supreme Court. In particular, in dealing with a stay application:

- The dispute must fall within the scope of the arbitration agreement and it must be clear that this is what parties want. Mere reference to a dispute is not enough;

- The court must have a 'sufficient' reason to refuse to stay proceedings and refer the matter to arbitration;
- The court's power to stay proceedings is discretionary.

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The main authority on this is the decision of the Supreme Court of Cyprus Appeal Jurisdiction in *Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*. In that case, Kenya sought to set aside the award before the Cypriot courts, arguing that the tribunal had not complied with its plea of *lis alibi pendens* because it did not consider or admit its counter-claim requesting suspension of the arbitral proceedings pending the Kenyan proceedings. The Cypriot Court of First Instance rejected Kenya's request to suspend the execution of the award pending the proceedings in Kenya.<sup>31</sup>

Kenya subsequently appealed this decision, raising two arguments: (i) its counter-claim had not been admitted in the arbitration, and (ii) the Court of First Instance should have suspended the execution of the award.<sup>32</sup>

The Court of Appeal determined that the arbitral tribunal's decision not to admit the counter-claim was not a violation of public policy and upheld the Court of First Instance's decision that 'the remedy of a stay, unlike in enforcement proceedings under the New York Convention or the UNCITRAL Model Law as adopted in Cyprus, was not available with respect to setting aside proceedings'.<sup>33</sup>

Notably, by citing the *Law of Contract* by G. H. Treitel,<sup>34</sup> the Cyprus Supreme Court defined the term 'public policy' in the following terms:

"Public policy is a variable notion, depending on changing manners, morals and economic conditions. In theory, this flexibility of the doctrine of public policy could provide a judge with an excuse for invalidating any contract which he violently disliked....

On the other hand, the law does adapt itself to changes in economic and social conditions, as can be seen particularly from the development of the rules as to contracts in restraint of trade. This point has often been recognised judicially....

The present attitude of the courts represents a compromise between the flexibility inherent in the notion of public policy and the need for certainty in commercial affairs."<sup>35</sup>

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The interpretation of the New York Convention and a good example of national courts' attitude towards the enforcement of awards (notably with regards to public policy) is discussed – among other issues – in a 1999 Cyprus Supreme Court decision.<sup>36</sup>

In that case, the Supreme Court of Cyprus confirmed that foreign awards need to be enforced in accordance with the rules of the New York Convention subject at all times to 'the inherent jurisdiction, reinforced by statute, to stay or strike out an action or to restrain by injunction the institution or continuance of proceedings in a foreign court or the enforcement of foreign judgments, whenever it is necessary to prevent injustice'.<sup>37</sup>

## V. ARBITRATION LANDSCAPE

### A. *Institutional arbitration*

Prior to 2010 there was no permanent arbitral institution located in Cyprus that was able to offer administrative and procedural support for the parties in both domestic and international arbitration proceedings.<sup>38</sup>

Currently, the most prominent arbitral institutions in Cyprus are the Cyprus Arbitration and Mediation Center (CAMC) and the Cyprus Eurasia Dispute Resolution and Arbitration Center (CEDRAC).<sup>39</sup>

With regard to the CEDRAC, the primary goal of its establishment was to provide means for 'international business people' to resolve their commercial disputes in Cyprus.

Currently, the CEDRAC offers only arbitration services. Nevertheless, it is in the process of establishing a mediation unit to enable it to provide mediation services in the future as well.<sup>40</sup> CEDRAC also takes the initiative to organise annual conferences and events on arbitration in order to further Cyprus's development as a potential arbitration hub.

### B. *Measures to strengthen institutional arbitration capabilities*

Based on the available data, it is unclear whether the Government of Cyprus has recently undertaken any measures to strengthen institutional arbitration.<sup>41</sup> It is nevertheless suggested that there have been some efforts initiated in recent years by the Cyprus Chamber of Commerce and Industry and the CEDRAC to develop the country as a centre of arbitration.<sup>42</sup>

These efforts include the capacity-building of lawyers, accountants, architects and engineers, all of whom would readily offer their services as either arbitrators or parties' counsel.<sup>43</sup>

### C. *Submission of disputes to arbitration vs. litigation*

There are no clear statistics on the number of arbitrations in Cyprus. Anecdotally, however, it appears that the number of arbitrations held in Cyprus is increasing year on year.<sup>44</sup> In fact, since 2008 it is reported that more than 40 arbitration-related decisions have been issued by the Cyprus Courts of First Instance.<sup>45</sup>

On the other hand, a 2014 EU study indicated that 'other than construction disputes, few other commercial disputes are commonly referred to arbitration in Cyprus, reflecting the fact that arbitration is relatively unpopular with both practicing lawyers and within the government in Cyprus'.<sup>46</sup>

With regard to the estimated timeframe for the recognition and enforcement of awards, one source indicates that it is between 3 and 12 months.<sup>47</sup>

The ICC Statistics indicate that in 2017, there were 13 parties (7 claimants and 6 respondents) and one co-arbitrator from Cyprus.<sup>48</sup> Moreover, there appears to be no data regarding the percentage of disputes submitted to arbitration (as opposed to regular litigation before national courts).

### D. *Participation by foreign counsel in international arbitrations*

As a member of the European Union, Cyprus is bound by European law and especially Directive 98/5/EC on qualifications of lawyers (Qualifications of Lawyers Directive)<sup>49</sup> and Directive 77/249/EEC.<sup>50</sup> The goal behind both directives is to provide freedom of legal services within the EU by facilitating

the effective exercise of the legal profession. Both directives have been transposed into the Cypriot national law by virtue of an amendment to the Advocates Law (Cap. 2) 1955.

Consequently, EU lawyers may practise within any country of the EU by using their home jurisdiction's title and upon presenting documents evidencing their legal qualification.

However, if the lawyer wants to provide legal services on a permanent basis in Cyprus, he/she would have to apply for registration at the Bar Council. Further, they would need to be accompanied by a Cypriot qualified lawyer in case they need to go to court. All EU foreign (non-Cypriot) lawyers may apply to be qualified as lawyers in Cyprus under the same conditions as Cyprus nationals.

With respect to non-EU lawyers, they can also practise in Cyprus both temporarily or on a permanent basis as long as they obtain a special permission from the Bar Council and provide the necessary certificates (such as the qualification certificate) to the Registrar of the Supreme Court. Similar to EU lawyers, they will be able to appear in court only if accompanied by Cypriot qualified lawyers.<sup>51</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

No information was available.

##### 2. Time taken for enforcement/annulment proceedings

No information was available.

##### 3. Percentage of awards annulled/not enforced

No information was available.\

#### *F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 1,100 days to resolve a commercial dispute in a first-instance court in Cyprus – 20 days for filing and service of court processes, 900 days for trial and judgment and 180 days for enforcement of judgment.<sup>52</sup> Cyprus ranks well below average in the Europe and Central Asia region, where it takes an average of 496.3 days to resolve commercial disputes in first-instance courts.<sup>53</sup> In terms of overall ease of enforcing contracts, Cyprus scored 48.59 of 100 and ranked 138 of 190.<sup>54</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>55</sup>

#### *G. Statistics on judges and lawyers per capita*

The available data shows that in 2016 there were approximately 13 judges and 430 lawyers (per 100,000 inhabitants) in Cyprus.<sup>56</sup>

## **VI. FUNDING FOR LEGAL CLAIMS**

### *A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for arbitration in Cyprus, but there is no information to indicate that legal aid is provided for businesses. Cyprus provides free legal assistance in cross-border disputes under The Legal Aid Act of 2002

for natural persons.<sup>57</sup> While this does not include a business, the Act also provides for legal aid to 'a person who is domiciled or habitually resident in the Republic'.<sup>58</sup> There is no definition for 'a person' in the Act, although the difference in wording indicates that this latter definition may include a corporation. This provision covers costs 'in respect of legal aid expenses incurred by a lawyer practicing in the Republic, provided that the case relates to a case before a court of another Member State',<sup>59</sup> which is defined as a Member of the European Union, excluding Denmark.<sup>60</sup> Therefore this assistance is limited to litigation matters and not arbitration. The only other legal aid provided for is in criminal, family, or human rights law.<sup>61</sup>

#### B. *Third-party funding*

No jurisprudence or literature appears to be available on whether the doctrines of champerty and maintenance are applicable in Cyprus or on the availability of third-party funding in the country. However, since Cyprus law is based on the English common law, and the crimes and torts of maintenance and champerty applied in the United Kingdom at the time of its independence in 1960, it is likely that the rules still exist in Cyprus by virtue of the common law. No specific statutes directly address third-party funding.<sup>62</sup> The Civil Litigation in Court Regulation of 2008 lists costs that are recoverable, and it is normal for an unsuccessful party to pay the costs of the winning party. However, this does not extend to third parties. Third-party funding may therefore not be legally permitted.

#### C. *Contingency fees*

Contingency fees are prohibited in Cyprus. The most common structure used for legal fees are hourly rates, but retainers and caps are also used.<sup>63</sup>

Legal fees in Cyprus are generally regulated and governed by the Bar Council when it comes to non-contentious matters. In contentious matters, the Supreme Court has power to fix fees by taking into account the time involved and the size of the action.<sup>64</sup>

All fee agreements must be in writing.<sup>65</sup>

#### D. *Insurance for legal expenses*

Legal expense insurance is available in Cyprus.<sup>66</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Michalis Kyriakides and Nicolas Kyriakides (2016), 'Cyprus', in Jacob C Jorgensen (ed.), *Finding, Freezing and Attaching Assets: A Multi-Jurisdictional Handbook*, Kluwer Law International, 81.
- 3 Alecos Markides (2018), 'Cyprus', in James H Carter (ed.), *The International Arbitration Review*, 9th edn, The Law Reviews, 142–43.
- 4 *Ibid.*, 141–42. It is nevertheless noted that arbitrations in respect of admiralty matters are still governed by the English Arbitration Act of 1950.
- 5 *Ibid.*
- 6 *Ibid.*
- 7 *Ibid.*



- 8 Ibid.
- 9 ICA Law 1987, section 2(2).
- 10 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](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 27 August 2019.
- 11 Markides (2018), 'Cyprus', 142. See also Christiana Pyrkotou and Athina Chatziadamou (2015), *The International Comparative Legal Guide to International Arbitration 2015*, 12th edn, Chapter 28 – Cyprus, 229.
- 12 ICA Law 1987, section. 16.
- 13 Ibid., section 17.
- 14 Ibid., section 26.
- 15 See New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed on 31 July 2019.
- 16 Ibid.
- 17 International Comparative Legal Guides (2019), 'Enforcement of Foreign Judgments 2018 | Cyprus' <<https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/cyprus>> accessed 27 August 2019.
- 18 See ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>>.
- 19 OSCE, 'Convention on Conciliation and Arbitration within the OSCE' <<https://www.osce.org/cca/111409?download=true>> accessed 27 August 2019 and OSCE (2018), 'List showing signatures and ratifications or accessions with respect to the Convention on Conciliation and Arbitration within the OSCE' <<https://www.osce.org/cca/40119?download=true>> accessed 27 August 2019.
- 20 International Energy Charter, 'The Energy Charter Treaty' <<https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>> accessed 27 August 2019.
- 21 European Commission (2018), 'Report on Implementation of EU Free Trade Agreements: 1 January 2017–31 December 2017'.
- 22 UNCTAD Investment Policy Hub, 'Cyprus' <<https://investmentpolicy.unctad.org/country-navigator/56/cyprus>> accessed 31 August 2019.
- 23 World Bank Group (2019), 'Doing Business 2019: Training for Reform – Economy Profile: Cyprus', 49–50.
- 24 See *Yiola A. Skaliotou v Christoforos Pelekanos* (1976) 1 CLR 251.
- 25 A Markides, 'Judicial Attitudes in Cyprus' (speech delivered at CEFRAC Inaugural Conference, Nicosia, 18 November 2011).
- 26 Ibid.
- 27 *Bienvenito Steamship Co Ltd v Georghios Chr Georhiou and Another*, 18 CLR 215.
- 28 See *Yiola A. Skaliotou v Christoforos Pelekanos* (1976) 1 CLR 251, 258.
- 29 *Bienvenito Steamship Co Ltd v Georghios Chr Georhiou and Another*, 18 CLR 215.
- 30 *Yiola A. Skaliotou v Christoforos Pelekanos* (1976) 1 CLR 251.
- 31 Cyprus No. 1, *The Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, Supreme Court of Cyprus Appeal Jurisdiction, Civil Appeal No. 10071, 28 April 1999 <<http://www.kluwerarbitration.com/document/ipn22080>> accessed 27 August 2019.
- 32 Ibid.
- 33 Ibid.
- 34 G H Treitel (1991), *The Law of Contract*, 8th edn, 424–25.
- 35 Cyprus No. 1, *The Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, Supreme Court of Cyprus Appeal Jurisdiction, Civil Appeal No. 10071, 28 April 1999.
- 36 Ibid., see also Alecos Markides (2018), 'Cyprus', 148. For the sake of completeness, the New York Convention website refers to three more court decisions in Cyprus that have applied the New York Convention, see New York Arbitration Convention,

- 'Court Decisions – Decisions per Country' <<http://www.newyorkconvention.org/court+decisions/decisions+per+country>> accessed 27 August 2019.
- 37 Cyprus No. 1, *The Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, Supreme Court of Cyprus Appeal Jurisdiction, Civil Appeal No. 10071, 28 April 1999.
- 38 European Parliament (2014), Directorate General for Internal Policies, *Legal Instruments and Practice of Arbitration in the EU (Study)*, PE 509.988, 73.
- 39 The In-House Lawyer, 'What arbitral institutions (if any) exist in your country?' <[http://www.inhouselawyer.co.uk/wgd\\_question/what-arbitral-institutions-if-any-exist-in-your-country/](http://www.inhouselawyer.co.uk/wgd_question/what-arbitral-institutions-if-any-exist-in-your-country/)> accessed 27 August 2019. NB: the Cyprus Chamber of Commerce and Industry is also mentioned in some instances (see e.g. Kypros Chrysostomides and others (2016), 'Commercial Arbitration – Cyprus' *Global Arbitration Review*, 28 July 2016, and Haviaras & Philippou L.L.C., 'The Legal 500 & The In-House Lawyer Comparative Legal Guide – Cyprus: Arbitration', 18 <<http://www.inhouselawyer.co.uk/practice-areas/international-arbitration-3rd-edition/cyprus-arbitration-3/>> accessed 27 August 2019) but their website does not seem to provide clear indications in this respect (see <<http://www.ccci.org.cy/>> accessed 27 August 2019 and <<http://www.intracen.org/Arbitration-Service-of-the-Cyprus-Chamber-of-Commerce-and-Industry/>> accessed 27 August 2019). There is nevertheless an ICC National Committee for Cyprus (<<https://iccwbo.org/about-us/global-network/regional-offices/#1483450013310-2f13f3f9-d678>> accessed 27 August 2019). One source also refers to the Chartered Institute of Arbitrators – Cyprus Branch, which has adopted its own set of Arbitration Rules, but these do not appear to be publicly accessible, see <<https://netlawmedia.com/news/authorities-faculties/ciarb-cyprus-branch-arbitration-rules-and-scheme/>> accessed 27 August 2019.
- 40 See CEDRAC, 'Dispute Resolution Services' <[http://www.cedrac.org/wwwroot/dispute\\_res\\_serv.htm](http://www.cedrac.org/wwwroot/dispute_res_serv.htm)> accessed 27 August 2019.
- 41 The European Commission (2018), 'The 2018 EU Justice Scoreboard', European Union, 29 (Figure 35, regarding the member states' efforts in promoting the use of ADR methods). See also Antonis Loizou Frics (2017), 'Improving real estate arbitration in Cyprus', *Cyprus Mail Online*, 17 September 2017 <<https://cyprus-mail.com/2017/09/17/improving-real-estate-arbitration-in-cyprus/>> accessed 27 August 2019.
- 42 Markides (2018), 'Cyprus', 146.
- 43 *Ibid.*, 146.
- 44 *Ibid.*, 149. In this respect it should, however, be noted that the 2017 ICC Statistics do not list Cyprus in the selected countries as place of arbitration; see *ICC Dispute Resolution Bulletin 2018*, Vol. 2, 60.
- 45 Markides (2018), 'Cyprus' 146.
- 46 European Parliament (2014), Directorate General for Internal Policies, *Legal Instruments and Practice of Arbitration in the EU (Study)*, PE 509.88, 74.
- 47 Haviaras & Philippou, *The Legal 500 & The In-House Lawyer Comparative Legal Guide – Cyprus: Arbitration*, 30.
- 48 *ICC Dispute Resolution Bulletin 2018*, Vol. 2, 55, 58.
- 49 Directive 98/5/EC Of The European Parliament And Of The Council, Official Journal of the European Communities, 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member Country other than that in which the qualification was obtained <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0005&from=EN>> accessed 27 August 2019.
- 50 Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31977L0249&from=EN>> accessed 27 August 2019.
- 51 See Practical Law Thomson Reuters, 'Cyprus: Ethics and practicalities' <[https://uk.practicallaw.thomsonreuters.com/2-214-5019?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/2-214-5019?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 27 August 2019.

- 52 European Commission (2018), 'The 2018 EU Justice Scoreboard', 31, 33.
- 53 Ibid.
- 54 Ibid.
- 55 Ibid.
- 56 Ibid.
- 57 The Legal Aid Act of 2002, 165(I)/2002 at s 6A(2).
- 58 Ibid., s 6A(4).
- 59 Ibid., s 6A(4).
- 60 Ibid., s 6A(1).
- 61 The Legal Aid Act of 2002, 165(I)/2002.
- 62 Andreas Erotocritou Litigation & Dispute Resolution 2016: Cyprus, 17 Feb 2016 found at [www.iclg.co.uk](http://www.iclg.co.uk) accessed on 12 Dec 2016.
- 63 Panayiotis Neocleous and Andreas Neocleous (2010), 'Cyprus: Ethics and practicalities', *Practical Law*, 1 August 2010 <[https://uk.practicallaw.thomsonreuters.com/2-214-5019?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/2-214-5019?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 27 August 2019.
- 64 Ibid.
- 65 Ibid.
- 66 Email from insurer, 17 September 2019.

# DOMINICA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Dominica was colonised by both France and England, which alternated their possession over the island between 1627 and 1783. The country remained, however, under English rule from 1783 onwards, and became independent only on 1 November 1981.<sup>2</sup> Hence, the Dominican legal system is still heavily based on the English common law.<sup>3</sup>

The arbitral legislation of Dominica is composed only by the Arbitration Act 1988<sup>4</sup> ("Arbitration Act"). The Arbitration Act is based on the English Arbitration Act 1950,<sup>5</sup> and it is applicable to both domestic and international arbitrations.

### B. *Description of prior legislation and reasons for its replacement*

The Dominican arbitral legislation has not changed since its enactment.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act was enacted on 1 January 1988 and entered into force on 2 June 1998.

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act governs both domestic and international arbitration proceedings.

### C. *Details and/or relevant amendment and modifications*

As described above, the arbitration legislation of Dominica has not changed since its enactment.

One article discusses generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and harmonise the Commonwealth Caribbean countries' legislation.<sup>6</sup>

The author reports that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes that occurred in the international arbitration legal framework in the second half of the twentieth century – such as the establishment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the UNCITRAL arbitration rules, and the UNCITRAL Model Law on International Commercial Arbitration.

After years of discussion and analysis, the Committee presented two drafts proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth, as well the fact that most adopted legislation was

based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.<sup>7</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions recommended by the Committee were never implemented. As a result, the Dominican Arbitration Act, as with many other arbitration acts of the Commonwealth Caribbean countries, does not reflect modern trends and best practices. Certain scholars,<sup>8</sup> in an attempt to identify why the proposals of the Project were never implemented, speculate that the project was too ambitious. The scholars also highlight that implementing the legislative reforms in all countries would be too burdensome and time-consuming. In addition, they point out that:

[M]ost of the individuals ... were apathetic toward the concept of harmonization of arbitral legislation in the region. The general feeling, according to Ms. Straker, was that there were many other more important matters that had to be addressed first by the Commonwealth Caribbean territories.<sup>9</sup>

[T]he business community of the Commonwealth Caribbean [held] that the process of arbitration was deemed to be neither speedier nor less expensive than the adjudicatory process, especially in view of the fact that in most cases the parties had to go to court to enforce awards in their favour. Commercial disputants, according to Mr. Thompson, felt more comfortable with the courts in the islands.<sup>10</sup>

Hence, the Dominican arbitral legislation is still based on the 1950 English Arbitration Act. There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of CARICOM. It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>11</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The Arbitration Act is not based on the Model Law, but on the English Arbitration Act 1950.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The Arbitration Act differs considerably from the UNCITRAL Model Law.

Although no literature is available commenting on Dominica's current arbitration legislation, the analysis of the provisions of the Arbitration Act shows remnants of provisions no longer present in modern legislation.

Some noteworthy differences between the Arbitration Act and the UNCITRAL Model Law are, for example: (i) the inclusion of umpires (section 10); (ii) the right of the two party-appointed arbitrators to indicate an umpire, in cases where the arbitral agreement only refers to two arbitrators (section 10); (iii) the power granted to the parties, in certain cases, to supply vacancies of arbitrators (section 12); (iv) the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures; and (v) lack of provisions on separability of the arbitral agreement.

#### *F. Powers and duties of arbitrators*

Section 14(3) of the Arbitration Act determines that, unless otherwise agreed by the parties, arbitrators and umpires have the right to administer the oath to, and take the affirmation of, any party or witness on a reference under the agreement. In relation to awards, section 15(1) sets out that arbitrators and umpires have the power to make an award at any time; section 18 determines

that, by default, this arbitration award shall be final and binding on the parties and the persons claiming under them respectively; and section 19 empowers the arbitrator or umpire with the right to correct any clerical mistake or error arising from any accidental slip or omission in an award.

Furthermore, section 17 sets forth that:

[U]nless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the High Court to order specific performance of any contract other than a contract relating to land or any interest in land.

#### *G. Arbitrator immunity*

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS\**

#### *A. Signatory to the New York Convention.*

Dominica became a party to the New York Convention on 28 October 1988.<sup>12</sup>

#### *B. Reservations to the New York Convention*

Dominica has not made any reservations to the New York Convention.<sup>13</sup>

#### *C. Method of domestic implementation of the New York Convention*

The New York Convention is entirely incorporated in the Arbitration Act, in part IX, 'Enforcement of Convention Awards', section 2.

#### *D. Other international/regional treaties*

Dominica is a party of the Caribbean Community (CARICOM)<sup>14</sup> and of the Organisation of Eastern Caribbean States (OECS).<sup>15</sup>

Dominica has entered into two bilateral investment treaties, both of which are in force (the United Kingdom and Germany).<sup>16</sup>

### **IV. RELEVANT CASE LAW**

#### *A. Approach of the national courts to the enforcement of arbitration agreements*

No information was available.

#### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Arbitration Act, section 36(3) sets out public policy as one of the grounds to refuse enforcement of 'Convention' arbitral awards. However, no literature was found discussing the grounds of public policy in Dominica law, which could be used to refuse enforcement of an arbitral award.

#### *C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Although no cases of international relevance were located, one precedent from the Eastern Caribbean Supreme Court, in the High Court of Justice Commonwealth of Dominica, is worth noting.

In the case *Calais Shipholding Co v Bronwen Energy Trading Ltd*,<sup>17</sup> Calais received leave to enforce three arbitration agreements in the same manner

as a judgment of the Dominica High Court, and the awards were converted into an order of court. Subsequently, Calais filed a winding-up petition for Bronwen to be wound up, because Bronwen failed to satisfy the judgments (even though Bronwen was duly served on the judgments). The application was granted, and the winding-up order was filled by Calais in October 2010. However, in November 2012, Bronwen filed a motion to discharge and set aside the winding-up order. Some of the reasons presented by Bronwen to ground its request were the non-disclosure of facts which were material to Calais application, essentially (i) the awards had already been converted into a merged judgment in England and for this reason the Dominican courts were not competent to enter judgment in the terms of the awards; and (ii) that the Federal Court of Nigeria ruled that Clause 10 of the charter party was void on the grounds that it ousted the jurisdiction of that court, and Calais' application in Dominica courts was based on Clause 10.

In the judgment, the court refused the claimant's arguments. The Hon. Justice Brooks noted that, even though the Claimant's argument had some legitimacy, it was not possible to discuss the awards' validity based on these grounds at that stage of the procedure:<sup>18</sup>

While there may be some validity in Counsel's argument regarding the 'possible' validity of the judgment and the awards here in Dominica based on the similarity of the Nigerian Law and Dominica Law as submitted by Mr Forde, I am of the view that this i[s] not the forum for the Applicant to make that submission. This submission should have and would have properly been made either before the Judge's order was made in Dominica or upon appeal of the said order. I note, once again, that the applications were duly served on Bronwen and they failed and/or refused to participate in the matter at that stage and they cannot now, at this stage, seek to make submissions that could have properly been made then. I am therefore unable to agree with learned Counsel Mr Forde in this regard.<sup>19</sup>

Although the issues in discussion in the *Calais* case are not directly related to arbitration matters, this case shows that (i) despite the lack of official data and commentaries, Dominica has some arbitration activity in practice; and (ii) the East Caribbean Supreme Court prevented Bronwen from discussing again the grounds of the arbitral awards converted into judgments, thus preventing an improper request to set aside the awards in a manner not permitted by law.

## V. ARBITRATION LANDSCAPE

### A. *Institutional arbitration*

Dominica does not have an arbitral institution, and no statistical data is available regarding the arbitration practice in the country.

### B. *Measures to strengthen institutional arbitration capabilities*

No information was found other than that concerning the Arbitration Project Advisory Committee. Created to lead a reform in the arbitral legislation of the Caribbean countries, the Project was not implemented.

### C. *Submission of disputes to arbitration vs. litigation*

No information was available.

### D. *Participation by foreign Counsel in international arbitrations*

No information was available.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 681 days to resolve a commercial dispute in a first-instance court in Dominica – 21 days for filing and service of court processes, 450 days for trial and judgment and 210 days for enforcement of judgment.<sup>20</sup> Dominica ranks below the Latin America and the Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>21</sup> In terms of overall ease of enforcing contracts, Dominica scored 59.17 of 100 and ranked 83 of 190.<sup>22</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

Additionally, in terms of the judicial structure and reported caseload, according to the Eastern Caribbean Supreme Court Annual Report 2017–2018, the Registry of the Court of Appeal staff has 14 people in charge of the case management department.<sup>23</sup> The report mentions that, in 2017, 441 appeals in total were filed in the High Courts and Magistrates Courts, considering all the nine member countries of the OECS. In the same year, 20 full court sittings were scheduled, of which one court sitting was from Dominica. Moreover, the report notes that 67 written judgments were delivered, of which 2 were originated from Dominican courts. Finally, the report also points out that 814 oral judgments were uttered, although no specific data is available for the number of cases related to each member country. None of the significant cases reported discuss arbitration-related issues.<sup>24</sup>

*G. Statistics on judges and lawyers per capita*

According to the OECS Bar Association, there are 75 lawyers acting in Dominica.<sup>25</sup> No information is available regarding the total number of judges in the country, which has a population of 73,925.<sup>26</sup>

## **VI. funding for legal claims**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for arbitration in Dominica. Dominica's legal aid system is targeted towards women, disabled persons, and senior citizens, not businesses. The assistance is provided mainly in the areas of family law, criminal law, employment law, and property matters. The Ministry of Justice, Immigration and National Security state that the Legal Aid Clinic also provides legal education, but it is unclear whether this relates to commercial and business disputes.<sup>27</sup>



### B. *Third-party funding*

No literature appears to be available on the doctrines of champerty and maintenance in Dominica or on the availability of third-party funding in the country. However, given that Dominica's legal system is based on English common law, and the rule of maintenance and champerty applied at the time of independence,<sup>28</sup> it is likely that the rule still exists in Dominica by virtue of the common law.<sup>29</sup>

The Eastern Caribbean Supreme Court (ECSC) is a binding authority in the Dominica and has indicated that champerty is still a matter of public policy applicable in other Eastern Caribbean countries.<sup>30</sup> However, particularly regarding third-party funding, the court clarified in *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited* that.

The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.<sup>31</sup>

It seems, therefore, that although the rule of maintenance and champerty is still applicable in Dominica, third-party funding would not necessarily be considered illegal.

### C. *Contingency fees*

In accordance with the Organisation of the Eastern Caribbean States (OECS) Bar Association Code of Ethics, '[a]n attorney-at-law may, with the prior agreement of the client, charge a contingency fee not exceeding twenty percent and reasonable commissions on collection of liquidated claims'.<sup>32</sup>

### D. *Insurance for legal expenses*

No information was located regarding the availability of legal expense insurance in Dominica.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 12 September 2019.

- 2 The Commonwealth, 'Dominica: History' <<http://thecommonwealth.org/our-member-countries/dominica/history>> accessed 14 August 2019.
- 3 Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117 Vol. 63 No. 1, 120.
- 4 Act No. 6 (Cap. 4:50) of 1988, available at <<http://www.dominica.gov.dm/laws/chapters/chap4-50.pdf>> accessed on 14 August 2019.
- 5 EPDF (2004), 'Alternative Dispute Resolution: A Developing World Perspective', Albert K Fiadjoe, Cavendish, 76–77 <<https://epdf.tips/alternative-dispute-resolution-a-developing-world-perspective.html>> accessed 14 August 2019.
- 6 Lubic (1994), 'Present Status of International Commercial Arbitration...'
- 7 *Ibid.*, 123.
- 8 *Ibid.*
- 9 *Ibid.*, 124.
- 10 *Ibid.*
- 11 Caribbean Radio, 'Draft model arbitration bill for CARICOM states being reviewed by committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>>, accessed 12 Sept 2019.
- 12 See New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 14 August 2019.
- 13 *Ibid.*
- 14 CARICOM website <<https://www.caricom.org/>> accessed 13 August 2019.
- 15 OECS website <<https://www.oecs.org/>> accessed 13 August 2019. The other OECS state members are Antigua and Barbuda, St Kitts and Nevis, Montserrat, Anguilla, the British Virgin Islands, Grenada, St Lucia, St Vincent, the Grenadines and Martinique.
- 16 UNCTAD Investment Policy Hub, 'Dominica' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 14 August 2019.
- 17 *Calais Shipholding Co v Brown Energy Trading Ltd*, Eastern Caribbean Supreme Court, in the High Court of Justice Commonwealth of Dominica, SUIT NO. DOMHCV2009/0096, judgment of 9 March 2012 <<https://www.eccourts.org/calais-shipholding-co-v-bronwen-energy-trading-ltd/>> accessed 14 August 2019.
- 18 *Ibid.*, 34.
- 19 *Ibid.*, 34.
- 20 World Bank (2019), Doing Business, 'Enforcing Contracts' <<http://www.doingbusiness.org/en/data/exploreconomies/dominica>> accessed 14 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 21 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 22 *Ibid.*
- 23 Eastern Caribbean Supreme Court (2019), 'Eastern Caribbean Supreme Court Annual Report 2017–2018' <<https://www.eccourts.org/annual-report-2017-2018/>> accessed 13 August 2019.
- 24 *Ibid.*
- 25 Government of the Commonwealth of Dominica, Ministry of Justice, Immigration & National Security, 'Legal Aid Clinic' <<http://justice.gov.dm/divisions/legal-aid-clinic>> accessed 14 September 2019.
- 26 *Ibid.*
- 27 *Ibid.*
- 28 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

- 29 Jamaican Bar Association, 'Access to Justice – Third Party Litigation Funding and Contingency Fee Arrangements' <[http://www.jambar.org/index.php?option=com\\_jevents&task=icalrepeat.detail&evid=2&Itemid=1&year=2016&month=04&day=05&title=access-to-justice-third-party-litigation-funding-contingency-fee-agreements&uid=1d19b1892500cd9462f0a659e26cfa75](http://www.jambar.org/index.php?option=com_jevents&task=icalrepeat.detail&evid=2&Itemid=1&year=2016&month=04&day=05&title=access-to-justice-third-party-litigation-funding-contingency-fee-agreements&uid=1d19b1892500cd9462f0a659e26cfa75)> accessed 15 May 2019.
- 30 *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153. See also *Israel Bruce v William Black-Williams* ECSC Saint Vincent and the Grenadines in the HCJ, Claim No. SVGHCV2014/0040 (13 July 2015).
- 31 *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited* ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153–54.
- 32 OECS Bar Association Code of Ethics, Part B: Mandatory Provisions and Specific Prohibitions <<http://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/code-of-ethics>> accessed 14 August 2019.

# ENGLAND, WALES & NORTHERN IRELAND<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The query is not applicable to this jurisdiction.

### B. *Description of prior legislation and reasons for its replacement*

The first legislative arbitration law in England was established in 1698.<sup>2</sup> Even before this, however, and stretching back to Roman and pre-Roman England, arbitration was already in existence in various forms in England.<sup>3</sup> The English arbitration statute of 1698 was an example of legislative response to what was already widespread commercial practice at that time.<sup>4</sup> The Act provided that it 'shall and may be lawful for all merchants and traders and others desiring to end any controversy, suit or quarrel ... for which there is no other remedy but by personal action or suit in equity, by arbitration to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His Majesty's Courts of Records which the parties shall choose...' and that 'any arbitrage or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity.'<sup>5</sup>

Between the 1698 arbitration statute and the subsequent English Arbitration Act of 1889, there were two notable developments in English arbitration legislation. Through the English Civil Procedure Act 1833,<sup>6</sup> the English legislature rendered the authority of an arbitrator irrevocable except with the leave of the court, made refusal to attend an arbitration as a witness in defiance of an arbitrator's order a contempt of court, and empowered arbitrators to administer oaths.<sup>7</sup> The English Common Law Procedure Act of 1854<sup>8</sup> then added a considerable number of provisions relating to arbitration.<sup>9</sup> In the years following, many English mercantile associations started issuing standard contract forms containing arbitration clauses. The increase in commercial arbitration cases arising from this created an increasing need for the English arbitration laws to be developed further.<sup>10</sup>

In 1889, a new arbitration law was promulgated, the English Arbitration Act 1889.<sup>11</sup> This 1889 Act was widely utilised and influential. After several rounds of amendments in 1920,<sup>12</sup> 1924,<sup>13</sup> 1930<sup>14</sup> and 1934,<sup>15</sup> England subsequently consolidated its arbitration legislation in 1950 via the English Arbitration Act 1950.<sup>16</sup>

In the 1973, a US trade embargo on exports of soybean products to the then Soviet Union caused 'an unprecedented number of some 1000 London-seated trade-arbitrations as well as numerous appeals to the English courts'.<sup>17</sup> Between 1973 and 1979, the provisions of the English Arbitration Act 1950 which obliged parties to compulsorily seek judicial review on points of law became widely abused, affecting the English arbitration system and London's popularity as a seat.<sup>18</sup>

This led to the enactment of the English Arbitration Act 1979, which attempted to tackle these issues and which brought a conceptual shift in the relation between the courts and arbitration.<sup>19</sup> Under the new legislative policy, the assumption was that parties 'preferred to take the risk of not having a complete substantive justice – i.e. the arbitrator misapplying law – in pursuit

of the more valuable benefits that party autonomy, speed and finality would bring'.<sup>20</sup>

In the 1980s, the UK Department of Trade and Industry established a Departmental Advisory Committee on Arbitration Law under the Chairmanship of Lord Justice Mustill. One of the key tasks of this Committee was to decide whether to recommend the enactment of the UNICTRAL Model Law on International Commercial Arbitration 1985. The Committee eventually decided against adopting the Model Law wholesale but recommended that a revised arbitration law should as far as possible adopt the structure and language of the Model Law. In 1996, the English Arbitration Act 1996 (EAA 1996) was passed.<sup>21</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The EAA 1996 came into force on 31 January 1997.

### B. *Scope of application to domestic and international arbitrations*

The EAA 1996 applies to both domestic and international arbitrations where the seat of arbitration is England and Wales or Northern Ireland. The EAA 1996 does not distinguish between domestic and international arbitration proceedings.<sup>22</sup>

### C. *Details and/or relevant amendments and modifications*

The EAA 1996 has not been amended to date.

### D. *Relationship to the UNCITRAL Model Law*

The EAA 1996 largely parallels the UNCITRAL Model Law in structure but there are several important differences, which are set out below.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The key differences between the EAA 1996 and the UNCITRAL Model Law on International Commercial Arbitration are as follows:<sup>23</sup>

- a. The EAA 1996 applies to all forms of arbitration, whereas the Model Law only applies to international commercial arbitration;
- b. Under the EAA 1996, a party may appeal an arbitral award on a point of law (unless agreed otherwise);
- c. Under the EAA 1996, an English court is only able to stay its own proceedings and cannot refer a matter to arbitration;
- d. The default provisions of the EAA 1996 for the appointment of arbitrators provide for the appointment of a sole arbitrator as opposed to three arbitrators;
- e. Under the EAA 1996, where each party is required to appoint an arbitrator, a party may treat its party-nominated arbitrator as the sole arbitrator in the event that the other party fails to make an appointment;
- f. There is no time limit for a party to oppose the appointment of an arbitrator under the EAA 1996; and
- g. The EAA 1996 does not prescribe strict rules for the exchange of pleadings.

#### *F. Powers and duties of arbitrators*

Section 38 of the EAA 1996 provides that unless otherwise agreed by the parties, an arbitral tribunal has the power to order:

- a. Security for costs;
- b. Inspection, photographing, preservation, custody, detention, sampling or observations of property which is subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings;
- c. The examination on oath or affirmation of a party or witness; and
- d. Evidence preservation.

Section 39 of the EAA 1996 provides that parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award. However, unless the parties agree to confer such power on the tribunal, the tribunal will have no such power.

Section 41 of the EAA 1996 provides that the parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration, and also provides for certain default powers that arbitrators will have unless otherwise agreed by the parties. These include the power to make default judgments, the power to continue with proceedings in the absence of a party, and the power to make peremptory orders and consequential orders for the noncompliance of such.

Section 48 of the EAA 1996 provides that the parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies, and that, unless otherwise agreed by the parties, the tribunal shall have the power to make declarations, order the payment of money, and the same power as the court to order a party to do or refrain from doing anything, to order specific performance of a contract, and to order the rectification, setting aside or cancellation of a deed or other document.

Section 49 of the EAA 1996 provides that the parties are free to agree on the powers of the tribunal as regards the award of interest, and that unless otherwise agreed by the parties, the tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rate as will meet the justice of the case.

Section 56 of the EAA 1996 grants to tribunals the power to refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

Section 57 of the EAA 1996 provides that the parties are free to agree on the powers of the tribunal to correct an award or make an additional award, and that where there is no such agreement, a tribunal will have such power, subject to the limitation that these powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

Section 65 of the EAA 1996 provides that, unless otherwise agreed by the parties, the tribunal has the power to direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

### G. Arbitrator immunity

Section 29 of the EAA 1996 provides that an arbitrator is not liable for anything done or omitted in the discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. This immunity applies as well to an arbitrator's employee or agent.

## III. INTERNATIONAL INSTRUMENTS

### A. Signatory to the New York Convention

The United Kingdom became a party to the New York Convention on 24 September 1975.<sup>24</sup>

### B. Reservations to the New York Convention

The United Kingdom has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>25</sup>

### C. Method of domestic implementation of the New York Convention

The New York Convention is given effect in the country through the operation of sections 100 to 104 of the EAA 1996.<sup>26</sup>

### D. Other international/regional treaties

The United Kingdom is a contracting state of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('ICSID Convention').<sup>27</sup>

The United Kingdom has entered into 104 bilateral investment treaties with different countries, 93 of which are in force (Colombia, Mexico, Mozambique, Serbia, Bosnia and Herzegovina, Vietnam, Sierra Leone, El Salvador, Kenya, Lebanon, Hong Kong, Uganda, Croatia, Tonga, Nicaragua, Slovenia, Republic of Moldova, Chile, Azerbaijan, Bulgaria, Oman, Kazakhstan, Romania, Cote d'Ivoire, Eswatini, Lao People's Democratic Republic, Venezuela, Georgia, Turkmenistan, Cuba, Kyrgyzstan, Pakistan, Estonia, Albania, Belarus, Latvia, United Republic of Tanzania, Honduras, Uzbekistan, Peru, Trinidad and Tobago, Armenia, Lithuania, Barbados, Nepal, Ukraine, United Arab Emirates, Bahrain, Uruguay, Mongolia, Turkey, Argentina, Nigeria, Morocco, Burundi, Czech Republic, Slovakia, Guyana, Congo, Ghana, Russian Federation, Tunisia, Bolivia, Grenada, Poland, Benin, Antigua and Barbuda, Hungary, Dominica, Jamaica, Malta, Mauritius, China, Haiti, Panama, Saint Lucia, Cameroon, Belize, Yemen, Paraguay, Malaysia, Papua New Guinea, Lesotho, Philippines, Bangladesh, Senegal, Sri Lanka, Jordan, Thailand, Indonesia, Republic of Korea, Singapore, and Egypt).<sup>28</sup>

The United Kingdom has also entered into two FTAs through the EU mechanisms, neither of which are in force.

## IV. RELEVANT CASE LAW

### A. Approach of the national courts to the enforcement of arbitration agreements

England is and has consistently been a pro-arbitration jurisdiction. The UK Supreme Court has noted that it has jurisdiction to grant anti-suit injunctions under section 37 of the English Senior Courts Act 1981 even where there are no arbitral proceedings in contemplation or there is no statutory basis under the Act for an injunction, in circumstances where the court is seeking to

support arbitration by requiring parties to refer their disputes to arbitration.<sup>29</sup> Furthermore, *Sonact Group Ltd v Premuda SPA*<sup>30</sup> confirmed that the English courts continue to take a pro-arbitration approach to the interpretation and application of arbitration clauses. In this case, the High Court confirmed that even if a settlement agreement does not contain an express arbitration clause to deal with disputes arising out of the settlement, an arbitration clause in the original contract may be adequate to cover future disputes arising out of a settlement.

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

In *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. v Ras Al Khaimah National Oil Co.*, the English Court of Appeal stated:<sup>31</sup>

It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

The English Court of Appeal in *RBRG Trading (UK) v Sinocore International*<sup>32</sup> provided further guidance in the form of the following principles:<sup>33</sup>

- It is legitimate for the English court, in considering whether a foreign arbitral award should not be enforced on the ground of public policy, to take account of the underlying contract on which the award is based;
- If that contract is in itself contrary to public policy (e.g. a contract to share the proceeds of crime or a contract to pay a bribe) the award may be refused enforcement on the ground of public policy;
- It is important to distinguish between domestic public policy in English law and considerations of international public policy applied by the English courts so as to disapply foreign law or refuse to enforce an arbitral award, as the case may be. Thus, the mere fact that English law would have arrived at a different result does not of itself justify the application of English public policy;
- The mere fact that the performance of the contract may be illegal in the place of performance, without more, will not render an award on the basis of such a contract unenforceable in England, where the contract is legal by its applicable law and by the *lex arbitri*;
- If it is apparent on the face of the award that the contract was made with the intention of violating the law of a foreign friendly state, then the enforcement of an award rendered on the basis of such a contract may be contrary to English public policy;
- The court has to perform a balancing exercise between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the enforcement power of the English court is not abused: the nature of, and strength of the case for, the illegality, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal are factors in the balancing exercise between the competing public policies of finality and illegality;
- In considering whether and, if so, to what extent public policy is engaged the degree of connection between the claim sought to be enforced and the relevant illegality will be important;
- As per the principle summarised above, the English court will not enforce a contract that is in itself contrary to public policy and the interposition of an arbitration award will not isolate the successful party's claim from the illegality which gave rise to it. It has been held that the same approach will apply where



the award gives effect to a corrupt practice, such as to enforce payment of a bribe, and where the award upheld a fraudulent claim to payment based on the presentation of documents which were admitted or found to be forgeries;

- Where fraud or illegality is not apparent on the face of the award but is asserted by a party opposing enforcement, the Court of Appeal had previously stated: '[t]here are authorities which in my view support the proposition that where illegality is raised and at least where the evidence of illegality is so strong that if not answered it would be decisive of the case, the court would not allow reliance on issue estoppel, or on the principle in *Henderson v Henderson* to prevent the point being ventilated. In other words, illegality can if raised provide the special circumstances in which an estoppel will not provide a defence';
  - However, the court will not refuse to enforce a lawful claim under a lawful transaction (even if voidable) on the basis that the transaction is tainted by fraud or corruption;
  - There is also no public policy to refuse to enforce an award based on a contract during the course of the performance of which there has been a failed attempt at fraud;
  - Where a tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts, the English court should not allow the facts to be reopened, save 'possibly in exceptional circumstances';
  - Where, on the facts found, there is no illegality under the governing law but there is illegality under English law, the public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely domestic public policy;
  - The Supreme Court decision in *Patel v Mirza* does not affect the principles to be applied when considering recognition and enforcement under AA 1996, s 103; and
  - Allegations of bribery and intimidation of a witness will not suffice for the public policy exception to apply in circumstances where there is no evidence that those factors caused the witness not to give evidence.
- C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Three recent key English arbitration cases<sup>34</sup> include *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* (IPCO Nigeria),<sup>35</sup> *Maximov v Open Joint Stock Company 'Novolipetsky Metallurgichesky Kombinat'* (Maximov),<sup>36</sup> and *Halliburton Company v Chubb Bermuda Insurance Limited* (Halliburton v Chubb).<sup>37</sup>

*IPCO Nigeria*<sup>38</sup> dealt with the question as to when security may or may not be ordered in proceedings to enforce a New York Convention award under the EAA 1996. In this decision, the UK Supreme Court set aside a Court of Appeal order requiring the Nigerian National Petroleum Corp (NNPC) to put up \$100 million in security in relation to a Nigerian arbitral award in favour of IPCO (Nigeria) Ltd, as a condition of the Commercial Court determining whether to enforce the award. The Supreme Court held that there was nothing in sections 103(2) and (3) of the EAA 1996 that enabled an enforcing court to order security as a condition of challenging enforcement under those subsections. Instead, security may only be ordered as a price for seeking an adjournment under section 103(5) and, where the court does adjourn the enforcement proceeding, pending set-aside proceedings at the seat of

arbitration. The impact of this case for award creditor defending proceedings under sections 103(2) or (3) of the EAA 1996 is that they should look for other means of indirectly securing their award.

*Maximov*<sup>39</sup> involved the denial of enforcement in England of an award that had been set aside at the seat. The claimant in the case had obtained an award in its favour in an arbitration between the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, which the Moscow Arbitrazh Court set aside on the basis of various non-disclosures by two of the arbitrators as well as arguments based on public policy and non-arbitrability of the dispute, which had not been argued or raised during the set-aside hearing. This setting aside judgment was upheld by the Federal Arbitrazh Court of Moscow District, and also the Supreme Arbitrazh Court of the Russian Federation. In London, the Commercial Court denied enforcement of the award, holding that the test was whether the Russian courts' decisions were so extreme and incorrect as not to be open to a Russian court acting in good faith. Lacking evidence of actual bias of the Russian courts, the Commercial Court, despite its discomfort with some aspects of the Russian court decisions, found that the decisions were not so extreme or perverse as to be able to demonstrate or infer bias. This decision shows that the English courts are willing to carefully examine set-aside judgments for signs of impropriety, but also demonstrates the high threshold that needs to be met before bias in foreign proceedings should be inferred. Thus, for an English court to enforce an award that has been set aside by the court at the seat of arbitration, it will need to be clear that the foreign court acted in bad faith.

In *Halliburton v Chubb*<sup>40</sup> the English Court of Appeal dismissed a challenge to an arbitrator on the basis that, although he should have disclosed related appointments, his failure to disclose would not have led a fair-minded and informed observer to conclude that the arbitrator was biased. The Court of Appeal dismissed the argument that accepting multiple appointments from one common party would, in itself, justify an inference of apparent bias, as 'something more' would be required to justify doubts as to the arbitrator's impartiality. Arbitrators are assumed to be trustworthy enough to approach each case with an open mind, and to make decisions purely on the matters before them. Moreover, the facts showed that the arbitrator's non-disclosure was accidental, even if, as a matter of best practice, disclosure should have been made. *Halliburton v Chubb* is currently on appeal and will be heard by the UK Supreme Court by the end of 2019.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Institutional arbitration is commonplace. England is home to the London Court of International Arbitration (LCIA), one of the world's leading arbitral institutions. Based on statistics from its 2018 Annual Report, LCIA in 2018 handled 317 new cases, of which 271 used the LCIA Rules.<sup>41</sup> Eleven per cent of the arbitrations referred under the LCIA Rules in 2018 had quantified sums in dispute exceeding US\$100 million.<sup>42</sup>

In addition to institutional arbitration, London is well known for being a preferred seat for ad hoc and arbitrations administered by trade associations. Ad hoc maritime arbitrations and arbitrations administered by trade

associations account for at least 90 per cent of international commercial arbitrations in London.<sup>43</sup> Not accounting for other trade associations or for ad hoc arbitrations in which the LCIA or ICC was providing services, LMAA and GAFTA arbitrations in 2019 thus totalled more than 4,000 in comparison to 368 with the ICC and LCIA.<sup>44</sup>

#### *B. Measures to strengthen institutional arbitration capabilities*

In 2001, the UK Government made an Alternative Dispute Resolution Pledge, which committed government departments and agencies to, among other things, consider and use alternative dispute resolution in all suitable cases wherever the other party accepts it and provide appropriate clauses in their standard procurement contracts on the use of alternative dispute resolution to settle their disputes.<sup>45</sup>

In 2011, the UK Government signed its first Dispute Resolution Commitment, which supplemented and replaced the 2001 Alternative Dispute Resolution Pledge.<sup>46</sup> In this Dispute Resolution Commitment, UK Government departments and their agencies committed to, among other things:

- a. Engaging in a process of appropriate dispute resolution in respect of any dispute which has not been resolved through the organisation's normal complaints procedure, as an alternative to litigation;
- b. Adopting appropriate dispute resolution clauses in their contracts with other parties; and
- c. Recognising that the use of appropriate dispute resolution processes can often avoid the high cost in time and resources of going to court.

In June 2017, the Brexit Working Group of the Bar Council of England and Wales issued a recommendation paper urging the UK Government to preserve the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC and maintain the freedom of movement for immigration purposes for arbitrators, arbitration lawyers and clients both from the EU and to the EU as currently provided for in articles 45, 49 and 56 TFEU and Directive 2004/38/EC.<sup>47</sup> This was to manage the risk of parties, lawyers and arbitrators choosing to arbitrate elsewhere other than London in view of Brexit considering the risk to the continuation of English lawyers appearing as counsel or arbitrators in overseas hearings should it be made (or appear to be made) more difficult for English lawyers to appear in arbitrations which take place in the EU.<sup>48</sup>

#### *C. Submission of disputes to arbitration vs. litigation*

Based on the UK Ministry of Justice's Civil Justice Statistics Quarterly for England and Wales, county courts in England and Wales received 534,545 claims in the first quarter of 2018 and 493,071 claims in the second quarter of 2018.<sup>49</sup> From the same source, there were 15,352 civil trials in England and Wales in the first quarter of 2018, and there were 15,435 trials in the second quarter of 2018.<sup>50</sup> In comparison, for the whole of 2018, the LCIA received 317 new arbitration filings.<sup>51</sup> 20.6 per cent of parties to arbitration under the LCIA Rules in 2018 were from England.<sup>52</sup>

#### *D. Participation by foreign counsel in international arbitrations*

Section 12 of the English Legal Services Act 2007 sets out a list of 'reserved legal activities' which comprises the exercise of rights of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial

activities, and the administration of oaths.<sup>53</sup> Section 13(2) of this Act then provides that a person is entitled to carry on a reserved legal activity where (a) the person is an authorised person in relation to the relevant activity or (b) the person is an exempt person in relation to that activity.<sup>54</sup> It is an offence for a person to carry on a reserved legal activity unless that person is duly entitled to do so.<sup>55</sup> 'Authorised persons' in relation to reserved legal activities refers to persons or licensable bodies duly authorised by relevant approved regulators or licensing bodies to carry out the activities.<sup>56</sup> Examples of approved regulators include the Law Society of England and Wales and the Bar Council of England and Wales.<sup>57</sup> The effect of this is that foreign lawyers are unable to appear in the courts of England and Wales unless they have obtained ad hoc permission to do so from such regulators.<sup>58</sup>

There are no nationality restrictions on rights of audience before an arbitral tribunal in English law.<sup>59</sup> Thus, it may be the case that a London-based arbitration might involve no participation by London-based lawyers.<sup>60</sup> However, in practice, typically one or more of the English law firms or the London offices of international law firms will be involved.<sup>61</sup>

There are no nationality restrictions in English law on the right to be appointed as an arbitrator.<sup>62</sup> However, the rules of the LCIA and ICC impose certain nationality requirements on the selection of arbitrators.<sup>63</sup> Thus, if one of the parties is British or majority owned by English shareholders, the chairman of a tribunal appointed under these rules is unlikely to be from outside England.<sup>64</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

Based on the 2018 LCIA Annual Casework Report, disputes in the banking and finance, energy and resources, and transport and commodities sectors dominate the LCIA's caseload.<sup>65</sup> London is also home to the largest share of maritime arbitrations in the world, handling approximately 1,500 maritime arbitrations in 2017.<sup>66</sup> Arbitrations under trade association rules such as GAFTA, FOSFA, minor metals, rubber associations, and refined sugar and general ad hoc trade arbitrations are also common in England.<sup>67</sup>

##### 2. Time taken for enforcement/annulment proceedings

The time taken to obtain permission to enforce an award 'depends on whether documents need to be served outside of the jurisdiction and whether the other party seeks to challenge enforcement'.<sup>68</sup>

##### 3. Percentage of awards annulled/not enforced

On 29 April 2018, the Judiciary of England and Wales issued a set of statistics showing that in 2017 the courts received 56 applications for appeals on points of law under s 69 of the EAA 1996.<sup>69</sup> Of these 56 applications, 10 were successful.<sup>70</sup> In the same year, 47 s 68 EAA 1996 challenges to arbitral awards for serious irregularity were brought.<sup>71</sup> Of these 47 applications, 0 were successful.<sup>72</sup>

#### *F. Statistics/information on the length of court proceedings in commercial cases*

According to the UK Government's Open Justice Project, the average case length for trials over claims valued at over GB£10,000 was 56 weeks. This time is calculated from the time a case is submitted to the court to the end of trial.<sup>73</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 437 days to resolve a commercial dispute in a first-instance court in England – 30 days for filing and service of court processes, 345 days for trial and judgment and 62 days for enforcement of judgment.<sup>74</sup> In terms of overall ease of enforcing contracts, the UK scored 68.69 of 100 and ranked 32 of 190.<sup>75</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>76</sup>

*G. Statistics on judges and lawyers per capita*

According to the UK Judiciary's Judicial Diversity Statistics 2018, as at 1 April 2018, the country had 1,703 tribunal judges.<sup>77</sup> With a population of about 66 million people living in the UK, this works out to a ratio of about 1 judge per 38,750 citizens.

According to the UK Solicitors Regulation Authority, there were 194,969 solicitors on the roll in England and Wales as at the end of April 2019.<sup>78</sup> Of this number, 145,547 are practising solicitors.<sup>79</sup> This works out to a ratio of about 1 solicitor per 340 citizens, or 1 practising solicitor per 450 citizens.

According to the UK Bar Standards Board, there were 16,598 barristers in practice in England and Wales in 2018.<sup>80</sup> This works out to a ratio of about 1 barrister per 3,980 citizens.

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

The current civil and criminal legal aid schemes in England and Wales are governed by Part 1 of the English Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) together with supporting secondary legislation.<sup>81</sup> Before the LASPO 2012, the general approach was that any civil legal matter would be eligible for legal aid provided that it was not one of the 'excluded' matters listed in Schedule 2 of the previous English Access to Justice Act 1999. At that time, individual applications for legal aid funding were assessed by reference to a 'Funding Code', which set out general principles on eligibility for legal aid. The LASPO 2012 changed this by implementing a new approach to legal aid: civil legal matters are excluded from the scope of legal aid unless they are one of the matters listed in Schedule 1 of the LASPO 2012.<sup>82</sup> Commercial dispute resolution is not one of the matters listed in Schedule 1 of the LASPO 2012.

In relation to legal aid for legal persons, paragraph 3(1)(a) of Schedule 3 of the LASPO 2012 provides that civil legal aid will only be available where the Director of Legal Aid Casework has made an exceptional case determination in relation to the person and the services.<sup>83</sup> This would appear to make civil legal aid for commercial dispute resolution involving companies and businesses generally unavailable.

*B. Third-party funding*

There is at present no legislation statutorily regulating third-party funding in England, but third-party funding is widely used in commercial disputes in the country.<sup>84</sup> In November 2016, Lord Justice Tomlinson said in the costs appeal in the case of *Excalibur Ventures v Texas Keystone and others* that '[...] litigation

funding is an accepted and judicially sanctioned activity perceived to be in the public interest'.<sup>85</sup>

The regulation of third-party funding in England occurs mostly on a voluntary basis by the Association of Litigation Funders of England and Wales (ALF). The ALF administers self-regulation of third-party funders via its Code of Conduct for Litigation Funders.<sup>86</sup> This Code of Conduct is binding on all ALF members, which comprise: Augusta Ventures, Balance Capital, Burford Capital, Calunius Capital, Harbour Litigation Funding, Redress Solutions, Therium Capital, Vannin Capital, and Woodsford Litigation Funding.<sup>87</sup> These nine entities are the key third-party funders active in the English market.<sup>88</sup>

### C. Contingency fees

Contingency fees have been permitted in England and Wales since 1 April 2013, when the Jackson Reforms were implemented. The 2013 reforms lifted the earlier English law restrictions against the use of contingency fees, which were previously considered to breach the traditional common law rules against champerty and maintenance. There are two main forms of contingency fee arrangements. 'Damages-based agreements' or DBAs, are arrangements whereby the fee charged by the lawyer is calculated as a percentage of the damages recovered,<sup>89</sup> and 'conditional fee agreements' or CFAs are arrangements whereby legal fees are charged with reference to time spent, but the lawyer agrees to work for a reduced or no fee if the case fails, and for a higher fee if the case succeeds. DBAs were introduced in the 2013 reforms as an alternative to the traditional 'no-win no-fee' CFA. DBAs and the limitations of their use became regulated through the English Damages-Based Agreements Regulations 2013 (DBA Regulations), but it is reported that as of 2019, DBAs have still not become commonly used in England and Wales.<sup>90</sup>

### D. Insurance for legal expenses

Legal expenses insurance is available in England. Both 'before the event' and 'after the event' insurance is available, with the former insuring against future legal actions that may be fought or defended and the latter insuring against the risk of losing and potential costs liabilities in relation to ongoing legal actions. The UK Financial Ombudsman Service accepts complaints involving legal expenses insurance.<sup>91</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 12 September 2019.
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- 3 See D Roebuck (2008), *Early English Arbitration*, The Arbitration Press, for an extensive exposition about arbitration in England from prehistoric times to the twelfth century, stretching across Roman Britain, the Anglo-Saxon period, and the time of the Kentish Kings, to the tenth century and beyond.
- 4 G Ellenbogen (1952), 'English Arbitration Practice', *Law and Contemporary Problems*, Vol. 17 No. 4, 656, 657.
- 5 Ibid.
- 6 3 & 4 Will. 4, c. 42.
- 7 Ellenbogen (1952), 'English Arbitration Practice', 656, 657.

- 8 17 & 18 Vict. C., 125.
- 9 Ibid.
- 10 Ibid.
- 11 52 & 53 Vict, c. 49.
- 12 10 & 11 Geo. 5, c. 81.
- 13 14 & 15 Geo. 5, c. 39.
- 14 20. Geo. 5, c. 15.
- 15 24 & 25 Geo. 5, c. 14.
- 16 14 Geo. 6, c. 27. For a discussion of the various amendments to the 1889 Act, see C Nordon (1935), 'British Experience with Arbitration', *University of Pennsylvania Law Review*, Vol 83, 314.
- 17 A Spotorno (2019), 'Arbitration and the Development of English Law', *Arbitration*, Vol. 85 No. 2, 106, 110.
- 18 Ibid., 106, 111.
- 19 Ibid.
- 20 Ibid.
- 21 English Arbitration Act 1996.
- 22 Sections 85–87 of the EAA 1996 that only apply to domestic arbitration only are not in force.
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- 24 'New York Convention Guide' <<http://newyorkconvention1958.org/index.php?lvi=cmspage&pageid=11&menu=581&opacview=-1>> accessed on 31 July 2019.
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- 30 [2018] EWHC 3820 (Comm).
- 31 [1987] 2 Lloyd's Rep 246 at p. 254. N.B. This statement is widely applied in English courts, see e.g. *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2016] EWHC 2834 (Comm).
- 32 [2018] EWCA Civ 838 (23 April 2018) (English Ct. App.)
- 33 See *RBRG Trading (UK) v Sinocore International* [2018] EWCA Clu 838 (23 April 2019) paras 22 et seq Lexis PSL, 'Enforcing arbitral awards in England and Wales' <[https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5N2X-TJ91-DXSN-603M-00000-00/Enforcing\\_arbitral\\_awards\\_in\\_England\\_and\\_Wales](https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5N2X-TJ91-DXSN-603M-00000-00/Enforcing_arbitral_awards_in_England_and_Wales)> accessed 3 June 2019.
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- 37 [2018] EWCA Civ 817(19 April 2018).
- 38 [2017] UKSC 16.

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- 42 LCIA Annual Casework Report 2018.
- 43 The City UK Legal Services Report 2017, 33: excluding CEDR (mediation), 3,710 international arbitrations in London in 2016, of which 3,294 were London Maritime Arbitration Association (LMAA) <<https://www.thecityuk.com/assets/2017/Reports-PDF/39ccc4245b/Legal-excellence-internationally-renowned-Legal-services-2017.pdf>> accessed 12 Sept 2019; GAFTA Arbitrators Directory 2018 (reports 984 arbitrations in 12 months – omitted by City UK from its report) <<https://www.gafta.com/write/MediaUploads/Arbitration/Gafta-Arbitrator-Directory-2018.pdf>> accessed 12 September 2019.
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- 52 Ibid.
- 53 English Legal Services Act 2007, s 12.
- 54 Ibid., s 13.
- 55 Ibid., s 14.
- 56 Ibid., s 18.
- 57 English Legal Services Act 2007, Sch. 4.
- 58 See Bar Council of England and Wales (2018), 'UK Delegation Paper: EU lawyers in the UK – Practice rights under the draft withdrawal agreement and Q&A' <[https://www.barcouncil.org.uk/media/695906/eu-lawyers-in-the-uk-practice-rights-q-a\\_revised\\_nov\\_2018.pdf](https://www.barcouncil.org.uk/media/695906/eu-lawyers-in-the-uk-practice-rights-q-a_revised_nov_2018.pdf)> accessed 12 June 2019
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- 83 English Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 3 para. 3(1) <<http://www.legislation.gov.uk/ukpga/2012/10>> accessed 4 June 2019.
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- 86 Association of Litigation Funders (2018), 'Code of Conduct for Litigation Funders' <<http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>> accessed 30 May 2019.

- 87 Perrin (2017), 'Ch 5: England and Wales', in *The Third Party Litigation Funding Law Review*.
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- 90 UK Ministry of Justice: Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Civil Litigation Funding and Costs (2019) at p. 5 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf)> accessed 3 June 2019.
- 91 UK Financial Ombudsman Service: Legal expenses insurance <[https://www.financial-ombudsman.org.uk/publications/technical\\_notes/legal-expenses.html](https://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html)> accessed 3 June 2016.

## FIJI<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

Fiji is a former British colony, and its legislation is influenced by the laws of the United Kingdom. Fiji borrowed its arbitration legislation from the UK, the Fiji Arbitration Act 1965 being based on the English Arbitration Act 1950.<sup>2</sup>

#### B. *Description of prior legislation and reasons for its replacement*

Until 2017 both domestic and international arbitration in Fiji were governed by the Fiji Arbitration Act 1965.<sup>3</sup> However, following the enactment of the Fiji International Arbitration Act in 2017 ("2017 Act"), international arbitrations are now governed by the 2017 Act, while domestic arbitration continues to be governed by the 1965 Act.

The 2017 Act was enacted to improve the investment climate in Fiji by creating a comprehensive legislative framework for international arbitration consistent with international best practices, and to implement the country's commitments under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').<sup>4</sup> This legislative reform to Fiji's international arbitration regime was supported by the Asian Development Bank.<sup>5</sup>

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

Commercial arbitration in Fiji is currently governed by the 1965 Act and the 2017 Act. The 1965 Act regulates domestic arbitration proceedings and was enacted on 10 June 1965.<sup>6</sup> The 2017 Act governs international arbitration proceedings and was enacted on 15 September 2017.<sup>7</sup>

#### B. *Scope of application to domestic and international arbitrations*

The Fiji International Arbitration Act 2017 applies to international arbitration, while the domestic arbitration regime is still governed by the Fiji Arbitration Act 1965.<sup>8</sup> The 2017 Act will apply if: one of the parties is not domiciled in Fiji; the place of arbitration is outside Fiji; a substantial number of the obligations imposed by the commercial relationship are to be performed outside Fiji; or the place with which the subject matter of the dispute is most connected is outside Fiji; or the parties expressly agree that the subject matter of the arbitration agreement relates to more than one state.<sup>9</sup>

#### C. *Details and/or relevant amendment and modifications*

As noted above, the legal framework for international arbitration was subject to an important reform in 2017, which resulted in the adoption of the 2017 Act. However, the Fiji Arbitration Act 1965 itself has never been amended.

#### D. *Relationship to the UNCITRAL Model Law*

The 1965 Act is based on the English Arbitration Act 1950. The 1965 Act predates the UNCITRAL Model Law on International Commercial Arbitration.

The 2017 Act fully incorporates the provisions of the UNCITRAL Model Law, including its latest amendment adopted in 2006.<sup>10</sup> The 2017 Act also

incorporates certain best practices in international commercial arbitration, similar to the provisions of the Australian International Arbitration Act 1974, the Hong Kong Arbitration Ordinance 2010 and the Singapore International Arbitration Act 2002.<sup>11</sup>

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The Fiji Arbitration Act 1965 is not based on the UNCITRAL Model Law and therefore its provisions differ substantially from the provisions of the UNCITRAL Model Law.

First, the doctrine of separability and the competence-competence rule are not incorporated in the law.<sup>12</sup> Second, there are default provisions in favour of one arbitrator, if the parties did not agree otherwise, as well as a requirement for arbitrators to render the award within three months.<sup>13</sup> Third, the Fiji Arbitration Act 1965 establishes the mechanism of a 'special case', which implies the right and, if requested by the court, also the obligation of arbitrators to refer questions of law for the opinion of the court.<sup>14</sup> While the Fiji Arbitration Act 1965 recognises the parties' right to appoint arbitrators,<sup>15</sup> it allows the courts to set aside such appointment in certain circumstances<sup>16</sup> and to remove arbitrators for 'misconduct',<sup>17</sup> thus establishing substantial controlling powers of the courts over arbitration. Finally, the Fiji Arbitration Act 1965 does not contain modern provisions on the enforcement and setting aside of awards. The general rule is stated in section 12: 'Where an arbitrator or umpire misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.'<sup>18</sup> This provision gives the courts wide discretion to assess the criteria for setting aside of the awards.

The Fiji International Arbitration Act 2017 fully incorporates the provisions of the UNCITRAL Model Law, including the latest amendments adopted in 2006. The major divergence from the UNCITRAL Model Law consists in additional provisions of the Fiji International Arbitration Act 2017, that were borrowed from arbitration laws of Singapore, Hong Kong, and Australia.<sup>19</sup>

The definition of 'arbitral tribunal' in section 2 of the Act includes 'an emergency arbitrator', which allows the enforcement of orders and awards by emergency arbitrators.<sup>20</sup> Section 45 of the Act expressly provides for confidentiality of arbitration proceedings.<sup>21</sup> The Fiji International Arbitration Act 2017 also regulates the liability and immunity of arbitrators, appointing authorities and arbitral institutions<sup>22</sup> and representation in arbitration proceedings.<sup>23</sup> Finally, section 55 of the 2017 Act clarifies that fraud, corruption and a breach of the rules of natural justice fall under the definition of public policy.<sup>24</sup>

*F. Powers and duties of arbitrators*

The powers and duties of arbitrators in international cases are regulated by the Fiji International Arbitration Act 2017, which is based on UNCITRAL Model Law. Consequently, arbitrators have the same powers and duties as in any UNCITRAL Model Law jurisdiction. The Act, however, specifically limits the liability of arbitrators acting in good faith, as explained below.

Some powers of arbitrators in domestic arbitration are specifically mentioned in the Fiji Arbitration Act 1965:

- a. to administer oaths to or take affirmations of the parties and the witnesses appearing;

- b. to state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and
- c. to correct in an award any clerical mistake or error arising from any accidental slip or omission.<sup>25</sup>

The Fiji Arbitration Act 1965 also imposes an obligation on arbitrators to render an award within three months.<sup>26</sup>

No information was found on any particular requirements for persons acting as arbitrators in Fiji.

#### G. Arbitrator immunity

Section 21 of the Fiji International Arbitration Act provides for the immunity of arbitrators, of the appointing authority, of an arbitral and other institution. According to section 21(1) of the Act, '[a]n arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator'.<sup>27</sup> There is no similar rule for domestic arbitrations.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Fiji became a party to the New York Convention on 27 September 2010.<sup>28</sup>

#### B. Reservations to the New York Convention

Fiji has not made any reservations to the New York Convention.<sup>29</sup>

#### C. Method of domestic implementation of the New York Convention

Fiji gave effect to the New York Convention in the Fiji International Arbitration Act 2017. Section 53 of the Act incorporates the formal requirements for the application for recognition and enforcement of the award and section 54 of the Act reproduces the grounds for refusing recognition and enforcement of the awards established by the New York Convention.

#### D. Other international/regional treaties

Fiji is a signatory to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>30</sup>

The agreement between Australia and Fiji on trade and economic relations signed on 11 March 1999 provides that '[w]here a dispute arises out of a commercial contract the Parties shall encourage, subject to their respective laws, the use of alternative dispute resolution procedures, including negotiation, mediation, conciliation, and international arbitration'.<sup>31</sup>

Fiji also participates in the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, signed on 23 June 2000, which stipulates that co-operation between the signatories shall support development and modernisation of mediation and arbitration systems.<sup>32</sup>

Fiji has entered into five free trade agreements, four of which are signed and in effect (Melanesian Spearhead Group, Pacific Island Countries Trade Agreement, South Pacific Regional Trade and Economic Cooperation Agreement and the Pacific ACP–ECE Economic Partnership Agreement).<sup>33</sup>

## IV. RELEVANT CASE LAW

### A. Approach of the national courts to the enforcement of arbitration agreements

The Fijian courts appear to support arbitration and have recognised an arbitration agreement that was challenged. In the case of *Tahila Management and Financial Services v Spruce Ltd*.<sup>34</sup> the plaintiff applied for an appointment of the third arbitrator, based on the arbitration agreement concluded between the parties. The defendant first agreed to submit the dispute to arbitration and nominated an arbitrator, but later delayed the arbitration proceedings. The defendant alleged that there was no arbitration agreement and that in any event the dispute could not be referred to arbitration because the defendant terminated the main agreement. The High Court of Fiji established that there was an arbitration agreement signed by both parties, and also applied the doctrine of separability of the arbitration agreement, rejected the defendant's objections and appointed an arbitrator.<sup>35</sup>

Further, the Fijian courts are also likely to grant the stay of court proceedings when the conditions of section 5 of the Fiji Arbitration Act 1965 are satisfied, namely: (i) there is no sufficient reason why the matter should not be referred in accordance with the submission and (ii) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.<sup>36</sup> In *Consort Shipping Line Ltd v FAI Insurance* the High Court of Fiji rejected the defendant's appeal of the decision granting the stay of court proceedings because the parties agreed to submit their dispute to arbitration.<sup>37</sup>

### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

The Fiji International Arbitration Act 2017 contains a general requirement pursuant to which recognition and enforcement of award may be refused on the public policy ground,<sup>38</sup> as well as an additional provision clarifying that the notion of public policy covers the issues of fraud and corruption and a breach of the rules of natural justice.<sup>39</sup> In the Report on the Fiji International Arbitration Act 2017 the Parliament cites the submission of the Fiji Chamber of Commerce and Industry, according to which "'public policy" should be only so interpreted as far as it aims to broaden the public interest of honesty and fair dealing, of not violating a basic notion of Fijian law'.<sup>40</sup> However, there are no Fijian court decisions available interpreting the public policy ground for refusal of recognition and enforcement of award.

### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

No important judgments on interpretation of the New York Convention have been found. This might be due to the fact that this instrument was given effect to very recently through adoption of the Fiji International Arbitration Act 2017.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

There are no arbitration institutions in Fiji,<sup>41</sup> but some disputes involving parties from Fiji have been administered by the Australian Centre for International Commercial Arbitration (ACICA) based in Sydney, Australia.<sup>42</sup>

*B. Measures to strengthen institutional arbitration capabilities*

There is no information available on initiatives aimed at strengthening institutional arbitration capabilities.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

For admission in Fiji, foreign lawyers must be admitted to practise in the foreign jurisdiction and there must be reciprocal recognition of qualifications between Fiji and the overseas jurisdiction.<sup>43</sup> Lawyers admitted as a barrister or a solicitor in a Commonwealth country may be admitted in Fiji if they reside in Fiji for at least three months and have legal experience considered appropriate by the Chief Justice.<sup>44</sup>

There are no specific rules for legal practitioners acting in arbitration proceedings.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 397 days to resolve a commercial dispute in a first-instance court in Fiji – 36 days for filing and service of court processes, 206 days for trial and judgment and 155 days for enforcement of judgment.<sup>45</sup> Fiji ranks above the East Asia & Pacific region, where it takes an average of 581.1 days to resolve commercial disputes in first-instance courts.<sup>46</sup> In terms of overall ease of enforcing contracts, Fiji scored 57.05 of 100 and ranked 97 of 190.<sup>47</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

*G. Statistics on judges and lawyers per capita*

To be admitted to practise in Fiji, local lawyers should have: (a) a bachelor of law degree (four years of study); (b) a certificate of successful completion of either the Professional Diploma in Legal Practice offered by the University of the South Pacific or Graduate Diploma in Legal Practice offered at Fiji National University; or (c) an equivalent law degree and bar admission course from abroad; and (d) be admitted to the roll of barristers and solicitors of the High Court of Fiji and hold a current practising certificate issued by the Chief Registrar's office.<sup>48</sup>

According to the website of the Judicial Department of Fiji, there are 9 judges in the Supreme Court, 13 judges of the Court of Appeal, 21 judges in High Courts, 27 magistrates in magistrate's courts and 1 judge and 4 magistrates in family courts.<sup>49</sup> This gives the total number of 75 judges/magistrates in Fiji.

The most recent statistics on the number of lawyers, from 2011, indicate that there are 350 lawyers in Fiji, including 230 lawyers in private practice and 120 government/in-house lawyers.<sup>50</sup> The ratio of lawyers per capita is 1:3,840.<sup>51</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for arbitration in Fiji. The Legal Aid Commission was founded by the Legal Aid Act 1996 and the Legal Aid Amendment Decree 2009 with the purpose of providing legal services to those that cannot afford a private lawyer.<sup>52</sup> The Commission has been given recognition under the 2013 Fijian Constitution.<sup>53</sup> While mainly providing advice and free representation in court, the Commission also provides 'other forms of assistance',<sup>54</sup> leaving open the possibility of assistance in alternative methods of dispute resolution.

The Legal Aid Act 1996 states that the Commission shall provide legal assistance to impoverished persons.<sup>55</sup> The definition of 'persons' in the 1996 Act does include a corporation.<sup>56</sup> That said, the Commission limits their assistance in civil law to certain matters including probate, letters of administration, Fiji National Provident Fund withdrawals in the absence of valid nominations, and the drafting of wills, deed poll, and powers of attorney.<sup>57</sup> Since the Act provides that the Commission must provide legal assistance to persons, subject to the resources available to it, the Commission is able to limit the areas of civil law assistance in this manner.<sup>58</sup>

### B. *Third-party funding*

No jurisprudence or literature appears to be available on the doctrines of champerty and maintenance in Fiji or on the availability of third-party funding in the country. The law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished by statute by the Criminal Law Act (UK) in 1967 but a champertous agreement may still be treated as contrary to public policy and unlawful.<sup>59</sup> As this was the law applied at the time of independence in 1970 it is likely still applicable in Fiji. Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to occur in Fiji.

### C. *Contingency fees*

Contingency fees are authorised in Fiji but are limited to 10 per cent of the total amount awarded or property received.<sup>60</sup>

### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.



- 2 Greenberg et al. (2010), 'International Commercial Arbitration practice in Australia, New Zealand and the Pacific Islands', in H A Grigera Naón and P E Mason (eds), *International Commercial Arbitration Practice: 21st Century Perspectives*, LexisNexis, 15-12.
- 3 Ibid.
- 4 Standing Committee on Justice, Law and Human Rights (2017), *Report on the International Arbitration Bill 2017*, Parliamentary Paper No. 109, 4–5. See also GAR (2017), 'Fiji Passes New Law', Alison Ross <<https://globalarbitrationreview.com/article/1147655/fiji-passes-new-law>> accessed 7 March 2019.
- 5 Asian Development Bank (2016), *Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific* (Technical Assistance Report), paras 12–13.
- 6 Arbitration Act 1965.
- 7 International Arbitration Act 2017; GAR (2017), 'Fiji Passes New Law'; Horrigan et al. (2017), 'Fiji's International Arbitration Act 2017' <<https://hsfnotes.com/arbitration/2017/10/18/fjjs-international-arbitration-act-2017/>> accessed 7 March 2019.
- 8 Fiji International Arbitration Act 2017, s 4; WilmerHale (2017), 'International Arbitration Group Assists Fiji in Adoption of UNCITRAL Model Law on International Commercial Arbitration', G Born and J Lim, para 4 <<https://www.wilmerhale.com/en/insights/client-alerts/2017-09-25-international-arbitration-group-assists-fiji-in-adoption-of-uncitral-model-law-on-international-commercial-arbitration>> accessed 7 March 2019.
- 9 International Arbitration Act 2017, s 4(3); GAR (2017), 'Fiji Passes New Law'.
- 10 Standing Committee on Justice, Law and Human Rights, *Report on the International Arbitration Bill 2017* (Parliamentary Paper No. 109, 2017) 4.
- 11 WilmerHale (2017), 'International Arbitration Group Assists Fiji in Adoption of UNCITRAL Model Law', para 1.
- 12 Greenberg et al. (2010), 'International Commercial Arbitration practice in Australia, New Zealand and the Pacific Islands', 15-12.
- 13 Fiji Arbitration Act 1965, sch 1, s 1 ('If no other mode of reference is provided, the reference shall be to a single arbitrator.'). Fiji Arbitration Act 1965, Schedule 1, s 4 ('The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which arbitrators, by any writing signed by them, may, from time to time, extend the time for making the award.')
- 14 Fiji Arbitration Act 1965, s 15.
- 15 Ibid., s 6(1).
- 16 Ibid., s 7.
- 17 Ibid., s 12(1).
- 18 Ibid., s 12(2).
- 19 WilmerHale (2017), 'International Arbitration Group Assists Fiji in Adoption of UNCITRAL Model Law', para 8.
- 20 Fiji Arbitration Act 1965, s 2.
- 21 Ibid., s 45.
- 22 Ibid., s 21.
- 23 Ibid., s 35.
- 24 Ibid., s 55.
- 25 Ibid., s 8.
- 26 Fiji Arbitration Act 1965, sch 2, s 4.
- 27 Fiji International Arbitration Act 2017, s 21(1).
- 28 UNCITRAL, 'Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' <[https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards)> accessed 7 March 2019.
- 29 Ibid.

- 30 See ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 9 March 2019.
- 31 UNCTAD, Investment Policy Hub, Agreement between Australia and Fiji on Trade and Economic Relations (adopted 11 March 1999, entered into force 15 December 1999) Art 7(1) <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3183>> accessed 9 March 2019.
- 32 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (adopted 23 June 2000, entered into force 1 April 2003) Art 21 <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3185>> accessed 9 March 2019.
- 33 Asian Regional Integration Center, 'FTAs: Fiji' <[aric.adb.org](http://aric.adb.org)> accessed 3 July 2019.
- 34 *Tahila Management and Financial Services v Spruce Ltd* [2014] FJHC 879.
- 35 Ibid.
- 36 Fiji Arbitration Act 1965, s 5.
- 37 *Consort Shipping Line Ltd v FAI Insurance (Fiji) Ltd* [1998] FJHC 205.
- 38 Fiji International Arbitration Act 2017, s 54(1)(b)(ii).
- 39 Fiji International Arbitration Act 2017, s 55.
- 40 Standing Committee on Justice, Law and Human Rights, *Report on the International Arbitration Bill 2017, Appendix B Copies of Submissions Received by the Standing Committee on Justice, Law and Human Rights, Fiji Chamber of Commerce and Industry, International Arbitration Bill 2017* (Parliamentary Paper No. 109, 2017) para 1–b.
- 41 Ballantine, C (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, UNCITRAL, 285, 293.
- 42 Ibid, 285, 291.
- 43 Mogish et al. (2013), *Rights and Procedures of Admission in South Pacific Countries* (South Pacific Lawyers' Conference, 14–15 November 2013), para 2.4.
- 44 Ibid., para 2.3.
- 45 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreconomies/fiji#>> accessed on 27 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 46 Ibid.
- 47 Ibid.
- 48 Mogish et al. (2013), *Rights and Procedures of Admission in South Pacific Countries*, para 2.2.
- 49 Judicial Department of Fiji <<http://www.judiciary.gov.fj/>> accessed 8 March 2019.
- 50 Legal Aid Commission, 'About Us' <<https://legalaidfiji.com.fj/About-Us>> accessed 15 September 2019.
- 51 Ibid.
- 52 Ibid.
- 53 Constitution of the Republic of Fiji at s 118.
- 54 Legal Aid Commission, 'Our Services' <<https://legalaidfiji.com.fj/Our-Services>> accessed 15 September 2019.
- 55 Legal Aid Act 1996, No. 10 of 1996 at s 6(1).
- 56 Legal Aid Act 1996, No. 10 of 1996 at s 3.
- 57 Legal Aid Commission, 'Our Services'.
- 58 Legal Aid Act 1996, No. 10 of 1996 at s 6(1).
- 59 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any

rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

- 60 Fiji Legal Practitioners (Amendment) Decree 2012 (Decree No. 53), Art 78A. See also Krishna Raj (2012), 'Billing Ethics: A Study of the Use of Time-Based Billing by Private Legal Practitioners in Fiji', The University of South Pacific Research Paper, 2. <<http://digilib.library.usp.ac.fj/gsd/collect/usplibr1/index/assoc/HASH6d61.dir/doc.pdf>> accessed 7 March 2019.

# THE GAMBIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. Relationship with existing or prior English Arbitration Act(s)

The Republic of the Gambia ('Gambia') was a British protectorate between 1900 and 1965, when it became an independent nation within the Commonwealth.<sup>2</sup> The Gambia became a republic in 1970.<sup>3</sup> The Gambia briefly left the Commonwealth in October 2013 but rejoined in February 2018.<sup>4</sup> The Gambia's current legal system is based on statutory enactments and other decrees enacted pursuant to the Constitution of 1997, English common law, Sharia law (for marriage, divorce and inheritance matters in Islamic communities), and customary law.<sup>5</sup>

Arbitration in The Gambia is currently governed by the Alternative Dispute Resolution Act of 2005 (ADRA). The ADRA repealed the pre-independence Arbitration Act of 1955.<sup>6</sup> No literature appears to be available on the relationship of the Arbitration Act 1955 with the prior English Arbitration Acts. However, considering The Gambia's colonial history, it is likely that the Arbitration Act 1955 was modelled after the English arbitration laws in force at the time of enactment, i.e., the 1950 English Arbitration Act.

### B. Description of prior legislation and reasons for its replacement

Prior to the ADRA, arbitration in The Gambia was governed by the Arbitration Act of 1955.

## II. CURRENT ARBITRAL LEGISLATION

### A. Date of enactment

The ADRA was enacted on 29 July 2005.

### B. Scope of application to domestic and international arbitrations

The ADRA governs both domestic and international arbitration proceedings. Part X of the ADRA applies only to international commercial arbitration and provides that the New York Convention shall apply to those arbitrations if certain conditions are met (see Section IV.C for additional details).

### C. Details and/or relevant amendments and modifications

On 27 June 2006, the ADRA was amended by the Alternative Dispute Resolution (Amendment) Act 2006.<sup>7</sup> The Amendment Act expressly repealed the Arbitration Act 1955<sup>8</sup> and substituted new definitions for 'contract', 'court' and 'dispute' in the following terms:

- a. 'Contract' means a commercial contract, an investment contract and any contract involving a civil case;
- b. 'Court' means any court or tribunal established under the Constitution of the Republic of The Gambia or any other law; and
- c. 'Dispute' means a dispute or difference – (a) arising out of a commercial or an investment contract; (b) involving any civil cause or matter; or (c) arising in any other way.<sup>9</sup>

The Gambia has not formally adopted the UNCITRAL Model Law on International Commercial Arbitration (the 'UNCITRAL Model Law'),<sup>10</sup> but the

ADRA closely follows the Model Law and includes most of its substantive provisions in similar or nearly identical terms. The key distinctions are noted below.

*D. Relationship to the UNCITRAL Model Law*

As noted above, The Gambia has not adopted the Model Law,<sup>11</sup> but the ADRA closely follows and is generally based on the UNCITRAL Model Law.<sup>12</sup> Further, section 55 of the ADRA provides that notwithstanding the provisions of the Act, parties to an international commercial agreement may agree that disputes shall be referred to arbitration in accordance with the UNCITRAL Model Law arbitration rules (which are set out in Schedule 1 to the Act) or any other international arbitration rules acceptable to the parties.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

There are a few differences between the Model Law and the ADRA:

Regarding a court's obligation to refer parties to arbitration when a matter is the subject of an arbitration agreement, the ADRA provides that courts have no such obligation if they find that 'there is not in fact any dispute between the parties with regard to the matters agreed to be referred'. No such express exception exists under the Model Law.<sup>13</sup> The exceptions in the Model Law (i.e., agreement null and void, inoperative or incapable of being performed) are also included in the ADRA.<sup>14</sup>

The ADRA regime for tribunal-ordered interim measures is slightly more flexible than the Model Law regime. Article 31 of the ADRA provides that, unless the parties otherwise agree, tribunals may order interim protective measures 'as they consider necessary in respect of the subject matter of the dispute'.<sup>15</sup> By contrast, the Model Law provides a closed list of permitted interim measures: measures to maintain or restore status quo, prevent harm or prejudice to the arbitral process, and preserve assets or evidence.<sup>16</sup> In addition, the Model Law, unlike the ADRA, provides the legal standard to be used in determining whether to grant an interim measure (although for certain measures such standard applies only if the tribunal considers it appropriate).<sup>17</sup> Unlike the Model Law, the ADRA does not provide for *ex parte* orders in connection with interim measures.<sup>18</sup> The enforcement regime for interim orders is also slightly more flexible under the ADRA than under the Model Law. The ADRA provides that, unless the parties otherwise agree, orders regarding interim measures are subject to the same enforcement and recognition regime as awards.<sup>19</sup> The Model Law provides a few additional grounds for courts to refuse recognition or enforcement of interim measures (e.g., failure to comply with tribunal's security orders, measures incompatible with court powers).<sup>20</sup>

Regarding the public policy exception to a court's obligation to recognise or enforce an award (or to refuse setting it aside), the Model Law refers expressly to the public policy of the state, whereas the ADRA refers simply to 'public policy'.<sup>21</sup> In addition, as explained in more detail below, the ADRA provides additional grounds which would trigger the public policy exception and upon which an award could be set aside (i.e., fraud, corruption, gross irregularity or breach of the rules of natural justice in connection with the making of the award, or breach of natural justice during the arbitral proceedings). The Model Law does not provide such examples.<sup>22</sup>

The ADRA provides for the appointment of an umpire where there are more than two arbitrators.<sup>23</sup> The Model Law makes no provision for the appointment of an umpire.

*F. Powers and duties of arbitrators*

The ADRA requires anyone approached to be appointed as an arbitrator to 'disclose to the parties any circumstances he or she knows is likely to give rise to justifiable doubts as to his or her impartiality or independence'.<sup>24</sup> The same duty to disclose continues after appointment and throughout the arbitral proceedings.<sup>25</sup> Arbitral tribunals have the power to rule on their own jurisdiction, including on objections to the existence or validity of the arbitration agreement.<sup>26</sup> Unless otherwise agreed by the parties, tribunals have the power to order interim protective measures as they 'may consider necessary in respect of the subject matter of the dispute',<sup>27</sup> to decide on whether oral hearings are necessary,<sup>28</sup> and to appoint experts.<sup>29</sup> Tribunals shall make awards according to the substantive law chosen by the parties and 'such other considerations as are agreed by the parties or determined by the arbitral tribunal'.<sup>30</sup>

*G. Arbitrator immunity*

2. Article 28 of the ADRA provides that '[a]n arbitrator is not liable in respect of anything done or not done in his or her capacity as an arbitrator'.<sup>31</sup>

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention<sup>32</sup>*

The Gambia is not a party to the 1958 New York Convention.<sup>33</sup>

*B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

*C. Method of domestic implementation of the New York Convention*

As noted above, The Gambia is not a party to the New York Convention. However, the ADRA has domesticated all of the provisions of the New York Convention, which are annexed as schedule 2 to the ADRA.<sup>34</sup> Article 56 of the ADRA provides that the Convention shall apply to the enforcement and recognition of any award made in The Gambia or in any contracting state if the following conditions are met: first, the award must 'aris[e] out of an international commercial arbitration'<sup>35</sup> (as defined in the ADRA<sup>36</sup>); second, the dispute must 'arise out of a legal relationship that is contractual';<sup>37</sup> and third, the relevant contracting state must have 'reciprocal legislation recognising the enforcement of arbitral awards made in The Gambia in accordance with the provisions of the Convention'.<sup>38</sup>

*D. Other international/regional treaties*

The Gambia ratified the United Nations Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 ('ICSID Convention') on 26 January 1975.<sup>39</sup> The Gambia has also been party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) ('Mauritius Convention') since 2018.<sup>40</sup> The Gambia has been a member of the Regional Economic Community of West African States (ECOWAS) since 28 May 1975, and has also ratified the

WIPO Copyrights Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

The Gambia has signed 17 bilateral investment treaties with different countries, of which five are in force (Morocco, Taiwan, Netherlands, Qatar and Switzerland).<sup>41</sup> The Gambia has also entered into the Agreement Establishing the African Continental Free Trade Area (AfCFTA).

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

One commentator noted a few years ago that '[a]lthough reported cases in the public domain are few and far between, the practice of arbitration has come up for consideration from time to time before the Gambian courts, and the consensus view is that the Gambian courts would in most cases prefer to support arbitration'.<sup>42</sup> Furthermore, '[b]ased on available decisions in the public domain, the Gambian judiciary is seen generally to be supportive of parties seeking to enforce international arbitral awards'.<sup>43</sup>

In *Lerr Group Limited v Ballast Nedam Africa*,<sup>44</sup> the Gambian High Court upheld an application, brought by a party to an arbitration agreement, seeking a stay of proceedings and compelling parties to arbitration pursuant to an arbitration clause in a service contract referring any dispute between the parties to the Netherlands Arbitration Institute (NAI). In compelling parties to arbitration, the High Court rejected the jurisdictional objections raised to the effect that the cause of action arose in The Gambia and that it would be onerous for the parties to travel to the Netherlands for the arbitration hearings. The High Court judge was satisfied that since there was no allegation of fraud, duress or trickery, the agreement to arbitrate in the Netherlands had to be honoured and enforced.

##### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The ADRA provides that courts may refuse to recognise or enforce arbitral awards if they find that 'the recognition or enforcement of the award would be contrary to public policy'.<sup>45</sup> The ADRA provides two examples of grounds for finding that an award is against public policy. First, if 'the making of the award was induced or affected by fraud, corruption or gross irregularity'.<sup>46</sup> Second, if there was a 'breach of the rules of natural justice' (1) 'during the arbitral proceedings'<sup>47</sup> or (2) 'in connection with the making of the award'.<sup>48</sup> Article 49(7) is clear, however, that these examples should not be taken to 'limit[] the generality' of the public policy grounds for setting aside or refusing recognition or enforcement of an award'.

##### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

As stated above, there are few reported decisions on the provisions of the ADRA. See *Lerr Group Limited v Ballast Nedam Africa*,<sup>49</sup> above.

#### V. ARBITRATION LANDSCAPE

##### A. *Institutional arbitration*

There are no known arbitral institutions active in The Gambia. No Gambian entity appears to have been a party to an ICC arbitration in 2017.<sup>50</sup> The

ADRA created the Alternative Dispute Resolution Secretariat (ADRS),<sup>51</sup> which is empowered to provide some of the functions of an arbitral institution (e.g., appoint arbitrators when parties fail to do so, provide facilities for arbitrations, maintain a register of experienced arbitrators, provide guidelines on fees, and generally perform any function assigned to it under the ADRA or by the parties).<sup>52</sup> There were 792 cases registered with the ADRS between June 2008 and 2014, 'of which 577 cases were solved by ADRS'.<sup>53</sup>

*B. Measures to strengthen institutional arbitration capabilities*

No information was available.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

Under the Legal Practitioners Act, the requirements to be admitted to practise law in The Gambia include being a Gambian citizen (or non-citizen who has been a resident for more than 15 years) and having a law degree and professional qualification to practise law in any Commonwealth country.<sup>54</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

One commentator noted a few years ago that '[a]rbitration is regularly used to resolve commercial disputes and in particular large and complex construction cases within The Gambia. Most cases involve the Gambian Government as a party'.<sup>55</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced.

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

According to the World Bank's Doing Business Report 2019, it takes an average of 407 days to enforce a contract through the Gambian court system. This is shorter than the average in sub-Saharan Africa (655.1 days) and also shorter than the average for OECD high income countries (582.4 days). In particular, filing and service take an average of 43 days, trial and judgment 302 days, and enforcement of the judgment 62 days.<sup>56</sup> In terms of overall ease of enforcing contracts, Gambia scored 53.91 of 100 and ranked 117 of 190.<sup>57</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>58</sup>

*G. Statistics on judges and lawyers per capita*

According to The Gambia Bar Association, '[t]here are approximately 200 legal practitioners admitted to practice in the Gambia', but a third of them work outside the country.<sup>59</sup> As of July 2018, the estimated population of The Gambia was 2,092,731 people.<sup>60</sup> That means there was approximately one lawyer per 10,464 people.



## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for arbitration in The Gambia, but there is no information to indicate that legal aid is provided for businesses. The Legal Aid Act of 2008 created the National Agency of Legal Aid to administer and manage the legal aid system in The Gambia.<sup>61</sup> The Act extends to any professional assistance given by a lawyer, which includes alternative dispute resolution mechanisms such as conciliation, mediation and arbitration.<sup>62</sup> The Act does not define a 'person' that may receive legal aid, nor does it limit legal aid to certain types of disputes.

### B. *Third-party funding*

No jurisprudence or literature appears to be available on the doctrines of champerty and maintenance in The Gambia or on the availability of third-party funding in the country. However, since The Gambia legal system is based on the English common law, and the rules of maintenance and champerty applied at the time of independence,<sup>63</sup> it is likely that the rules still exist in The Gambia by virtue of the common law. Third-party funding may therefore not be generally legally permitted

### C. *Contingency fees*

No information was available.

### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Encyclopaedia Britannica, 'The Gambia History' <<https://www.britannica.com/place/The-Gambia/History>> accessed 9 July 2019.
- 3 Ibid.
- 4 The Commonwealth, 'Gambia, The: History' <<http://thecommonwealth.org/our-member-countries/gambia/history>> accessed 9 July 2019.
- 5 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa' <<https://www.herbertsmithfreehills.com/latest-thinking/guide-to-dispute-resolution-in-africa>> accessed 9 July 2019.
- 6 Alternative Dispute Resolution Act 2005, art. 106.
- 7 Alternative Dispute Resolution (Amendment) Act 2006 (No. 6 of 2006).
- 8 Ibid., s 2(a).
- 9 Ibid., s 2(b).
- 10 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 11 UNCITRAL, 'Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 9 July 2019.
- 12 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa'.
- 13 Compare Alternative Dispute Resolution Act 2005, art. 12(2)(b) with UNCITRAL Model Law, art. 8(1).

- 14 See Alternative Dispute Resolution Act 2005, art. 12(2)(a).
- 15 Alternative Dispute Resolution Act 2005, art. 31(a).
- 16 See UNCITRAL Model Law, art. 17.
- 17 See UNCITRAL Model Law, art. 17A.
- 18 See UNCITRAL Model Law, art. 17B.
- 19 See Alternative Dispute Resolution Act 2005, art. 31(2).
- 20 Compare Alternative Dispute Resolution Act 2005, art. 31(2) with UNCITRAL Model Law art. 17I.
- 21 Compare UNCITRAL Model Law arts 34(b)(ii) and 36(b)(ii) with Alternative Dispute Resolution Act 2005, arts 49(2)(b)(ii) and 53(1)(b)(ii).
- 22 Compare Alternative Dispute Resolution Act 2005, art. 49(7) and 53(7) with UNCITRAL Model Law, arts 34 and 36.
- 23 See Alternative Dispute Resolution Act 2005, arts 20–27.
- 24 *Ibid.*, art. 16(1).
- 25 *Ibid.*, art. 16(2).
- 26 *Ibid.*, art. 30.
- 27 *Ibid.*, art. 31(1).
- 28 *Ibid.*, art. 38(1).
- 29 *Ibid.*, art. 40(1).
- 30 *Ibid.*, art. 46(1).
- 31 *Ibid.*, art. 28.
- 32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention); New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 May 2019.
- 33 New York Arbitration Convention, 'Contracting States'.
- 34 See Alternative Dispute Resolution Act 2005, Second Schedule.
- 35 *Ibid.*, art. 56.
- 36 *Ibid.*, art. 56.
- 37 *Ibid.*, art. 56(b).
- 38 *Ibid.*, art. 56(a).
- 39 See ICSID, 'List of Contracting States and other Signatories of the Convention' <[icsid.worldbank.org](http://icsid.worldbank.org)> accessed 9 July 2019.
- 40 United Nations Convention on Transparency in Treat-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) UNTS available at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXII-3&chapter=22&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en)> accessed 9 July 2019.
- 41 UNCTAD Investment Policy Hub, 'Gambia' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed on 30 September 2019.
- 42 Ike Ehiribe (2013), 'Chapter 2.2: The Republic of Gambia', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 150.
- 43 *Ibid.*, 152.
- 44 *Lerr Group Limited v Ballast Nedam Africa*, Civil Suit No.: HC/269/09/CO/082/D2 (unreported) cited in Ehiribe (2013), 'Chapter 2.2: The Republic of Gambia', 151–52.
- 45 Alternative Dispute Resolution Act 2005, art. 53(1)(b)(ii).
- 46 Alternative Dispute Resolution Act 2005, art. 49(7)(a) (setting aside) and art. 53(3)(a) (recognition or enforcement).
- 47 Alternative Dispute Resolution Act 2005, art. 49(7)(b)(i) (setting aside) and art. 53(3)(b)(i) (recognition and enforcement).
- 48 Alternative Dispute Resolution Act 2005, art. 49(7)(b)(ii) (setting aside) and art. 53(3)(b)(ii) (recognition and enforcement).

- 49 *Lerr Group Limited v Ballast Nedam Africa*, Civil Suit No.: HC/269/09/CO/082/D2 (unreported) cited in Ehiribe (2013), 'Chapter 2.2: The Republic of Gambia', 149, 151–52.
- 50 ICC (2018), 'Extract' 2 ICC Dispute Resolution <<https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>> accessed 9 July 2019.
- 51 See Alternative Dispute Resolution Act 2005, art. 99.
- 52 *Ibid.*, art. 100.
- 53 The Republic of The Gambia's Combined Report on the African Charter on Human & Peoples' Rights & Initial Report on the Protocol to the African Charter on the Rights of Women in Africa (2018), 39.
- 54 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa'.
- 55 Ike Ehiribe (2013), 'Chapter 2.2: The Republic of Gambia', 150.
- 56 Gambia Bar Association, 'Membership' <<http://gba.gm/membership>> accessed 9 July 2019.
- 57 *Ibid.*
- 58 *Ibid.*
- 59 *Ibid.*
- 60 Central Intelligence Agency, 'The World Factbook: Africa: Gambia' <<https://www.cia.gov/library/publications/the-world-factbook/geos/ga.html>> accessed 9 July 2019.
- 61 Institute for Human Rights and Development in Africa (2012), 'Legal Aid in The Gambia: An Introduction to Law and Practice', 10 <<https://www.ihrda.org/wp-content/uploads/2012/04/Legal-Aid-in-The-Gambia-layout-2012-website-download.pdf>> accessed 15 September 2019.
- 62 *Ibid.*, 20.
- 63 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

# GHANA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Ghana is a former British colony. It gained its independence on 6 March 1957.<sup>2</sup> As a former British colony, it received certain laws from Britain which remain effective either as common law or existing law. Essentially, the Ghanaian legal system comprises the Constitution, Acts of Parliament, and the common law.<sup>3</sup>

The Alternative Dispute Resolution Act 2010 ('ADR Act') in Ghana is not based on the English Arbitration Act 1950. However, the ADR Act kept certain provisions which reflect those of the English Arbitration Act 1996.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

The Arbitration Act was first enacted in 1961.<sup>5</sup> This Act was replaced by the ADR Act in 2010.<sup>6</sup> The amendment was to standardise the provision and to increase access to alternative dispute resolution.<sup>7</sup> Further, the Act 2010 includes the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').<sup>8</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The ADR Act 2010 was enacted on 31 May 2010.<sup>9</sup>

### B. *Scope of application to domestic and international arbitrations*

The ADR Act governs both domestic and international arbitration proceedings.<sup>10</sup>

### C. *Details and/or relevant amendment and modifications*

The ADR Act has not been amended since 2010.

### D. *Relationship to the UNCITRAL Model Law<sup>11</sup>*

The ADR Act is partially based on the UNCITRAL Model.<sup>12</sup> Part 1 of the Act is mostly based on the Model Law.<sup>13</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The ADR Act reflects many of the provisions of the Model Law, but the Act has modified and expanded the Model Law in some respects.<sup>14</sup>

Unlike the Model Law, the Act gives power to the tribunal to grant a relief on the basis of justice, regardless of parties' prior agreement. On the other hand, article 28(3) of the UNCITRAL Model Law recognises this concept only if the parties had an agreement about it.<sup>15</sup>

The ADR Act does not put a limit on courts' involvement in the arbitration disputes, while the Model Law does.<sup>16</sup>

Unlike the Model Law, which provides parties' freedom to decide the procedure of the arbitral proceeding, the ADR Act states that both parties and arbitrators determine the rules when the arbitration commences.<sup>17</sup>

While the Model Law does not state that the tribunal is allowed to subpoena a witness, the ADR Act gives the arbitral tribunal powers to subpoena a witness.<sup>18</sup>

When it comes to the subject matter, the ADR Act applies to a wider scope of disputes including commercial disputes, while the Model Law essentially applies to international commercial disputes between contracting parties.<sup>19</sup>

In the ADR Act, the court and the Alternative Dispute Resolution Centre (set up by the ADR Act) have the position of the conciliator of the Model Law.<sup>20</sup>

#### *F. Powers and duties of arbitrators*

According to the ADR Act, the arbitrator has power to decide on matters of procedure and evidence. Matters of procedure and evidence include (a) the time and place for holding any part of the proceedings; (b) the questions that should be put to and answered by respective parties and how the questions should be put; (c) the documents to be provided by the parties and at what stage of the proceedings; and (d) the application or non-application of the strict rules of evidence as to admissibility, relevance or weight of any material sought to be tendered and how the material should be tendered.<sup>21</sup>

The arbitrator may determine the time within which any direction is to be complied with.<sup>22</sup>

The parties may agree to permit an arbitrator to (a) consolidate one arbitral proceeding with other arbitral proceeding; and (d) hold concurrent hearings.<sup>23</sup>

The arbitrator may order a claimant to provide security for the costs of the arbitration whether the claimant is an individual resident in Ghana or a body established or registered by law in Ghana, unless otherwise agreed by the parties.<sup>24</sup>

The arbitrator may give directions in respect of property which is the subject matter of the arbitration and which is owned or is in the possession of a party, (a) for the inspection, preservation, photographing or detention of the property by the arbitrator, an expert or a party; and (b) that samples be taken or an experiment be conducted on the property.<sup>25</sup>

The arbitrator may subpoena a witness and shall at the request of a party subpoena a witness.<sup>26</sup>

The arbitrator may direct a party or a witness to give evidence on oath or affirmation and may for that purpose administer the oath or affirmation.<sup>27</sup>

#### *G. Arbitrator immunity*

According to the ADR Act, an arbitrator is not liable for any act or omission in the discharge of the arbitrator's functions as an arbitrator unless the arbitrator is shown to have acted in bad faith.<sup>28</sup> Arbitrators will, however, be liable for the consequences of deliberate wrongdoing arising from the performance of their duties.<sup>29</sup>

### **III. International Instruments**

#### *A. Signatory to the New York Convention*

Ghana became a party to the New York Convention on 9 April 1968.<sup>30</sup>

#### *B. Reservations to the New York Convention*

Ghana has not made any reservations to the New York Convention.<sup>31</sup>

### C. Method of domestic implementation of the New York Convention

The ADR Act provides the enforcement of foreign awards under the New York Convention. The convention is included as the First schedule in the ADR Act.<sup>32</sup>

### D. Other international/regional treaties

Ghana is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>33</sup> Ghana ratified the Convention on 13 July 1966 which entered into force on 14 October 1966.<sup>34</sup>

Ghana has signed 28 bilateral investment treaties with different states, of which only nine are in force (Burkina Faso, Serbia, Malaysia, Germany, Denmark, Switzerland, China, Netherlands, and the United Kingdom).<sup>35</sup> Ghana has also entered into the Agreement Establishing the African Continental Free Trade Area (CFTA).

## IV. Relevant case law

### A. Approach of the national courts to the enforcement of arbitration agreements

According to one commentary, the Ghanaian courts are more inclined to 'uphold, if possible, rather than neutralise an arbitration agreement'.<sup>36</sup> In 1962, the Supreme Court in *Khoury v Khoury*, in determining the applicable test as to whether an arbitration agreement should be enforced or not, stated that the test:

[I]s not whether it will be more satisfactory that the case should proceed in court, but whether there is sufficient reason why the matter should not be referred in accordance with the submission because, in a sense, the person opposing the stay is seeking to get out of his contract to refer the dispute to arbitration. To refuse stay on this ground would in effect neutralise the contract the parties had agreed upon.<sup>37</sup>

Section 6 of the ADR Act provides that '[w]here there is an arbitration agreement and a party commences an action in a court, the other party may... apply to the court to refer the action ... to which the arbitration agreement relates, to arbitration'.<sup>38</sup> In *George Kodua v Interbeton B.V.*, the Court of Appeal found that the plaintiff's ground for refusal of enforcement of foreign arbitration agreement, because conducting arbitration abroad might be expensive, was not a valid defence.<sup>39</sup> This case, as well as many others, demonstrates the pro-arbitration approach courts in Ghana follow in addressing this enforcement question.<sup>40</sup>

### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

Section 59(3) of the ADR Act does not mention public policy as ground for refusing enforcement of an arbitral award.<sup>41</sup> As the New York Convention is incorporated in the First Schedule to the Act, Ghana is subject to compliance with the New York Convention's requirements for foreign awards' enforcement. Thus, the recognition or enforcement of awards in Ghana might be refused on public policy grounds under article V(2) of the New York Convention.<sup>42</sup> The Ghanaian courts favour arbitration and implement a high bar to refuse recognition or enforcement, even where the parties oppose enforcement on grounds of public policy.<sup>43</sup> The Ghanaian courts may also

refuse to stay proceedings when there is arbitration if that agreement violates public policy.<sup>44</sup>

C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

In *Republic v High Court, Ex parte Chacem Ltd*, the Supreme Court restricted the ability of the national courts to intervene in arbitration proceedings under the national arbitration legislation (the ADR Act, 2010). The Supreme Court examined the scope of the powers of the High Court in intervening in arbitration proceedings and limited the High Court's ability to intervene in arbitration proceedings. The Supreme Court indicated that the courts must be very slow and cautious in intervening in arbitration proceedings and that court interventions should not whittle away the functions of arbitral tribunals and lose benefits of arbitration.<sup>45</sup>

Although the above was a positive approach to the treatment of arbitration proceedings, the Supreme Court did not take the opportunity to recognise the role and potential involvement of non-signatories in arbitration proceedings.

In this case, a party to an arbitration agreement instituted arbitration proceedings against the other party for breach of contract. After pleadings had been filed, the claimant applied to the sole arbitrator to join a non-signatory to the arbitration agreement to the proceedings. The non-signatory was the parent company of the respondent and had been involved in the contract negotiation and, indeed, exercised complete control over the respondent. The non-signatory was served with the application to join it and it filed a preliminary objection on the basis that the tribunal did not have the jurisdiction to join a non-signatory to arbitration proceedings.

The sole arbitrator held that joinder was a procedural matter and therefore the ADR Act gave him power to determine the application, but then held that the ADR Act, the applicable rules, and the arbitration agreement did not provide for joining non-signatories and since arbitration is a private agreement, it was an implied term that non-signatories are excluded. The tribunal recognised developments in US and other jurisdictions on joining non-signatories but noted that they were not binding on the tribunal. He held that the tribunal did not have power to join a non-signatory to arbitration proceedings.

The claimant applied to the High Court to determine a preliminary point of law (whether the court would have power to join a non-signatory to arbitration proceedings in the proper circumstances). The High Court ordered the joinder of the non-signatory to the proceedings by lifting the veil of incorporation to find that the non-signatory is essentially the respondent's alter-ego.

The non-signatory applied to the Supreme Court to quash the High Court decision. The Supreme Court found that the proceedings before the High Court was not for the determination of a question of law arising in the course of arbitral proceedings. Section 40 deals with questions of law arising in the course of a hearing and not issues such as joinder. Where a tribunal makes a decision on joinder, it is not subject to an appeal. The court stated<sup>46</sup>:

What must be noted is that the provisions in Act 798 on arbitral proceedings must be considered as alternative methods of resolution of disputes, and therefore, in our view, the intervention of the High Court, unless expressly provided for and in clear instances devoid of any

controversy, must be very slow, and cautious. Otherwise, in our respective opinion, the High Courts will once again use these interventions to whittle away the functions of the arbitral tribunals and render nugatory the benefits that are to be derived from these arbitral proceedings as contained and provided for in Act 798.

Even though, as has been pointed out, the Courts have been granted some control mechanisms over the conduct of arbitral proceedings under the Act, the scope and extent to which the High Court intervened in this instance has far exceeded its jurisdiction. It is in our resolve to limit the unbridled interference of the court into the workings of arbitral tribunals under Act 798 that has culminated into this decision.

The Supreme Court held that: (1) The High Court exceeded its jurisdiction when it made an order joining the non-signatory when the motion before it was for the determination of a preliminary point of law; and (2) the High Court decision contains an error of law because arbitration is voluntary and must be consented to by the parties. The Supreme Court therefore quashed High Court's decision.

In *Attorney-General v Balkan Energy Ghana Limited, Balkan Energy LLC, Mr Phillip Elders*, the case involved the Government of Ghana and a foreign investor where the court found that matters involving the interpretation and enforcement of the Ghanaian Constitution are non-arbitrable. The Ghanaian courts held that the Power Purchase Agreement on which basis international arbitration proceedings were commenced was void because it did not satisfy the constitutional requirement of obtaining parliamentary approval. The international tribunal proceeded with the arbitration proceedings in spite of a High Court decision staying the arbitration proceedings and awarded damages in favour of the investor. The Supreme Court also held that the agreement was null and void because it lacked parliamentary approval.<sup>47</sup>

In another case against the Republic of Ghana, *Bankswitch Ghana Limited* (a Ghanaian company but 60 per cent Swiss-owned), signed a contract with the Government of Ghana to provide an electronic platform to process and value imported goods. The government terminated the contract which led *Bankswitch Ghana Limited* to initiate arbitration proceedings. The arbitral tribunal relied on the principle of estoppel to dismiss the Government of Ghana's allegation that the contract was void because parliamentary approval was required but not sought. An action was subsequently filed at the Supreme Court, relying on the decision in *Balkan*, to argue that the underlying contract is void because it did not receive parliamentary approval. The Supreme Court matter was, however, withdrawn and therefore the court did not make a pronouncement on the issue.<sup>48</sup>

In both *Balkan* and *Bankswitch*, the investors who obtained the arbitral awards in their favour in spite of the position taken by the Supreme Court did not seek to enforce the awards in Ghana where, naturally, the majority of the state's assets are located. It is difficult to imagine that this strategy was not informed by the risk that the awards may not be enforced in Ghana.

## V. Arbitration landscape

### A. Institutional arbitration

The Ghana Arbitration Centre is the most commonly used arbitral institution in Ghana.<sup>49</sup> Also, the Marian Conflict Resolution Centre and Ghana Association



of Certified Mediators and Arbitrators can be used for negotiation, mediation, and arbitration.<sup>50</sup>

Arbitral institutions such as the LCIA, ICC, and PCA are commonly used in Ghana. According to data released by the ICC, the institution received 11 arbitrations involving Ghanaian parties in 2018.

*B. Measures to strengthen institutional arbitration capabilities*

In the past decade, the Ghanaian Government has undertaken certain measures to promote and develop arbitration in Ghana. The most important measure was the revision of the arbitration law for both domestic and international arbitration with the ADR Act in 2010.<sup>51</sup>

*C. Submission of disputes to arbitration vs. litigation*

There are no statistics available on this. However, an overwhelming majority of disputes are resolved by litigation as compared to arbitration. The Ghana Arbitration Centre, which is the leading arbitral institution, receives an average of 25 referrals a year.

*D. Participation by foreign counsel in international arbitrations*

The ADR Act does not impose any limitations on foreign lawyers participating in the arbitral proceedings in Ghana.<sup>52</sup> Foreign practitioners must fulfil all requirements such as resident and work permit in order to be employed.<sup>53</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

There are no statistics on the sectors where arbitration is routinely used. However, the Ghana Arbitration Centre, the leading arbitral institution in the country, indicates that they receive referrals from financial institutions, the energy sector, and the telecommunications sector.<sup>54</sup> Arbitration is most commonly used in the following areas: energy; construction; labour disputes; oil and gas; mining; insurance services; intellectual property rights; maritime and shipping; property and land disputes.<sup>55</sup>

2. Time taken for enforcement/annulment proceedings

The process for enforcing a foreign arbitral award can generally be completed within a short time if the application for leave to enforce is not opposed. The experience has generally been an average of three months. If the application is opposed, it takes longer. The time taken for annulment proceedings is less predictable, largely depending on the issues raised in the matter.

The limitation period for enforcing an arbitral award is 12 years for arbitrations under the ADR Act and six years for arbitrations outside the Act. Most foreign arbitral awards will therefore have six years within which to apply to enforce the award.

3. Percentage of awards annulled/not enforced

There are no statistics available on this.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 710 days to resolve a commercial dispute in a first-instance court in Ghana – 15 days for filing and service of court processes, 365 days for trial and judgment and 330 days for enforcement of judgment.<sup>56</sup> Ghana ranks below the average

for sub-Saharan Africa, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>57</sup> In terms of overall ease of enforcing contracts, Ghana scored 54 out of 100 and ranked 116 of 190.<sup>58</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>59</sup>

#### G. *Statistics on judges and lawyers per capita*

There are no statistics available on this. However, the Ghana Bar Association indicates that there should be about 3,000 lawyers in the country, on the basis that 2,900 lawyers applied for/renewed their practising licences.

There are currently 14 Justices of the Supreme Court, 25 Justices of the Court of Appeal, 87 Justices of the High Court and 62 Circuit Court Judges. At the District Courts, there are a total of 173 Magistrates at post. Seventy of them are professional magistrates, 67 senior career magistrates, and 36 are career magistrates.

The population of Ghana was 30,519,074 as of 27 August 2019, based on United Nations estimates.

## VI. funding for legal claims

#### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for arbitration in Ghana, but there is no information to indicate that legal aid is provided for businesses. The Legal Aid Scheme Act 1997 entitles persons to legal aid with civil law matters relating to landlord/tenant, insurance, interstate succession, child maintenance, or other civil matters prescribed by parliament. If a person's matter does not fall into one of these categories, an application can be made to the Legal Aid Board to decide whether that person requires legal aid.<sup>60</sup> The overall purpose of the scheme is to achieve a 'just and equitable society where Ghana's socially and financially disadvantaged in need of legal services have nationwide access to high quality legal aid'.<sup>61</sup> There is no wording in the legislation that limits this service to individuals. Importantly, a 'person' is defined in Ghana's Interpretation Act 2009 as including 'a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons as well as an individual'.<sup>62</sup>

The Legal Aid Scheme Act 1997 mandates that legal aid cover all assistance as provided by a lawyer, including any steps 'preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or to bring an end to any proceedings'.<sup>63</sup> Therefore, alternative dispute resolution mechanisms can be covered by the country's legal aid scheme.

#### B. *Third-party funding*

As a common law jurisdiction, Ghana inherited the crimes and torts of maintenance and champerty when it became independent in 1957. Ghana has indicated an interest in facilitating a third-party funding market.<sup>64</sup> In the litigation *Jonah v Kulendi & Kulendi* the Supreme Court of Ghana did not make any definite pronouncement on the availability of third-party funding.<sup>65</sup> However, one of the Justices acknowledged that it is a common occurrence for third parties to fund claims.<sup>66</sup>

Generally, the parties to the litigation or arbitration fund the proceedings themselves or with the support of family or other benign sponsors, but not by funders with commercial and financial interests. It is also possible for a party to take a loan to fund proceedings. There are no professional funders active in the market.

#### C. Contingency fees

Contingency fees or success fees are allowed in Ghana. The Ghana Bar Association scale of fees cites success fees as a type of acceptable fee arrangement between parties and their lawyers.

#### D. Insurance for legal expenses

Legal insurance is not commonly used in Ghana, although there is no law preventing its use. It is not an insurance product ordinarily listed or offered by the leading insurance providers in Ghana. However, a party may be able to obtain legal insurance if it can find an insurer who is prepared to secure the risk.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 The Commonwealth, 'Ghana: History' <<http://thecommonwealth.org/our-member-countries/ghana/history>> accessed 28 August 2019.
- 3 The Constitution of the Republic of Ghana, article 11.
- 4 Invest in Africa, 'Dispute Resolution in Ghana' <<https://investin africa.com/detail/113>> accessed 28 August.
- 5 Ghana Arbitration Act 1961 (Act 38) <<http://laws.ghanalegal.com/acts/id/8/arbitration-act>> accessed 28 August 2019.
- 6 The Alternative Dispute Resolution Act, 2010 (Act 798) <<https://wipo lex.wipo.int/en/text/339485>> accessed 28 August 2019.
- 7 Paul F Kirgis (2014), 'Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana', *Cardozo J. Conflict Resol.*, Vol. 16, 101 <[http://scholarship.law.umt.edu/faculty\\_lawreviews/106](http://scholarship.law.umt.edu/faculty_lawreviews/106)> accessed 28 August 2019.
- 8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 9 The Alternative Dispute Resolution Act, 2010 (Act 798), Preamble.
- 10 Lexology, 'Arbitration In Ghana' <[www.lexology.com/library/detail.aspx?g=02eed885-3a6f-4fbc-8ac1-a303f5fffe6e](http://www.lexology.com/library/detail.aspx?g=02eed885-3a6f-4fbc-8ac1-a303f5fffe6e)> accessed 28 August 2019.
- 11 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 12 Mayer Brown (2011), 'Arbitration in Ghana – the Alternative Dispute Resolution Act 2010', Kwadwo Sarkodie <[www.mayerbrown.com/-/media/files/perspectives-events/publications/2011/10/arbitration-in-ghana-the-alternative-dispute-resol/files/arbitrationghana\\_sarkodie/fileattachment/arbitrationghana\\_sarkodie.pdf](http://www.mayerbrown.com/-/media/files/perspectives-events/publications/2011/10/arbitration-in-ghana-the-alternative-dispute-resol/files/arbitrationghana_sarkodie/fileattachment/arbitrationghana_sarkodie.pdf)> accessed 28 August 2019.
- 13 Getting The Deal Through, 'Ghana Arbitration' <<https://gettingthedealthrough.com/area/3/jurisdiction/134/arbitration-ghana/>> accessed 28 August 2019.
- 14 Ibid, 2.
- 15 Thomson Reuters Practical Law, 'Arbitration procedures and practice in Ghana: overview', Nene Amegatcher and Melisa Amarteifio <<https://uk.practicallaw>>

- thomsonreuters.com/6-610-7025?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1> accessed 28 August 2019.
- 16 Ibid.
- 17 Ibid.
- 18 Ibid.
- 19 Getting The Deal Through, 'Ghana Arbitration'
- 20 Ibid.
- 21 The Alternative Dispute Resolution Act, 2010 (Act 798), s 31(4).
- 22 Ibid., s 31(5).
- 23 Ibid., s 31(6).
- 24 Ibid., s 31(7).
- 25 Ibid., s 31(8).
- 26 Ibid., s 31(9).
- 27 Ibid., s 31(10).
- 28 Ibid., s 23(1). Section 23(1) also applies to an employee or an agent of the arbitrator.
- 29 Getting The Deal Through, 'Ghana Arbitration'.
- 30 New York Arbitration Convention official website, available at <<http://www.newyorkconvention.org/countries>> accessed on 14 August 2019.
- 31 UNCITRAL (2019), 'United Nations Commission On International Trade Law' <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed 28 August 2019.
- 32 The Alternative Dispute Resolution Act, 2010 (Act 798).
- 33 See ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>>
- 34 Ibid.
- 35 UNCTAD Investment Policy Hub, 'Ghana' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 28 August 2019.
- 36 Emilia Onyema (ed.) (2018), *Rethinking the Role of African National Courts in Arbitration*, Wolters Kluwer, 303.
- 37 *Khoury v Khoury* [1962] 1 GLR 98, SC.
- 38 The Alternative Dispute Resolution Act, 2010 (Act 798), s 6.
- 39 Onyema, E. (ed.) (2018), *Rethinking the Role of African National Courts in Arbitration*, 307.
- 40 Ibid., 303.
- 41 The Alternative Dispute Resolution Act, 2010 (Act 798), s 59(3).
- 42 Invest in Africa, 'Dispute Resolution in Ghana'.
- 43 Emilia Onyema [shouldn't it be Onyema, E?] (ed.) (2018), *Rethinking the Role of African National Courts in Arbitration*, 314; Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell, para 16-020.
- 44 S A Tiewul (1974), 'The Enforcement of Arbitration Agreements and Awards', *U Ghana LJ*, Vol. 11, 143, 157.
- 45 *The Republic v High Court (Commercial Division) Accra Ex Parte Ghacem Limited; Al Fanj Construction & Engineering, Interested Party (Civil Motion J5/209/2018)*. (30 May 2018).
- 46 Republic High Court, *Ex parte Chacem Ltd* [2018] GHASC 34 (30 May 2018) p 12.
- 47 *Attorney General v Balkan Energy Ghana Limited, Balkan Energy LLC, Mr Phillip Elders* [2012] 2 SCCGLR 998.
- 48 *Bankswitch Ghana Limited v The Republic of Ghana (Acting as the Government of Ghana)* PCA Case No. 2011–10.
- 49 Arbitration Centre (2019), 'Ghana Arbitration Centre' <<http://www.ghanaarbitration.org>> accessed 28 August 2019.
- 50 Marian Conflict Resolution Centre, 'Marian Conflict Resolution Centre Mission' <<http://mariancrc.org>> accessed 28 August 2019; Ghana Association Of Certified Mediators & Arbitrators, 'Who We Are...' <<http://ghacma.org>> accessed 28 August 2019.

- 51 Mayer Brown (2011), 'Arbitration in Ghana – the Alternative Dispute Resolution Act 2010', Kwadwo Sarkodie.
- 52 Ibid.
- 53 Ibid.
- 54 <https://arbitrationcentreggh.com/>, accessed 12 Sept 2019.
- 55 Thomson Reuters Practical Law, 'Arbitration procedures and practice in Ghana: overview'.
- 56 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/ghana#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/ghana#DB_ec)> accessed 28 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 57 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 58 Ibid.
- 59 Ibid.
- 60 Legal Aid Scheme Act, 1997 (Act 542) at s 2(2).
- 61 Legal Aid Scheme, Ghana, 'Vision and Mission' <<http://www.legalaidghana.org/web/index.php/about-us/vision-mission>> accessed 15 September 2019.
- 62 Interpretation Act 1960, c 4 at s 32(1).
- 63 Legal Aid Scheme Act, 1997 (Act 542) at s 2(3).
- 64 Bench Nieuwveld, L & V Sahani, "Third Party Funding in Latin America, the Caribbean, the Middle East, and Africa: An Overview" in Bench Nieuwveld, L & V Sahani, *Third-Party Funding in International Arbitration* (2<sup>nd</sup> ed, Kluwer Law International, Aalphen van den Rijn, 2017) §13.02.
- 65 [2013–2014] 1 SCGLR 272.
- 66 [2013–2014] 1 SCGLR 272, cited in Lexology Conducting Litigation in Ghana (25 July 2019) available at [lexology.com/library](http://lexology.com/library) (last accessed 15 August 2019).

# GRENADA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Grenada became independent on 7 February 1974.<sup>2</sup> As with most Commonwealth Caribbean countries, Grenada's legal system is deeply influenced by English common law.<sup>3</sup>

The Grenadian arbitral legislation is composed by the Grenada Arbitration Act 1989<sup>4</sup> and the Arbitration (Foreign Awards) Act 1958,<sup>5</sup> later amended by Act No. 13 of 1978, and currently included in Chapter No. 20 of the Laws of Grenada. The Arbitration Act is based on the English Arbitration Act 1950,<sup>6</sup> while the Foreign Awards Act reproduces the British Arbitration (Foreign Awards) No. 1 Order 1933.<sup>7</sup>

### B. *Description of prior legislation and reasons for its replacement*

The Grenadian arbitral legislation has not changed since its enactment, and it is formed by the Arbitration Act and the Foreign Awards Act.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act was enacted on 20 January 1989 and the Foreign Awards Act was enacted in 1958.

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act does not expressly refer to the scope of the Act, neither does it restrict its applicability to domestic or international arbitration agreements. Thus, the same Arbitration Act governs both domestic and international arbitration, although enforcement of foreign arbitral awards is subjected to the Foreign Awards Act.

### C. *Details and/or relevant amendments and modifications*

As described above, the arbitration legislation of Grenada has not changed substantially since its enactment.

One article discusses generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and harmonise the Commonwealth Caribbean countries' legislation.<sup>8</sup>

The author reports that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes that occurred in the international arbitration legal framework in the second half of the twentieth century – such as the establishment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the UNCITRAL arbitration rules, and the UNCITRAL Model Law on International Commercial Arbitration.

After years of discussion and analysis, the Committee presented two drafts proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles

of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth, as well as the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom, which 'permitted judicial interference in the arbitration proceeding.'<sup>9</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions recommended by the Committee were never implemented. As a result, the Grenadian Arbitration Act, as with many other arbitration acts of the Commonwealth Caribbean countries, does not reflect modern trends and best practices. Certain scholars,<sup>10</sup> in an attempt to identify why the proposals of the Project were never implemented, speculate that the project was too ambitious. The scholars also highlight that implementing the legislative reforms in all countries would be too burdensome and time-consuming. Besides these reasons, some other opinions point out that:

[M]ost of the individuals ... were apathetic toward the concept of harmonization of arbitral legislation in the region. The general feeling, according to Ms. Straker, was that there were many other more important matters that had to be addressed first by the Commonwealth Caribbean territories.<sup>11</sup>

[T]he business community of the Commonwealth Caribbean [held] that the process of arbitration was deemed to be neither speedier nor less expensive than the adjudicatory process, especially in view of the fact that in most cases the parties had to go to court to enforce awards in their favour. Commercial disputants, according to Mr. Thompson, felt more comfortable with the courts in the islands.<sup>12</sup>

Hence, the Grenadian arbitral legislation is still based on the 1950 English Arbitration Act. There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of CARICOM. It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>13</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The Arbitration Act is not based on the UNCITRAL Model Law, but on the English Arbitration Act 1950.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The Arbitration Act differs considerably from the UNCITRAL Model Law.

Although no literature is available commenting on Grenada's current arbitration legislation, the analysis of the provisions of the Arbitration Act shows remnants of provisions no longer present in modern legislations.

Some noteworthy differences between the Arbitration Act and the UNCITRAL Model Law are, for example, (i) the inclusion of umpires (section 8); (ii) the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures; (iii) the lack of provisions on separability of the arbitral agreement, and (iv) several opportunities for the national courts to intervene in the arbitration proceedings.

#### *F. Powers and duties of arbitrators*

Section 15 of the Arbitration Act determines the powers of an arbitrator, including (i) the right to administer the oath to, and take the affirmation of, any

party or witness appearing in the proceedings, and (i) the right to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Further, section 26 of the Arbitration Act sets out the powers and remuneration of referees and arbitrators, determining that '[f]or the purposes of a reference, an official, or special referee or an arbitrator is deemed to be an officer of the Court and, subject to the rules of the Court, each has such authority and shall conduct a reference in such manner as the Court may direct'.

Moreover, some other duties and powers are spread in other provisions of the Arbitration Act, such as the right of arbitrators and umpires to make an award at any time,<sup>14</sup> and to determine the costs of the award or reference.<sup>15</sup>

#### G. Arbitrator immunity

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Grenada, alongside St Kitts & Nevis, and St Lucia, are the only Caribbean islands that are not parties to the New York Convention.

#### B. Reservations to the New York Convention

This query is not applicable to this jurisdiction.

#### C. Method of domestic implementation of the New York Convention

This query is not applicable to this jurisdiction.

#### D. Other international/regional treaties

Grenada is party to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, 'by virtue of extension notices issued by the British government'.<sup>16</sup>

Grenada is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention'),<sup>17</sup> and the State is a party of the Caribbean Community (CARICOM),<sup>18</sup> and of the Organisation of Eastern Caribbean States (OECS).<sup>19</sup> Grenada has also signed and provisionally enforced the Economic Partnership Agreement between the Caribbean Forum and the European Community (CARIFORUM–European Community).<sup>20</sup>

Finally, Grenada has signed bilateral investment treaties with the United Kingdom and the United States of America, which have been in force since 25 February 1998 and 3 March 1989, respectively.<sup>21</sup>

### IV. RELEVANT CASE LAW

#### A. Approach of the national courts to the enforcement of arbitration agreements

According to a report from the American Caribbean Law Institute – Stetson University College Law:

ADR has not been as well received in the Caribbean compared to the United States. While mediations are now an integrated step of certain civil matters arbitrations have largely been avoided in Grenada. Grenada stands among a minority of nations having not signed the New York Convention for the



Enforcement of Arbitral Awards, a fact which may contribute to fewer international companies engaging in business there.<sup>22</sup>

Section 20 of the Arbitration Act, which deals with enforcement, has been interpreted as arbitration friendly.<sup>23</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Foreign Awards Act, section 4(1) sets out public policy as one of the grounds to refuse enforcement of a foreign arbitral award. However, no literature was found discussing the grounds of public policy in Grenadian law which could be used to refuse enforcement of an arbitral award.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The only two decisions involving Grenada which have been internationally discussed are the co-related ICSID cases *RSM Production Corporation v Grenada*,<sup>24</sup> and *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada*.<sup>25</sup>

In *RSM Production v Grenada*, the arbitration discussed the breach of contractual obligations involving an oil and gas exploration contract. The tribunal, after confirming it had jurisdiction to hear the case, decided that both claims and counter-claims should be dismissed. As a result, each party should bear its own costs, and the arbitration costs should be split equally between the parties. Four months after the award was rendered, RSM Production sought the annulment of the award, but the procedure was first suspended for lack of payment of the costs, and later discontinued.<sup>26</sup>

The second arbitration proposed by RSM production and its shareholders started in parallel to the annulment procedure described above. In this procedure, claimants were seeking recognition that Grenada had (i) expropriated claimants' investments without compensation; (ii) acted in an 'arbitrary, discriminatory and illegal fashion'; (iii) breached the Agreement; (iv) failed to provide full protection and security; and (v) failed to treat claimants fairly and equitably. The tribunal, agreeing with Grenada's arguments, found that RSM Production was trying to revisit the previous findings of the arbitral tribunal in the first arbitration, and that this attempt was against both the principle of collateral estoppel and the ICSID Convention. The tribunal dismissed claimants' claims and ordered them to pay the full costs of the arbitration and the full costs incurred by Grenada.<sup>27</sup>

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

Grenada does not have an arbitral institution, and no statistic data is available regarding the arbitration practice in the country. The literature is also scarce, and only a few arbitration cases have been reported by the Eastern Caribbean Supreme Court (composed by the Court of Appeal and the High Court of Justice),<sup>28</sup> involving the whole region.

*B. Measures to strengthen institutional arbitration capabilities*

No information was found other than the above-mentioned Arbitration Project Advisory Committee. Created to lead a reform in the arbitral legislation of the Caribbean countries, the Project was not implemented.

C. *Submission of disputes to arbitration vs. litigation*

No information was available.

D. *Participation by foreign counsel in international arbitrations*

No information was available.

E. *Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

*No information was found. It might be worth mentioning that the World Justice Project, Rule of Law Index – a index which measures the adherence of countries to the rule of law – places Grenada in the 8th position in the regional rank, and in the 36th position in the global rank, out of 113 countries analysed. Particularly considering the country's civil justice index, the general score of Grenada is 0.59. This sets Grenada in the 11th position in the regional rank and in the 41st position in the global rank.*

F. *Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 688 days to resolve a commercial dispute in a first-instance court in Grenada – 28 days for filing and service of court processes, 460 days for trial and judgment and 200 days for enforcement of judgment.<sup>29</sup> Grenada ranks below the Latin America and the Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>30</sup> In terms of overall ease of enforcing contracts, Grenada scored 59.33 of 100 and ranked 80 of 190.<sup>31</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

G. *Statistics on judges and lawyers per capita*

According to the OECS Bar Association,<sup>32</sup> there are 37 lawyers acting in Grenada. No information is available regarding the total number of judges in the country, which has a population of 107,825.<sup>33</sup>

## VI. FUNDING FOR LEGAL CLAIMS

A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for arbitration in Grenada. The Legal Aid and Counselling Clinic (LACC) offers legal representation to low-income persons, with a focus on women and children. The clinic was established by the Grenada Community Development Agency, a non-governmental organisation that aids in the development of the country's rural communities.<sup>34</sup> With the clinic's goal of providing 'legal and non-legal solutions to problems encountered by persons who are unable to afford services elsewhere',<sup>35</sup> there is the possibility that a business could seek legal assistance from LACC in the form of litigation or ADR. There is no government-supported legal assistance for businesses or other persons in Grenada.

### B. *Third-party funding*

No literature appears to be available on the doctrines of champerty and maintenance in Grenada or on the availability of third-party funding in the country. However, given that Grenada's legal system is based on English common law,<sup>36</sup> and the rule of maintenance and champerty applied at the time of independence, it is likely that the rule still exists in Grenada by virtue of the common law.<sup>37</sup>

The Eastern Caribbean Supreme Court (ECSC) is a binding authority in the country and has indicated that champerty is still a matter of public policy applicable in other Eastern Caribbean countries.<sup>38</sup> However, particularly regarding third-party funding, the Court clarified in *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited* that:

The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.<sup>39</sup>

It seems, therefore, that although the rule of maintenance and champerty is still applicable in Grenada, third-party funding would not necessarily be considered illegal.

### C. *Contingency fees*

In accordance with the OECS Bar Association Code of Ethics contingency fees are expressly permitted: '[a]n attorney-at-law may, with the prior agreement of the client, charge a contingency fee not exceeding twenty percent and reasonable commissions on collection of liquidated claims'.<sup>40</sup> This will apply where the state either does not have a Legal Profession Act or does have a Legal Profession Act that does not provide for contingency fees.

### D. *Insurance for legal expenses*

No information was located regarding the availability of legal expense insurance in Grenada.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the

- development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 The Official Website of the Government of Grenada, 'Independence History' <<https://www.gov.gd/articles/independence.html>> accessed 13 August 2019.
  - 3 Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117 Vol. 63 No. 1, 120.
  - 4 Act No. 2 of 1989.
  - 5 Chapter No. 21 of 1958 (Foreign Awards Act).
  - 6 Albert K Fiadjoe (2004), 'Alternative Dispute Resolution: A Developing World Perspective', Cavendish, 76–77 <<https://epdf.tips/alternative-dispute-resolution-a-developing-world-perspective.html>> accessed 13 August 2019.
  - 7 Dirk Otto (2010), 'Article VII', in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 443, 469.
  - 8 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
  - 9 Ibid., 123.
  - 10 Ibid.
  - 11 Ibid., 124.
  - 12 Ibid.
  - 13 Caribbean Radio, 'Draft model arbitration bill for CARICOM states being reviewed by committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>>, accessed 12 Sept 2019.
  - 14 Subject to Arbitration Act, section 18(2), and to any provision to the contrary agreed by the parties. See Arbitration Act, section 11(3).
  - 15 First Schedule Arbitration Act, Provisions to be Implied in Arbitration Agreements, section 4, paragraph 8.
  - 16 Dirk Otto, 'Article VII', in Herbert Kronke, Patricia Nacimiento et al. (eds) (2010), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 443, 459.
  - 17 See ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 28 August 2019.
  - 18 CARICOM website available at <<https://www.caricom.org/>> accessed 13 August 2019.
  - 19 OECS website available at <<https://www.oecs.org/>> accessed 13 August 2019. The other OECS state members are Antigua and Barbuda, St Kitts and Nevis, Montserrat, Anguilla, the British Virgin Islands, Dominica, St Lucia, St Vincent, the Grenadines and Martinique.
  - 20 SICE, Foreign Trade Information System, 'Economic Partnership Agreement between the CARIFORUM States and the European Community' <[http://www.sice.oas.org/Trade/CAR\\_EU\\_EPA\\_e/careu\\_in\\_e.ASP](http://www.sice.oas.org/Trade/CAR_EU_EPA_e/careu_in_e.ASP)> accessed 31 August 2019.
  - 21 UNCTAD Investment Policy Hub, 'Grenada' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 August 2019.
  - 22 American Caribbean Law Institute – Stetson University College of Law (2010), 'Grenada', Case Study, 10 <<https://www.stetson.edu/law/international/caribbean/home/media/grenada-case-study-pdf.pdf>> accessed 13 August 2019.
  - 23 Ibid.
  - 24 Dietmar Prager and Rebecca Jenkin, '*RSM Production Corporation v Grenada*, Award, ICSID Case No. ARB/05/14, 13 March 2009', A contribution by the ITA Board of Reporters, Kluwer Law International.
  - 25 Dietmar Prager, '*Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada*, Award, ICSID Case No. ARB/10/06, 10 December 2010', A contribution by the ITA Board of Reporters, Kluwer Law International.

- 26 Dietmar Prager and Rebecca Jenkin, '*RSM Production Corporation v Grenada*, Award, ICSID Case No. ARB/05/14, 13 March 2009'
- 27 Ibid.
- 28 In total, there are 18 reported cases, unequally distributed between 2018 and 2006. The judgments are available at <<https://www.eccourts.org/search-results/?q=arbitration>> accessed 13 August 2019.
- 29 World Bank (2019), Doing Business, 'Enforcing Contracts' <<http://www.doingbusiness.org/en/data/exploreconomies/grenada>> accessed 13 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 30 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 31 Ibid.
- 32 'OECS Bar Association is an organization of legal practitioners and representative Bar Associations all functioning within and under the jurisdiction of the EASTERN CARIBBEAN SUPREME COURT a superior Court of record of the Eastern Caribbean.' See at OECS Bar Association website, <<http://www.oecsbar.org/index.php/en/about-us>> accessed 13 August 2019.
- 33 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 34 Grenada Community Development Agency, 'About Us' <<http://grecoda.org/sample-page/>> accessed 14 September 2019.
- 35 Legal Aid and Counselling Clinic, 'About Us' <<http://www.lacc.grecoda.org/about-us>> accessed 14 September 2019.
- 36 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 37 Jamaican Bar Association, 'Access to Justice – Third Party Litigation Funding and Contingency Fee Arrangements' <[http://www.jambar.org/index.php?option=com\\_phocadownload&view=category&download=393:JAMBAR%20Presentation%20-%20Access%20to%20Justice%20and%20Litigation%20Funding%20-%20Final&id=16:november-conference-2015&start=10&Itemid=105](http://www.jambar.org/index.php?option=com_phocadownload&view=category&download=393:JAMBAR%20Presentation%20-%20Access%20to%20Justice%20and%20Litigation%20Funding%20-%20Final&id=16:november-conference-2015&start=10&Itemid=105)> accessed 15 May 2019.
- 38 *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153. See also *Israel Bruce v William Black-Williams* ECSC Saint Vincent and the Grenadines in the HCJ, Claim No. SVGHCV2014/0040 (13 July 2015).
- 39 *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited* ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153–54.
- 40 OECS Bar Association, Code of Ethics, Part B: Mandatory Provisions and Specific Prohibitions <<http://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/code-of-ethics>> accessed 14 August 2019.

# GUYANA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Guyana's Arbitration Act is based on the United Kingdom's Arbitration Act of 1889.<sup>2</sup>

### B. *Description of prior legislation and reasons for its replacement*

Arbitration in Guyana is governed by the Arbitration Act of 1931, as amended in 1998. The Arbitration Act is based on the UK Arbitration Act of 1889,<sup>3</sup> and includes provision on the implementation of the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927.<sup>4</sup>

Guyana is one of the countries forming part of the English-speaking Caribbean.<sup>5</sup> It gained its independence as a sovereign state within the Commonwealth on 19 September 1966.<sup>6</sup> Guyana's legal system is based on the common law.<sup>7</sup> Thus, English jurisprudence, as well as decisions from the British Commonwealth tradition, are of a persuasive authority in Guyana.<sup>8</sup>

One article discusses generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and harmonise the Commonwealth Caribbean countries' legislation.<sup>9</sup>

The author reports that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes that occurred in the international arbitration legal framework in the second half of the twentieth century – such as the establishment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the UNCITRAL Arbitration Rules, and the UNCITRAL Model Law on International Commercial Arbitration.

After years of discussion and analysis, the Committee presented two drafts proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth, as well as the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.'<sup>10</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions recommended by the Committee were never implemented. As a result, the Guyana Arbitration Act, as with many other arbitration acts of the Commonwealth Caribbean countries, does not reflect modern trends and best practices. Certain commentators,<sup>11</sup> in an attempt to identify why the proposals of the Project were never implemented, speculate that the project was too ambitious. They also highlight that implementing the legislative reforms in all countries would be too burdensome and time-consuming. Besides these reasons, some other opinions collected by them pointed out that:

[M]ost of the individuals...were apathetic toward the concept of harmonization of arbitral legislation in the region. The general feeling, according to Ms. Straker, was that there were many other more important matters that had to be addressed first by the Commonwealth Caribbean territories.<sup>12</sup>

[T]he business community of the Commonwealth Caribbean was that the process of arbitration was deemed to be neither speedier nor less expensive than the adjudicatory process, especially in view of the fact that in most cases the parties had to go to court to enforce awards in their favour. Commercial disputants, according to Mr. Thompson, felt more comfortable with the courts in the islands.<sup>13</sup>

There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of CARICOM. It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>14</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act of Guyana was enacted in 1931 and remains in force today. It was amended in 1998.

### B. *Scope of application to domestic and international arbitrations*

The same law governs both domestic and international arbitration proceedings.

### C. *Details and/or relevant amendments and modifications*

No information was available.

### D. *Relationship to the UNCITRAL Model Law*

The Arbitration Act is not based on the UNCITRAL Model Law.<sup>15</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

Guyana's Arbitration Legislation is not based on the UNCITRAL Model Law. The Arbitration Act of Guyana thus departs in numerous ways from the Model Law.

The core differences are in the absence of certain legal doctrines that are part of the UNCITRAL Model Law, such as the doctrine of competence-competence and the separability doctrine. In contrast to the UNCITRAL Model Law, the Arbitration Act of Guyana also states that the default number of arbitrators in the absence of party agreement is one, rather than three.

### F. *Powers and duties of arbitrators*

Under the Arbitration Act of Guyana arbitrators have the power to (a) administer oaths or to take the affirmation of the parties and witnesses appearing; (b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and (c) to correct in an award any clerical mistake or error arising from any accidental slip or omission.<sup>16</sup>

### G. *Arbitrator immunity*

The Arbitration Act of Guyana is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*<sup>17</sup>

Guyana became a party to the New York Convention on 25 September 2014.<sup>18</sup>

#### B. *Reservations to the New York Convention*

Guyana has not made any reservations to the New York Convention.<sup>19</sup>

#### C. *Method of domestic implementation of the New York Convention*

No information was available.

#### D. *Other international/regional treaties*

Guyana is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention).<sup>20</sup> The ICSID Convention was signed on 3 July 1969 and entered into force on 10 August 1969.<sup>21</sup>

Guyana has also been a member of the Caribbean Community (CARICOM) since 1984.<sup>22</sup> The Revised Treaty of Chaguaramas establishing the CARICOM single market and economy, which includes provisions on investment protection, thus applies to Guyana.<sup>23</sup>

Guyana is a member of the Organization of American States (OAS). All OAS states are bound by the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards which 'ensur[es] extraterritorial validity of judgments and arbitral awards rendered in [the OAS's] respective territorial jurisdictions'. Companies doing business within OAS states, including the US and/or the five Non-Convention states in the OAS, should be aware of this treaty and its potential assistance in enforcing an award.<sup>24</sup>

Guyana has entered into nine bilateral investment treaties, five of which are currently in force (Republic of Korea, Switzerland, China, Germany, the UK).<sup>25</sup>

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

The approach is to recognise and enforce arbitration awards and agreements.<sup>26</sup>

#### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Guyana's Arbitration Act provides that, as a condition precedent to the enforcement of an arbitral award, the award must not be contrary to the public policy or the law of Guyana.<sup>27</sup>

The Caribbean Court of Justice (CCJ), the final court of appeal for the Caribbean region that is recognised by Guyana as the final court of appeal,<sup>28</sup> has interpreted the public policy exception under the New York Convention on two occasions. First, in its 2013 judgment in *BCB Holdings Limited & Another v The Attorney General of Belize* (BCB Holdings)<sup>29</sup> and more recently in November 2017 in *The Belize Bank Limited v The Attorney General of Belize* (Belize Bank).<sup>30</sup> In both cases, the Government of Belize (GoB) sought to resist enforcement of a London Court of International Arbitration (LCIA) award on public policy grounds.



The argument in both cases was essentially the same, i.e. that the underlying agreement was illegal notwithstanding the arbitral tribunal's determination to the contrary. According to the GoB, it was never bound by the agreement because the agreement was not subject to parliamentary approval, which violated the separation of powers and the Constitution. While the CCJ refused to enforce the LCIA award in the *BCB Holdings* case, it upheld the award in the more recent *Belize Bank* case. The difference in outcome is based on the differing facts in the two cases. *BCB Holdings* concerned a settlement agreement conferring tax concessions and the CCJ deemed that legislative approval was required for the agreement but not obtained. The *Belize Bank* case concerned a promissory note, which the Privy Council (the then final Court of Appeal for Belize) had already determined, in the context of another case, that the GoB did not require legislative approval to issue.

In *BCB Holdings*, the CCJ had been asked for the first time to formulate its own test in relation to the public policy exception. The CCJ began by recognising that the public policy in play was the public policy of Belize, the jurisdiction in which the arbitral award was being enforced. It went on to say that in the context of enforcement of an arbitral award, domestic public policy was influenced by the international approach under the New York Convention; specifically, the court adopted a pro-enforcement approach and thus a more restrictive approach to the public policy exception than would otherwise be the case in the domestic context. The court therefore concluded that 'to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must present an unacceptable violation of those principles'.

In *Belize Bank* the CCJ clarified more precisely the nature of the illegality required: 'the court conducts a balancing exercise weighing the interest of guaranteeing the finality of the award against the competing interest of ensuring respect for fundamental principles of its legal system such as the rule of law'. The court went on to describe *BCB Holdings* as 'exceptional'; the 'uncontested' facts revealing 'clear and credible evidence of illegality' in the creation of a unique tax regime without legislative sanction which violated the separation of powers and the constitutional order of Belize.

#### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

Save for the cases set out in section V(B) above, there do not appear to be any decisions or judgments that have interpreted the New York Convention. However, decisions of the CCJ are binding on the Guyana Court of Appeals, which demonstrates a positive impact in the favour of the institution of arbitration.<sup>31</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Institutional arbitration is not common in Guyana. Currently, there are no active institutions in the jurisdiction. The government has not undertaken measures to strengthen institutional arbitration capabilities.

### B. Measures to strengthen institutional arbitration capabilities

There are no particular steps that have been undertaken by the Government of Guyana to strengthen institutional arbitration within the jurisdiction.

However, there are a number of events and conferences on the promotion of arbitration in Guyana, where government officials participate as guests and speakers and express ideas on the necessity of promoting and developing arbitration as a mean of dispute resolution in Guyana.<sup>32</sup>

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

According to the United Kingdom Law Society, the conduct of arbitration proceedings by a foreign lawyer is considered as the practice of law for which a licence is required in Guyana.<sup>33</sup> It is, therefore, required to hire a local counsel and request a dispensation from the courts to allow the foreign lawyer to be a part of the team advising the party.<sup>34</sup> Nonetheless, solicitors qualified in England and Wales are capable of being admitted to the local bars of the Caribbean countries, including Guyana.<sup>35</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 581 days to resolve a commercial dispute in a first-instance court in Guyana – 21 days for filing and service of court processes, 240 days for trial and judgment and 320 days for enforcement of judgment.<sup>36</sup> Guyana ranks above the average time taken in the Latin America and Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>37</sup> In terms of overall ease of enforcing contracts, Guyana scored 57.87 out of 100 and ranked 93 out of 190 countries.<sup>38</sup> The score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of the judicial processes in that court.

*G. Statistics on judges and lawyers per capita*

There is no information available. However, according to the Guyana Bar Association's website, there are currently 184 attorneys registered with the bar.<sup>39</sup> Although there is no official information on the number of judges in Guyana, sources suggest that there are currently 21 judges.<sup>40</sup>

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for arbitration in Guyana and there is no information to indicate that legal aid is provided for businesses. The Guyana Legal Aid Clinic, the only legal aid provider in the country, assesses eligibility through financial and substantive criteria. The clinic does not provide

assistance in arbitration or any other ADR methods, only taking matters that are within the jurisdiction of the courts they serve, specifically the Court of Appeal, the High Court, and certain magistrates courts.<sup>41</sup>

Although business-to-business disputes are not listed in the types of matters eligible for legal aid coverage, they are importantly also not listed in the excluded legal matters. These consist of conveyancing, estates valued at more than \$500,000, defamation, possession or rent collection proceedings by a landlord, and perceptive title applications.<sup>42</sup> If the clinic is not able to take an applicant's claim, they do offer referrals to lawyers in private practice who may take a case for a reduced fee.<sup>43</sup>

#### B. *Third-party funding*

No jurisprudence or literature appears to be available on the doctrines of champerty and maintenance in Guyana or on the availability of third-party funding in the country. However, given that Guyana's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied at the time of its independence, it is likely that the rule still exists in Guyana by virtue of the common law.

#### C. *Contingency fees*

Contingency fees are legal in Guyana. According to the Legal Profession Act, 'an attorney-at-law may make arrangements with his clients for contingency fees [...] which entitle the attorney-at-law to a fixed percentage of the damages or other amount received or recovered for the client, in addition to any costs awarded by the court or agreed to in settlement of a claim'.<sup>44</sup> The Act further specifies that all such arrangements must be in writing.<sup>45</sup>

#### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 EPDF (2004), 'Alternative Dispute Resolution: A Developing World Perspective', Albert K Fiadjoe, Cavendish, 76. See also *Jamaica Observer* (2015), 'Caribbean urged to sign on to UNCITRAL Model Law' <[www.jamaicaobserver.com/news/Caribbean-urged-to-sign-on-to-UNCITRAL-Model-Law\\_46836?profile=&template=PrinterVersion](http://www.jamaicaobserver.com/news/Caribbean-urged-to-sign-on-to-UNCITRAL-Model-Law_46836?profile=&template=PrinterVersion)> accessed 21 August 2019.
- 3 EPDF (2004), 'Alternative Dispute Resolution: A Developing World Perspective'. See also *Jamaica Observer* (2015), 'Caribbean urged to sign on to UNCITRAL Model Law'.
- 4 See Arbitration Act 1931, Part III.
- 5 Robert B Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117, Vol. 63 No. 1.
- 6 The Commonwealth, 'Guyana: History' <<http://thecommonwealth.org/our-member-countries/guyana/history>> accessed 21 August 2019.
- 7 US Department of State (2018), 'Guyana Investment Climate Statement 2018' <[www.state.gov/reports/2018-investment-climate-statements/guyana/](http://www.state.gov/reports/2018-investment-climate-statements/guyana/)> accessed 21 August 2019.

- 8 UNICEF Eastern Caribbean (2002), 'In Focus', Vol. 15 <[www.unicef.org/easterncaribbean/cao\\_publications\\_cifreform.pdf](http://www.unicef.org/easterncaribbean/cao_publications_cifreform.pdf)> accessed 5 June 2019. See also Junior S Browne (2017), 'Legal Research in the Caribbean' (PowerPoint) <<http://biatl.soutron.net/Library/Catalogues/Controls/Download.aspx?id=3994&iduser=7>> accessed 21 August 2019.
- 9 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
- 10 Ibid., 123.
- 11 Ibid.
- 12 Ibid., 124.
- 13 Ibid.
- 14 Caribbean Radio, 'Draft model arbitration bill for CARICOM states being reviewed by committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>>, accessed 12 September 2019.
- 15 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 16 Laws of Guyana Chapter 7:03, Arbitration Act section. 8 <<http://ilo.org/dyn/natlex/docs/ELECTRONIC/105463/128965/F767169145/GUY105463%202012.pdf>> accessed 21 April 2019.
- 17 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 18 New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 18 April 2019.
- 19 Ibid.
- 20 See ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 21 April 2019.
- 21 ICSID, 'List of Contracting States and Other Signatories of the Convention' <[icsid.worldbank.org](https://icsid.worldbank.org)> accessed 28 August 2019.
- 22 CARICOM, The Caribbean Community, 'Members. Guyana' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/guyana>> accessed 18 April 2019.
- 23 The Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy <[https://caricom.org/documents/4906-revised\\_treaty-text.pdf](https://caricom.org/documents/4906-revised_treaty-text.pdf)> accessed 16 April 2019.
- 24 Joanna Rosen and Yi-Chin Ho (2014), 'The ABCs of Arbitrating Outside of the New York Convention', Latham & Watkins LLP <<https://www.lw.com/thoughtLeadership/lw-international-arbitration-newsletter-june-2014>> accessed 21 April 2019.
- 25 UNCTAD Investment Policy Hub, 'Guyana' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed on 30 September 2019.
- 26 Laws of Guyana Chapter 7:03, ss 13 and 27 and Third Schedule.
- 27 Laws of Guyana Chapter 7:03, Arbitration Act Art. 28. <<http://ilo.org/dyn/natlex/docs/ELECTRONIC/105463/128965/F767169145/GUY105463%202012.pdf>> accessed 21 April 2019.
- 28 Angeline Welsh (2018), 'Framing the Public Policy Exception: view from the Caribbean' <<https://lawofnationsblog.com/2018/01/25/framing-public-policy-exception-view-caribbean/>> accessed 21 April 2019.
- 29 *BCB Holdings Limited & Another v The Attorney General of Belize* [2013] CCJ 5 (AJ) <[www.caribbeancourtsofjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf](http://www.caribbeancourtsofjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf)> accessed 21 April 2019.
- 30 *The Belize Bank Limited v The Attorney General of Belize* [2017] CCJ 18 (AJ) <[www.caribbeancourtsofjustice.org/wp-content/uploads/2017/11/2017-CCJ-18-AJ-1.pdf](http://www.caribbeancourtsofjustice.org/wp-content/uploads/2017/11/2017-CCJ-18-AJ-1.pdf)> accessed 21 April 2019.

- 31 New York Arbitration Convention, 'Court Decisions – Decisions per Country' <<http://www.newyorkconvention.org/court+decisions/decisions+per+country>> accessed 31 July 2019.
- 32 Guyana Chronicle (2018), 'Modern arbitration laws crucial', Ariana Gordon <<http://guyanachronicle.com/2018/04/26/modern-arbitration-laws-crucial>> accessed 21 April 2019.
- 33 Interview with Calvin A Hamilton, Founding Partner, Hamilton Abogados SLP (email, 28 August 2019).
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- 35 The Law Society, 'How to practise in the Caribbean' <<https://communities.lawsociety.org.uk/caribbean/how-to-practise-in-the-caribbean/5044595.article>> accessed 16 April 2019.
- 36 World Bank (2019), Doing Business, 'Enforcing Contracts' <[www.doingbusiness.org/en/data/exploreeconomies/guyana#DB\\_ec](http://www.doingbusiness.org/en/data/exploreeconomies/guyana#DB_ec)> accessed 21 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 37 World Bank (2019), Doing Business, 'Enforcing Contracts',.
- 38 Ibid.
- 39 The Guyana Bar Association, 'Members' <<http://guyanabarassociation.org/lawyers/>> accessed 18 April 2019.
- 40 Guyanese Lawyer (2019), 'Guyana Judges/Judgments Cases/ Lawyer/Attorney At Law/Lead Litigation/Trial Attorneys' <[www.guyaneselawyer.com/listofjudges.html](http://www.guyaneselawyer.com/listofjudges.html)> accessed 21 August 2019.
- 41 Guyana Legal Aid Clinic, 'Getting legal aid' <<https://www.legalaid.org.gy/node/4>> accessed 14 September 2019.
- 42 Guyana Legal Aid Clinic, 'Substantive eligibility' <<https://www.legalaid.org.gy/node/14>> accessed 14 September 2019.
- 43 Guyana Legal Aid Clinic, 'I am not eligible for legal aid. What can I do?' <<https://www.legalaid.org.gy/node/21>> accessed 14 September 2019.
- 44 Guyana Legal Practitioners (Amendment) Act 2010, Act No. 26 of 2010 <[www.oas.org/juridico/pdfs/mesicic4\\_guy\\_prac.pdf](http://www.oas.org/juridico/pdfs/mesicic4_guy_prac.pdf)> accessed 6 June 2019.
- 45 Ibid.

# INDIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

India's first legislation on arbitration was the Indian Arbitration Act, 1899, which was based on the English Arbitration Act of 1889.<sup>2</sup> India's subsequent legislation on arbitration – the Arbitration Act, 1940 (the 1940 Act) was based on the English Arbitration Act, 1934.<sup>3</sup>

### B. *Description of prior legislation and reasons for its replacement*

The 1899 Act dealt with arbitration by agreement without the intervention of the court, and was limited to the Presidency towns of Calcutta, Bombay, and Madras. The Second Schedule to the Code of Civil Procedure 1908 also regulated arbitration and extended to all places to which the 1899 Act did not apply.<sup>4</sup> Matters related to arbitration continued concurrently in the 1899 Act and in sections 89 and 104, and Schedule II, of the Civil Procedure Code 1908.

In 1940, a comprehensive Arbitration Act was enacted repealing the 1899 Act and the provisions relating to arbitration contained in the Civil Procedure Code.<sup>5</sup> The 1940 Act was the first major consolidated legislation to govern arbitration across India.<sup>6</sup> The 1940 Act did not, however, contain any provisions for the enforcement of foreign awards.<sup>7</sup> Additionally, the Act was subject to criticism as some provisions resulted in delays and needless expense.<sup>8</sup> Foreign investors who invested in the Indian economy, after India's liberalisation in 1991, required a predictable and efficient system of resolution of disputes.<sup>9</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The current Arbitration and Conciliation Act 1996 (the "1996 Act") received the assent of the President on 16 August 1996 and came into force on 22 August 1996.<sup>10</sup>

### B. *Scope of application to domestic and international arbitrations*

The 1996 Arbitration and Conciliation Act is a composite piece of legislation governing both domestic and international arbitration. The 1996 Act has two main parts. Part I deals with domestic and international arbitration where the seat of arbitration is in India. Part II deals with enforcement of foreign awards. Certain provisions in Part I, including the power of the courts to grant interim relief in aid of arbitration, also apply to foreign-seated arbitrations.

### C. *Details and/or relevant amendments and modifications*

There have been two key rounds of amendments to the 1996 Act. First, the 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act 2015 (the "2015 Act") (published in the Gazette on 1 January 2016). The Act addressed various issues such as the power of courts to grant interim relief for foreign-seated arbitrations, fast-track procedures for proceedings, timelines for the conclusion of arbitrations and the scope of the public policy exception.

The 2015 Act, among other things, also introduced the fifth and seventh schedules to the 1996 Act that set standards of impartiality and independence for arbitrators. The standards are modelled on the Orange

and Red Lists of the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration and supplement section 12 of the Act, which have been further clarified by the Indian courts.<sup>11</sup>

The 1996 Act was also amended in 2019 by the Arbitration and Conciliation (Amendment) Act 2019 (the "2019 Act") (published in the Gazette on 9 August 2019). The 2019 Act made several substantial changes to the 1996 Act, including the setting of certain time limits, clarifying standards of judicial review of arbitral clauses, the establishment of an independent body called the 'Arbitration Council of India',<sup>12</sup> and the inclusion of the Eighth Schedule to establish the qualifications and experience of arbitrators. The Arbitration Council, whose chairperson will be appointed in consultation with the Chief Justice of India, is responsible for promoting and encouraging arbitration, mediation, conciliation and other alternative dispute resolution mechanisms, and framing policy and guidelines for establishing and maintaining uniform professional conduct in arbitration matters.<sup>13</sup> It also, among other things, empowers the Council to 'grade' arbitral institutions on the basis of criteria listed in the Act<sup>14</sup> and maintain an electronic depository of arbitral awards made in India.<sup>15</sup>

Notably, while section 29A of the 1996 Act (incorporated as part of the 2015 amendments) required that all arbitrations be completed within one year of the arbitral tribunal being constituted, the 2019 Amendment limits the scope of the provision. In particular, the time limit does not apply to international commercial arbitrations. The amended section, however, still requires the tribunal to act expeditiously and endeavour to render its award within 12 months.<sup>16</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The 1996 Act is largely based on the 1985 UNCITRAL Model Law, and even references the UNCITRAL Model Law in its Preamble.<sup>17</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The 1996 Act is largely based on the Model Law but contains a few significant departures.<sup>18</sup> A number of the departures are captured by the 2015 and 2019 amendments identified above. In addition, there are certain other departures that were included in the 1996 Act from the outset of its adoption. The more notable departures are set out below.

The wording of article 1(2) of the UNCITRAL Model Law which made provisions of the law applicable 'only if the place of arbitration is in the territory of this State' was adopted by the Arbitration Act of 1996 without the word 'only',<sup>19</sup> which led to significant confusion as to the applicability of the Act and needed further clarifications by the Supreme Court.<sup>20</sup>

In section 10, which provides for the number of arbitrators, the default in the 1996 Act is a sole arbitrator as opposed to the three-member default provided for in article 10 of the UNCITRAL Model Law.

The arbitrator challenge procedure is similar in both the 1996 Act and the UNCITRAL Model Law. However, the UNCITRAL Model Law provides under article 13(3) that parties can appeal to the court or relevant authority against an unsuccessful challenge within 30 days of decision of the tribunal rejecting the challenge.<sup>21</sup> The 1996 Act does not, however, allow court involvement until after the tribunal has rendered the award.<sup>22</sup> Interlocutory judicial challenges

in certain situations listed in the Seventh Schedule have, however, been permitted by the Supreme Court in recent judgments.<sup>23</sup>

On the provision for court assistance in taking evidence, while the two texts are similar, the 1996 Act provides for more detail on the method to be adopted, and specifies that persons failing to adhere to such court orders, or if found in contempt of the tribunal, would suffer 'like disadvantages, penalties, and punishments' as they would for offences in suits being heard in court.<sup>24</sup> This is a significant addition to the UNCITRAL Model Law.

Where the parties have not made an express choice of law for the substance of the dispute, the UNCITRAL Model Law provides that the tribunal can determine the applicable law with recourse to the conflict of laws rules it determines is appropriate.<sup>25</sup> In contrast, the 1996 Act provides that the tribunal can apply the 'rules of law it considers to be appropriate given all the circumstances surrounding the dispute'.<sup>26</sup>

#### *F. Powers and duties of arbitrators*

Arbitrators' powers and duties are subject to several provisions of chapters III, V, VI, and VII of Part I of the Arbitration and Conciliation Act 1996.<sup>27</sup> These are, inter alia, provisions in relations to disclosures, keeping time, the award making and the equal treatment of parties, and are structured in a similar way to the UNCITRAL Model Law.

The 2019 Amendment has added the Eighth Schedule to the Act which adds clarity to the scope of the duties of the arbitrator. Under the heading 'general norms applicable to Arbitrator' the Act now sets out duties such as 'the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties', 'the arbitrator should not involve in any legal proceeding and avoid any potential conflict connected with any dispute to be arbitrated by him' and 'the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards'.<sup>28</sup>

#### *G. Arbitrator immunity*

The 2019 Amendment provided limited immunity and reads: 'No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.'<sup>29</sup>

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

India became a party to the 1958 New York Convention on 13 July 1960.<sup>30</sup>

#### *B. Reservations to the New York Convention*

India has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>31</sup>



### C. *Method of domestic implementation of the New York Convention*

The New York Convention has been given effect domestically through chapter 1, Part II of the 1996 Act. Chapter 2, Part II of the 1996 Act gives effect to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

### D. *Other international/regional treaties*

India is not party to any treaties designed to facilitate or further international arbitration. For instance, India has not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>32</sup>

India has entered into 23 bilateral investment treaties with different countries 20 of which are in force (United Arab Emirates, Lithuania, Latvia, Mozambique, Bangladesh, Senegal, Myanmar, Syrian Arab Republic, Brunei, Iceland, Libya, Mexico, Jordan, Bosnia and Herzegovina, Saudi Arabia, Sudan, Serbia, Finland, Philippines, and Turkey).<sup>33</sup>

India has also entered into four free trade agreements, all of which are signed and in effect (Asia-Pacific Trade Agreement, India–Sri Lanka Free Trade Agreement, Indo–Nepal Treaty of Trade, Bhutan–India Trade Agreement, and the South Asian Free Trade Area).<sup>34</sup>

## IV. RELEVANT CASE LAW

### A. *Approach of the national courts to the enforcement of arbitration agreements*

The recent trend in enforcement decisions in India is one of respect for the arbitral process and non-interference by the courts in India. This trend can be traced back to the judgment of the Supreme Court of India in *Shree Lal Mahal Ltd v Progetto Grano SpA*,<sup>35</sup> which narrowed down grounds for refusing enforcement of the arbitral awards to what is consistent with the statutory language of section 48 of the 1996 Act and with the provisions of article 36 of the UNCITRAL Model Law. The decision rejected the then-prevalent expansive interpretation of the court's power to interfere with a foreign award. Foreign awards have rarely, if ever, been interfered with, or refused enforcement since *Shree Lal Mahal Ltd*.<sup>36</sup>

A number of other notable decisions demonstrate the recent pro-arbitration ethos of the Indian courts. For instance, as noted in section C below, the Supreme Court in *Bharat Aluminium Co.* circumscribed the supervisory jurisdiction that Indian courts could exercise over foreign-seated arbitrations, consistent with international best practices. In *Shin Etsu Chemical Co. v Aksh Optifibre Ltd.*, the Supreme Court confirmed by majority that when questions arose on whether an arbitration agreement is 'null and void, inoperative or incapable of being performed' the court could only undertake a prima facie determination.<sup>37</sup> In *Enercon (India) Ltd v Enercon GMBH*, the Supreme Court held that it was a duty of the court to make a seemingly unworkable arbitration clause workable within the permissible limits of the law.<sup>38</sup>

### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The grounds to set aside an award are set out in section 34 of the 1996 Act, which includes a public policy exception in section 34(2)(b)(ii). In *Renusagar Power Plant Co. Ltd. v General Electric Company*,<sup>39</sup> the Indian Supreme Court while dealing with a challenge to enforcement of a New York Convention

award, held that the notion of 'public policy' is limited to include (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.<sup>40</sup>

Subsequent case law, in turn, interpreted the phrase 'fundamental policy of Indian law', albeit in the context of a challenge to a domestic award, to broadly include: (a) duty of the tribunal to adopt a 'judicial approach', i.e. to ensure that the arbitral tribunal acts in a bona fide manner and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration;<sup>41</sup> and (b) principles of natural justice.<sup>42</sup> 'Justice or morality' has been construed to capture basic or fundamental notions of justice and morality, i.e. such notions as would shock the conscience of the court.<sup>43</sup>

In *ONGC v Saw Pipes*, however, the Supreme Court whilst dealing with a challenge to a domestic award added a fourth limb to the test in *Renusagar*, and expanded the public policy exception, by holding that it would encompass cases of 'patent illegality'.<sup>44</sup> 'Patent illegality' was, in turn, construed to apply to cases that were 'contrary to law'.<sup>45</sup> This test gave public policy an expansive scope in India permitting judicial review of the merits of the award, and was subject to criticism.

Consequently, the 2015 amendments to the 1996 Act sought to limit the scope of the public policy exception. As set out in the explanatory section to section 34(2)(b)(ii), the public policy exception is limited to circumstances where '(a) the making of the award was induced by fraud or corruption; (b) the award is in conflict with the fundamental policy of Indian law; or (c) the award is in conflict with the most basic notions of morality or justice.' The explanation to section 34(2) expressly prohibits judicial review of the merits of the award and was inserted to remedy the mischief caused by the *Saw Pipes* ruling. The public policy exception is similarly limited in the context of grounds to refuse enforcement of foreign awards under section 48(2)(b), i.e. New York Convention awards.

However, section 18 of the 2015 amendments to the Act statutorily permits judicial review of a pure domestic award on grounds of patent illegality.

In 2019, the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v National Highways Authority of India (NHAI)* in the context of an international commercial arbitration seated in India, emphasised the limited scope of the public policy exception. The court observed that 'this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice'.<sup>46</sup>

#### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

Given its reliance on case law, there are a number of significant decisions that have clarified the application of the 1996 Act (and its amendments), the Indian position on international arbitration and the interpretation of the New York Convention.<sup>47</sup> While it is not feasible to be exhaustive in this report, a few key decisions are set out below.

In *Bhatia International*, the Supreme Court interpreted the 1996 Act to permit courts to exercise powers under Part I of the Act and grant interim relief in aid of arbitration even where these proceedings were not seated in India.<sup>48</sup> Part I of the Act is, however, limited to arbitrations seated in India. The case, albeit designed

to aid foreign arbitrations, resulted in unintended consequences of future courts exercising other supervisory powers under Part I of the Act over foreign-seated arbitration, including the review and setting aside of foreign awards.

This problematic and unworkable position was eventually overturned in the Supreme Court's subsequent decision in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*,<sup>49</sup> which held that Part I of the Act does not apply to foreign-seated arbitrations. The decision limited the supervisory jurisdiction Indian courts could exercise over foreign-seated arbitrations. While the decision achieved the important objective of preventing courts from interfering in foreign-seated arbitrations, it also prevented Indian courts from exercising their powers under Part I of the Act to aid foreign arbitral proceedings (in particular, section 9 on interim measures (e.g., injunctions, orders of preservation, and security)), and section 27 on assistance in taking evidence (e.g., compelling witnesses to give evidence in the arbitration). This consequence of *Bharat Aluminium Co.* was resolved by the 2015 amendments which provided that, among other things, the courts could exercise certain limited Part I powers in foreign-seated arbitrations, including the power to grant interim relief.

In *Enercon (India) Ltd v Enercon GMBH*, the Supreme Court observed that the role of the courts must be to support and encourage arbitration, and that the principle of 'least intervention by the courts' is recognised in all UNCITRAL Model Law jurisdictions.<sup>50</sup>

In *Booz Allen and Hamilton Inc. v SBI Home Finance*, the Supreme Court set the criteria for arbitrability, stating that disputes involving a determination of rights or obligations *in rem* or matters that are statutorily conferred exclusively to certain courts or tribunals, such as landlord–tenant disputes' are not arbitrable. However those dealing with rights *in personam* can be generally considered arbitrable.<sup>51</sup>

As noted above, in *Ssangyong Engineering & Constuction Co. Ltd. v National Highways Authority of India (NHA)* the Supreme Court held that the courts are not empowered in enforcement proceedings to review the merits of an award as that is impermissible under the scheme of the Model Law.<sup>52</sup> More significantly, the Supreme Court in the context of the 'patent illegality' explained that this ground of challenge would only apply to cases where the tribunal had made a fundamental error of law on which no two views could be possible.<sup>53</sup>

In *Reva Electric Car Co. Pvt Ltd. v Green Mobil*, the Supreme Court, affirming the principle of separability, held that the arbitration agreement would survive a declaration that the main contract is null and void.<sup>54</sup>

In *Chloro Controls (I) Pvt Ltd. v Severn Trent Water Purification Inc.*, the Supreme Court also held that non-signatories could be bound by an arbitration agreement,<sup>55</sup> and considered certain circumstances where that would be permissible. The decision was affirmed and followed in *Cheran Properties Limited v Kasturi & Sons Ltd. & Ors*<sup>56</sup> and *Ameet Lalchand Shah and Ors v Rishabh Enterprises and Ors*.<sup>57</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

The use of institutional arbitration is in its nascent stages in India.<sup>58</sup> The most prevalent form of arbitration in India is ad hoc arbitration, accounting for 90–95 per cent of all arbitrations.<sup>59</sup>

### B. Measures to strengthen institutional arbitration capabilities

The Delhi International Arbitration Centre (DIAC) and the Mumbai Centre for Institutional Arbitration (MCIA) are the two prominent arbitration centres in India.

DIAC, formerly the Delhi High Court Arbitration Centre, was established by the Delhi High Court on 25 November 2009.<sup>60</sup> The New Delhi International Arbitration Centre (NDIAC) Act was passed by Parliament on 18 July 2019 and entered into force on 26 July 2019.<sup>61</sup> The Act was enacted to 'provide for the establishment and incorporation of the New Delhi International Arbitration Centre for the purpose of creating an independent and autonomous regime for institutionalised arbitration'.<sup>62</sup>

The MCIA was launched in October 2016, to promote institutional arbitration in India. The MCIA is a neutral, private, not-for-profit charitable entity registered in India. The MCIA was established as a joint initiative between the Government of Maharashtra in India and the domestic and international business and legal communities.<sup>63</sup>

India has also undertaken several measures to strengthen institutional arbitration in India. As noted above, the 2019 amendments provided for the establishment of the Arbitration Council tasked with the promotion and regulation of institutional arbitration. The 2019 Act also included the strengthening of institutional arbitration as one of its objectives and amended section 11 of the 1996 Act to allow the Supreme Court and high courts to designate arbitral institutions and review panels of arbitrators established by the institutions.<sup>64</sup>

### C. Submission of disputes to arbitration vs. litigation

Given the sub-optimal nature and pace of litigation proceedings in India, there is a general belief that arbitration is a beneficial and advantageous alternative to the court system. Surveys conducted in India reveal that 91 per cent of companies that have a formal dispute resolution policy favour arbitration and 61 per cent included arbitration clauses in their contracts.<sup>65</sup>

### D. Participation by foreign counsel in international arbitrations

In *Bar Council of India v AK Balaji*,<sup>66</sup> the Supreme Court clarified that foreign lawyers, although not permitted to practise in India, would not be debarred from participating in international arbitration proceedings if the rules of institutional arbitration applied or if the matter was covered by provisions of the 1996 Act. Foreign counsel would, however, be subject to the Code of Conduct applicable to the legal profession in India.<sup>67</sup> The Supreme Court directed the Bar Council of India to frame rules to regulate the conduct of foreign counsel in India. The Bar Council of India has, thus far, not published any rules in this regard.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

Reports suggest that an arbitration clause is present in almost 95 per cent of agreements between parties, and sectors mostly using arbitration include the construction and infrastructure, and the oil and gas sectors. Other sectors include trade, shipping/maritime, insurance, and corporate.<sup>68</sup>

#### 2. Time taken for enforcement/annulment proceedings

As per the report of the Niti Aayog (the policy development wing of the government), it takes 24 months to resolve challenges under section 34 in the lower courts, 12 months in high courts and 48 months in Supreme Court. In all it takes around 2,508 days on an average to decide applications filed under section 34.<sup>69</sup>

### 3. Percentage of awards annulled/not enforced

From 1996 to 2007, there were 565 challenges in the Indian High Court against domestic awards rendered by arbitral tribunals. Ninety-four were allowed (17 per cent), 443 rejected (78 per cent) and 28 modified (5 per cent). In the Indian Supreme Court in the same time period, there were 16 challenges against domestic awards, with 5 allowed (31 per cent), 8 rejected (50 per cent) and 3 modified (19 per cent). In respect of foreign awards in the High Court and Supreme Court collectively (between 1997 and 2006), there were 17 challenges, with only 1 allowed (6 per cent), 15 rejected (88 per cent) and 1 modified (6 per cent).<sup>70</sup>

#### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 1,445 days to resolve a commercial dispute in a first-instance court in India – 45 days for filing and service of court processes, 1,095 days for trial and judgment and 305 days for enforcement of judgment.<sup>71</sup> In terms of overall ease of enforcing contracts, India scored 41.19 of 100 and ranked 163 of 190.<sup>72</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

It is accepted generally that the length of court proceedings is extremely long, with some studies by the Government Planning Commission even stating that on an average a real estate or land dispute takes 20 years to get resolved.<sup>73</sup>

#### G. Statistics on judges and lawyers per capita

India has 19 judges per 100,000 people, i.e. around 21,000 judges in total.<sup>74</sup> As of 2014, there were approximately 1.8 million lawyers in India, which meant 1 lawyer for every 736 people.<sup>75</sup>

## VI. FUNDING FOR LEGAL CLAIMS

#### A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)

Legal aid is available for arbitration in India, but there is no information to indicate that legal aid is provided for businesses. The right to legal aid in India is constitutionally recognised. Section 39A of the Constitution of India states that 'The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.<sup>76</sup> Meanwhile, the Legal Services Authorities Act 1987 limits those entitled to free legal services to a member of a Scheduled Caste or Tribe, a victim of human trafficking, a woman or child, a mentally ill or otherwise disabled person, a victim of natural disaster, ethnic violence, or caste atrocity, and industrial workman, an person in custody, or a person with an annual income of less than 12,000 rupees if the

case is before the Supreme Court or less than 9,000 rupees if the case is before a court other than the Supreme Court.<sup>77</sup> Since the Constitution came into force following the enactment of the Act, it is unclear if the eligibility criteria for legal aid have been expanded to other groups of persons. The more recently adopted Regulations to the 1987 Act do not provide any clarification of this issue.<sup>78</sup>

The National Legal Services Authority, a governmental body established by the 1987 Act, does provide legal assistance for alternative dispute resolution mechanisms. The 1987 Act states that legal aid will be given for any dispute before any court, authority, or tribunal (including those with judicial and quasi-judicial functions) and advice on any legal matter can be provided.<sup>79</sup> The Legal Services Authorities Act 1987 also has as one of its functions the organisation of Lok Adalats<sup>80</sup> for the amicable settlement of disputes.

#### B. *Third-party funding*

There is no legislation or case law specifically addressing third-party funding in India. The law of this jurisdiction is largely derived from the English common law. At the time of India's independence in 1947 the crimes and torts of champerty and maintenance had not been abolished in the United Kingdom.<sup>81</sup> In *DR.V.A. Babu (Died) Legal v State of Kerala Represented By District*<sup>82</sup> it was observed that 'the English Law of champerty and maintenance may not as such be applicable in India'.<sup>83</sup> The court stated that 'the distinction between the law in England and the Indian law regarding champerty agreements is that while in England champerty agreements, whoever the parties to the same are, are per se illegal, in India such agreements become per se illegal only if Advocates are involved'.<sup>84</sup> Some commentators, notably a retired Supreme Court judge, expressed the view that third-party funding is against public policy as it encourages speculative litigation.<sup>85</sup> However, there are some observations in old cases law suggesting that third-party funding arrangements are permissible so long as the funding agreement is made with the bona fide object of assisting a valid claim and the funding is not provided by a lawyer.<sup>86</sup> In a recent decision, *Bar Council of India v AK Balaji*, the Supreme Court of India indicated in *obiter dicta* that 'there appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation'.<sup>87</sup> The position is currently untested and uncertain as there is no authoritative judicial pronouncement on the issue. In the absence of regulations permitting third-party funding, there is risk of a conservatively minded court viewing such arrangements as opposed to public policy.

The Arbitration and Conciliation Act 1996 governs both domestic and international arbitration in India, which has been amended by the Arbitration and Conciliation (Amendment) Ordinance 2015, but these amendments did not address third-party funding. India has also adopted the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration.

#### C. *Contingency fees*

Contingency fees or fees determined as a percentage of the final judgment or award are prohibited in India,<sup>88</sup> in particular, under the Bar Council of India Rules.<sup>89</sup>

#### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 See P C Markanda et al. (2016), *Law Relating to Arbitration and Conciliation*, 9th edn, LexisNexis, 1–8; See also Law Commission (India) (2014), *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 246, 2014) paras 2–3 <<http://lawcommissionofindia.nic.in/reports/Report246.pdf>> accessed 3 September 2019.
- 3 *Ibid.*, paras 2–3.
- 4 *Ibid.*
- 5 *Ibid.*
- 6 *Ibid.*
- 7 India ratified the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention), 1927 on 23 October 1937 and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), 1958 on 13 July 1960. The Indian legislature passed the Arbitration (Protocol and Convention) Act, 1937 to deal with Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 to deal with New York Convention Awards. See Law Commission (India), *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 246, 2014).
- 8 *Guru Nanak Foundation v Rattan Singh* (1981) 4 SCC 634 (the India Supreme Court observing that 'Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep'); Anant Merathia (2016), 'Reforms in Indian Arbitration Laws in 2015 – An Analysis for the Stakeholders Involved', *International Journal of Law and Legal Jurisprudence Studies*, Vol. 3 No. 1, 37.
- 9 Merathia (2016), 'Reforms in Indian Arbitration Laws in 2015 – An Analysis for the Stakeholders Involved', 39.
- 10 The Arbitration and Conciliation Act 1996, s 1(3). See Gazette of India, Extraordinary, Part II, sec. 3(i), vide notification No. G.S.R 375(E) dated 22 August 1996.
- 11 Joshua Folkard (2018), 'Interlocutory judicial challenges to arbitrators in India: *HRD Corporation v GAIL* and *TRF v Energo* from a comparative perspective', *Arbitration International*, Vol. 34 No. 1, March 2018, 155–65.
- 12 See the Arbitration and Conciliation Act, 1996, Part IA.
- 13 *Ibid.*, s 43D(1).
- 14 *Ibid.*, s 43I.
- 15 *Ibid.*, s 43K.
- 16 The Arbitration and Conciliation (Amendment) Act 2019, section 6 (amending section 29A of the 1996 Act)
- 17 See the Arbitration and Conciliation Act, 1996, Preamble.
- 18 Harisankar K Sathyapalan and Aakanksha Kumar (2018), 'Chapter 2: India – The 1985 Model Law and the 1996 Act: A Survey of the Indian Arbitration Landscape', in Gary F Bell (ed.), *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons*, Cambridge.
- 19 The Arbitration and Conciliation Act 1996, section 2(2).
- 20 Sathyapalan and Kumar (2018), 'Chapter 2: India – The 1985 Model Law and the 1996 Act: A Survey of the Indian Arbitration Landscape', 32.
- 21 UNCITRAL Model Law, Article 13(3).
- 22 The Arbitration and Conciliation Act 1996, sections 13(4) and 13(5).

- 23 *HRD Corporation v GAIL (India) Ltd.* (2018) 12 SCC 471; See also Folkard (2018), 'Interlocutory judicial challenges to arbitrators in India: *HRD Corporation v GAIL* and *TRF v Energo* from a comparative perspective'.
- 24 The Arbitration and Conciliation Act 1996, section 27(5).
- 25 UNCITRAL Model Law, article 28(2).
- 26 The Arbitration and Conciliation Act 1996, section 28(1)(b)(iii).
- 27 Global Arbitration Review (2018), 'India', Madhur Baya <https://globalarbitrationreview.com/jurisdiction/1004959/india> accessed 13 August 2019.
- 28 The Arbitration and Conciliation Act 1996, Eighth Schedule.
- 29 The Arbitration and Conciliation Act 1996, s 42B.
- 30 See New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 13 August 2019.
- 31 See 'New York Convention Guide' <<http://newyorkconvention1958.org/index.php?lvl=cmepage&pageid=11&menu=581&opacview=-1>> accessed 13 August 2019; See also Fali Nariman (2008), 'Application of the New York Convention in India', *Journal of International Arbitration*, Vol. 25, 893.
- 32 ICSID, 'Member States' <[icsid.worldbank.org](http://icsid.worldbank.org)> accessed on 13 August 2019.
- 33 UNCTAD Investment Policy Hub, 'India' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 34 Asian Regional Integration Center, 'FTAs: India' <[aric.adb.org](http://aric.adb.org)> accessed 30 September 2019.
- 35 (2014) 2 SCC 433.
- 36 Global Arbitration Review (2018), 'India'.
- 37 (2005) 7 SCC 234, paras 69–71, 111 and 33.
- 38 (2014) 5 SCC 1, para 88.
- 39 (1994) Supp (1) SCC 644.
- 40 *Renusagar* (1994) Supp (1) SCC 644, para 66.
- 41 *ONGC Ltd. v Western Geco International Ltd.* (2014) 9 SCC 263, para 35.
- 42 *ONGC v Western Geco* (2014) 9 SCC 263, para 38.
- 43 *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49, para 36.
- 44 (2003) 5 SCC 705, para 31
- 45 *ONGC v Saw Pipes* (2003) 5 SCC 705, para 15.
- 46 Civil Appeal No. 4779 of 2019, para 76.
- 47 Due to practical limitations, only certain key cases have been selected and assessed here, but for a more detailed assessment of the Indian Arbitration Landscape see Sathyapalan and Kumar (2018), 'Chapter 2: India – The 1985 Model Law and the 1996 Act: A Survey of the Indian Arbitration Landscape'.
- 48 (2002) 4 SCC 105.
- 49 (2012) 9 SCC 552.
- 50 (2014) 5 SCC 1, para 90.
- 51 (2011) 5 SCC 532, para 38.
- 52 *Ssanyong*, Civil Appeal No. 4779 of 2019, paras 44–48.
- 53 *Ibid.*, paras 29–30.
- 54 (2012) 2 SCC 93, paras 46–51.
- 55 (2013) 1 SCC 641, para 70.
- 56 (2018) 16 SCC 413, para 20.
- 57 (2018) 15 SCC 678, paras 22–26.
- 58 Law Commission (India), *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 246, 2014), 9.
- 59 See Anjali Anchayil and Medha Srivastava, Pushing Institutional Arbitration in India, 17 August 2017, <<https://www.livemint.com/Opinion/AXgpyH01L4oIMw43nDx5NN/ Pushing-institutional-arbitration-in-India.html>> accessed 3 September 2019.
- 60 Delhi International Arbitration Centre <<http://www.dacdelhi.org/>> accessed 13 August 2019.



- 61 The New Delhi International Arbitration Centre Act 2019 (preamble).
- 62 Ibid.
- 63 Nicolas Peacock, Donny Surtani and Kritika Venugopal (2017), 'MCIA recognised by the Supreme Court of India as an appointing institution' (Herbert Smith Freehills, 3 August 2017) <<https://hsfnotes.com/arbitration/2017/08/03/mcia-recognised-by-the-supreme-court-of-india-as-an-appointing-institution/>> accessed 13 August 2019.
- 64 The Arbitration and Conciliation (Amendment) Act 2019, section 3 (amending section 11 of the 1996 Act).
- 65 PWC, 'Corporate Attitudes & Practices Towards Arbitration in India' <<https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf>> accessed 13 August 2019.
- 66 (2018) 5 SCC 379; See also Bhavana Sunder, Kshama Loya and Vyapak Desai (2018), 'Entry Restricted Casually: The Supreme Court of India's Judgment on the Entry of Foreign Lawyers in India', *Asian Dispute Review*, Vol. 20 No. 3, 112.
- 67 *Balaji* (2018) 5 SCC 379 para 45
- 68 EY, 'Emerging Trends in Arbitration in India' <<https://www.ey.com/in/en/services/assurance/fraud-investigation---dispute-services/ey-emerging-trends-in-arbitration-in-india>> accessed 3 September 2019.
- 69 Bibek Debroy and Suparna Jain, Strengthening Arbitration and its Enforcement in India – Resolve in India, Niti Aayog, Government of India <[https://www.niti.gov.in/writereaddata/files/document\\_publication/Arbitration.pdf](https://www.niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf)> accessed 3 September 2019, 14.
- 70 Information by Dharmendra Rau, Kachwaha and Partners.
- 71 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/india#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/india#DB_ec)> accessed 3 September 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 72 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/india#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/india#DB_ec)> accessed 3 September 2019.
- 73 The Constitution of India, 2007 at s 39A.
- 74 Business Line (2018), 'India has 19 judges per 10 lakh people: Data' <<https://www.thehindubusinessline.com/news/india-has-19-judges-per-10-lakh-people-data/article25030009.ece>> accessed 23 August 2019.
- 75 Commonwealth Human Rights Initiative (2018), *Hope Behind Bars: Status Report on Legal Aid for Persons in Custody*, Vol. 1, 2.
- 76 The Constitution of India, 2007 at s 39A.
- 77 The Legal Services Authorities Act, No. 39 of 1987 at s 12.
- 78 National Legal Services Authority (Legal Services Clinics) Regulations, 2011; National Legal Services authority (Free and Competent Legal Services) Regulations, 2010.
- 79 The Legal Services Authorities Act, No. 39 of 1987 at ss 1(aaa) and (c).
- 80 Lok Adalat (People's court) is an innovative method of alternative dispute resolution in India. It is a forum where cases at pre-litigation stage, or even pending cases, in a court of law are settled. Lok Adalats have been given statutory status under the Legal Services Authorities Act, 1987.
- 81 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 82 CRP No. 933 Of 2002(E) [2007] INKLHC 16894 (7 September 2007)
- 83 *DR.V.A. Babu (Died) Legal v State of Kerala Represented By District* [2007] INKLHC 16894 para 4.

- 84 Ibid., para 5, relying on the Supreme Court decision in *District Judge v J.C. Gandhi* AIR 1954 SC 557 (29 June 1956).
- 85 *Times of India* (2019), 'As third party funding (TPF) of litigation takes off globally, will India follow suit', Swati Deshpande, 22 February <<https://timesofindia.indiatimes.com/city/mumbai/as-third-party-funding-tpf-of-litigation-takes-off-globally-will-india-follow-suit/articleshow/68119946.cms>> accessed on 3 September 2019.
- 86 See *Ram Coomar Coondoo v Chunder Canto Mookerjee* 1876 SCC OnLine PC 19 (where the Privy Council held that the principles of champerty and maintenance were not applicable to India but that a transaction which is inequitable, extortionate and unconscionable and not made with the bona fide objects of assisting a claim would be invalid); *Lala Ram Sarup v Court of Wards* AIR 1940 PC 19, at p. 7 ('a fair agreement to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, per se opposed to public policy...'); *Mr. G, A Senior Advocate of the Supreme Court* (1955) 1 SCR 490, at para. 11 (noting in the context of funding agreements that 'there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction per se, that is to say, when a legal practitioner is not concerned'.)
- 87 *Bar Council of India v AK Balaji* (2018) 5 SCC 379, para. 38.
- 88 Practical Law Thomson Reuters (2018), 'Litigation and Enforcement in India', Anupama Hebbar, Pritha Srikumar Iyer and Sita Kapadia <[https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 13 August 2019.
- 89 Bar Council of India Rules 1975 (Part VI, Chapter II, section II, Rule 20).

# JAMAICA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

On 6 August 1962, Jamaica gained independence from the United Kingdom.<sup>2</sup> Being a former United Kingdom colony, the legal system of Jamaica is deeply influenced by English common law.<sup>3</sup>

Before the 2017 Arbitration Act, the arbitral legislation of Jamaica was governed by the Arbitration Act 1900,<sup>4</sup> which was modelled on the English Arbitration Act 1889.

### B. *Description of prior legislation and reasons for its replacement*

The Arbitration Act 1900 did not reflect modern trends and best practices.<sup>5</sup> There was recognition that the Act was limited to domestic arbitration.<sup>6</sup> The Arbitration Act 1900 did not provide an effective alternative method to the courts, even though national courts showed deference to arbitration and arbitral awards.<sup>7</sup> It was also almost entirely devoid of rules governing the procedure of arbitration proceedings.<sup>8</sup> None of the principles that can be found in the UNCITRAL Model Law on International Commercial Arbitration have an equivalent in the 1900 Act. In short, the prior legislation did not reflect modern trends and best practices of modern domestic and international arbitration.<sup>9</sup>

The objectives of the Arbitration Act 2017 were, inter alia, to (a) facilitate domestic and international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; (b) facilitate and obtain the fair and speedy resolution of disputes by arbitration without unnecessary delay or expense; (c) facilitate the use of arbitration agreements.<sup>10</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act 2017 came into effect on 7 July 2017.<sup>11</sup>

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act 2017 applies to both domestic arbitration and international commercial arbitration, subject to any agreement in force between Jamaica and any other state or states.<sup>12</sup>

### C. *Details and/or relevant amendments and modifications*

The new 2017 Act provides provisions governing the arbitration proceedings, starting from the arbitration agreement,<sup>13</sup> the method of appointment of arbitrators,<sup>14</sup> the jurisdiction of the arbitral tribunal (the principle of competence-competence),<sup>15</sup> and the form and content of the arbitral award.<sup>16</sup>

Secondly, the new Act confers power on the arbitral tribunal to grant interim measures.<sup>17</sup> The arbitral tribunal can grant interim measures and preliminary orders at the request of a party, unless otherwise agreed. It gives the same power to courts (in Jamaica or elsewhere) to order interim measures in the context of arbitral proceedings.

Thirdly, it provides for the application of experts by the tribunal.<sup>18</sup> It also includes a provision for seeking the assistance of the court in taking evidence.<sup>19</sup>

Fourthly, it introduces electronic communications as a method of 'writing' in relation to 'arbitration agreements'.<sup>20</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The Jamaican Arbitration Act 2017 is an adoption of the 2006 Model Law.<sup>21</sup> Jamaica became the first independent country in the Commonwealth Caribbean to adopt the Model Law for both domestic and international arbitration.<sup>22</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

There is no divergence between the provisions of the Arbitration Act 2017 and the Model Law provisions.

#### *F. Powers and duties of arbitrators*

According to the new Arbitration Act (2017), arbitrators have the power:

- a. to rule on their own jurisdiction;<sup>23</sup>
- b. to grant interim measures and preliminary orders at the request of a party, unless otherwise agreed by the parties.<sup>24</sup> The types of interim measures are:
  - i. to maintain or restore the status quo pending the determination of the dispute;
  - ii. to take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
  - iii. to provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - iv. to preserve evidence that may be relevant and material to the resolution of the dispute.
- c. to appoint experts and require a party to give the expert any relevant information;<sup>25</sup> and
- d. to terminate the proceedings if the claimant fails to submit his statement of claim within the requisite timeframe and without sufficient cause, unless otherwise agreed by the parties.<sup>26</sup>

#### *G. Arbitrator immunity*

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Jamaica became a party to the 1958 New York Convention on 10 July 2002.<sup>27</sup>

#### *B. Reservations to the New York Convention*

Jamaica has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>28</sup>

#### *C. Method of domestic implementation of the New York Convention*

Recognition and enforcement of foreign arbitral awards are incorporated in Part IX of the Arbitration Act 2017.<sup>29</sup> The former Arbitration (Recognition

and Enforcement of Foreign Awards) Act 2001, which included the relevant provisions, was amended in section IX.

*D. Other international/regional treaties*

Jamaica has been a party of the Caribbean Community (CARICOM) since 1 August 1973.<sup>30</sup>

Jamaica has signed 17 bilateral investment treaties, of which 11 are in force (Republic of Korea, Spain, China, Argentina, United States of America, Italy, France, Germany, Netherlands, Switzerland, and the United Kingdom).<sup>31</sup>

Jamaica has also signed and provisionally enforced the Economic Partnership Agreement between the Caribbean Forum and the European Community (CARIFORUM–European Community).<sup>32</sup>

#### IV. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

As indicated in the World Bank report on the business environment in Jamaica, valid arbitration agreements and clauses are usually enforced by the courts.<sup>33</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

An arbitral award may be set aside by the court if the court finds that the recognition or enforcement of the award would be contrary to the public policy of Jamaica: '(1) Recognition or enforcement of an arbitral award, Grounds for irrespective of the country in which it was made, may be refused only (b) if the Court finds that (ii) the recognition or enforcement of the award would be contrary to the public policy of Jamaica.'<sup>34</sup> A standard for refusing enforcement of an arbitral award has not been discussed in the Supreme Court level even though the public policy ground was raised by one party.<sup>35</sup>

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

*Rose Hall Resort, L.P v The Ritz Carlton Hotel Company of Jamaica Limited*:<sup>36</sup> the Supreme Court of Judicature of Jamaica found that the dispute fell within the scope of the arbitration agreement. The Court decided that there were no grounds for refusing a stay: (1) as a matter of Jamaican law, the subject matter was arbitrable as it involved *in personam* rights to the possession of Jamaican land rather than *in rem* possession of that land; (2) the arbitration agreement was not 'incapable of being performed' under article II(3) of the 1958 New York Convention because of the alleged non-arbitrability of the subject matter; and (3) the non-arbitrability argument raised in terms of public policy also failed on the merits as the dispute was arbitrable; further, it was premature at the agreement-enforcement stage, and it did not meet the standards of public policy in the context of the enforcement of foreign awards (basic conceptions of morality and fairness).<sup>37</sup>

*D. Approach of the national courts to the enforcement of arbitration agreements*

No information was available.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

The Jamaica International Arbitration Center Ltd (JAIAC) was initially established as the Mona International Centre for Arbitration and Mediation (MICAM) in 2015, in collaboration with the University of West Indies' Mona Campus and with institutional support from Kuala Lumpur Regional Centre for Arbitration (KLRC). The JAIAC provides administration support of domestic, regional, and international arbitration, mediation, adjudication, and neutral evaluation.<sup>38</sup> It also administers and provides support for ad hoc arbitrations.<sup>39</sup> The rules of the JAIAC include the adopted the UNCITRAL Arbitration Rule, JAIAC Fast Track Arbitration Rules and JAIAC Mediation Rules.<sup>40</sup>

The Dispute Resolution Foundation is a 24-year-old private voluntary foundation that encourages the use of alternative dispute resolution in Jamaica. One of four divisions is 'Court, Corporate and Commercial Mediation & Mediation Services'.<sup>41</sup>

The Chartered Institute of Arbitrators has a local branch in the Caribbean region.<sup>42</sup>

### B. Measures to strengthen institutional arbitration capabilities

In June 2018, the Hon. Audley Shaw, Minister of Industry, Commerce, Agriculture and Fisheries, called for greater use of arbitration in resolving commercial disputes, particularly in the context of international commercial transactions.<sup>43</sup> He noted that arbitration should be the mechanism used to facilitate the settlement of commercial disputes because of its flexibility and efficiency in comparison to litigation.<sup>44</sup>

The Jamaican Government has given support by progressing an agenda with their July 7 implementation of the new Arbitration Act 2017.<sup>45</sup>

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

According to the Legal Profession Act 1978, all attorneys must be enrolled and hold a practising certificate in order to practise law in Jamaica.<sup>46</sup> It is an offence under the Legal Profession Act for a person who is not enrolled in Jamaica to practise as a lawyer.<sup>47</sup> Overseas attorneys who want to practise law in Jamaica need to meet legal requirements to be called to the Jamaican Bar, and need a practising certificate issued by the General Legal Council (GLC).<sup>48</sup>

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

One article noted that Jamaica has been actively involved in arbitral decisions in the mineral sector, especially bauxite.<sup>49</sup> Arbitration is commonly used in construction and manufacturing disputes as well.<sup>50</sup>

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases.*

The 2019 World Bank Doing Business ranking indicates that it takes about 550 days to resolve a commercial dispute in a first-instance court in Jamaica – 30 days for filing and service of court processes, 450 days for trial and judgment and 70 days for enforcement of judgment.<sup>51</sup> Jamaica ranks above the Latin America and Caribbean region, where it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>52</sup> In terms of overall ease of enforcing contracts, Jamaica scored 51.87 of 100 and ranked 127 of 190.<sup>53</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

For representation of clients in arbitration, the Arbitration Act (2017) states:

a foreign representative of any party appearing before the Court arbitrations or the arbitral tribunal shall be permitted to have a right of audience where that foreign representative appears together with any person who is admitted to practise as a lawyer in Jamaica where the leave of the court has been granted.<sup>54</sup>

However, for legal representatives in domestic arbitration, a foreign representative 'shall not appear in a domestic arbitration unless the need for such foreign representative has been justified before the Court and the leave of the Court has been granted'.<sup>55</sup>

*G. Statistics on judges and lawyers per capita*

As of 24 April 2019, there were 2,102 practising lawyers in Jamaica.<sup>56</sup> Considering the population of Jamaica, 2,904,923, the ratio of lawyers per capita is 1:1,381.<sup>57</sup> Statistics on the number of judges in Jamaica per capita are not available; however, according to official websites of the judiciary, there are currently 10 judges in the Court of Appeal<sup>58</sup> and 40 judges in the Supreme Court,<sup>59</sup> as well as judges at the parish level.

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for businesses in Jamaica and there is no information to indicate that legal aid is provided for arbitration. Although the Legal Aid Act states that legal aid services may be provided to any person involved in a civil matter, the legislation is clear that a body of persons, whether corporate or unincorporated, is not to be included in the definition of a person.<sup>60</sup> Therefore a business is ineligible for legal aid assistance in Jamaica. The Act is silent on whether assistance will be provided for alternative dispute resolution mechanisms but states that legal aid may be granted 'to a person who is in need of legal services in any civil cause or matter'.<sup>61</sup> Generally, the Act is geared towards litigation assistance but this provision leaves room for interpretation on other dispute mechanisms.

Among law firms, Nunes, Scholefield DeLeon and Co, a law firm specialising in civil and commercial litigation and arbitration, provides pro bono legal advice.<sup>62</sup> Another law firm specialises in arbitration, DunnCox, and offers a pro bono service as well.<sup>63</sup> C & C Williams & Associates, specialising in criminal law, civil law, conveyance and probate, offers legal aid and pro bono service.<sup>64</sup>

### B. Third-party funding

Since Jamaica's legal system is based on the English common law, and the crimes and torts of maintenance and champerty applied at the time of its independence in 1962, it is likely that the rules of maintenance and champerty still exist in Jamaica by virtue of the common law. This is particularly so since the Legal Profession Act 2013 of Jamaica does not address third-party funding.<sup>65</sup> It is suggested that in cases where the Legal Profession Act does not address the issue of third-party funding it is governed by common law.<sup>66</sup>

No jurisprudence, literature, or legislation was found to indicate whether the rule of maintenance and champerty has been overruled. Hence, the appropriate inference is that rule of maintenance and champerty is still applicable in Jamaica and third-party funding might therefore not be legally permitted.

### C. Contingency fees

OECD Code of Ethics as amended 1996 Part B, Mandatory Provisions & Specific Provisions s 10(3) states: 'An Attorney at Law shall not charge a contingency fee save and except reasonable commission on collection of liquidated claims with the prior agreement of the client.'<sup>67</sup>

### D. Insurance for legal expenses

Legal insurance is available for both natural and legal persons. There are legal providers located in the region and outside of the region. However, no information was available on whether legal expense insurance was available in Jamaica.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Jamaica Information Service, 'The History Of Jamaica' <<https://jis.gov.jm/information/jamaican-history/>> accessed 12 August 2019.
- 3 Jamaica Information Service, 'The Judiciary' <<https://jis.gov.jm/government/the-judiciary/>> accessed 12 August 2019.
- 4 Government of Jamaica, Ministry of Justice, 'Arbitration Act' <<https://moj.gov.jm/laws/arbitration-act>> accessed 12 August 2019.
- 5 Peter D Maynard (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?', *Caribbean Law Review*, Vol. 20, 36–52.
- 6 Lexis PSL (2017), 'The Benefits Of The New Arbitration Bill In Jamaica' <[https://www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/5MPR-39F1-DYW7-W28J-00000-00/The\\_benefits\\_of\\_the\\_new\\_Arbitration\\_Bill\\_in\\_Jamaica](https://www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/5MPR-39F1-DYW7-W28J-00000-00/The_benefits_of_the_new_Arbitration_Bill_in_Jamaica)> accessed 12 August 2019.
- 7 Ibid.
- 8 *Jamaica Observer* (2017), 'Arbitration Gets A Makeover!' <[http://www.jamaicaobserver.com/business-observer/arbitration-gets-a-makeover-\\_105970?profile=1&template=MobileArticle](http://www.jamaicaobserver.com/business-observer/arbitration-gets-a-makeover-_105970?profile=1&template=MobileArticle)> accessed 12 August 2019.
- 9 *Jamaica Observer* (2017), 'Arbitration Gets A Makeover!'
- 10 Ibid; See also The Arbitration Act 2017, Abstract <<http://www.japarliament.gov.jm/attachments/article/339/The%20Arbitration%20Act,%202017.pdf>> accessed 12 August 2019.



- 21 Government of Jamaica, Ministry of Justice, 'Arbitration Act'; *Jamaica Observer* (2017), 'Arbitration Gets A Makeover!'.
- 22 The Arbitration Act 2017, Part. II(2) (Scope of application).
- 23 The Arbitration Act 2017, Cls. 10–12.
- 24 *Ibid.*, Cls. 13–18.
- 25 *Ibid.*, Cl. 19.
- 26 The Arbitration Act 2017, Cl. 46; *Jamaica Observer* (2017), 'Arbitration Gets A Makeover!'.
- 27 The Arbitration Act 2017, Cl. 20.
- 28 *Ibid.*, Cl. 41.
- 29 *Ibid.*, Cl. 30.
- 30 *Ibid.*, Cl. 10(4).
- 31 United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006' <[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status)> accessed 12 August 2019.
- 32 Global Arbitration Review (2017), 'Jamaica Gets New Law', Alison Ross <<https://globalarbitrationreview.com/article/1144175/jamaica-gets-new-law>> accessed 12 August 2019.
- 23 The Arbitration Act 2017, Cl. 19 (Competence of arbitral tribunal to rule on its jurisdiction).
- 24 The Arbitration Act 2017, Cl. 20 (Interim measures and preliminary orders).
- 25 The Arbitration Act 2017, Cl. 41 (Expert appointed by arbitral tribunal).
- 26 The Arbitration Act 2017, Cl. 40 (Default of a party).
- 27 New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 12 August 2019.
- 28 *Ibid.*
- 29 The Arbitration Act 2017, Cl. 56.
- 30 CARICOM Secretariat, 'Country Profile For Jamaica' 2019' <[https://caricom.org/country\\_profiles/jamaica/](https://caricom.org/country_profiles/jamaica/)> accessed 12 August 2019.
- 31 UNCTAD Investment Policy Hub, 'Jamaica' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 28 August 2019.
- 32 Foreign Trade Information System (SICE), 'Economic Partnership Agreement between the CARIFORUM States and the European Community' <[http://www.sice.oas.org/Trade/CAR\\_EU\\_EPA\\_e/careu\\_in\\_e.ASP](http://www.sice.oas.org/Trade/CAR_EU_EPA_e/careu_in_e.ASP)> accessed 31 August 2019.
- 33 World Bank (2019), 'Doing Business: Jamaica' (A World Bank Group Flagship Report), 50.
- 34 The Arbitration Act 2017, Cl. 57 (1)(b)(ii).
- 35 The Court in *Channel Tunnel Group Ltd v Balfour Beatty Construction* (1993) did not need to address the public policy issue because the court only had to review the requirements under Art. II which pertain to the recognition and enforcement of an arbitration agreement. Marike Paulsson, 'The Future of Rising Seats in the Caribbean: The Role of the Courts and the 1958 New York Convention In Jamaica' <[https://www.arbitration-icca.org/media/9/87567973757438/jamaica\\_nyc\\_resolutions.pdf](https://www.arbitration-icca.org/media/9/87567973757438/jamaica_nyc_resolutions.pdf)> accessed 12 August 2019.
- 36 *Rose Hall Resort, L.P. v The Ritz Carlton Hotel Company of Jamaica Limited*, Supreme Court of Judicature of Jamaica, Claim No. 2009 HCV 05413, 29 March 2010, 'Jamaica No. 1, Rose Hall Resort, L.P. v The Ritz Carlton Hotel Company of Jamaica Limited, Supreme Court of Judicature of Jamaica, Claim No. 2009 HCV 05413, 29 March 2010', in Albert Jan Van den Berg (ed.) (2013), *Yearbook Commercial Arbitration*, Volume 38, ICCA & Kluwer Law International, 411–13.
- 37 *Ibid.*
- 38 Jamaica International Arbitration Centre Ltd., 'About Us' <<http://www.jaiac.org/about-us/>> accessed 12 August 2019.
- 39 *Ibid.*
- 40 *Ibid.*
- 41 Government of Jamaica, Ministry of Justice, 'Dispute Resolution Foundation' <<https://moj.gov.jm/dispute-resolution-foundation>> accessed 12 August 2019.

- 42 CI Arb, 'Caribbean' <<https://www.ciarb.org/our-network/americas/caribbean/>> accessed 12 August 2019.
- 43 Government of Jamaica, Ministry of Industry, Commerce Agriculture and Fisheries (2018), 'Minister Shaw Calls For Greater Use Of Arbitration In Resolving Disputes' <<http://micaf.gov.jm/content/minister-shaw-calls-greater-use-arbitration-resolving-disputes>> accessed 12 August 2019.
- 44 Ibid.
- 45 *Jamaica Observer* (2017), 'Arbitrate, Don't Litigate' <[http://www.jamaicaobserver.com/business/arbitrate-don-8217-t-litigate-jamaica-becoming-a-go-to-centre-for-arbitration-in-the-caribbean-and-latin-america\\_108144](http://www.jamaicaobserver.com/business/arbitrate-don-8217-t-litigate-jamaica-becoming-a-go-to-centre-for-arbitration-in-the-caribbean-and-latin-america_108144)> accessed 12 August 2019.
- 46 Legal Profession Act (1978), section 8.
- 47 General Legal Council (2017), 'Practising Law In Jamaica Without A Practising Certificate' <<https://www.generallegalcouncil.org/practising-law-in-jamaica-without-a-practising-certificate/>> accessed 12 August 2019.
- 48 Ibid.
- 49 Maynard (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?', *Caribbean Law Review* 20, 36–52.
- 50 Interview with arbitration specialist, Caribbean.
- 51 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/jamaica#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/jamaica#DB_ec)> accessed 15 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 52 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 53 Ibid.
- 54 The Arbitration Act 2017, Cl. 58(1) (Foreign representation in international arbitration).
- 55 The Arbitration Act 2017, Cl. 59(1) (Legal representatives in domestic arbitrations).
- 56 General Legal Council, 'Practising Attorneys 2019' <<https://www.generallegalcouncil.org/attorneys/practising-attorneys/>> accessed 12 August 2019.
- 57 Worldometer, 'Jamaica Population' <<http://www.worldometers.info/world-population/jamaica-population/>> accessed 12 August 2019.
- 58 The Court Of Appeal, Jamaica, 'President And Judges Of Appeal' <<http://www.courtsofappeal.gov.jm/content/president-and-judges-appeal>> accessed 12 August 2019.
- 59 The Supreme Court Of Jamaica, 'Current Judges' <<http://supremecourt.gov.jm/content/current-judges>> accessed 12 August 2019.
- 60 Legal Aid Act 1997 LN 78/2002 at s 2.
- 61 Legal Aid Act 1997 LN 78/2002 at s 16(a).
- 62 British High Commission, Kingston (2016), List of Lawyers in Kingston <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/560446/Lawyer\\_List\\_-\\_Jamaica\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560446/Lawyer_List_-_Jamaica_2016.pdf)> accessed 12 August 2019; Nunes Scholefield Deleon & Co, 'Alternative Dispute Resolution' <<http://www.nsdco.com/practice-areas/alternative-dispute-resolution/>> accessed 12 August 2019.
- 63 British High Commission, Kingston (2016), List of Lawyers in Kingston ; 'Dunncox – Attorneys In Jamaica' (*DunnCox - Attorneys in Jamaica*, 2019) <<https://dunncox.com/>> accessed 12 August 2019.
- 64 British High Commission, Kingston (2016), List of Lawyers in Kingston.
- 65 Jamaican Bar Association (2016), 'Access To Justice – Third Party Litigation Funding & Contingency Fee Arrangements' <[http://www.jambar.org/index.php?option=com\\_jevents&task=icalrepeat.detail&evid=2&Itemid=1&year=2016&month=04&day=05&title=access-to-justice-third-party-litigation-funding-contingency-fee-agreements&uid=1d19b1892500cd9462f0a659e26cfa75](http://www.jambar.org/index.php?option=com_jevents&task=icalrepeat.detail&evid=2&Itemid=1&year=2016&month=04&day=05&title=access-to-justice-third-party-litigation-funding-contingency-fee-agreements&uid=1d19b1892500cd9462f0a659e26cfa75)> accessed 12 August 2019.
- 66 Ibid.
- 67 Ibid.

## KENYA<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

Kenya is a common law country by virtue of it being an English protectorate from 1895 to 1920 and its later status from 1920 as a colony of Britain.<sup>2</sup> Within this early period, in 1914, Kenya enacted its Arbitration Ordinance 1914, which mirrored the English Arbitration Act 1889.<sup>3</sup> In 1963, Kenya attained independence and started developing its own domestic base of legislation and case law. In 1968, Kenya enacted its Arbitration Act 1968, which mirrored the English Arbitration Act 1950.<sup>4</sup>

#### B. *Description of prior legislation and reasons for its replacement*

The replacement of Kenya's Arbitration Act 1968 occurred after the UNCITRAL Model Law on International Commercial Arbitration<sup>5</sup> was passed in June 1985. After the passage of the UNCITRAL Model Law, business associations such as the Kenya Association of Manufacturers began pushing for the country to enact new arbitration legislation.<sup>6</sup> In 1995, Kenya's Arbitration Act 1995 (KAA 1995) was enacted.<sup>7</sup> The KAA 1995 is largely based on the UNCITRAL Model Law 1985 and remains applicable to date.<sup>8</sup>

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

Today, arbitration in Kenya is governed by the KAA 1995.<sup>9</sup>

The KAA 1995 was assented to by the Parliament of Kenya on 10 August 1995 and came into effect on 2 January 1996.<sup>10</sup> The Act and its Arbitration Rules<sup>11</sup> were subsequently amended by the passing of the Arbitration (Amendment) 2009, which was assented to on 1 January 2010.<sup>12</sup>

#### B. *Scope of application to domestic and international arbitrations*

The KAA 1995 applies to both domestic and international arbitration. It covers both arbitral proceedings and arbitral award enforcement. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention')<sup>13</sup> governs the enforcement of international arbitration awards in the country and is incorporated into the KAA 1995.

Within the provisions of the KAA 1995, distinction is made between domestic and international arbitration. Under section 3(3) of the KAA 1995, an arbitration is considered international if (i) the parties' place of business were in different states at the time of conclusion of the arbitration agreement, (ii) the juridical seat of the arbitration or any place where a substantial part of the obligations of the commercial relationship is to be performed or the place most closely connected to the subject matter of the dispute are outside the state, or (iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.<sup>14</sup>

The significance of this distinction under section 3(3) of the KAA 1995 is that section 39 of the KAA 1995 makes provision for appeals on question of law to the High Court in domestic arbitration.<sup>15</sup> This provision is however not provided for in the context of international arbitration.

*C. Details and/or relevant amendments and modifications*

In 2010, the KAA 1995 was amended by the Kenyan Arbitration (Amendment) Act 2009.<sup>16</sup> This amendment introduced provisions addressing arbitrator immunity, the general duty of parties, the effect of awards, and costs and expenses.<sup>17</sup>

*D. Relationship to the UNCITRAL Model Law*

The KAA 1995 was based entirely on the 1985 UNCITRAL Model Law.<sup>18</sup> However, the KAA 1995's 2010 amendment introduced additional provisions, as already briefly described above.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The differences arise from the 2010 amendment to the KAA 1995, since the KAA 1995 was based entirely on the 1985 UNCITRAL Model Law.<sup>19</sup> The key differences are that the KAA 1995 (as amended in 2010) provides (i) for the withdrawal and immunity of arbitrators, (ii) for rules relating to costs, expenses and interest, (iii) that the parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings, (iv) that except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in a manner provided under the KAA 1995.<sup>20</sup>

*F. Powers and duties of arbitrators*

Section 18 of the KAA 1995 is titled 'Power of Arbitral Tribunal' and states as follows:<sup>21</sup>

(1) Unless the parties agree, an arbitral tribunal may, on the application of a party – (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or (b) order any party to provide security in respect of any claim or any amount in dispute; or (c) order a claimant to provide security for costs. (2) The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1). (3) If a request is made under subsection (2), the High Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under subsection (1) as it would have in civil proceedings before that Court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the High Court.

*G. Arbitrator immunity*

Section 16B of the KAA 1995 (as amended in 2010) provides that:<sup>22</sup> (1) An arbitrator shall not be liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator. (2) Subsection (1) shall extend to apply to a servant or agent of an arbitrator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the arbitrator. (3) Nothing in this section affects any liability incurred by an arbitrator by reason of his resignation or withdrawal.

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*

Kenya became a party to the New York Convention on 10 February 1989.<sup>23</sup>

#### B. *Reservations to the New York Convention*

Kenya has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>24</sup>

#### C. *Method of domestic implementation of the New York Convention*

Section 36 of the KAA 1995 provides that an international arbitration award shall be recognised as binding and enforced in accordance with the New York Convention or any other convention to which Kenya is a signatory which relates to arbitral awards.<sup>25</sup> Section 37 of the KAA 1995 reflects the permissible grounds for refusing recognition contained in the New York Convention.<sup>26</sup>

#### D. *Other international/regional treaties*

Kenya is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention).<sup>27</sup>

Kenya has also entered into 18 bilateral investment treaties, 11 of which are in force (Japan, United Arab Emirates, Republic of Korea, Kuwait, Burundi, Finland, France, Switzerland, United Kingdom, Germany, and the Netherlands).<sup>28</sup>

Kenya is party to two free trade agreements, both of which are in force (Common Market for Eastern and Southern Africa,<sup>29</sup> and the Agreement Establishing the African Continental Free Trade Area<sup>30</sup>).

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

Local courts reportedly take a pro-arbitration approach and will not intervene unnecessarily in arbitrations.<sup>31</sup> Challenges to awards in the courts are also generally unsuccessful.<sup>32</sup>

#### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

In *Christ for All Nations v Apollo Insurance Co Ltd*,<sup>33</sup> the Kenyan High Court in Nairobi held that public policy would cover anything that was either (i) inconsistent with the Constitution or the Laws of Kenya whether written or unwritten, (ii) inimical to the national interests of Kenya, or (iii) contrary to justice and morality. This test has been since applied in numerous other Kenyan decisions, for instance, *Kenyan Sugar Research Foundation v Kenchuan Architects Ltd*,<sup>34</sup> *Anne Mumbi Hinga v Victoria Njoki Gathara*<sup>35</sup> and *Tanzania National Roads Agency v Kundan Singh Construction Limited*.<sup>36</sup>

#### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

In *Christ for All Nations v Apollo Insurance Co Ltd*,<sup>37</sup> the Kenyan High Court in Nairobi held that public policy exception to enforcement would cover anything that was either (i) inconsistent with the Constitution or the Laws of Kenya whether written or unwritten, (ii) inimical to the national interests of

Kenya, or (iii) contrary to justice and morality. This test has been since applied in numerous other Kenyan decisions, for instance, *Kenyan Sugar Research Foundation v Kenchuan Architects Ltd.*<sup>38</sup> *Anne Mumbi Hinga v Victoria Njoki Gathara*<sup>39</sup> and *Tanzania National Roads Agency v Kundan Singh Construction Limited*.<sup>40</sup>

In *Kenya Shell Limited v Kobil Petroleum Limited*,<sup>41</sup> the applicant sought to have the arbitration award set aside on the ground that the arbitral tribunal had misunderstood or misapplied the law in its interpretation of the contract. Both the Kenyan High Court and Court of Appeal refused to set aside the award. Similarly, both the Kenyan High Court and Court of Appeal refused to set aside the arbitration award in *Shell Limited v Century Oil Trading Co Limited*.<sup>42</sup> Kenyan commentators note that the Kenyan High Court has taken its cue from the Court of Appeal in the above cases and seldom interferes with arbitration awards.<sup>43</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

The main bodies offering arbitration services in Kenya are the Nairobi Centre for International Arbitration<sup>44</sup> and the Chartered Institute of Arbitrators, Kenya.<sup>45</sup>

In June 2017, the International Chamber of Commerce (ICC) launched its Kenya regional office, ICC-Kenya. In July 2018, the ICC announced that it would create an Africa Commission to coordinate its expanding range of activities and growth on the African continent.<sup>46</sup> The ICC has also released its 2017 dispute resolution statistics, which shows that, for 2017, the ICC administered a total of six cases involving Kenyan parties.<sup>47</sup>

In September 2017, the Permanent Court of Arbitration signed a Cooperation Agreement with the Nairobi Centre for International Arbitration in order to further promote arbitration.<sup>48</sup>

### B. Measures to strengthen institutional arbitration capabilities

A May 2018 GAR report states that Kenya is one of the 'shining lights of the East Africa market for international arbitration', 'steadily building up a strong arbitration practice to match its position as the region's commercial and investment hub'.<sup>49</sup> During the inauguration of the Nairobi Centre for International Arbitration in 2013, President Kenyatta (in a speech read on his behalf by the Kenyan Cabinet Secretary of the National Treasury) observed that 'the inauguration of the [Centre] today will mark another milestone in a journey to transform the way we do business in Kenya. We are committed to transforming the lives of our people and the realization of the final agenda for Africa's emancipation and rapid sustainable development.'<sup>50</sup> In December 2015, the Nairobi Centre for International Arbitration published its own set of arbitration and mediation rules, which include modern mechanisms such as provisions for the appointment of an emergency arbitrator.<sup>51</sup>

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

Section 31 of the Kenya Advocates Act 2012 prohibits unqualified persons from acting as an advocate in the country, but section 11 permits the Kenyan Attorney-General to grant any practitioner entitled to appear before superior

courts of a Commonwealth country admission to the right to practise as an advocate in Kenya in relation to specific matters.<sup>52</sup>

It appears however that, outside these general restrictions, for the purposes of arbitration proceedings, section 25(5) of the KAA 1995 permits parties to be represented "by any person of their choice".<sup>53</sup> Furthermore, section 12(1) of the KAA 1995 provides that 'No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties'.<sup>54</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

Arbitration is reportedly routinely used in the construction industry.<sup>55</sup>

##### 2. Time taken for enforcement/annulment proceedings

No clear information was found on this, save for an article stating that '[t]he length of time between filing the [enforcement application] and its hearing varies, depending on whether the business of the court allows for applications to be heard expeditiously'.<sup>56</sup>

##### 3. Percentage of awards annulled/not enforced.

No information was available.

#### *F. Statistics/information on the length of court proceedings in commercial cases.*

The 2019 World Bank Doing Business ranking indicates that it takes about 465 days to resolve a commercial dispute in a first-instance court in Kenya – 40 days for filing and service of court processes, 365 days for trial and judgment and 60 days for enforcement of judgment.<sup>57</sup> Kenya ranks above average in the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>58</sup> In terms of overall ease of enforcing contracts, Kenya scored 58.27 of 100 and ranked 88 of 190.<sup>59</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

#### *G. Statistics on judges and lawyers per capita*

According to the Kenyan Judiciary website, the Kenyan Court of Appeal has a maximum of 30 judges, the Kenyan High Court has a maximum of 150 judges, and the Kenyan Magistrates' Courts have at least 455 Magistrates.<sup>60</sup> Beyond these categories, there is also a Kadhis' Court which deals with questions on Muslim law relating to personal status, marriage, divorce, and inheritance, a Military Court which deals with court martials, and specialised tribunals established by the Government to exercise judicial or quasi-judicial functions to supplement ordinary courts in the administration of justice.<sup>61</sup> Counting just the judges in Kenya's ordinary courts, the country has 635 judicial officers.<sup>62</sup> Since Kenya has a total population of approximately 51 million, this works out to a ratio of about 1 judge per 80,300 citizens.

## **VI. FUNDING FOR LEGAL CLAIMS**

### *A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

The Kenyan Legal Aid Act 2016 ("the Act") includes in its definition of legal aid 'assistance in resolving disputes by alternative dispute resolution' and

'reaching and giving effect to any out-of-court settlement'. By its definition, alternative dispute resolution may include arbitration, mediation, negotiation, conciliation, and the use of informal dispute resolution mechanisms.<sup>63</sup>

Legal aid is not available for businesses in Kenya but it is available for arbitration. The Act specifically excludes from legal aid services 'a company, corporation, trust, public institution, civil society, non-governmental organization or other artificial person'.<sup>64</sup> While the Government launched a National Action Plan for Legal Aid 2017–2022, there is no indication that legal aid will be extended to businesses.<sup>65</sup>

#### B. *Third-party funding*

There are no express provisions under the laws of Kenya or case law dealing with third-party funding. Given that Kenya's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied at the time of its independence in 1964, it is likely that the rule still exists in Kenya by virtue of the common law. No case law or legislation was found to indicate that the rule has been overruled.

Under Kenyan law,<sup>66</sup> advocates of the High Court of Kenya are not permitted to enter into champerty and maintenance agreements with regard to litigations or 'contentions business'<sup>67</sup> in Kenya.<sup>68</sup> The Law Society of Kenya has taken the position that no third party can fund or receive the benefit of a legal suit<sup>69</sup> – the Law Society's regulatory power relates only to Kenyan-registered lawyers.

However, case law dealing with the prohibition of champerty and maintenance agreements is limited to advocates<sup>70</sup> and there has been no judicial pronouncement on whether third parties (apart from advocates) can fund and receive benefits from litigation cases and arbitrations. Based on the above, the legality of third-party funding in Kenya remains unclear.

#### C. *Contingency fees*

Under section 46(c) of the Advocates Act,<sup>71</sup> Advocates of the High Court of Kenya are not permitted to charge clients on a contingency fee basis.

#### D. *Insurance for legal expenses*

There is no prohibition under the Insurance Act<sup>72</sup> for natural persons and businesses obtaining legal protection insurance (LPI). However, there are no reported instances of the use of LPI in Kenya and insurance providers in Kenya do not market themselves as providing such cover.<sup>73</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell, 96.
- 3 Kenya Arbitration Ordinance 1889.
- 4 Kenya Arbitration Act 1968.
- 5 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.



- 6 Jacob Gakeri (2011), 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR', *International Journal of Humanities and Social Sciences*, Vol. 1 No. 6, 219, 231.
- 7 Kenya Arbitration Act 1995.
- 8 Kenya Arbitration Act 1995; Gakeri (2011), 'Placing Kenya on the Global Platform', 219, 226.
- 9 Kenya Arbitration Act 1995.
- 10 Ibid.
- 11 Kenya Legal Notice No. 58/1997: rules under s 40 of the Kenya Arbitration Act 1995.
- 12 Kenya Arbitration (Amendment) Act 2009.
- 13 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 14 Kenya Arbitration Act 1995, s 3.
- 15 Ibid., s 39.
- 16 Kenya Arbitration (Amendment) Act 2009.
- 17 Ibid.
- 18 Gakeri (2011), 'Placing Kenya on the Global Platform', 219, 226.
- 19 ICLG, 'Kenya: International Arbitration 2018' <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/kenya>> accessed 22 August 2019.
- 20 Kenya Arbitration Act 1995, ss 16A, 16B, 19A, 32A, 32B, 32C.
- 21 Ibid., s 18.
- 22 Ibid. s 16B.
- 23 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 22 August 2019.
- 24 Ibid.
- 25 Kenya Arbitration Act 1995, s 36.
- 26 Ibid., s 37.
- 27 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 22 August 2019.
- 28 UNCTAD Investment Policy Hub, 'Kenya' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 22 August 2019.
- 29 United Nations Economic Commission for Africa, 'COMESA – Common Market for Eastern and Southern Africa' <<https://www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa>> accessed 22 August 2019.
- 30 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 22 August 2019.
- 31 Thomson Reuters, Practical Law Arbitration Blog, 'Arbitration in Africa: Swithin J Munyantwali, Uganda, part 1 of 2' <<http://arbitrationblog.practicallaw.com/arbitration-in-africa-swith-in-j-munyantwali-uganda-part-1-of-2/>> accessed 22 August 2019.
- 32 Ibid.
- 33 *Christ for All Nations v Apollo Insurance Co Ltd* (2002) 2 EA 366.
- 34 *Kenyan Sugar Research Foundation v Kenchuan Architects Ltd* [2013] eKLR.
- 35 *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.
- 36 *Tanzania National Roads Agency v Kundan Singh Construction Limited*, decision of the Court of Appeal at Mombasa in Civil Appeal No. 38 of 2013.
- 37 *Christ for All Nations vs Apollo Insurance Co Ltd* (2002) 2 EA 366.
- 38 *Kenyan Sugar Research Foundation v Kenchuan Architects Ltd* [2013] eKLR.
- 39 *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.
- 40 *Tanzania National Roads Agency v Kundan Singh Construction Limited*, decision of the Court of Appeal at Mombasa in Civil Appeal No. 38 of 2013.
- 41 *Kenya Shell Limited v Kobil Petroleum Limited* (1999) KLR 574.

- 42 *Shell Limited v Century Oil Trading Co Limited* [2008] eKLR.
- 43 Gakeri (2011), 'Placing Kenya on the Global Platform', 219, 236.
- 44 Nairobi Centre for International Arbitration <<https://www.ncia.or.ke/>> accessed 22 August 2019.
- 45 CI Arb Kenya, 'Dispute Appointment Services' <<https://www.ciarbkenya.org/dispute-appointment-services/>> accessed 22 August 2019.
- 46 ICC (2018), 'ICC Court to launch Africa Commission' <<https://iccwbo.org/media-wall/news-speeches/icc-court-launch-africa-commission/>> accessed 22 August 2019.
- 47 ICC (2018), '2017 Dispute Resolution Statistics', *ICC Dispute Resolution Bulletin* 2018, Issue 2, 51–65.
- 48 GAR (2018), 'The Middle Eastern and African Arbitration Review: Developments in African Arbitration' (10 May 2018) <<https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169293/developments-in-african-arbitration>> accessed 22 August 2019.
- 49 Ibid.
- 50 Ibid.
- 51 Herbert Smith Freehills (2017), 'Commercial Arbitration in Africa: Present and Future Legal Briefing' <<https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future>> accessed 22 August 2019.
- 52 Kenya Advocates Act 2012, ss 11, 31.
- 53 Kenya Arbitration Act 1995, s 25(5).
- 54 Ibid., s 12(1).
- 55 Thomson Reuters, Practical Law, 'Litigation and enforcement in Kenya: overview' <[https://1.next.westlaw.com/Document/l6da5f045db8e11e8a5b3e3d9e23d7429/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&isplcusc=true&firstPage=true](https://1.next.westlaw.com/Document/l6da5f045db8e11e8a5b3e3d9e23d7429/View/FullText.html?contextData=(sc.Default)&transitionType=Default&isplcusc=true&firstPage=true)> accessed 22 August 2019.
- 56 Ecrone Omulloh (2016), 'Enforceability of Arbitral Awards in Kenya' <<http://www.lexgrouppafrica.com/enforceability-of-arbitral-awards-in-kenya/>> accessed 22 August 2019.
- 57 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/kenya#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/kenya#DB_ec)> accessed 22 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 58 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 59 Ibid.
- 60 Republic of Kenya, Judiciary, 'Courts: Overview' <<https://www.judiciary.go.ke/courts/>> accessed 22 August 2019.
- 61 Ibid.
- 62 Ibid.
- 63 Legal Aid Act, No. 6 of 2016 at s 2.
- 64 Legal Aid Act, No. 6 of 2016 at s 37(a).
- 65 Office of the Attorney General and Department of Justice (2017), 'National Action Plan for Legal Aid 2017–2022' <<https://www.statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf>> accessed 16 September 2019.
- 66 Section 46(c) of the Advocates Act (Cap. 16 of the Laws of Kenya).
- 67 Section 2 of the Advocates Act (Cap. 16 of the Laws of Kenya), defined 'contentious business' as: 'any business done by an advocate in any court, civil or military, or relating to proceedings instituted or intended to be instituted in any such court, or any statutory tribunal or before any arbitrator or panel of arbitrators'.
- 68 Law Society of Kenya (2016), 'Code of Ethics and Conduct for Advocate's, Code 71–74, <[https://lsk.or.ke/Downloads/Code\\_of\\_Ethics\\_and\\_Conduct\\_for\\_Advocates.pdf](https://lsk.or.ke/Downloads/Code_of_Ethics_and_Conduct_for_Advocates.pdf)> accessed 22 August 2019.

69 Ibid., Code 71.

70 Kenya Law, *D. Njogu & Co. Advocate v National Bank of Kenya Ltd* [2009] Misc. Civil App. 606 of 2007 <<http://kenyalaw.org/caselaw/cases/view/54636/>> accessed 22 August 2019.

71 Cap. 16, Laws of Kenya.

72 Cap. 486, Laws of Kenya.

73 Interviewee, partner, law firm, London.

# KINGDOM OF ESWATINI<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The Kingdom of Eswatini ('Eswatini'), formerly known as Swaziland,<sup>2</sup> was a former British protectorate from 1903 until it regained its independence on 6 September 1968.<sup>3</sup> In 1904, the Arbitration Act No. 24 of 1904 ("1904 Act") was enacted to regulate arbitration in Eswatini.<sup>4</sup> The 1904 Act was modelled on the English Arbitration Act 1889.<sup>5</sup> The 1904 Act remains the applicable arbitration statute in Eswatini and has not been revised or amended since its enactment.

### B. *Description of prior legislation and reasons for its replacement*

This query is not applicable to this jurisdiction (please see above).

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The 1904 Arbitration Act became effective on 28 July 1904. It was enacted as an 'Act to provide for the settlement of differences by arbitration'.<sup>6</sup> It is the principal arbitration act in Eswatini.<sup>7</sup>

### B. *Scope of application to domestic and international arbitrations*

The 1904 Act contains no provision expressly dealing with international arbitration and likely applies only to domestic arbitration. It has been described as a first-generation arbitration statute, designed with domestic arbitration in mind and unsuitable for international commercial arbitration.<sup>8</sup>

### C. *Details and/or relevant amendments and modifications*

The 1904 Act has not been amended or revised to date.

### D. *Relationship to the UNCITRAL Model Law*

Eswatini has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.<sup>9</sup> The 1904 Act predates the UNCITRAL Model Law.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The 1904 Act differs from the UNCITRAL Model Law in several respects. Key differences include:

- a. The arbitration agreement is not separable from the main agreement;<sup>10</sup>
- b. Arbitrators do not have the statutory power to determine their jurisdiction;<sup>11</sup>
- c. Arbitrators lack powers to grant orders of interim relief;<sup>12</sup>
- d. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>13</sup>
- e. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>14</sup>
- f. There are limited grounds for setting aside an award namely: misconduct by an arbitrator and the improper procurement of the arbitration or the award;<sup>15</sup> and

- g. There are excessive opportunities for court interference with the arbitral process such as power of the court to set aside appointment of an arbitrator in certain circumstances,<sup>16</sup> to remit award for reconsideration,<sup>17</sup> issue binding opinion on points of law stated to it by the arbitral tribunal,<sup>18</sup> and to extend the time for making an award.<sup>19</sup>

*F. Powers and duties of arbitrators*

Section 12 of the 1904 Act empowers an arbitrator to:

- a. Administer oaths or take the affirmation of the parties and witnesses;
- b. On application of either party, appoint a commissioner to take the evidence of a person residing outside Eswatini;
- c. State a part of or the whole award as a special case for the opinion of the court; and
- d. Correct clerical mistakes or errors in an award arising from accidental slips or omissions.

*G. Arbitrator immunity*

The 1904 Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Eswatini is not a party to the 1958 New York Convention.<sup>20</sup>

*B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction.

*D. Other international/regional treaties*

Eswatini is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>21</sup> It signed the ICSID Convention on 3 November 1970 and ratified it on 14 June 1971. The ICSID Convention became effective in Eswatini on 14 July 1971.<sup>22</sup>

Pursuant to section 69 of the ICSID Convention, Eswatini has implemented the ICSID Convention through its enactment of the Arbitration (International Investment Disputes) Act 1966 of Swaziland.<sup>23</sup> To date, Eswatini has not been involved in any ICSID proceedings and there are no pending cases against it.<sup>24</sup>

Eswatini has entered into six bilateral investment treaties, only two of which are in force (United Kingdom and Germany).<sup>25</sup> Eswatini is also part of the Agreement Establishing the African Continental Free Trade Area 2018, which is currently in force.<sup>26</sup>

### IV. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

No information was available.

*B. Standard for refusing enforcement of an arbitral award on the grounds of public policy*

No information was available.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

No information was available. The use of arbitration in Eswatini is still very much limited to employment disputes. Indeed, besides the statutory arbitration of labour disputes pursuant to the provisions of the Industrial Relations Act 2000 there is very little or no reported activity on commercial arbitration under the 1904 Act. Despite the foregoing, in the arbitration space, Eswatini is best known for the ICC arbitration dispute between MTN and the Swaziland Post and Telecommunications Corporation (SPTC), which resulted in an ICC arbitration finding that SPTC had breached a joint venture agreement.<sup>27</sup>

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration—*

Eswatini does not presently have a domestic arbitration body that administers commercial or investment disputes.<sup>28</sup> There is only one active arbitral institution in Eswatini. It is the Conciliation, Mediation and Arbitration Commission (CMAC), established pursuant to section 62 of the Industrial Relations Act 2000. The CMAC was established as an alternative dispute resolution (ADR) mechanism solely to administer the settlement of labour disputes between two private parties. The CMAC does not administer commercial or investment disputes.<sup>29</sup> Recent statistics suggest that the CMAC hears about 100 arbitration cases per year.<sup>30</sup>

*B. Measures to strengthen institutional arbitration capabilities*

No information was available.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*E. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 956 days to resolve a commercial dispute in a first-instance court in Eswatini – 14 days for filing and service of court processes, 912 days for trial and judgment and 30 days for enforcement of judgment.<sup>31</sup> Eswatini ranks below the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>32</sup> In terms of overall ease of enforcing contracts, Eswatini scored 36.72 of 100 and ranked 172 of 190.<sup>33</sup>

The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>34</sup>

*F. Participation by foreign counsel in international arbitrations*

The 1904 Act is silent on foreign counsel participation in arbitration proceedings seated in Eswatini. It is unclear if any restriction exists.

*G. Statistics on judges and lawyers per capita*

No information was available.

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for businesses or for arbitration in the Kingdom of Eswatini. There is no legal aid system in Eswatini, regardless of the type of matter. The only exception is for individuals charged with an offence that carries with it a sentence of death or life imprisonment.<sup>35</sup> Private institutions occasionally provide some form of legal aid to indigent persons which is, however, limited by donor preferences and scarcity of funds – such private donations are usually offered mostly in matters of maintenance, inheritance, and domestic or sexual abuse.<sup>36</sup>

The Conciliation, Mediation and Arbitration Commission is an independent body that has attempted to fill the gap by providing access to ADR mechanisms for a minimal charge.<sup>37</sup> It currently only covers labour matters,<sup>38</sup> meaning there is no legal assistance available for business-to-business disputes in Eswatini.

*B. Third-party funding*

No literature or case law appears to be available on the applicability of the doctrines of champerty and maintenance in Eswatini. However, given that Eswatini's legal system is derived from the English common law and the crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967 but a champertous agreement could still be treated as contrary to public policy and unlawful.<sup>39</sup> As this was the law applied at the time of independence it is likely still applicable in Eswatini and third-party funding might be held to violate public policy on the grounds of the rule of maintenance and champerty.

*C. Contingency fees*

Charging contingency fees is considered unethical in Eswatini. Lawyers in the country are not allowed to enter into contingency fee arrangements or charge contingency fees.<sup>40</sup>

*D. Insurance for legal expenses*

Legal expenses insurance is available in Eswatini. An active legal insurance provider in Eswatini is United Holdings.<sup>41</sup> They provide legal expenses cover for legal counselling and representation in cases involving civil matters, criminal matters, administrative matters, labour matters, and accidental death matters.<sup>42</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Eswatini used to be known as Swaziland until 19 April 2018, when King Mswati III, by Legal Notice No. 80 of 2018 published in the Gazette of 11 May 2018, officially changed its name to the Kingdom of eSwatini. See Adams & Adams (2018), 'Adams on Africa' <<https://www.adams.africa/insights/eswatini-swaziland-name-change-made-official-notice-gazette/>> accessed 31 July 2019.
- 3 GlobalLex (2007), 'The Law and Legal Research in Swaziland', Buhle Dube and Alfred Magagula <[https://www.nyulawglobal.org/globalex/Swaziland.html#\\_Civil\\_Court\\_Legal](https://www.nyulawglobal.org/globalex/Swaziland.html#_Civil_Court_Legal)> accessed 31 July 2019.
- 4 David Butler (2004), 'The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress', *Journal of International Arbitration*, Vol. 21, No. 2, 169.
- 5 Ibid.
- 6 Arbitration Act 1904 (preamble).
- 7 A secondary arbitration statute in Eswatini is the Industrial Relations Act 2000, which regulates the arbitration of labour disputes.
- 8 Butler (2004), 'The State of International Commercial Arbitration in Southern Africa', 169, 199.
- 9 United Nations, 'Overview of the Status of UNCITRAL Conventions and Model Laws' <<https://uncitral.un.org/sites/uncitral.un.org/files/overview-status-table.pdf>> accessed 31 July 2019.
- 10 See UNCITRAL Model Law, art. 16(1).
- 11 Ibid.
- 12 See UNCITRAL Model Law, art. 17.
- 13 See Arbitration Act 1904, s 4 (first schedule); cf. UNCITRAL Model Law, art. 10 (providing that the default number of arbitrators shall be three).
- 14 See Arbitration Act 1904, s 4 (first schedule).
- 15 See Arbitration Act 1904, s 16(2); cf. UNCITRAL Model Law, art. 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non-arbitrability of dispute and award contravenes public policy).
- 16 Arbitration Act 1904, s 11.
- 17 Ibid., s 15.
- 18 Ibid., s 19.
- 19 Ibid., s 14.
- 20 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed on 31 July 2019.
- 21 ISCID (2018), '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 31 July 2019.
- 22 Ibid.
- 23 Amazu Asouzu (2001), *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, Cambridge University Press, 377.
- 24 IARB Africa, 'Country Profile: Swaziland' <<https://www.iarbafrica.com/en/resources/country-profile/swaziland>> accessed 31 July 2019.
- 25 UNCTAD Investment Policy Hub, 'Eswatini' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 July 2019.



- 26 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 22 August 2019.
- 27 International Arbitration Information (2015), 'Swaziland ICSID Arbitration Notice of Dispute' <<https://www.international-arbitration-attorney.com/swaziland-icsid-arbitration-notice-of-dispute/>> accessed 31 July 2019.
- 28 US Department of State (2019) '2018 Investment Climate Statements: Eswatini' <<https://www.state.gov/reports/2018-investment-climate-statements/eswatini/>> accessed 31 July 2019.
- 29 Ibid.
- 30 African Lii (2012), 'The Scope of Labour Conciliation Mediation and Arbitration in Swaziland', Nathi Gumede <<https://africanlii.org/blogs/nathi-gumede/scope-conciliation-mediation-and-arbitration-swaziland>> accessed 31 July 2019.
- 31 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/eswatini#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/eswatini#DB_ec)> accessed on 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 32 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 33 Ibid.
- 34 Ibid.
- 35 The Constitution of the Kingdom of Swaziland Act, 2005 at s 21(2)(c).
- 36 GlobaLex (2007), 'The Law and Legal Research in Swaziland'.
- 37 Open Society Initiative for Southern Africa (2013), 'Swaziland: Justice Sector and the Rule of Law', Maxine Langwenya <[https://www.icj.org/wp-content/uploads/2014/06/afrimap\\_swz\\_justice\\_sector\\_Langwenya.pdf](https://www.icj.org/wp-content/uploads/2014/06/afrimap_swz_justice_sector_Langwenya.pdf)> accessed 15 September 2019.
- 38 Rules of the Conciliation, Mediation and Arbitration Commission, 2008 at Rule 4(1)(b).
- 39 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 40 Open Society Initiative for Southern Africa (2013), 'Swaziland: Justice Sector and the Rule of Law'.
- 41 United Holdings (2019), 'Legal Insurance' <<https://unitedholdingswaziland.com/insurance/legal-insurance/>> accessed 31 July 2019.
- 42 Ibid.

# KIRIBATI<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Kiribati ('Kiribati') is a developing state in the South Pacific, which obtained its independence from the United Kingdom in 1979.<sup>2</sup> The laws of Kiribati are highly influenced by the UK's legislation, and several acts of the United Kingdom, including the Arbitration Act 1950, were made applicable to Kiribati.<sup>3</sup> The Arbitration Act of Kiribati adopted in 1990 (the 'Kiribati Arbitration Act') is almost identical to the English Arbitration Act 1950, with the exception of the provisions on the enforcement of certain foreign judgments,<sup>4</sup> which were not included in the Kiribati Arbitration Act 1990.

### B. *Description of prior legislation and reasons for its replacement*

The Kiribati Arbitration Act has not been amended since its adoption.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Kiribati Arbitration Act was adopted in 1990.<sup>5</sup> Kiribati has several specialised Acts that provide for settlement of disputes by means of arbitration. For example, the Mineral Development Licensing Ordinance 1978 stipulates that disputes between the holder of a mining licence and the owner or lawful occupier of the mining area relating to the rent and the compensation for any disturbance of the rights to be paid by the holder of the mining licence shall be settled by arbitration.<sup>6</sup> Arbitration constitutes a mechanism of settlement of individual and collective labour disputes upon agreement of the parties or in some other circumstances established in the Employment and Industrial Relations Code 2015<sup>7</sup> and the Industrial Relations Code 1998<sup>8</sup> accordingly.

### B. *Scope of application to domestic and international arbitrations*

The Kiribati Arbitration Act 1990 governs both domestic and international arbitration.

### C. *Details and/or relevant amendments and modifications*

The Kiribati Arbitration Act has not been amended.

### D. *Relationship to the UNCITRAL Model Law*

Kiribati has not adopted the United Nations Commission in International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.<sup>9</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The provisions of the Kiribati Arbitration Act differ substantially from the provisions of arbitration laws in Model Law jurisdictions.

The primary particularity of the Kiribati Arbitration Act consists in granting significant powers to the High Court to supervise and control the arbitration proceedings. First, the authority of arbitrator or umpire is 'irrevocable except by leave of the High Court or a Judge thereof'.<sup>10</sup> Second, the High Court intervenes at the stage of the appointment of arbitrators. The High Court 'may set aside any appointment' made by the parties in accordance with

the provisions of the Kiribati Arbitration Act.<sup>11</sup> In case of obstacles to the constitution of the arbitration tribunal (e.g., failure of a party to appoint an arbitrator, death of an arbitrator, etc.), the High Court appoints an arbitrator or an umpire to supply the vacancy.<sup>12</sup> Third, the High Court may remove an arbitrator for failure 'to use all reasonable dispatch'<sup>13</sup> or for misconduct.<sup>14</sup> Fourth, the High Court can make a number of orders with regard to arbitration proceedings; for example, examination of witnesses, discovery, or interim injunctions.<sup>15</sup> Finally, the Kiribati Arbitration Act establishes the mechanism of 'special case', which permits the High Court to give directions to arbitrators on the questions of law.<sup>16</sup>

The second major characteristic of the Kiribati Arbitration Act is the absence of detailed provisions on recognition and enforcement and setting aside of awards. Section 24(2) of the Kiribati Arbitration Act provides that '[w]here an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set aside the award'.<sup>17</sup> National courts are therefore given broad discretion in setting aside of the awards, and the criteria for setting aside of the awards are very broad. The enforcement of awards is governed by the same rules as the enforcement of judgments.<sup>18</sup>

#### *F. Powers and duties of arbitrators*

According to the Kiribati Arbitration Act 1990, arbitrators can examine witnesses, request document production, and make other determinations necessary for the conduct of the proceedings.<sup>19</sup> The Kiribati Arbitration Act stipulates that 'if an arbitrator or umpire has misconducted himself or the proceedings', the High Court may remove him or set aside the award.<sup>20</sup> These provisions establish control of the state courts over arbitrators' actions, but the scope of this control is quite broad, and its limits are unclear. There is a separate right of a party to challenge an arbitrator for absence of impartiality.<sup>21</sup> One of the particularities of the Kiribati Arbitration Act is the arbitrators' right and obligation, if requested so by the High Court, to state any question of law arising in the course of the reference or any award or any part of an award in the form of special case for the decision of the High Court.<sup>22</sup>

#### *G. Arbitrator immunity*

The Kiribati Arbitration Act 1990 is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention<sup>23</sup>*

Kiribati is not a party to the 1958 New York Convention.<sup>24</sup>

#### *B. Reservations to the New York Convention*

This query is not applicable.

#### *C. Method of domestic implementation of the New York Convention*

This query is not applicable.

#### *D. Other international/regional treaties*

Kiribati participates in the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its member states, signed on 23 June 2000, which stipulates

that cooperation between the signatories shall support development and modernisation of mediation and arbitration systems.<sup>25</sup>

Kiribati has entered into four free trade agreements, three of which are in effect (Pacific Island Countries Trade Agreement, South Pacific Regional Trade and Economic Cooperation Agreement, and Pacific ACP–EC Economic Partnership Agreement).<sup>26</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

According to the World Bank Group Report on the Kiribati business environment, the courts of Kiribati enforce valid arbitration clauses and agreements, and there are no arbitrability limitations on the commercial disputes.<sup>27</sup> No case law on the enforcement of arbitration agreements has been found.

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

No information was available.

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

No information was available.

#### V. ARBITRATION LANDSCAPE

##### A. Institutional arbitration

There are no arbitral institutions in Kiribati.<sup>28</sup>

##### B. Measures to strengthen institutional arbitration capabilities

There are no arbitral institutions in Kiribati and no measures to strengthen institutional arbitration capabilities have been put in place in Kiribati.

##### C. Submission of disputes to arbitration vs. litigation

No information was available.

##### D. Participation by foreign counsel in international arbitrations

1. According to the Lawyers' Admission (Amendment) Rules 1992, only a person admitted may practise or represent a client before any court of law in Kiribati.<sup>29</sup> Pursuant to article 9(1) of the same rules, a person admitted to practise in a Commonwealth country can be admitted to practise in Kiribati if this person complies with the requirements established for the citizens of Kiribati,<sup>30</sup> i.e. the person wishing to practise in Kiribati needs to submit an application to the Attorney General and pass a personal interview during which it is established whether the applicant is qualified for admission and whether she is a fit and proper person to be admitted.<sup>31</sup> There is no information available about the possibility for non-Commonwealth lawyers to practise in Kiribati and there are no specific rules on representation of clients in arbitration.

##### E. Relevant statistical data

1. Sectors where arbitration is routinely used

No information was available.

## 2. Time taken for enforcement/annulment proceedings

No information was available.

## 3. Percentage of awards annulled/not enforced

No information was available.

F. *Statistics/information on the length of court proceedings in commercial cases*

According to the Court Annual Report on the Judiciary of Kiribati, in 2014 the duration of court proceedings in the Court of Appeal was 235 days, in the magistrates' courts 469 days, and in the High Court 49 days.<sup>32</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 660 days to resolve a commercial dispute in a first-instance court in Kiribati – 20 days for filing and service of court processes, 100 days for trial and judgment and 540 days for enforcement of judgment.<sup>33</sup> Kiribati ranks below the East Asia & Pacific region, in which it takes an average of 581 days to resolve commercial disputes in first-instance courts.<sup>34</sup> In terms of overall ease of enforcing contracts, Kiribati scored 53.39 of 100 and ranked 120 of 190.<sup>35</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>36</sup>

G. *Statistics on judges and lawyers per capita*

The only available statistics on the number of lawyers in Kiribati date from 2011: in this year, there were 33 lawyers in Kiribati, including 8 lawyers in private practice and 25 government/in-house lawyers,<sup>37</sup> of which 51 per cent were women.<sup>38</sup> These statistics result in the ratio of 1:12,593 lawyers per capita.<sup>39</sup> Pursuant to different statistics, the country has around 160 magistrates.<sup>40</sup>

The development of arbitration in Kiribati is further prevented by the limited number of lawyers practising in the country and the restricted access to legal services.<sup>41</sup> The access to legal services is disproportionate within the country, with some islands, such as Kiritimati, having few or no residential lawyers at all.<sup>42</sup> There are no tertiary educational institutions in Kiribati, and practising lawyers are educated abroad.<sup>43</sup>

## VI. FUNDING FOR LEGAL CLAIMS

A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for arbitration in Kiribati. Legal aid is available in Kiribati through the Office of the People's Lawyer (OPL). The OPL is an independent government body that reports to the Minister of Justice, with the mission of providing 'free, accessible, quality and timely legal aid to the disadvantaged people of Kiribati'.<sup>44</sup> The OPL provides assistance in a range of civil law matters, including contract disputes, which suggests that businesses may be able to obtain legal aid.<sup>45</sup> In addition to providing legal advice, the OPL also offers mediation services by employing two trained mediators.<sup>46</sup>

B. *Third-party funding*

Kiribati initially inherited its law on the rules of champerty and maintenance from the English common law. The tort of maintenance and champerty was abolished by section 34 of the Criminal Law and Procedure (Patriation) Act

1991. Therefore, the rules of champerty and maintenance are no longer applicable in Kiribati and third-party funding is legally permissible.

### C. Contingency fees

In *Bank of Kiribati v Maitinnara* the Kiribati Court of Appeal referred to Rule 41(1) of the Professional Conduct and Practice (Kiribati Lawyers) Rules 2011, which provides: 'A lawyer ... must not enter into a costs agreement under which the amount payable, or any part of the amount payable, to the lawyer ... is calculated by reference to a percentage of any judgment, settlement or monetary sum to be recovered by the client.' The Kiribati Court of Appeal analysed a cost agreement concluded between a bank and its lawyer and providing for a commission of 5 per cent of the amount recovered due to the lawyer in case of a successful trial. The bank alleged that calculation of lawyers' fees based on a percentage of the amount awarded was prohibited by Rule 41(1) and that such fees were unreasonable. The Kiribati Court of Appeal decided that this amount was due to the lawyer because the agreement was concluded before the adoption of the Professional Conduct and Practice (Kiribati Lawyers) Rules 2011, and therefore the restrictions introduced by this act were not applicable to the questioned agreement.<sup>47</sup>

This is the only case found discussing the issue of the contingency fees. The Professional Conduct and Practice (Kiribati Lawyers) Rules 2011 are not available online. Based on the findings of the Kiribati Court of Appeal in *Bank of Kiribati v Maitinnara*, contingency fees are prohibited by the lawyers' professional regulations for the agreements concluded after the adoption of the Professional Conduct and Practice (Kiribati Lawyers) Rules 2011, i.e. from 21 January 2011.

### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Martin Tsamenyi (1993), 'Kiribati', in Michael A Ntuny (ed.), *South Pacific Islands Legal Systems*, University of Hawaii Press, 75.
- 3 *Ibid.*, 78.
- 4 English Arbitration Act 1950, pt II.
- 5 Kiribati Arbitration Act 1990.
- 6 Mineral Development Licensing Ordinance 1978, ss 43, 44.
- 7 Employment and Industrial Relations Code 2015, s 128.
- 8 Industrial Relations Code 1998, s 12, as amended by the Industrial Relations Code (Amendment) Act 2008.
- 9 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 10 Kiribati Arbitration Act 1990, s 3.
- 11 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 9.
- 12 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 12.
- 13 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 14 (3).

- 14 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 24 (1).
- 15 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, ss 13 (4), (5) and (6).
- 16 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 22.
- 17 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 24 (2).
- 18 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302. Kiribati Arbitration Act 1990, s 27.
- 19 *Ibid.*, s 13(1).
- 20 *Ibid.*, ss 24(1) and 24(2).
- 21 *Ibid.*, s 25(1)(b).
- 22 *Ibid.*, s 22(1).
- 23 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 24 See Gary Born (2018), 'Bilateral Arbitration Treaties – A solution for Small States?,' in Petra Butler, Eva Lein & Rhonson Salim (eds), *Integration and Dispute Resolution in Small States*, Springer, 221, 225.
- 25 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (adopted 23 June 2000, entered into force 1 April 2003) art 21 <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3185>> accessed on 9 March 2019.
- 26 'Asian Regional Integration Center', 'FTAs: Kiribati' <<https://aric.adb.org/fta-country>>.
- 27 World Bank Group (2019), 'Doing Business 2019: Kiribati', 46 <<http://www.doingbusiness.org/en/data/exploreconomies/kiribati#>> accessed 1 April 2019.
- 28 C Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, 285, 293.
- 29 Lawyers' Admission (Amendment) Rules 1992, rule 15(1).
- 30 *Ibid.*, rule 9(1).
- 31 *Ibid.*, rule 3.
- 32 Republic of Kiribati, Judiciary, 'Kiribati Annual Court Report, 2012, 2013, 2014', 16, 27, 39 <[http://www.pacii.org/ki/court\\_annual\\_reports/kiribati\\_annual\\_court%20report\\_2012-2014.pdf?stem=&synonyms=&query=judiciary](http://www.pacii.org/ki/court_annual_reports/kiribati_annual_court%20report_2012-2014.pdf?stem=&synonyms=&query=judiciary)> accessed 1 April 2019.
- 33 World Bank Group (2019), 'Doing Business 2019: Kiribati', 44.
- 34 *Ibid.*, 43.
- 35 *Ibid.*
- 36 *Ibid.*, 42.
- 37 South Pacific Lawyers Association (2011), *Needs Evaluation Survey for South Pacific Lawyer Associations*, 14.
- 38 South Pacific Lawyers Association (2014), *Women in the Law in the South Pacific*, 9.
- 39 South Pacific Lawyers Association (2011), *Needs Evaluation Survey*, 5. See also Bilimoria (2017), 'Choices for the South Pacific Region's Bar Associations and Law Societies?', in Petra Butler & Caroline Morice (eds), *Small States in a Legal World*, Springer, 245, 262.
- 40 Republic of Kiribati, Judiciary, 'Kiribati Annual Court Report, 2012, 2013, 2014', 16, 27, 39 (containing the figures on the number of judges in the Court of Appeal, the High Court and the Magistrates' Courts in 2014). See also, for information on the number of magistrates, Chief Justice's Chambers, High Court of Kiribati 'Formal Speech by Chief Justice – Commencing the 2015 Legal Year of the High Court of Kiribati' <<http://www>.

- paclii.org/ki/court\_annual\_reports/Chief-justice-address-2015.html?stem=&synonyms=&query=judiciary> accessed 1 April 2019; Chief Justice's Chambers, High Court of Kiribati 'Formal Speech by Chief Justice – Commencing the 2013 Legal Year of the High Court of Kiribati' <[http://www.paclii.org/ki/court\\_annual\\_reports/Chief-justice-address-2013.htm?stem=&synonyms=&query=judiciary](http://www.paclii.org/ki/court_annual_reports/Chief-justice-address-2013.htm?stem=&synonyms=&query=judiciary)> accessed 1 April 2019.
- 41 Tsamenyi (1993), 'Kiribati', in Michael A Ntuny (ed.), *South Pacific Islands Legal Systems*, 98. See also Billimoria (2017), 'Choices for the South Pacific Region's Bar Associations ...', 245, 262.
- 42 Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands' 288; Lincoln Feast (2016), 'Justice delayed, justice denied on Pacific's remote Kiritimati', Reuters, 27 April 2016 <<https://uk.reuters.com/article/uk-pacific-justice/justice-delayed-justice-denied-on-pacifics-remote-kiritimati-idUKKCN0XN2WT>> accessed 1 April 2019.
- 43 Tsamenyi (1993), 'Kiribati', in Michael A Ntuny (ed.), *South Pacific Islands Legal Systems*, 75.
- 44 Office of the People's Lawyer, 'About Us' <<http://www.opl.org.ki/about-us/>> accessed 15 September 2019.
- 45 Ibid., 'Legal Advice and Court Representation'.
- 46 Ibid., 'Mediation', 9.
- 47 *Development Bank of Kiribati v Maitinnara* [2015] KICA 2; Civil Appeal 02 of 2015 (19 August 2015) <<http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KICA/2015/2.html?stem=&synonyms=&query=contingency%20fee>> accessed 1 April 2019.



# LESOTHO<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Lesotho was historically a British colony and known as the colony of Basutoland.<sup>2</sup> It gained its independence on 4 October 1966 and became the independent Kingdom of Lesotho.<sup>3</sup> Prior to its independence and afterwards, Lesotho has been essentially administered through customary law, Roman-Dutch civil law, and the English common law.<sup>4</sup>

Arbitration in Lesotho is governed by the Arbitration Act 1980.<sup>5</sup> There is no record of an earlier arbitration statute. The 1980 Act does not repeal or refer to previous statutes. The 1980 Act is partially based on the English Arbitration Act, 1950.<sup>6</sup>

### B. *Description of prior legislation and reasons for its replacement*

No record of any arbitration legislation in Lesotho prior to 1980 could be found.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

1. The principal arbitration statute in Lesotho is the Arbitration Act 1980.<sup>7</sup> The 1980 Act came into force on 15 July 1980. It was enacted to 'provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals...'.<sup>8</sup>

### B. *Scope of application to domestic and international arbitrations*

The 1980 Act governs arbitration proceedings conducted in Lesotho and does not distinguish between domestic and international arbitration proceedings.<sup>9</sup> Lesotho does not have a separate arbitration statute for international arbitration. Although the 1980 Act makes no express reference to international arbitration, nothing in it suggests that it does not or cannot apply to international arbitration proceedings seated in Lesotho. Regardless of this, the 1980 Act is considered to be 'totally inadequate' for international arbitration.<sup>10</sup>

### C. *Details and/or relevant amendment and modifications*

The 1980 Act has undergone no revisions or amendment since its inception.<sup>11</sup> It remains the extant arbitration Act in Lesotho. There are presently no publicly known efforts at modernising the 1980 Act to align it with contemporary international standards.

### D. *Relationship to the UNCITRAL Model Law*

Lesotho has not adopted the UNCITRAL Model Law on International Commercial Arbitration, 1985.<sup>12</sup> The 1980 Act predates the Model Law and therefore none of its provisions are based on it.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The 1980 Act differs from the Model Law in several respects. Key differences<sup>13</sup> between the 1980 Act and the Model Law include:

- a. The arbitration agreement is not separable from the main agreement;<sup>14</sup>
- b. Arbitrators do not have the statutory power to determine their jurisdiction;<sup>15</sup>
- c. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>16</sup>
- d. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>17</sup>
- e. The limited grounds for setting aside an award, namely: misconduct by an arbitrator; gross irregularity or excess of powers by arbitral tribunal; and the award having been improperly obtained;<sup>18</sup> and
- f. More opportunities for court interference with the arbitral process such as power of the court to set aside appointment of arbitrator in certain circumstances,<sup>19</sup> to remit award for reconsideration,<sup>20</sup> issue binding opinion on points of law stated to it by the arbitral tribunal,<sup>21</sup> and to extend the time for making an award.<sup>22</sup>

#### *F. Powers and duties of arbitrators*

The 1980 Act empowers arbitrators to issue interim awards,<sup>23</sup> to order specific performance,<sup>24</sup> to determine evidentiary matters<sup>25</sup> (such as receipt of evidence, examination of the witnesses, etc), to correct errors in an award,<sup>26</sup> and to award costs.<sup>27</sup>

#### *G. Arbitrator immunity*

The 1980 Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Lesotho became a party to the 1958 New York Convention on 13 June 1989.<sup>28</sup>

#### *B. Reservations to the New York Convention*

Lesotho has not made any reservations to the New York Convention.<sup>29</sup>

#### *C. Method of domestic implementation of the New York Convention*

Although a signatory, Lesotho does not appear to have domesticated the New York Convention within its laws. The New York Convention is not given effect in the 1980 Act, and neither is there separate legislation implementing its provisions.<sup>30</sup> Foreign arbitral awards will nonetheless be enforceable pursuant to the New York Convention as Lesotho courts are obliged to enforce them in accordance with the mechanisms set out thereunder.<sup>31</sup> However, there do not appear to be any reported cases on the enforcement of foreign arbitral awards pursuant to the New York Convention in Lesotho.<sup>32</sup>

#### *D. Other international/regional treaties*

Lesotho is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>33</sup> It ratified the ICSID Convention on 8 July 1969<sup>34</sup> and domesticated it through the Arbitration (International Investment Disputes) Act 1974. This Act provides for the enforcement of ICSID awards in Lesotho.<sup>35</sup>

*Lesotho has entered into three bilateral investment treaties, all of which are in force (Switzerland, Germany, and the United Kingdom).*<sup>36</sup>

Lesotho is party to two free trade agreements, both of which are in force (Southern African Customs Union,<sup>37</sup> and the Agreement Establishing the African Continental Free Trade Area<sup>38</sup>).

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

It is difficult to assess the general approach of Lesotho courts to commercial arbitration given the limited practice of commercial arbitration under the Act and the paucity of relevant information. However, a few available court decisions suggest that Lesotho courts take a pro-enforcement approach in relation to arbitration agreements and arbitral awards.

In *Lebone Consultants (Pty) Ltd v National Aids Commission*,<sup>39</sup> the plaintiff instituted a breach of contract action against the defendant in disregard of an arbitration clause. The plaintiff contended that the defendant had waived his right to arbitrate by 'pleading over to the merits and failing to apply for a stay of the proceedings in pursuance of section 7 of the Act'.<sup>40</sup> The court disagreed that the defendant had waived his right to arbitrate, noting that the defendant's plea over to the merit was that the matter was premature before the court and for a request that it be referred to arbitration. The court held that the language in section 7 of the Act is permissive and that 'pleading over to the merits cannot, *pe ser*, be a bar, when the Defendant decides to enforce the right of arbitration'.<sup>41</sup> The court accordingly enforced the arbitration agreement and compelled arbitration.

In *M & C Construction International (Pty) Ltd v Lesotho Housing and Land Corp.*,<sup>42</sup> the Court of Appeal upheld the validity and finality of an arbitral award and overturned the High Court's decision setting aside the award. The Court of Appeal rejected the High Court's reliance on a lesser standard and a fairness requirement in its assessment of what constitutes misconduct and gross irregularity under the 1980 Act. The Court of Appeal confirmed that an arbitral award could only be set aside pursuant to the narrow grounds contained in the 1980 Act which were not satisfied in this case. The Court of Appeal further held that a tribunal's *bona fide* mistake of law or fact, without elements of partiality, does not amount to 'misconduct' or 'gross irregularity' and is insufficient to vacate an award.

##### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

It is not clear what the Lesotho public policy standard is for refusing enforcement of arbitral awards. The Act does not provide for public policy as a ground for setting aside an award.<sup>43</sup> Moreover, there appears to be no reported case law on the enforcement of foreign arbitral awards from which to draw guidance.<sup>44</sup>

##### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

There do not appear to be any decisions or judgments that have interpreted the New York Convention.<sup>45</sup> Regarding case law interpretation of the 1980 Act, see discussion above.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

There is only one active arbitral institution in Lesotho, namely the Directorate of Dispute Prevention and Resolution (DDPR).<sup>46</sup> The DDPR is considered to be a semi-autonomous labour tribunal.<sup>47</sup> It was established by the Lesotho Labour Code (Amendment) Act 2000 to 'resolve trade disputes through arbitration', among other things.<sup>48</sup> It is not clear if the DDPR also administers commercial arbitration under the Act.

The institutional arbitration capability in Lesotho is relatively weak. The practice of arbitration under the 1980 Act is mostly limited to the resolution of labour disputes.<sup>49</sup>

### B. Measures to strengthen institutional arbitration capabilities

There are currently no known efforts by the government or industry bodies aimed at modernising the 1980 Act or strengthening institutional arbitration capabilities.

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

In Lesotho, pursuant to the Legal Practitioners Act 1983,<sup>50</sup> only admitted and enrolled legal practitioners may practise law in Lesotho courts. Foreign lawyers may be admitted and enrolled based on their admission in their home country after satisfying certain requirements of the Legal Practitioners Act 1983.<sup>51</sup> It is not clear if this restriction also applies to arbitration proceedings seated in Lesotho.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

No information was available.

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 615 days to resolve a commercial dispute in a first-instance court in Lesotho – 45 days for filing and service of court processes, 300 days for trial and judgment and 270 days for enforcement of judgment.<sup>52</sup> Lesotho ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>53</sup> In terms of overall ease of enforcing contracts, Lesotho scored 57.18 of 100 and ranked 95 of 190.<sup>54</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>55</sup>

Further, anecdotal evidence suggests that the courts are overburdened, and commercial cases generally take years to resolve.<sup>56</sup> To tackle this problem,

a commercial court was established in 2010. It is suggested that this court has reduced both the time to resolve commercial disputes and the costs of litigation.<sup>57</sup>

G. *Statistics on judges and lawyers per capita*

No information was available.

## VI. FUNDING FOR LEGAL CLAIMS

A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for arbitration in Lesotho. Legal aid is available through the Government's Legal Aid Board to indigent persons involved in civil or criminal disputes.<sup>58</sup> In addition, the National University of Lesotho Faculty of Law offers free legal services to indigent communities in civil, criminal, and customary law.<sup>59</sup> One of the main purposes of the university's legal aid clinic is 'to address grave inequalities in society that affect the social wellbeing of people'.<sup>60</sup> No information is available specifying the organisation's mandates for business-to-business support, or whether there is assistance provided for alternative dispute resolution.

B. *Third-party funding*

Third-party funding is not recognised and is not available in Lesotho. The common law rule of maintenance and champerty still applies<sup>61</sup> and may operate to outlaw such funding arrangements.

C. *Contingency fees*

It is not clear if contingency or conditional fee arrangements are currently permitted in Lesotho.

D. *Insurance for legal expenses*

Legal expense insurance (LEI) is available for litigants involved in legal proceedings in Lesotho. The Insurance Act 2014 provides the relevant legal framework. It charges the Central Bank of Lesotho with the responsibility of administering the Act and regulating insurance businesses.<sup>62</sup> The Central Bank of Lesotho recognises LEI as a legitimate insurance business and has approved a few LEI providers as licensed insurance companies in Lesotho.<sup>63</sup> An active LEI company in the market is the Legal Voice Limited.<sup>64</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Itumeleng Shale (2014), 'Update: The Law and Legal Research in Lesotho'; The Commonwealth Secretariat, 'Lesotho: History' <<http://thecommonwealth.org/our-member-countries/lesotho/history>> accessed 1 April 2019.
- 3 Shale (2014), 'Update: The Law and Legal Research in Lesotho'; The Commonwealth, 'Lesotho: History' <<https://thecommonwealth.org/our-member-countries/lesotho/history>> accessed 1 April 2019.

- 4 Common law was received in Lesotho through the General Law Proclamation 2(B) of 29 May 1884. The proclamation provided that 'the law to be administered in [Basutoland] shall as nearly as the circumstances of [Basutoland] will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope...' (currently Western Cape, South Africa). The proclamation preserved customary law in suits between Africans. The common law that was applicable in the Cape of Good Hope at the time was a mixture of Roman-Dutch civil law and the English common law. Further, no Acts passed by the Cape Parliament after 29 September 1984 were to be applicable as laws of Basutoland and certain enactments prior to that date were similarly excluded. See Sebastian Poulter (1969), 'The Common Law in Lesotho', *JAfrL*, Vol. 13, 127; Shale (2014), 'Update: The Law and Legal Research in Lesotho'; The Commonwealth, 'Lesotho: History'.
- 5 Arbitration Act 1980 (preamble).
- 6 David Butler (2004), 'The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress', *JIntlArb*, Vol. 21, 169, 171.
- 7 Thato Ramoseme (2013), 'Chapter 1.3: Lesotho', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 37.
- 8 Arbitration Act 1980 (preamble).
- 9 Arbitration Act 1980, s 2 defines arbitration proceedings as 'proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement.'
- 10 Butler (2004), 'The State of International Commercial Arbitration in Southern Africa...', 169, 199.
- 11 Ramoseme (2013), 'Chapter 1.3: Lesotho', 37; Georgia State University, 'Lesotho' (Arbitration in Africa, 2019) <[https://arbitrationinafrica.com/imagemap\\_area/lesotho/](https://arbitrationinafrica.com/imagemap_area/lesotho/)> accessed 1 April 2019.
- 12 International Council for Commercial Arbitration, 'Consultative Workshop on Cooperation among African Arbitration Initiatives' <[https://www.arbitration-icca.org/media/7/8466995322746/overview\\_of\\_arbitration\\_legislation\\_in\\_africa.pdf](https://www.arbitration-icca.org/media/7/8466995322746/overview_of_arbitration_legislation_in_africa.pdf)> accessed 1 April 2019.
- 13 See Ramoseme (2013), 'Chapter 1.3: Lesotho', 37.
- 14 See Model Law, Art 16(1).
- 15 Ibid.
- 16 See Arbitration Act 1980, s 10; cf. Model Law, art. 10 (providing that the default number of arbitrators shall be three).
- 17 See Arbitration Act 1980, s 12.
- 18 See Arbitration Act 1980, s 34(1); cf. Model Law, art. 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non-arbitrability of dispute and award contravenes public policy).
- 19 Arbitration Act 1980, s 14(2).
- 20 Ibid., s 33.
- 21 Ibid., s 21.
- 22 Ibid., s 24.
- 23 Ibid., s 27.
- 24 Ibid., s 28.
- 25 Ibid., s 15.
- 26 Ibid., s 31.
- 27 Ibid., s 36.
- 28 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 1 April 2019.
- 29 Ibid.

- 30 Ramoseme (2013), 'Chapter 1.3: Lesotho', 37, 39.
- 31 See New York Convention, arts III and V.
- 32 LesLII (Lesotho Legal Information Institute), 'Free Access to Law from Lesotho' <<https://lesotholii.org/>> accessed 14 August 2019; Ramoseme (2013), 'Chapter 1.3: Lesotho', 37, 39.
- 33 ICSID (2018), '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 10 March 2019.
- 34 Ibid.
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- 36 UNCTAD, 'Investment Policy Hub', 'Lesotho' <<https://investmentpolicy.unctad.org/country-navigator/120/lesotho>> accessed 31 July 2019.
- 37 EFTY, 'Southern African Customs Union' <<https://www.efta.int/free-trade/free-trade-agreements/sacu>> accessed 3 August 2019.
- 38 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 22 August 2019.
- 39 [2010] LSHC 37 (CIV/T/555/2007).
- 40 [2010] LSHC 37 (CIV/T/555/2007).
- 41 [2010] LSHC 37 (CIV/T/555/2007).
- 42 [2016] LSCA 4.
- 43 Arbitration Act 1980, s 34.
- 44 Lesotho Legal Information Institute (2009), 'Free Access to Law from Lesotho' <<https://lesotholii.org/>> accessed 14 August 2019; Ramoseme (2013), 'Chapter 1.3: Lesotho', 37, 39.
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- 46 Lesotho Ministry of Labour and Employment, 'About DDPR' <<https://web.archive.org/web/20130616151504/http://www.labour.gov.ls/about/ddpr.php>> accessed 22 May 2019.
- 47 Ibid.
- 48 Labour Code (Amendment) Act, 2000, s 46B.
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- 50 Legal Practitioners Act 1983, ss 3 and 4.
- 51 Legal Practitioners Act 1983, s 22.
- 52 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/lesotho#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/lesotho#DB_ec)> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 53 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 54 Ibid.
- 55 Ibid.
- 56 United States of America, International Trade Administration, 'Lesotho – Dispute Settlement' <<https://www.export.gov/article?id=Lesotho-Dispute-Settlement>> accessed 22 May 2019.
- 57 Ibid.

- 58 American Bar Association Rule of Law Initiative (2017), 'Thematic Report: Access to Justice' <<https://www.verite.org/wp-content/uploads/2017/12/ABA-ROLI-Thematic-Report-3.-Access-to-Justice-Aug-2017.pdf>> accessed 15 September 2019 at p 6.
- 59 Namati, 'National University of Lesotho Legal Aid Clinic (NULLAC)' <<https://namati.org/network/organization/national-university-of-lesotho-legal-aid-clinic-nullac/>> accessed 15 September 2019.
- 60 Itumeleng Shale (2014), 'Update: The Law and Legal Research in Lesotho'.
- 61 See *Ramaphike v Maphothoane* [2010] LSHCCD 14, 1 (holding that '[t]he "contracts" or "agreements" were champertous. Whilst the law has evolved a little since times when champerty and maintenance were strictly outlawed both the arrangements pleaded herein fall well-short of an acceptable arrangement').
- 62 The Insurance Act 2014, ss 2 and 3.
- 63 Central Bank of Lesotho, 'List of licensed Insurance Companies' <<https://www.centralbank.org.ls/index.php/financial-stability/95-supervision/619-insurance-companies-in-lesotho-as-at-march-2008>> accessed 1 April 2019.
- 64 Ibid.



## MALAWI<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Malawi was historically a British colony and known as the territory of Nyasaland.<sup>2</sup> It gained its independence on 6 July 1966 and became the Republic of Malawi.<sup>3</sup> The Malawi legal system is based on English common law, pre-1902 English Statutes of General Application and Acts of the Malawi Parliament.

Arbitration in Malawi is currently governed by the Arbitration Act 1967 (the '1967 Act'). There appears to be no record of any prior arbitration legislation. The 1967 Act does not repeal or refer to previous statutes.

Although it is not clear if post-1902 English arbitration statutes governed arbitration proceedings in Malawi, the 1967 Act provides that it shall be substituted as the applicable arbitration law under contracts that provided for arbitration pursuant to the 'Arbitration Act of 1950, of the United Kingdom, or any Act which that Act replaced'.<sup>4</sup>

#### B. *Description of prior legislation and reasons for its replacement*

There is no record of any Malawian arbitration legislation prior to 1967.

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

The principal arbitration statute in Malawi is the Arbitration Act 1967. The Act was enacted on 4 October 1967 and became effective on 6 November 1967. The 1967 Act is partially modelled on the now-repealed English Arbitration Act 1950.<sup>5</sup>

#### B. *Scope of application to domestic and international arbitrations*

Malawi does not have a separate arbitration statute for international arbitration. Although the 1967 Act does not explicitly refer to international arbitration, it is considered to apply to both domestic and international arbitration proceedings in Malawi.<sup>6</sup>

#### C. *Details and/or relevant amendments and modifications*

The 1967 Act remains the extant Arbitration Act in Malawi. It has undergone no revisions or amendment since its inception. It retains obsolete provisions which are unsuitable for modern commercial arbitration practice. For example, the Act still contains references to the appointment and role of umpires in arbitration proceedings, does not empower arbitrators to determine their jurisdiction, and does not provide for the doctrine of separability of arbitration agreements.<sup>7</sup> Further, there are presently no publicly known efforts to modernise the Act to align it with contemporary international standards.

#### D. *Relationship to the UNCITRAL Model Law*

Malawi has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.<sup>8</sup> The Act predates the Model Law and therefore none of its provisions are based on it.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The 1967 Act differs from the Model Law in several respects.<sup>9</sup> Key differences between the Act and the Model Law include:

- a. The arbitration agreement is not separable from the main agreement;<sup>10</sup>
- b. Arbitrators do not have the statutory power to determine their jurisdiction;<sup>11</sup>
- c. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>12</sup>
- d. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>13</sup>
- e. The limited grounds for setting aside an award namely: misconduct by an arbitrator and the improper procurement of an arbitration or award;<sup>14</sup> and
- f. Considerable opportunities for court interference with the arbitral process such as power of the court to make orders in respect of security of costs and interim relief,<sup>15</sup> to appoint an arbitrator or umpire,<sup>16</sup> to remit award for reconsideration,<sup>17</sup> issue binding opinion on points of law stated to it by the arbitral tribunal,<sup>18</sup> and to extend the time for making an award.<sup>19</sup>

#### *F. Powers and duties of arbitrators*

The 1967 Act empowers arbitrators to issue interim awards,<sup>20</sup> to order specific performance,<sup>21</sup> to determine evidentiary matters<sup>22</sup> (such as receipt of evidence, examination of the witnesses, etc), to correct errors in an award,<sup>23</sup> to award costs,<sup>24</sup> etc.

#### *G. Arbitrator immunity*

The 1967 Act lacks provisions on immunity of arbitrators.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Malawi is not a contracting state to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention').<sup>25</sup>

Certain foreign arbitral awards are nonetheless enforceable pursuant to Part III of the 1967 Act. They include:

- a. awards made pursuant to an arbitration agreement which is subject to the Protocol on Arbitration Clauses signed on behalf of the United Kingdom at a meeting of the Assembly of the League of Nations held on 24 September 1923 (the 1923 Protocol); and
- b. awards made in such territories and between persons subject to the jurisdiction of such territories as the Minister of Justice and Constitutional Affairs, being satisfied that reciprocal provisions have been made, may by notice published in the Gazette declare to be parties to the Convention on the Execution of Foreign Arbitral Awards signed in Geneva on behalf of the United Kingdom on 26 September 1927 (the 'Geneva Convention').<sup>26</sup>

Malawi implemented the 1923 Protocol and the Geneva Convention in the 1967 Act, although it never acceded to either instrument after its independence, nor were either extended to it before its independence.<sup>27</sup> Both

treaties are incorporated pursuant to Part III of the Act as the second and third Schedule to the Act, respectively.

Finally, the present practical significance of Part III of the Act in relation to the 1923 Protocol and the Geneva Convention is almost negligible. Most countries are now signatories to the New York Convention, which has superseded both the 1923 Protocol and the Geneva Convention.<sup>28</sup> Some commentaries, however, suggest that the Act allows for the enforcement of foreign awards otherwise made pursuant to the 1923 Protocol and the Geneva Convention and made in a non-reciprocating state.<sup>29</sup>

*B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction.

*D. Other international/regional treaties*

Malawi is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>30</sup> It signed the ICSID Convention on 9 June 1966 and ratified it on 23 August 1966. The ICSID Convention became effective in Malawi on 14 October 1966.<sup>31</sup> Malawi has domesticated the ICSID Convention by enacting the Investment Disputes (Enforcement of Awards) Act 1966. This Act provides for the enforcement of ICSID awards in Malawi.<sup>32</sup>

Malawi is a member state of the Southern African Development Community Treaty, Protocol on Finance and Investment (SADC treaty).<sup>33</sup> The SADC treaty mandatorily provides for the international arbitration of investment disputes if such claims cannot be amicably settled and after the exhaustion of local remedies.<sup>34</sup> Malawi is also party to the Common Market for Eastern and Southern Africa,<sup>35</sup> and the Agreement Establishing the African Continental Free Trade Area.<sup>36</sup> Malawi is not a party to the Organisation of Business Law Convention (OHADA).<sup>37</sup>

Malawi has entered into seven bilateral investment treaties, of which three are in force (Netherlands, Italy, and Egypt).<sup>38</sup>

#### IV. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

Overall, Malawi courts take a pro-arbitration approach to arbitration, particularly in relation to the enforcement of arbitration agreements. The courts usually do not interfere with a valid arbitration agreement unless there are compelling reasons to do so.<sup>39</sup> They tend to uphold arbitration clauses by staying proceedings and compelling arbitration.<sup>40</sup>

In *Access Communications Limited et al. v Fags Investments Limited et al.*,<sup>41</sup> the Commercial Court emphasised that the policy of the modern court is to encourage dispute settlement by arbitration. The Commercial Court enforced an arbitration clause on the grounds that the expressed intention of the parties should be fulfilled notwithstanding that the applicant disputed the illegality of a contract and arbitration clause. The Commercial Court stayed proceedings pending arbitration.<sup>42</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

It is not clear what the Malawi's public policy standard is for refusing enforcement of arbitral awards. Although the 1967 Act requires that the enforcement of foreign arbitral awards must not be contrary to the public policy or the law of Malawi,<sup>43</sup> it does not define awards or arbitration agreements which are or will be contrary to the public policy of Malawi. The Act also does not provide any guidance on what the standards for assessing public policy violations should be. Further, existing Malawi case law on the enforcement of foreign arbitral awards does not provide guidance.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

While Malawi is not a signatory of the New York Convention, the 1967 Act has been interpreted by the Malawi Supreme Court in *Bauman Hinde and Co. Ltd. v David Whitehead and Son Ltd.* to permit the enforcement of foreign arbitral awards. The court held that a foreign arbitral award was enforceable pursuant to sections 27 and 37 (Part III) of the Act, either by an 'action' or 'with leave of the court' in the same manner as a local judgment to the same effect. The Court also held that, in accordance with the British and Commonwealth Judgments Act (BCJA) 1922,<sup>44</sup> foreign awards obtained in the United Kingdom could be registered and enforced in Malawi as if they were made in Malawi. Foreign judgments include arbitration awards which have reached an enforceable stage in the issuing country.<sup>45</sup> This decision in effect empowered the courts to decide which foreign awards could be enforced in Malawi.

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

Malawi does not have an arbitral institution.<sup>46</sup> There is only one special arbitral institute in Malawi, namely the Agricultural Commodity Exchange for Africa (ACEA). The ACEA is an agricultural commodity exchange facilitating trade in the physical spot and forward markets. It offers arbitration services for disputes arising under the auspices of the Agricultural Commodities Exchange.<sup>47</sup> Arbitration under the ACEA is administered in accordance with the ACEA arbitration rules 2005.<sup>48</sup>

*B. Measures to strengthen institutional arbitration capabilities*

In the last year the government has started a review of the Arbitration Act.<sup>49</sup>

*C. Submission of disputes to arbitration vs. litigation*

There is no statistical data available on the percentage of disputes submitted to arbitration. Arbitration practice in Malawi is limited. Most commercial cases are tried by the Commercial Division of the High Court of Malawi.<sup>50</sup>

*D. Participation by foreign counsel in international arbitrations*

In Malawi, pursuant to the Legal Education and Legal Practitioners Act 1965, only admitted legal practitioners whose names are on the role of legal practitioners may practise law in Malawi courts. Foreign lawyers may be admitted to practise law based on their admission in their home country after satisfying certain requirements of the Legal Education and Legal Practitioners Act.<sup>51</sup>

Further, the Chief Justice is empowered, without formality, to admit any person to practise law if he or she is of the opinion that the applicant has sufficient legal knowledge and qualifications, is of good character, has come to Malawi for the purpose of appearing in such cause or causes, and has paid the prescribed fee.<sup>52</sup>

It is doubtful if the above restriction also applies to arbitration proceedings seated in Malawi. The Legal Education and Legal Practitioners Act 1965 appears to limit the practice of law 'as a legal practitioner' to proceedings before Malawi courts. It defines a legal practitioner as 'a person who has been admitted to practice the profession of the law before the High Court, or before any court subordinate thereto'.<sup>53</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

There are no publicly available statistics relating to the conduct of arbitration proceedings in Malawi.

##### 2. Time taken for enforcement/annulment proceedings

There are no publicly available statistics relating to the conduct of arbitration proceedings in Malawi.

##### 3. Percentage of awards annulled/not enforced

There are no publicly available statistics relating to the conduct of arbitration proceedings in Malawi.

#### *F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 522 days to resolve a commercial dispute in a first-instance court in Malawi – 42 days for filing and service of court processes, 360 days for trial and judgment and 120 days for enforcement of judgment.<sup>54</sup> Malawi ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>55</sup> In terms of overall ease of enforcing contracts, Malawi scored 47.40 of 100 and ranked 145 of 190.<sup>56</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

Further, anecdotal evidence suggests that the courts suffer from long backlogs, and commercial cases generally take years to resolve.<sup>57</sup> It can take between one and five years to obtain a judgment in the General Division of the High Court and up to nine months to obtain a judgment in the Commercial Division.<sup>58</sup> It can take up to four years to obtain a judgment from the Supreme Court of Appeal.<sup>59</sup> It is further suggested that the enforcement of judgments is difficult and continues to be a problem.<sup>60</sup>

#### *G. Statistics on judges and lawyers per capita*

There is minimal available data on the number of judges per capita in Malawi. The Supreme Court of Malawi comprises nine Justices.<sup>61</sup> As at 31 January 2019, there were 418 licensed legal practitioners, registered with the Malawi Law Society.<sup>62</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for businesses and for arbitration in Malawi. Legal aid services are provided by the government-created Legal Aid Bureau.<sup>63</sup> In Malawi's Legal Aid Bill 2010 ('the Act'), a legally aided person is defined as 'a natural or legal person in receipt of legal aid in accordance with this Act'.<sup>64</sup> By specifying 'a legal person', the Act can theoretically apply to businesses. Additionally, legal aid can be given not just to litigants of a dispute, but also to interested parties.<sup>65</sup>

The Act specifically excludes from eligibility of legal aid election petitions, proceedings consequent to a judgment summons, insolvency proceedings, foreclosure of mortgages, drafting of documents for the registration of companies and firms, transfer of property and conveyancing, and defamation.<sup>66</sup> In addition, a person must have reasonable grounds to initiate or defend a claim and have insufficient means to afford a private attorney.<sup>67</sup> While not all business-related disputes may be covered under the Act, some disputes, such as contract negotiation, can be covered by legal aid.

Legal aid applies to 'representation in any court, tribunal or similar body or authority' and enables people to have access to 'legal assistance in preventing or in settling or otherwise resolving disputes'.<sup>68</sup> Therefore, people may receive assistance for arbitration and/or mediation proceedings.

### B. *Third-party funding*

No literature or jurisprudence appears to be available on the current applicability of the doctrines of champerty and maintenance in Malawi or the availability of third-party funding in that jurisdiction. Given that Malawi's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied at the time of its independence, it is reasonable to assume that the rule of maintenance and champerty is likely still applicable in Malawi and third-party funding might therefore not be legally permissible.

Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to take place in Malawi.

### C. *Contingency fees*

Malawi has no law that expressly permits or prevents the charging of legal fees on a contingency basis. Contingency or conditional fee arrangements appear to be an acceptable practice in Malawi.<sup>69</sup> Further, the Legal Aid Act 2011 appear legitimises contingency fee arrangements by permitting the Legal Aid Bureau to enter into such arrangements with an applicant for legal aid.<sup>70</sup>

### D. *Insurance for legal expenses*

Legal protection insurance does not appear to be available in Malawi. The Insurance Act 2010 does not provide for this type of insurance. Further, there are no active legal protection insurance providers in the Malawi insurance market.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Malawi became a British colonial protectorate in 1891. In 1893, it was named the British Central Africa Protectorate and in 1907 it was renamed Nyasaland. See GlobaLex (2019), 'Update: Malawi Legal System and Research Resources, Redson Kapindu <<http://www.nyulawglobal.org/globalex/Malawi1.html>> accessed on 10 July 2019.
- 3 Ibid.
- 4 Arbitration Act 1967, s 35. Available at MalawiLii, 'Arbitration Act, 1967' <<https://malawilii.org/mw/legislation/act/1967/26>> accessed 21 May 2019> accessed 10 July 2019.
- 5 S Finizio, D Morris and K Drage (2015), 'Enforcing arbitral awards in Sub-Saharan Africa –Part 1', WilmerHale <<https://www.wilmerhale.com/-/media/e65969781b5342e2a8c492a61c6f2a1c.pdf>> accessed 2 September 2019; A Jones (2015), 'International Commercial Arbitration in SADC Countries', DPhil thesis, University of Johannesburg <<https://ujcontent.uj.ac.za/vital/access/services/Download/uj:17045/SOURCE1>> accessed 2 September 2019.
- 6 See *Industrias Metalurgicas Pescamona Sociedad Animana (IMPESA) v Heavy Engineering Limited*, MSCA Civil Appeal No. 14 of 2000 (unreported) (judgment of 29 May 2002), Supreme Court of Appeal. (In that case, the arbitration proceedings were conducted in Malawi, while parties had their places of business in Kenya and Argentina respectively). See also Kelious Mlenga (2012), 'A review of Selected Aspects Malawi's Arbitration Legal Framework in Light of the International Arbitration Regime', Academia <[https://www.academia.edu/2056766/A\\_REVIEW\\_OF\\_SELECTED\\_ASPECTS\\_MALAWI\\_S\\_ARBITRATION\\_LEGAL\\_FRAMEWORK\\_IN\\_LIGHT\\_OF\\_THE\\_INTERNATIONAL\\_ARBITRATION\\_REGIME](https://www.academia.edu/2056766/A_REVIEW_OF_SELECTED_ASPECTS_MALAWI_S_ARBITRATION_LEGAL_FRAMEWORK_IN_LIGHT_OF_THE_INTERNATIONAL_ARBITRATION_REGIME)> accessed 2 September 2019; Kandako Mhone (1990), 'Arbitration law in Malawi and its implications for the PTA/SADCC organizations', *The Comparative and International Law Journal of Southern Africa*, Vol. 23, 234; Jones (2015), 'International Commercial Arbitration in SADC Countries'.
- 7 See discussion in section III E.
- 8 ICCA (2016), 'Consultative Workshop on Cooperation among African Arbitration Initiatives: Overview of arbitration legislation in Africa' <[https://www.arbitration-icca.org/media/7/84669995322746/overview\\_of\\_arbitration\\_legislation\\_in\\_africa.pdf](https://www.arbitration-icca.org/media/7/84669995322746/overview_of_arbitration_legislation_in_africa.pdf)> accessed 1 April 2019.
- 9 See generally, Shabir Latif (2013), 'Chapter 1.5: Malawi', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 47.
- 10 See Model Law, art. 16(1).
- 11 Ibid.
- 12 See Arbitration Act 1967, s 8; cf. Model Law, art. 10 (providing that the default number of arbitrators shall be three).
- 13 See Arbitration Act 1967 Act, ss 10 and 11.
- 14 See Arbitration Act 1967, s 24(2); cf. Model Law, art. 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non-arbitrability of dispute and award contravenes public policy).
- 15 Arbitration Act 1967, s 13(6).
- 16 Ibid., s 12.
- 17 Ibid., s 23.
- 18 Ibid., s 22.
- 19 Ibid., s 14(2).

- 20 Ibid., s 15.
- 21 Ibid., s 16.
- 22 Ibid., s 13.
- 23 Ibid., s 18.
- 24 Arbitration Act 1967, s 19.
- 25 New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 1 April 2019.
- 26 Arbitration Act 1967, s 36(1)(b) and (c).
- 27 A Asouzu (2001), *International Commercial Arbitration and African States – Practice, participation and Institutional Development*, Cambridge University Press, Chapter 6, fn. 28.
- 28 New York Convention, Article VII(2).
- 29 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Malawi' <<https://www.herbertsmithfreehills.com/file/13746/download?token=z5WibrC5>> accessed 2 September 2019.
- 30 ISCID (2018) '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 10 March 2019.
- 31 Ibid.
- 32 Investment Disputes (Enforcement of Awards) Act 1966, ss 4–5.
- 33 Southern African Development Community, 'Member States' <<https://www.sadc.int/member-states/>> accessed 10 March 2019.
- 34 SADC Treaty, Art 28. See also Duncan Bagshaw (2015), 'International Arbitration and Southern and Central Africa', ICCA, 14 June 2015 <[https://www.arbitration-icca.org/media/5/63998035118979/international\\_arbitration\\_and\\_southern\\_and\\_central\\_africa\\_bagshaw.pdf](https://www.arbitration-icca.org/media/5/63998035118979/international_arbitration_and_southern_and_central_africa_bagshaw.pdf)> accessed 10 March 2019.
- 35 United Nations Economic Commission for Africa, 'COMESA – Common Market for Eastern and Southern Africa' <<https://www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa>> accessed 22 August 2019.
- 36 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 22 August 2019.
- 37 SADC Treaty, art 28. See also Bagshaw (2015), 'International Arbitration and Southern and Central Africa'.
- 38 UNCTAD, 'Investment Policy Hub', 'Malawi' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 39 Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell.
- 40 See *Chanthunya v Ngwira*, 12 MLR 133 (holding that an arbitration clause does not oust the jurisdiction of the court but merely enables the party seeking to rely on the clause to seek a stay of the proceedings pending arbitration); see also *National Insurance Co Ltd v Ngwira* [1993] 16(1) MLR 38.
- 41 Commercial Case 142 of 2012.
- 42 Latif (2013), 'Chapter 1.5: Malawi', 47.
- 43 Arbitration Act 1967, s 38(1).
- 44 British and Commonwealth Judgments Act 1922, s 3.
- 45 Ibid., s 2.
- 46 US Department of State, '2018 Investment Climate Statements: Malawi' <<https://www.state.gov/reports/2018-investment-climate-statements/malawi/>> accessed 2 September 2019.
- 47 ICCA, SOAS (2016), 'Arbitral Institutions in Africa, 2016' <[https://www.arbitration-icca.org/media/8/63288270366591/list\\_of\\_arbitral\\_institutes\\_regional\\_ordering\\_oct\\_2016\\_new.pdf](https://www.arbitration-icca.org/media/8/63288270366591/list_of_arbitral_institutes_regional_ordering_oct_2016_new.pdf)> accessed 10 July 2019; ICCA, 'Overview of Arbitral Institutes and



- Rules in Africa' <[https://www.arbitration-icca.org/media/7/93362387113384/overview\\_of\\_arbitral\\_institutes\\_and\\_rules\\_in\\_africa.pdf](https://www.arbitration-icca.org/media/7/93362387113384/overview_of_arbitral_institutes_and_rules_in_africa.pdf)> accessed on 10 July 2019.
- 48 Agricultural Commodity Exchange for Africa (2015), 'Rules of Arbitration' <[http://www.bidvolumeonly.org/media/1309/ace\\_arbitration\\_rules.pdf](http://www.bidvolumeonly.org/media/1309/ace_arbitration_rules.pdf)> accessed on 21 May 2019.
- 49 Information attained through surveys conducted for this study.
- 50 Latif (2013), 'Chapter 1.5: Malawi', 47.
- 51 Legal Education and Legal Practitioners Act 1965 (LELPA 1965), s 9–12.
- 52 *Ibid.*, s 12(3).
- 53 *Ibid.*, s 2.
- 54 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/malawi#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/malawi#DB_ec)> accessed 2 September 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 55 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 56 *Ibid.*
- 57 US Department of State, '2018 Investment Climate Statements: Malawi'.
- 58 Addleshaw Gooddard, 'Malawi' <<https://www.addleshawgooddard.com/en/doing-business-in-africa/africa-countries-a-z-list/malawi/>> accessed 21 May 2019.
- 59 *Ibid.*
- 60 *Ibid.*
- 61 Malawi Judiciary, 'Supreme Court of Appeal' <<https://www.judiciary.mw/supremecourt>> accessed 21 May 2019; Malawi Law Society <<https://malawilawsociety.net/>> accessed on 21 May 2019.
- 62 Malawi Law Society, 'Membership Directorate' <<https://malawilawsociety.net/index.php/membership/membership-directory>> accessed 21 May 2019.
- 63 Malawi Legal Aid Bureau, 'Who are we?' <<http://legallaidbureau.org/lab-mission-vision.html>> accessed 15 September 2019.
- 64 Legal Aid Bill, No. 28 of 2010 at s 2.
- 65 Malawi Legal Aid Bureau, 'Role of Legal Aid: Legal aid in Civil Cases' <<http://legallaidbureau.org/lab-civil-matters-page.html>> accessed 15 September 2019.
- 66 Legal Aid Bill, No. 28 of 2010 at First Schedule.
- 67 Legal Aid Bill, No. 28 of 2010 at s 20.
- 68 Legal Aid Bill, No. 28 of 2010 at ss 16(c) and 19(c).
- 69 For instance, the Malawi Law Society does not appear to frown on such arrangements. See Golden Matonga (2015), 'Macra in Legal Fees Shock', *The Nation*, 26 April 2015 <<https://mwnation.com/macra-in-legal-fees-shock/>> accessed 21 May 2019. See also Alfred Chauwa (2017) 'Malawi Law Society Pens Errant Lawyer Ndende over Embezzlement', *NYASA Times*, 12 September 2017 <<https://www.nyasatimes.com/malawi-law-society-pens-errant-lawyer-ndende-embezzlement/>> accessed 21 May 2019.
- 70 LAA 2011, s 46.

# MALAYSIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. Relationship with existing or prior English Arbitration Act(s)

Malaysia's prior arbitration laws were modelled on English arbitration legislation. What is now West Malaysia was previously British Malaya in the 1800s and what is now East Malaysia was then known as British Borneo. From 1826, the British East India Company controlled the Straits Settlements, which comprised Singapore, Malacca and Penang. In 1867, the Straits Settlements became a British Crown Colony. English law has a large influence on Malaysia and Malaysia operates predominantly in the common law legal tradition to this day. This said, as a Muslim country, the country operates a dual system of law, with a parallel Islamic / Sharia law system that has jurisdiction over Muslims in certain personal and criminal law matters.<sup>2</sup>

### B. Description of prior legislation and reasons for its replacement

The earliest arbitration legislation in what is now Malaysia was the Straits Settlements Arbitration Ordinance of 1809.<sup>3</sup> This Ordinance stood for 143 years before it was replaced by the Malaysian Arbitration Act of 1952, which was first applied in Sarawak, one of Malaysia's states.<sup>4</sup> The Malaysian Arbitration Act 1952 was subsequently incorporated into the other states of Malaysia in 1972. The Malaysian Arbitration Act 1952 was based on the English Arbitration Act 1950. It was amended once in 1980, to 'oust instances of court intervention in arbitrations conducted under the UNCITRAL Arbitration Rules, the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration and the Washington Convention'.<sup>5</sup>

In 2005, Malaysia enacted its Arbitration Act 2005. The 2005 Act was largely based on the 1985 UNCITRAL Model Law on International Commercial Arbitration<sup>6</sup> and the New Zealand Arbitration Act 1969, and 'drastically reduced instances of judicial intervention in domestic arbitration'.<sup>7</sup> The 2005 Act applies to arbitrations that commenced after 15 March 2006.

## II. CURRENT ARBITRAL LEGISLATION

### A. Date of enactment

The Arbitration Act 2005 received Royal Assent on 30 December 2005 and came into force on 15 March 2006.

### B. Scope of application to domestic and international arbitrations

The Arbitration Act 2005 applies to both domestic and international arbitrations.

### C. Details and/or relevant amendments and modifications

The Arbitration Act 2005 was amended in 2011 and 2018.

The 2011 amendment adjusted the level of court intervention that a court may have in an arbitral process. The amendments can be classified into six areas, set out below:

- First, the 2011 amendment introduced an express statutory restriction on curial intervention to only grounds provided under the Act. This was achieved by amending section 8 to read: 'No court shall intervene in matters governed by this Act, except where so provided in this Act';

- Second, the amendment restricted refusals of stay of court of proceedings to only one ground. Before the amendment, the court under section 10 of the Malaysian Arbitration Act 2005 was obliged to stay proceedings and refer parties to arbitration unless either of the following grounds were met: (i) the arbitration agreement was null and void, inoperative or incapable of being performed, or (ii) there was in fact no dispute between the parties with regard to the matters to be referred. The 2011 amendment removed the second ground;<sup>8</sup>
- Third, the amendment clarified the power of the court in admiralty proceedings and interim orders. Under section 10(1) of the 2005 Act, the court in granting a stay of proceedings may impose any condition that it deems fit. The 2011 amendments introduced a new subsection that empowered the High Court to order that any security provided either in form of a property arrested or bail, shall be retained as security for fulfilling any award that may be rendered in the arbitral proceeding. Alternatively, the court may order that the stay of proceedings is conditioned upon the provision of equivalent security for the satisfaction of any award that may be rendered during the arbitral proceedings;<sup>9</sup>
- Fourth, the amendment extended the scope of the Malaysian Arbitration Act 2005 to international arbitrations involving seats outside Malaysia. This meant that such arbitrations could also be subject to stay of court proceedings in Malaysia.<sup>10</sup>
- Fifth, the amendment introduced new directions on the recognition and enforcement of awards. This included introducing a new principle of 'separability of matters submitted for arbitration in an award'. This has been explained as follows:

While s 39(2)(a)(v) confers on the court the right to not recognise or enforce an award that contains decisions on matters that are beyond the scope of what the parties submitted to arbitration, the new 39(3) mitigates such harshness by providing that, in recognising and enforcing an award, the High Court should separate matters submitted to arbitration from those not submitted to it, and recognise and enforce only the former; and

- Sixth, the right of parties to refer any question of law arising out of an award to the High Court was restricted, by the introduction of a new provision allowing the High Court to dismiss any such reference unless the question of law substantially affects the rights of one or more of the parties.<sup>11</sup>

The 2018 amendment further enhanced interim protection measures in support of arbitration and confidentiality, while minimising recourse against arbitral awards. The 2018 amendment adopted the 2006 amendments to the UNCITRAL Model Law, and its scope can be enumerated as follows:

- First, it clarified the definition of an 'arbitral tribunal' to include emergency arbitrators;
- Second, it introduced a new section 3A which expressly secures the freedom of both domestic and international parties to arbitral proceedings the freedom to choose and appoint any representative;
- Third, it broadened the requirement for an arbitration agreement to be in writing to cover content which is recorded in any form including electronic communications or where it is contained in an exchange of a statement of claim and defence in which the existence of an agreement is alleged by one part and not denied by the other;

- Fourth, amendments were made concerning preliminary orders and interim measures dealing with their scope, conditions, application, modification, suspension, termination and enforcement. The High Court is granted jurisdiction to grant interim measures to maintain or restore the status quo of the parties pending the determination of a dispute by the arbitral tribunal and to make orders for the preservation of evidence or for security for costs;
- Fifth, arbitral tribunals are now expressly empowered to award both pre-award and post-award interest;
- Sixth, additional protections on arbitral confidentiality were introduced, prohibiting the disclosure of arbitral proceedings or awards except for certain limited circumstances. In addition, a stipulation was included that court proceedings under the Arbitration Act should be conducted in private unless the court orders that proceedings should be done in open court on the application of a party or based on its own satisfaction that the proceedings ought to be so heard;
- Seventh, the right for domestic parties to judicially challenge arbitral awards on grounds of questions of law that substantially affect their rights has been removed, to enhance the finality of arbitration awards.

#### *D. Relationship to the UNCITRAL Model Law*

The 2005 Act was based on the 1985 UNCITRAL Model Law. The 2018 amendment has brought it in line with the UNCITRAL Model Law's 2006 amendments.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The principles of the Model Law have been largely incorporated into the 2005 Act in their original form and phraseology.<sup>12</sup> The key difference is that the 2005 Act covers both domestic and international arbitrations. Further consequential differences arise; for instance, section 12 of the Malaysian Arbitration Act provides that where the parties fail to agree on the number of arbitrators, in an international arbitration, the default number shall be three (following article 10 of the Model Law), while in a domestic arbitration, the default number shall be one.<sup>13</sup>

#### *F. Powers and duties of arbitrators*

Section 21(3) of the Arbitration Act 2005 provides that a tribunal shall (unless agreed otherwise by the parties) have power to:

- Determine the admissibility, relevance, materiality and weight of any evidence;
- Draw on its own knowledge and expertise;
- Order the provision of further particulars in a statement of claim or statement of defence;
- Order the giving of security for costs;
- Fix and amend time limits within which various steps in the arbitral proceedings must be completed;
- Order the discovery and production of documents or materials within the possession or power of a party;
- Order the interrogatories to be answered;
- Order that any evidence be given on oath or affirmation; and
- Make such other orders as the arbitral tribunal considers appropriate.

Section 19(1) of the 2005 Act relates to interim measures and provides that (unless otherwise agreed by the parties) the following interim orders may be sought (and therefore granted by a tribunal):

- Security for costs;
- Discovery of documents and interrogatories;
- Giving of evidence by affidavit; and
- The preservation, interim custody or sale of any property which is the subject matter of the dispute.

Section 28(1) of the 2005 Act provides that (unless otherwise agreed by the parties) the arbitral tribunal may:

- Appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and
- Require a party to give the expert any relevant information or to produce or provide access to any relevant documents, goods or other property for the expert's inspection.

Section 27 of the 2005 Act provides that (unless otherwise agreed by the parties) if, without showing sufficient cause –

- The claimant fails to communicate his statement of claim in the time required, the arbitral tribunal may terminate the proceedings.
- The respondent fails to communicate his statement of defence in accordance with the time required, the arbitral tribunal may continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.
- Any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.
- The claimant fails to proceed with the claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.

#### *G. Arbitrator immunity*

Section 47 of the Arbitration Act 2005 provides that an arbitrator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention<sup>14</sup>*

Malaysia became a party to the 1958 New York Convention on 5 November 1985.<sup>15</sup>

#### *B. Reservations to the New York Convention*

Malaysia has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>16</sup>

#### *C. Method of domestic implementation of the New York Convention*

The New York Convention is integrated into the 2005 Act. The Convention's provisions on recognition and enforcement of awards are integrated into sections 38–39 of the 2005 Act.

#### *D. Other international/regional treaties*

Malaysia is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the 'ICSID Convention').<sup>17</sup> The ICSID Convention is implemented in Malaysia by the Malaysian Convention on Settlement of Investment Disputes Act 1966.

Malaysia has entered into 66 bilateral investment treaties, of which 54 are in force (Syrian Arab Republic, Slovakia, Islamic Republic of Iran, Morocco, Saudi Arabia, Algeria, Bahrain, Ethiopia, Burkina Faso, Lebanon, Turkey, Democratic People's Republic of Korea, Macedonia, Cuba, Uzbekistan, Egypt, Ghana, Guinea, Czech Republic, Romania, Kazakhstan, Peru, Uruguay, Mongolia, Spain, Bosnia and Herzegovina, Croatia, Bangladesh, Jordan, Argentina, Cambodia, Namibia, Albania, Poland, Hungary, Taiwan, Chile, Vietnam, Denmark, China, United Arab Emirates, Republic of Korea, Italy, Kuwait, Finland, Austria, Sri Lanka, United Kingdom, Belgium–Luxembourg Economic Union, Sweden, Switzerland, France, Netherlands, and Germany).<sup>18</sup>

Malaysia has also entered into seven free trade agreements, all of which are signed and in effect (ASEAN Free Trade Area, ASEAN–Hong Kong China Free Trade Agreement, ASEAN–Australia and New Zealand Free Trade Agreement, New Zealand–Malaysia Free Trade Agreement, Australia–Malaysia Free Trade Agreement, Malaysia–Chile Free Trade Agreement, and the Malaysia–Turkey Free Trade Agreement).<sup>19</sup>

## **IV. RELEVANT CASE LAW**

### *A. Approach of the national courts to the enforcement of arbitration agreements*

Malaysia is a pro-arbitration jurisdiction and takes a broad approach to the construction of arbitration agreements.<sup>20</sup> Both the doctrines of competence-competence and separability are recognised and have been regularly applied by Malaysian courts.<sup>21</sup> Malaysia also recognises the principle of incorporation of arbitration agreements by reference.<sup>22</sup>

### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

A high threshold is set for the establishment of a breach of public policy. In the case of *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd*, the Court held that an applicant challenging an arbitral award on a breach of public policy must: (i) identify the particular public policy which is said to be conflicted, (ii) provide evidence as to how it is conflicted and (iii) how the breach prejudiced its rights. No vague allegation that the determination of the arbitrator was inconsistent with Malaysian law and the rule of natural justice or that the findings were purportedly not supported by law and evidence will suffice. An error of law or fact does not engage the public policy of Malaysia.<sup>23</sup>

### *C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

There is considerable jurisprudence variously relating to different aspects of the arbitration lifecycle. Some examples are set out below:

Re: Arbitrator's power to rule on own jurisdiction

In the ... case of *Asiagroup Sdn Bhd v PFCE Timur Sdn Bhd*,<sup>24</sup> the High Court (at [24]) recognised the statutory power and jurisdiction of arbitrators to rule on their own jurisdiction, and affirmed the principle that even if the court had doubts concerning the existence of the arbitration agreement within a contract, it should lean in favour of granting a stay so that the dispute may be referred to arbitration in order to let the arbitrators first decide whether they had jurisdiction to arbitrate the dispute.

Re: Formalities for incorporation by reference of an arbitration agreement

The decision in *Thien Seng Chan Sdn Bhd v Teguh Wiramas Sdn Bhd & Anor* affirms that the document containing the arbitration clause need not be signed by the parties in order for it to be incorporated into the contract.<sup>25</sup>

Re: Interplay between arbitration and a winding-up petition

In *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd*, the High Court found that:

'a winding-up petition is not a substantive claim that is contemplated by section 10 of the 2005 Act, but a statutory right that may be invoked and exercised at any time in accordance with the law on winding-up, and cannot be modified or diluted by section 10; and

a winding-up petition is not a claim for payment, but a *sui generis* proceeding with different reliefs and end results from a civil proceeding subject to arbitration, and is therefore not susceptible to a stay pending arbitration.'<sup>26</sup>

Re: Challenge of arbitrator appointments

In the case of *Sebiro Holdings Sdn Bhd v Bhag Singh*, the Court of Appeal was confronted with the question of whether the KLRCA director's appointment of an arbitrator was susceptible to challenge. Before the High Court, the appellant had sought, but failed to terminate, the appointment of the respondent as arbitrator on the grounds that he lacked geographical knowledge of Sarawak, which was the place of performance of the underlying contract. In dismissing its appeal, the Court of Appeal noted that 'the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the 2005 Act] is an administrative power' and therefore '[his function] is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed'.<sup>27</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Institutional arbitration is commonplace. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was in 2018 renamed as the Asian International Arbitration Centre (AIAC). Based on the KLRCA 2017 Annual Report, the KLRCA recorded 932 cases in 2017.<sup>28</sup>

### B. Measures to strengthen institutional arbitration capabilities

The KLRCA rebranded itself in 2018 as the Asian International Arbitration Centre (AIAC) in an attempt to position itself better to attract Asian-wide arbitration matters.

### C. Submission of disputes to arbitration vs. litigation

No information was available.

#### D. Participation by foreign counsel in international arbitrations

As a starting point, only Malaysian advocates and solicitors may practise law in Malaysia and appear and plead in Malaysia's courts.<sup>29</sup> However, Malaysia is presently in the process of reformulating its rules on foreign lawyers – in January 2019, proposed revisions to the Legal Profession Act 1976 were submitted to the Malaysian Attorney-General.<sup>30</sup> The full document appears to be only available to access to members of the Malaysian Bar, but some of the proposed changes include special fly-in-fly-out provisions for foreign lawyers.<sup>31</sup>

For the purpose of arbitration, under section 3A of the Arbitration Act 2005 (as amended in 2018) parties may be represented by any person of their choice.<sup>32</sup> However, for the purposes of East Malaysia, in *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal*,<sup>33</sup> the Federal Court of Malaysia held that the effect of section 8(1) of the Advocates Ordinance 1953, read with section 2(1)(a) and (b) of that statute, was to prohibit foreign lawyers, who do not have the right to practise law in Sabah, from representing parties to arbitration proceedings in Sabah.<sup>34</sup>

#### E. Relevant statistical data

##### 1. Sectors where arbitration is routinely used

According to the (then) KLRC Annual Reports from 2015 to 2017, construction disputes form the bulk of disputes typically arbitrated in Malaysia. This is due to the use of standard form building contracts that incorporate arbitration clauses.<sup>35</sup>

Other types of disputes which tend to engage arbitration include agency disputes, aviation disputes, financial disputes, corporate disputes, energy disputes, IP disputes, insurance disputes, maritime disputes, real estate disputes, and sale of goods.<sup>36</sup>

##### 2. Time taken for enforcement/annulment proceedings

The usual time taken for enforcement/annulment proceedings should be between 3 and 9 months, depending on whether there is any objection to the award being enforced.<sup>37</sup>

An appeal arising from any such objection to the Court of Appeal may take 6–12 months to be determined. Thereafter, any application for leave to appeal to the Federal Court may take a further 3–6 months to be determined. If leave to appeal to the Federal Court is granted, the appeal itself may then take a further 6–9 months to be determined.<sup>38</sup>

##### 3. Percentage of awards annulled/not enforced

No information was available.

#### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 425 days to resolve a commercial dispute in a first-instance court in Malaysia – 35 days for filing and service of court processes, 270 days for trial and judgment and 120 days for enforcement of judgment.<sup>39</sup> Malaysia ranks above average in the East Asia & Pacific region, where it takes an average of 581.1 days to resolve commercial disputes in first-instance courts.<sup>40</sup> In terms of overall ease of enforcing contracts, Malaysia scored 68.23 of 100 and ranked 33 of 190.<sup>41</sup> The enforcing contracts score captures the time and costs for resolving



commercial disputes through a local first-instance court and the quality of judicial processes of such court.

G. *Statistics on judges and lawyers per capita*

According to the Malaysian Bar Council, there were 18,445 lawyers in Malaysia as of 18 February 2019.<sup>42</sup> Since Malaysia has a population of about 32 million presently, the lawyer:population ratio is about 1:1,700.

According to the Malaysian Judiciary Yearbook 2015, there were 140 superior court judges in Malaysia in that year. This works out to a superior court judge:population ratio of about 1: 228,000. The Yearbook does not set out the total number of judges, and neither does the 2016 one.

## VI. FUNDING FOR LEGAL CLAIMS

A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is available for businesses, but not arbitration, in Malaysia. There are three bodies that provide legal aid in Malaysia: the Bar Council, the Legal Aid Department, and the National Legal Aid Foundation. The Bar Council provides assistance for all civil law matters, except those involving recovery of debts and motor vehicle accidents. This means businesses may be able to use this legal aid scheme.<sup>43</sup> The National Legal Aid Foundation only deals with criminal matters.<sup>44</sup>

The Legal Aid Department gets its powers from the Legal Aid Act 1971, which lists the civil proceedings that may receive legal aid in the third Schedule. Included in the third Schedule is 'rights and liabilities under the Hire-Purchaser Act 1967', an Act which regulates the form and content of purchase agreements and the rights and duties of parties to these agreements.<sup>45</sup> Therefore, Malaysia does provide legal aid for certain types of business-to-business disputes. Additionally, the Legal Aid Act 1971 allows the Minister to authorise legal aid for any matter, regardless of whether it is listed in the third Schedule, if he or she is satisfied that it is in the interests of justice to do so having regard to the particular hardship of the applicant.<sup>46</sup>

The 1971 Act states that any aided person who has a dispute within those outlined in the third Schedule may have their dispute referred to a mediator.<sup>47</sup> There is no similar provision for arbitration.

B. *Third-party funding*

No literature and jurisprudence appears to be available on the current applicability of the doctrines of champerty and maintenance in Malaysia or the availability of third-party funding in that jurisdiction. However, given that Malaysia's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied at the time of its independence in 1957, it is reasonable to assume that the rule of maintenance and champerty is likely still applicable in Malaysia.<sup>48</sup>

Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to occur in Malaysia. In *Mastika Jaya Timber v Shankara* the High Court Sarawak followed the Singaporean precedent in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* in ruling that an oral arrangement in which the attorney would refund the retainer fee if unsuccessful was invalid. The

court stated that the champerty doctrine invalidates 'any agreement which stipulates for or contemplates payment only in the event of success in such suit, action, or proceeding'.<sup>49</sup>

### C. Contingency fees

Section 112 of the Malaysian Legal Profession Act 1976 (LPA) expressly prohibits contingency fee arrangements. However, 'under section 116 of the LPA, advocates and solicitors may enter into an agreement for costing contentious business and the list of considerations in determining the amount of legal fee is provided under rule 11 of the Legal Profession (Practice and Etiquette) Rules 1978, which includes factors such as the time, labour and skill required, the novelty and difficulty of the question involved and the amount in controversy'.<sup>50</sup>

### D. Insurance for legal expenses

No information was available.<sup>51</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 See generally Zaleha Kamaruddin (2012), 'The Islamic Legal System in Malaysia and the Quest for Transformation in the 21st Century', *Aust J Basic and App Sci*, Vol. 6 No. 11, 74.
- 3 Straits Settlements Arbitration Ordinance XIII of 1809.
- 4 Malaysian Arbitration Act 1952.
- 5 Dato Syed Ahmad Idid and Umar Oseni (2014), 'The Arbitration (Amendment) Act 2011: Limiting Court Intervention in Arbitral Proceedings in Malaysia', *Malayan Law Journal*, Vol. 2, i, vii–viii.
- 6 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24.I.L.M. 1302.
- 7 *Ibid* and Oseni, 'The Arbitration (Amendment) Act 2011', i, viii.
- 8 *Ibid.*, i, xvi.
- 9 *Ibid.*, i, xvi–xvii.
- 10 *Ibid.*, i, xvii.
- 11 *Ibid.*, i, xix.
- 12 The In-House Lawyer, 'Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?' <[http://www.inhouselawyer.co.uk/wgd\\_question/is-the-law-governing-international-arbitration-in-your-country-based-on-the-uncitral-model-law-are-there-significant-differences-between-the-two/](http://www.inhouselawyer.co.uk/wgd_question/is-the-law-governing-international-arbitration-in-your-country-based-on-the-uncitral-model-law-are-there-significant-differences-between-the-two/)> accessed 15 August 2019.
- 13 Malaysian Arbitration Act 2005, s 12. See also, for instance, Malaysian Arbitration Act 2005, s 30, which provides that for domestic arbitrations seated in Malaysia, the applicable substantive law shall be Malaysian law.
- 14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 15 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 16 *Ibid.*
- 17 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 15 August 2019.

- 18 UNCTAD Investment Policy Hub, 'Malaysia' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 19 Asian Regional Integration Center, 'FTAs: Malaysia' <[aric.adb.org](http://aric.adb.org)> accessed 30 September 2019.
- 20 GAR, 'Malaysia' <<https://globalarbitrationreview.com/chapter/1170059/malaysia>> accessed 15 August 2019.
- 21 Ibid.
- 22 Ibid.
- 23 *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd* [2016] MLJU 354, [44].
- 24 *Asiagroup Sdn Bhd v PFCE Timur Sdn Bhd* [2017] MLJU 515.
- 25 *Thien Seng Chan Sdn Bhd v Teguh Wiramas Sdn Bhd & Anor* [2017] MLJU 1117.
- 26 *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900.
- 27 *Sebiro Holdings Sdn Bhd v Bhag Singh* [2015] 4 CLJ 409.
- 28 KLRCA Annual Report 2017.
- 29 Malaysian Legal Profession Act 1976, ss 35, 37.
- 30 Malaysian Bar (2019), 'Proposed New Act to Govern the Legal Profession Submitted to the Attorney General' (Circular No 005/2019 dated 10 January 2019) <[http://www.malaysianbar.org.my/notices\\_for\\_members/proposed\\_new\\_act\\_to\\_govern\\_the\\_legal\\_profession\\_submitted\\_to\\_the\\_attorney\\_general.html](http://www.malaysianbar.org.my/notices_for_members/proposed_new_act_to_govern_the_legal_profession_submitted_to_the_attorney_general.html)> accessed 15 August 2019.
- 31 The Malaysian Lawyer (2019), 'Proposed Requirements for Fly-In-Fly-Out Foreign Lawyers in Malaysia' <<https://themalaysianlawyer.com/2019/03/20/proposed-fly-in-fly-out-for-foreign-lawyers-in-malaysia/>> accessed 15 August 2019.
- 32 Malaysian Arbitration Act 2005, s 3A.
- 33 *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal* [2017] 2 MLJ 141.
- 34 GAR, 'Malaysia'.
- 35 KLRCA Annual Report, 2015–2017.
- 36 International Bar Association, 'Arbitration Guide, Malaysia 2018' <[https://www.ibanet.org/Search/Search.aspx?collection=iba-meta&query=arbitration%20country%20guides&start\\_rank=51](https://www.ibanet.org/Search/Search.aspx?collection=iba-meta&query=arbitration%20country%20guides&start_rank=51)> accessed 15 August 2019.
- 37 Ibid.
- 38 Ibid.
- 39 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/malaysia#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/malaysia#DB_ec)> accessed on 15 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 40 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 41 Ibid.
- 42 The Malaysian Bar, 'Statistics – No of lawyers and law firms' <[http://www.malaysianbar.org.my/statistics\\_no\\_of\\_lawyers\\_and\\_law\\_firms.html](http://www.malaysianbar.org.my/statistics_no_of_lawyers_and_law_firms.html)> accessed 15 August 2019.
- 43 The Malaysian Bar, 'Seeing A Lawyer' <[http://www.malaysianbar.org.my/seeing\\_a\\_lawyer.html](http://www.malaysianbar.org.my/seeing_a_lawyer.html)> accessed 14 September 2019. Note: it should be considered that this information is from a 2005 article. There is no more recent information on the types of cases handled by the Bar Council.
- 44 Bar Council Legal Aid Centre, 'YBGK Program' <<https://www.kllac.com/ybgk-program/>> accessed 14 September 2019.
- 45 Legal Aid Act 1971, Act 26/2013 at Third Schedule.
- 46 Legal Aid Act 1971, Act 26/2013 at s 12(3).
- 47 Legal Aid Act 1971, Act 26/2013 at s 29B.(1).

- 48 See for instance, *Mastika Jaya Timber Sdn Bhd v Shankar A/L Ram Pohumall* [2010] MYSSHC 46.
- 49 Section 112 of the Legal Profession Act 1976. See also *Mastika Jaya Timber v Shankara* (2010). Suit no. 22-229-2009-1 at 7-8.
- 50 ICLG, 'Malaysia, Litigation & Dispute Resolution 2019' <<https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/malaysia>> accessed 15 August 2019.
- 51 Thomson Reuters Practical Law, 'Dispute Resolution: Malaysia', Christopher Leong, Chooi and Company <[https://uk.practicallaw.thomsonreuters.com/3-385-6343?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/3-385-6343?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 15 August 2019.

## MALTA<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Malta is a former British colony that gained its independence on 21 September 1964.<sup>2</sup> The Maltese legal system is a unique combination of civil and common law. Malta is traditionally a civil law country but, as a result of its English heritage, also has the common law with regard to sources of English law.<sup>3</sup> Maltese arbitration legislations have been influenced by both civil law and common law.<sup>4</sup>

#### B. *Description of prior legislation and reasons for its replacement*

Provisions on arbitration can be found in the earliest versions of the Civil Code and in the Code of Organisation and Civil Procedure ('Code of Procedure') as early as the Code de Rohan in the late 1700s.<sup>5</sup> In 1995, the Code of Procedure was modified to allow precautionary warrants to foster arbitration.<sup>6</sup>

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

The Arbitration Act was signed in 1996 and entered into force on 23 February 1998. It is found in Chapter 387 of the Laws of Malta.

#### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act contains different provisions for domestic arbitration (Part IV of the Act) and for international arbitration (Part V of the Act). Part V of the Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.<sup>7</sup>

The provisions of the Maltese Arbitration Act governing domestic arbitration are not based on the Model Law. They provide for a legal framework for domestic arbitration proceedings, including arbitrability of claims,<sup>8</sup> filing a notice of arbitration,<sup>9</sup> appointment<sup>10</sup> and challenge<sup>11</sup> of arbitrators, jurisdiction of the arbitral tribunal,<sup>12</sup> written submissions of the parties,<sup>13</sup> taking of evidence,<sup>14</sup> conduct of hearing,<sup>15</sup> interim measures,<sup>16</sup> and form of the award.<sup>17</sup> One of the particularities of the domestic arbitration proceedings is the requirement for all arbitrations to be registered with the Malta Arbitration Centre (MAC), the arbitration centre based in Valletta, by filing a notice of arbitration before the award is granted.<sup>18</sup> In addition, the Maltese Arbitration Act stipulates the right to appeal the award on the points of law (for voluntary arbitration),<sup>19</sup> or both on the points of facts and law (for compulsory arbitration).<sup>20</sup>

The Maltese Arbitration Act (Parts II and III) governs the establishment of the MAC, its internal governance and structure, and the functions and finances of the MAC.<sup>21</sup>

#### C. *Details and/or relevant amendments and modifications*

The 1998 Arbitration Act has been amended several times, with the most significant changes made by the 2004 amendment which introduced the concept of mandatory arbitration for a number of disputes including the disputes relating to the law of condominiums and motor traffic disputes.<sup>22</sup>

The latest amendments to the Maltese Arbitration Act were made in 2015 to reflect changes to the Consumer Affairs Act.<sup>23</sup>

*D. Relationship to the UNCITRAL Model Law*

Part V of the Arbitration Act which deals with international arbitration incorporates the Model Law.<sup>24</sup> Article 55 of the Arbitration Act stipulates that 'the Model Law shall form part of the Laws of Malta and shall be enforceable as such', and provisions of the Model Law are wholly adopted by Malta.<sup>25</sup> However, the amendments introduced in the Model Law in 2006 have not been reflected in the Arbitration Act.<sup>26</sup>

*E. Departure(s) (if any) from the UNCITRAL Model Law*

There are two main differences between the Arbitration Act and the Model Law.<sup>27</sup> First, parties can exclude the application of the Model Law, in which case, unless otherwise agreed by the parties, the provisions governing domestic arbitration will apply.<sup>28</sup> Second, the Arbitration Act contains different provisions on recognition and enforcement of arbitral awards from the Model Law.<sup>29</sup> The departures relate to the procedure, not the grounds for refusal of recognition and enforcement.<sup>30</sup>

*F. Powers and duties of arbitrators*

The Maltese Arbitration Act 1998 provides powers and duties of arbitrators as stipulated in the Model Law. The Arbitration Act allows and obliges arbitrators:

- a. To rule on its own jurisdiction of the arbitral tribunal;<sup>31</sup>
- b. To disclose any situations that could give rise to justifiable doubts as to an arbitrator's independence or impartiality;<sup>32</sup>
- c. To determine the procedure in such a manner as the arbitral tribunal considers appropriate;<sup>33</sup>
- d. To grant interim measures;<sup>34</sup> and
- e. To make corrections or give interpretations of the award.<sup>35</sup>

*G. Arbitrator immunity*

Article 20(5) of the Arbitration Act stipulates that arbitrators are not liable for negligence in anything done or omitted by them in their capacity of arbitrator; however, they are liable for actions and omissions attributable to malice or fraud on their part.<sup>36</sup>

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Malta became a party to the 1958 New York Convention on 22 June 2000.<sup>37</sup>

*B. Reservations to the New York Convention*

Malta made two reservations to the New York Convention: first, the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, the Convention only applies with respect to arbitration agreements concluded and awards rendered after the date of Malta's accession to the Convention.<sup>38</sup>

*C. Method of domestic implementation of the New York Convention*

The text of the New York Convention is integrated into the Maltese Arbitration Act and is reproduced in an annex to the Act.<sup>39</sup>

#### D. *Other international/regional treaties*

Malta acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention') on 24 April 2002.<sup>40</sup>

Malta is a signatory to the Convention on Conciliation and Arbitration within the OSCE adopted on 15 December 1992, which provides for settlement of disputes between the state parties through conciliation and arbitration.<sup>41</sup>

2. Malta has signed 23 bilateral investment agreements with different states, of which 20 are in force (Serbia, Montenegro, China, Turkey, Cyprus, Austria, Croatia, Slovenia, Tunisia, Slovakia, Sweden, Egypt, Kuwait, Belgium-Luxembourg Economic Union, United Kingdom, Netherlands, Bulgaria, France, Germany, and Italy).<sup>42</sup> Malta has also entered into 25 free trade agreements through the European Union mechanisms.

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

While valid arbitration clauses are usually enforced by state courts,<sup>43</sup> the attitude of the national courts is not always arbitration friendly. In particular, the provisions on mandatory arbitration in the Arbitration Act have encouraged some judges to view arbitration as an element of the Maltese legal system.<sup>44</sup> For example, Maltese courts have interpreted article 15(3) of the Arbitration Act (which provides for stay of court proceedings in the presence of an arbitration agreement) in a way that endorses the overriding jurisdiction of the courts to continue court proceedings even when courts found an existing arbitration agreement.<sup>45</sup>

#### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Maltese Arbitration Act clarifies that an award is in conflict with the public policy of Malta if (a) the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.<sup>46</sup> According to one of the sources, there is no specific definition of 'public policy', but in cases of recognition and enforcement of foreign judgments it is usually applied in the following circumstances:

- a. cases where interest rates exceed the legally permitted rates;
- b. cases concerning activities that are licensable by public authorities in Malta;
- c. matters that constitute a criminal offence in Malta or that constitute a breach of fundamental human rights; and
- d. cases where the foreign procedure is fundamentally contrary to principles of natural justice as applied in Malta.<sup>47</sup>

#### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The New York Convention Guide cites one case from 2017 on the interpretation of the New York Convention, which is only available in Maltese.<sup>48</sup> No other case law has been found.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

There is only one arbitral institution currently in Malta, the MAC, which was established by the Arbitration Act.<sup>49</sup>

### B. Measures to strengthen institutional arbitration capabilities

The Maltese Government has been implementing measures to increase the attractiveness and quality of arbitration in Malta,<sup>50</sup> including the adoption of the Maltese Arbitration Act.<sup>51</sup> One of the steps towards the development of arbitration was the establishment of the MAC, which is a successful arbitral institution whose functions include not only administration of cases, but also the promotion of Malta as a centre for international commercial arbitration.<sup>52</sup>

### C. Submission of disputes to arbitration vs. litigation

Official caseload statistics are not available on the website of the MAC, but a study conducted for the European Parliament in 2015 provides the following information: '[T]he Malta Arbitration Centre reports an average caseload of approximately four hundred cases per year. However, approximately 95% of those cases involve a claim for €25,000 Euros or less and arise out of Malta's mandatory arbitration provisions.'<sup>53</sup>

According to the ICC statistics, there were four Maltese parties as claimants and respondents in 2018.<sup>54</sup>

### D. Participation by foreign counsel in international arbitrations

The European Union statistics demonstrate that in 2016 the duration of court proceedings in litigious civil and commercial cases in Malta took around 400 days in the courts of first instance and around 800 days in the courts of second instance, a figure which is significantly higher than in many European countries.<sup>55</sup> Yet, the duration of court proceedings in Malta has halved since 2010.<sup>56</sup>

Under article 18(1) of the Arbitration Act the parties may be represented or assisted by a person of their choice. Paragraph 2 makes it clear that foreign lawyers do not require special permission to represent clients in arbitral proceedings in Malta, whether in respect of domestic or international arbitration.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

According to the study conducted for the European Parliament in 2015, between 2010 and 2015 the most common sectors using the MAC were energy (91 cases), corporate (60 cases), construction (42 cases), civil (35 cases), finance (1 case), and maritime (1 case).<sup>57</sup>

#### 2. Time taken for enforcement/annulment proceedings

Recourse against awards delivered in Malta is made through the filing of an appeal application in the Courts of Malta which must be filed within 15 days from date of receipt of the award.<sup>58</sup> Appeals on points of law are only applicable in voluntary arbitrations and appeals on points of law and on points of fact are applicable in mandatory arbitrations.



An award on the lapse of 30 days of receipt of the award (provided no recourse has been taken against the award) constitutes an executive title and can be enforced in the Courts of Malta as if it were a judgment.<sup>59</sup>

### 3. Percentage of awards annulled/not enforced

No information available. However, appeals against awards were only made in less than 5 per cent of the cases filed with the MAC.<sup>60</sup>

#### F. *Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 505 days to resolve a commercial dispute in a first-instance court in Malta – 15 days for filing and service of court processes, 365 days for trial and judgment and 125 days for enforcement of judgment.<sup>61</sup> Malta ranks above the Middle East & North Africa region, in which it takes an average of 622 days to resolve commercial disputes in first-instance courts.<sup>62</sup> In terms of overall ease of enforcing contracts, Malta scored 67.57 of 100 and ranked 39 of 190.<sup>63</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>64</sup>

#### G. *Statistics on judges and lawyers per capita*

According to the EU statistics, the ratio of judges to inhabitants in Malta is around 1:10,000,<sup>65</sup> and the ratio of lawyers is around 30:10,000.<sup>66</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information in Malta to indicate that legal aid is provided for businesses, nor is there any mention of assistance in commercial dispute resolution.<sup>67</sup> The task force on the prospective justice reform in Malta set up in 2013 noted that the legal aid regime should cover mediation and arbitration proceedings.<sup>68</sup> There is no indication that anything has been done about this recommendation.

Legal Aid Malta was formed by the Legal Aid Agency (Establishment) Order in 2014 and the Legal Aid Agency (Procedures) Order in 2016.<sup>69</sup> The mission of Legal Aid Malta is to ensure people with low income are professionally and legally represented in a broad spectrum of litigations, defence, and advocacy. Legal Aid Malta has not included businesses or arbitration in its work.

The Legal Aid Agency provides administrative support in respect of procedures or measures on legal aid and also has the added functions and duties to undertake studies for the purposes of improving legal aid.<sup>70</sup> Any person wishing to apply for a legal aid lawyer has to apply through the Legal Aid Agency. The Agency would then carry out the merit and means test to see whether the person is eligible for the benefit of legal aid and appoint a legal aid lawyer.

### B. *Third-party funding*

No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Malta or the availability of third-party funding in that jurisdiction. However, given that Malta's legal system is based on English common law, and the crimes and torts

of maintenance and champerty applied at the time of its independence in 1964, it is reasonable to assume that the rule of maintenance and champerty is likely to be still applicable in Malta.<sup>71</sup>

#### C. Contingency fees

Contingency fee arrangements are not allowed in Malta.<sup>72</sup>

#### D. Insurance for legal expenses

There are few sources available discussing the legal expense insurance. According to these sources, insurance companies can cover certain legal costs depending on the terms and conditions of the insurance policy,<sup>73</sup> but it is not clear whether it is a common practice.<sup>74</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 The Commonwealth, 'Malta: Constitution and politics' <<http://thecommonwealth.org/our-member-countries/malta/constitution-politics>> accessed 5 September 2019.
- 3 Patrick J Galea (2014), 'A Brief Overview Of Malta, A Roman-Civil Law Country, With Common Law Adoption As Rules Of Civil Evidence', *Digital Evidence and Electronic Signature Law Review* 5 <<https://sas-space.sas.ac.uk/5596/1/1869-2602-1-SM.pdf>> accessed 5 September 2019.
- 4 Andrea Carlevaris (2002), 'Arbitration in Malta – Current Developments', *J Int Arb*, Vol. 19 No. 3, 275.
- 5 *Ibid.*
- 6 *Ibid.*
- 7 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 8 Arbitration Act 1996, arts 15, 15A, 15B.
- 9 Arbitration Act 1996, art. 17.
- 10 *Ibid.*, art. 2.
- 11 *Ibid.*, arts 24, 25, 26.
- 12 *Ibid.*, art. 32.
- 13 *Ibid.*, arts 29, 30, 33.
- 14 *Ibid.*, art. 36.
- 15 *Ibid.*, art. 37.
- 16 *Ibid.*, art. 38.
- 17 *Ibid.*, art. 44.
- 18 *Ibid.*, art. 17.
- 19 *Ibid.*, arts 70A, 70B.
- 20 Arbitration Act 1996, art. 70C. See also Delos (2018), 'Delos Guide to Arbitration Places, Malta', Marisa Vella, Kristina Rapa Manche, Martina Camilleri, 2 <<https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-1st-edn-Malta.pdf?pdf=GAP1-Malta>> accessed 22 May 2019.
- 21 Arbitration Act 1996, pts II and III.
- 22 European Parliament Think Tank (2015), 'Legal instruments and practice of arbitration in the EU, Study', Tony Cole, Ilias Bantekas et al., 138 <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2015\)509988](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)509988)> accessed 27 February 2019. See also Arbitration Act 1996, art. 15(11) and the fourth schedule.

- 23 Delos (2018), 'Delos Guide to Arbitration Places, Malta'.
- 24 Carlevaris (2002), 'Arbitration in Malta – Current Developments', 275, 281.
- 25 Arbitration Act 1996, art. 55.
- 26 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](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 18 March 2019.
- 27 Delos (2018), 'Delos Guide to Arbitration Places, Malta'.
- 28 Arbitration Act 1996, art. 60.
- 29 Arbitration Act 1996, art. 59.
- 30 Delos (2018), 'Delos Guide to Arbitration Places, Malta'.
- 31 Arbitration Act, art. 32.
- 32 Arbitration Act 1996, art. 12.
- 33 Ibid., art. 38(6).
- 34 Ibid., art. 38(6).
- 35 Ibid., arts 48, 49.
- 36 Ibid., art. 20(5).
- 37 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 38 New York Arbitration Convention, 'Contracting States'; United Nations Treaty Collection, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958' <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=xxii-1&chapter=22&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=xxii-1&chapter=22&lang=en#EndDec)> accessed 27 February 2019; Andrea Carlevaris, 'Arbitration in Malta – Current Developments' (2002) 19(3) J Int'l Arb 275.
- 39 Carlevaris (2002), 'Arbitration in Malta – Current Developments'; Arbitration Act 1996, art. 74(1), Second sch, pt III.
- 40 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>> accessed 23 April 2019.
- 41 Convention on Conciliation and Arbitration within the OSCE (adopted 15 December 1992). OSCE (2018), 'List showing signatures and ratifications or accessions with respect to the Convention on Conciliation and Arbitration within the OSCE' <<https://www.osce.org/cca/40119?download=true>> accessed 28 February 2019.
- 42 UNCTAD, 'Investment Policy Hub' 'Malta' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 28 August 2019.
- 43 World Bank Doing Business, 'Malta', 46 <<http://www.doingbusiness.org/en/data/exploreconomies/malta>> accessed 23 May 2019.
- 44 European Parliament Think Tank (2015), 'Legal instruments and practice of arbitration in the EU, Study', Tony Cole, Ilias Bantekas et al. <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2015\)509988](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)509988)> accessed 27 February 2019.
- 45 European Parliament Think Tank (2015), 'Legal instruments...', 139., citing e.g. Court of Appeal, 25 February 2003 in *Calibre Industries Ltd. v Muscat Motors*; Court of Appeal, 10 October 2003 in *Gatt Ignatius v Facchetti Franco*; Court of Appeal, 9 November 2012, in *Malta Shipyards Limited v VPJ Limited*.
- 46 Arbitration Act, art. 58.
- 47 Thomson Reuters Practical Law, 'Enforcement of judgments and arbitral awards in Malta: overview', Thomas Bugeja <[https://uk.practicallaw.thomsonreuters.com/1-619-2993?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/1-619-2993?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 19 March 2019.
- 48 *Samsung C&T Deutschland and GMBH v Geden Holdings Limited*, Case No. 810/2016 (Malta, First Hall Civil Court, Judgment of 15 June 2017) <<http://>

- newyorkconvention1958.org/index.php?lvl=notice\_display&id=4738&opac\_view=2>  
accessed 28 February 2019.
- 49 European Parliament Think Tank (2015), 'Legal instruments...', 89.
- 50 Ibid., 136.
- 51 Carlevaris (2002), 'Arbitration in Malta – Current Developments', 275, 277.
- 52 Malta Arbitration Centre (2018), 'About Us' <<https://mac.org.mt/en/about-mac/Pages/About-MAC.aspx>> accessed 27 February 2019.
- 53 European Parliament Think Tank (2015), 'Legal instruments...', 136.
- 54 ICC, '2018 Statistical Report' [2019] ICC 898E, 21.
- 55 European Commission (2018), 'The 2018 EU Justice Scoreboard', 12 <[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en)> accessed 28 February 2019.
- 56 Ibid.
- 57 European Parliament Think Tank (2015), 'Legal instruments...', Annex 1, 98.
- 58 MAC (email, 6 Sept 2019).
- 59 Ibid.
- 60 Ibid.
- 61 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreconomies/malta>> accessed 27 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 62 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 63 Ibid.
- 64 Ibid.
- 65 European Commission (2018), 'The 2018 EU Justice Scoreboard', 31.
- 66 Ibid., 33.
- 67 Carla Camilleri (2017), 'Access to Legal Assistance in Malta – Mapping the availability of legal assistance for the protection of fundamental rights in Malta', 29–32 <[http://aditus.org.mt/Publications/atlas/atlasreport\\_2017.pdf](http://aditus.org.mt/Publications/atlas/atlasreport_2017.pdf)> accessed 27 February 2019.
- 68 Ibid., 33, 35.
- 69 Subsidiary Legislation 595.11 Legal Aid Agency (Establishment) Order 2014 and S.L. 595.17 Legal Aid Agency (Procedures) Order 2016, Ministry for Justice, Culture and Local Government. <http://justiceservices.gov.mt/LegalServicesSearch> accessed 14 September 2019.
- 70 Camilleri (2017), 'Access to Legal Assistance in Malta ...', 28.
- 71 See also Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017), *Third-Party Funding in International Arbitration*, 2nd edn, Kluwer Law International, 229.
- 72 Delos (2018), 'Delos Guide to Arbitration Places, Malta', 2; Maltese Code of Organization and Civil Procedure, art 83 ('Advocates shall not, either directly or indirectly, enter into or make any agreement or stipulation *quotae litis*.').
- 73 Getting the Deal Through (2018), 'Dispute Resolution, Malta', Carla Camilleri <<https://gettingthedealthrough.com/area/9/jurisdiction/94/dispute-resolution-malta/>> accessed 28 February 2019.
- 74 The sources are contradictory. A report on legal protection insurance worldwide published by RIAD, an association of legal protection insurers and service providers, does not include Malta and four other countries, because '[e]ither these countries do not have legal protection insurance or the premium income is neglectable'. RIAD, 'Legal Protection Data' (2018) <<http://riad-online.eu/industry-data/statistics/market-shares-in-europe/>> accessed 28 February 2019. Compare Rafalo, 'Litigation and Enforcement in Malta: Overview' (2012), Practical Law para 6 ('Insurance is a legitimate way of funding litigation. Maritime litigation in Malta is largely funded by protection and indemnity (P&I) clubs.').

# MAURITIUS<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Mauritius is a former French colony and a former British colony, which is why it has legal concepts from both civil and common law systems. It was a French colony until 1814, when it came under British rule. Mauritius maintained its French laws and customs such as the Civil Code, the Criminal Code, and the Commercial Code. However, under the British, English judges presiding in Mauritian courts adopted English procedure. As such, Mauritius' laws are mostly French Codes supplemented with British provisions on procedure.<sup>2</sup>

Mauritius' domestic legislation on arbitration is the Mauritian International Arbitration Act 2008 (IAA). The IAA is based on the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) on International Commercial Arbitration as amended in 2006.<sup>3</sup>

### B. *Description of prior legislation and reasons for its replacement*

Until 2009 the Mauritius Civil Procedure Code 1808 governed domestic and international arbitrations. Even though the Code includes many modern arbitration standards and elements, it did not deliver a suitable framework for international commercial arbitrations. Therefore, the Mauritian International Arbitration Act 2008 was enacted.<sup>4</sup> The Civil Procedure Code is still applicable to domestic arbitrations.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Mauritius enacted the International Arbitration Act in 2008. The IAA was promulgated by Parliament on 25 November 2008 and came into force on 1 January 2009. The IAA was amended with effect from 1 June 2013 by the International Arbitration (Miscellaneous Provisions) Act 2013 (IA(MP)A).

Mauritius also has the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (as amended in 2013) and the Supreme Court (International Arbitration Claims) Rules 2013, which provide a framework for the IAA since the IAA provides that all court applications under the IAA are to be made to a panel of three judges of the Supreme Court.<sup>5</sup>

### B. *Scope of application to domestic and international arbitrations*

In Mauritius, the provisions for domestic arbitration are contained in the Civil Procedure Code 1808 (Code de Procédure Civile) (CPC).

On the other hand, international arbitration is governed by the IAA 2008, which incorporated the UNCITRAL Model Law 2006.

### C. *Details and/or relevant amendments and modifications*

The Mauritius International Arbitration Centre (MIAC) is an independent arbitration centre in Mauritius. Previously, the MIAC had a joint venture agreement with the London Court of International Arbitration (LCIA) that established the LCIA–MIAC Arbitration Centre in 2011. This joint venture was terminated on 27 July 2018.<sup>6</sup> MIAC has its own arbitration rules (MIAC Rules) which are based on the UNCITRAL Rules and the IAA.<sup>7</sup>

Additionally, in 2013, Mauritius introduced the International Arbitration (Miscellaneous Provisions) Act 2013 (which amended the Act and the New York Convention Act 2001), and the Supreme Court (International Arbitration Claims) Rules 2013 (the Court Rules).<sup>8</sup>

Another unique feature of the Mauritian arbitration system is the existence of a Permanent Court of Arbitration (PCA) office, which was opened in September 2010.<sup>9</sup> The PCA decides on many important issues such as: the appointment of arbitrators and constitution of arbitral tribunals,<sup>10</sup> the challenge or termination of the mandate of arbitrators,<sup>11</sup> the adjustment of arbitrators' fees and expenses<sup>12</sup> and the extension of time limits agreed by parties.<sup>13</sup> With the exception of a challenge under section 39 of the International Arbitration Act, decisions of the PCA on these issues are final with no possibility of appeal to courts.<sup>14</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The international arbitration legislation is based on UNCITRAL Model Law as amended in 2006 (the 'Amended Model Law').<sup>15</sup> It departs from the Model Law in many instances, however. The International Arbitration Act 2008 also includes provisions from the English, Singaporean, and New Zealand international arbitration acts.<sup>16</sup> The domestic arbitration is still governed by the Civil Procedure Code.<sup>17</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

Unlike the UNCITRAL Model Law, the IIA not only refers to commercial arbitration disputes, but also covers investment arbitrations where the seat of arbitration is Mauritius.<sup>18</sup>

Furthermore, the IIA applies to both institutional and ad hoc arbitrations.<sup>19</sup>

Section 24 of the IIA enacts articles 18, 19, and 22 of the UNCITRAL Model Law. The tribunal has a duty to provide the parties with a 'reasonable' rather than 'full' opportunity of presenting their case (this was changed in accordance with section 33(1)(a) of the English Arbitration Act 1996).<sup>20</sup>

Section 24(1)(b) of the Act specifically sets out the duty of the tribunal to apply procedures suitable to every particular case, avoiding unnecessary delay and expenses, which is also in accordance with section 33(1)(b) of the English Arbitration Act 1996.<sup>21</sup>

#### *F. Powers and duties of arbitrators*

Pursuant to section 24 of the IAA, the general duties of arbitrators in international arbitrations are to:

- a. treat the parties with equality and give them a reasonable opportunity of presenting their case; and
- b. adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay and expenses, so as to provide a fair and efficient means for the resolution of the dispute between the parties.

Where parties have already agreed on the conduct of an arbitration, arbitrators have broad discretionary powers to conduct an international arbitration in the way they consider appropriate and may determine all procedural and evidential matters.

Under section 13 of the IAA, when a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstance

likely to give rise to justifiable doubts about his impartiality or independence. Such a duty continues throughout the arbitral proceedings.

#### G. *Arbitrator immunity*

Pursuant to section 19 of the IAA, an arbitrator will not be liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

Rules of arbitral institutions such as the MCCI Chamber of Commerce and Industry Arbitration and Mediation Centre (MARC) contain a similar immunity except in cases of bad faith.

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*

Mauritius became a party to the 1958 New York Convention on 19 June 1996.<sup>22</sup>

#### B. *Reservations to the New York Convention*

Mauritius has not made any reservations to the New York Convention.<sup>23</sup>

Initially, there was a reciprocity reservation with respect to article 1(3) of the New York Convention where Mauritius will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of another contracting state. However, this reservation was removed.

#### C. *Method of domestic implementation of the New York Convention*

The New York Convention was incorporated in the Mauritian law in a statute of 2001<sup>24</sup> called the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (CREFAAA 2001).

#### D. *Other international/regional treaties*

Mauritius is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 ('ICSID Convention').<sup>25</sup> The ICSID Convention was ratified in June 1969 and entered into force in July 1969.<sup>26</sup>

Mauritius is a contracting state to the 1899 Convention for the Pacific Settlement of International Disputes which entered into force on 3 August 1970. It is, however, not a contracting state to the 1907 Convention for the Pacific Settlement of International Disputes.<sup>27</sup>

Mauritius has entered into 47 bilateral investment treaties with different countries, of which 28 are currently in force (United Arab Emirates, Zambia, Egypt, Kuwait, Turkey, Congo, United Republic of Tanzania, Finland, Republic of Korea, Belgium-Luxembourg Economic Union, Barbados, Madagascar, Sweden, Senegal, Burundi, Singapore, Romania, Czech Republic, Switzerland, South Africa, Portugal, Pakistan, Indonesia, Mozambique, China, United Kingdom, France, and Germany). Mauritius has also entered into four Free Trade Agreements (Common Market for Southern and Eastern Africa (COMESA), Southern African Development Community (SADC), Mauritius–Turkey Free Trade Agreement, and the Mauritius–Pakistan Preferential Trade Agreement).<sup>28</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

The International Arbitration Act 2008 sets out a pro-arbitration regime which allows Mauritius and foreign courts to intervene in relation to international arbitrations only to the extent so provided by the IAA (section 2A).<sup>29</sup> Section 5 of the IAA imposes a non-interventionist approach to arbitration proceedings, where judges will assess the validity and applicability of an arbitration agreement strictly on a prima facie basis. Section 5 of the IAA gives effect inter alia to Mauritius' obligations under article II(3) of the New York Convention. The test under the IAA to find an arbitration agreement invalid is whether 'there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed'.

Courts in Mauritius are required to have regard to the specific features of international arbitration (section 23(1)(b)) and to not disrupt the arbitral proceedings. Until now, none of the attempts made before the Mauritian courts or the Mauritius Designated Court to either seek a disguised review of the merits of an award, to oust the jurisdiction of the tribunal or to challenge the enforcement of foreign or non-domestic awards has been successful.<sup>30</sup>

Moreover, the IAA grants the right to appeal to the Judicial Committee of the Privy Council (JCPC) against decisions of the Supreme Court under the IAA.<sup>31</sup>

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

In Mauritius the recognition and enforcement of award may be refused on the grounds of public policy, i.e. where the award is unjust, noticeably incorrect or mistaken, allows appeal only in serious cases, does not comply with the rule of law or norms of a fair hearing, or does not comply with applicable standards of natural justice.<sup>32</sup>

In *State Trading Corporation v Betamax Ltd*,<sup>33</sup> the Supreme Court of Mauritius found that it has the power to exercise ultimate control over the arbitral process where it was considered to be against the public policy of Mauritius. The court found that the enforcement of an illegal contract of breach of Mauritian public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius and would therefore be contrary to public policy. This case is presently on appeal before the Judicial Committee of the Privy Council.

In *Cruz City 1 Mauritius Holdings v Unitech Limited*,<sup>34</sup> the court had accepted that the notion of public policy in Mauritius when it comes to the recognition and enforcement of international arbitral awards meant international public policy, and not the domestic public policy of Mauritius.

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

In *Mall of Mont Choisy Ltd v Pick 'N' Pay Retailers Proprietary Limited & Ors*,<sup>35</sup> the court considered the meaning of 'null and void, inoperative or incapable of being performed' as found in article II(3) of the New York Convention. The court, in assessing the reach of this test, stated that a clause is 'inoperative' when it is so rendered either by inherent or acquired procedural defect such that the clause itself cannot operate or take effect. It does not have the same



meaning as where a clause is 'inapplicable'; that is, 'not relevant or appropriate' to the action because the dispute does not come within the ambit of the clause. Similarly, a clause is 'incapable of being performed' when there is a failing or deficiency in itself that prevents it from being executed. There tends to be some overlapping between the ground that the clause is 'incapable of being performed' and the ground that it is 'inoperative', but the court took the view that they do not mean that the clause is 'inapplicable' to the action. The court considered that it would be inappropriate to stretch the meaning of these widely adopted terms in this sense. The court therefore held that the term 'null and void, inoperative or incapable of being performed' in section 5(2) did not cover an arbitration agreement which was 'inapplicable' to the dispute, subject matter of the action.

## V. ARBITRATION LANDSCAPE

### A. *Institutional arbitration*

There is no information on whether institutional arbitration is common in Mauritius, but in the last few years, Mauritius has been considered the arbitration centre in Southern Africa.

In that regard, there are a number of arbitration institutions in Mauritius:

- a. The Mauritius International Arbitration Centre (MIAC) is an independent arbitration centre in Mauritius.
- b. The Arbitration and Mediation Centre (MARC), which is the arbitration institution of the Mauritius Chamber of Commerce and Industry (MCCI).
- c. the Mauritius branch of the Chartered Institute of Arbitrators (CIArb)
- d. Permanent Court of Arbitration office (PCA).

### B. *Measures to strengthen institutional arbitration capabilities*

The government has undertaken many measures to create and develop Mauritius as an arbitration hub and preferred place for dispute settlement. Until 27 July 2018 the MIAC, which is an independent arbitration centre in Mauritius, had a joint venture with the London Court of International Arbitration (LCIA–MIAC) which was established in 2011. In July 2018, MIAC started to operate without the LCIA and came up with its own arbitration rules, which are based on the UNCITRAL Rules and the IAA. Notably, Mauritius hosted the ICCA Congress in May 2016 with focus on 'International arbitration and the rule of law: contribution and conformity'.<sup>36</sup>

### C. *Submission of disputes to arbitration vs. litigation*

No information was available.

### D. *Participation by foreign counsel in international arbitrations*

Section 27 of the International Arbitration Act 2008 states: 'Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not be qualified to practice law in Mauritius or in any other jurisdiction.'

### E. *Relevant statistical data*

1. Sectors where arbitration is routinely used

Arbitrations are common in the construction sector because the standard forms of contract used contain arbitration clauses.<sup>37</sup> Shareholder disputes in global business companies are also common as several such companies have opted to have arbitration clauses in their constitutions.<sup>38</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 490 days to resolve a commercial dispute in a first-instance court in Mauritius – 15 days for filing and service of court processes, 325 days for trial and judgment and 150 days for enforcement of judgment.<sup>39</sup> Mauritius ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>40</sup> In terms of overall ease of enforcing contracts, Mauritius scored 70.37 of 100 and ranked 27 of 190.<sup>41</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

*G. Statistics on judges and lawyers per capita*

According to the 2018 Annual Report of the Judiciary, which list the number of members of the Judiciary and private legal practitioners (barristers and solicitors) 2018, there were 67 judges, and 992 private practitioners. The ratio is roughly 1 judge to 18,895 citizens and 1 private practitioner to 1,276 citizens.<sup>42</sup>

## **VI. FUNDING FOR LEGAL CLAIMS**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information in Mauritius to indicate that legal aid is provided for businesses; nor is there any mention of assistance in commercial dispute resolution. Legal aid in Mauritius is provided by the Legal Aid Act 1974.<sup>43</sup> Legal aid only applies to civil and criminal proceedings in Mauritius.<sup>44</sup> In the Interpretation and General Clauses Act 1975 it is stated that the word 'person' applies to a person or individual and shall apply to and include a group of persons whether corporate or unincorporated. A 2008 Green Paper report on Legal Aid in Mauritius outlines that section 4(b) of the Act mentions that 'a person must make a sworn statement' when applying for legal aid and thus the Green Paper states that the Act envisages an individual and not a body corporate.<sup>45</sup> There is no information to counteract this conclusion.

*B. Third-party funding*

Third-party funding is neither prohibited nor expressly allowed under Mauritius law and the practice is not common in court litigation or in international commercial arbitration seated in Mauritius.<sup>46</sup> There are no active third-party funders in the market and the legality of the practice and its scope has yet to be tested by the Mauritius courts. Since Mauritius' legal system is based on English common law, and the rule of maintenance and champerty applied at

the time of independence in 1968 in the United Kingdom,<sup>47</sup> it is reasonable to assume that the rule of maintenance and champerty is still applicable.

### C. Contingency fees

There is no restriction on the type of fee structure that can be agreed between clients and their legal representatives, although the code of ethics of barristers and solicitors prohibits success fee arrangements where the success fee payable to a barrister or a solicitor is more than 10 per cent of the amount recovered by the client.<sup>48</sup>

### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Juristconsult Chambers, 'Historical Background' <<https://www.juristconsult.com/legal-framework/historical-background/>> accessed 13 August 2019.
- 3 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.
- 4 Salim A H Moollan and Anne-Sophie Jullienne (2018), National Report for Mauritius, *ICCA International Handbook on Commercial Arbitration*, Bosman (ed.).
- 5 Juristconsult Chambers, International Legal Services (2016), 'Arbitration and Mauritius', Marc Hein <<https://www.juristconsult.com/wp-content/uploads/2016/07/Offshore-Investment-April-2016-MH.pdf>> accessed 9 April 2019.
- 6 LCIA (2018), 'LCIA-MIAC Joint Venture Agreement Terminated By Mutual Agreement' <<https://www.lcia.org/News/lcia-miac-joint-venture-agreement-terminated-by-mutual-agreement.aspx>> accessed 13 August 2019; MIAC, 'About Us' <<http://miac.mu/about-us/>> accessed 9 April 2019.
- 7 Appleby (2019), 'Summary of recent changes in arbitration in Mauritius' <<https://www.applebyglobal.com/insights/insights-2019/summary-of-recent-changes-in-arbitration-in-mauritius.aspx>> accessed 9 April 2019.
- 8 GAR (2016) 'International Arbitration Country Chapter on Mauritius', *The Middle Eastern and African Global Arbitration Review*.
- 9 Permanent Court of Arbitration, 'Mauritius Office' <<https://pca-cpa.org/en/about/structure/pca-mauritius-office/>> accessed 13 August 2019.
- 10 IAA, s 12.
- 11 IAA, ss 14, 15 and 16.
- 12 IAA, s 18(2).
- 13 IAA, s 30.
- 14 IAA, s 19(5).
- 15 Abdul Jinadu, 'Arbitrating in Mauritius' <<http://www.keatingchambers.com/wp-content/uploads/2017/12/AJ-Arbitrating-in-Mauritius.pdf>> accessed 30 August 2019.
- 16 Moollan and Jullienne (2018), National Report for Mauritius.
- 17 Ibid.
- 18 Ibid.
- 19 Ibid.
- 20 Global Arbitration Review (2016), 'Mauritius', Anne-Sophie Jullienne <<https://globalarbitrationreview.com/chapter/1036978/mauritius>> accessed 13 August 2019.
- 21 Ibid.

- 22 See 'New York Convention Guide' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 23 Ibid.
- 24 Dr Jamsheed Peeroo, 'Mauritius as an arbitration centre for the region: Speech of Dr Jamsheed Peeroo at the International Arbitration Conference organised on 25 July 2017 at the Labourdonnais Hotel, Port-Louis', (Lexpress, 28 July 2017) <<https://www.lexpress.mu/idee/312870/mauritius-arbitration-centre-region>> accessed 13 August 2019.
- 25 ICSID Laywers, 'Mauritius Arbitration' <<https://icsidlawyers.com/citypage.php?cityid=MauritiusArbitration>> accessed 13 August 2019.
- 26 Ibid.
- 27 Ibid.
- 28 Mauritius Chamber of Commerce and Industry, 'Trade' <[mcci.org](http://mcci.org)> accessed 31 August 2019.
- 29 Global Arbitration Review (2016), 'Mauritius'.
- 30 Ibid.
- 31 Ibid.
- 32 IAA, Part IV.
- 33 *State Trading Corporation v Betamax Ltd* 2019 SCJ 154.
- 34 *Cruz City 1 Mauritius Holdings v Unitech Limited and another* 2014 SCJ 100.
- 35 *Mall of Mont Choisy Ltd v Pick 'N' Pay Retailers Proprietary Limited & Ors* 2015 SCJ 10 and *UBS AG v Mauritius Commercial Bank Ltd* 2016 SCJ 43.
- 36 ICCA, 'ICCA 2016 Congress Mauritius: 8–11 May 2016' <[https://www.arbitration-icca.org/conferences-and-congresses/ICCA\\_2016\\_Congress\\_Mauritius.html](https://www.arbitration-icca.org/conferences-and-congresses/ICCA_2016_Congress_Mauritius.html)> accessed 13 August 2019.
- 37 Interview with BLC Robert & Associates (email, 1 Sept 2019).
- 38 BLC Robert & Associates (email, 1 Sept 2019).
- 39 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/mauritius#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/mauritius#DB_ec)> accessed 16 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 40 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 41 Ibid.
- 42 The 2018 Annual Report of the Judiciary, tables 11.1, 11.3.
- 43 The Legal Aid Act 1974 was amended by the Legal Aid (Amendment) Act 2012.
- 44 Legal Aid Act 1974, s 4.
- 45 Attorney General's Office Mauritius. Equal Access to Justice Reform on Legal Aid in Mauritius: Green Paper prepared by Professor V Prukash Torul, July 2008, p. 22, section 4.3 'Who is eligible for legal aid?' <<http://attorneygeneral.govmu.org> accessed> 14 September 2019.
- 46 Thomson Reuters Practical Law, 'Arbitration procedures and practice in Mauritius: Overview', Anne-Sophie Jullienne <[https://uk.practicallaw.thomsonreuters.com/w-018-4263?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-018-4263?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 12 September 2019; See also Getting the Deal Through (2019), 'Litigation Funding in Mauritius', Rishi Pursem and Bilshan Nursimulu <<https://gettingthedealthrough.com/area/94/jurisdiction/129/litigation-funding-mauritius/>> accessed 13 August 2019.
- 47 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 48 Thomson Reuters Practical Law, 'Arbitration procedures and practice in Mauritius: Overview'.

## MOZAMBIQUE<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Mozambique was, until 1975, a Portuguese colony. After its independence, Mozambique faced a civil war which lasted until October 1992, when a peace agreement was signed. Mozambique became a member of the Commonwealth in 1995.<sup>2</sup>

In view of the Mozambican history, the official language of the country is Portuguese,<sup>3</sup> and the Mozambican legal system is primarily based on the Portuguese legal system<sup>4</sup> (although some influence of common law has been reported).<sup>5</sup> The constitution is the fundamental law of Mozambique. Since its independence Mozambique has had three Constitutions (1990, 2004, and 2018).<sup>6</sup> Only after the 2004 Constitution did arbitration gain constitutional recognition, and was included as part of the judiciary's organisation and is recognised as a valid form of dispute resolution.<sup>7</sup>

#### B. *Description of prior legislation and reasons for its replacement*

Before the Arbitration, Conciliation and Mediation Law (Law No. 11/99, of 8 July 1999, 'Arbitration Law') was enacted in 1999, arbitration was regulated by the Civil Code.<sup>8</sup> There do not appear to be any commentaries discussing arbitration under the Civil Code or why it was replaced in 1999.

#### C. *Date of enactment*

The two main pieces of legislation regulating arbitration in Mozambique are (i) the Arbitration, Conciliation and Mediation Law 1999; and (ii) Chapter X of the Law No. 7/2014, of 28 February 2014 (Administrative Procedure Law).<sup>9</sup> The Arbitration Law entered into force on 11 August 2011. The Administrative Procedure Law permits the use of arbitration for the settlement of disputes involving '(i) administrative agreements and (ii) contractual liability and torts of the Public Administration'.<sup>10</sup> This Law regulates administrative arbitration and it contains similar provisions to the Arbitration Law.<sup>11</sup>

#### D. *Scope of application to domestic and international arbitrations*

The Arbitration Law regulates domestic proceedings as well as international arbitration proceedings.<sup>12</sup>

#### E. *Details and/or relevant amendments and modifications*

The arbitral legal framework of Mozambique is composed of (i) provisions of the Constitution of the Republic; (ii) federal laws regulating arbitration; and (iii) specific legislation providing for the use of arbitration in some particular sectors.<sup>13</sup>

The Constitution of the Mozambican Republic, as above discussed, recognises arbitration as a valid method for resolving disputes. Article 4 of the 2018 Constitution expressly accepts different methods for resolving controversies, and article 222(2) includes arbitration amongst the tribunals which are recognised by Mozambican legal system.<sup>14</sup>

#### F. *Relationship to the UNCITRAL Model Law*

The Arbitration Law is not based on the UNCITRAL Model Law on International Commercial Arbitration.<sup>15</sup> However, commentators have pointed

out that the legislation is comparable with the UNCITRAL Model Law in most aspects.<sup>16</sup>

#### G. *Departure(s) (if any) from the UNCITRAL Model Law*

Some divergences between the Arbitration Law and the UNCITRAL Model Law which are worth noting include: (i) the Arbitration Law sets out the use of mediation and conciliation; (ii) article 13 of the Arbitration Law provides that if the defendant does not object to court proceedings, the arbitration agreement is considered waived; and (iii) rules for appointment of arbitrators and regulating certain aspects of their role during the proceedings, which are discussed in greater detail below.

#### H. *Powers and duties of arbitrators*

Under the Arbitration Law, arbitrators can grant interim measures,<sup>17</sup> decide their own competence,<sup>18</sup> appoint experts,<sup>19</sup> and take the evidence or request the assistance of the courts to do so.<sup>20</sup>

Arbitrators must communicate their rejection to an appointment within five days from the notification, or their acceptance will be tacitly recognised.<sup>21</sup> Arbitrators shall also abide by the ethical code imposed by article 22 of the Arbitration Law. They must be independent and impartial from the parties, and they must disclose any facts that may affect their independence and impartiality. Moreover, arbitrators should perform their duties with loyalty and in good faith.<sup>22</sup>

The award issued by the arbitral tribunal must comply with the requirements of Article 39 of the Arbitration Law, and with the time limit set out in article 35.<sup>23</sup> The Arbitration Law also sets out that those who have acted as mediators in a proceeding cannot be appointed as arbitrators in the same proceeding.<sup>24</sup>

#### I. *Arbitrator immunity*

The immunity granted to arbitrators is equivalent to immunity granted to judges. Arbitrators are normally immune, unless they act with dishonesty or in fraud in the exercise of their role as arbitrators. It is also possible to hold an arbitrator accountable for damages if the arbitrator withdraws from his/her role without presenting justification.<sup>25</sup>

## II. INTERNATIONAL INSTRUMENTS

### A. *Signatory to the New York Convention*

Mozambique became a party to the 1958 New York Convention on 11 June 1998 and it entered into force on 9 September 1998.<sup>26</sup>

### B. *Reservations to the New York Convention*

Mozambique has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>27</sup>

### C. *Method of domestic implementation of the New York Convention*

The New York Convention was given effect through the Resolution No. 22/98 of 2 June 1998.<sup>28</sup>

### D. *Other international/regional treaties*

Mozambique is also a signatory of the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (the

'ICSID Convention'). Mozambique ratified the Convention on 4 April 1995 and the Convention entered into force in the country on 7 July 1995.<sup>29</sup>

Mozambique has entered into 27 bilateral investment treaties, of which 20 are in force (Japan, India, Vietnam, Belgium-Luxembourg Economic Union, Finland, United Kingdom, Switzerland, France, Denmark, Germany, Netherlands, Sweden, Cuba, China, Indonesia, Italy, Algeria, United States of America, Mauritius, and Portugal).<sup>30</sup>

Mozambique has also entered into three free trade agreements, all of which are in force (Agreement Establishing the African Continental Free Trade Area (AfCTA),<sup>31</sup> COMESA–EAC–SADC Tripartite Free Trade Area,<sup>32</sup> and the Southern African Development Community Free Trade Area (SADCFTA)<sup>33</sup>).

### III. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

No information was available.

#### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

One commentator explains that '[a] foreign arbitral award may not be recognized for enforcement in Mozambique if the award conflicts with any mandatory Mozambique rules of public order or if the award is affected by any of the grounds for refusal stated in Article V of the New York Convention'.<sup>34</sup> Given that the constitution is the bedrock of the Mozambican legal system, it seems reasonable to assume that many constitutional provisions which organise the state's attributions, financial, and social order also therefore constitute the Mozambican public order.

#### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Only one commercial case has been reported in arbitration databases. In *Fobinter v Cogropa, E.E.* the Supreme Court of Mozambique recognised an award issued under the Grain and Feed Trade Association, which discussed the parties' consent to submit disputes arising from a share-purchase agreement to arbitration. Cogropa had agreed to the contract but did not sign it. When Fobinter initiated arbitration against Cogropa, the company alleged it did not consent to arbitration and opted not to take part in the proceedings. The arbitration was decided in favour of Fobinder. When informed of the arbitral decision, Cogropa decided to challenge the award. The Supreme Court of Mozambique, however, recognised that the arbitral award was valid and enforceable under Mozambican law, and that no violation of due process had occurred. The Supreme Court also explained that an analysis under the New York Convention would lead to the same conclusion (even though the Convention was not applicable in this case, because the arbitration happened before the accession of Mozambique to the Convention).<sup>35</sup>

### IV. ARBITRATION LANDSCAPE

#### A. *Institutional arbitration*

The Mozambican Centre of Arbitration, Conciliation and Mediation (CACM) is the only arbitral institution in Mozambique.<sup>36</sup> The CACM was created in 2002, and it is under the auspices of the Confederação das Associações Económicas de Moçambique (CTA).<sup>37</sup>

CACM provides its own set of arbitration rules,<sup>38</sup> and the latest information available about the institution affirms that '[s]o far, CACM has only administered domestic arbitrations, mainly in the areas of construction, real estate development, and rental agreements'.<sup>39</sup>

CACM also appears to have a steady number of referred cases yearly. The most recent statistical data available shows that the institution received an average of 20 cases per year between 2009 and 2012.<sup>40</sup>

According to 2018 ICC Statistics, the institution received eight arbitrations involving Mozambican parties in 2017.<sup>41</sup> When discussing arbitration in Africa, the LCIA caseload report only specifies the percentage of cases involving Nigerian and Mauritian parties, and it refers generically to 'other Africa' data. In view of that, it is not possible to assess if the institution administered arbitrations involving Mozambican parties in 2017 and 2018.

#### *B. Measures to strengthen institutional arbitration capabilities*

No information was available.

#### *C. Submission of disputes to arbitration vs litigation*

Statistical data released by CACM and ICC (discussed above) demonstrate that arbitration practice in Mozambique is active. The number of cases submitted to arbitration, however, is still low in comparison with the caseload of Mozambican courts.

#### *D. Participation by foreign counsel in international arbitrations*

Mozambique adopts a unified system where lawyers can act as solicitors and barristers at the same time.<sup>42</sup> Mozambican legal practitioners are only allowed to practise as lawyers after being admitted to the national bar association, which requires a law degree and two stages of traineeship.<sup>43</sup>

In order to register at the Bar, non-nationals who studied in Mozambican law schools are subject to the same terms as nationals.<sup>44</sup> Foreign lawyers also need to register with the Mozambican Bar to practise in the country.

According to the Bar Statute 2005, foreign lawyers are those who hold a diploma from a foreign law school.<sup>45</sup> Their registration with the Mozambican Bar is conditioned on (i) agreements or treaties establishing reciprocity amongst Mozambique and the foreign country; (ii) admission to the Mozambican bar exam; and (iii) fulfilment of all the other requirements imposed on Mozambican lawyers, as established in the Bar Statute. Further requirements are also imposed by the Mozambican Bar Regulation for Registering Foreign Lawyers,<sup>46</sup> which includes, for instance, residence in the country. No express exceptions are made to the arbitration practice. The restrictions imposed on foreign lawyers have been critically assessed as anti-competitive barriers, and an archaic trace of the Mozambican legal market compared to more modern trends.<sup>47</sup>

#### *E. Relevant statistical data*

##### *1. Sectors where arbitration is routinely used*

Domestic arbitration in Mozambique often involves the construction and real estate development sectors, and rental agreements.<sup>48</sup> In the international arbitration space, Mozambique is famous for its oil, gas, and mining sectors. This may hint at the main causes for disputes at the international level, even though no official data was located in the course of research.



2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

According to Carlos Mondlane, president of the Mozambican Association of Judges, the lack of judges in Mozambique negatively impacts the efficiency of the judiciary.<sup>49</sup> A recent study reveals that the number of judges in comparison with the Mozambican population is very low, and at the beginning of 2019 there was a court backlog of 156,569 cases.<sup>50</sup>

The World Justice Project Report (2019) – an index created to measure the adherence of countries to the rule of law – listed Mozambique in the 108th position in its global rank, out of 126 countries analysed. This position was classified in the report as within the range of countries with 'low adherence' to the rule of law. Comparatively, this classification puts Mozambique in the 23rd position in sub-Saharan African.<sup>51</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 950 days to resolve a commercial dispute in a first-instance court in Mozambique – 90 days for filing and service of court processes, 640 days for trial and judgment and 220 days for enforcement of judgment.<sup>52</sup> Mozambique ranks below the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>53</sup> In terms of overall ease of enforcing contracts, Mozambique scored 39.78 of 100 and ranked 167 of 190.<sup>54</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

*G. Statistics on judges and lawyers per capita*

The total population of Mozambique in 2019 was 29,668,834, according to the World Bank.<sup>55</sup> The total number of lawyers is 1,735,<sup>56</sup> whereas the total amount of judges is 369.<sup>57</sup>

## V. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is available for businesses in commercial dispute resolution in Mozambique. Article 62 of the Mozambique Constitution states that all citizens have a right to legal assistance and aid.<sup>58</sup> This is provided by free legal assistance at the Institute for Legal Assistance and Representation (Instituto de Assistência e Patrocínio Jurídico, IPAJ). IPAJ was created in 1994 by Law No. 6/1994 to function as a state body, under the supervision of the Ministry of Justice, for the provision of legal aid.<sup>59</sup> A 2006 Open Society report outlined how there needs to be an overhaul of the legal aid system in Mozambique including providing more funding to the IPAJ.<sup>60</sup> This may allow for an extension of legal aid to arbitration or to businesses. It is unclear whether any of these suggestions have been taken on board by the Government of Mozambique.

The current focus of legal aid is in criminal law. The first university legal clinic in Mozambique – opened in 2003 at Eduardo Mondlane University in Maputo

– focuses on providing legal aid services to prisoners.<sup>61</sup> That clinic has also partnered with the Liga dos Direitos Humanos to train rural community paralegals in law and human rights.<sup>62</sup> An increasing number of citizens using the courts are relying on legal aid provided by civil society organisations, but this is only in relation to criminal and family law matters.<sup>63</sup>

#### B. Third-party funding

No jurisprudence or literature appears to be available on the doctrines of maintenance and champerty in Mozambique or on the availability of third-party funding in the country. Given Mozambique's civil law heritage and the general permission of third-party funding in civil law countries it could be assumed that third-party funding is permissible. However, the law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished by statute in 1967 but a champertous agreement may still be treated as contrary to public policy and unlawful. As this was the law applied at the time of independence it is likely still applicable in Mozambique.

Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to take place in Mozambique. Case law indicates that the common law doctrines of champerty and maintenance have been overruled. Hence, the appropriate inference is that the rules of maintenance and champerty are no longer applicable and third-party funding might therefore be legally permissible.

#### C. Contingency fees

Lawyers registered at the Mozambican Bar are subjected to the Mozambican Bar Association Statute (approved by Law No. 28/2009 of 29 September 2009, 'Bar Statute'). Article 66 (2) of the Bar Statute limits lawyer's fees to 50 per cent of the total amount in dispute, and article 67(1)(c) forbids lawyers to 'establish that the rights to attorney's fees is dependent on the result of the dispute or business' (*pactum quota litis*).<sup>64</sup> However, article 67(2) clarifies that if the agreement between lawyer and client determines beforehand the fees in accordance with the amount in dispute, even if it does so in percentage terms, this is not considered a *pactum quota litis* if the agreement intends to increase the fee's amount. In sum, a lawyer cannot subject his or her fees to the case's success, but can partially determine that the fee will be increased, depending on the case result.

#### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 The Commonwealth, 'Mozambique: History' <<http://thecommonwealth.org/our-member-countries/mozambique/history>> accessed 27 June 2019.
- 3 Constitution of the Republic of Mozambique 2018, article 10.
- 4 Clifford Chance (2014), 'Dispute Resolution in Mozambique: The Rise of Arbitration' <[https://www.cliffordchance.com/briefings/2014/03/dispute\\_resolutioninmozambique.html](https://www.cliffordchance.com/briefings/2014/03/dispute_resolutioninmozambique.html)> accessed 27 June 2019.

- 5 'Essencialment o sistema comporta elementos do direito estatutário herdado do colonialismo, elementos trazidos pela prática da aplicação da justiça nas zonas libertadas durante a luta armada e certamente alguns elementos de direito costumeiro.' Gina Welsh (1991), 'A Nova Justiça em Moçambique', 32 *Revista Critica de Ciências Sociais*, 107 <<http://www.ces.uc.pt/rccs/includes/download.php?id=424>> accessed 27 June 2019
- 6 The Law No. 1/2018 of 12 June 2018 partially reformed the 2004 Constitution and restated most of its provisions.
- 7 Constitution of the Republic of Mozambique 2004, Article 223.
- 8 See in John Miles, Tunde Fagbohunlu and Kamal R Shah (eds) (2016), *Arbitration in Africa: A Review of Key Jurisdictions*, Street and Maxwell, 335.
- 9 Jorge Graça (2013), 'Chapter 1.7: Mozambique', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 63.
- 10 Joana Galvão Teles (2015), 'Arbitration in Mozambican Law', 24 *Spain Arbitration Review* | *Revista del Club Español del Arbitraje*, 101.
- 11 'The rules established in Law 7/2014 are similar to the ones found in the LACM regarding domestic arbitrations, with some differences which arise from the administrative nature of the claims, such as (i) the inexistence of provisions on choice of law for the merits of the claim and (ii) in case of annulment of the decision of the arbitral tribunal, the review of the merits of the claim by the First Section of the Administrative Court.' Teles (2015), 'Arbitration in Mozambican Law'.
- 12 Article 53 of the Arbitration Law sets out that '[f]ailing specific stipulation by the parties, the provisions of this Law that relate to arbitration in general are applicable to international commercial arbitration, with the necessary adaptations, subject to the application of the special provisions foreseen in this Law'.
- 13 See in Miles, Fagbohunlu and Shah (2016), *Arbitration in Africa: A Review of Key Jurisdictions*, 335.
- 14 Constitution of the Republic of Mozambique 2018, articles 4 and 222(2).
- 15 UNCITRAL, 'Status' <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 28 June 2019.
- 16 According to Sofia Martins, Filipa Russo de Sa and Ricardo Saraiva 'for the most part, based on the Model Law', see Lexis PSL (2017), 'Arbitration in Mozambique – Getting the Deal Through Guide 2017', Sofia Martins, Filipa Russo de Sa and Ricardo Saraiva <<https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5BH8-F9B1-DXSN-60MW-00000-00/Arbitration%20in%20Mozambique%E2%80%94Getting%20the%20Deal%20Through%20report>> accessed 28 June 2019. See also Graça (2013), 'Chapter 1.7: Mozambique', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 63.
- 17 Arbitration Law, article 33.
- 18 Arbitration Law, article 37(1).
- 19 'Unless otherwise agreed by the parties', Arbitration Law article 31.
- 20 Arbitration Law, article 32.
- 21 Graça (2013), 'Chapter 1.7: Mozambique', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 63, 64.
- 22 Lexis PSL (2017), 'Arbitration in Mozambique – Getting the Deal Through Guide 2017'.
- 23 Unless otherwise agreed by the parties, the award must be issued in six months, counted from the date of constitution of the tribunal.
- 24 Arbitration Law, article 21
- 25 See Lexis PSL (2017), 'Arbitration in Mozambique – Getting the Deal Through Guide 2017'.
- 26 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed on 26 June 2019.
- 27 See 'New York Convention Guide' <[http://newyorkconvention1958.org/index.php?lvl=cmspage&page\\_id=11&menu=581&opacview=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&page_id=11&menu=581&opacview=-1)> accessed on 26 June 2019.

- 28 Resolution n. 22/98 of 2 June 1998 available at <[https://lisbonarbitration.mlgts.pt/xms/files/Mocambique/A.\\_International\\_Conventions\\_Convencoes\\_Internacionais/1.\\_Convencao\\_de\\_Nova\\_lorque\\_-PT-.pdf](https://lisbonarbitration.mlgts.pt/xms/files/Mocambique/A._International_Conventions_Convencoes_Internacionais/1._Convencao_de_Nova_lorque_-PT-.pdf)> accessed on 11 July 2019; see also Lexis PSL (2017), 'Arbitration in Mozambique – Getting the Deal Through Guide 2017'.
- 29 ICSID, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 28 June 2019.
- 30 UNCTAD Investment Policy Hub, 'Mozambique' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 31 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.
- 32 Tralac, 'SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents' <<https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>> accessed 30 September 2019.
- 33 Southern African Development Community <<https://www.sadc.int>> accessed 30 September 2019.
- 34 Graça (2013), 'Chapter 1.7: Mozambique', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 63.
- 35 'Mozambique No. 1, *Fobinter, S.A. v. Cogropa, E.E., Supreme Court of Mozambique*, 27 February 2014', in Albert Jan van den Berg (ed.) (2017), *Yearbook Commercial Arbitration 2017*, Volume 42, 446–48.
- 36 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa', 205, 207 <<https://www.herbertsmithfreehills.com/latest-thinking/guide-to-dispute-resolution-in-africa>> accessed on 28 June 2019.
- 37 Freely translated as Mozambican Confederation of Economic Associations. See CACM, 'Apresentação do Centre' <[http://www.cacm.org.mz/?page\\_id=39](http://www.cacm.org.mz/?page_id=39)> accessed on 28 June 2019.
- 38 CACM, 'Regulamento de Arbitragem' <<http://www.cacm.org.mz/wp-content/uploads/2017/01/Regulamento-de-Arbitragem-.pdf>> accessed on 28 June 2019.
- 39 Graça (2013), 'Chapter 1.7: Mozambique', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 63, 65.
- 40 Ibid.
- 41 ICC (2018), 'ICC Dispute Resolution Bulletin', 2. <<https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>> accessed 28 June 2019.
- 42 'Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa'.
- 43 Ibid.
- 44 Bar Statute, article 150 (1).
- 45 Bar Statute, article 150 (2).
- 46 Mozambican Bar Association Statute, available at <<http://www.oam.org.mz/wp-content/Docs/1-Estatuto/Estatuto-da-Ordem-de-Advogados-de-Mocambique-actual.pdf>> accessed 10 July 2019.
- 47 SAPO (2018), 'Exercício da advocacia por estrangeiros', Tomás Timbane <<http://opais.sapo.mz/exercicio-da-advocacia-por-estrangeiros>> accessed 28 June 2019.
- 48 Graça (2013), 'Chapter 1.7: Mozambique', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 63, 65. ICC (2018), 'ICC Dispute Resolution Bulletin', 2. <<https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>> accessed on 28 June 2019.
- 49 SAPO (2019), 'Cada juiz tem 800 processos pendentes em Moçambique', Olivia Massango, <<http://opais.sapo.mz/cada-juiz-tem-800-processos-pendentes-em-mocambique>> accessed 28 June 2019.
- 50 Verdade (2019), 'Tribunal Supremo revela assombrosos números da (in) Justiça em Moçambique', Adérito Caldeira <<http://www.verdade.co.mz/>>

- tema-de-fundo/35-themadefundo/67900-tribunal-supremo-revela-assombrosos-  
numeros-da-injustica-em-mocambique> accessed 28 June 2019.
- 51 World Justice Project, 'Rule of Law Index 2019', 109 <[https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf)> accessed 28 June 2019.
- 52 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/mozambique#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/mozambique#DB_ec)> accessed 28 June 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 53 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 54 Ibid.
- 55 Ibid.
- 56 The number of lawyers corresponds to the number of legal practitioners who are inscribed in the Law Society of Mozambique. The number of graduates in law may be higher than this number. See full list of members of the Law Society at Ordem dos Advogados de Moçambique, 'Advogados Inscritos' <<http://www.oam.org.mz/advogados-inscritos/>> accessed 28 June 2019.
- 57 Verdade (2019), 'Tribunal Supremo revela assombrosos números da (in)Justiça em Moçambique'.
- 58 Mozlegal, 'Constitution of the Republic of Mozambique', art. 62. <[http://confinder.richmond.edu/admin/docs/Constitution\\_\(in\\_force\\_21\\_01\\_05\)\(English\)-Mozlegal.pdf](http://confinder.richmond.edu/admin/docs/Constitution_(in_force_21_01_05)(English)-Mozlegal.pdf)> accessed 14 September 2019
- 59 Governo de Moçambique, 'Ministerio da Justiça, Assuntos Constitucionais e Religiosos' <<http://www.mjcr.gov.mz/servicos/assistencia-juridica-e-patrocinio-judiciario/>> accessed 28 June 2019.
- 60 Africa Criminal Justice Reform, 'Mozambique Justice Sector and the Rule of Law', Open Society Foundation Initiative for Southern Africa <<https://acjr.org.za/resource-centre/Mozambique%20Justice%20report%20-Eng.pdf/view>> accessed 14 September 2019.
- 61 United Nations Office on Drugs and Crime (2007), 'Access to Legal Aid in Criminal Justice Systems in Africa Survey Report', 17. [https://www.unodc.org/pdf/criminal\\_justice/Survey\\_Report\\_on\\_Access\\_to\\_Legal\\_Aid\\_in\\_Africa.pdf](https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf) accessed 14 September 2019.
- 62 Ibid.
- 63 Africa Criminal Justice Reform, 'Mozambique Justice Sector and the Rule of Law'.
- 64 Mozambican Bar Association Statute.

# NAMIBIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Namibia was historically known as South West Africa (SWA) and governed as a territory of South Africa from 1985 to 1990.<sup>2</sup> During this period, most South African laws, including its common law, were applicable in SWA.<sup>3</sup> The legislative authority of SWA was the South African administration, and legislation which was applicable to SWA explicitly mentioned this extension.<sup>4</sup> One such applicable law was the South African Arbitration Act 1965.<sup>5</sup> This Act currently governs arbitration proceedings in Namibia.

The South African Arbitration Act 1965 was modelled on the English Arbitration Act 1950.<sup>6</sup> The Act unified the different arbitration regimes in South Africa by repealing the provincial arbitration legislations, including the Arbitration Proclamation of South-West Africa (Proclamation 3 of 1926).<sup>7</sup> All the repealed arbitration legislations were largely based on the English Arbitration Act of 1889.<sup>8</sup>

In 1990, SWA gained its independence and became the Republic of Namibia.<sup>9</sup> To avoid a gap in the administration of law, the Namibian Constitution preserved the validity of all laws in force in SWA immediately before the date of independence until they were repealed or amended by Act of Parliament or declared unconstitutional by a competent court.<sup>10</sup> The South African Arbitration Act 1965 is one of the preserved laws. It remains the applicable arbitration act in Namibia as it has not yet been repealed or amended.<sup>11</sup>

### B. *Description of prior legislation and reasons for its replacement*

This query is not applicable to this jurisdiction. See above.

### C. *Date of enactment*

As stated above, the principal national arbitration act in Namibia is the Arbitration Act 1965, which came into force on 14 April 1965. It was enacted to 'provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration'.<sup>12</sup>

The Labour Act 2007 governs arbitration proceedings of labour disputes only. It is, however, uncertain whether the Recognition and Enforcement of Foreign Arbitral Awards Act 1977 (RFFA) is supplementary arbitration legislation applicable in Namibia.<sup>13</sup>

### D. *Scope of application to domestic and international arbitrations*

The Arbitration Act 1965 governs domestic arbitration proceedings in Namibia. It is unclear whether the 1965 Act applies to international arbitration proceedings too. The Act makes no express reference to international arbitration and there is no stand-alone Act on international arbitration. Indeed, commentators diverge on whether the 1965 Act applies to only domestic arbitration proceedings<sup>14</sup> or to both international and domestic arbitration proceedings.<sup>15</sup> In contrast, prior to the enactment of the South Africa International Arbitration Act 2017, the 1965 Act, as applied in South Africa, was considered to apply to both international and domestic arbitration proceedings seated in South Africa.<sup>16</sup>

*E. Details and/or relevant amendments and modifications*

The Arbitration Act 1965 has undergone no revisions or amendment since its inception. It remains the extant arbitration act in Namibia. There are presently no publicly known efforts to modernise the 1965 Act to align it with contemporary international standards.<sup>17</sup>

*F. Relationship to the UNCITRAL Model Law<sup>18</sup>*

Namibia has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985.<sup>19</sup> The Arbitration Act 1965 predates the Model Law and therefore none of its provisions are based on it. The 1965 Act is based on the English Arbitration Act 1950.

*G. Departure(s) (if any) from the UNCITRAL Model Law*

The Arbitration Act 1965 differs from the Model Law in several respects. Key differences between the Act and the Model Law include:<sup>20</sup>

- a. The arbitration agreement is not separable from the main agreement;<sup>21</sup>
- b. Arbitrators do not have the statutory power to determine their jurisdiction;<sup>22</sup>
- c. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>23</sup>
- d. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>24</sup>
- e. The limited grounds for setting aside an award, namely: misconduct by an arbitrator; gross irregularity or excess of powers by arbitral tribunal; and the award having been improperly obtained;<sup>25</sup> and
- f. Excessive opportunities for court interference with the arbitral process, such as power of the court to make orders in respect of security of costs and interim relief,<sup>26</sup> to set aside an arbitration agreement on good cause shown,<sup>27</sup> to appoint an arbitrator or umpire,<sup>28</sup> to set aside appointment of arbitrator in certain circumstances,<sup>29</sup> to remit award for reconsideration,<sup>30</sup> issue binding opinion on points of law stated to it by the arbitral tribunal,<sup>31</sup> and to extend the time for making an award or doing anything under the Act.<sup>32</sup>

*H. Powers and duties of arbitrators*

The Arbitration Act 1965 empowers arbitrators to issue interim awards,<sup>33</sup> to order specific performance,<sup>34</sup> to determine evidentiary matters<sup>35</sup> (such as receipt of evidence, examination of the witnesses, etc.), to correct errors in an award,<sup>36</sup> and to award costs.<sup>37</sup>

*I. Arbitrator immunity*

The Arbitration Act 1965 contains no provision in relation to arbitrator immunity.

## II. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention<sup>38</sup>*

Namibia is not a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention').<sup>39</sup> It also appears that Namibia has no specific legislative provision for the enforcement of foreign arbitral awards.<sup>40</sup> There is also no reported

case law on the enforcement of foreign arbitral awards in Namibian courts.<sup>41</sup> It is, however, suggested that foreign arbitral awards would be enforceable under common law against award debtors in Namibia.<sup>42</sup>

*B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction. See paragraph above.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction. See above.

*D. Other international/regional treaties*

Namibia has signed but not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>43</sup>

Namibia has signed 15 bilateral investment treaties (BITs) with different countries, nine of which are currently in force (Italy, Austria, Spain, Netherlands, Finland, France, Malaysia, Switzerland, and Germany).<sup>44</sup> These BITs provide for arbitration as a means of the settlement of disputes. To date, Namibia has not been a party to any known investment treaty arbitrations.<sup>45</sup>

In addition, Namibia is a member country of the Southern African Development Community Treaty, Protocol on Finance and Investment (SADC Treaty).<sup>46</sup> The SADC Treaty mandatorily provides for the international arbitration of investment disputes if such claims cannot be amicably settled and after the exhaustion of local remedies.<sup>47</sup> Namibia is also a party to the Agreement Establishing the African Continental Free Trade Area (AfCTA).<sup>48</sup>

### III. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

It is difficult to assess what the general attitude of the Namibian judiciary is to arbitration given the limited resort to arbitration under the Arbitration Act 1965 and the paucity of relevant information. However, two recent Namibian Supreme Court cases indicate that the Namibian judiciary take a pro-enforcement approach in relation to arbitration agreements. In both cases, the Supreme Court applied the 1965 Act and upheld the validity of an arbitration agreement and arbitral award.

In *Do Rego v JC Beerwinkel t/a JC Builders*,<sup>49</sup> the appellant challenged the High Court's decision which made the award an order of court for the purposes of enforcement under section 31 of the Act. The appellant argued that the arbitrator was not validly appointed because a condition precedent in the arbitration agreement was not met. The Supreme Court rejected this argument, finding that the arbitration agreement was valid, the parties mutually agreed and understood that their disputes would be determined by arbitration, and that the conduct of the appellant never suggested otherwise or that the arbitration could not proceed because of a condition precedent. The Supreme Court upheld the High Court's decision.

In *Merit Investment Eleven (Pty) Ltd v Namsov Fishing Enterprises (Pty) Ltd*,<sup>50</sup> the Supreme Court dismissed the appellant's challenge of the High Court's decision which made the award an order of court for the purposes of enforcement under section 31 of the Arbitration Act 1965. The Supreme Court held: (i) that under the Act, the requirement of an arbitration agreement



to be in writing does not require that the agreement must be signed by the parties; (ii) that the appellant accepted the terms of the arbitration contained in the respondent's letter by conduct and participated in the arbitration to its finality, and therefore, cannot challenge the validity of the arbitration agreement on the grounds that it did not provide written confirmation of its terms as required by the respondent's letter.

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

It is not clear what the Namibian public policy standard is for refusing enforcement of arbitral awards. There is no reported case law from which to seek guidance.<sup>51</sup> Further, the Arbitration Act 1965 does not provide for public policy as a ground for setting aside an award. It is, however, suggested that the public policy standard includes principles of natural justice.<sup>52</sup>

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

This query is not applicable. See above section IIIA.

#### IV. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

The institutional arbitration capability in Namibia is weak. There are presently no active arbitral institutions. Formerly, Namibia had an arbitral institution established in 2003 and known as the Professional Arbitration and Mediation Association of Namibia (PAMAN). PAMAN was, however, dormant for several years prior to its dissolution in 2013.<sup>53</sup>

*B. Measures to strengthen institutional arbitration capabilities*

There are currently no publicly known governmental measures at reviving or strengthening institutional arbitration capabilities in Namibia.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

The practice of law in Namibia is exclusive for persons who have been admitted and authorised to practise as legal practitioners or enrolled as such, in accordance with the Legal Practitioners Act 1995.<sup>54</sup> To qualify for admission,<sup>55</sup> an applicant must demonstrate that he or she is a fit and proper person, possesses the requisite academic and professional qualifications, and is either a Namibian citizen or has been lawfully admitted to Namibia for permanent residence and is ordinarily resident in Namibia, or is the holder of an employment permit issued pursuant to Namibia immigration laws.

It is unclear if the above restriction extends to arbitration proceedings. It is, however, suggested that there appear to be no restrictions on foreign lawyers representing parties in arbitral proceedings seated in Namibia.<sup>56</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

There are no publicly available statistics pertaining to the conduct of arbitration proceedings in Namibia. No data exists to suggest, if any, the preference for arbitration over litigation in the resolution of commercial disputes.

## 2. Time taken for enforcement/annulment proceedings

There are no publicly available statistics pertaining to the conduct of arbitration proceedings in Namibia.

## 3. Percentage of awards annulled/not enforced

There are no publicly available statistics pertaining to the conduct of arbitration proceedings in Namibia.

### F. *Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 460 days to resolve a commercial dispute in a first-instance court in Namibia – 10 days for filing and service of court processes, 400 days for trial and judgment and 50 days for enforcement of judgment.<sup>57</sup> Namibia ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>58</sup> In terms of overall ease of enforcing contracts, Namibia scored 63.44 of 100 and ranked 58 of 190.<sup>59</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>60</sup>

### G. *Statistics on judges and lawyers per capita*

There is no publicly available data on the number of judges and lawyers per capita in Namibia.

The Namibian court system comprises the Supreme Court, the High Court, and the lower courts. The Supreme Court is the highest court of appeal. It hears appeals from the High Court and also has original matters referred to it by the Attorney General. The High Court has both original and appellate jurisdiction over all civil and criminal prosecutions, including cases involving the interpretation of the Namibian Constitution. Lower courts mainly comprise magistrate and customary courts. They are creatures of statute and have clearly defined jurisdiction.<sup>61</sup>

## V. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

In Namibia, legal aid is available to persons involved in arbitration. Under the Legal Aid Act of 1990, as a condition for the grant of legal aid parties may be required to submit their dispute to arbitration if the director of legal aid considers that the dispute is properly suited for arbitration.<sup>62</sup> In addition, legal aid is available for 'any proceedings held before a board, council, body, or any other authority in terms of law, if such person may, in terms of the law concerned, be legally represented at such proceedings'.<sup>63</sup> This could include arbitration and mediation as well as litigation.

The Namibian Government is charged under the Namibian Constitution<sup>64</sup> and the Legal Aid Act 1990<sup>65</sup> to provide legal aid in civil and criminal matters to persons who cannot afford the services of legal practitioners. To qualify, an applicant must have reasonable grounds for instituting or defending the proceedings, lack sufficient means to afford legal representation, and the interest of justice requires such applicant to be legally represented. Interpretation of laws in Namibia defines a 'person' as including: (a) municipal council, or like authority; or (b) any company incorporated or registered as

such under any law; or (c) anybody of persons corporate or unincorporate.<sup>66</sup> Therefore businesses may be able to get legal aid in Namibia.

#### B. *Third-party funding*

No jurisprudence appears to be available on the current applicability of the doctrines of champerty and maintenance in Namibia or the availability of third-party funding in that jurisdiction. However, a Report of the Legal Assistance Centre<sup>67</sup> draws parallels between the Namibian constitutional guarantee to access to justice and the South African case law discussing the rule of maintenance and champerty in light of the South African constitutional guarantee to access to justice. The Report cites the 2004 South African case, *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*, which gives an overview of the South African common law on maintenance and champerty. The court concluded that in light of the constitutional values the understandings of public policy regarding maintenance and champerty had changed and agreements which might once have been considered champertous are not automatically contrary to public policy or void any longer.<sup>68</sup> The Report suggests that given Namibia's comparable constitutional values it would be highly likely that Namibian courts would follow their South African counterparts regarding the treatment of the doctrine of maintenance and champerty.<sup>69</sup>

#### C. *Contingency fees*

Contingency or conditional fee arrangements are not currently permitted in Namibia.<sup>70</sup> Anecdotal evidence, however, suggests that they are used in practice nonetheless.<sup>71</sup>

#### D. *Insurance for legal expenses*

Legal protection insurance (LPI) is recognised in Namibia. The Short-Term Insurance Act<sup>72</sup> provides the legal framework under which LPI is provided. Under this Act, LPI qualifies as a short-term insurance business and insurance companies can provide insurance against risks of loss to insured persons attributable to the incurring of legal costs/expenses including costs of litigation.<sup>73</sup> LPI providers active in Namibia include Legal Wise<sup>74</sup> and Santam.<sup>75</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Namibia was colonised twice; first by Germany from 1884 to 1915 and then by South Africa from 1915 to 1989. Following transition to South African rule in 1915, some German laws remained applicable in Namibia unless specifically repealed, pursuant to Proclamation Martial Law 15 of 1915 and its successive amendments. Overall, the period of German colonial rule did not leave significant traces in the legal system. See generally, GlobalLex, 'Update: Researching Namibian Law and the Namibian Legal System', Geraldine Mwanza Geraldo and Isabella (Skeffers) Nowases <[www.nyulawglobal.org/globalex/Namibia1.html](http://www.nyulawglobal.org/globalex/Namibia1.html)> accessed 10 March 2019.
- 3 GlobalLex, 'Update: Researching Namibian Law and the Namibian Legal System'.
- 4 Ibid.
- 5 Arbitration Act, 1965 (RSA), s 41.

- 6 Lise Bosman (2013), 'Part I Southern Africa – Chapter 1: The Southern African Development Community and the UNCITRAL Model Law', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer.
- 7 Arbitration Act, 1965 (RSA), s 42. The repealed arbitration acts were the Arbitration Act, 1898 of the Cape of Good Hope (Act 29 of 1898), the Arbitration Act 1898 of Natal (Act 24 of 1898), the Arbitration Ordinance of the Transvaal 1904 (Ordinance 24 of 1904), and the Arbitration Proclamation of South-West Africa (Proclamation 3 of 1926). See also Chris-Mari Delpont (2016), 'A Critical Analysis of the South African Law of Arbitration, Specifically Pertaining to Arbitration Clauses in FIDIC and GCC' (LLM thesis, University of Pretoria) <[https://repository.up.ac.za/bitstream/handle/2263/56993/Delpont\\_Critical\\_2016.pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/56993/Delpont_Critical_2016.pdf?sequence=1)> accessed 10 March 2019.
- 8 Delpont (2016), 'A Critical Analysis of the South African Law of Arbitration...'
- 9 GlobalLex, 'Update: Researching Namibian Law and the Namibian Legal System'.
- 10 Namibian Constitution, art 140(1). See also GlobalLex, 'Update: Researching Namibian Law and the Namibian Legal System'.
- 11 Leigh-Anne Agnew (2013), 'Chapter 1.8: Namibia', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 12 Arbitration Act, 1965 (preamble).
- 13 The RFFA is a South African legislation enacted to domesticate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Although the RFFA was in effect in South Africa prior to Namibia's independence and should therefore be applicable in Namibia, unlike the Arbitration Act 1965, it does not expressly state that it applies to South West Africa (Namibia). An argument is, however, made in the annotations in the RFFA's preamble, for the RFFA's possible extension to Namibia despite the absence of specific reference in the RFFA. Further, commentators do not generally consider the RFFA as part of the legal framework for arbitration in Namibia. See Lise Bosman (2013), 'Part I Southern Africa – Chapter 1: The Southern African Development Community and the UNCITRAL Model Law', in Bosman, *Arbitration in Africa: A Practitioner's Guide*; Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia' <[https://www.herbertsmithfreehills.com/sites/contenthub\\_mothership/files/Guide%20to%20dispute%20resolution%20in%20Africa\\_w\\_bookmarks2.pdf](https://www.herbertsmithfreehills.com/sites/contenthub_mothership/files/Guide%20to%20dispute%20resolution%20in%20Africa_w_bookmarks2.pdf)> accessed 10 March 2019; International Council for Commercial Arbitration (2016), 'Consultative Workshop on Cooperation among African Arbitration Initiatives' <[https://www.arbitration-icca.org/media/7/84669995322746/overview\\_of\\_arbitration\\_legislation\\_in\\_africa.pdf](https://www.arbitration-icca.org/media/7/84669995322746/overview_of_arbitration_legislation_in_africa.pdf)> accessed 10 March 2019.
- 14 Agnew (2013), 'Chapter 1.8: Namibia', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 15 Jackwell Feris, 'Dispute Resolution and Africa: Development of International Arbitration in Southern Africa', ICCA <[www.arbitration-icca.org/media/3/14388521103640/cdh\\_international\\_arbitration\\_feris.pdf](http://www.arbitration-icca.org/media/3/14388521103640/cdh_international_arbitration_feris.pdf)> accessed 10 March 2019.
- 16 Lise Bosman (2013), 'Chapter 1.10: South Africa', in Bosman, *Arbitration in Africa: A Practitioner's Guide*. See also Thomson Reuters Practical Law (2016), 'Arbitration procedures and practice in South Africa: Overview', Nicholas Taitz <[https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 10 March 2019.
- 17 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia'.
- 18 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 19 ICCA (2016), 'Consultative Workshop on Cooperation among African Arbitration Initiatives' <[https://www.arbitration-icca.org/media/7/84669995322746/overview\\_of\\_arbitration\\_legislation\\_in\\_africa.pdf](https://www.arbitration-icca.org/media/7/84669995322746/overview_of_arbitration_legislation_in_africa.pdf)> accessed 10 March 2019.

- 20 Bosman (2013), 'Chapter 1.10: South Africa', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 21 See Model Law, art. 16(1).
- 22 Ibid.
- 23 See Arbitration Act 1965, s 9; cf. Model Law, art. 10 (providing that the default number of arbitrators shall be three).
- 24 See Arbitration Act 1965, s 19(c).
- 25 See Arbitration Act 1965, s 33; cf. Model Law, art. 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non-arbitrability of dispute and award contravenes public policy).
- 26 Arbitration Act 1965, s 21.
- 27 Ibid., s 3(2)(a).
- 28 Ibid., s 12.
- 29 Ibid., s 13.
- 30 Ibid., s 32.
- 31 Ibid., s 20.
- 32 Ibid., s 38.
- 33 Ibid., s 26.
- 34 Ibid., s 27.
- 35 Ibid., s 14.
- 36 Ibid., s 30.
- 37 Ibid., s 35.
- 38 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 39 New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 10 March 2019; Agnew (2013), 'Chapter 1.8: Namibia' in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 40 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia'; ICCA (2016), 'Consultative Workshop on Cooperation among African Arbitration Initiatives'; Bosman (2013), 'Part I Southern Africa – Chapter 1: The Southern African Development Community and the UNCITRAL Model Law', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 41 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia'; ICCA (2016), 'Consultative Workshop on Cooperation among African Arbitration Initiatives'; Lise Bosman (2013), 'Part I Southern Africa – Chapter 1: The Southern African Development Community and the UNCITRAL Model Law', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 42 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia'; LexAfrica (2018), 'Guide to the Enforcement of Foreign Money Judgments and Arbitral Awards in Africa' <<https://www.lexafrika.com/wp-content/uploads/2019/05/Lex-Africa-Enforcement-Guide-DIGITAL.pdf>> accessed 10 March 2019.
- 43 Namibia signed the ICSID Convention on 26 Namibia 1998. ICSID, '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 10 March 2019.
- 44 UNCTAD Investment Policy Hub, 'Namibia' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 10 March 2019.
- 45 UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' <<https://investmentpolicyhub.unctad.org/ISDS>> accessed 10 March 2019; Agnew (2013), 'Chapter 1.8: Namibia', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 46 Southern African Development Community, 'Member States' <<https://www.sadc.int/member-states/>> accessed 10 March 2019.

- 47 SADC Treaty, art. 28. See also ICCA (2016), 'International Arbitration and Southern and Central Africa' <[https://www.arbitration-icca.org/media/5/63998035118979/international\\_arbitration\\_and\\_southern\\_and\\_central\\_africa\\_bagshaw.pdf](https://www.arbitration-icca.org/media/5/63998035118979/international_arbitration_and_southern_and_central_africa_bagshaw.pdf)> accessed 10 March 2019.
- 48 Tralac, 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.
- 49 [2012] NASC 17 (22 August 2012).
- 50 [2017] NASC 6 (24 March 2017).
- 51 Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia'; ICCA (2016), 'Consultative Workshop on Cooperation among African Arbitration Initiatives'; Bosman (2013), 'Part I Southern Africa – Chapter 1: The Southern African Development Community and the UNCITRAL Model Law', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 52 LexAfrica (2018), 'Guide to the Enforcement of Foreign Money Judgments and Arbitral Awards in Africa'.
- 53 Benjamin Schernick (2014), 'Namibia in Transformation: Contributions to the Facilitation of Past and Present Conflict from a Process Work Perspective' (Master of Arts thesis, Process Work Institute, Portland, Oregon) <[www.processwork.org/files/Finalprojects/Schernick-Namibia\\_Contributions-2014.pdf](http://www.processwork.org/files/Finalprojects/Schernick-Namibia_Contributions-2014.pdf)> accessed 10 March 2019. See Herbert Smith Freehills (2016), 'Guide to Dispute Resolution in Africa: Namibia'.
- 54 Legal Practitioners Act 1995, s 3.
- 55 Legal Practitioners Act 1995, ss 4 and 5.
- 56 Agnew (2013), 'Chapter 1.8: Namibia', in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 57 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/namibia#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/namibia#DB_ec)> accessed 26 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 58 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 59 Ibid.
- 60 Ibid.
- 61 Legal Aid Act 1990, s 19.
- 62 Ibid., s 19.
- 63 Ibid., s 22(1).
- 64 Namibian Constitution, art. 95(h).
- 65 Legal Aid Act 1990.
- 66 Republic of Namibia, Annotated Statutes, Interpretation of Laws, Proclamation 37 of 1920. c. 1, s.2. <<http://www.lac.org.na/laws/annoSWA/LAW%20%281920%29%20-%20Interpretation%20of%20Laws%20Proclamation%2037%20of%201920%20%28annotated%29.pdf>> accessed 31 August 2019.
- 67 Zoila Hinson and Dianne Hubbard (2012), 'Costs and Contingency Fees', in *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*, Legal Assistance Centre <[www.lac.org.na/projects/grap/Pdf/access2justice3\\_costs.pdf](http://www.lac.org.na/projects/grap/Pdf/access2justice3_costs.pdf)> accessed 10 March 2019.
- 68 *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA).
- 69 Hinson and Hubbard (2012), 'Costs and Contingency Fees', 29–32.
- 70 Rules of the Law Society of Namibia, r 21(2)(n) (expressly prohibits contingency fee arrangements); *Gramowsky v Steyn*, 1922 SWA 48 at 52 (a pre-independence precedent in Namibia that held that contingency fee arrangements are not enforceable and are against public morality); Hinson and Hubbard (2012), 'Costs and Contingency Fees'.

- 71 Hinson and Hubbard (2012), 'Costs and Contingency Fees'. In *Disciplinary Committee for Legal Practitioners v Murorua and Another* [2012] NAHC 161 a member of the Law Society of Namibia had been fined in a disciplinary proceeding for charging a client a contingency fee; this was noted without comment by the court in an application to strike the attorney from the roll as a sanction for another charge. The legal practitioner in question disputed that he had been rightly convicted of any of the three offences considered at the disciplinary hearing. The application was brought in terms of section 35(9) of the Legal Practitioners Act 15 of 1995, which requires an application to the court for an order to strike a legal practitioner's name from the roll or to suspend him or her from practice; therefore the focus of the case was another charge which had attracted this sanction [para 1, 21].
- 72 Short-Term Insurance Act 1998.
- 73 Short-Term Insurance Act, s 13(1) Schedule 1(6)(h).
- 74 See Legal Wise <[www.legalwise.com.na/](http://www.legalwise.com.na/)> accessed 31 August 2019.
- 75 See Santam, 'Legal Insurance' <[www.santam.na/products/personal/legal-insurance/](http://www.santam.na/products/personal/legal-insurance/)> accessed 31 August 2019.

# NAURU<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Nauru is an island country in Micronesia, Oceania, in the Central Pacific. Nauru gained its independence and joined the Commonwealth of Nations as a Special Member in 1968 and became a full member in 2000.<sup>2</sup> It was admitted as the 187th member country of the United Nations in September 1999.<sup>3</sup> Nauru's legal system is based on English common law.<sup>4</sup> The law of Nauru adopts by reference via the Nauru Custom and Adopted Laws Act 1971, the English Arbitration Act 1950.<sup>5</sup> Additionally, the Nauru Civil Procedure Act 1972 includes Nauru's supplementary rules concerning arbitration proceedings.<sup>6</sup>

### B. *Description of prior legislation and reasons for its replacement*

There is prior legislation regarding arbitration in Nauru, and the English Arbitration Act 1950 alongside the supplementary provisions under the Civil Procedure Act 1972 govern arbitration in Nauru.<sup>7</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Nauru Custom and Adopted Laws Act 1971 was enacted on 5 January 1972.<sup>8</sup> The 1972 Civil Procedure Act was enacted on 21 July 1972.<sup>9</sup>

### B. *Scope of application to domestic and international arbitrations*

The English Arbitration Act 1950, which applies by reference to Nauru, applies to both domestic and international arbitration proceedings. English courts have found that enforcement of foreign awards from countries that are not party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (such as the British Virgin Islands, Gibraltar, the Isle of Man, Bermuda, the Cayman Islands, Guernsey and Jersey) can be made under s 37 of the Arbitration Act 1950.<sup>10</sup>

### C. *Details and/or relevant amendments and modifications*

There have been no arbitration-related amendments or modifications in Nauru.

### D. *Relationship to the UNCITRAL Model Law*

The arbitration legislation applicable, the English Arbitration Act 1950, pre-dates (and therefore does not adopt) the United Nations Commission on International Trade Law Model Law of 1985 ('UNCITRAL Model Law').

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

Some notable differences between the English Arbitration Act 1950 and the UNCITRAL Model Law are that, under the English Arbitration Act 1950:

- a. The arbitration agreement is not separable from the main agreement;
- b. Arbitrators do not have the statutory power to determine their jurisdiction;
- c. Arbitrators lack powers to grant orders of interim relief;
- d. The default number of arbitrators in the absence of agreement by parties is one arbitrator; and
- e. There is reference to the appointment and use of 'umpires' in the arbitration proceedings.



*F. Powers and duties of arbitrators*

The Civil Procedure Act 1972 imposes on arbitrators the duties to: (a) administer oaths or take the affirmations of the parties and witnesses appearing and (b) correct in an award any clerical mistake or error.<sup>11</sup>

*G. Arbitrator immunity*

No information was available.

**III. INTERNATIONAL INSTRUMENTS**

*A. Signatory to the New York Convention.*

Nauru is not a party to the New York Convention.<sup>12</sup>

*B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction

*D. Other international/regional treaties*

Nauru signed the International Centre for Settlement of Investment Disputes Convention (ICSID Convention) on 12 April 2016 and it entered into force on 12 May 2016.<sup>13</sup>

Nauru does not have any bilateral investment treaties.<sup>14</sup> Nonetheless, Nauru has three treaties with investment provisions (TIP)<sup>15</sup> and five investment-related instruments (IRIs).<sup>16</sup>

Nauru has signed four free trade agreements, of which three are in effect (Pacific Island Countries Trade Agreement, South Pacific regional Trade and Economic Cooperation Agreement, Pacific ACP–ECE Economic Partnership Agreement).<sup>17</sup>

**IV. RELEVANT CASE LAW**

*A. Approach of the national courts to the enforcement of arbitration agreements*

No information was available.

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

No information was available.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

There are no domestic judgments and decisions that have interpreted the New York Convention in view of Nauru not being a signatory of the Convention.

**V. ARBITRATION LANDSCAPE**

*A. Institutional arbitration*

No information was available.

*B. Measures to strengthen institutional arbitration capabilities*

No information was available.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

No information was available.

*E. Relevant statistical data*

## 1. Sectors where arbitration is routinely used

No information was available.

## 2. Time taken for enforcement/annulment proceedings

No information was available.

## 3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

There are no publicly available statistics/information.<sup>18</sup>

**VI. FUNDING FOR LEGAL CLAIMS***A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Nauru has no clear provision for legal aid for businesses or for commercial dispute resolution but it may be possible. Section 32 of the Legal Practitioners Act 2019 states that 'a practitioner must provide at least 1 annual pro bono legal assistance to persons unable to afford legal services and such assistance must be carried out to the standard of practise of a reasonable and prudent practitioner'.<sup>19</sup> The Act has no restrictions that the pro bono legal assistance could not be for a business in arbitration. The Act establishes the Law Society and provides for the regulation of the legal profession and in the Act a 'client' means a person who consults a practitioner and on whose behalf the practitioner renders or agrees to render a legal service with or without fees.<sup>20</sup>

*B. Third-party funding*

No literature appears to be available on the doctrines of champerty and maintenance in Nauru or on the availability of third-party funding in the country. However, section 4 of the Custom and Adopted Laws Act 1971 stipulates that 'the common law and the statutes of general application [...] which were in force in England on the thirty-first day of January, 1968, are hereby adopted as laws of Nauru'; that '[t]he principles and rules of equity which were in force in England on the thirty-first day of January, 1968, are hereby adopted as the principles and rules of equity in Nauru'; and that 'in every civil cause or matter instituted in any Court law and equity shall be administered concurrently', and section 5 provides that English common law applies only insofar as it is 'not repugnant to or inconsistent with the provisions' of any statute law applied in Nauru.<sup>21</sup> Thus, the common law rule of maintenance and champerty<sup>22</sup> would apply in Nauru.

*C. Contingency fees*

Given that the common law rule of maintenance and champerty applies by virtue of adoption in Nauru, contingency fees are not permissible.

*D. Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 The Commonwealth, 'Republic of Nauru: Key facts' <<http://www.thecommonwealth.org/our-member-countries/nauru>> accessed 22 August 2019.
- 3 Ibid.
- 4 Nauru Custom and Adopted Laws Act 1971, s 4(1) ('the common law and the statutes of general application, including all rules, regulations and orders of general application made thereunder, which were in force in England on the thirty-first day of January 1968, are hereby adopted as laws of Nauru').
- 5 Ibid. See also Nauru Civil Procedure Rules 1972, O. 47 r. 1 (which refers to 'the Arbitration Act 1950 of England in its application to Nauru').
- 6 Nauru Civil Procedure Rules 1972, O. 47.
- 7 Nauru Civil Procedure Act 1972.
- 8 Nauru Custom and Adopted Laws Act 1971.
- 9 Nauru Civil Procedure Act 1972.
- 10 Thomson Reuters Practical Law, 'Arbitration procedures and practice in the UK (England and Wales): overview' <<https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=%28sc.Default%29>> accessed 22 August 2019.
- 11 English Arbitration Act 1950, ss 12(1), 17.
- 12 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/list+of+contracting+states>> accessed 22 August 2019.
- 13 See ICSID (2019), 'Contracting States and Measures Taken by them for the Purpose of the Convention' <[icsid.worldbank.org](https://icsid.worldbank.org)> accessed 31 August 2019.
- 14 UNCTAD Investment Policy Hub, 'Nauru' <[investmentpolicy.unctad.org](https://investmentpolicy.unctad.org)> accessed 22 August 2019.
- 15 Two of which are currently in force, the Cotonou Agreement and the South Pacific regional Trade and Economic Cooperation Agreement. UNCTAD Investment Policy Hub, 'Nauru'.
- 16 UNCTAD Investment Policy Hub, 'Nauru'.
- 17 Asian Regional Integration Center, 'FTAs: Nauru' <[aric.adb.org](https://aric.adb.org)> accessed 31 August 2019.
- 18 The Government of the Republic of Nauru, 'Justice Department' <<http://www.naurugov.nr/government/departments/department-of-justice-and-border-control.aspx>> accessed 22 August 2019.
- 19 Legal Practitioners Act 2019, s 32
- 20 Legal Practitioners Act 2019 s 4 Definitions.
- 21 Nauru Custom and Adopted Laws Act 1971, ss 4–5.
- 22 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

# NEW ZEALAND<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. Relationship with existing or prior English Arbitration Act(s)

In 1840, New Zealand inherited the English Arbitration Act of 1698. In 1890, New Zealand enacted its own Arbitration Act 1890, which was based on the English Arbitration Act 1889. The Arbitration Act 1908 followed, which was New Zealand's principal arbitration statute until its replacement in 1996. Amendments were made to the Arbitration Act 1908 in 1938, mirroring similar amendments in the English Arbitration Act 1934. Despite other later amendments in England, New Zealand did not follow suit and until 1996 New Zealand's arbitration legislation reflected the United Kingdom Arbitration Acts of 1890 and 1934.<sup>2</sup>

New Zealand's arbitration legislation was comprehensively amended with the enacting of the Arbitration Act 1996 ('NZAA'), which remains in force. It is principally based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985 ('UNCITRAL Model Law'), rather than UK legislation. There remains a connection between the NZAA and the Arbitration Act 1996 (UK), however, given the two Acts follow a similar structure and both have been drafted against the background of the Model Law (although in different ways – unlike the UK Act, the NZAA is expressly based on the Model Law).

### B. Description of prior legislation and reasons for its replacement

The pre-1996 New Zealand law relevant to arbitration was contained across a number of different statutes – including the Arbitration Act 1908 as substantially amended by the Arbitration Amendment Act 1938, the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933, the Arbitration (Foreign Agreements and Awards) Act 1982 and the Arbitration (International Investment Disputes) Act 1979 – along with the common law overlay. Furthermore, New Zealand's arbitration legislation had not kept pace with the developments in the UK and elsewhere, particularly in terms of the promotion of enhanced party autonomy and reduced scope for judicial intervention. The New Zealand Law Commission recognised that this 'antiquated system' may have contributed to the 'modest use' of arbitration in New Zealand up to that point.<sup>3</sup>

In addition to general codification aimed at promoting arbitration and making it more accessible, and the philosophical developments in favour of party autonomy, the Law Commission recognised the benefits of adopting the UNCITRAL Model Law, which had already been adopted by a number of other countries.<sup>4</sup> The Law Commission's recommendations formed the basis for the NZAA.<sup>5</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. Date of enactment

The Arbitration Act 1996 (NZ) (NZAA) came into force on 1 July 1997.

### B. Scope of application to domestic and international arbitrations

Section 6 of the New Zealand Arbitration Act provides that the provisions of schedule 1 of the NZAA apply to all arbitrations held in New Zealand.

By contrast, section 6 distinguishes between domestic and international arbitrations in terms of the application of schedule 2. Schedule 2 applies automatically to domestic arbitrations subject to the contrary agreement of the parties. The position is reversed for international arbitrations held in New Zealand – schedule 2 does not apply to those arbitrations unless the parties agree to be bound by the provisions of that schedule.

The provisions in schedule 2 relate to the default appointment of arbitrators, the consolidation of arbitral proceedings, powers relating to the conduct of arbitral proceedings, determination of preliminary points of law by the court, appeals to the High Court on questions of law, costs and expenses of an arbitration, and extension of time for commencing arbitration proceedings. Each of these matters involves judicial involvement to varying degrees. In essence, therefore, parties to a domestic arbitration must specifically contract out of the provisions of schedule 2 to limit the courts' jurisdiction, whereas parties to an international arbitration must expressly contract to allow for the higher level of judicial oversight embodied in schedule 2.<sup>6</sup>

Whether or not an arbitration is 'international' for the purposes of the NZAA is determined by reference to the criteria in art. 1(3) of schedule 1, and includes:

- a. where parties to an arbitration have their places of business or habitual residences in different states at the time of conclusion of the agreement;
- b. the place of the arbitration, any place where a substantial part of the obligations of any commercial or other relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected is outside the state in which the parties have their places of business or habitual residences; or
- c. the parties have expressly agreed that the subject matter of the arbitration relates to more than one country.

### C. *Details and/or relevant amendments and modifications*

Three significant amendments have been made to the NZAA.

The first was in 2007 following a review by the New Zealand Law Commission earlier in the decade.<sup>7</sup> The review was focused on specific issues identified in the operation of the NZAA, including matters relating to confidentiality and consumer protection issues. The Arbitration Amendment Act 2007 introduced measures intended to circumscribe more precisely when confidentiality attaches to documents and information used in arbitral proceedings. It also clarified that there is a presumption that court proceedings under the Act will be conducted in public, which may be rebutted only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.<sup>8</sup> Finally, the 2007 amendment made it clear that consumers are natural persons only, and that an arbitration agreement in a consumer contract is only enforceable where the consumer enters into a separate written agreement with the other party to the consumer contract, after the dispute has arisen, certifying that, having read and understood the arbitration agreement, the consumer agrees to be bound by it.<sup>9</sup>

The Arbitration Amendment Act 2016 dealt with emergency arbitrators and empowered the Minister of Justice to appoint a body (replacing the High Court) to be responsible for resolving differences between parties in the appointment

of arbitrators.<sup>10</sup> On 9 March 2017, the Arbitrators' and Mediators' Institute of New Zealand Incorporated (AMINZ) was appointed to fulfil this role.<sup>11</sup>

The most recent amendments came into force on 8 May 2019 and changed three features of the NZAA: removal of the 'quick draw' procedure; introduction of a further requirement that jurisdictional challenges are to be pursued in the courts in a timely manner; and limiting the scope of the courts to set aside arbitral awards.<sup>12</sup>

The 'quick draw' procedure, previously in schedule 2 of the NZAA, arose where the parties had been unable to agree on the appointment of an arbitrator, or there had been a default in the appointment process. In those situations, either party could serve notice on the other specifying the default and nominating an arbitrator. If the other party failed to rectify the default within seven days, then the nominated arbitrator would be automatically appointed. In the future, the default process under the Act for resolving such issues will be for either party to request that AMINZ appoint the arbitrator or arbitrators. If, however, the arbitration clause in the contract provides for a different procedure for dealing with such issues (such as reference to the President of the New Zealand Law Society), that method for resolving any deadlock will continue to prevail.

Under the NZAA, parties are required to raise any challenges to the jurisdiction of the arbitral tribunal before the statement of defence is submitted. Any challenge to the tribunal's jurisdictional ruling must then be raised in the High Court within 30 days. The amendment to the Act provides that a failure to pursue such a challenge will operate as a waiver to any subsequent right to object to jurisdiction.<sup>13</sup> The amendment responds to an issue that arose in *Astro v Lippo*,<sup>14</sup> a decision of the Singapore Court of Appeal, in which the unsuccessful party held off making its jurisdictional challenge until enforcement of the award.

Finally, the 2019 Arbitration Amendment Act made amendments to avoid arbitration agreements being set aside or held unenforceable by the courts in situations where procedural provisions in the arbitration agreement have not been followed because the agreed procedure would have been in conflict with the NZAA. It recognises that the NZAA takes primacy over the parties' agreement in certain circumstances, and adherence to the NZAA should not undermine the validity of an arbitral award rendered in accordance with the provisions of the NZAA.

Also worth a mention is the very recent introduction of new provisions relating to the use of arbitration to resolve trust disputes in the new Trusts Act 2019. Among other things, it validates agreements to arbitrate and arbitration awards, and provides for the application of the NZAA to such arbitrations.<sup>15</sup> Although the new provisions involve a significant degree of judicial oversight, they are a very positive step forward for the resolution of disputes arising in relation to trusts.

#### *D. Relationship to the UNCITRAL Model Law*

As noted above, the NZAA is based on the provisions of the UNCITRAL Model Law. One of the purposes of the NZAA is the promotion of international consistency of arbitral regimes based on the Model Law,<sup>16</sup> and section 3 provides that, in interpreting the NZAA, an arbitral tribunal or court may refer to documents relating to the Model Law and originating from the United Nations Commission on International Trade Law or its working group for the preparation of the Model Law.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The Model Law is effectively replicated in schedule 1 to the NZAA, with relatively minor changes.<sup>17</sup> A key difference is that the Act is not restricted to commercial matters but applies to disputes of all kinds, subject to other laws and public policy limits. Schedule 2 of the Act also includes a small number of additional provisions applying to domestic arbitrations (with an option to opt out), and to which parties to an international arbitration may opt in.<sup>18</sup>

*F. Powers and duties of arbitrators*

Section 6 of the NZAA implies a number of statutory powers (as set out in schedules 1 and 2 to the NZAA) into all submission agreements, some of which may be excluded in whole or in part. As noted above, the provisions of both schedules automatically apply to domestic arbitrations, but the parties may agree that schedule 2 does not apply. By contrast, only schedule 1 applies automatically to international arbitrations, but parties may agree that the provisions in schedule 2 will also apply.<sup>19</sup>

In terms of the powers in schedule 1:

- a. Article 16 provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement;
- b. Article 17A provides the arbitral tribunal with the power to grant an 'interim measure' (temporary measures requiring a party to, among other things, maintain or restore the status quo pending determination of a dispute, provide a means of preserving assets out of which a subsequent award may be satisfied, and preserve evidence that may be relevant and material to the resolution of the dispute). Article 17D provides the arbitral tribunal with the power also to grant a 'preliminary order' (an order directing a party not to frustrate the purpose of an interim measure). Articles 17H–17K provide ancillary powers relating to interim measures and preliminary orders, including the power to modify, suspend or cancel the measure or order, and the power to award costs or damages where the arbitral tribunal later determines that, in the circumstances, the measure or order should not have been granted or issued;
- c. Chapter 5 of schedule 1 contains a number of powers relating to the conduct of the arbitral proceedings, most of which are subject to any agreement reached between the parties. These powers arise in relation to place of the arbitration,<sup>20</sup> language to be used,<sup>21</sup> whether to hold oral hearings for the presentation of evidence or for oral argument,<sup>22</sup> and whether to appoint experts to report to the arbitral tribunal on specific issues.<sup>23</sup> Of particular note:
  - i. Article 19 provides that subject to the provisions of schedule 1, and failing agreement of the parties to agree on the procedure to be followed, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. This power includes the power to determine the admissibility, relevance, materiality and weight of any evidence.
  - ii. Article 27 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request the court's assistance in taking evidence (for instance, subpoenaing witnesses, ordering non-party discovery and issuing a commission or request for the taking of evidence out of the jurisdiction).

Schedule 2 includes:

- a. in article 2, the power of the arbitral tribunal to order the consolidation of proceedings on the application of at least one party in each of the arbitral proceedings (or that the proceedings be heard at the same time or one immediately after another, or that any proceedings be stayed until after the determination of any other of them); and
- b. in article 3, powers (subject to the alternative agreement of the parties) relating to the conduct of the proceedings, including powers to:
  - i. adopt inquisitorial processes;
  - ii. draw on its own knowledge and expertise;
  - iii. order the giving of security for costs;
  - iv. make certain orders in relation to discovery and production of documents, and the giving of evidence;
  - v. order any party to do all such things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently; and
  - vi. make an interim, interlocutory or partial award.

Finally, section 12 in the main body of the NZAA provides that, unless the parties agree otherwise, the tribunal may award any remedy or relief that could have been ordered by the High Court. As recognised by the authors of *Williams & Kawharu on Arbitration*, this confirms the ability of a tribunal to award relief and make orders under statutes such as the Commerce Act 1986 and Fair Trading Act 1986.<sup>24</sup>

#### G. Arbitrator immunity

Section 13 of the 1996 Arbitration Act provides that an arbitrator is not liable for acts of negligence when acting in the capacity of arbitrator. Effectively, an arbitrator enjoys an equivalent immunity to that enjoyed by a High Court judge – in the absence of fraud or criminal conduct, the arbitrator is immune from suit.<sup>25</sup> Submission agreements routinely also include provisions by which the parties agree to discharge the arbitrator from any liability arising in the course of the arbitrator's conduct of the arbitration.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

New Zealand became a party to the 1958 New York Convention on 6 January 1983.<sup>26</sup>

#### B. Reservations to the New York Convention

New Zealand has not made any reservations to the New York Convention.

#### C. Method of domestic implementation of the New York Convention

The New York Convention is given effect to in New Zealand through the NZAA. This is one of the express purposes of the NZAA, and the New York Convention is reproduced in schedule 3 of the NZAA.<sup>27</sup>

#### D. Other international/regional treaties

New Zealand is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention')<sup>28</sup>



and number of bilateral investment treaties (BITs) and free trade agreements (FTAs) including investment chapters, some of which provide for (or at least anticipate) investment treaty arbitration.<sup>29</sup>

Notably, article 28.23 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (to which New Zealand is a party)<sup>30</sup> provides that state parties must encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area. To that end, state parties are required to provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes (which will be deemed to have been complied with if the state is party to, and in compliance with, the New York Convention).

New Zealand has entered into four BITs, of which two are in force (Hong Kong and China).<sup>31</sup> New Zealand has also entered in 11 FTAs, of which 10 are signed and in effect (Trans-Pacific Strategic economic Partnership Agreement, South Pacific Regional Trade and Economic Cooperation Agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, New Zealand–Singapore Closer Economic Partnership, New Zealand–Thailand Closer Economic Partnership Agreement, Australia–New Zealand Closer Economic Relations Trade Agreement, ASEAN–Australasia and New Zealand FTA, Republic of Korea–New Zealand Closer Economic Partnership, New Zealand–People’s Republic of China FTA and New Zealand–Malaysia FTA).<sup>32</sup>

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

New Zealand is generally considered a pro-arbitration jurisdiction. Putting aside the Supreme Court’s judgment in *Carr v Gallaway Cook Allan* (discussed below), the courts have been very supportive of arbitration<sup>33</sup> and the legislature has ensured that the NZAA and arbitration in New Zealand keeps pace with international trends and developments.<sup>34</sup> The recent reforms in the Trusts Act 2019 are an example of this.<sup>35</sup>

##### B. *Standard for refusing enforcement of an arbitral award on the grounds of public policy*

The recognition and enforcement of arbitral awards is governed by articles 35 and 36 of schedule 1 to the NZAA, both of which are closely modelled on the New York Convention.<sup>36</sup> Article 35(1) provides that, subject to the provisions of articles 35 and 36, a New Zealand or foreign arbitral award must be recognised as binding and, on application to the High Court (or, alternatively, the District Court for awards of a value up to NZ\$350,000), must be enforced by entry as a judgment in terms of the award or by action. Article 35(2) sets out certain procedural requirements that must be met by a party relying on an award or applying for its enforcement.

Article 36 sets out a number of grounds for refusing recognition or enforcement of an arbitration award, including where the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand, or the recognition or enforcement of the award would be contrary to the public policy of New Zealand.<sup>37</sup> Article 36(3) provides non-exhaustive guidance on the circumstances in which an award will be contrary to the public policy of New Zealand, specifically if:

- a. the making of the award was induced or affected by fraud or corruption; or
- b. a breach of the rules of natural justice occurred during the arbitral proceedings, or in connection with the making of the award.

The grounds for refusal of recognition or enforcement in article 36(1) are for the most part the same as the grounds for setting aside an arbitral award under article 34 (a key difference being the recognition that art. 36 applies to foreign awards as well as domestic awards). The New Zealand Court of Appeal has held in *Amaltal v Maruha* that the public policy exception in article 34(2)(b)(ii) is to be applied narrowly, asking whether some 'fundamental principle of law and justice' has been engaged.<sup>38</sup> The High Court has elaborated on this, indicating that there 'must be some element of illegality, or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the processes and powers'.<sup>39</sup> The Court of Appeal has stated that a similarly narrow approach to that taken in *Amaltal* will be appropriate in relation to the public policy ground in article 36(1)(b)(ii).<sup>40</sup>

C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Notable recent judgments of the New Zealand courts relating to arbitration include *Carr v Gallaway Cook Allan*,<sup>41</sup> *Zurich Australian Insurance Ltd v Cognition Education Ltd*,<sup>42</sup> and *Ngāti Hurungaterangi v Ngāti Wahiao*.<sup>43</sup>

In *Carr v Gallaway Cook Allan*, the validity of the parties' agreement to arbitrate was challenged and the Supreme Court refused to sever the offending element of the agreement.

Clause 1.1 of the agreement recorded that the dispute was submitted to the decision of a named arbitrator whose decision was to be final and binding on the parties. Clause 1.2 referred to the parties' rights of appeal under article 5 of schedule 2 of the NZAA, 'amended so as to apply to "questions of law and fact" (emphasis added)'.<sup>44</sup> The agreement also dealt with a number of other procedural issues. The arbitrator found largely in favour of Gallaway Cook Allan, and the Carr interests applied to the High Court for an order setting aside the arbitral award or, in the alternative, for leave to appeal on grounds of error of law and fact. Before the courts it was common ground that clause 1.2 was contrary to the requirements, which allowed only for appeals on a point of law.

There were three issues before the Supreme Court:

- a. What constitutes an 'arbitration agreement' for the purposes of the NZAA?
- b. Could the ineffective words in clause 1.2 be severed from the remainder of the parties' agreement?
- c. If those words could not be severed and the parties' agreement was therefore invalid, should the court set aside the award under article 34(2)(a)(i) of schedule 1?

The court held that the term 'arbitration agreement' in the NZAA has a broad meaning going beyond the formal submission of disputes to an arbitral tribunal and encompassing procedural matters on which the parties had agreed.<sup>45</sup> The court then applied ordinary contract principles to the question of severability. The court held that the italicisation of the words 'questions of law and fact' and the notation '(emphasis added)' made clear that the scope of the right to appeal was a fundamental part of the agreement. The phrase could not be

severed, and the arbitration agreement was therefore not valid.<sup>46</sup> Finally, the majority of the court held that it was inappropriate to exercise its discretion to refuse to set aside the award. The invalidity of an arbitration agreement was a fundamental defect. It would be an extraordinary step to uphold an award in circumstances where there was no contractual basis for it, and there was no justification for such an extraordinary step in the circumstances of the case.<sup>47</sup> Carr has come in for some fairly trenchant criticism. In particular, concerns have been raised about the broad interpretation of 'arbitration agreement'. As noted in *Williams & Kawharu on Arbitration*:<sup>48</sup>

... the fundamental requirement for an arbitration is the parties' agreement or consent to arbitrate certain disputes between them, and nothing more. This requirement is given effect to in art. 34(2)(a)(i). By including procedural matters within the meaning of 'arbitration agreement', the Supreme Court's decision means that awards may be set aside under art. 34(2)(a)(i) even in cases where the parties have consented to arbitration and their consent is clearly valid. ... The Supreme Court's approach contemplates that an award may be set aside on the basis of a minor or ancillary procedural error that was arguably immaterial to the parties' ultimate agreement to settle their disputes by arbitration.

By contrast to Carr, the Supreme Court's decision in *Zurich Australian Insurance Ltd v Cognition Education Ltd* might be described as more supportive of arbitration. The issue in Zurich concerned the granting of a stay of judicial proceedings where the matter in question was subject to an arbitration agreement. Article 8(1) of schedule 1 provides that where a proceeding is brought in court in a matter which is subject to an arbitration agreement, the court must stay the proceedings and refer to the matter to arbitration, unless, inter alia, 'there is not in fact any dispute between the parties with regard to the matters agreed to be referred'. Although schedule 1 is based on the Model Law, the quoted words are not contained in the Model Law and were added by the New Zealand Law Commission with the purpose of ensuring that the efficiency of the courts' summary judgment procedure was not lost.<sup>49</sup>

Cognition Education Ltd had taken out an insurance policy with Zurich Australian Insurance Ltd, which provided for any dispute to be referred to arbitration. Cognition made a claim on the policy and Zurich refused to pay out. Cognition then filed proceedings in the High Court and applied for summary judgment, arguing that there was no dispute because Zurich did not have an arguable defence to its claim. Zurich applied for a stay of proceedings. Cognition argued that the application for summary judgment should be heard first and, if the court was willing to grant summary judgment, this meant that there was not in fact any dispute between the parties.

The Supreme Court held that the purpose of the added words in article 8(1) (relating to the existence of a dispute) is to 'filter out cases where the defendant is obviously simply playing for time ... where it is immediately demonstrably that there is, in reality no dispute'. It is not intended to address circumstances in which the defendant disputes a claim on grounds a plaintiff is very likely to overcome.<sup>50</sup> The court held that, in principle, where there is an application for a stay and an application for summary judgment, the stay application should be determined first and only if that is rejected should the application for summary judgment be considered.<sup>51</sup> Such an interpretation was considered to be consistent with New Zealand's international obligations under the New York Convention, as well as with the purposes of the NZAA insofar as it promotes consistency with international arbitral regimes based on

the Model Law, recognises the importance of party autonomy, and limits the scope of curial intervention in the arbitral process.<sup>52</sup>

*Ngāti Hurungaterangi v Ngāti Wahiao* addresses the nature and standard of an arbitral tribunal's duty to give reasons; the issue arising in the context of a complex Treaty of Waitangi settlement dispute.<sup>53</sup> In the late nineteenth century, the Crown had acquired certain ancestral lands from the Māori customary owners. In 2008, following a critical report from the Waitangi Tribunal, the Crown agreed to return the lands. Ngāti Whakaue and Ngāti Wahiao were unable to agree on which of them was entitled to which block of land, but agreed to establish a joint trust to take title to the lands until determination of their competing claims to mana whenua (territorial authority over land). The Trust Deed provided that, if the parties were unable to agree, their claim would be referred to an arbitral panel for determination.

A panel was convened – made up of a retired Supreme Court judge and two respected Māori elders – to determine the rights of beneficial ownership according to which party or parties had mana whenua over which lands in the late nineteenth century. The parties were represented by legal counsel and extensive evidence of both an oral and documentary nature was called. The arbitral panel delivered an interim decision in June 2013 and that was adopted as the final award, delivered in November 2014. The award determined that the land should be apportioned equally between Ngāti Whakaue and Ngāti Wahiao, but it left implementation to be agreed between them. Ngāti Whakaue appealed on questions of law, primarily as to the adequacy of the panel's reasoning.

The court noted art. 31(2) of schedule 1 of the NZAA, which had been imported from the Model Law and provides that an award shall state the reasons upon which it is based. The Court noted the purposes behind the duty to give reasons,<sup>54</sup> and noted that standard of the reasons will be dictated by the context:<sup>55</sup>

The reasons must reflect the importance of the arbitral reference and the panel's conclusion. There is no qualitative measure of adequacy. The reasons are not required to meet a minimum criterion or extent – or to satisfy the curial standard – except that they must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points. They must engage with the parties' competing cases and the evidence sufficiently to justify the result. They must be the reasons on which the award is based; if they do not satisfy these requirements, they are not reasons.

The court held that the panel had failed to discharge its mandate to give a reasoned award. The reasons did not meet the requisite standard in the context. They were inadequate and inconsistent, and were not commensurate with the importance of the subject matter and the panel's conclusion.<sup>56</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Although institutional arbitration takes place in New Zealand, it is difficult to assess whether it is common or not. It is probably accurate to conclude that ad hoc arbitration remains the dominant approach, but reliance on institutional arbitration is growing.<sup>57</sup>

The key New Zealand-based organisations are AMINZ, the New Zealand Dispute Resolution Centre (NZDRC) and the New Zealand International Arbitration Centre (NZIAC):

- a. AMINZ is the leading dispute resolution organisation in New Zealand, initially formed in the 1970s as a branch of the Chartered Institute of Arbitrators (UK). It is not an arbitral institution but it facilitates and provides services relating to arbitration, mediation, and conciliation services. In terms of arbitration specifically, AMINZ has published arbitration rules, protocols, and guidelines.<sup>58</sup> It also assists in the appointment of arbitrators, including as the appointed body under the NZAA, responsible for resolving differences between parties in the appointment of arbitrators. Finally, AMINZ also runs an Arbitration Appeals Tribunal, as an alternative to the current procedure of taking an appeal to the High Court.<sup>59</sup>
- b. The NZDRC and NZIAC are both arbitral institutions. The NZAIC was established in 2010 and maintains panels of arbitrators and mediators, and administers international arbitrations and mediations in New Zealand, supported by modern procedural rules. The NZIAC has as its object the support and facilitation of the growth and development of international dispute resolution in the region, and the promotion of New Zealand as a safe and neutral regional hub for international dispute resolution and seat for international arbitration. By contrast, the NZDRC focuses on resolution of domestic disputes. It administers domestic commercial arbitrations and provides procedural rules which may be adopted by parties.<sup>60</sup>

*B. Measures to strengthen institutional arbitration capabilities*

Significant efforts have been made (and continue to be made) by industry bodies to strengthen institutional arbitration capabilities. For example, in 2017 AMINZ published new arbitration rules, which reflected trends in arbitral institutions internationally.<sup>61</sup> AMINZ has also developed an Arbitration Appeals Tribunal as an alternative to taking an appeal to the High Court, to ensure the confidentiality of arbitration proceedings is preserved.<sup>62</sup>

It is also notable that AMINZ has been designated as the 'appointing body' responsible for resolving differences between parties in the appointment of arbitrators.<sup>63</sup> Parliament's decision to create the process for the 'appointing body' to resolve such differences, and the government's subsequent decision to appoint AMINZ to this role, serves as recognition of the important role of institutions, and the expertise and capabilities of AMINZ.

*C. Submission of disputes to arbitration vs. litigation*

There are no published statistics on the number of disputes submitted to arbitration.<sup>64</sup> However, it has been observed that commercial arbitration has increased in New Zealand in the past two decades and that the development of rules by the likes of AMINZ, NZDRC, NZIAC and the Building Disputes Tribunal (BDT) has also resulted in a steady increase in the number of institutional arbitrations. At the same time, there has been a decline in consumer arbitration since 2007 when a requirement was introduced in s 5 of the NZAA for a separate written arbitration agreement to be entered into after a dispute has arisen.<sup>65</sup>

*D. Relevant statistical data*

1. Sectors where arbitration is routinely used

There are no statistics publicly available regarding the sectors where arbitration is used routinely. However, AMINZ reports that it made nine arbitrator appointments in the 2018–19 financial year, with the majority of those arbitrations being in the construction/building area.<sup>66</sup>

2. Time taken for enforcement/annulment proceedings

There are no statistics publicly available.

3. Percentage of awards annulled/not enforced

There are no statistics publicly available.

*E. Statistics/information on the length of court proceedings in commercial cases*

A 2017 study by the University of Otago Legal Issues Centre found that, on average, a case filed in the High Court will conclude within 191.5 days, but 'general proceedings'<sup>67</sup> frequently exceeded the average case length, taking an average of 381 days to conclude.<sup>68</sup>

In terms of judgment delivery, the High Court of New Zealand recorded in its 2018 *Annual Review* that it has set a standard of 90 per cent of civil judgments delivered within three months of the hearing or last submissions, and in 2018 the actual result was 91.4 per cent (the court delivered 2,547 judgments in 2018).<sup>69</sup>

Under section 170 of the Senior Courts Act 2016, the High Court is required to periodically publish information about the number of judgments of the Court which the Chief High Court Judge considers are 'outstanding beyond a reasonable time for delivery' – in application, this encompasses any judgment over six months old. At 31 March 2018, there were eight judgments outstanding beyond a reasonable time (and a further nine had become outstanding beyond a reasonable time, but had been resolved by 31 March). At 30 September 2018, there were four judgment then outstanding beyond a reasonable time (and a further 10 had become outstanding beyond a reasonable time, but had been resolved by 30 September).<sup>70</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 216 days to resolve a commercial dispute in a first-instance court in New Zealand – 7 days for filing and service of court processes, 167 days for trial and judgment and 42 days for enforcement of judgment.<sup>71</sup> New Zealand ranks well above average for the OECD high income group, in which it takes an average of 582.4 days to resolve commercial disputes in first-instance courts.<sup>72</sup> In terms of overall ease of enforcing contracts, New Zealand scored 71.48 of 100 and ranked 21 of 190.<sup>73</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>74</sup>

*F. Participation by foreign counsel in international arbitrations*

In New Zealand, only people holding a current New Zealand practising certificate issued by the New Zealand Law Society are 'lawyers'.<sup>75</sup> A foreign qualified lawyer without a New Zealand practising certificate is not a 'lawyer' for the purposes of the New Zealand regulatory regime.

Section 21 of the Lawyers and Conveyancers Act 2006 (LCA) provides that it is an offence for a person who is not a lawyer to provide legal services and describe themselves as a 'lawyer, law practitioner, barrister, solicitor, barrister and solicitor, attorney-at-law, or counsel'.<sup>76</sup> 'Legal services' is defined as the

services provided in carrying out 'legal work', which is defined, in turn, as including 'mediation, conciliation, or arbitration services'.

There are also certain 'reserved areas of work', which may be undertaken only by New Zealand 'lawyers' (as defined). These include appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal, and representing any other person before any New Zealand court or New Zealand tribunal.<sup>77</sup> 'New Zealand tribunal' is not defined, but is likely to include any arbitral tribunal seated in New Zealand. It is an offence for a person other than a 'lawyer' (as defined in the Lawyers and Conveyancers Act) to undertake such work.<sup>78</sup>

There are two key exceptions, however:

- a. Section 25 of the LCA provides that members of the legal profession of a country outside New Zealand (not holding a New Zealand practising certificate) may describe themselves in the terms set out in s21(1)(b)<sup>79</sup> and may, among other things, provide:

... legal services (including appearances) in New Zealand in relation to any proceedings before any court or other body if, for the purpose of those proceedings, it is essential that the provider of those legal services has knowledge of—

- i. the law of a country or territory outside New Zealand; or
- ii. international law.<sup>80</sup>

- b. Section 27 of the LCA provides that persons may appear as advocates for, or represent, any other person before any court or tribunal, where that appearance or representation is allowed or required by any Act. Article 24(4) of schedule 1 of the NZAA appears to provide this authority, stating that parties to an arbitration may be 'represented by any other person of their choice' at a hearing, any other meeting of the arbitral tribunal under article 24, or in any proceedings conducted on the basis of documents or other materials.

As such, lawyers from other jurisdictions may appear in arbitration proceedings seated in New Zealand, but would need to take care that they are complying with the requirements of the LCA in doing so.<sup>81</sup>

#### G. *Statistics on judges and lawyers per capita*

The New Zealand Law Society has reported that as of 1 February 2019, there were 13,530 lawyers practising in New Zealand (with a further 803 based overseas holding New Zealand practising certificates). This means there is approximately 1 lawyer for every 365 citizens in New Zealand.<sup>82</sup>

As at 31 July 2019, there were 238 judges in New Zealand, as follows:<sup>83</sup>

- a. six judges of the Supreme Court, and one acting judge;
- b. 10 judges of the Court of Appeal;
- c. 46 judges of the High Court (including seven associate judges); and
- d. 157 District Court judges, which includes nine Environment Court judges and four judges working full-time in other roles, such as the Chief Coroner and Chair of the Independent Police Complaints Authority;
- e. five judges of the Employment Court; and
- f. 14 judges of the Māori Land Court.

Statistics New Zealand estimated that the resident New Zealand population as at 31 March 2019 was approximately 4.96 million people, meaning there is approximately one judge per 20,840 citizens.

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid is not expressly available for arbitration, or any other form of commercial alternative dispute resolution. Legal aid in New Zealand is governed by the Legal Services Act 2011 and it does provide assistance through funding for legal services in relation to private mediation under section 27 of the Act.<sup>84</sup> There is no mention of arbitration. Legal aid may be available for certain civil disputes that may be heard before certain courts or tribunals (including in relation to debt recovery, breaches of contract, and bankruptcy proceedings), but is generally limited to litigation involving natural persons.<sup>85</sup> The Act also covers trustee corporations applying for legal aid in connection with proceedings in which it is concerned in a representative, fiduciary, or official capacity.<sup>86</sup> The Interpretation Act defines person as to include a corporation sole, a body corporate, and an unincorporated body, so there is potential for a business to come under this definition and get legal aid.<sup>87</sup> There are community law centres across New Zealand that provide assistance to citizens in need in civil and criminal matters. However, community law centres do not provide advice to businesses.

### B. *Third-party funding*

The legal and regulatory framework governing third-party funding in New Zealand has been described as 'antiquated',<sup>88</sup> but third-party funding is increasingly being used in New Zealand. The Law Commission is set to review litigation funding in New Zealand. While the review has been deprioritised since it was first announced in 2017, it is likely the review will take place across the next few years and reform will follow.<sup>89</sup>

In the absence of legislation regulating third-party funding, the applicable principles have been developed by the courts. Although the common law torts of maintenance and champerty have not yet been abolished, the approach taken in respect of those torts is somewhat 'relaxed' and the courts have been 'cautiously permissive' of litigation funding.<sup>90</sup> Willy and Sissons have observed that third-party funding does not yet appear to have emerged in arbitration proceedings, but that 'it is only a matter of time before it does so'.<sup>91</sup>

There are a number of litigation funders in the market, both local (including LPF Group Ltd, Litigation Funding Ltd, Tempest Litigation Funders, and Earthquake Services Ltd) and international (Harbour Litigation Funding (UK) and Litigation Lending and IMF Bentham (Australia)).<sup>92</sup>

### C. *Contingency fees*

Contingency fees between lawyers and clients are permitted in New Zealand, and regulated by the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.<sup>93</sup> Conditional fee agreements authorised under those instruments expressly exclude liability for proceedings founded on the torts of maintenance or champerty.<sup>94</sup>



#### D. Insurance for legal expenses

Liability policies also generally make some provision for the costs of defending or settling a claim against the assured. To obtain insurance for defence costs, an express term is required. A liability insurer may undertake the defence of an action against its assured.<sup>95</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 New Zealand Law Commission (1991), *Arbitration*, (NZLC R20) at [5] and [25]–[32].
- 3 New Zealand Law Commission (1988), *Arbitration: A Discussion Paper* (NZLC PP7) at [7] and [18]–[20]; and New Zealand Law Commission (1991) *Arbitration*, at [5] and [25]–[32]. See also David A R Williams and others (2017), *Williams & Kawharu on Arbitration*, 2nd edn, LexisNexis, Wellington, 37–38.
- 4 New Zealand Law Commission (1991) *Arbitration*, at [5], [35] and Ch 3.
- 5 See Arbitration Bill 1996 (117-2).
- 6 Williams and others (2017), *Williams & Kawharu* at [2.5].
- 7 New Zealand Law Commission (2003), *Improving the Arbitration Act 1996* (NZLC R83).
- 8 Arbitration Amendment Act 2007, s 6, introducing ss 14A–14I into the Arbitration Act 1996.
- 9 Arbitration Amendment Act 2007, s 5, amending s 11 of the Arbitration Act 1996.
- 10 Arbitration Amendment Act 2016, amending the definition of ‘arbitral tribunal’ in s 2, adding s 6A, and amending art. 11 of sch 1 of the Arbitration Act 1996.
- 11 *New Zealand Gazette* (2017), ‘Appointment of Arbitration Body’, 2 March.
- 12 See John Walton (2019), ‘The Arbitration Amendment Act 2019: Further refinement’, *LawTalk* 928, 28.
- 13 Where a party takes no steps in the arbitration at all, however, that party will not be precluded by the amendment from challenging the award at the enforcement and recognition stage.
- 14 *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57.
- 15 Trusts Act 2019 (NZ), ss 142–48.
- 16 Arbitration Act 1996 (NZ), s 5(b).
- 17 For a helpful comparison between the Model Law and the Arbitration Act 1996 (NZ), see Williams and others (2017), *Williams & Kawharu*, Appendix 3.
- 18 See Arbitration Bill 1996 (117-2) at ii.
- 19 Arbitration Act 1996, s 6.
- 20 Arbitration Act 1996, sch 1, art. 20.
- 21 *Ibid.*, art. 22.
- 22 *Ibid.*, art. 24.
- 23 *Ibid.*, sch 1, art. 26.
- 24 Williams and others (2017), *Williams & Kawharu* at [2.4.3], citing *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 (HC).
- 25 Anthony Willy and Terry Sissons (2018), *Arbitration*, 2nd edn, Thomson Reuters, Wellington, at [1.4].
- 26 See New York Arbitration Convention, ‘Contracting States’ <<http://www.newyorkconvention.org/countries>> accessed on 31 July 2019.
- 27 Arbitration Act 1996 (NZ), s 5(f) and sch 3. Section 5(f) also states that a purpose of the Act is also to give effect to New Zealand’s obligations under the Protocol on Arbitration Clauses (1923), and the Convention on the Execution of Foreign Arbitral Awards (1927). The English texts of all these instruments are also set out in sch 3 of the Act.

- 28 See World Bank Group, International Centre for settlement of Investment Disputes, 'List of Contracting States and other Signatories of the Convention' <<https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>> accessed 31 August 2019.
- 29 Compare, for example, the Agreement between New Zealand and Singapore on a Closer Economic Partnership (opened for signature 14 November 2000, entered into force 1 January 2001), art. 34 and New Zealand–Thailand Closer Economic Partnership Agreement (opened for signature 19 April 2005, entered into force 1 July 2005, against Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (signed 7 April 2008, entered into force 1 October 2008), art. 153, and Free Trade Agreement between New Zealand and the Republic of Korea (signed 23 March 2015, entered into force 20 December 2015), arts 10.18–10.21.
- 30 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018).
- 31 UNCTAD, Investment Policy Hub, 'New Zealand' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 August 2019.
- 32 Asian Regional Integration Center, 'FTAs: New Zealand' <[aric.adb.org](http://aric.adb.org)> accessed 31 August 2019.
- 33 See Williams and others (2017), *Williams & Kawharu* at n 118, citing, among other cases, *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA); *Safe Kids in Daily Supervision Ltd v McNeill* [2012] 1 NZLR 714 (HC); *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383; and *Danone Asia-Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZHC 1681.
- 34 Williams and others (2017), *Williams & Kawharu* at [2.11].
- 35 Trusts Act 2019 (NZ), ss 142–48.
- 36 See generally Williams and others (2017), *Williams & Kawharu* at Ch 19.
- 37 See also art. 34 of sch 1 to the Arbitration Act 1996, regarding applications for settling aside arbitral awards.
- 38 *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA) at [47] and [56].
- 39 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [76].
- 40 *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359 at [21]–[23]. See the discussion in Williams and others (2017), *Williams & Kawharu* at [17.5.7] in relation to art. 34(2)(b)(ii), and [19.9.3] in relation to art. 36(2)(b)(ii).
- 41 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792.
- 42 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383.
- 43 *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770.
- 44 The italicisation and reference to the emphasis were included in clause 1.2.
- 45 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [38]–[46] and [90].
- 46 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [67]–[72].
- 47 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [81]–[86].
- 48 Williams and others (2017), *Williams & Kawharu* at [17.5.2]. See also [2.11], where the authors note: '[Carr involved] the setting aside of an otherwise unimpeachable award because of the inclusion of an impermissible provision in the arbitration agreement [which] is hard to justify.'
- 49 Law Commission *Arbitration* (NZLC R20, 1991) at [309] (and generally at [308]–[313]).
- 50 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [39].
- 51 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [52].
- 52 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]–[42]. See further *Teak Construction Ltd v Andrew Brands Ltd* [2015] NZHC 2312; Williams and others (2017), *Williams & Kawharu* at [3.12] and [4.13.5]; and Amokura Kawharu and Anna Kirk 'Arbitration' [2016] NZ L Rev 615.

- 53 See generally Amokura Kawharu (2018), 'Arbitration of Treaty of Waitangi Settlement Disputes' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3179811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3179811)> accessed 31 August 2019.
- 54 *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [61].
- 55 *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [63].
- 56 *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [104]–[106].
- 57 Willy and Sissons have observed that 'the availability of institutional arbitrations managed by two established dispute resolution bodies in New Zealand, AMINZ and NZDRC, could see institutional arbitrations overtaking ad hoc arbitrations as the norm' in New Zealand: Willy and Sissons (2018), *Arbitration* at 45.
- 58 For example AMINZ *Arbitration Rules* (2017); and AMINZ *Emergency Arbitration Protocol*.
- 59 Arbitrators' and Mediators' Institute of New Zealand Inc – Te Mana Kaiwhakatau, Takawaenga o Aotearoa <[www.aminz.org.nz](http://www.aminz.org.nz)> accessed 31 August 2019.
- 60 New Zealand International Arbitration Centre <[www.nziac.co.nz](http://www.nziac.co.nz)> accessed 31 August 2019; New Zealand Dispute Resolution Centre | Te Pokapū Mō te Whakatau Teatohe o Aotearoa <[www.nzdrcc.co.nz](http://www.nzdrcc.co.nz)> accessed 31 August 2019.
- 61 The NZIAC and NZDRT also offer modern arbitration rules that reflect international trends.
- 62 Arbitrators' and Mediators' Institute of New Zealand Inc – Te Mana Kaiwhakatau, Takawaenga o Aotearoa <[www.aminz.org.nz](http://www.aminz.org.nz)> accessed 31 August 2019.
- 63 Arbitration Act 1996, s 6A; and 'Appointment of Arbitration Body' (2 March 2017) *New Zealand Gazette* No 2017-go1094.
- 64 In terms of the courts, see *Report from the High Court 2018: The Year in Review* <<https://www.courtsofnz.govt.nz/publications/judicial-reports>> accessed 31 August 2019; and District Court of New Zealand *Annual Report 2018* <<http://www.districtcourts.govt.nz/reports-publications-and-statistics/annual-reports/>> accessed 31 August 2019.
- 65 Williams and others (2017), *Williams & Kawharu* at [1.1.9].
- 66 Email AMINZ 3 September 2019.
- 67 At the time of the study, the High Court divided civil disputes into six categories: appeals, bankruptcy, company liquidation, general proceedings, judicial review, and originating application: Bridgette Toy-Cronin and others *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, November 2017) at 35. General proceedings are described by the Ministry of Justice as cases where the plaintiff wants to recover money or settle a dispute with another person or an organisation: Ministry of Justice 'Going to Court' <[www.justice.govt.nz](http://www.justice.govt.nz)> accessed 31 August 2019.
- 68 Bridgette Toy-Cronin and others (2017), *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, November 2017) at i and Ch 5.
- 69 *Report from the High Court 2018: The Year in Review* at 4 <<https://www.courtsofnz.govt.nz/publications/judicial-reports>> accessed 31 August 2019.
- 70 *Ibid.*, 4–5.
- 71 World Bank (2019), Doing Business, 'Enforcing Contracts', New Zealand' <[https://www.doingbusiness.org/en/data/exploreconomies/new-zealand#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/new-zealand#DB_ec)> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 72 World Bank (2019), Doing Business, 'Enforcing Contracts', New Zealand'.
- 73 *Ibid.*
- 74 *Ibid.*
- 75 See definition of 'lawyer' in s 6 of the Lawyers and Conveyancers Act 2006.
- 76 See also ss 23 and 24 of the Lawyers and Conveyancers Act 2006.

- 77 Lawyers and Conveyancers Act 2006, s 6 (definition of 'reserved areas of work').
- 78 Lawyers and Conveyancers Act 2006, s 24.
- 79 Subject to the requirements in s 25(2). Those terms are: 'lawyer, law practitioner, barrister, solicitor, barrister and solicitor, attorney-at-law, or counsel'.
- 80 Lawyers and Conveyancers Act 2006, s 25.
- 81 See generally Phillip Green, Barbara Hunt and Tomas Kennedy-Grant, *Green & Hunt on Arbitration Law and Practice* (online looseleaf edn, Thomson Reuters) at [ARSch1.24.06] and [ARSch1.24.07]; and New Zealand Law Society (2017), 'Practice Briefing: Overseas lawyers working in New Zealand' <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)> accessed 31 August 2019.
- 82 Geoff Adlam (2019), 'Snapshot of the Profession 2019', *LawTalk* 27 at 27.
- 83 For information on tribunals, See <<https://www.justice.govt.nz/tribunals/>>.
- 84 Legal Services Act 2011, s 27
- 85 Legal Services Act 2011, ss 7 and 10–12.
- 86 *Arbitrators' Institute of New Zealand v Legal Service Board* [1995] 2 NZLR 202 (HC).
- 87 Interpretation Act 1999 No 85. c. 1, s 29.
- 88 Adina Thorn and Rohan Havelock (2018), 'New Zealand', in Leslie Perrin (ed.), *The Third Party Litigation Funding Law Review*, 2nd edn, Law Business Research Ltd, 101.
- 89 See Law Commission (2018), 'Review of Class Actions and Litigation Funding' (10 May) <[www.lawcom.govt.nz](http://www.lawcom.govt.nz)> accessed 31 August 2019.
- 90 See Thorn and Havelock (2018), 'New Zealand', in Perrin, *The Third Party Litigation Funding Law Review*, 101; *PriceWaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735; and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.
- 91 Willy and Sissons (2018), *Arbitration*, at [15.4.16(1)].
- 92 Thorn and Havelock (2018), 'New Zealand', in Perrin, *The Third Party Litigation Funding Law Review* 101; and New Zealand Law Society 'Seven litigation funding services in NZ' <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)> accessed 31 August 2019.
- 93 Lawyers and Conveyancers Act 2006, ss 333–36; and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 9.8–9.12.
- 94 See Willy and Sissons (2018), *Arbitration*, at [15.4.16(2)].
- 95 See Robert Merkin and Chris Nicoll (eds) (2014), *Colinvaux's Law of Insurance in New Zealand*, Thomson Reuters, Wellington, at [16.1.4]–[16.1.6].

# NIGERIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Nigeria is a common law country by virtue of British colonial rule that began in the nineteenth century. In 1914, the Colony and Protectorate of Southern Nigeria was merged with the Northern Nigeria Protectorate to form the single colony of Nigeria. Nigeria attained its independence on 1 October 1960.

The legal framework for arbitration in Nigeria dates from 1914, the year of the amalgamation of the protectorates, with the passing of the Arbitration Ordinance of 1914 on 31 December 1914 (the '1914 Act').<sup>2</sup> The 1914 Act was identical to and modelled on the English Arbitration Act of 1889.<sup>3</sup>

### B. *Description of prior legislation and reasons for its replacement*

The 1914 Act applied throughout the country as Nigeria was a unitary state in 1914.<sup>4</sup> After Nigeria became a federation in 1954, the 1914 Act was re-enacted in 1958 as the Arbitration Act, Cap. 13, Laws of the Federation of Nigeria, 1958 (the '1958 Act'). The 1958 Act also applied throughout the country and was adopted at that time by each federating region (now states) into its own laws.<sup>5</sup>

However, the 1958 Act was repealed by the Arbitration and Conciliation Decree, No. 11 of 14 March 1988 (the '1988 Decree'). The 1988 Decree was promulgated by a federal military government following a military takeover of the democratic regime in 1988. It applied throughout the federation and superseded all state arbitration laws and the 1979 Constitution in existence at the material time.<sup>6</sup> The 1988 Decree was modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.<sup>7</sup> Significantly, Nigeria became the first African country to adopt the Model Law when it promulgated the 1988 Decree.<sup>8</sup>

A democratic regime was restored to power in 1999. The democratic regime ushered in the current 1999 Constitution of Nigeria, which preserved the validity of the 1988 Decree as an existing law.<sup>9</sup> Consequently, the 1988 Decree was renamed the Arbitration and Conciliation Act 1988<sup>10</sup> and remains the extant arbitration act in Nigeria.

Further, Nigeria is currently a constitutional democracy and federation with 36 states and a Federal Capital Territory. Pursuant to the 1999 Constitution, legislative powers are shared between the federal government and the federating states, with the former having exclusive legislative competence over certain matters. It is unsettled whether arbitration in Nigeria falls within the exclusive legislative competence of the federal government or it is a matter of shared legislative competence. In this regard, some states still operate their existing state arbitration laws and at least one state has enacted a new law to govern arbitration proceedings within the state. However, federal arbitration law will always prevail in the event of a conflict between it and a state arbitration law.<sup>11</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Commercial arbitration in Nigeria is currently regulated under three statutory instruments:

- a. The Arbitration and Conciliation Act 1988;<sup>12</sup>
- b. The Lagos State Arbitration Law 2009;<sup>13</sup> and
- c. The 1914 Act.

The Arbitration and Conciliation Act, 1988 (ACA) was enacted on 14 March 1988. The ACA is the federal arbitration law in Nigeria. It mandatorily applies to all domestic arbitrations where parties have not chosen another law to govern their proceedings.<sup>14</sup> It is the principal arbitration statute, designed 'to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration' in Nigeria.<sup>15</sup> The Lagos State Arbitration Law 2009 (LSAL) was enacted and came into force on 18 May 2009. The LSAL governs arbitration proceedings where Lagos State is the seat of arbitration, unless the parties have expressly agreed otherwise.<sup>16</sup> The 1914 Act is still applicable as the state arbitration law in all the states in Nigeria except for Lagos State.<sup>17</sup>

#### *B. Scope of application to domestic and international arbitrations*

The Arbitration and Conciliation Act applies to both domestic and international arbitrations seated in Nigeria. Part I of the ACA applies to domestic commercial arbitration, while Part III of the ACA applies only to international commercial arbitration.

It is unsettled whether the LSAL applies to both domestic and international arbitrations seated in Lagos. The LSAL makes no distinction between domestic and international arbitration, and simply states that it applies to 'all arbitration within the state'.<sup>18</sup> The Nigerian courts have made no pronouncement on this point. Considering Nigeria's federal structure, it has been suggested that the Lagos Law, while broad in scope, should not be applicable to international arbitrations proceedings seated in Lagos.<sup>19</sup> In contrast, it has been argued that the ability of parties contemplating international arbitration to select between federal and state arbitration law is consistent with the distribution of legislative competence in the 1999 Constitution and the principle of party autonomy.<sup>20</sup>

#### *C. Details and/or relevant amendments and modifications*

Both the ACA and the LSAL have not been amended to date. However, there is a pending Arbitration and Conciliation Act (Repeal and Re-enactment) Bill, 2017 (the 'Bill'). The Bill has been passed by the Senate (the upper legislative chamber) and is currently pending before the House of Representatives. If passed into law, the Bill will repeal the ACA.

The Bill contains certain innovative provisions which reflect modern and contemporary best practices and will enhance the perception of Nigeria as an attractive destination for arbitration. It incorporates the 2006 amendments to the Model Law. Some key features of the Bill include provisions that:

- a. expand the requirement that an arbitration agreement must be in writing to include electronic communication;
- b. empower the courts to grant interim measures in aid of arbitration proceedings in Nigeria or abroad;<sup>21</sup>
- c. provide for the recognition and enforcement by courts of interim measures of protection issued by arbitral tribunals irrespective of the country in which it was issued subject to certain conditions;<sup>22</sup>

- d. guarantee the immunity of arbitrators, appointing authority and arbitral institutions from liability for their actions or omissions in the discharge of their official functions;<sup>23</sup>
- e. tacitly recognise the availability of third-party funding in arbitration proceedings;<sup>24</sup> and
- f. provide for emergency arbitration proceedings and the appointment of an emergency arbitrator.<sup>25</sup>

*D. Relationship to the UNCITRAL Model Law*

The ACA is largely based on the 1985 Model Law. It adopted the Model Law with minimal modifications. Like the Model Law, the ACA recognises a greater degree of autonomy and responsibility on the arbitral tribunal and parties, ensures minimal judicial intervention in the arbitral process, and recognises core fundamental doctrines of separability and competence-competence.<sup>26</sup>

The LSAL is largely based on the Model Law and incorporates its 2006 amendments.<sup>27</sup> It provides for contemporary arbitration provisions such as provisions relating to the consolidation or concurrent arbitral proceedings,<sup>28</sup> arbitrator immunity,<sup>29</sup> powers of tribunal to award interest,<sup>30</sup> and order security for costs<sup>31</sup> or exercise a lien over its award until fees are paid.<sup>32</sup>

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The ACA goes a step beyond the Model Law, to restrict court intervention/ involvement during the challenge of an arbitrator,<sup>33</sup> decision on the termination of the mandate of an arbitrator,<sup>34</sup> and a tribunal ruling on its competence.<sup>35</sup> In these instances, the tribunal is the final deciding authority. Other areas of divergence are found in issues concerning the set aside procedure for awards,<sup>36</sup> extension of time for performance of any act under the ACA,<sup>37</sup> definition of international arbitration,<sup>38</sup> etc. In these areas, there are no equivalent provisions in the Model Law.<sup>39</sup>

*F. Powers and duties of arbitrators*

The ACA empowers the arbitrators (i) to order interim measures of protection;<sup>40</sup> (ii) to appoint experts;<sup>41</sup> (iii) to determine its jurisdiction;<sup>42</sup> (iv) to determine admissibility, relevance, materiality and weight of any evidence placed before it; and (v) to administer oaths to or take the affirmations of the parties and witnesses appearing, etc.<sup>43</sup>

*G. Arbitrator immunity*

The ACA is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist. In contrast, section 18 of the LSAL confers immunity on arbitrators, making them not liable for their actions or omissions in the discharge of their arbitrator functions, unless the act or omission is determined to have been in bad faith.<sup>44</sup>

**III. INTERNATIONAL INSTRUMENTS**

*A. Signatory to the New York Convention*

Nigeria became a party to the 1958 New York Convention on 17 March 1970.

*B. Reservations to the New York Convention*

Nigeria has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another

contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>45</sup>

#### C. *Method of domestic implementation of the New York Convention*

The New York Convention is given effect in the country through the operation of section 54 of the ACA,<sup>46</sup> which incorporates the New York Convention verbatim into the Second Schedule of the ACA. Section 54 of the ACA provides that 'without prejudice to section 51 and 52 of the Act, ...the [New York Convention] shall apply to any award made in Nigeria or in any contracting state: provided that such contracting state has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria ... and that the Convention shall apply only to differences arising out of legal relationship which is contractual.'

Nigeria appears to have indirectly waived its reciprocity reservation under the Convention by reproducing verbatim in sections 51 and 52 of the ACA, the provisions of articles IV and V of the New York Convention and the grounds for the refusal of recognition and enforcement of awards. Both sections read together with section 54 of the ACA effectively makes any arbitral award, 'irrespective of the country in which it is made', enforceable in Nigeria, subject to the same provisions on recognition and enforcement as contained in New York Convention.<sup>47</sup>

#### D. *Other international/regional treaties*

Nigeria is a contracting state to the World Bank Convention for the Settlement of Investment Disputes 1965 ('ICSID Convention').<sup>48</sup> It domesticated the ICSID Convention by enacting the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967.<sup>49</sup>

Nigeria has entered into 30 bilateral investment treaties, of which 15 are currently in force (Finland, Spain, Serbia, Sweden, China, Switzerland, Italy, South Africa, Germany, Romania, Republic of Korea, Taiwan, Netherlands, United Kingdom, and France).<sup>50</sup> Nigeria is also a party to the Agreement Establishing the African Continental Free Trade Area (AfCTA).<sup>51</sup>

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

Nigerian courts mostly take a pro-arbitration approach towards the enforcement of arbitration agreements.<sup>52</sup> Sections 4 and 5 of the ACA empower the courts to stay an action which is the subject of an arbitration and refer parties to arbitration. The power of the court in this regard is discretionary, subject to the applicant meeting certain conditions.<sup>53</sup> However, given the contractual nature of arbitration, the courts are usually inclined to honour the commercial intent of the parties by staying proceedings commenced in breach of arbitration agreements. A few examples are considered below.<sup>54</sup>

In *M.V. Lupex v N.O.C. & S. Ltd*,<sup>55</sup> the Respondent charterer, in violation of clause 7 of the parties' charter party agreement which provided for arbitration in London under English law, commenced proceedings at the Federal High Court and applied and obtained *ex parte* orders for the arrest of a ship. The owners sought a stay of the proceedings on the grounds that the parties were



involved in an ongoing arbitration in London. Both the Federal High Court and the Court of Appeal refused the application for stay. On a further appeal to the Supreme Court, the Supreme Court in unequivocal terms held the parties bound to their arbitration agreement. The Supreme Court reasoned that the respondent 'having voluntarily submitted to arbitration as contracted by the parties, it was an abuse of the process of the court for it to institute a fresh suit in Nigeria against the appellant in respect of the same dispute during the pendency of the arbitration'. The Supreme Court held further that:

the statutory discretion of the court under sections 4 and 5 of the Arbitration and Conciliation Act for the stay of court proceedings in favour of arbitration may not be exercised to refuse a stay with a view to favour the allegation of a party that litigation within jurisdiction is more convenient than arbitration as expressly agreed to by the parties. The law is also settled that the mere fact that a dispute is of a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to.

In *Kano State Urban Development Board v Fanz Construction Ltd*,<sup>56</sup> the dispute arose from a construction agreement between the parties. Fanz Construction Ltd initially issued court proceedings against the Kano State Urban Development Board (KSUDB) but subsequently applied for the case to be referred to arbitration. An award was issued in favour of Fanz. KSUDB then sought to set aside the award, arguing that because steps had been taken in the court proceedings, the trial judge was obliged to determine the parties' dispute and therefore lacked jurisdiction to stay proceedings and refer the dispute to arbitration. The Supreme Court rejected this argument. The Supreme Court held that section 5 of the Arbitration Law conferred the trial court with jurisdiction to either grant or refuse an application for stay of proceedings. Given the court's discretion in that regard, such jurisdiction was not lost by the fact that it may have arrived at the wrong decision. The Supreme Court held further that '[T]he defendant having allowed the arbitrator to embark on the whole reference, having regard to the agreement of reference between the parties to this case and without any objection, it is now no longer open to him to challenge the authority of the arbitrator to take the reference.'

Further support for the Nigerian judiciary's pro-arbitration resolve is seen in a statement made by the former Chief Justice of Nigeria, Hon. Walter Samuel Onnoghen, in a letter dated 26 May 2017 addressed to all heads of court in Nigeria. In the letter, the Honourable Chief Justice criticised the practice of courts indulging proceedings in breach of arbitration agreements and urged all heads of court to introduce a practice direction that will forbid the courts from entertaining a claim for breach of contract containing an arbitration clause, without first ensuring that the clause is 'invoked and enforced'. In particular, the Honourable Chief Justice addressed the heads of court in the following terms:

- a. No court shall entertain an action instituted to enforce a contract or claim damages arising from a breach thereof, in which the parties have, by consent, included an arbitration clause and without first ensuring that the clause is invoked and enforced;
- b. The courts must insist on enforcement of the arbitration clause by declining jurisdiction and award substantial costs against parties engaged in the practice;

- c. A party who institutes an action in court to enforce breach of contract containing an arbitration clause without first invoking the clause is, himself, in breach of the said contract and ought not to be encouraged by the courts; and
- d. The time saving nature of an arbitration proceedings encourages heightened commercial and economic activities and foreign investments and therefore needs the support and encouragement of the judiciary.<sup>57</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Sections 48(2)(b)(ii) and 52(2)(b)(ii) of the ACA provide for public policy as a ground for setting aside or refusing the enforcement of an award. The ACA does not define the concept of public policy or prescribe the standards for determining its breach. The courts have also not offered guidance in this regard. It is, however, thought that issues of illegality or breach of Nigerian law or state policies will trigger the public policy exception and result in refusing the enforcement or the setting aside of an award.<sup>58</sup>

In *Total (Nig.) Plc v Ajayi*,<sup>59</sup> a non-arbitration-related case, the Court of Appeal made the following statement:

... principle of public policy is to protect public interest by which the courts would not sanction what is injurious to public welfare or against the public good. The phrase public policy, therefore, means that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to public welfare or public good. But public policy, like a chameleon, changes from time to time and from place to place. For a court to contend that an act or transaction is against public policy it must go further to show in what respect the act or transaction is against public policy.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Nigerian courts have recently witnessed a lot of activity emanating from the commercial arbitration sphere. They have been invited to decide a significant amount of arbitration-related cases, involving issues such as the enforcement of arbitration agreements, arbitrability and jurisdiction, interim measures of protection, recognition, and enforcement of arbitral awards. For the most part, they have taken a pro-arbitration approach in their disposition of these cases. A few examples are noted below.<sup>60</sup>

In the context of anti-arbitration injunctions, in *Statoil Nigeria Limited v Nigerian National Petroleum Corporation*,<sup>61</sup> the Court of Appeal overturned the decision of the lower court, which had granted an interim order of injunction restraining the arbitral tribunal from continuing arbitration proceedings. The Court of Appeal held that under the ACA, anti-arbitration injunctions are not permissible and therefore Nigerian courts lack the jurisdiction to grant them. The Court of Appeal relied on section 34 of the ACA, which provides that '[a] court shall not intervene in any matter governed by this Act, except where so provided in this Act'.

The courts have also dealt with the grounds to set aside and enforce awards. Pursuant to sections 29 and 48 of the ACA, an application to set aside an award to the High Court is the exclusive recourse against an award.

A domestic arbitral award can be set aside if the award decides matters beyond the scope of reference or the arbitrator misconducted himself, or the arbitration proceedings or award were improperly procured. A foreign arbitral award may be set aside on grounds similar to those in the UNCITRAL Model Law. In *Guinness Nigeria Ltd v Nibol*,<sup>62</sup> the High Court of Lagos State, in refusing to set aside an arbitral award, reviewed extensive case law on the subject and explained the position of Nigerian law in the following terms:

I am in total agreement with [counsel] that there is a live Judicial Policy of ascribing priority to the upholding of Arbitral Awards, by the regular Courts ... and that there is a narrow compass that attracts the Courts to override this Policy by setting aside an Award. This argument is valid and pivotal for a Court to keep in mind in these type of matters for reasons espoused in the Case Law ...

I am satisfied that the evidential burden on Guinness must necessarily be a strident one ... I agree and hold that it is a high hurdle, indeed, to be scaled, for Guinness to get the regular Court to ignore the contractual, consensual and Arbitral Forum elected by the Parties; elongate the more summary and timely Arbitral experience; and interfere with, subvert and substitute the Arbitrator's Jurisdiction as the Sole Judge of Law or Fact.

I hold that the [final award] represents the contractual and consensual and legally binding outcome precisely within the contemplation and expectations of both [parties] with which this Court will not intervene or interfere or be tempted to sit on Appeal over the Award so as to illegitimately determine whether the findings or conclusions of the Arbitrator is wrong in law or fact.

In relation to arbitrability, under sections 48(b)(i) and 52(2)(b)(i) of the ACA, an award may be set aside if the court determines that the subject matter of the dispute is not capable of settlement by arbitration. In *KSUDB v Fanz*,<sup>63</sup> the Supreme Court set out the criteria for determining arbitrable disputes under Nigerian law. Essentially, the dispute 'must consist of a justiciable issue triable civilly'. The test is that the dispute must be one capable of being 'compromised lawfully by way of accord and satisfaction'.

Recently, the Court of Appeal has taken very different approaches on the issue of arbitrability of tax-related disputes. While matters of taxation ordinarily satisfy the test in *KSUDB*, pursuant to section 251(1)(b) of the 1999 Constitution, issues of taxation, and government revenue are within the exclusive jurisdiction of the Federal High Court. The Court of Appeal decisions in *Esso v NNPC*,<sup>64</sup> *Esso v FIRS*,<sup>65</sup> and *Shell v FIRS*<sup>66</sup> are representative. They all arose from similar facts – dispute regarding the lifting entitlement and cost allocations under a production sharing contract (PSC) between the international oil companies (IOCs) and the Nigerian oil entity ('NNPC'). The IOCs commenced arbitration proceedings against NNPC contending that NNPC breached the PSC by exceeding its oil lifting entitlement and overstating the IOCs' petroleum profit tax liability. NNPC challenged the jurisdiction of the tribunal on the grounds that the arbitration concerned a tax matter and was therefore not arbitrable. The Federal High Court upheld NNPC's objections. On appeal, the Court of Appeal took different approaches:

In *Esso v NNPC*, the Court of Appeal took a pro-arbitration approach by drawing a distinction between tax disputes and contractual disputes. The court held:

There is no doubt in my mind that the claims before the arbitral tribunal as to the Petroleum Profit Tax returns preparation and calculation of lifting allocations can be severed from the tax dispute. This is because they are strictly based on the Production Sharing Contract. The trial court therefore ought to have severed them in setting aside the arbitral award.

Similarly, in *Esso v FIRS*, the court took a pro-arbitration approach, by considering an arbitral tribunal as an extra-judicial body and not a court precluded from the exercise of judicial powers pursuant to section 251 of the 1999 Constitution. In the words of the court:

arbitration by an arbitral tribunal over any of the arbitrable subject matters over which the Federal High Court is vested exclusive jurisdiction by S. 251(1) of the 1999 Constitution is not an encroachment by an Arbitral Tribunal into that exclusive jurisdiction as it is not engaged in the exercise of judicial power over such subject matter. So the trial court was wrong to have interfered with or intervened in the arbitration proceedings and award on the ground that exclusive jurisdiction over the subject matter of the arbitral dispute is vested in the Federal High Court by S. 251(1) of the 1999 Constitution.

In contrast, the court in *Shell v FIRS* did not draw a distinction between contractual disputes and tax disputes, and held that the claims before the tribunal were largely tax matters and were therefore not arbitrable. The Supreme Court has yet to consider this issue.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

There are several active local arbitral institutions in Nigeria. These institutions administer the resolution of disputes by international arbitration and all have modern arbitration rules, which are available on their websites. They include:

- a. Lagos Court of Arbitration (LCA)<sup>67</sup>
- b. Lagos Chamber of Commerce International Arbitration Centre (LACIAC);<sup>68</sup>
- c. Maritime Arbitrators Association of Nigeria (MAAN);<sup>69</sup>
- d. Regional Centre for International Commercial Arbitration Lagos (RCICAL);<sup>70</sup>
- e. International Centre for Arbitration & Mediation, Abuja (ICAMA);<sup>71</sup> and
- f. Janada International Centre for Arbitration & Mediation, Abuja.<sup>72</sup>

There are also a number of foreign arbitral institutions that have branches in Nigeria such as the International Chamber of Commerce (ICC) (Nigeria)<sup>73</sup> and the Chartered Institute of Arbitrators, United Kingdom (Nigeria Branch).<sup>74</sup> Further, there is no empirical evidence available to assess arbitration users' degree of preference for institutional arbitration over ad hoc proceedings. Anecdotal evidence, however, suggests that most arbitrations in Nigeria are ad hoc.<sup>75</sup>

### B. Measures to strengthen institutional arbitration capabilities

The development of institutional arbitral capabilities in the country has been largely driven by the private sector – the arbitral institutions and the international arbitration community. The several arbitral institutions in Nigeria have and continue to routinely deploy innovative initiatives, provide

training, organise arbitration-related conferences, and engage in strategic partnerships and collaborations, aimed at strengthening the institutional arbitration capability, promoting access to justice and growing the arbitration culture in Nigeria.

For example, the Chartered Institute of Arbitrators, Nigeria Branch, on 6 July 2017, launched its Micro, Small and Medium Enterprises (MSME) Arbitration Scheme, to promote and facilitate access by MSMEs to arbitration for resolution of commercial disputes. The scheme is intended to provide simple, cost-effective and timely resolution of commercial disputes in less than 90 days from the appointment of a sole arbitrator or as soon as practicable.<sup>76</sup>

#### C. *Submission of disputes to arbitrations vs. litigation*

There is no available statistical data that discloses the percentage of disputes settled by arbitration in comparison to those resolved through the courts.

There is generally a paucity of statistical information on the conduct of arbitral proceedings and arbitration users in Nigeria. According to the International Chamber of Commerce ('ICC') preliminary statistics for the year 2016, ICC arbitration was increasing in North and sub-Saharan Africa with a 50 per cent increase in the number of participating parties. Record figures were observed, especially for Nigeria, which accounted for 30 of 3,099 parties involved in the 966 new cases administered by the court filed in 2016.

#### D. *Participation by foreign counsel in international arbitrations*

Considering recent Court of Appeal decisions (discussed below), it is unsettled whether, or to what extent, foreign counsel can participate in international arbitration proceedings in Nigeria. In practice, however, there appears to be no restriction on the choice of representation for parties in arbitral proceedings in Nigeria. Indeed, some commentators endorse this view<sup>77</sup> and certain arbitration rules explicitly provide that parties to arbitral proceedings may be represented by 'parties' of their choice.<sup>78</sup>

Pursuant to the Legal Practitioners Act 2004, a person is only entitled to practise as a barrister before the courts or act as a solicitor if he has been admitted to the Nigerian Bar.<sup>79</sup> Article 4 of the Arbitration and Conciliation Rules<sup>80</sup> which is the First Schedule to the ACA provides that: 'the parties *may* be represented or assisted by legal practitioners of their choice'. The use of the word 'may' indicates that parties have the discretion to determine whether to appoint a legal practitioner or not. This fact was recognised by the Court of Appeal in *Stabilini Visinoni Ltd v Mallinson & Partners Ltd*<sup>81</sup> where the court held that representation in arbitration proceedings is open to lawyers and non-lawyers alike.

However, in a later case, *Shell Nigeria Exploration and Production Company ('SNEPCo') & 3 Ors. v Federal Inland Revenue Service & Anor*<sup>82</sup> the Court of Appeal affirmed the decision of the Federal High Court which had set aside an arbitral award on the ground that the notice of arbitration was invalid because it was signed by a firm of United Kingdom solicitors (an extension of a Nigerian rule of litigation procedure that pleadings and all court processes must be signed by an identified legal practitioner whose name is on the Nigerian roll of legal practitioners).

It is unclear if the arbitration in *Shell* qualified as an international arbitration as defined in section 57(2) of the ACA. However, it is doubtful that the fact that the arbitration qualified as an international arbitration would have impacted

the decision of the court in *Shell*. The court treated the provisions of the Legal Practitioners Act as mandatory, although the Court did not consider the previous decision in *Stabilini*. In light of the decision in *Shell*, which is on appeal before the Supreme Court, while foreign counsel are at liberty to participate in Nigerian-seated arbitration, it is prudent that such participation does not extend to the signing any of the documents to be submitted to the tribunal.

#### E. Relevant statistical data

##### 1. Sectors where arbitration is routinely used

Anecdotal evidence suggests that use of arbitration is most prevalent in the oil and gas, construction, telecommunication, and employment sectors.<sup>83</sup>

##### 2. Time taken for enforcement/annulment proceedings

No specific empirical data was found. However, a commentator has suggested that it takes between two and six years to enforce an arbitral award in Nigeria, considering possible appeals of the enforcing court's decision up to the Supreme Court.<sup>84</sup>

##### 3. Percentage of awards annulled/not enforced

No information was available

#### F. Statistics/information on the length of court proceedings in commercial cases.

The 2019 World Bank Doing Business ranking indicates that it takes about 447 days to resolve a commercial dispute in a first-instance court in Nigeria – 40 days for filing and service of court processes, 265 days for trial and judgment and 142 days for enforcement of judgment.<sup>85</sup> Nigeria ranks above average in the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>86</sup> In terms of overall ease of enforcing contracts, Nigeria scored 57.90 of 100 and ranked 92 of 190.<sup>87</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

#### G. Statistics on judges and lawyers per capita

There is no publicly available data that discloses the number of active lawyers and judges in Nigeria. However, it was reported that in 2018 about 6,500 lawyers were admitted to the Nigerian Bar and it is further suggested that since 1962 Nigeria has trained up to 70,000 lawyers.<sup>88</sup>

## VI. FUNDING FOR LEGAL CLAIMS

#### A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)

There may be scope for legal aid to be provided in arbitration. There is an express restriction, however, on legal aid being provided to businesses. The Legal Aid Act 2011 (LAA) provides the legal framework through which the Nigerian Government provides litigation assistance to its indigent citizens. Although it is unclear whether legal aid will be available to persons involved in commercial arbitration proceedings, section 8(4) of the LAA appears sufficiently broad to cover such proceedings.<sup>89</sup> Further, legal aid is not available to corporate bodies. Section 24(2) of the LAA expressly provides that 'references to persons seeking or receiving legal aid do not include references to corporate bodies'.<sup>90</sup>

The LAA was enacted 'to provide for the establishment of a legal aid and access to justice fund into which financial assistance would be made available to indigent citizens to prosecute their claims in accordance with the Constitution'.<sup>91</sup> The LAA establishes the Legal Aid Council,<sup>92</sup> which is empowered to be 'responsible for the operation of a scheme for the grant of legal aid and access to justice in certain matters or proceedings to persons with inadequate resources'.<sup>93</sup>

Legal aid is available in both criminal and civil proceedings.<sup>94</sup> Section 8(4) of the LAA provides that 'legal aid shall also be granted in respect of any breach or denial of any such right, obligation, duty, privilege or service and the [Legal Aid Council] shall be responsible for the representation before any court or tribunal for such civil matters'.<sup>95</sup>

#### B. *Third-party funding*

There is currently no statutory framework regulating third-party funding in Nigeria. The common law torts of champerty and maintenance remain applicable in Nigeria and form the basis by which the validity of such third-party funding arrangements may be assessed. For example, recently the Nigerian courts in *Kessington Egbor v Peter Ogbemor*<sup>96</sup> reaffirmed that the financing of litigation for a share in the proceeds of the suit is champertous.

However, the ACA Amendment Bill recognises the possibility of third-party funding in arbitration. It defines third-party funding as 'an arrangement between a specialist funding company, an individual, a corporation, a bank, an insurance company or an institution (the funder) and a party involved in the arbitration, whereby the funder will agree to finance some or all of the party's legal fees in exchange for a share of the recovered damages'.<sup>97</sup> Article 41(2)(g) of the Bill defines 'costs' in arbitration to include third-party funding. In addition, article 50(1) empowers the arbitral tribunal to fix the costs of arbitration and to consider the 'costs of obtaining third-party funding' in fixing such costs.

While commentators applaud the third-party funding aspects of the Bill as improving access to justice, they caution that there is a need for the country's legislature to go beyond an implicit recognition of third-party funding in Nigeria by, inter alia, (i) expressly acknowledging the application of third-party funding in Nigeria, (ii) abolishing or limiting the common law rules of champerty and maintenance, and (iii) addressing more substantive concerns of third-party funding which impact the integrity of the arbitral process, such as issues of disclosure of funding arrangements.<sup>98</sup>

#### C. *Contingency fees*

Contingency fees arrangements are enforceable in Nigeria. Section 50(1) of the Rules of Professional Conduct for Legal Practitioners 2007 ("RPC") provides that a lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken for a client whether contentious or non-contentious: provided that (a) the contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation; and (b) the contract is not (i) vitiated by fraud, mistake or undue influence; or (ii) contrary to public policy.

In addition, a contingency fee arrangement where a lawyer assumes the expenses or costs of litigation will be unenforceable in law. Section 51 of the RPC prohibits a lawyer from entering into an agreement to pay for or bear the

expenses of his client's litigation, but the lawyer may, in good faith, advance expenses – (a) as a matter of convenience, and (b) subject to reimbursement.

#### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Fabian Ajogwu, SAN (2013), *Commercial Arbitration in Nigeria: Law & Practice*, 2nd edn, 19.
- 3 Paul Obo Idornigie and Isaiah Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration', in Emilia Onyema (ed.), *Rethinking the Role of African National Courts in Arbitration*, Kluwer Law International, 255
- 4 Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration', 255.
- 5 Ajogwu (2013), *Commercial Arbitration*, 19; Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 6 Ajogwu (2013), *Commercial Arbitration*, 19; Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 7 Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 8 United Nations, UNCITRAL (2016), 'Overview of the Status of UNCITRAL Conventions and Model Laws' <<https://uncitral.un.org/sites/uncitral.un.org/files/overview-status-table.pdf>> accessed 31 July 2019; Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 9 Constitution of the Federal Republic of Nigeria 1999, s 315.
- 10 Arbitration and Conciliation Act 1988, Cap. A18, Laws of the Federation of Nigeria 2004.
- 11 Constitution of the Federal Republic of Nigeria 1999, s 4(5). See Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell, 287, 288.
- 12 Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004 of 14 March 1988.
- 13 Lagos State Arbitration Law, No 10 of 2009.
- 14 Funke Adekoya, SAN, 'A Structured Guide to Arbitral Proceedings in Nigeria', <<https://www.lexology.com/navigator/#!results/27/view>> accessed 31 July 2019.
- 15 The Arbitration and Conciliation Act (preamble).
- 16 Lagos State Arbitration Law, s 2 ('From the commencement of this Law, all arbitration within the State shall be governed by the provisions of this Law except where the parties have expressly agreed that another Arbitration Law shall apply').
- 17 Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 18 Lagos Arbitration Law, s 2.
- 19 Emilia Onyema (2010), 'A Critique of the New 2009 Arbitration Law of Lagos State', *Apogee Journal of Business, Property & Constitutional Law*, Vol. 2 No. 5, 1–25.
- 20 Gbenga Bamodu (2018), 'Judicial Support for Arbitration in Nigeria: On Interpretation of Aspects of Nigeria's Arbitration and Conciliation Act', *Journal of African Law*, Vol. 62 No. 2.
- 21 Arbitration and Conciliation Act (Repeal and Re-enactment) Bill 2017, s 19.
- 22 *Ibid.*, s 28.



- 23 Ibid, s 13.
- 24 Ibid., s 50(1)(g).
- 25 Ibid., s 16.
- 26 Ibid., s 12(2).
- 27 Babajide Ogundipe and Lateef Akangbe (2019), 'The International Arbitration Review: Nigeria', *The Law Reviews* <<https://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-10/1196107/nigeria>> accessed 31 August 2019; Adekoya, 'A Structured Guide to Arbitral Proceedings in Nigeria'; Thomson Reuters (2018), 'Arbitration in Africa: Babatunde Fagbohunlu, SAN, Nigeria – part 1' <<http://arbitrationblog.practicallaw.com/arbitration-in-africa-babatunde-fagbohunlu-san-nigeria-part-1-of-2/>> accessed 31 August 2019.
- 28 LSAL, ss 40(1) and (2).
- 29 Ibid., s18.
- 30 Ibid., s 46.
- 31 Ibid., s 26.
- 32 Ibid., s 49(2).
- 33 Arbitration and Conciliation Act, ss 8–9.
- 34 Ibid., s 10.
- 35 Ibid., s 12(1).
- 36 Ibid., ss 29 and 30.
- 37 Ibid., s 36.
- 38 Arbitration and Conciliation Act, s 57(2)(d) (provides that an arbitration is international if 'the parties despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.')
- 39 See generally Emilia Onyema (2013), 'Chapter 2.4: Nigeria', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 163; Elizabeth Idigbe and Betty Biayeibo (2019), 'Nigeria: International Arbitration' <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/nigeria>> accessed 31 August 2019.
- 40 Ibid., s 13.
- 41 Ibid., s 22.
- 42 Ibid., s 12.
- 43 Ibid., s 20(5).
- 44 Lagos Law, ss 18(2) and 18 (3).
- 45 See 'New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 46 Arbitration and Conciliation Act 1988, s 54 mandates the application of the Convention to any award arising out of an international commercial arbitration, made in Nigeria or in any contracting state, 'provided that such contracting state has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria .... and that the Convention shall apply only to differences arising out of legal relationship which is contractual.' See Arbitration and Conciliation Act 1988, s 53.
- 47 Arbitration and Conciliation Act 1988, ss 51 and 52. See generally, Dorothy Ufot (2008), 'The Influence of the New York Convention on the Development of International Arbitration in Nigeria', *Journal of International Arbitration*, Vol. 25 No. 6, 821.
- 48 See ICSID, 'Member States' <[icsid.worldbank.org](https://icsid.worldbank.org)> accessed 31 August 2019.
- 49 Cap. I20 Laws of the Federation of Nigeria 2004 of 1967.
- 50 UNCTAD Investment Policy Hub, 'Nigeria' <[investmentpolicy.unctad.org](https://investmentpolicy.unctad.org)> accessed 31 August 2019.
- 51 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfra-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.

- 52 See e.g., *The Owners of the MV Lupex v Nigerian Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (pt 844) 469. See also Miles et al. (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, 287; Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 53 The conditions include that (i) the application must be made timeously in that the applicant must not submit to the court's substantive jurisdiction to determine the dispute; (ii) it must be appropriate in the circumstances to refer the dispute to arbitration; and (iii) the applicant must be ready and willing to do everything necessary for the proper conduct of the arbitration. See Arbitration and Conciliation Act, s 5; Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration', 255, 268–69.
- 54 See generally, Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'.
- 55 *The Owners of the MV Lupex v Nigerian Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (pt 844) 469.
- 56 *Kano State Urban Development Board v Fanz Construction* [1990] 4 NWLR (Pt. 142) 1.
- 57 Chief Justice of Nigeria Directive CJN/P. D./VOL. 1./001 of 26 May 2017 (urging heads of court to adopt practice direction that will promote the enforcement of arbitration agreements).
- 58 Idigbe and Biayeibo (2019), 'Nigeria: International Arbitration 2019'.
- 59 [2004] 3 NWLR (Pt 860) 270.
- 60 For an extensive discussion of arbitration-related decisions, see Idornigie and Bozimo (2018), 'Chapter 10: Attitude of Nigerian Courts Towards Arbitration'; Ufot (2008), 'The Influence of the New York Convention on the Development of International Arbitration in Nigeria'.
- 61 (2013) 7 CLRN 72.
- 62 (2015) 5 CLRN 65.
- 63 *Kano State Urban Development Board v Fanz Construction* [1990] 4 NWLR (Pt. 142) 1.
- 64 *Esso Exploration & Production Nigeria Ltd. & Anor. v. Nigerian National Petroleum Corporation* (2016) 6 CLRN 25.
- 65 *Esso Exploration and Production Nigeria Limited & Anor. v Federal Inland Revenue Service & Anor.* (Unreported judgment of the Court of Appeal in CA/A/402/2012), delivered on 10 March 2017.
- 66 *Shell Nigeria Exploration & Production & 3 Ors. v Federal Inland Revenue Service & Anor* (2016) 11 CLRN 36.
- 67 Lagos Court of Arbitration <<https://www.lca.org.ng/>> accessed 31 August 2019.
- 68 Lagos Chamber of Commerce International Arbitration Centre <<http://www.laciac.org/>> accessed 31 August 2019.
- 69 Maritime Arbitrators Association of Nigeria <<https://www.maanigeria.org/>> accessed 31 August 2019.
- 70 Regional Centre for International Commercial Arbitration Lagos <<https://rcical.org/>> accessed 31 August 2019.
- 71 International Centre for Arbitration & Mediation, Abuja <<http://www.icama.com/>> accessed 31 August 2019.
- 72 Janada International Centre for Arbitration & Mediation, Abuja <<http://jjcam.org/>> accessed 31 August 2019.
- 73 International Chamber of Commerce (Nigeria) <<https://iccng.org/>> accessed 31 August 2019.
- 74 CIArb UK (Nigeria) <<https://www.ciarbnigeria.org/>> accessed 31 August 2019.
- 75 Mike Bamigboye (2015), 'Does National Court Involvement Undermine the Arbitration Processes?', SSRN <<https://ssrn.com/abstract=2858812>> accessed 31 August 2019.

- 76 CIArb UK (Nigeria), 'Micro, Small and Medium Enterprises (MSME)' <<https://www.ciarnigeria.org/msme>> accessed 31 August 2019.
- 77 Onyema (2013), 'Chapter 2.4: Nigeria', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 163, 167; Idigbe and Biayeibo (2019), 'Nigeria: International Arbitration 2019'.
- 78 See e.g., Lagos Chamber of Commerce International Arbitration Centre Arbitration Rules, art. 7(2); Lagos Court of Arbitration, Arbitration Rules, art. 6.
- 79 Legal Practitioners Act 1975, ss 2 and 7.
- 80 Arbitration and Conciliation Act, s 15(1) ('The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act.')
- 81 [2014] 12NWLR (Pt. 1420) 134 at 172.
- 82 Appeal No. CA/A/208/2012 – (Unreported).
- 83 Thomson Reuters Practical Law (2017), 'Arbitration procedures and practice in Nigeria: Overview', Funke Adekoya, SAN and Prince-Alex Iwu <[https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 31 August 2019; O Ewa and others (2018), 'International Arbitration Practices in Nigeria: A Construction Industry Appraisal', *World Journal of Innovative Research*, Vol. 5 No. 1; Respondent Judiciary Questioning.
- 84 Onyema (2013), 'Chapter 2.4: Nigeria', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 163, 166.
- 85 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/nigeria#DB\\_ecec](https://www.doingbusiness.org/en/data/exploreconomies/nigeria#DB_ecec)> accessed 22 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 86 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 87 Ibid.
- 88 TNV The Nigerian Voice (2010), 'Since 1962, Law School has not [sic] Trained up to 70,000 Lawyers' <<https://www.thenigerianvoice.com/news/27276/since-1962-law-school-has-not-trained-up-to-70-000-lawyers.html>> accessed 31 August 2019.
- 89 Legal Aid Act 2011, s 8(4).
- 90 Legal Aid Act 2011, s 24(2).
- 91 The Legal Aid Act 2011 (preamble). See section 46(4)(b) of the 1999 Constitution which provides that 'the National Assembly shall make provisions for rendering financial assistance to any indigent citizen of Nigeria where his [fundamental human rights] has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim'.
- 92 The Legal Aid Act 2011, s 1.
- 93 Ibid. (preamble).
- 94 Ibid., s 8.
- 95 Ibid., s 8(4).
- 96 (2015) LPELR-24902(CA).
- 97 Arbitration and Conciliation Act (Repeal and Re-enactment) Bill 2017, s 84.
- 98 Kluwer Arbitration Blog (2018), 'Jumping on the TPF Bandwagon: Nigeria's New Arbitration Bill Embraces Third-Party Funding', Joshua Karton and Abayomi Okubote <<http://arbitrationblog.kluwerarbitration.com/2018/06/03/jumping-tpf-bandwagon-nigerias-new-arbitration-bill-embraces-third-party-funding/>> accessed 31 August 2019; Kluwer Arbitration Blog (2018), 'Third Party Funding for Arbitration in Nigeria: Yea or Nay?', Joseph Onele <<http://arbitrationblog.kluwerarbitration.com/2018/06/07/third-party-funding-arbitration-nigeria-yea-nay/>> accessed 31 August 2019; Kluwer Arbitration Blog (2019), 'Third Party Funding in Nigerian Seated Arbitrations: Setting the Law Straight', Opemipo Omoyeni <<http://arbitrationblog.kluwerarbitration.com/2019/03/12/third-party-funding-in-nigerian-seated-arbitrations-setting-the-law-straight/>> accessed 31 August 2019.

# PAKISTAN<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. Relationship with existing or prior English Arbitration Act(s)

The legal system of the Islamic Republic of Pakistan is generally derived from the English model through the adoption of the laws and structures of British India, which itself was based on the nineteenth-century English law. Additionally, it should be noted that Pakistan is an Islamic Republic. Hence, Pakistan's legal system is based on common law, inherited from the British legal system, and Islamic (Sharia) law.<sup>2</sup>

Arbitration and other forms of alternative dispute resolution have had a deep and long history in Pakistan. Historically, use of mediatory and conciliatory institutions such as *jirgas* and *panchayats* was a common method of resolving disputes.<sup>3</sup> Formal regulation of arbitration proceedings were introduced by the British East India Company between 1772 and 1827.<sup>4</sup> Arbitration is currently regulated by the provisions of the Arbitration Act 1940 (the '1940 Act'). The 1940 Act was introduced by the British colonial government in erstwhile undivided India.<sup>5</sup>

### B. Description of prior legislation and reasons for its replacement

The 1940 Act continues to be in force in Pakistan. Pursuant to the Constitution (18th Amendment) Act 2010, the regulation of domestic arbitration was devolved from the federal government to the various provinces. Accordingly, because of the 18th Amendment, provinces are empowered and competent to enact individual legislation for the regulation of arbitration proceedings.<sup>6</sup> Although there have been proposals from provinces to enact such laws, no province has enacted arbitration laws and the federal 1940 Act continues to regulate arbitration proceedings seated in Pakistan.

## II. CURRENT ARBITRAL LEGISLATION

### A. Date of enactment

As explained above, the Act adopted in 1940 is still in force.

### B. Scope of application to domestic and international arbitrations

It seems as if arbitration in general is governed by the 1940 Act, along with the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, which gives effect to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'),<sup>7</sup> explained below. However, it should be noted that Pakistan does not have particular legislation dealing solely with international arbitration as the 1940 Act does not specifically cater for foreign arbitral proceedings. This, unfortunately, has resulted (at times) in court decisions that are perceived to be unfavourable to the development of international arbitration.<sup>8</sup>

### C. Details and/or relevant amendments and modifications

The 1940 Act appears to have been scarcely modified or amended since its initial enactment.

### D. Relationship to the UNCITRAL Model Law

The 1940 Act is not based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ('UNCITRAL Model Law').

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The 1940 Act differs significantly from the UNCITRAL Model Law, the main difference being, as explained above, that the 1940 Act seems to govern only domestic arbitration and not international commercial arbitration. Other differences include:

- a. Tribunal's jurisdiction – while the Model Law specifically provides for the arbitrator(s) competence-competence, the 1940 Act does not;
- b. Stay of proceedings – while the Model Law 'preserves' arbitration by requiring national courts to stay litigation proceedings in case of a valid arbitration agreement, the 1940 Act does not. In fact, under the 1940 Act the national courts of Pakistan are granted discretion to decide whether or not to stay a particular case in favour of arbitration;
- c. Interim relief – unlike the Model Law, the 1940 Act does not provide arbitrators with the power to grant interim relief but gives that power to the court;
- d. Setting aside of awards – the 1940 Act has expanded the 'Model Law list' of grounds on which an award can be set aside. An award may be set aside under the 1940 Act if an arbitrator or umpire misconducts himself or herself or the proceedings, or if the award was improperly procured or is otherwise invalid. Courts have construed these grounds to include serious errors of law by the arbitral tribunal;
- e. The 1940 Act provides for appeals against court orders:
  - i. superseding an arbitration;
  - ii. on an award stated in the form of a special case;
  - iii. modifying or correcting an award;
  - iv. award remittance – the 1940 Act empowers the national courts, in certain circumstances, to remit the award to the arbitrators for reconsideration of matters. In contrast, the Model Law gives this opportunity to the arbitral tribunal, i.e. to resume filing or refusing to file an arbitration agreement;
  - v. staying or refusing to stay legal proceedings where there is an arbitration agreement; and
  - vi. setting aside or refusing to set aside an award.
- f. Proceedings in order to eliminate any ground on which the award can be set aside;
- g. Appointment of arbitrator(s) – when the dispute is to be decided by a three-member panel, the Arbitration Act, just like the Model Law, provides that each party shall appoint one. However, the 1940 Act differs from the Model Law regarding the way it deals with a failure of a party to appoint an arbitrator. In such an event, the 1940 Act allows for the other appointed arbitrator (by the opposing party) to act as a sole arbitrator, and his/her award will be considered binding upon both parties, as if the party failing to appoint an arbitrator had consented;<sup>9</sup>
- h. Number of arbitrators – while the default rule under the Model Law is that in case of a lack of agreement on the number of arbitrators, three arbitrators shall be appointed, under the 1940 Act the rule provides for a sole arbitrator. Additionally, the 1940 Act allows a reference to two arbitrators and an umpire, whereas the Model Law does not expressly provide for it; and

- i. Terminology – the 1940 Act refers to the presiding arbitrator as an 'umpire', while this is not the case under the Model Law.

#### F. Powers and duties of arbitrators

Article 13 of the 1940 Act provides the arbitrators and umpire with the following kinds of powers subject to the parties' agreement:

- a. to administer oath to the parties and witnesses appearing;
- b. to state a special case for the opinion of the court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court;
- c. to make the award conditional or in the alternative;
- d. correct in an award any clerical mistake or error arising from any accidental slip or omission; and
- e. administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.<sup>10</sup>

#### G. Arbitrator immunity

The 1940 Act does not specify whether arbitrators are accorded immunity or not. However, the Peshawar High Court did discuss arbitrators' criminal liability in *Haq Nawaz Khan v the State*.<sup>11</sup> The arbitrators in that case were accused of misappropriating the subject matter (property) of an arbitration.<sup>12</sup>

The High Court held that no criminal actions can be initiated against arbitrators, and that their actions can only be challenged under the Arbitration Act. The High Court did not discuss whether a civil action for damages could be initiated against arbitrators exceeding their authority, but it noted that the Arbitration Act provides for remedies in such cases, e.g. challenge of the award or removal of the arbitrator, or where an arbitrator is removed for failing to proceed with the arbitration or for misconduct, he or she is not entitled to receive remuneration in respect of his or her services (section 11 of the Arbitration Act).

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Pakistan became a party to the New York Convention on 30 December 1958.<sup>13</sup>

#### B. Reservations to the New York Convention

Pakistan has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>14</sup>

#### C. Method of domestic implementation of the New York Convention

The New York Convention is given effect to by the Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act, 2011 (REA 2011). The Act applies to all foreign arbitration awards and agreements made or executed after 14 July 2005.

#### D. Other international/regional treaties

Pakistan is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') which entered into force on 15 October 1966.<sup>15</sup>

Pakistan has concluded 53 bilateral investment treaties in total, 16 of which, are signed but still not in force and five are terminated. The other 32 are still in force (Bahrain, Kuwait, Tajikistan, Lao People's Democratic Republic, Kazakhstan, Bosnia and Herzegovina, Lebanon, Belgium-Luxembourg Economic Union, Japan, Australia, Sri Lanka, Oman, Italy, Mauritius, Denmark, Syrian Arab Republic, Islamic Republic of Iran, United Arab Emirates, Switzerland, Romania, Portugal, Turkey, Singapore, United Kingdom, Spain, Uzbekistan, China, Netherlands, Republic of Korea, France, Sweden, and Germany).<sup>16</sup>

Pakistan is also a party to several multilateral treaties on investments, including the South Asia Free Trade Area Accord, the Agreement on the Promotion and Protection of Investments among Member States of the Economic Cooperation Organization, and the Agreement on Promotion, Protection and Guarantee of Investments among the Member States of the Organisation of Islamic Conference.<sup>17</sup>

Four free trade agreements have been signed and entered into force by Pakistan (Pakistan–Sri Lanka FTA, Pakistan–People's Republic of China FTA, Indonesia–Pakistan FTA, and South Asian Free Trade Area).<sup>18</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

Pakistani courts have attempted to create a supportive environment for arbitration, while still grappling with the inherent limitations of the 1940 Act. Notably, judgments have recognised the separability presumption<sup>19</sup> and stayed litigation proceedings in favour of arbitration agreements.<sup>20</sup> Regrettably, the 1940 Act permits courts to set aside awards for misappreciation of evidence and the law, and therefore permits *de novo* review of arbitral awards.<sup>21</sup> This has permitted courts to interfere in arbitral awards in a wide range of circumstances, thereby inhibiting the finality of arbitral awards.<sup>22</sup>

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

The 1940 Act does not have 'public policy' as a ground on which an award can be set aside. In fact, it provides for only three grounds.<sup>23</sup>

With regard to international awards, Pakistan is a party to the New York Convention, which has 'public policy' as a ground on which an award can be set aside.

The meaning of public policy has been set out by the Pakistani Supreme Court in *Yasin Khan v Feroze Khan* as comprising 'any act the allowing of which would be against the general interest of the community'.<sup>24</sup> The Supreme Court elaborated as follows:

This policy has evolved itself with the growth of organised society. Certain standards in the domain of morality, used in its widest sense, have assumed sanctity on account of their acceptance by the general community. Therefore, any agreement which would destroy these standards or adversely affect the development of society or its organisation have to be viewed from this angle and it is here that the principle of public policy is born.<sup>25</sup>

In the case of *Nan Fung Textiles Ltd v Sadiq Traders Ltd*, the Sindh High Court accepted the following propositions:<sup>26</sup>

- a. The general head of 'public policy' covers a wide range of topics, such as, for example, trading with enemy in time of war, stifling prosecution, champerty and maintenance and various other matters';
- b. Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life; and fifthly, objects economically against the public interest; and
- c. However, the above statement (b) 'is not exhaustive as certain cases may not fit clearly into any of these five categories'. Instead, 'the law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it.

The Sindh High Court found that if the respondent could make out his case of violation of any of the five public policy groups mentioned, enforcement of the foreign award may be declined.<sup>27</sup> However, the court on the facts eventually arrived at the decision that enforcement of the award in question would not be against public policy.<sup>28</sup>

In addition, under section 23 of the Pakistan Contract Act 1872, an arbitration agreement is unenforceable if 'it is opposed to public policy'. There is one case to that end that sheds some light as to what could be considered a violation of public policy and that is *Hub Power Company Limited v WAPDA*.<sup>29</sup> However, that case had more to do with the separability doctrine rather than public policy.<sup>30</sup>

#### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

With regard to the New York Convention, the court's ruling in the case of *Louis Dreyfus Commodities Suisse SA v Acro Textile Mills Ltd* should be noted. In that case, the Lahore High Court clarified the procedure and approach of national courts in matters of enforcement of foreign arbitral awards.<sup>31</sup>

In particular, the High Court held that the general pro-enforcement bias of the New York Convention and the REA 2011 was 'the underlying thrust to liberalise procedures for enforcing foreign arbitral awards', and that Pakistani courts should shun a tendency to view an application for enforcement with scepticism, and consider the arbitral award as having a sound legal and foundational element.

The court further held that the policy of the REA 2011 required it to dispose of issues in enforcement proceedings by the usual test for summary judgment, and not by a regular trial. This decision dispels the previous impression that the procedure for enforcement of foreign awards required a full trial.<sup>32</sup>

With regard to domestic arbitration, in a recent decision, the Supreme Court restated and clarified the principles on which an arbitral award can be set aside by a court under the Arbitration Act 1940. In the case of *Gerry's International (Pvt) Ltd v Aeroflot Russian International Airlines*,<sup>33</sup> the Supreme Court confirmed that an arbitrator is the sole judge of all questions, both of law and fact; and a court could not review the award, nor entertain any question as to whether the arbitral tribunal decided properly on a point of law. However, it held that a court could set aside the award if there was an error, factual or legal, on the surface of it.<sup>34</sup>



As far as investment arbitration is concerned, it has been reported that in the past few years, Pakistan has faced two major investment treaty disputes which concluded unfavourably for it. Unfortunately for Pakistan, both awards came out in the same year (2017).

The first award was in the case of *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*,<sup>35</sup> rendered on 20 March 2017. The case was initiated by an Australian company (Tethyan) against Pakistan regarding the unlawful denial of a mining lease. The ICSID tribunal rejected Pakistan's final defence against liability and confirmed that Pakistan has violated several provisions of its bilateral investment treaty with Australia. The damages phase of the proceedings is underway, and a ruling is expected soon.

On 22 August 2017, the ICSID tribunal in *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*,<sup>36</sup> found Pakistan liable for the unlawful detention by the government of four electricity-generating vessels owned by Karkey, as well as breaches of contractual payment obligations for electricity generated. The tribunal ordered Pakistan to pay damages in the amount of US\$845,890,000. Pakistan has challenged the award in annulment proceedings, which are pending.<sup>37</sup>

However, in June 2018, Pakistan failed to provide security for the award in accordance with the ICSID ad hoc committee's decision on stay of enforcement issued on 22 February 2018, which has caused the stay to terminate. Karkey has commenced enforcement proceedings in the US District Court for the District of Columbia.<sup>38</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Arbitration is not common in Pakistan – either before arbitral institutions or on an ad hoc basis.<sup>39</sup>

Currently, there appears to be no prominent arbitral institution in Pakistan, and disputes involving Pakistani entities are resolved in institutions in Dubai, London, or Singapore.<sup>40</sup> Commentators have noted that parties do not prefer arbitration over commercial litigation.<sup>41</sup> This response is surprising as the litigation system in Pakistan appears to suffer from delays and overburdened courts.

### B. Measures to strengthen institutional arbitration capabilities

The Pakistan Business Council has recommended the amendment of the Arbitration Law in order to be updated in accordance with the UNCITRAL Model Law. The Bill was presented to the Parliament on 27 April 2009.<sup>42</sup>

The purpose of the Bill is to implement the Model Law into Pakistan's national arbitration law. Yet, it should be noted that some suggest that the Bill is a 'modified version of the Indian Arbitration Act of 1996'.<sup>43</sup> Hence, there is a concern that the Bill will also 'copy' the problems and issues that India is facing in terms of its arbitral legislation, such as the public policy ground.

Upon recommendations of the Pakistan Business Council, a Bill for a new consolidated arbitration law based on the UNCITRAL Model Law was presented to Parliament on 27 April 2009. This Bill aims to consolidate the

law relating to domestic arbitration, international commercial arbitration, recognition, and enforcement of foreign arbitral awards as well as settlement of international investment disputes.<sup>44</sup>

*C. Submission of disputes to arbitration vs. litigation*

There are no statistics on the percentage of disputes submitted to arbitration or sectors where recourse to arbitration is common.

*D. Participation by foreign counsel in international arbitrations*

According to article 55 of the 1973 Legal Practitioners and Bar Council Act of Pakistan, the Bar Council has the power to decide on the rules determining 'the circumstances in which and the conditions subject to which nationals of any foreign country may be admitted as advocates and foreign qualifications may be recognised for purposes of their admission'.

Article 26 of the 1973 Legal Practitioners and Bar Council Act clarifies that persons qualified for admission as advocates in Pakistan have to be 'a citizen of Pakistan or a person deriving his nationality from the State of Jammu and Kashmir: Provided that, subject to the other provisions of this Act, a national of any other country [who has resided in Pakistan for a period of not less than one year immediately preceding the day on which he applies for admission] may be admitted as an advocate if citizens of Pakistan duly qualified are permitted to practice law in that other country.'

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

Mining and construction are sectors where arbitration is routinely used.<sup>45</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

No official statistic on the length of court proceedings in Pakistan was found, but other sources suggest that the judiciary is quite slow. In particular, it is stated that more than 1.8 million cases were pending in Pakistan's courts as of January 2018.<sup>46</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 1,096 days to resolve a commercial dispute in a first-instance court in Pakistan (Karachi) – 96 days for filing and service of court processes, 700 days for trial and judgment and 300 days for enforcement of judgment.<sup>47</sup> Pakistan ranks just very slightly above average for the South Asia region, in which it takes an average of 1,101.6 days to resolve commercial disputes in first-instance courts.<sup>48</sup> In terms of overall ease of enforcing contracts, Pakistan scored 44.36 of 100 and ranked 156 of 190.<sup>49</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>50</sup>

*G. Statistics on judges and lawyers per capita*

No information was available.

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information indicating that there is legal aid for businesses or for commercial dispute resolution in Pakistan. Section 13 of the Legal Practitioners and Bar Councils Act 1973 outlines that one of the roles of the Pakistan Bar Council is to provide free legal aid.<sup>51</sup> The Legal Aid Society established in 2013 serves marginalised and underprivileged communities to reduce challenges in accessing justice by providing free legal aid, advice and representation.<sup>52</sup> There are also nine advice and legal aid centres (ALAC) funded by the UNHCR that are operational in the main refugee-hosting areas of four provinces in Pakistan in order to provide free legal support to persons of concern.<sup>53</sup>

### B. *Third-party funding*

Champerty and maintenance are still treated 'as sins in Pakistan', mainly due to the fact that those doctrines are believed to 'work against the common man'.<sup>54</sup> The provisions of the 1940 Act do not regulate third-party funding, i.e. they do not carve out an exception for arbitration. Other legislative enactments are similarly silent on this issue. In line with the treatment of the doctrine of champerty and maintenance as 'sins' it is suggested that third-party funding is prohibited and is likely 'to be held as against public policy for being champertous'.<sup>55</sup>

### C. *Contingency fees*

It is unclear whether contingency fees are legal. While there is no strict prohibition or allowance for contingency fees under the domestic law of Pakistan, it is suggested by some commentators that contingency fees are prohibited in Pakistan.<sup>56</sup>

At the same time, according to the Pakistan Legal Practitioners and Bar Council Rules of 1976, section 154, 'in fixing fees, advocates should avoid charges which over-estimate their advice and services as well as those which undervalue them'. It further states that 'in determining the amount of fee it is proper to consider', a list of issues need to be taken into consideration such as 'the contingency of the certainty of the compensation'.

It would seem that while the outcome of the case shall not be the only factor determining the legal fees, it is one of the elements to be taken into account.

### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 United Nations Human Rights (2013), Special Rapporteur on the Independence of Judges and Lawyers, Mission to Pakistan, UN Doc. A/HRC/23/43/Add. 2 (by Gabriela Knaul).
- 3 Uzair Karamat Bhandari, Feisal Hussain Naqvi et al. (2002), 'Pakistan', in Michael Moser & John Choong (eds), *Asia Arbitration Handbook*, OUP, 903; Tariq Hassan (2002), 'International Arbitration in Pakistan – A Developing Country Perspective', *Journal of International Arbitration*, Vol. 19 No. 6, 591.

- 4 Bhandari, Naqvi et al. (2002), 'Pakistan', in Moser & Choong, *Asia Arbitration Handbook*, 903.
- 5 Makhdoom Ali Khan (2012), 'National Report for Pakistan', in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration*.
- 6 United Nations Human Rights (2013), Special Rapporteur on the Independence of Judges and Lawyers, Mission to Pakistan, UN Doc. A/HRC/23/43/Add. 2 (by Gabriela Knaul).
- 7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 8 Getting the Deal Through (2019), 'Arbitration', Pakistan <<https://gettingthedealthrough.com/area/3/jurisdiction/101/arbitration-pakistan/>> accessed 4 July 2019.
- 9 See article 9, Arbitration Act 1940 available at World Intellectual Property Organisation, 'The Arbitration Act, 1940' <<https://www.wipo.int/edocs/lexdocs/laws/en/pk/pk066en.pdf>> accessed 4 July 2019.
- 10 Arbitration Act 1940.
- 11 *Haq Nawaz Khan v the State*, 2005 YLR 1850.
- 12 See 'Getting the Deal Through (2019), 'Arbitration', Pakistan.
- 13 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 14 Ibid.
- 15 See ICSID, 'Pakistan' <<https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST105>> accessed 4 July 2019.
- 16 UNCTAD, 'Investment Policy Hub', 'Pakistan' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 August 2019.
- 17 Ibid.
- 18 Asian Regional Integration Center, 'Free Trade Agreements: 'FTAs: Pakistan' <[aric.adb.org](http://aric.adb.org)> accessed 31 August 2019.
- 19 *Hitachi v Rupali*, 1998 SCMR 1618.
- 20 *Island Textile Mills Ltd. v V/O Technoexpert*, 1979 Civil Law Cases (CLC) 307.
- 21 Section 33 Arbitration Act 1940. See also Rana Sajjad Ahmad (2017), 'Pakistan's Legal Framework for International Arbitration and Seminal Judgements of the Supreme Court', *International Journal of Arab Arbitration*, Vol. 9 No. 2, 29.
- 22 Bhandari, Naqvi et al. (2002), 'Pakistan', in Moser & Choong, *Asia Arbitration Handbook*, 903, 932–33 (referencing case law allowing court intervention); Ikram Ullah (2017), 'Judicial Review of Arbitral Award in Pakistan', *Asian International Arbitration Journal*, Vol. 13 No. 1, 53.
- 23 Section 30 of the Arbitration Act 1940.
- 24 *Sardar Muhammad Yasin Khan v Raja Feroze Khan* (1972) 24 PLD (AJ & K) 46, 52 (Pak.).
- 25 *Sardar Muhammad Yasin Khan v Raja Feroze Khan* (1972) 24 PLD (AJ & K) 46, 52 (Pak.).
- 26 *Nan Fung Textiles Ltd v Sadiq Traders Ltd* (1982) 34 PLD (Karachi) 619, 624 (Pak.).
- 27 *Nan Fung Textiles Ltd v Sadiq Traders Ltd* (1982) 34 PLD (Karachi) 619, 624 (Pak.).
- 28 *Nan Fung Textiles Ltd v Sadiq Traders Ltd* (1982) 34 PLD (Karachi) 619, 624 (Pak.). For further information on public policy in arbitration in Pakistan, see Ikram Ullah (2016), 'Public Policy in Arbitration: Still a Long Way to Go', *Contemporary Asia Arbitration Journal*, Vol. 9 No. 1, 53.
- 29 *Hub Power Company Limited v WAPDA*, PLD 2000 SC 841.
- 30 See Getting the Deal Through (2019), 'Arbitration', Pakistan, 9.
- 31 See *Louis Dreyfus Commodities Suisse SA v Acro Textile Mills Ltd*, PLD 2018 Lahore 59 available at <<https://sys.lhc.gov.pk/appjudgments/2018LHC788.pdf>> accessed 4 July 2019.
- 32 'Getting the Deal Through (2019), 'Arbitration', Pakistan.
- 33 See *Gerry's International (Pvt) Ltd v Aeroflot Russian International Airlines*, 2018 SCMR 662 available at <[http://www.supremecourt.gov.pk/web/user\\_files/File/C.A.\\_539\\_2003.pdf](http://www.supremecourt.gov.pk/web/user_files/File/C.A._539_2003.pdf)> accessed 4 July 2019.

- 34 Getting the Deal Through (2019), 'Arbitration', Pakistan .
- 35 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, <<https://www.italaw.com/cases/1631>> accessed 4 July 2019.
- 36 *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 <<https://www.italaw.com/cases/2024>> accessed 4 July 2019.
- 37 Ibid.
- 38 See *In re Application of the Islamic Republic of Pakistan for an Order Permitting Discovery Pursuant to 28 U.S.C. s1782 v Arnold & Porter Kaye Scholer LLP*, Mis. Action No. 18-103 (RMC), available at <<https://www.italaw.com/sites/default/files/case-documents/italaw10463.pdf>> accessed 4 July 2019.
- 39 Bhandari, Naqvi et al. (2002), 'Pakistan', in Moser & Choong, *Asia Arbitration Handbook*, 903–4.
- 40 Ibid.
- 41 Ibid.
- 42 The Pakistan Business Council, 'Arbitration Bill' <[https://www.pbc.org.pk/research/arbitration\\_bill/](https://www.pbc.org.pk/research/arbitration_bill/)> accessed 4 July 2019.
- 43 The Counsel, 'Pakistani Arbitration: Towards the Model Law', Shahid Jamil <<http://www.counselpakistan.com/vol-1/dispute-resolution/pakistani-arbitration.php>> accessed 4 July 2019.
- 44 The Pakistan Business Council, 'Arbitration Bill'.
- 45 Response Judiciary Questionnaire.
- 46 See *DAWN* (2018), 'Over 1.8 Million Cases Pending in Pakistan's Courts', Malik Asad (21 January) <<https://www.dawn.com/news/1384319>> accessed on 4 July 2019; '4000 judges can't clear 1.9m cases: Justice Asif Saeed Khosa', 16 January 2018 <<https://www.dawn.com/news/1383230>> accessed 4 July 2019; *The News* (2018), '1.87 million cases pending in Pak courts', Tariq Butt (15 January) <<https://www.thenews.com.pk/print/268487-1-87-million-cases-pending-in-pak-courts>> accessed 4 July 2019.
- 47 World Bank (2019), *Doing Business*, 'Enforcing Contracts' <<http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts>> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 48 World Bank (2019), *Doing Business*, 'Enforcing Contracts'
- 49 Ibid.
- 50 Ibid.
- 51 The Pakistan Code, The Legal Practitioners and Bar Councils Act 1973 <<http://pakistancode.gov.pk/english>> accessed 14 September 2019.
- 52 Legal Aid Society Pakistan, 'Overview of Organization' <<https://www.las.org.pk/about-us/overview-of-organization/>> accessed 14 September 2019.
- 53 UNCHR (2018), 'Pakistan: Summary of Legal Assistance and Aid programme January–March 2018' <<https://data2.unhcr.org/en/documents/download/63141>> accessed 14 September 2019.
- 54 Warda Yasin, 'Abolition of the Doctrines of Champerty and Maintenance in Pakistan' <<https://pljlawsite.com/2015art7.htm>> accessed 4 July 2019.
- 55 Getting the Deal Through (2019), 'Arbitration', Pakistan.
- 56 See Delos (2018), 'Delos Guide to Arbitration Places (GAP): Pakistan', Umer Akram Chaudhry, Aneesa Agha and Asad Ladha <<https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-1st-edn-Pakistan.pdf?pdf=GAP1-Pakistan>> accessed 4 July 2019. A prohibition of contingency fees would be in line with the strict application of the rules of maintenance and champerty.

# PAPUA NEW GUINEA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Papua New Guinea (or PNG) is an independent state situated in the South Pacific.<sup>2</sup> The legal system of Papua New Guinea has its roots in colonial legislation.<sup>3</sup> Historically, PNG became a British colony in 1884 and was administered by Australia from 1905 till 1975. PNG gained its independence on 16 September 1975.<sup>4</sup> The earliest arbitration legislation applicable to Papua New Guinea was the United Kingdom Interdict Act 1867,<sup>5</sup> which was enacted to 'consolidate and amend the laws relating to arbitration, interpleader, mandamus, *quo warranto* prohibition and injunction'.

The Arbitration Ordinance 1912 (1912 Ordinance)<sup>6</sup> repealed the United Kingdom Interdict Act 1867.<sup>7</sup> The 1912 Ordinance was enacted by the Lieutenant Governor of the Territory of Papua New Guinea as an ordinance to amend the law relating to arbitration in Papua New Guinea. Subsequently, in 1951, the Arbitration Act of Papua New Guinea 1951 (the 'PNG Arbitration Act') was enacted. However, the PNG Arbitration Act does not refer to or repeal the 1912 Ordinance. Further, both the 1912 Ordinance and the PNG Arbitration Act contain some identical provisions with the English Arbitration Act 1889<sup>8</sup> and appear to have been modelled on it.

### B. *Description of prior legislation and reasons for its replacement*

The PNG Arbitration Act 1951 has not been amended to date.<sup>9</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The PNG Arbitration Act was enacted in 1951 and became effective on 22 November 1951.<sup>10</sup>

### B. *Scope of application to domestic and international arbitrations*

The PNG Arbitration Act does not distinguish between international and domestic arbitration.

### C. *Details and/or relevant amendments and modifications*

Arbitration legislation of Papua New Guinea has never been amended.<sup>11</sup>

### D. *Relationship to the UNCITRAL Model Law*

The PNG Arbitration Act predates the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. Further, Papua New Guinea has not adopted the UNCITRAL Model Law following its recent accession to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') on 17 July 2019.<sup>12</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law.*

The provisions of the current PNG Arbitration Act contain substantial differences from the UNCITRAL Model Law. However, in light of the recent accession to the New York Convention, there may be domestic legislative

reform eliminating some or all differences from the UNCITRAL Model Law. Nonetheless, current differences are as follows:

- a. The doctrine of separability and the competence-competence rule are not stipulated in the PNG Arbitration Act;<sup>13</sup>
- b. The PNG Arbitration Act stipulates the terms implied in arbitration agreement, in particular, that '[i]f no other mode of reference is provided, the reference is to a single arbitrator', and that '[t]he arbitrators shall make their award in writing within three months after entering on the reference';<sup>14</sup>
- c. The PNG Arbitration Act grants substantial powers of control to state courts. The stay of court proceedings in the presence of arbitration agreement is possible if 'there is no sufficient reason why the matter should not be referred in accordance with the submission',<sup>15</sup> therefore national courts have a wide discretion of whether to refer the dispute to arbitration. Besides, the National Court (one of the Higher Courts in Papua New Guinea) not only nominates arbitrators if the parties fail to do so,<sup>16</sup> but also has the power 'if it thinks fit, [to] set aside an appointment made [under section 6 of the PNG Arbitration Act]'<sup>17</sup> or to remove an arbitrator for 'misconduct'.<sup>18</sup> Besides, the PNG Arbitration Act introduces the mechanism of 'special case', which implies the right and, if requested by the National Court, also the obligation of arbitrators to refer questions of law for the opinion of the National Court;<sup>19</sup> and
- d. The provisions of the PNG Arbitration Act on recognition and enforcement of awards are not in line with the legislation in the UNCITRAL Model Law jurisdictions. Pursuant to section 11(1) of the PNG Arbitration Act, '[w]here an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the [National] Court may set aside the award'.<sup>20</sup> This wording implies that the award may be set aside on the ground of error of law. Such a ground, however, does not exist in the UNCITRAL Model Law. The awards can be enforced in accordance with general rules and the common law in the same manner as court judgments.<sup>21</sup>

#### *F. Powers and duties of arbitrators*

According to the PNG Arbitration Act, arbitrators have power:

- a. to state an award as to the whole or part of the submission in the form of a special case for the opinion of the National Court;
- b. to correct a clerical mistake or error arising from an accidental slip or omission in an award; and
- c. to administer oaths to, or take the affirmations of, the parties and witnesses appearing.<sup>22</sup>

The PNG Arbitration Act provides for several obligations of arbitrators. In particular, arbitrators are obliged, if so directed by the National Court, to state in the form of a special case for the opinion of the National Court any question of law arising in the course of the arbitration;<sup>23</sup> they shall render an award within three months after their appointment<sup>24</sup> but this time limit can be extended by the National Court.<sup>25</sup> The PNG Arbitration Act stipulates that the National Court may remove an arbitrator or set aside the award, if an arbitrator 'misconducted himself'.<sup>26</sup> Therefore the PNG Arbitration Act establishes control by the courts of arbitrators' conduct; however, the exact scope of such control remains unclear.

### G. Arbitrator immunity

The PNG Arbitration Act 1951 is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

## III. INTERNATIONAL INSTRUMENTS

### A. Signatory to the New York Convention

Papua New Guinea became a party to the New York Convention on 17 July 2019.<sup>27</sup>

### B. Reservations to the New York Convention

Papua New Guinea has not made any reservation to the New York Convention.<sup>28</sup>

### C. Method of domestic implementation of the New York Convention

Given the recent accession to the New York Convention, the Convention has not yet entered into force in Papua New Guinea. As such it is not yet certain how the New York Convention is given effect. The Convention will enter into force for Papua New Guinea on 15 October 2019.<sup>29</sup>

### D. Other international/regional treaties

Papua New Guinea is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (the 'ICSID Convention').<sup>30</sup> Papua New Guinea ratified the ICSID Convention on 20 October 1978 and it entered into force on 19 November 1978.<sup>31</sup>

Papua New Guinea participates in the partnership agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its member states, signed on 23 June 2000, which stipulates that co-operation between the signatories shall support development and modernisation of mediation and arbitration systems.<sup>32</sup>

Papua New Guinea has signed six bilateral investment treaties, five of which have entered into force (Australia, China, Germany, Japan, and the United Kingdom).<sup>33</sup>

Papua New Guinea has signed six free trade agreements, of which five are currently in force (Pacific Island Countries Trade Agreement, South Pacific Regional Trade and Economic Cooperation Agreement, Melanesian Spearhead Group, Pacific ACP–EC Economic Partnership Agreement, Australia–Papua New Guinea Trade and Commercial Region).<sup>34</sup>

## IV. RELEVANT CASE LAW

### A. Approach of the national courts to the enforcement of arbitration agreements

As indicated in the World Bank report on the business environment in Papua New Guinea, valid arbitration agreements and clauses are not usually enforced by the courts.<sup>35</sup>

There have been cases in Papua New Guinea where the state courts held that an arbitration clause was to be considered as void with the rest of the contract, thus refusing to apply the separability doctrine.<sup>36</sup> However, the separability doctrine has been applied in more recent court decisions.<sup>37</sup>



*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

No information was available.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

No information was available.

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

There are no arbitral institutions in Papua New Guinea,<sup>38</sup> but some disputes involving parties from Papua New Guinea having been administered by the Australian Centre for International Commercial Arbitration (ACICA), based in Sydney, Australia.<sup>39</sup>

*B. Measures to strengthen institutional arbitration capabilities*

No information was available.

*C. Percentage of disputes submitted to arbitration (as opposed to regular litigation before domestic courts)*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

According to the Lawyers Act 1986, any person intending to practise as a lawyer in Papua New Guinea needs to apply for a certificate and meet specific requirements, in particular to have a law degree from the University of Papua New Guinea or other equivalent qualifications accepted by the Admission Council, and must satisfy the practice qualifications.<sup>40</sup> Foreign lawyers from certain countries, such as the UK, New Zealand, or Australia, can be admitted to practise in Papua New Guinea if they satisfy the qualification requirements and have practised as a lawyers in their country for a period of three years.<sup>41</sup> Such lawyers are often asked to take an examination on Papua New Guinea law before they can get the certificate.<sup>42</sup> It is not clear whether lawyers from other countries can apply for the certificate to practise in Papua New Guinea. There are no specific rules for representation of clients in arbitration.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

Mining, and land management related to environmental matters are routinely arbitrated.<sup>43</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 591 days to resolve a commercial dispute in a first-instance court in Papua New Guinea – 30 days for filing and service of court processes, 381 days for trial and judgment and 180 days for enforcement of judgment.<sup>44</sup> Papua New

Guinea ranks below the East Asia & Pacific region, where it takes an average of 581.1 days to resolve commercial disputes in first-instance courts.<sup>45</sup> In terms of overall ease of enforcing contracts, Papua New Guinea scored 36.21 of 100 and ranked 173 of 190.<sup>46</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

#### G. *Statistics on judges and lawyers per capita*

According to the most recent available statistics, which date from 2011, there are 879 lawyers in Papua New Guinea, including 591 private lawyers and 288 government/in-house lawyers, of which 29 per cent are women.<sup>47</sup> However, considering the significant population of Papua New Guinea,<sup>48</sup> as compared to the other countries in the region, the ratio of lawyers per capita is low (1:10,470).<sup>49</sup> Statistics on the number of judges in Papua New Guinea per capita are not available; however, according to official websites of the judiciary, there are currently the Chief Justice, Deputy Chief Justice and 35 judges in the National and Supreme Courts<sup>50</sup> as well as about 100 magistrates in district courts.<sup>51</sup>

## VI. FUNDING FOR LEGAL CLAIMS

#### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information indicating that there is a legal aid regime available for arbitration or for businesses. The Public Solicitor's office provides legal aid in civil and criminal cases for those who cannot afford to pay a lawyer; however, priority is given to criminal cases.<sup>52</sup> No formal pro bono services exist from law firms.<sup>53</sup> Legal assistance is provided by students under an initiative run by the Law School at the University of Papua New Guinea.<sup>54</sup>

#### B. *Third-party funding*

In *Simon Norum trading as Simon Norum & Co Lawyers v Daniel Ikio and Komaip Trading Pty Ltd*<sup>55</sup> the National Court of Justice observed that '[i]n the UK the old crimes and torts of maintenance and champerty were abolished by statute in 1967, but a champertous agreement may still be treated as contrary to public policy and so unlawful'. The court appears to endorse the United Kingdom treatment of the doctrine of maintenance and champerty in its judgment when discussing whether a lawyer's contingency fee agreement was champertous.<sup>56</sup> Hence, it seems that the common law rule of maintenance and champerty as set out under section 14 of the Criminal Law Act 1967 (UK) is applicable in Papua New Guinea and therefore third-party funding may not be legally permitted in certain circumstances.<sup>57</sup> Further, the PNG Constitution<sup>58</sup> makes the operation of common law subject to, or subordinate to an Act of Parliament, with the latter prevailing in the event of conflict. However, PNG does not currently have legislation permitting or legalising third-party funding.

However, section 57 of the Papua New Guinean Constitution empowers anyone concerned with the violation of another's right to seek enforcement or protection from the courts. This provision could be used to make a case for funding litigation for the enforcement of a human right.

#### C. *Contingency fees*

PNG courts have interpreted section 66(2) of the Lawyers Act 1986 to permit contingency fee arrangements and to override the common law doctrines of maintenance and champerty to the extent it outlaws the charging of

contingency fees by lawyers.<sup>59</sup> In *Norum trading as Simon Norum & Co Lawyers v Ikiio and Komaip Trading Pty Ltd*,<sup>60</sup> the National Court of Justice held that although under common law contingency fees arrangements are champertous, the common law doctrine of maintenance and champerty is subordinate to the Lawyers Act 1986, which will prevail in the event of any conflict. The court further held that section 62 of the 1986 Act permits entering into contingency fee arrangements provided such arrangements are fair and reasonable, having regard to the nature and complexity of that case.<sup>61</sup> Considering the particular circumstances of the instant case, the court concluded that a contingency fee of 25 per cent was unreasonable.<sup>62</sup>

#### D. Insurance for legal expenses

There is no information available regarding the legal framework for insurance for legal issues. As of April 2019, a company called 'Tower' provides an insurance for business risks, which covers legal liability arising from business actions in Papua New Guinea.<sup>63</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Papua New Guinea obtained its independence from the UK in 1975. See John Nonggor (1993), 'Papua New Guinea', in Michael A Ntumy (ed.), *South Pacific Islands Legal Systems*, University of Hawaii Press, 202.
- 3 PNG has statute based on Australian and British law due to its colonial history. For example, it adopted the Queensland Criminal Code (1899). See David Weisbrot (1981), 'Customizing the Common Law: The True Papua New Guinea Experience', *American Bar Association Journal*, Vol. 67 No. 6, 727, 728.
- 4 'Papua New Guinea: History' <<https://www.papuanewguinea.travel/history>> accessed 31 August 2019.
- 5 Interdict Act 1867, 31 Vic. No. 11 (Queensland Adopted). Section 2 provides that 'Merchants and traders etc. desiring to end controversies by arbitration may agree that their submission of the suit to the award of any person should be made a rule of any court of record etc....'
- 6 Arbitration Ordinance 1912 (No. 49 of 1912).
- 7 Arbitration Ordinance 191, sch 2, s 2.
- 8 English Arbitration Act 1889.
- 9 See C Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, United Nations, 285, 287; APEC Secretariat (1999), 'A guide to Arbitration and Dispute Resolution in APEC Member Economies: Papua New Guinea', 13-1 <[https://www.apec.org/-/media/APEC/Publications/1999/12/International-Commercial-Disputes-A-Guide-to-Arbitration-and-Dispute-Resolution-in-APEC-Member-Econo/99\\_cti\\_comdispute.pdf](https://www.apec.org/-/media/APEC/Publications/1999/12/International-Commercial-Disputes-A-Guide-to-Arbitration-and-Dispute-Resolution-in-APEC-Member-Econo/99_cti_comdispute.pdf)> accessed 31 August 2019.
- 10 See PNG Arbitration Act, 1951.
- 11 See Ballantine (2017), 'Opening Oceania: ...', 285, 287; APEC Secretariat (1999), 'A guide to Arbitration and Dispute Resolution in APEC Member Economies', Papua New Guinea.
- 12 UNCITRAL (2019), 'Papua New Guinea accedes to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)'

- <<https://uncitral.un.org/en/news/png-accedes-new-york-convention>> accessed 14 August 2019.
- 13 Greenberg et al. (2010), 'Chapter 15. International Commercial Arbitration Practice in Australia, New Zealand, and the Pacific Islands', in Horacio A Grigera Naón & Paul E Mason (eds), *Commercial Arbitration Practice In The 21st Century*, Lexis Nexis, 15-1, 15-12-15-13; UNCITRAL Model Law, article 16.
- 14 PNG Arbitration Act, sch 1, ss 1 and 3.
- 15 Ibid., s 4(1).
- 16 Ibid., s 5(2).
- 17 Ibid., s 6(2).
- 18 Ibid., s 11(1).
- 19 Ibid., s 18.
- 20 Ibid., s 11(1).
- 21 Administration of Justice Act 1920.
- 22 PNG Arbitration Act, s 7.
- 23 Ibid., s 18.
- 24 Ibid., sch 1, s 3.
- 25 Ibid., s 9.
- 26 Ibid., s 11.
- 27 UNCITRAL (2019), 'Papua New Guinea accedes to the UN Convention ...'.
- 28 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention); New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 August 2019.
- 29 UNCITRAL (2019), 'Papua New Guinea accedes to the UN Convention ...'.
- 30 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 31 August 2019.
- 31 Ibid.
- 32 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (adopted 23 June 2000, entered into force 1 April 2003) art 21 <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3185>> accessed 9 April 2019.
- 33 UNCTAD, 'Investment Policy Hub' 'Papua New Guinea' <[investmentpolicy.unctad.org/](https://investmentpolicy.unctad.org/)> accessed 31 August 2019.
- 34 Asian Regional Integration Center, 'FTAs: Papua New Guinea' <[aric.adb.org](http://aric.adb.org/)> accessed 31 August 2019.
- 35 World Bank Group (2019), *Doing Business 2019: Papua New Guinea* (A World Bank Group Flagship Report), 48.
- 36 *The Independent State of Papua New Guinea v Barclay Brothers PNG Ltd*. [2015] (Papua New Guinea Court of Appeals, 9 December 2005), cited in Greenberg et al. (2010), 'Chapter 15. International Commercial Arbitration Practice in Australia, New Zealand, and the Pacific Islands', 15-1, 15-12.
- 37 *Kutubu Catering Ltd v Eurest (PNG) Catering and Services Ltd* [2016] PGNC 68; N6255 (13 April 2016).
- 38 See Ballantine (2017), 'Opening Oceania: ...', 285, 293.
- 39 Ibid., 285, 291.
- 40 Lawyers Act 1986, s 25.
- 41 Lawyers Act 1986, s 25 (3); Commonwealth of Nations, 'Find Legal Expertise in Papua New Guinea' <[http://www.commonwealthofnations.org/sectors-papua\\_new\\_guinea/business/legal/](http://www.commonwealthofnations.org/sectors-papua_new_guinea/business/legal/)> accessed 10 April 2019.
- 42 Ibid.

- 43 Brydget Barker Hudson, 'Arbitration in Papua New Guinea' <mediationcentre.com> accessed 30 August 2019.
- 44 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/papua-new-guinea#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/papua-new-guinea#DB_ec)> accessed 16 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 45 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 46 Ibid.
- 47 South Pacific Lawyers Association (2011), *Needs Evaluation Survey for South Pacific Lawyer Associations*, Final Report, 9.
- 48 It is reported that as of 2019 the population of Papua New Guinea was 8,251,162 (World Bank Group, *Doing Business 2019: Papua New Guinea* (A World Bank Group Flagship Report), 4).
- 49 South Pacific Lawyers Association (2011), *Needs Evaluation Survey for South Pacific Lawyer Associations*, 5. See also Bilimoria, N (2017), 'Choices for the South Pacific Region's Bar Associations and Law Societies?', in Petra Butler & Caroline Morice (eds), *Small States in a Legal World*, Springer, 245, 262
- 50 National & Supreme Courts of Papua New Guinea, 'Judges' <<http://www.pngjudiciary.gov.pg/about-the-courts/judges>> accessed 9 April 2019.
- 51 Magisterial Service of Papua New Guinea, 'Magistrates of the District Courts of Papua New Guinea' <<http://www.magisterialservices.gov.pg/magistrates.aspx>> accessed 9 April 2019.
- 52 South Pacific Lawyers Association (2011), *Needs Evaluation Survey*, 33; Constitution of the Independent State of Papua New Guinea, s 177(2).
- 53 South Pacific Lawyers Association (2011), *Needs Evaluation Survey*, 33.
- 54 Ibid.; ABC News (2013), 'PNG People to Get Free Legal Aid from Local Law Students' <<https://www.abc.net.au/news/2013-11-14/an-png-people-to-get-free-legal-aid-from-local-law-students/5090874>> accessed 9 April 2019.
- 55 [1997] PGLawRp 200 (11 July 1997).
- 56 See the court's discussion regarding the legality of contingency fees below para 35.
- 57 See *Norum trading as Simon Norum & Co Lawyers v Ikiio and Komaip Trading Pty Ltd* [1997] PGNC 82; N1593
- 58 Constitution of Papua New Guinea, sch 2.2.
- 59 *Norum trading as Simon Norum & Co Lawyers v Ikiio and Komaip Trading Pty Ltd* [1997] PGNC 82; N1593 (11 July 1997); *Yapao Lawyers v Pawe and Porgera River Alluvial Miners Association* [1998] PGNC 89; N1759 (18 September 1998)
- 60 *Norum trading as Simon Norum & Co Lawyers v Ikiio and Komaip Trading Pty Ltd* [1997] PGNC 82; N1593
- 61 Lawyers Act 1986, s 66(2) an agreement between a lawyer and his client in respect of either contentious or non-contentious legal services 'may provide for the remuneration of the lawyer by a gross sum, or by commission or percentage, or otherwise, and at a greater or a lesser rate than that at which he would otherwise have been entitled to be remunerated'.
- 62 *Norum trading as Simon Norum & Co Lawyers v Ikiio and Komaip Trading Pty Ltd* [1997] PGNC 82; N1593 (11 July 1997).
- 63 Tower Insurance, 'Business Insurance' <<http://www.towerinsurance.com.pg/insurance/business-insurance/>> accessed 9 April 2019.

# RWANDA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. Relationship with existing or prior English Arbitration Act(s)

The arbitral legislation of Rwanda was developed only recently as part of the reforms in the Rwandan legal system, which commenced in 2002.

Although modern arbitration is a recent phenomenon in Rwanda, a long-term tradition of customary dispute resolution methods has been reported as part of the Rwandan traditional jurisdictional roots ('*Abunzi*' systems).<sup>2</sup> Historically, the *Abunzi* systems contained forms of dispute resolution with features akin to arbitration, mediation, and/or traditional courts, varying according to the powers granted to the member(s) of the *Abunzi*.<sup>3</sup> Nowadays, however, *Abunzi* references are generally associated exclusively with mediation.<sup>4</sup>

After the end of the genocide, Rwanda focused on developing its economy and boosting investment. Different measures were undertaken to improve the legal system as part of this initiative.<sup>5</sup> While its legal system was originally based on the Belgian civil law system, Rwanda adopted as part of the reforms features of both common and civil law.<sup>6</sup>

### B. Description of prior legislation and reasons for its replacement

As part of the reforms above described, in 2003 a new Constitution was adopted by Rwanda. Following that, in 2004 the Code of Civil, Commercial, Labour and Administrative Procedure ('2004 Code') was approved, in 2006 a new investment law was introduced, in 2007 the country established specialised courts in commercial matters, in 2008 a new arbitration law was implemented and in 2009 the country joined the Commonwealth.<sup>7</sup>

The idea of incorporating arbitration to the Rwandan legal system was first introduced by the Rwanda Business Federation as a potential solution for the heavy caseload of the national courts. This idea was embraced by the Rwandan Government during the beginning of the reforms and resulted in the inclusion of provisions regulating arbitration procedure in the 2004 Code, as well as the creation of an arbitration organisation (Centre d'arbitrage et d'Expertise du Rwanda – CAER). However, CAER was not well accepted by the Rwandan business community, which culminated in its closure, and in the Private Sector Federation of Rwanda starting a new committee for the development of arbitration in the country.<sup>8</sup>

The efforts of the Private Sector Federation resulted in the promulgation of a new arbitration law and the creation of a new arbitral institution, as discussed below.<sup>9</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. Date of enactment

Law No. 05/2008 on Arbitration and Conciliation in Commercial Matters of 14 February 2008 (Rwanda Arbitration Law) was published in the Official Gazette of the Republic on 6 March 2008.<sup>10</sup>

### B. Scope of application to domestic and international arbitrations

The Rwanda Arbitration Law is applicable to domestic and international arbitration and conciliation involving commercial matters. In view of this

scope, the Rwandan Arbitration Law excludes some other civil matters not considered of commercial nature, such as co-operative disputes, industrial and labour disputes.<sup>11</sup>

*C. Details and/or relevant amendments and modifications*

As described above, between March 2008 and July 2012, Rwanda had two arbitration laws in force: the 2004 Code and the Rwanda Arbitration Law. This peculiar circumstance lasted until 14 June 2012, when Law No. 21/2012 adopting a new Code on Civil, Commercial, Labour and Administrative Procedure (2012 Code) entered into force. The 2012 Code revoked the previous treatment given to arbitration by the 2004 Code. Thus, since July 2012, the only statute effectively regulating arbitration in Rwanda is Law No. 05/2008, i.e. the Rwanda Arbitration Law 2008.

In addition, Law No. 51/2010 of 10 January 2010 established an independent body to help developing arbitration in Rwanda, known as the Kigali International Arbitration Centre (KIAC).<sup>12</sup> The KIAC was created to occupy the vacuum left by the demise of CAER, as explained above.<sup>13</sup> The Ministerial Order No. 16/12 of 15 May 2012 sets out the KIAC arbitration rules.

*D. Relationship to the UNCITRAL Model Law<sup>14</sup>*

The Rwanda Arbitration Law is based on the United Nations Commission in International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, with the amendments of 2006, and it mirrors the provisions of the Model Law in almost all provisions.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

One relevant difference is that the Rwanda Arbitration Law also regulates conciliation, and in this aspect it departs from the treatment given by the Model Law – which deals exclusively with arbitration.

*F. Powers and duties of arbitrators*

Arbitrators must be impartial, independent, and attend to the qualification requirements agreed by the parties.<sup>15</sup> They can grant interim measures<sup>16</sup> and preliminary orders,<sup>17</sup> decide the convenience of having oral hearings if no requests were made by the parties, but shall determine a hearing if at least one of the parties so requested.<sup>18</sup>

*G. Arbitrator immunity*

The Rwanda Arbitration Law 2008 is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention<sup>19</sup>*

Rwanda became a party to the 1958 New York Convention on 31 October 2008.<sup>20</sup>

*B. Reservations to the New York Convention*

Rwanda has not made any reservations to the New York Convention.

*C. Method of domestic implementation of the New York Convention*

The New York Convention is given effect in section 9, articles 50 and 51 of the Arbitration Law, which deals with the country's recognition and enforcement of awards.

#### *D. Other international/regional treaties*

Rwanda is also a signatory of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention'), which entered into force in the country on 14 November 1979,<sup>21</sup> and the 1907 Hague Convention for the Pacific Settlement of International disputes (since 19 April 2011). Moreover, the country is part of the East African Community (EAC), and of the Common Market for Eastern and Southern Africa (COMESA), although Rwanda is not a signatory of the Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA Convention).

In terms of bilateral investment treaties, Rwanda has signed eleven in total, however, only four are currently in force (Republic of Korea, United States of America, Belgium-Luxembourg Economic Union, and Germany).<sup>22</sup> Rwanda is also a party to the Agreement Establishing the African Continental Free Trade Area (AfCTA).<sup>23</sup>

### **IV. RELEVANT CASE LAW**

#### *A. Approach of the national courts to the enforcement of arbitration agreements*

At the end of 2007 Rwanda created separate commercial courts<sup>24</sup> presided over by more than 22 judges with specialised commercial and arbitration knowledge.<sup>25</sup> At first, to overcome the lack of experienced judges in the country, the government hired judges with expertise in arbitration and commercial matters from Mauritius, who helped to train their Rwandan colleagues. The government also sponsored the education of Rwandan judges, offering scholarships for masters programmes in commercial and arbitration matters.<sup>26</sup> As a result, Rwanda courts have been described as arbitration friendly, and prepared to deal with different complex commercial matters.<sup>27</sup>

#### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Article 51(2)(b) of the Arbitration Law sets out public policy as one of the grounds for refusing the recognition and enforcement of foreign arbitral awards.

As with most jurisdictions, Rwandan law does not provide a legal definition of what is considered 'public policy'. However, the most valuable principles of the Rwanda legal system are included in the state's Constitution, and therefore an 'arbitration agreement must comply with the Constitution of the Republic of Rwanda to meet all legal requirements and actual cultural values'.<sup>28</sup>

#### *C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The Commercial High Court, for instance, stated that the jurisdiction of national courts to hear interim measures is limited to the provisions of the arbitral agreement.<sup>29</sup> The court also repealed a party's attempt to have the merit of an arbitral award revised by the court, stating that '[t]here is just a unique way of appealing an award, which is to ask for the award to be set aside'.<sup>30</sup> In terms of requests for setting aside awards, the court also positioned itself against claims that did not comply with the strict requirements imposed by the Arbitration Law.<sup>31</sup>

In terms of investment cases, Rwanda has faced three ICSID disputes so far, although one of the cases was discontinued pursuant to ICSID Arbitration



Rule 43(1).<sup>32</sup> The other two ongoing cases involve the cancelling of a mining concession by the Rwandan Government and a gas extraction and electricity generation project.<sup>33</sup>

## V. ARBITRATION LANDSCAPE

### A. *Institutional arbitration*

The only arbitration institution in Rwanda is KIAC. As stated above, KIAC was created by Law No. 51/2010 of 10 January 2010, as a result of the incentives proposed by the Rwanda Private Sector Federation and implemented by the Government of Rwanda. The centre opened only in May 2012, and it operates independently from the Rwandan Government.

The KIAC arbitration rules are similar to the 2012 ICC Arbitration Rules and include for instance the availability of an emergency arbitrator.<sup>34</sup> Furthermore, the centre has an administrative organisation similar to most arbitral institutions, with a secretariat and board of directors.<sup>35</sup>

As part of the KIAC efforts to develop arbitration in Rwanda, the institution offers constant trainings in partnership with the Chartered Institute of Arbitration, resulting in over 300 trained arbitrators. KIAC also promotes the use of arbitration amongst the business community and is constantly offering seminars and conferences to propagate arbitration.<sup>36</sup>

Additionally, the African Arbitration Association (AFAA) established its headquarters in Rwanda, as a 'a non-profit private sector-led association'.<sup>37</sup> According to the AFAA, the organisation aims to promote the practice of international arbitration in Africa, as well as other means of dispute resolution. Although the institution is focused largely in the continent, the choice for the AFAA to be based in Kigali is further evidence that Rwanda is thriving as a new arbitration hub.

Although the awareness and use of institutional arbitration has increased considerably in Rwanda, research commissioned by KIAC in 2015 to measure the perception of arbitration in Rwanda<sup>38</sup> concluded that 14.4 per cent of respondents preferred ad hoc arbitration and 28 per cent indicated they favour ad hoc and institutional arbitration equally. Around 58 per cent of those interviewed stated that they prefer institutional arbitration.<sup>39</sup> The strong presence of ad hoc arbitration in Rwanda is attributed to the fact that 'unlike institutional arbitration, in Ad Hoc arbitration there are no fixed charges and the fee is negotiable on both sides'.<sup>40</sup>

### B. *Measures to strengthen institutional arbitration capabilities*

As seen above, Rwanda has only recently engaged in the promotion of arbitration as an alternative to the national courts. With arbitration legislation only enacted in the past 10 years, Rwanda has a long way to go to establish arbitration as common practice, but the country is considered one of the most successful regional examples in Africa.<sup>41</sup>

This is due mostly to the combined efforts of the government and industry bodies to strengthen the practice of arbitration in Rwanda. These efforts have resulted in a modern arbitration legal framework in consonance with international practice, a reliable and proactive arbitration institution working to further arbitration knowledge, and national courts specialised and prepared to deal with arbitration matters.

More generally regarding the financial situation of the country, a 2019 US report for investors stated that<sup>42</sup>

"Many United States investors express concern that local access to affordable credit is a serious challenge in Rwanda. Interest rates are high for the region, banks offer predominantly short-term loans, collateral requirements can be higher than 100 percent of the value of the loan, and Rwandan commercial banks rarely issue significant loan values. The prime interest rate is at 16–18 percent. Large international transfers are subject to authorization. Investors who seek to borrow more than USD 1 million must often engage in multi-party loan transactions, usually leveraging support from larger regional banks. Credit terms generally reflect market rates and foreign investors are able to negotiate credit facilities from local lending institutions if they have collateral and bankable projects. In some cases, preferred financing options may be available through specialized funds including the Export Growth Fund or the Rwanda Development Bank ('BRD')."

Moreover, this US report also raised concern that the Rwandan Government has pressured businesses to adopt arbitral agreements choosing 'the Rwanda-based KIAC for the seat [sic] of arbitration in contracts signed with the government'. Yet according to this report, this choice would have negatively impacted potential international financing, because the 'KIAC has a short track record'.<sup>43</sup>

#### C. *Submission of disputes to arbitration vs. litigation*

According to the KIAC annual report from 2016/2017 (the last one released by the institution), as of June 2017 the KIAC had administered 66 cases filed since 2012, of which 53 were submitted to the KIAC rules.<sup>44</sup> A press release of 25 January 2019 announced that the number of cases administered by KIAC had soared to 100 in total.<sup>45</sup> These 100 cases comprise both domestic and international arbitrations, involving countries such as the US, Italy, South Africa, Kenya, Korea, Turkey, Burundi, Nigeria, Pakistan, Senegal, Spain, Switzerland, Singapore, France, Zambia, Uganda, India, China and members of the African Union. According to the executive director of KIAC, the disputes have a total amount in claims worth more than US\$50 million.<sup>46</sup>

#### D. *Participation by foreign counsel in international arbitrations*

Foreign lawyers can practise in Rwanda if they cumulatively demonstrate that (i) they meet the qualification requirements of their home jurisdiction; and (ii) they can present a Bar letter of good standing from their Bar home jurisdiction and (iii) an approval letter from the president of the Kigali Bar Association.<sup>47</sup>

Furthermore, Law No. 83/2013 of 11/09/2013 establishing the Bar Association in Rwanda sets forth that foreign lawyers can be authorised to practise as an advocate where there is a reciprocity agreement between the foreign country and Rwanda.

#### E. *Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

This information was not found. However, it is worth mentioning that some commentators generically point out that East African countries normally refer disputes in the energy and mining sectors to arbitrations, as well as disputes arising from infrastructure contracts.<sup>48</sup>

## 2. Time taken for enforcement/annulment proceedings

No information was available.

## 3. Percentage of awards annulled/not enforced

No information was available.

F. *Statistics/information on the length of court proceedings in commercial cases*

Since the judicial reforms started, a backlog of cases in Rwandan courts was one of the main reasons for the Government investment in arbitration as an alternative to the judicial system. Data released by the Rwandan judiciary referring to 2015/2016 reveals that as a result of the measures implemented the time it takes for a new case to be heard by a court, as well as the time for completion of a case submitted to national courts, have been considerably reduced.<sup>49</sup> The number of pending cases also decreased from 42,670 in 2011/2012 to 17,231 in 2015/2016, whereas the number of backlog cases declined from 18,416 to 5,508 in the same period.

The 2019 World Bank Doing Business ranking indicates that it takes about 230 days to resolve a commercial dispute in a first-instance court in Rwanda – 20 days for filing and service of court processes, 120 days for trial and judgment and 90 days for enforcement of judgment.<sup>50</sup> Rwanda ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>51</sup> In terms of overall ease of enforcing contracts, Rwanda scored 59.54 of 100 and ranked 78 of 190.<sup>52</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

G. *Statistics on judges and lawyers per capita*

Data collected for research in September 2010<sup>53</sup> noted that Rwanda has only five lawyers per 100,000 inhabitants, which is one of the lowest ratios analysed in the research. In comparison with other African countries parties of the Commonwealth, this statistic lists Rwanda behind Botswana (with 12 lawyers), Mauritius (with 42), and South Africa (with 43).

According to the information provided by the Rwandan Bar Association, in 1997, when the Bar was created it had only 37 members. In 2014, the membership exceeded 1,073 members, including all practising advocates, and interns who aspire to become lawyers after completing two years of internship.<sup>54</sup> It is important to note that the registration with the Bar is a requirement for lawyers in private practice, although those working in public offices do not need to register.<sup>55</sup>

The data indicates that the Government's efforts to reform the Rwandan legal system and to invest in the education and qualification of legal practitioners may have resulted in an increase of the number of lawyers per capita, although more recent data is not available.

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no provision for legal aid to businesses or for arbitration in all policy and action taken by providers of legal aid in Rwanda. The 2014 National

Legal Policy outline by the Ministry of Justice extends legal aid to civil, administrative, and criminal matters. This includes mediation but does not mention arbitration. There are a total of 74 identified legal aid providers including two made available by the Ministry of Justice through the Access to Justice Bureaus and *Abunzi*, 30 NGOs, four universities, and 40 private practitioners.<sup>56</sup> The Legal Aid Forum was established in Rwanda in 2006 and is now composed of 36 national and international non-governmental organisations, professional bodies, universities, legal aid clinics, faith-based organisations and trade unions that provide or support legal aid services to the indigent and vulnerable population of Rwanda.<sup>57</sup>

#### B. *Third-party funding*

No information about third-party funding could be located.

Regarding the rule of maintenance and champerty, the only information found is a KIAC report that mentions a presentation discussing laws of champerty and maintenance in African countries, and the difficulties faced in enforcing arbitral awards where third-party funders have been involved. This presentation was given at a KIAC conference and it did not include Rwanda among the countries where this rule is still in force, which may be an indication that there is no such prohibition in the country.<sup>58</sup> This assumption is also reinforced by the fact that the Rwandan legal system is primarily based on the Belgian legal system, and therefore it is unlikely that the English common law rule of maintenance and champerty was incorporated in the Rwanda legal system.

#### C. *Contingency fees*

No information was available.

#### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 See brief discussion about the community-based *Abunzi* systems in Fidèle Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration', in Emilia Onyema (ed.), *Rethinking the Role of African National Courts in Arbitration*, Kluwer Law International.
- 3 Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration', 328. Masengo sets out that the 'Abunzi system is often translated as "Mediation", whereby the "Umwunzi" (mediator) was required by parties or appointed by community, family to settle a dispute between disputants. The designated "umwunzi" had the power like that of both modern mediator and arbitrator; a sort of "med-arb" function was assigned to the umwunzi allowing him to first seek a negotiated agreement and, when this fails, to adjudicate the dispute.'
- 4 Martha Mutisi (2011), 'The Abunzi Mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution', African Centre for the Constructive Resolution of Disputes <<https://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> accessed 27 August 2019.
- 5 US Department of State, '2018 Investment Climate Statements' <[state.gov](https://www.state.gov)> accessed 30 July 2019.

- 6 Ibid; However, some commentators have pointed that the country has 'began transitioning from its dual civil and common law legal system to a more common law-based system, in part to facilitate the harmonization of laws in the East African Community but mainly as part of a reform process to improve its commercial justice system.' See Rukia Baruti Dames (2017), 'International Arbitration: The Making of a Safe Seat in Africa', in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, 19, 960, available at: <<http://www.kluwerarbitration.com/document/KLI-KA-ICCA-Congress-19-048-n>> accessed 30 July 2019.
- 7 Herbert Smith Freehills (2017), 'A dialogue with Dr Fidèle Masengo, Secretary General of the Kigali International Arbitration Centre' (HSF Africa Group) <<https://www.herbertsmithfreehills.com/uk/grads/latest-thinking/a-regional-success-story-the-development-of-arbitration-in-rwanda>> accessed 27 August 2019.
- 8 'Abunzi' systems in Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration', 327–31.
- 9 See below at para. 10.
- 10 Available at the New York Arbitration Convention <<http://www.newyorkconvention.org/national+arbitration+law+-+rwanda>> accessed 27 August 2019.
- 11 Didas M Kayihura (2013), 'Chapter 3.6: Rwanda', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 223.
- 12 More information about the Kigali International Arbitration Centre (KIAC) is available at <<http://www.kiac.org.rw/>> accessed 27 August 2019.
- 13 See above at para. 5.
- 14 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 15 Rwandan Arbitration Act, article 14.
- 16 Rwandan Arbitration Act, s 5, articles 19–23.
- 17 Rwandan Arbitration Act, s 5, articles 24–25.
- 18 Rwandan Arbitration Act, article 36.
- 19 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 20 See 'New York Convention Guide' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 21 See ISCID, 'List of Contracting States and other Signatories of the Convention' <[icsid.worldbank.org](http://icsid.worldbank.org)> accessed 31 August 2019.
- 22 UNCTAD Investment Policy Hub, 'Rwanda' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 23 Tralac, 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.
- 24 Law No. 59/2007 of 16 December 2007.
- 25 Global Arbitration Review (2019), 'Rwanda pushes for arbitration centre', Alison Ross, <<https://globalarbitrationreview.com/article/1028667/rwanda-pushes-for-arbitration-centre>> accessed on 27 August 2019.
- 26 'Abunzi' systems in Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration', 334–35.
- 27 Didas M Kayihura (2013), 'Chapter 3.6: Rwanda', in Bosman, *Arbitration in Africa: A Practitioner's Guide*, 226–27.
- 28 'Abunzi' systems in in Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration', 346.
- 29 Dames (2017), 'International Arbitration: The Making of a Safe Seat in Africa', 964–65.

- 30 See 'Abunzi' systems in in Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration' 340–41, referring to the case *Fina Bank SA v Mulindangabo Jacob* R COM A 0008/11/HCC.
- 31 See 'Abunzi' systems in in Masengo (2018), 'Attitude of Rwandan Courts Towards Arbitration', 340–41, referring to the case *Tigo Rwanda Ltd v Endsco Ltd*, Judgment R COM A 0442/13/HCC (High Commercial Court).
- 32 All cases available at the ICSID website <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/10>> <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/21>> and <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/19/3>> accessed 27 August 2019.
- 33 The *East African* newspaper stated that the Rwandan government cancelled nine mining concessions between 2011 and 2015; see *East African* (2016), 'Rwanda cancels mining concessions as investors fail to abide by rules' <<https://www.theeastafrican.co.ke/rwanda/Business/Rwanda-cancels-mining-concessions/1433224-3085360-iqw21l/index.html>> accessed 27 August 2019; See also Global Arbitration Review (2019), 'Details of ICSID claim against Rwanda come to light', Cosmo Sanderson <<https://globalarbitrationreview.com/article/1179578/details-of-icsid-claim-against-rwanda-come-to-light>> accessed 27 August 2019.
- 34 John Miles, Nicola Muriuki et al. (2017), 'The Development of International Arbitration in Africa', in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Volume 19.
- 35 Herbert Smith Freehills (2017), 'A dialogue with Dr Fidèle Masengo, Secretary General of the Kigali International Arbitration Centre'.
- 36 *Ibid.*
- 37 See the African Arbitration Association website <<https://afaa.ngo/>> accessed 27 August 2019.
- 38 See KIAC, ICF (2015), Perception of Arbitration Services in Rwanda Endline Survey <<http://www.kiac.org.rw/IMG/pdf/-28.pdf>> accessed 27 August 2019. The research interviewed 500 different respondents, including 275 arbitration users (construction industry, including contractors, architects, engineers, energy developers, mining, manufacturing, other businesses, government institutions, non-governmental organisations), 30 financial institutions (users and advisers) and 195 legal professional bodies (only lawyers and judges). The respondents were mostly men (83%), around 41 years old (although the full age range varied from 25 to 79 years), and they were highly educated (91.2% had at least one degree). Based on this latter information, the survey also assumed that 'they are also relatively wealthy'. Of the respondents, 45.4% work on legal professional bodies, and the other 54.6% were considered users. 35.2% of the respondents were members of the Rwanda Bar Association (35.2%) followed by the construction industry (18.2%), government institutions (18.0%), finance institutions/banking/insurance (6.2%), manufacturing industry (6.0%), judiciary (4.4%), energy developers (3.4%), and mining (3.2%). Only 31% of respondents were lawyers/advocates, and 13% legal advisers. Interestingly, 38% stated they held a senior position in the institution they work for (such as 'permanent secretary, executive secretary, director general, mayor, managing partner, CEO, judge').
- 39 The uptake of institutional arbitration is lower than reported by the 2006 International Arbitration Survey, Queen Mary University of London, which reported a 76% worldwide preference for institutional arbitration available at <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy\\_2006.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf)> accessed 27 August 2019. However, it has to be noted that the participants of the KIAC study came from a wide range of backgrounds and included non-governmental organisations whereas the Queen Mary study surveyed exclusively large businesses.

- 40 Interestingly, this answer was provided mainly by lawyers, when in comparison with other respondents. See KIAC, ICF (2015), *Perception of Arbitration Services in Rwanda Endline Survey*, 28.
- 41 Herbert Smith Freehills (2017), 'A dialogue with Dr Fidèle Masengo'.
- 42 US Department of State (2019), '2019 Investment Climate Statements: Rwanda' <<https://www.state.gov/reports/2019-investment-climate-statements/rwanda/>> accessed 27 August 2019.
- 43 Ibid.
- 44 KIAC Annual Report (July 2016–June 2017) <[http://www.kiac.org.rw/IMG/pdf/annual\\_report\\_2016-2017\\_final.pdf](http://www.kiac.org.rw/IMG/pdf/annual_report_2016-2017_final.pdf)> accessed 27 August 2019.
- 45 KIAC (2019), 'Kigali Arbitration Centre register over 100 cases' <<http://kiac.org.rw/spip.php?article176>> accessed 27 August 2019.
- 46 Ibid.
- 47 Herbert Smith Freehills (2016), *Guide to Dispute Resolution in Africa*, 239 <<https://www.herbertsmithfreehills.com/latest-thinking/guide-to-dispute-resolution-in-africa>> accessed 27 August 2019.
- 48 J Cantor (2017), 'Rwanda and the Kigali International Arbitration Centre: The Future Faces of East African Arbitration and Growth', *Cardozo J. of Conflict Resolution*, Vol. 19 No. 93, 102–4.
- 49 Republic of Rwanda, Supreme Court, 'Summary of the Annual Report of the Judiciary of Rwanda 2015-2016' <[http://judiciary.gov.rw/fileadmin/Publications/Reports/Depliant\\_2015-2016\\_Achievements\\_VF.pdf](http://judiciary.gov.rw/fileadmin/Publications/Reports/Depliant_2015-2016_Achievements_VF.pdf)> accessed 27 August 2019.
- 50 World Bank (2019), *Doing Business*, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreconomies/rwanda>> accessed 27 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 51 World Bank (2019), *Doing Business*, 'Enforcing Contracts'
- 52 Ibid.
- 53 See Dihel, N, Fernandes, A M & Mattoo, A (2010), 'Developing Professional Services in Africa Through Regional Integration' <[https://www.uneca.org/sites/default/files/uploaded-documents/AEC/2010/Papers/session\\_i.1.3\\_1.\\_developing\\_profesional\\_services\\_in\\_africa\\_through\\_regional\\_integration.pdf](https://www.uneca.org/sites/default/files/uploaded-documents/AEC/2010/Papers/session_i.1.3_1._developing_profesional_services_in_africa_through_regional_integration.pdf)> accessed on 27 August 2019.
- 54 Rwandan Bar Association website <<http://www.rwandabar.org.rw/about/>> accessed on 27 August 2019.
- 55 Dihel, Fernandes, Mattoo (2010), 'Developing Professional Services in Africa...', 5.
- 56 Republic of Rwanda, Ministry of Justice (2014), 'National Legal Aid Policy', 10 [http://www.minijust.gov.rw/fileadmin/Documents/MoJ\\_Document/Legal\\_Aid\\_Policy\\_-\\_IMCC\\_Feedback.pdf](http://www.minijust.gov.rw/fileadmin/Documents/MoJ_Document/Legal_Aid_Policy_-_IMCC_Feedback.pdf)
- 57 Legal Aid Rwanda <http://legalaidrwananda.org> accessed 14 September 2019.
- 58 Kigali International Arbitration Centre (KIAC) (2014), 'Emerging Issues In International Arbitration: What A New Arbitral Seat Can Anticipate' <<http://www.kiac.org.rw/IMG/pdf/-6.pdf>>, 118 accessed 27 August 2019.

## SAMOA<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

Independent State of Samoa is a country consisting of two main islands, Savai'i and Upolu, and four smaller islands. Historically, Samoa (formerly Western Samoa until 1977), was a colony of Germany from 1900 to 1919, and then a league of Nations mandate of New Zealand 1919–45, and subsequently a United Nations trusteeship of New Zealand 1945–62.<sup>2</sup> Thus, from 1919 to 1962, Samoa was administered by New Zealand and certain New Zealand laws applied in Samoa.<sup>3</sup> Samoa gained its independence from New Zealand on 1 January 1962.<sup>4</sup>

Consequently, pre-independence Samoa's legal system comprised several sources of law including (i) the Samoa Act 1921 (New Zealand) including amendments; (ii) German law (Decrees 1900–1919); (iii) certain Acts of the New Zealand Parliament (enacted for or specifically applied to Western Samoa); (iv) certain Acts of the British Parliament (those in force in England on 14 January 1840 and in New Zealand on 7 December 1921); (v) English common law and equity; and (vi) custom.<sup>5</sup>

New Zealand arbitration legislations were specifically applied to Samoa.<sup>6</sup> These New Zealand legislations were influenced by the English arbitration legislations. For example, the New Zealand Arbitration Act 1890 (the '1890 Act') was based on the English Arbitration Act 1889.<sup>7</sup> Subsequently, the New Zealand Arbitration Act 1908 (the '1908 Act') was enacted, and it repealed the 1890 Act. The 1908 Act, including its amendments over the years, remained New Zealand's principal arbitration statute until its replacement in 1996.<sup>8</sup> The 1908 Act including its several amendments applied in Samoa.<sup>9</sup> These amendments are discussed below.

#### B. *Description of prior legislation and reasons for its replacement*

As discussed above, the 1908 Act together with its amendments applied in Samoa until 1976. Following Samoa's independence in 1962, the Samoan Constitution<sup>10</sup> preserved as existing laws certain New Zealand legislation, including the 1908 Act, which were in force in Samoa at the date of independence.

In 1976, the Samoa Arbitration Act was enacted (the '1976 Act'). This Act repealed the 1908 Act and all its amendments. This Act remains the extant arbitration statute in Samoa.

The enactments repealed are as follows:<sup>11</sup>

- a. The Arbitration Act 1908 (New Zealand 1908 – No. 8);
- b. The Arbitration Amendment Act 1915 (New Zealand 1915 – No. 13);
- c. The Arbitration Clauses (Protocol) and Arbitration (Foreign Awards) Act 1933 (New Zealand 1933 – No. 4);
- d. The Arbitration Amendment Act 1938 (New Zealand 1938 – No. 6);
- e. The Arbitration Amendment Act 1952 (New Zealand 1952 – No. 27); and
- f. The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Amendment Act 1957 (1957 – No. 44). No information is available for the reasons for its replacement.



## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The 1976 Act is the principal arbitration legislation in Samoa. It was enacted on 23 August 1976.<sup>12</sup>

### B. *Scope of application to domestic and international arbitrations*

The 1976 Act does not strictly distinguish between domestic and international arbitration; however, it contains a separate part on foreign arbitral awards,<sup>13</sup> and likely applies to both domestic and international arbitration. However, similar 1889 model arbitrations statutes have been described as first-generation arbitration statutes, designed with domestic arbitration in mind and unsuitable for international commercial arbitration.<sup>14</sup>

### C. *Details and/or relevant amendments and modifications*

The 1976 Act has been revised by the Legislative Drafting Division from 2008 to 2018 respectively under the authority of the Attorney General pursuant to the Revision and Publication of Laws Act 2008. These revisions, however, have not been substantive, but feature minor changes including:

- a. amendments to conform to modern drafting styles and to use modern language as applied in the laws of Samoa;
- b. amendments to up date references to offices, officers and statutes;
- c. insertion of the commencement date; and
- d. other minor language editing such as changing 'shall be' to 'is'.<sup>15</sup>

### D. *Relationship to the UNCITRAL Model Law*

The 1976 Act is modelled on the 1889 English Arbitration Act. It predates the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. Further, although the 1976 Act has been revised several times since it was enacted, these revisions, as stated above, have been quite minor, and thus have not substantially modelled the UNCITRAL Model Law.<sup>16</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The 1976 Act differs from the UNCITRAL Model Law in several respects. Key differences are that under the 1976 Act:

- a. 'Arbitration agreement' is not defined. Reference is instead made to the term 'submission', which is only vaguely defined as a 'written agreement to submit present or future differences to arbitration';<sup>17</sup>
- b. The arbitration agreement is not separable from the main agreement;<sup>18</sup>
- c. Arbitrators do not have the statutory power to determine their jurisdiction;<sup>19</sup>
- d. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>20</sup>
- e. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>21</sup>

- f. There are limited grounds for setting aside an award, namely: misconduct by an arbitrator and the improper procurement of the arbitration or the award;<sup>22</sup> and
- g. There are more opportunities for court interference with the arbitral process such as power of the court to: take over the determination of a dispute from the arbitrators and revoke the arbitration agreement if the dispute involves a 'question whether a party has been guilty of fraud';<sup>23</sup> set aside appointment of an arbitrator in certain circumstances;<sup>24</sup> remit award for reconsideration;<sup>25</sup> issue binding opinion on points of law stated to it by the arbitral tribunal;<sup>26</sup> and enlarge the time for making an award.<sup>27</sup>

#### *F. Powers and duties of arbitrators*

Section 10 of the 1976 Act empowers an arbitrator to:

- a. Administer oaths or take the affirmation of the parties and witnesses appearing; and
- b. Correct clerical mistakes or errors in an award arising from accidental slips or omissions.

In addition, an arbitrator can make an interim award, order specific performance of any contract other than a contract relating to land or any interest in land; and issue a final and binding award on the reference.<sup>28</sup>

#### *G. Arbitrator immunity*

The 1976 Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Samoa is not a party to the 1958 New York Convention.<sup>29</sup>

#### *B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

#### *C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction. However, it is worth pointing out that the 1976 Act devotes its entire part II to provisions regarding the enforcement of foreign arbitral awards. Section 21 of the 1976 Act provides that a foreign award shall be enforceable in Samoa either by action or in the same manner as a judgment or order to the same effect. Section 22 provides similar conditions for enforcement of foreign arbitral awards as contained in the New York Convention and UNCITRAL Model Law.<sup>30</sup>

#### *D. Other international/regional treaties*

Samoa is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (the 'ICSID Convention').<sup>31</sup> Samoa ratified the ICSID Convention on 25 April 1978 and it entered into force on 25 May 1978.<sup>32</sup>

Samoa has signed four free trade agreements, of which three are in effect (Pacific ACO–EC Economic Partnership Agreement, Pacific Island Countries Trade Agreement and the South Pacific Regional Trade and Economic Cooperation Agreement).<sup>33</sup>

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

No information was available.

##### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

No information was available.

##### C. *Key judicial decisions on the applicable arbitration legislation or the New York Convention*

No information was available.

#### V. ARBITRATION LANDSCAPE

##### A. *Institutional arbitration*

There is no arbitral institution in Samoa.<sup>34</sup>

##### B. *Measures to strengthen institutional arbitration capabilities*

No specific information on institutional arbitration capabilities was found. However, certain initiatives aimed at strengthening the commercial arbitration practice in Samoa are afoot. For example, in 2016, the Asian Development Bank (ADB) established an arbitration-specific project, named 'Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific'. The project is aimed at (i) assisting Pacific countries in acceding to the New York Convention; (ii) drafting new or updated arbitration laws to recognise the international arbitration agreements and implement the New York Convention; and (iii) strengthening capacity for international arbitration reforms through regional awareness building and dissemination workshops and training of arbitrators and judges on international commercial arbitration and recognition and enforcement proceedings under the New York Convention.<sup>35</sup>

Further, although not squarely relating to arbitration, on 20 December 2018 the United Nations General Assembly approved a resolution to adopt the United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention').<sup>36</sup> The signing ceremony of the Singapore Convention was held in Singapore on 7 August 2019 and 46 countries, including Samoa, the United States of America and China signed it on the first day.<sup>37</sup> The Singapore Convention sets out an international framework for the enforcement of settlement agreements arising out of mediation, and to this extent will operate to promote mediation as a complement to arbitration as an alternative dispute resolution worldwide.<sup>38</sup> The Singapore Convention will come into force six months after three countries have ratified, accepted, approved, or acceded to it.<sup>39</sup>

By swiftly signing the Singapore Convention, Samoa signalled to investors, the arbitration community and the world both its favourable disposition towards alternative dispute resolution mechanisms and its willingness to accept and/or participate in arbitration-related reforms.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

No information was available.

*E. Relevant statistical data*

## 1. Sectors where arbitration is routinely used

No information was available.

## 2. Time taken for enforcement/annulment proceedings

No information was available.

## 3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 455 days to resolve a commercial dispute in a first-instance court in Samoa – 35 days for filing and service of court processes, 240 days for trial and judgment and 180 days for enforcement of judgment.<sup>40</sup> Samoa ranks above the East Asia & Pacific region, where it takes an average of 581 days to resolve commercial disputes in first-instance courts.<sup>41</sup> In terms of overall ease of enforcing contracts, Samoa scored 58.59 of 100 and ranked 86 of 190.<sup>42</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>43</sup>

*G. Statistics on judges and lawyers per capita*

No information was available.

**VI. FUNDING FOR LEGAL CLAIMS***A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no provision for legal aid for businesses or for commercial dispute resolution in Samoa. The Samoan Community Law Centre has provided legal assistance since its establishment in 2015.<sup>44</sup> A January 2019 government press release discusses an amendment of the law in Samoa to restrict the Community Law Centre to only provide legal aid to defendants charged with criminal offences. The government states that there are insufficient funds available for supporting the Centre in more legal aid cases as the reason for this policy change and that the constitution only mandates legal representation for a defendant charged with a criminal offence.<sup>45</sup> Section 9 of the Constitution is the right to a free trial stating in subsection 4(3) that a person has the right to 'defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.<sup>46</sup> There is no reason in this wording why legal aid could not be provided for many different matters including commercial, but without further definition this does not seem to include businesses.

A Samoan Mediation Centre has been in the planning stages since 2013, which aims to provide purpose-built mediation facilities to enable more efficient and effective mediation and case management, improving access to justice.<sup>47</sup> There is no mention of arbitration. Neither is there mention of legal aid. There is also no information on the provision of legal aid through the Samoan Law Society.

#### B. *Third-party funding*

No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Samoa or the availability of third-party funding in that jurisdiction. However, given that Samoa's legal system is based on New Zealand (and English) common law, and the crimes and torts of maintenance and champerty applied at the time of its independence in 1962 in New Zealand,<sup>48</sup> it is reasonable to assume that the crimes and torts of maintenance and champerty are likely to be still applicable in Samoa.

Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to occur in Samoa.

#### C. *Contingency fees*

No information was available.

#### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Pacific Islands Legal Information Institute, 'Samoa Sources of Law Information', Don Paterson <<http://www.pacii.org/ws/sources.html>> accessed 2 May 2019; GlobalLex (2006), 'Introduction to Researching South Pacific Law,' Peter Murgatroyd <[https://www.nyulawglobal.org/globalex/South\\_Pacific\\_Law.html](https://www.nyulawglobal.org/globalex/South_Pacific_Law.html)> accessed 2 May 2019.
- 3 Pacific Islands Legal Information Institute, 'Samoa Sources of Law Information'.
- 4 See 'Permanent Mission of the Independent State of Samoa to the United Nations' <<https://www.un.int/samoa/event/independence-day>> accessed 2 May 2019; Pacific Islands Legal Information Institute, 'Samoa Sources of Law Information'.
- 5 Pacific Islands Legal Information Institute, 'Samoa Sources of Law Information'.
- 6 Samoa Arbitration Act 1976, s 33(1), sch 3.
- 7 Law Commission *Arbitration* (NZLC R20, 1991) at [5] and [25]–[32].
- 8 *Ibid.* In 1996, New Zealand comprehensively revised its arbitration legislative framework with the enactment of the Arbitration Act 1996 (NZ), which remains the extant arbitration statute in New Zealand.
- 9 Samoa Arbitration Act 1976, s 33(1), sch 3.
- 10 Constitution of Samoa 1960, art 114(a).
- 11 Samoa Arbitration Act 1976, schedule 3, section 33(1).
- 12 Pacific Islands Legal Information Institute, 'Consolidated Acts of Samoa 2018, Arbitration Act 1976' <[http://www.pacii.org/ws/legis/consol\\_act/aa1976137/](http://www.pacii.org/ws/legis/consol_act/aa1976137/)> accessed 2 May 2019.

- 13 See Samoa Arbitration Act 1976, ss 21–24, pt II.
- 14 David Butler (2004), 'The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress', *Journal of International Arbitration*, Vol. 21 No. 2, 169.
- 15 Pacific Islands Legal Information Institute, 'Consolidated Acts of Samoa 2018, Arbitration Act 1976: Revision Notes 2008–2018' <[http://www.paclii.org/ws/legis/consol\\_act/aa1976137/](http://www.paclii.org/ws/legis/consol_act/aa1976137/)> accessed 2 May 2019.
- 16 Ibid.
- 17 See Samoa Arbitration Act 1976, s 2; cf. UNCITRAL Model Law, Art. 7. (The UNCITRAL Model Law uses the term 'arbitration agreement', and contains comprehensive and up-to-date definitions of an arbitration agreement that reflect international best practice, including useful clarifications on how agreements concluded orally or by electronic communications would be addressed.)
- 18 See UNCITRAL Model Law, Art. 16(1).
- 19 Ibid.
- 20 See Samoa Arbitration Act 1976, s 6, sch 1; cf. UNCITRAL Model Law, Art. 10 (providing that the default number of arbitrators shall be three).
- 21 See Samoa Arbitration Act 1976, s 6, sch 1.
- 22 See Samoa Arbitration Act 1976, s 13; cf. UNCITRAL Model Law, Art 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non- arbitrability of dispute and award contravenes public policy).
- 23 Samoa Arbitration Act 1976, s16(2).
- 24 Samoa Arbitration Act 1976, s 13(1) and (3) (providing that an arbitrator's appointment will be set aside if the arbitrator misconducts himself or herself, or the proceedings, or fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award).
- 25 Samoa Arbitration Act 1976, s 27.
- 26 Ibid., s 20(3).
- 27 Ibid., s 26.
- 28 See Samoa Arbitration Act 1976, s 6, sch 1.
- 29 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 August 2019.
- 30 See Samoa Arbitration Act 1976, ss 21–24, pt II; New York Convention, art V; UNCITRAL Model Law, arts 34 and 35.
- 31 ICSID, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 31 August 2019.
- 32 Ibid.
- 33 Asian Regional Integration Center, 'FTAs: Samoa' <[aric.adb.org](http://aric.adb.org)> accessed 31 August 2019.
- 34 See C Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, United Nations, 285, 293.
- 35 Asian Development Bank, 'Regional: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific' <<https://www.adb.org/projects/50114-001/main#project-documents>> accessed 31 August 2019.
- 36 UNCITRAL, 'United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)' <[https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements)> accessed 31 August 2019.
- 37 See e.g. Baker & McKenzie (2019), 'Singapore Mediation Convention' <<https://www.bakermckenzie.com/en/insight/publications/2019/08/>>

- singapore-mediation-convention> accessed 31 August 2019; Ashurst, 'The Singapore Convention on Mediation' <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-singapore-convention-on-mediation/>> accessed 31 August 2019.
- 38 See e.g. Baker & McKenzie (2019), 'Singapore Mediation Convention'; Ashurst (2019), 'The Singapore Convention on Mediation'.
- 39 See e.g. Baker & McKenzie, '(2019), 'Singapore Mediation Convention'; Ashurst (2019), 'The Singapore Convention on Mediation'.
- 40 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/samoa#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/samoa#DB_ec)> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 41 Ibid.
- 42 Ibid.
- 43 Ibid.
- 44 Community Law Centre Act 2015 Part 3 Legal Assistance <http://www.palemene.ws/new/wp-content/uploads/01.Acts/Acts%202015/Community-Law-Centre-Act-2015-Eng.pdf>
- 45 Samoa Global News (2019), 'Legal Aid Only for Defendants of Criminal Cases', government press release <https://samoaglobalnews.com/legal-aid-for-civil-court-cases-under-fire/> accessed 15 September 2019
- 46 Constitution of the Independent State of Samoa, s 9(4)(3) <<http://www.samoagovt.ws/publications/>>
- 47 Mediation Centre, Samoan Law and Justice Sector <<http://www.samoaljs.ws/english/index>> accessed 15 September 2019.
- 48 See New Zealand country report. The 1963 Crimes Amendment Act could not be located to ascertain whether the crimes of maintenance and champerty had been abolished as in Kiribati at independence. The 2013 Crimes Act does not list maintenance and champerty as an offence.

# SCOTLAND<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. Relationship with existing or prior English Arbitration Act(s)

Although a part of the United Kingdom, Scotland's legal system has remained separate from those of England and Wales and Northern Ireland. Article 19 of the Act of Union 1707 provides that '[t]he Scottish legal system and its courts was to remain unchanged'.<sup>2</sup> Nevertheless, Scotland's current arbitral legislation, the Arbitration (Scotland) Act 2010 (the 'Arbitration Act')<sup>3</sup> broadly follows the English Arbitration Act 1996, as discussed below.

### B. Description of prior legislation and reasons for its replacement

Prior to the 2010 Arbitration Act, Scotland did not have a domestic arbitration statute. The applicable law was not to be found in one Act but was scattered over multiple Acts of the UK Parliament, the pre-Union Scottish Parliament, and numerous cases.<sup>4</sup> Scotland's old arbitration law comprised a mixture of old case law dating back to 1207 and piecemeal statute dating back to 1695.

As a result of the absence of a domestic arbitration statute, Scotland's old arbitration law was viewed as 'not only riddled with anomalies, defects and uncertainties' but also 'largely inaccessible'.<sup>5</sup> Hence, Scotland adopted the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ('UNCITRAL Model Law') 1985 regulating international commercial arbitrations in 1990.

However, the 1990 Act was not widely used, and Scotland decided to adopt a new legislation based on the English Arbitration Act as a model for a new Scottish Arbitration Act.<sup>6</sup> Some of the reasons presented for repealing the 1990 Act and adopting a new legislation based on the English Arbitration Act were:<sup>7</sup>

- a. Having similar laws on arbitration as England and Wales and Northern Ireland would facilitate cross-border transactions between the countries, since it is expected that most commercial parties would be trading within the United Kingdom as a whole. It would therefore be advantageous to have fewer differences in the law;
- b. The ten-year survey of the English Arbitration Act 1996 made it clear that there were elements of the English Arbitration Act that were desirable to users of arbitration;<sup>8</sup> and
- c. By tracking the development of the English Arbitration Act 1996 over the years, Scotland was able to obtain a substantial and significant resource on arbitration jurisprudence at zero cost.

The 2010 Arbitration Act in Scotland is said to represent 'a new beginning for arbitration in Scotland'.<sup>9</sup> In the first, widely lauded judgment under the 2010 Arbitration Act, Lord Glennie said:

[The 2010 Arbitration Act] marks a new beginning for arbitration in Scotland, recognising the desire in this field for party autonomy, privacy and finality. This is reflected in s.1, which sets out the 'founding principles' to which the court and arbitrators, in construing the Act, must have regard. These include the need for fairness, impartiality, expedition and economy in dispute resolution; freedom (subject to certain safeguards) for parties to



decide for themselves how to resolve their disputes; and limits on the scope for court intervention in the arbitral process. An earlier step on this road in Scotland was taken in the Law Reform (Miscellaneous Provisions) Scotland Act 1990, s.66 and Schedule 7 of which applied the UNCITRAL Model Law to international commercial arbitrations. While adhering to the philosophy underlying the Model Law, the new Act represents a departure from that earlier approach in two respects. First, rather than simply applying the provisions of the Model Law *en bloc* to arbitrations in Scotland, it follows the approach in the (English) Arbitration Act 1996 of setting out in the Act a tailor-made set of provisions covering all stages of the arbitral process in a Convention compliant way. Second, it applies (or will eventually apply) to all arbitrations in Scotland, not just international commercial arbitrations.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act received Royal Assent on 5 January 2010 and came into force on 7 June 2010.

### B. *Scope of application to domestic and international arbitrations*

Pursuant to section 2(1) of the 2010 Arbitration Act, the term 'arbitration' under the Act includes domestic arbitration, arbitration between parties residing, or carrying on business, anywhere in the United Kingdom, and international arbitration.

### C. *Details and/or relevant amendments and modifications*

The 2010 Arbitration Act has not been amended to date.

### D. *Relationship to the UNCITRAL Model Law*

The Arbitration Act is not based on the UNCITRAL Model Law on International Commercial Arbitration (with 2006 amendments). Instead, and subject to modifications, the Arbitration Act is based on the English Arbitration Act 1996.<sup>10</sup>

Notably, Rule 26 of the Arbitration Act provides that the Ministers may by order modify: (a) the Scottish Arbitration Rules, (b) any other provision of this Act, or (c) any enactment which provides for disputes to be resolved by arbitration, in such manner as they consider appropriate in consequence of any amendment made to the UNCITRAL Model Law, the UNCITRAL Arbitration Rules, or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Before giving such order, the Ministers must consult such persons appearing to them to have an interest in the law of arbitration as they think fit.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

As previously stated, the 2010 Arbitration Act is not based on the Model Law. Interestingly, Scotland is the first (and only) jurisdiction which formally repealed the Model Law.<sup>11</sup> The key differences between the 2010 Arbitration Act and the UNCITRAL Model Law are as follows: (1) the Arbitration Act applies to all forms of arbitration,<sup>12</sup> whereas the Model Law only applies to international commercial arbitration; (2) the default provisions of the Arbitration Act for the appointment of arbitrators provide for the appointment of a sole arbitrator<sup>13</sup> as opposed to three arbitrators; and (3) under the Arbitration Act, where each party is required to appoint an arbitrator, a party may treat its

party-nominated arbitrator as the sole arbitrator in the event that the other party fails to make an appointment.<sup>14</sup>

#### F. Powers and duties of arbitrators

Rule 19 of the Scottish Arbitration Rules set out in Schedule 1 of the Arbitration Act provides that arbitrators may rule on (i) their own jurisdiction; (ii) the validity of the arbitral agreement; (iii) whether the tribunal was properly constituted; and (iv) what matters may be subjected to arbitration in accordance with the arbitral agreement.

Rule 20 sets out that '[a]ny party may object to the tribunal on the ground that the tribunal does not have, or has exceeded, its jurisdiction in relation to any matter'.<sup>15</sup> The rules also provide a time limit for such objection and the tribunal may decide the objection by either (a) ruling on an objection independently from dealing with the subject matter of the dispute, or (b) delay ruling on an objection until it makes its award on the merits of the dispute (and include its ruling in that award).

2. The Arbitration Act imposes the duties of impartiality and independence on arbitrators, and they must in a timely fashion disclose any circumstances 'which might reasonably be considered relevant when considering whether the individual is impartial and independent'.<sup>16</sup> Arbitrators must also treat the parties fairly.

#### G. Arbitrator immunity

Rule 73 of Scottish Arbitration Rules set out in Schedule 1 of the Arbitration Act provides that '[n]either the tribunal nor any arbitrator is liable for anything done or omitted in the performance, or purported performance, of the tribunal's functions', and the immunity is extensive to clerks, agents, employees, or other persons assisting (such as tribunal secretaries).<sup>17</sup> The rule, however, does not apply if there has been bad faith, or where there has been an improper resignation by the arbitrator.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Scotland does not have the capacity to enter into international treaties. However, as part of the United Kingdom, it became a party to the New York Convention on 24 September 1975,<sup>18</sup> when the United Kingdom acceded to the Convention.

#### B. Reservations to the New York Convention

The United Kingdom made one reservation to the New York Convention; that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>19</sup>

#### C. Method of domestic implementation of the New York Convention

The New York Convention is given effect in Scotland through the operation of Rules 18 to 22 of the 2010 Arbitration Act.

#### D. Other international/regional treaties

3. As stated above, Scotland lacks the capacity to enter into international conventions on its own. However, Scotland, as a part of the United Kingdom, is a signatory to a number of international conventions intended to further international arbitration. Some of these conventions are:

- a. The 1923 Geneva Protocol on Arbitration Clauses.
- b. The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.
- c. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention').<sup>20</sup>

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

No specific information was available. However, commentaries suggest that the court may adopt a pro-enforcement stance. Since the enactment of the 2010 Arbitration Act, Scottish courts have been described as arbitration friendly and supportive to arbitration proceedings, although not many cases have been reported.<sup>21</sup> In an article from 2016, a commentator pointed out that:

Only six cases under the 2010 Act have given rise to reported decisions and five of those involve appeals against awards and a sixth an appeal against a jurisdictional ruling by an arbitrator; while the low number relates in part to the 2010 Act's highly restricted scope for judicial involvement, it is also probably due to the small number of arbitrations taking place in Scotland.<sup>22</sup>

As noted in the quote above, the Arbitration Act restricts court intervention in the few circumstances provided for in section 13, which sets out in its third paragraph that 'it is not competent for a party to raise the question of a tribunal's jurisdiction with the court except (a) where objecting to an order being made under section 12, or (b) as provided for in the Scottish Arbitration Rules (see rules 21, 22 and 67)'.

##### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

Pursuant to Rule 68 of the 2010 Arbitration Act, a party may challenge an award by appealing to the Outer House on the ground of serious irregularity, such as contradicting public policy. Scottish courts have yet to test rules on public policy. However, it is expected that, similar to English courts, Scottish courts will follow a narrow interpretation of this ground.<sup>23</sup>

##### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Before the 2010 Arbitration Act, the number of arbitration proceedings in Scotland was very low, and this number is still minor in comparison with England, for instance.

The Scottish courts still have not had many opportunities to decide upon issues arising from arbitration disputes, but the very first case interpreting provisions of the Arbitration Act set out an important guideline for future judgments:<sup>24</sup>

This Opinion addresses certain procedural matters with a view to offering guidance to practitioners...

Since the Act was closely and unashamedly modelled on the [1996] Act, and reflects the same underlying philosophy, authorities on that Act ... in relation to questions of interpretation and approach will obviously be of relevance. There is no point in re-inventing the (arbitration) wheel. In the

written submissions relating to this application, both parties have helpfully referred to authorities on the approach to granting leave to appeal under the English Act.<sup>25</sup>

In view of this decision, it is likely that Scottish courts will follow the English courts' approach and interpretation to provisions of the Arbitration Act and the New York Convention, enhancing its character of persuasive authority.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Until the enactment of the Arbitration Act in 2010, arbitration in Scotland was not common, and its use was mainly restricted to disputes arising out of leases, partnership disputes and, less often, construction disputes.<sup>26</sup>

Most arbitrations in Scotland are ad hoc and domestic, and the Scottish Arbitration Centre is generally named the appointing authority for ad hoc arbitration proceedings.<sup>27</sup> However, the Scottish Arbitration Centre does not administer arbitrations, or provide a specific set of rules.<sup>28</sup>

Other institutions have also provided services as appointing authorities, or 'arbitral appointment referees',<sup>29</sup> but none of them administer arbitration proceedings. Some of the institutions used as arbitral appointment referees are the Law Society of Scotland, the Royal Incorporation of Architects in Scotland, the Royal Institution of Chartered Surveyors and the Scottish Agricultural Arbiters and Valuers Association (SAAVA).

A commentator also noted that '[s]ince the coming into the force of the 2010 Act, it is becoming increasingly common to specify ICC arbitration in larger scale contracts with Scotland as the seat of arbitration'.<sup>30</sup>

### B. Measures to strengthen institutional arbitration capabilities

No particular measures to strengthen institutional arbitration capabilities in Scotland – other than the reform of the Arbitration Act – have been noted by commentators.

### C. Submission of disputes to arbitration vs. litigation

Although general information is not available, a survey analysing the situation between 1 July 2013 and 30 June 2014 identified 22 arbitration proceedings seated in Scotland,<sup>31</sup> while in the same period, there were 70,267 civil cases ongoing in Scottish courts.<sup>32</sup>

### D. Participation by foreign counsel in international arbitrations

The Arbitration Act does not impose any restrictions as to the nationality or qualification of party representatives, and the Law Society of Scotland does not impose a bar to lawyers qualified in another jurisdiction working in Scotland. However, foreign lawyers cannot describe themselves as 'solicitors' and cannot practise in certain types of work reserved by statute for Scottish qualified solicitors.<sup>33</sup> Some of these restrictions include conveyancing of land and/or buildings; litigation (civil or criminal); and obtaining confirmation in favour of executors.

Foreign lawyers can also register in Scotland following the application proceeding set out in Rule D7 of the Law Society of Scotland. Currently, there are 2,064 registered foreign lawyers in Scotland.<sup>34</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

The 2015 Scottish Arbitration Survey analysed 22 arbitrations seated in Scotland during the 1-year period between 1 July 2013 and 30 June 2014.<sup>35</sup> The survey concluded that arbitration was being used mostly to solve construction (13 cases), property (10 cases), agriculture (9 cases), and oil and gas disputes (4 cases), although other sectors such as road traffic MIB, JV disputes, local government, legal profession, energy, engineering, and accountancy and financial disputes were also mentioned.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

No information was available.<sup>36</sup>

*G. Statistics on judges and lawyers per capita*

According to the Law Society of Scotland, in 2018 Scotland had 11,952 solicitors, of which 53 per cent were female and 47 per cent were male.<sup>37</sup> In the same year, the country's population was 5.44 million, which results in about 0.22 lawyers per capita.

The number of judges in Scotland includes those who sit in the Court of Session and High Court as well as sheriffs principal, sheriffs, and justices of the peace.<sup>38</sup> Scotland currently has 35 Senators of the College of Justice (who sit in the Court of Session and the High Court of Justiciary), 32 sheriffs principals, 142 permanent or resident sheriffs sitting in 39 courts across the country, and around 450 justices of the peace.<sup>39</sup>

## **VI. FUNDING FOR LEGAL CLAIMS**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There are no provisions for legal aid for businesses or for commercial dispute resolution processes such as arbitration in Scotland. The Legal Aid (Scotland) Act 1986 limits the circumstances under which civil and criminal legal aid can be granted, and any application for legal aid considers the income and capital of the applicant.<sup>40</sup> Besides the financial test, where civil legal aid is requested, other information regarding whether the applicant has a plausible case, and whether it is reasonable in all circumstances that civil legal aid is made available are also analysed. Legal aid is also provided to children but there is no provision for businesses in the Act.

On the Scottish Legal Aid Board's (SLAB) website one of the frequently asked questions discusses whether a business can get legal aid. The answer is 'No'. The SLAB outlines that 'Legal aid can only be granted to an individual. If your case involves your limited company, or your partnership, then you are unlikely to qualify for civil legal aid. You may be able to qualify for legal aid if you are a partner in dispute with the remaining partners in your firm, but you would not qualify if you are effectively applying for legal

aid on behalf of the partnership. A sole trader can apply for legal aid for a business debt.<sup>41</sup>

#### *B. Third-party funding*

Scottish law does not contain any prohibition or restriction on a dispute being funded wholly, or in part, by a third party.<sup>42</sup> The prohibition on maintenance and champerty is not part of Scottish law.<sup>43</sup>

New entrants to the third-party funding market in Scotland are primarily focused on funding litigation by insolvency practitioners. Nonetheless, some funders have expressed their willingness to consider international arbitration cases.<sup>44</sup>

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 governs third-party litigation funding and there does not appear "to be any intention" for this Act to cover arbitration.<sup>45</sup>

There is no case law dealing with third-party funding in international arbitration seated in Scotland.<sup>46</sup>

#### *C. Contingency fees*

Fee agreements agreed on a speculative basis are allowed in Scotland (normally referred to as 'no win, no fee' basis).<sup>47</sup> The Law Society of Scotland does not set guidelines for fees, but it determines that the fees charged by solicitors must be fair and reasonable.<sup>48</sup>

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act allows 'success fee agreement', i.e. contingency fees in Scotland.<sup>49</sup> As defined by section 1(1) of the Act, success fee agreements are agreements by which the provider of the service ought to receive a payment from the recipient of the services if the recipient obtained a financial benefit 'in connection with a matter in relation to which the services are provided, but is not to make any payment, or is to make a payment of a lower amount than the success fee, in respect of the services if no such benefit is obtained'.<sup>50</sup>

Section 2 expressly provides that '[a] success fee agreement is not unenforceable by reason only that it is a pactum de quota litis (that is, an agreement for a share of the litigation)'.<sup>51</sup>

#### *D. Insurance for legal expenses*

Insurance for legal expenses is available in Scotland. The SLAB reviewed legal expenses insurance products offered in the United Kingdom by leading home and motor insurers, in 2013. The SLAB analysis concluded that in relation to home insurances, before the event (BTE) cover was offered as an optional extra in all home insurance products analysed. These options would offer, typically 'cover ... for the pursuit of personal injury claims, pursuit of breach of employment contracts, non-commercial disputes about faulty goods and services, and pursuit of actions arising from interference with the right to use, or damage to, the home. Some policies covered other areas, such as motoring offences, or disputes over inheritance. None covered family actions or judicial review. Other common exclusions were clinical negligence and multi-party actions'.<sup>51</sup>

Similarly, motor insurance policies also offered BTE cover as an optional extra covering 'only the recovery of uninsured losses (including personal injury) arising from a road traffic accident'.<sup>52</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 July 2019.
- 2 UK Parliament, Act of Union 1707, 'The Articles: legal and miscellaneous' (House of Lords, 2007) <[https://web.archive.org/web/20071114022831/http://www.parliament.uk/actofunion/04\\_05\\_legal.html](https://web.archive.org/web/20071114022831/http://www.parliament.uk/actofunion/04_05_legal.html)> accessed 18 July 2019.
- 3 Arbitration (Scotland) Act 2010 (up to date with all changes known to be in force on or before 17 December 2018).
- 4 Brandon Malone (2019), 'National Report for Scotland', in Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, Wolters Kluwer, 4.
- 5 Hew H Dundas (2013), 'Chapter 27: Arbitration in Scotland', in J Lew, H Bor et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland*, Kluwer Law International, 595.
- 6 In fact, one commentator points out that Scotland had in 19 years, 'a mere 10–15 ... cases'. See Hew R Dundas (2016), 'The Arbitration (Scotland) Act 2010: A Great Collaborative Success and an Innovative Model for Other Jurisdictions to Follow', *Indian Journal of Arbitration Law*, Vol. V Issue 1, 92.
- 7 Dundas (2013), 'Chapter 27: Arbitration in Scotland', 595.
- 8 'Report on the Arbitration Act 1996' (November 2006).
- 9 Arbitration Application No. 3 [2011] CSOH 164 at 2.
- 10 See the country report of England. See also Malone (2019), 'National Report for Scotland'.
- 11 Dundas (2013), 'Chapter 27: Arbitration in Scotland', 598.
- 12 Arbitration (Scotland) Act 2010, s 1.
- 13 Arbitration (Scotland) Act 2010, s 7 in conjunction with Rule 6 Scottish Arbitration Rules for arbitrations seated in Scotland.
- 14 Arbitration (Scotland) Act 2010, s 7 in conjunction with Rule 7 Scottish Arbitration Rules (note Rule 7 is a mandatory rule).
- 15 Scottish Arbitration Rules set out in Schedule 1 of the Arbitration Act, Rule 20(1).
- 16 Scottish Arbitration Rules set out in Schedule 1 of the Arbitration Act, Rule 8.
- 17 Scottish Arbitration Rules, Rule 73(3).
- 18 See 'New York Convention Guide' <[http://newyorkconvention1958.org/?opac\\_view=-1](http://newyorkconvention1958.org/?opac_view=-1)> accessed 31 July 2019.
- 19 Ibid.
- 20 Malone (2019), 'National Report for Scotland', 30.
- 21 Dundas (2013), 'Chapter 27: Arbitration in Scotland', 96.
- 22 Ibid., 96–97.
- 23 Malone (2019), 'National Report for Scotland', 31.
- 24 Arbitration Application No. 3 of 2011, [2012] S.L.T. 150 ¶ 1 (Scot.).
- 25 Arbitration Application No. 3 of 2011, [2012] S.L.T. 150 ¶ 8 (Scot.).
- 26 Brandon J Malone (2018), 'Scotland', in *Arbitration Guide IBA Arbitration Committee*, 3 <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Arbcountryguides.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx)> accessed 5 September 2019.
- 27 Ibid.
- 28 Malone (2019), 'National Report for Scotland', 5.
- 29 Arbitration Act, Art. 24.
- 30 Malone (2019), 'National Report for Scotland', 4.
- 31 University of Aberdeen and The Law Society of Scotland (2015), *Scottish Arbitration Survey* <[https://www.abdn.ac.uk/law/documents/Scottish\\_Arbitration\\_Survey\\_June\\_2015.pdf](https://www.abdn.ac.uk/law/documents/Scottish_Arbitration_Survey_June_2015.pdf)> accessed 5 September 2019.

- 32 Scottish Government (2019), Civil Justice Statistics in Scotland 2017–18, 40. <<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2019/04/civil-justice-statistics-scotland-2017-18/documents/civil-justice-statistics-scotland-2017-18/civil-justice-statistics-scotland-2017-18/govscot%3Adocument/civil-justice-statistics-scotland-2017-18.pdf>> accessed 5 September 2019.
- 33 S32 of the Solicitors (Scotland) Act 1980.
- 34 The Law Society of Scotland, Annual Report 2018 <<https://www.lawscot.org.uk/about-us/strategy-reports-plans/annual-reports/annual-report-2018/grow/>> accessed 5 September 2019.
- 35 University of Aberdeen and the Law Society of Scotland (2015), Scottish Arbitration Survey.
- 36 Note that the World Bank Doing Business statistics are only available for 'the United Kingdom'. However, particularly the data covering the enforcing contracts index refers only to the 'County Court of England and Wales', and the city of London.
- 37 The Law Society of Scotland, Annual Report 2018.
- 38 See more at Judiciary of Scotland, Court Structure <<http://www.scotland-judiciary.org.uk/16/0/Court-Structure>> accessed 5 September 2019.
- 39 Judiciary of Scotland, Court Structure.
- 40 Legal Aid (Scotland) Act 1986 ss 13–15 and ss 21–23 <<http://www.legislation.gov.uk/ukpga/1986/47/contents>>
- 41 Scottish Legal Aid Board, 'New to Legal Aid – Frequently Asked Questions' <<https://www.slabb.org.uk/new-to-legal-aid/>> accessed 15 September 2019.
- 42 Scottish Government (2013), 'Chapter 11 Alternative Sources Of Funding', in *Taylor Review: Review of Expenses and Funding of Civil Litigation in Scotland*, 27 <<https://www2.gov.scot/Publications/2013/10/8023/27>> accessed 4 September 2019.
- 43 Ibid.
- 44 Brandon Malone, Brandon Malone & Company/ Bonaccord (2018), 'Scotland Report', in Nikolaus Pitkowitz (ed.), *Handbook on Third-Party Funding in International Arbitration*, 338.
- 45 Malone B & A Mackenzie, "Scotland" International Arbitration – Law and Practice (8 August 2019) <<https://practiceguides.chambers.com>> (last accessed 30 August 2019).
- 46 Ibid., 339.
- 47 Law Society of Scotland, 'Costs of Legal Services' <<https://www.lawscot.org.uk/for-the-public/client-protection/cost-of-legal-services/>> accessed 04 September 2019.
- 48 Law Society of Scotland, 'Standards for Solicitors' <<https://www.lawscot.org.uk/for-the-public/client-protection/standards-for-solicitors/>> accessed 04 September 2019.
- 49 The Judge (2017), 'Damages Based Agreements Become Law in Scotland' <<https://www.thejudgeglobal.com/damages-based-agreements-become-law-scotland/>> accessed 5 September 2019; The Royal Assent Bill approved the Expenses and Group Proceedings Bill on June 5, 2018. See The Scottish Parliament, Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill <<https://www.parliament.scot/parliamentarybusiness/Bills/104998.aspx>> accessed 5 September 2019.
- 50 Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, article 1(1).
- 51 Scottish Government (2013), 'Chapter 6 Before the Event Insurance', in *Taylor Review: Review of Expenses and Funding of Civil Litigation in Scotland*, 27.
- 52 Ibid.



## SEYCHELLES<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Seychelles' domestic arbitral legislation is a part of the Commercial Code of Seychelles (Chapter 38, Title IX, Articles 110–150), 1 January 1977 ('Commercial Code'). It was not impacted by or borrowed from any English Arbitration Act.

#### B. *Description of prior legislation and reasons for its replacement*

Seychelles gained independence on 29 June 1976 and became a part of the Commonwealth. Due to the colonisation of Seychelles by both France and the United Kingdom, the state's legal system has elements of both civil and common law. For instance, Seychelles' private law has mostly originated from French law,<sup>2</sup> while more modern pieces of legislation regulating commerce, such as offshore business and financial services, are rooted in the common law.<sup>3</sup>

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

Seychelles' Commercial Code is not based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 ('UNCITRAL Model Law'), but on the European Convention providing a Uniform Law on Arbitration 1966, with some alterations.<sup>4</sup> Seychelles' arbitral legislation remains based on the French Code of Commerce promulgated in 1809.<sup>5</sup>

The Commercial Code is supplemented by Chapter 213 of the Seychelles Code of Civil Procedure, in force from 15 April 1920, as amended. Articles 205–207 pertain to procedures relating to arbitration such as the Seychelles courts' power to refer a matter to arbitration,<sup>6</sup> a 10-day period for parties to file an objection to an arbitral award before the court gives judgment in accordance with the award,<sup>7</sup> and the grounds for an award to be set aside or modified.<sup>8</sup>

#### B. *Scope of application to domestic and international arbitrations*

The Seychelles' arbitral legislation does not mention expressly if its scope encompasses both domestic and international disputes. Chapter 38 of the Commercial Code of Seychelles does not seem to provide a definition of the chapter's scope. However, article 110 section 2 differentiates an arbitral agreement in a domestic contract from 'an arbitration clause in an international agreement'. This indicates that both international and domestic arbitration are regulated by Chapter 38 of the Commercial Code.

#### C. *Details and/or relevant amendments and modifications*

The Commercial Code has not been amended to date.

#### D. *Relationship to the UNCITRAL Model Law*

Seychelles' arbitral legislation is not based on the UNCITRAL Model Law.

#### E. *Departure(s) (if any) from the UNCITRAL Model Law*

Although Seychelles' arbitral legislation is not based on the UNCITRAL Model Law some similarities between the two include some of the core principles

set out in the Model Law. Those include: the recognition of the competence-competence and separability principles,<sup>9</sup> respect for party autonomy,<sup>10</sup> and minimum court intervention.<sup>11</sup> On the other hand, the legislation is dated in some respects as it does not address certain problems faced in modern international arbitration. For example, there is only a brief description of the writing formality requirement of an arbitration agreement<sup>12</sup> and the Commercial Code does not provide for a default method for the appointment of arbitrators in the event that parties are unable to agree on the appointment of the sole arbitrator.<sup>13</sup>

*F. Powers and duties of arbitrators*

Arbitrators and the arbitral tribunal have the power to rule in respect of its own jurisdiction and examine the validity of the arbitration agreement.<sup>14</sup> In the event that there is an uneven number of arbitrators on the tribunal, the arbitrators have the power to nominate one of themselves to be the president of the tribunal unless the parties have agreed on another method of appointment.<sup>15</sup>

Further, an arbitrator has the power to correct any clerical mistake or error in an award arising from an accidental slip or omission.<sup>16</sup>

*G. Arbitrator immunity*

The Commercial Code is silent on arbitrator immunity.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Seychelles is not a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Nonetheless, notably the Commercial Code expressly includes provisions regarding the recognition and enforcement of arbitral awards based on the provisions of the Convention (with reciprocity restrictions).<sup>17</sup>

*B. Reservations to the New York Convention*

This query is not applicable.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable.

*D. Other international/regional treaties*

Seychelles signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) on 16 February 1978, and the Convention entered into force on 19 April 1978. The country is not a party of the Organization for the Harmonization of Business Law in Africa (OHADA) Treaties United Nations Convention.

Seychelles has signed five bilateral investment treaties (BITs); with Cyprus, France, Egypt, China, and India.<sup>18</sup> However, only the BITs with Cyprus and France are in force.<sup>19</sup>

Seychelles is also party to three free trade agreements, all of which are in force (Common Market for Eastern and Southern Africa (COMESA),<sup>20</sup> Southern African Development Community (SADC),<sup>21</sup> and the COMESA–SADC–East African Community Tripartite Free Trade Area<sup>22</sup>).

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

No information was found on this, other than that a party who applies for an order of stay of proceedings must, as a matter of procedure, file an affidavit to satisfy the court that that party is and has always been ready and willing to do all things for the proper conduct of the arbitration.<sup>23</sup>

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

As Seychelles is not a signatory of the New York Convention, it does not follow the standard for refusing enforcement of an award on the grounds of public policy under Article V(2)(b) of the New York Convention. However, Seychelles has a domestic provision for refusing enforcement on grounds of public policy. Article 150(2) of the Commercial Code provides that the '[e]nforcement of an arbitral award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.' There are no articles or cases discussing public policy in the context of enforcement of arbitral awards.

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

There is only one recent commercial arbitration case involving Seychelles that has been reported and this involved the request of a party to enforce a Paris arbitral award in the Seychelles courts.<sup>24</sup> This case is relevant as it demonstrates that the Seychelles courts do not recognise the terms of the New York Convention, although the Commercial Code does reproduce the terms of the Convention in its arbitration chapter. This is because, as described below, the procedure described in the Civil Code of Procedure expressly mentions that only awards 'under the New York Convention' shall be recognised.

The award was rendered by a sole arbitrator in favour of Eastern European Engineering Ltd (EEE) against Vijay Construction (Proprietary) Ltd, and it declared that the termination of the contracts between the parties, occasioned by EEE's request, was valid. As a result of this declaration, the tribunal ordered Vijay to indemnify EEE.

Following the decision, EEE began the procedure for recognition and enforcement of the arbitral award in the Seychelles Supreme Court. On 18 April 2017 the Court granted EEE's request. In its ruling the court first recognised that the New York Convention was not applicable in case, because the country was not a signatory of the Convention. As a result, the court stated that article 227 of the Civil Code of Procedure discussing the enforceability of foreign judgments was not applicable, because of the express reference to arbitral awards 'under the New York Convention, as provided under articles 146 and 148 of the Commercial Code of Seychelles'. Despite this fact, and in view of the absence of international and domestic provisions regarding the recognition and enforcement of international awards, the court then decided to apply English law to enforce the award. The justification provided by the Supreme Court was that it is 'inconceivable that a trading nation such as [Seychelles] would unfairly protect its nationals from the consequences of their international obligations freely entered into'.<sup>25</sup>

However, Vijay appealed from this decision to the Court of Appeal and the court granted the appeal. In its decision, the court first confirmed the understanding of the lower court that the provisions of the Commercial Code, regarding the recognition and enforcement of arbitral awards, were not applicable, given that Seychelles is not a signatory of the New York Convention.<sup>26</sup> Secondly, the Court of Appeal found that the lower court was wrong in its application of the English law and reverted the decision, concluding that the ICC award was not enforceable.<sup>27</sup>

This decision evidently compromises the status of Seychelles as an arbitral-friendly jurisdiction. The court concluded that the New York Convention was not applicable to the Seychelles and this conclusion consequently means that no foreign arbitral award would be enforceable in the country, unless Seychelles accedes to the New York Convention.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Seychelles does not have any arbitral institutions and the practice of arbitration is still very much incipient in the country.<sup>28</sup> No relevant statistics related on arbitration were available.

### B. Measures to strengthen institutional arbitration capabilities

No information was available.

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

Article 114 of the Commercial Code provides that '[a]liens shall not be excluded from being arbitrators', indicating that foreign counsel may sit as arbitrators in an arbitration in Seychelles.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

No information was available.

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 915 days to resolve a commercial dispute in a first-instance court in Seychelles, 75 days for filing and service of court processes, 720 days for trial and judgment and 120 days for enforcement of judgment.<sup>29</sup> Seychelles ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>30</sup> In terms of overall ease of enforcing contracts, Seychelles scored 51.25 of 100 and ranked 129 of 190.<sup>31</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

### G. *Statistics on judges and lawyers per capita*

The available statistics related to the Seychelles legal system demonstrate that the country has a low number of legal practitioners. In 2018, Seychelles had a population of 95,843 people, but according to the Bar Association of Seychelles, the country had less than 50 lawyers in practice that year.<sup>32</sup> There is no current and official information available regarding the number of judges in the Seychelles but the available data also shows it is a low number. The Court of Appeal has five judges, the Supreme Court (one Chief of Justice, seven puisne judges, and one Master) and the Magistrates' Court has five magistrates. These numbers are from 2016/2017 and no other updated sources were found.<sup>33</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid in Seychelles is regulated by the Legal Aid Act, Chapter 110 of 1 February 1986, amended on 23 April 2012 and 14 July 2014. It is available to individuals in most civil proceedings and in all criminal proceedings if the individual fulfils the respective requirements for legal aid.<sup>34</sup> The Interpretation Act 2014 defines a 'person' to include any public body, company or association or any body of persons corporate or unincorporated.<sup>35</sup> Therefore a business may be able to get legal aid.

### B. *Third-party funding*

No jurisprudence or literature discussing third-party funding could be located. Since the law of torts in the country is based on French law, it is unlikely that the torts of maintenance and champerty apply. The Seychelles Commercial Code does not set out any similar test.

### C. *Contingency fees*

Since the law of torts in the country is based on French law, it is unlikely that the torts of maintenance and champerty apply. The Seychelles Commercial Code does not set out any similar test.

### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 For example, article 205, Seychelles Code of Civil Procedure ('Reference to arbitration') refers to cases mentioned in article 1004 of the French Code of Civil Procedure.
- 3 Herbert Smith Freehills (2016), *Guide to Dispute Resolution in Africa*, 254.
- 4 *Ibid.*, 256.
- 5 Twomey, M (2017), *Legal Métissage in a Micro-jurisdiction: The Mixing of Common Law and Civil Law in Seychelles*, City Print, 20; Bosman, L (2013), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer, 13.
- 6 Article 205, Seychelles Code of Civil Procedure.
- 7 Article 206, Seychelles Code of Civil Procedure.

- 8 Article 207, Seychelles Code of Civil Procedure.
- 9 The separability principle is only recognised in international agreements. See article 110, section 2 of Chapter 38, Commercial Code.
- 10 Article 110(3), Commercial Code of Seychelles (Chapter 38, Title IX).
- 11 Article 113, Commercial Code of Seychelles (Chapter 38, Title IX).
- 12 Article 111(1), Commercial Code of Seychelles (Chapter 38, Title IX).
- 13 Article 115, Commercial Code of Seychelles (Chapter 38, Title IX).
- 14 Article 127(1), Commercial Code of Seychelles (Chapter 38, Title IX)
- 15 Article 118(2), Commercial Code of Seychelles (Chapter 38, Title IX)
- 16 Article 145, Commercial Code of Seychelles (Chapter 38, Title IX)
- 17 Articles 146, 148, Commercial Code of Seychelles (Chapter 38, Title IX)
- 18 UNCTAD, 'Investment Policy Hub' 'Seychelles' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 22 August 2019.
- 19 Ibid.
- 20 United Nations Economic Commission for Africa, 'COMESA – Common Market for Eastern and Southern Africa' <[uneca.org](http://uneca.org)> accessed 22 August 2019.
- 21 Southern African Development Community, 'About SADC' <[sadc.int](http://sadc.int)> accessed 22 August 2019.
- 22 Tralac, 'SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents' <[tralac.org](http://tralac.org)> accessed 22 August 2019.
- 23 *Intour v Emerald Cove* (2000) SLR 21.
- 24 *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd* (MA 128/2017 (arising in CC 33/2015)) [2017] SCSC 492.
- 25 *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd* (MA 128/2017 (arising in CC 33/2015)) [2017] SCSC 492 (14 June 2017) at [19].
- 26 *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd* (MA 128/2017 (arising in CC 33/2015)) [2017] SCSC 492 (14 June 2017) at [112].
- 27 *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd* (MA 128/2017 (arising in CC 33/2015)) [2017] SCSC 492 (14 June 2017) at [111].
- 28 Fredrick Egonda-Ntende (2013), 'Chapter 1.9: The Seychelles', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, 73.
- 29 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreeconomies/seychelles>> accessed 22 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 30 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 31 Ibid.
- 32 Bar Association of Seychelles, 'List of Members' <<https://sites.google.com/site/barassociationsc/about-us/list-of-members>> accessed 22 August 2019: The 'List of Members' page sets out the names of lawyers admitted to the Seychelles Bar. Seychelles has 39 lawyers who are honorary and/or full members of the Bar, and 10 associate members, who 'may not practice Seychelles law unless authorized to do so as a State Counsel, Public Prosecutor, Pupil, Articled Clerk or a restricted legal practitioner under sections 12 or 13A of the Legal Practitioners Act, as indicated above'.
- 33 Seychelles Nation (2018), 'The Judiciary of Seychelles' <<http://www.nation.sc/article.html?id=257292>> accessed 22 August 2019.
- 34 Legal Aid Act, s 2 Civil Proceedings and s 6 Criminal Proceedings.
- 35 Interpretation and General Provisions Act 2014, c. 103, s 3 (22) <[https://greybook.seylli.org/w/se/CAP103#!fragment/zoupio-\\_Toc384023216/](https://greybook.seylli.org/w/se/CAP103#!fragment/zoupio-_Toc384023216/)> accessed 22 August 2019.

## SIERRA LEONE<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Sierra Leone was a British colony from 1808 to 1961. It gained its independence on 27 April 1961. As a former British colony, it received certain laws from Britain which remain effective either as common law or existing law. Essentially, the Sierra Leone legal system comprises common law,<sup>2</sup> customary law, the Constitution, and Acts of Parliament of Sierra Leone.

Arbitration in Sierra Leone is currently governed by the Arbitration Act 1960 (the '1960 Act'). This Act was formerly entitled the Arbitration Ordinance 1927. It was a colonial statute, enacted by the British Parliament in 1927 as an 'Ordinance to provide for the reference and submission of disputes to Arbitration'. Because Sierra Leone was a British colony, the 1927 Ordinance applied directly to it.<sup>3</sup> Further, the 1927 Ordinance appears to be modelled on the English Arbitration Act 1889.

In 1960, the 1927 Ordinance, together with other colonial statutes in force on 1 January 1960,<sup>4</sup> were adopted as part of Sierra Leone's existing laws and codified as the Laws of Sierra Leone, 1960.<sup>5</sup> Thus, the 1927 Ordinance was renamed the Arbitration Act, Laws of Sierra Leone, 1960. Further, the validity of these existing laws is guaranteed and preserved by the Constitution of Sierra Leone.<sup>6</sup>

#### B. *Description of prior legislation and reasons for its replacement*

There is no record of any arbitration legislation applicable in Sierra Leone prior to the 1927 Ordinance. The 1927 Ordinance does not repeal or refer to any previous arbitration statute.

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

The principal arbitration statute in Sierra Leone is the 1960 Act. As stated above, the 1960 Act was formerly titled the Arbitration Ordinance 1927 and was enacted on 16 December 1927.<sup>7</sup>

#### B. *Scope of application to domestic and international arbitrations*

The 1960 Act does not explicitly refer to international arbitration, and Sierra Leone does not have a separate arbitration statute for international arbitration. The 1960 Act, however, will most likely also apply to international arbitration proceedings seated in Sierra Leone.

#### C. *Details and/or relevant amendments and modifications*

The 1960 Act has not been revised or amended since its enactment. It retains obsolete provisions which are extremely unsuitable for modern commercial arbitration practice.<sup>8</sup> The 1960 Act is currently in the process of being revised. A draft arbitration bill, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (the 'Model Law'),<sup>9</sup> is expected to be enacted soon.<sup>10</sup>

#### D. *Relationship to the UNCITRAL Model Law*

Sierra Leone has not adopted the Model Law. The 1960 Act predates the Model Law and, therefore, none of its provisions are based on it.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The 1960 Act differs from the Model Law in several respects, including:

- a. The arbitration agreement is not separable from the main agreement;<sup>11</sup>
- b. Arbitrators do not have the statutory power to determine their jurisdiction;<sup>12</sup>
- c. Arbitrators lack powers to grant orders of interim relief;<sup>13</sup>
- d. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>14</sup>
- e. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>15</sup>
- f. There are limited grounds for setting aside an award, namely: misconduct by an arbitrator and the improper procurement of the arbitration or the award;<sup>16</sup> and
- g. There are excessive opportunities for court interference with the arbitral process such as power of the court to set aside appointment of arbitrator in certain circumstances,<sup>17</sup> to remit award for reconsideration,<sup>18</sup> issue binding opinion on points of law stated to it by the arbitral tribunal,<sup>19</sup> and to enlarge the time for making an award.<sup>20</sup>

The draft arbitration amendment bill is expected to bridge most of these areas of divergence given that it is stated to be based largely on the Model Law and that the Sierra Leone Judiciary's Strategic Plan 2016–2021 has a goal of strengthening alternative dispute resolution as a conflict resolution and court decongestion strategy.<sup>21</sup> At minimum, the resulting amendment act should reflect most provisions of the Model Law including the power of the tribunal to determine its jurisdiction and the separability of an arbitration agreement.

#### *F. Powers and duties of arbitrators*

The 1960 Act empowers arbitrators to administer oaths or take affirmation of the parties and witnesses,<sup>22</sup> to correct clerical errors in an award,<sup>23</sup> to award costs,<sup>24</sup> etc.

#### *G. Arbitrator immunity*

The 1960 Act lacks provisions on immunity of arbitrators.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention<sup>25</sup>*

Sierra Leone is not a contracting state to the 1958 New York Convention.<sup>26</sup>

Not being a signatory to the New York Convention, foreign arbitral awards are generally not entitled to recognition and enforcement by the courts of Sierra Leone and are difficult to enforce. Some foreign arbitral awards are, however, enforceable pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1959 (the 'FJA'). The FJA applies to foreign arbitration awards<sup>27</sup> in the same way that it applies to foreign judgments and attaches a restriction of reciprocity as a condition for enforcement.<sup>28</sup> To be enforceable, section 4 of the FJA requires that a foreign arbitral award must first be registered as a foreign judgment by the Sierra Leone Supreme Court.<sup>29</sup>

Pursuant to section 6 of the FJA, a registered judgment may be set aside and become unenforceable for certain reasons including that the courts of the



issuing country lacked jurisdiction, the judgment was obtained by fraud, and the enforcement of the judgment would be contrary to the public policy of Sierra Leone.<sup>30</sup>

Given the restrictive condition of reciprocity under the FJA, most foreign arbitral awards would not be enforceable in Sierra Leone. However, emerging policy indications suggest a governmental and institutional commitment towards the reform of commercial arbitration in Sierra Leone, including the accession to the New York Convention. In fact, acceding to the New York Convention is considered as a key national priority in the Sierra Leone Justice Sector Reform Strategy and Investment Plan III.<sup>31</sup>

*B. Reservations to the New York Convention*

This query is not applicable.

*C. Method of domestic implementation of the New York Convention*

This query is not applicable.

*D. Other international/regional treaties*

Sierra Leone is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention').<sup>32</sup> It signed the ICSID Convention on 27 September 1965 and ratified on 2 August 1966. The ICSID Convention became effective in Sierra Leone on 14 October 1966.<sup>33</sup>

Sierra Leone has entered into four bilateral investment treaties, two of which are in force (United Kingdom and Germany).<sup>34</sup> Sierra Leone is also party to the Agreement Establishing the African Continental Free Trade Area (AfCTA).<sup>35</sup>

#### IV. RELEVANT CASE LAW

*A. Approach of the national courts to the enforcement of arbitration agreements*

Overall, Sierra Leone courts take a restrictive approach to arbitration, particularly in relation to the enforcement of arbitration agreements. In most cases, they decline to uphold parties' intention to arbitrate their commercial disputes by relying on the common law rule which prohibits parties from ousting the jurisdiction of the courts by contract.<sup>36</sup> This rule instructs that courts are not bound to accept parties' agreement to arbitrate because such agreements are deemed to be ouster of jurisdiction by contract, and hence not a bar to court actions. Sierra Leone courts have consistently upheld this common law rule in their interpretation of section 5 of the 1960 Act, which gives the High Court discretion to stay judicial proceedings pending arbitration.

In *Kabia v Kamara*,<sup>37</sup> the Court of Appeal declined to enforce the parties' arbitration agreement because of the common law rule prohibiting the contractual ouster of the court's jurisdiction. The court held that:

I interpret [the arbitration] clause as being merely an agreement between the parties to refer certain matters to arbitration. I think it has for a long time been the law that a mere agreement between the two parties to arbitration cannot be pleaded in bar of an action brought in respect thereof *Scot v. Avery*. [The arbitration clause] in my opinion is nothing more than a contract to refer. It may be the ordinary arbitration clause, but it is certainly not a submission for the arbitrator is neither chosen nor appointed. The

learned Trial Judge was therefore right in holding that [the] clause was not a bar to the action.<sup>38</sup>

The above remains the statement of law in Sierra Leone to date.

Sierra Leone courts have also exercised their discretion to stay proceedings under section 5 of the 1960 Act by wrongly referring to the *forum non conveniens* standard.<sup>39</sup> They have also refused application for stay of proceedings on the grounds that the arbitration clause became invalid due to the termination or invalidity of the underlying contract.<sup>40</sup> This effectively derogates from the separability principle. This was also the case in *Kabia v Kamara*, where the Court of Appeal held that a party is estopped from relying on an arbitration clause after wholly repudiating the container contract.

The above notwithstanding, some recent cases demonstrate an emerging pro-arbitration approach or trend in relation to the enforcement of arbitration agreements. For example, in *Courtville Investment v Sierra Leone Transport Authority*, the court stayed the court proceedings and compelled parties to arbitration.<sup>41</sup> Also, in *Madam Abi Haruna v Delian Shengai Ocean Fishery Co Ltd*, the court in determining the validity of an arbitration clause, opined, albeit obiter, that the doctrine of separability in the English Arbitration Act 1996 was a mere restatement of a common law rule and was therefore applicable in Sierra Leone.<sup>42</sup>

#### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

It is not clear what the Sierra Leone public policy standard is for refusing enforcement of arbitral awards. Public policy is not stated as a ground for enforcement or annulment of an arbitral award under the 1960 Act. There is also no case law precedent dealing with the refusal of enforcement of arbitral award on public policy grounds.

#### *C. Key judicial decisions on the applicable arbitration legislation or the New York Convention*

No Sierra Leone court decision has interpreted the New York Convention. Sierra Leone is not a signatory to the New York Convention.

No reported judgment has been found on the enforcement of arbitral awards – domestic or foreign. By contrast, judicial activity in relation to commercial arbitration under the 1960 Act has occurred mainly in the area of validity and enforcement of arbitration agreements.

## **V. ARBITRATION LANDSCAPE**

### *A. Institutional arbitration*

The institutional arbitration capability in Sierra Leone appears to be non-existent. A 2014 World Bank Group Report on Sierra Leone indicated that Sierra Leone does not have an arbitral institution and that arbitration is conducted on an ad hoc basis.<sup>43</sup> This still appears to be the case.

Despite this, there appear to be certain special arbitration organisations in Sierra Leone that provide limited arbitration services. They are the Sierra Leone Chamber of Commerce, Industry and Agriculture (for members only) and Sierra Leone Institution of Engineers (for resolution of disputes arising out of building and engineering contracts under the UNCITRAL rules or any other rules as agreed between the parties).<sup>44</sup>

*B. Measures to strengthen institutional arbitration capabilities*

There are currently no known efforts by the Sierra Leone Government or industry bodies aimed at strengthening institutional arbitration capabilities in Sierra Leone.

*C. Submission of disputes to arbitration vs. litigation*

There is no statistical data available on the percentage of disputes submitted to arbitration. Arbitration practice in Sierra Leone is limited.

*D. Participation by foreign counsel in international arbitrations*

In Sierra Leone, no person shall engage in the practice of law unless such person has been admitted and enrolled as a legal practitioner pursuant to the Legal Practitioners Act 2000. To qualify for admission, an applicant must:

- a. be the holder of a degree in law awarded by the University of Sierra Leone and of such level as the Council of Legal Education may prescribe;<sup>45</sup>
- b. be the holder of any degree in law of a recognised university or other institution of higher learning of a Commonwealth country approved by the Council of Legal Education;<sup>46</sup>
- c. be the holder of any degree in law of a recognised university or other institution of higher learning of a country with a legal system analogous to that of Sierra Leone approved by the Council of Legal Education;<sup>47</sup> and
- d. have passed the appropriate professional examinations conducted by the Council of Legal Education and served a period of pupillage of not less than 12 months with a legal practitioner of at least 10 years standing in Sierra Leone.<sup>48</sup>

Further, certain exemptions are available to citizens of Commonwealth countries who may be admitted to practise law in Sierra Leone upon showing that they are admitted and enrolled as a legal practitioner in a Commonwealth country, have practised law there for not less than 10 years, are fit and proper persons, and the Commonwealth country reciprocates a similar exemption for Sierra Leone citizens.

It is not clear if the above restriction applies to arbitration proceedings. The 1960 Act does not provide any guidance in this regard.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

There are no publicly available statistics pertaining to the conduct of arbitration proceedings in Sierra Leone.

2. Time taken for enforcement/annulment proceedings

There are no publicly available statistics pertaining to the conduct of arbitration proceedings in Sierra Leone. Anecdotally, enforcement proceedings may take from one to six months.<sup>49</sup>

3. Percentage of awards annulled/not enforced

There are no publicly available statistics pertaining to the conduct of arbitration proceedings in Sierra Leone.

*F. Statistics/information on the length of court proceedings in commercial cases*

There is no available official statistical data on the length of court proceedings in commercial cases. Anecdotal evidence suggests that commercial cases

generally take years to resolve. A Fast Track Commercial Court (FTCC) was established in 2010 with the aim of reducing the time taken to resolve commercial disputes.<sup>50</sup> However, available data suggests that the FTCC, due to resource limitations, has not been effective.<sup>51</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 515 days to resolve a commercial dispute in a first-instance court in Sierra Leone – 30 days for filing and service of court processes, 395 days for trial and judgment and 90 days for enforcement of judgment.<sup>52</sup> Sierra Leone ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>53</sup> In terms of overall ease of enforcing contracts, Sierra Leone scored 55.92 of 100 and ranked 105 of 190.<sup>54</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>55</sup>

#### G. *Statistics on judges and lawyers per capita*

There is minimal available data on the current number of judges in Sierra Leone.

The Supreme Court is the final appeal court in Sierra Leone and also exercises original jurisdiction in matters pertaining to the interpretation of the Constitution. It comprises a chief justice and not less than four other justices, and it is duly constituted by three justices.<sup>56</sup> The Court of Appeal essentially exercises appellate jurisdiction over decisions of the High Court. It consists of a chief justice and not less than seven justices, and it is duly constituted by three justices.<sup>57</sup>

The High Court exercises supervisory jurisdiction over all inferior traditional courts and adjudicating authority in Sierra Leone. It consists of a chief justice and not less than nine judges and is duly constituted by one judge.<sup>58</sup> Inferior courts include: magistrate courts, coroners court, local courts, etc.

There are currently about 400 lawyers registered with the Sierra Leone Bar Association, which indicates that there are approximately 5.29 lawyers/100,000 habitants in the country.<sup>59</sup> The population of Sierra Leone is 7,557,212.<sup>60</sup>

## VI. FUNDING FOR LEGAL CLAIMS

#### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid in Sierra Leone does not appear to contemplate companies or businesses as eligible candidates for legal aid, but it may be possible. Legal aid may be available for arbitration in Sierra Leone. Legal aid is available in Sierra Leone and is governed by the Legal Aid Act 2012 (LAA), which is an Act to provide accessible, affordable, credible and sustainable legal aid services to indigent persons. The LAA defines an indigent person as one who cannot afford to pay for legal services.<sup>61</sup> The Interpretation Act defines a 'person' to be any company or association or body of persons, corporate or unincorporate.<sup>62</sup>

The LAA established a Legal Aid Board, which is responsible for, among other things, the provision of legal aid and the determination of eligible indigent applicants for legal aid.<sup>63</sup> The Legal Aid Board prescribes the level of income which qualifies a person as indigent.<sup>64</sup> Under the LAA, legal aid is available

for qualifying indigent persons involved in either criminal or civil matters. An indigent person who wishes to bring or defend a civil or criminal matter shall have access to legal advice and assistance and legal representation if the interest of justice so requires and if the indigent person's application for legal aid is approved by the Legal Aid Board.<sup>65</sup>

The LAA does not contain any specific provision on the availability of legal aid in arbitration or mediation proceedings. Legal aid may, nonetheless, be available for parties to an arbitration or mediation proceeding given the LAA's definition of 'legal advice and assistance' to include 'assisting with alternative dispute resolution'.<sup>66</sup> The Sierra Leone Legal Aid Board has provided alternative dispute resolution services since 2016 and mediates civil and non-criminal matters.<sup>67</sup>

#### B. *Third-party funding*

No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Sierra Leone or the availability of third-party funding in this jurisdiction. However, given that Sierra Leone's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied in the United Kingdom at the time of its independence in 1961, it is reasonable to assume that the rule of maintenance and champerty is likely to be applicable in Sierra Leone and third-party funding will only be, if at all, permissible in very narrowly defined circumstances.

#### C. *Contingency fees*

Contingency fees are prohibited under the Legal Practitioners Act 2000.<sup>68</sup>

#### D. *Insurance for legal expenses*

Legal protection insurance is not provided for under the Sierra Leone Insurance Act 2016. It is, however, suggested that legal protection insurance may be available, and its availability depends on the individual insurance companies.<sup>69</sup> It is, however, not a common method of funding litigation in Sierra Leone.<sup>70</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Section 74 of the Courts Act 1965 which states that subject to the provision of the Constitution, the common law and statutes of general application in England before the 1st day of January 1880 shall automatically be part of the common law of Sierra Leone.
- 3 Arbitration Act 1960, s 1.
- 4 See LLMC Digital (2019), '1960, Laws of Sierra Leone' <<http://llmc.com/titledescfull.aspx?type=2&coll=295&div=709&set=63058>> accessed 24 May 2019.
- 5 Thus, the Laws of Sierra Leone, 1960 essentially comprise colonial ordinances that were originally enacted by the English Parliament but were in 1960 specifically adopted and codified by the Sierra Leone Parliament to be part of Sierra Leone's existing laws. See Prof. R M'Bayo (2015), *Sierra Leone State of the Media Report 2015* <<http://mrcgonline.org/media/attachments/2018/12/08/state-of-the-media-report-2015.pdf>> accessed 24 May 2018.

- 6 Constitution of Sierra Leone 1991, s 170(4).
- 7 See commencement section of the Arbitration Act 1960.
- 8 For example, the Arbitration Act 1960 lacks provisions on the separability of the arbitration agreement, and the power of the tribunal to determine its jurisdiction, and to issue interim reliefs.
- 9 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 10 ICLG, 'Sierra Leone: International Arbitration 2018' <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/sierra-leone>> accessed 11 July 2019; Kluwer Arbitration Blog (2017), 'Charting a New Path to Commercial Arbitration: Sierra Leone to Accede to the New York Convention', Michael Imran Kanu <<http://arbitrationblog.kluwerarbitration.com/2017/04/28/charting-a-new-path-to-commercial-arbitration-sierra-leone-to-accede-to-the-new-york-convention/>> accessed 11 July 2019.
- 11 See Model Law, art. 16(1). Although the 1960 Act does not provide for the separability of arbitration agreements, Sierra Leone court decision suggests that the separability principle is a common law doctrine which applies to arbitration proceedings in Sierra Leone. See *Madam Abi Haruna v Delian Shengai Ocean Fishery Co Ltd* (FTCC 122/15 (2015) SLHC 122) (In determining the validity of a corporation agreement containing an arbitration clause, the court opined (obiter) that the doctrine of separability in the English Arbitration Act 1996, confirmed in the English Court of Appeal case of *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* ([1993] 3 ALL ER 897), was a mere restatement of a common law rule, and hence applicable in Sierra Leone).
- 12 See Model Law, art. 16(1).
- 13 See Model Law, art. 17.
- 14 See Arbitration Act 1960, s 4 (first schedule); cf. Model Law, art. 10 (providing that the default number of arbitrators shall be three).
- 15 See Arbitration Act 1960, s 4 (first schedule).
- 16 See Arbitration Act 1960, s 12(2); cf. Model Law, art 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non-arbitrability of dispute and award contravenes public policy).
- 17 Arbitration Act 1960, s 7.
- 18 *Ibid.*, s 11.
- 19 *Ibid.*, s 15.
- 20 *Ibid.*, s 10.
- 21 ICLG, 'Sierra Leone: International Arbitration 2018'; Kluwer Arbitration Blog (2017), 'Charting a New Path to Commercial Arbitration:...':
- 22 Arbitration Act 1960, s 8(a).
- 23 *Ibid.*, s 8(c).
- 24 *Ibid.*, s 16.
- 25 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 26 New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 1 April 2019.
- 27 Foreign Judgments (Reciprocal Enforcement) Act 1959, s 10 defines judgment to include 'an award in proceedings on an arbitration, if the award has in pursuance of the law in the place where it was made become enforceable in the same manner as a judgment given by a court of that place. Any such award shall where necessary be deemed to be the judgment of a superior court.'
- 28 Foreign Judgments (Reciprocal Enforcement) Act 1959, s 3. See also ICLG, 'Sierra Leone: International Arbitration 2018'.

- 29 Foreign Judgments (Reciprocal Enforcement) Act 1959, s 4. See also Glenna Thompson (2015), 'Arbitration Procedures and Practice in Sierra Leone: Overview', *Practical Law* <[https://uk.practicallaw.thomsonreuters.com/3-619-8606?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/3-619-8606?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed 24 May 2019.
- 30 Foreign Judgments (Reciprocal Enforcement) Act 1959, s 6.
- 31 Kluwer Arbitration Blog (2017), 'Charting a New Path to Commercial Arbitration'.
- 32 ICSID, '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 10 March 2019.
- 33 *Ibid.*
- 34 UNCTAD, 'Investment Policy Hub' 'Sierra Leone' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 August 2019.
- 35 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfra-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 31 August 2019.
- 36 *Kili v Hollister* (1746) 1 Wils. 129.
- 37 *Kabia v Kamara* (1967/68) ALR SL CA, 455, 459. See *Scott v Avery* 10 ER 1121 (1856); 25 LJ Ex 308; 5 HLC 811. See also Kluwer Arbitration Blog (2017), 'Charting a New Path to Commercial Arbitration'.
- 38 *Kabia v Kamara* (1967/68) ALR SL CA, 455, 459. See *Scott v Avery* 10 ER 1121 (1856); 25 LJ Ex 308; 5 HLC 811.
- 39 Espoused in the English cases of *The Eleftheria and Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10; [1987] AC 460; [1986] 3 WLR 972. These cases were adopted in Sierra Leone as the relevant criteria for determining application for stay. See Kluwer Arbitration Blog (2017), 'Charting a New Path to Commercial Arbitration'.
- 40 *Riga Shipyards v Owners and/or Persons Interested in the Vessel M/V Redcat* (CC 105/2012).
- 41 *Courtville Investment (SL) Ltd v Sierra Leone Transport Authority* (FTCC: 059/13) 2013 [SLHC] HC.
- 42 Kluwer Arbitration Blog (2017), 'Charting a New Path to Commercial Arbitration'.
- 43 World Bank Group, 'Sierra Leone' <<http://iab.worldbank.org/Data/ExploreEconomies/sierra-leone?topic=arbitrating-commercial-disputes>> accessed on 11 July 2019; see also ICCA (2016), 'List of Arbitration Institutions in Africa', Emilia Onyema <[https://www.arbitration-icca.org/media/7/14403606533411/list\\_of\\_arbitration\\_institutions\\_in\\_africa\\_-\\_emilia.pdf](https://www.arbitration-icca.org/media/7/14403606533411/list_of_arbitration_institutions_in_africa_-_emilia.pdf)> accessed on 11 July 2019.
- 44 Thompson (2015), 'Arbitration Procedures and Practice in Sierra Leone: Overview'.
- 45 Legal Practitioners Act 2000, s 10(a)(i).
- 46 *Ibid.*, s 10(a)(ii).
- 47 *Ibid.*, s 10(a)(iii).
- 48 *Ibid.*, s 10(b).
- 49 ICLG, 'Sierra Leone: International Arbitration 2018'.
- 50 *Ibid.*
- 51 SierraLii, 'But How Fast is the Fast-Track Commercial Court?', Augustine Marrah <<https://sierralii.org/content/how-fast-fast-track-commercial-court>> accessed 11 July 2019; 'ICLG, 'Sierra Leone: International Arbitration 2018'.
- 52 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/sierra-leone#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/sierra-leone#DB_ec)> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 53 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 54 *Ibid.*
- 55 *Ibid.*

- 56 Constitution of Sierra Leone 1991, s 121.
- 57 Constitution of Sierra Leone 1991, s 128.
- 58 Constitution of Sierra Leone 1991, s 131.
- 59 Sierra Leone Bar Association, 'Directory of Lawyers' <<http://23.91.70.154/~barasoc/87-2/>> accessed 11 July 2019.
- 60 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 61 Legal Aid Act 2012, s 1.
- 62 The Interpretation Ordinance 1946. C.1, s 3.<<http://www.sierra-leone.org/Laws/Cap%2001.pdf>> accessed 31 August 2019.
- 63 Legal Aid Act 2012, s 9.
- 64 Ibid., s 21.
- 65 Ibid., s 20.
- 66 Ibid., s 1 <<http://www.sierra-leone.org/Laws/2012-06.pdf>> accessed 31 August 2019.
- 67 'Introducing Legal Aid in Sierra Leone', Presentation by Executive Director of Sierra Leone Legal Aid Board, May 2015 <[http://www.internationallegalaidgroup.org/images/miscdocs/South\\_Africa\\_2017\\_PowerPoints/compressed\\_PP\\_Introducing\\_Legal\\_Aid\\_in\\_Sierra\\_Leon.pdf](http://www.internationallegalaidgroup.org/images/miscdocs/South_Africa_2017_PowerPoints/compressed_PP_Introducing_Legal_Aid_in_Sierra_Leon.pdf)> accessed 31 August 2019.
- 68 Legal Practitioners Act 2000, s 44. The prohibition of contingency fees is in line with a stricter adherence to the rules of maintenance and champerty.
- 69 'ICLG, 'Sierra Leone: International Arbitration 2018'.
- 70 Ibid.



# SINGAPORE<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Singapore's prior arbitration laws were modelled on English arbitration legislation. Singapore was historically part of the British India controlled Straits Settlements, which comprised Singapore, Malacca and Penang. English law has a large influence on Singapore and Singapore operates in the common law legal tradition to this day.

### B. *Description of prior legislation and reasons for its replacement*

The earliest arbitration legislation in Singapore was the Straits Settlements Arbitration Ordinance of 1809.<sup>2</sup> This Ordinance stood for 144 years before it was replaced by the Singapore Arbitration Ordinance of 1953.<sup>3</sup> The Singapore Arbitration Ordinance 1953 was based on the English Arbitration Act of 1950. At this time, after the post-WW2 dissolution of the Straits Settlements in 1946, Singapore existed as a stand-alone British Crown Colony.

Between 1963 and 1965, Singapore was merged with Malaysia. When Singapore separated from Malaysia in 1965, the Singapore Arbitration Ordinance of 1953 was renamed the Singapore Arbitration Act 1953 (AA 1953).<sup>4</sup>

The AA 1953 stood as the governing statute for all arbitrations in Singapore for over 40 years. Under the AA 1953, no distinction was drawn between domestic and international arbitration.<sup>5</sup>

In 1995, Singapore's International Arbitration Act 1994 (IAA 1994) came into effect. This was an important juncture in Singapore's arbitration history. The IAA was implemented based on the Law Reform Committee of the Singapore Academy of Law's *Report on Review of Arbitration Laws* in 1993, which recommended the adoption of the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration in Singapore.<sup>6</sup> However, the IAA 1994 only adopted the UNCITRAL Model Law for international arbitrations in Singapore. It did not change the legislative regime under the AA 1953 in relation to domestic arbitrations. This was the result of a policy decision to first experiment to see how well the UNCITRAL Model Law would be received in international arbitrations, before extending it to domestic arbitrations as well.<sup>7</sup>

Three factors underscored Singapore's promulgation of the IAA 1994:<sup>8</sup>

- a. Singapore's desire to establish itself as an international arbitration centre;
- b. The increasing importance of party autonomy in international arbitrations over a high level of judicial intervention; and
- c. The particular appeal of the UNCITRAL Model Law in presenting an internationally accepted regime for such arbitrations.

In the years after the implementation of the IAA 1994, the UNCITRAL Model Law was well received by Singapore arbitrators and practitioners.<sup>9</sup> Thus, in March 2002, the Singapore Parliament proceeded to repeal the AA 1953 in favour of the new Singapore Arbitration Act 2001 (AA 2001), which brought domestic arbitrations in Singapore in line with the UNCITRAL Model Law.<sup>10</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The IAA 1994 came into force on 27 January 1995.

The AA 2001 came into force on 1 March 2002.

Both have been the subject of amendments, which are further considered below.

### B. *Scope of application to domestic and international arbitrations*

The IAA 1994 governs international arbitration proceedings. The AA 2001 governs domestic arbitration proceedings. Since the enactment of the IAA 1994, domestic and international arbitration proceedings in Singapore have been governed by separate regimes.

The primary difference between the two regimes is in the extent of judicial supervision available. Under the IAA 1994 regime, arbitral awards have a higher degree of finality, while the AA 2001 regime permits for greater judicial intervention.<sup>11</sup> This is most clearly apparent by comparing the appeal and stay procedures between the two regimes.

On appeal procedures, under the IAA 1994, there is no right of appeal on the merits of an award. Court intervention is limited to setting aside the award based on (i) the strictly delimited circumstances set out in article 34 UNCITRAL Model Law which are incorporated by the IAA 1994, and (ii) the two additional grounds of fraud and breach of natural justice stipulated by section 24 IAA 1994.

In contrast, under the AA 2001, appeals on questions of law arising out of an award are permitted with either the consent of the parties or the leave of the court.<sup>12</sup> The rationale for permitting this was the idea that, in domestic arbitrations, 'the Courts should be more closely involved ... both in order to protect weaker parties and for the purpose of being involved in the evolution of decisions that concern domestic law and practice'.<sup>13</sup>

In addition, under section 45(1) of the AA 2001, the Singapore High Court is permitted to determine any question of law arising in the course of arbitration proceedings which the court is satisfied substantially affects the rights of one or more of the parties. This can be done even before the arbitral tribunal itself has made any decision, but the safeguard in this provision is that its use requires either the consent of all the parties involved or the permission of the arbitral tribunal (in which case the court must be satisfied that the determination of the question is likely to result in substantial savings in costs and that there has been no delay in the application).<sup>14</sup> There is no equivalent provision under the IAA 1994 or the UNCITRAL Model Law.

In relation to the issue of stay of court proceedings in favour of arbitration, the key difference is that a stay is mandatory under section 6(2) of the IAA 1994 (unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed), while it is discretionary under section 6(2) AA 2001.

### C. *Details and/or relevant amendments and modifications*

The IAA 1994 has had seven amendments to date: in 2001,<sup>15</sup> 2002,<sup>16</sup> 2005,<sup>17</sup> 2009,<sup>18</sup> 2012 (via two amendment acts)<sup>19</sup> and 2016.<sup>20</sup>

The 2001 amendments introduced the following important revisions to the IAA 1994: (a) amendments to section 15 on opting out, (b) enactment of a new section 19B concerning the arbitral tribunal's powers to revisit or reverse an award that has been made, and (c) an edit in the definition of an 'award'.<sup>21</sup>

The 2002 amendment made specific provision in a new section 15A in the IAA 1994 for the application of rules of arbitration agreed to or adopted by the parties.<sup>22</sup>

The 2005 amendment made consequential amendments to section 13 of the IAA 1994 relating to the subpoena of witnesses, arising from the Singapore legislature's decision to change certain expressions used in relation to court proceedings.<sup>23</sup>

The 2009 amendment: (a) updated the IAA 1994's definition of 'arbitration agreements' and 'awards' to include reference to electronic communications and data messages, (b) inserted a new provision section 12A on court-ordered interim measures, and (c) inserted a new provision section 19C on the authentication of awards and arbitration agreements.<sup>24</sup>

The 2012 amendments: (a) inserted a new section 2A on the definition and form of an arbitration agreement, (b) amended section 10 on appeal on rulings of jurisdiction, (c) added elaboration on the power of an arbitral tribunal to award interest, and (d) made provision for the application of foreign limitation laws using the Singapore Foreign Limitation Periods Act 2012.<sup>25</sup>

The 2016 amendment made just a minor terminology change in relation to the appointing authority under the IAA 1994 from 'Chairman' of the Singapore International Arbitration Centre to 'President of the Court of Arbitration' of the Singapore International Arbitration Centre.<sup>26</sup>

The AA 2001 has had six amendments to date: in 2003,<sup>27</sup> 2005,<sup>28</sup> 2009,<sup>29</sup> 2012 (via two amendment acts)<sup>30</sup> and 2016.<sup>31</sup>

The 2003 amendment introduced a stipulation that the enforcement of an award under the AA 2001 as a court judgment would apply irrespective of whether the place of arbitration is in Singapore or elsewhere.<sup>32</sup>

The 2005 amendment, as with that of the IAA 1994, made consequential amendments to section 30 of the AA 2001 relating to the subpoena of witnesses, arising from the Singapore legislature's decision to change certain expressions used in relation to court proceedings.<sup>33</sup>

The 2009, 2012, and 2016 amendments, finally, apply the amendments from these years to the IAA 1994 (explained above) to the AA 2001.<sup>34</sup>

#### *D. Relationship to the UNCITRAL Model Law*

Both the IAA 1994 and the AA 2001 adopted the UNCITRAL Model Law in its entirety. However, certain specific modifications were undertaken. These are explained below.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The most obvious departure is section 24 of the IAA 1994 and section 48 of the AA 2001, which provide two additional grounds for setting aside an award: namely where it was induced or affected by fraud or corruption, or if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Further specific modifications from the UNCITRAL Model Law as set out in Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* are as follows:<sup>35</sup>

The Model Law is by this provision incorporated into the law of Singapore. Section 3 excludes Chapter VIII of the Model Law: that Part regulates the recognition and enforcement of awards and is based on the New York Convention. In its place, s. 19 provides for summary enforcement of domestic awards, and summary enforcement is extended to foreign awards by s. 19. Other provisions of the Model Law are nevertheless expressly modified at points by the IAA, including: s. 5, modifying art. 1 on the scope of application; s. 9, modifying art. 10(2) on the number of arbitrators; s. 9A modifying art. 11(3), consequential on the modification of the number of arbitrators; and s. 10 modifying art. 16(3) on the right of appeal against a jurisdictional ruling. The IAA also remedies certain of the deficiencies in the Model Law, e.g., by authorising the courts to grant interim protective measures (now provided for in the 2006 amendments to the Model Law). The parties may contract out of either the IAA or the Model Law, or both (s. 15(1)), although an agreement to use standard arbitration rules is not to amount to such an agreement (s. 15(2)). In the latter situation the IAA and the Model Law (as the case may be) will continue to apply to those parts of the arbitration which are not inconsistent with the adopted arbitration rules (see the Notes to s. 15A). An important feature of the Model Law is art. 5, which precludes court intervention unless there is express provision in the Model Law to the contrary. As will be seen from the annotations to the Model Law, judicial intervention is available only with regard to: the grant of interim measures (art. 9); assistance with the appointment of the tribunal (art. 11); assistance with the taking of evidence (art. 27); recourse against the award (art. 34); and recognition and enforcement of an award (art. 35). However, s. 12A of the IAA does permit the court to make various orders in respect of the arbitral procedure in addition to the matters listed in the Model Law.

#### F. Powers and duties of arbitrators

Section 12(1) of the IAA 1994 provides that a tribunal shall (without prejudice to any powers set out in the UNCITRAL Model Law) have powers to make orders or give directions to any party for:

- a. Security for costs;
- b. Discovery of documents and interrogatories;
- c. Giving of evidence by affidavit;
- d. The preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
- e. Samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
- f. The preservation and interim custody of any evidence for the purposes of the proceedings;
- g. Securing the amount in dispute;
- h. Ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- i. An interim injunction or any other interim measure.

Section 12(2) of the IAA 1994 provides that an arbitral tribunal shall, unless the parties had agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses.

Section 12(3) of the IAA 1994 provides that an arbitral tribunal shall, unless the parties had agreed to the contrary, have power to adopt, if it thinks fit, inquisitorial processes.

Section 12(5) of the IAA 1994 provides that, without prejudice to the application of Article 28 of the UNCITRAL Model Law, an arbitral tribunal in deciding a dispute (a) may award any relief or remedy that could have been ordered by the Singapore High Court if the dispute had been the subject of civil proceedings in that court, and (b) may award simple or compound interest on the whole or any part of any sum awarded, any sum in issue and costs.

Section 17 of the IAA 1994 provides that, with the consent in writing of all parties in an arbitration, an arbitrator may act as a conciliator in the proceedings.

For domestic arbitrations, section 28(2) of the AA 2004 replicates section 121(1) IAA 1994 except that the following powers are excluded: powers for (a) the preservation and interim custody of any evidence for the purposes of the proceedings, (b) securing the amount in dispute, and (c) interim injunctions or any other interim measure.

Under section 27(1) of the AA 2004 (which reflects article 26(1) UNCITRAL Model Law), unless otherwise agreed by the parties, the arbitral tribunal may (a) appoint experts on specific issues for determination and (b) require a party to give the expert any relevant information or to produce or provide access to any relevant documents, goods or other property for his inspection.

Under section 29(2) of the AA 2004 (which reflects article 25 UNCITRAL Model Law), unless otherwise agreed by the parties, if, without showing sufficient cause –

- a. The claimant fails to communicate his statement of claim in the time as determined by the arbitral tribunal, the arbitral tribunal may terminate the proceedings;
- b. The respondent fails to communicate his statement of defence in accordance with the time as determined by the arbitral tribunal, the arbitral tribunal may continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; or
- c. Any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Under section 29(3) of the AA 2004 (which has no parallel in the UNCITRAL Model Law), if the arbitral tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim, and the delay (a) gives rise or is likely to give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim or (b) has caused or is likely to cause serious prejudice to the respondent, the tribunal may make an award dismissing the claim.

### G. Arbitrator immunity

Section 25 of the IAA 1994 provides that an arbitrator shall not be liable for (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award. Section 20 of the AA 2004 provides the same.

## III. INTERNATIONAL INSTRUMENTS

### A. Signatory to the New York Convention

Singapore became a party to the 1958 New York Convention on 21 August 1986.<sup>36</sup>

### B. Reservations to the New York Convention

Singapore has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>37</sup>

### C. Method of domestic implementation of the New York Convention

The New York Convention is integrated into the IAA 1994 and is reproduced in the Second Schedule of the IAA 1994.<sup>38</sup>

The New York Convention's criteria for refusal of recognition and enforcement of awards are also integrated into the AA 2001.<sup>39</sup>

### D. Other international/regional treaties

Singapore is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the 'ICSID Convention').<sup>40</sup> The ICSID Convention is implemented in Singapore by the Singapore Arbitration (International Investment Disputes) Act 2012.<sup>41</sup>

Although not squarely relating to arbitration, on 20 December 2018, the United Nations General Assembly approved a resolution to adopt the United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention on Mediation').<sup>42</sup> The signing ceremony of the Singapore Convention on Mediation was held in Singapore on 7 August 2019 and 46 countries including the United States of America, China, India, and South Korea signed it on the first day.<sup>43</sup> The Singapore Convention sets out an international framework for the enforcement of settlement agreements arising out of mediation, and to this extent will operate to promote mediation as a complement to arbitration as a method of alternative dispute resolution worldwide.<sup>44</sup> The Singapore Convention will come into force six months after three countries have ratified, accepted, approved, or acceded to it.<sup>45</sup>

Singapore has entered into 46 bilateral investment treaties, of which 39 are in force (Qatar, Islamic Republic of Iran, United Arab Emirates, Russian Federation, Mexico, Kuwait, Libya, Democratic People's Republic of Korea, Turkey, Oman, Slovakia, Ukraine, Saudi Arabia, Bangladesh, Jordan, Bahrain, Bulgaria, Uzbekistan, Belarus, Mauritius, Slovenia, Latvia, Hungary, Egypt, Lao People's Democratic Republic, Cambodia, Mongolia, Czech Republic, Pakistan, Poland, Vietnam, Taiwan, China, Belgium-Luxembourg Economic Union, Switzerland, France, United Kingdom, Germany, Netherlands).<sup>46</sup>

Singapore has also entered into 23 free trade agreements (FTAs) (China–Singapore FTA, Panama–Singapore FTA, Singapore–Peru FTA, Singapore–Australia FTA, Singapore–Costa Rica FTA, Singapore–Taipei FTA, Singapore–Turkey FTA, Singapore–United States FTA, Sri Lanka–Singapore FTA, India–Singapore Comprehensive Economic Cooperation Agreement, New Zealand–Singapore Comprehensive Economic Partnership, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Republic of Korea–Singapore FTA, ASEAN–Australia–New Zealand FTA, ASEAN–China FTA, ASEAN–Hong Kong FTA, ASEAN–India FTA, ASEAN–Japan Comprehensive Economic Partnership, ASEAN Free Trade Area, EFTA–Singapore FTA, ASEAN–Korea Free Trade Area, Gulf Cooperation Council–Singapore FTA, Trans-Pacific Strategic Economic Partnership).<sup>47</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

Singapore is and has consistently been a pro-arbitration country. National courts readily enforce arbitration agreements. As to the applicable standard on which the Singapore courts will assess applications to stay court proceedings in favour of arbitration under section 6 IAA 1994, the 2016 Singapore Court of Appeal case of *Tomolugen Holdings v Silica Investors* held that courts in Singapore should adopt a prima facie standard of review when hearing a stay application under section 6 of the IAA. Thus, a court hearing such an application should grant a stay in favour of arbitration if the applicant was able to establish a prima facie case that: (a) there was a valid arbitration clause between the parties to the court proceedings; (b) the dispute in the court proceedings (or any part thereof) fell within the scope of the arbitration clause; and (c) the arbitration clause was not null and void, inoperative or incapable of being performed.<sup>48</sup>

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

1. A high threshold is set for the establishment of a breach of public policy. The Singapore Court of Appeal stated in *PT Asuransi Jasa Indonesia v Dexia Bank* that:<sup>49</sup>

In our view, [an objection on the basis of public policy] should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see *Downer Connect* ([58] supra) at [136]), or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice.

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

There are many cases in Singapore which have interpreted various individual provisions of both the IAA 1994 and the AA 2001 in their applications, across the entire lifecycle of an arbitration. Due to the constraints of space for the purposes of this country report however, just a small sample of these cases is set out here.

In relation to the right of parties in arbitrations to be given a reasonable opportunity to present their cases, the Singapore decision of *JVL Agro Industries Ltd v Agritrade International Pte Ltd*<sup>50</sup> outlined two aspects of this

right: a positive aspect and a responsive aspect. The positive aspect includes the opportunity to present the evidence and advance the propositions of law on which a party positively relies to establish its claim or defence. The responsive aspect encompasses the opportunity of the party to present the evidence and advance the propositions of law necessary to respond to the case made against it.<sup>51</sup> The court further elaborated on two aspects of the 'responsive aspect'. First, the party must have notice of the case to which it is expected to respond. Second, the party must be permitted to present the evidence and advance the propositions of law necessary to respond to it.<sup>52</sup>

In relation to the question of whether a party which fails to bring a setting aside application may later attempt to resist enforcement of an arbitral award, the Singapore decision of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Ors & Anor Appeal*,<sup>53</sup> clarified that even if a party elects not to bring a setting aside application as an 'active remedy', the party is not precluded from later resisting enforcement, which is referred to as a 'passive remedy'. This was held after the Singapore Court of Appeal referred to the *travaux préparatoires* of the UNCITRAL Model Law which it noted was intended to provide award debtors with a 'choice of remedies' for challenge of an award.<sup>54</sup>

In relation to challenges against arbitral awards on the basis a tribunal made its decision *infra petita* or *ultra petita*, the Singapore Court of Appeal held in *AKN v ALC*<sup>55</sup> that an arbitral tribunal's failure to consider an important issue that had been pleaded in an arbitration would be a breach of natural justice (permitting setting aside of its award within the meaning of section 24 IAA) because the arbitrator 'would not have brought his mind to bear on an important aspect of the dispute before him'.<sup>56</sup> However, an inference that a tribunal had indeed failed to consider an important pleaded issue must be shown to be clear and virtually inescapable before it may be drawn.<sup>57</sup> If the facts are also consistent with the tribunal having simply misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because it had thought it to be unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the tribunal had not applied its mind to the dispute or to an important aspect of the dispute and thereby acted in breach of natural justice should not be drawn.<sup>58</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Institutional arbitration is common in Singapore. The country is home to the Singapore International Arbitration Centre (SIAC), one of the world's pre-eminent arbitral institutions. Based on statistics from its 2018 Annual Report, SIAC in 2018 handled 402 new cases, which included 375 SIAC-administered cases and a total sum in dispute of US\$7.06 billion (S\$9.65 billion).<sup>59</sup> In addition, the Singapore Chamber of Maritime Arbitration (SCMA) is also based in Singapore and administers maritime arbitrations.<sup>60</sup> According to SCMA's 2018 *Year In Review*, SCMA received 56 new case references in 2018, and the average value of these disputes referred was US\$1.8 million.<sup>61</sup>

### B. Measures to strengthen institutional arbitration capabilities

The Singapore Government has for many years been supportive of international arbitration. In 1993 the Law Reform Committee of the Singapore Academy of Law undertook a detailed Review of Arbitration Laws which



resulted in the adoption of the IAA 1994.<sup>62</sup> In 1997, the Singapore Attorney General formed a Committee to study updating the law on domestic arbitration. This led to a 2001 report<sup>63</sup> and eventually to the AA 2001.

In 2016, the Singapore Government published draft legislation to legalise and regulate third-party funding for arbitration and arbitration-related litigation and mediation in Singapore. This led to the 2016 amendments to the IAA 1994 and AA 2001 providing accordingly.

#### C. *Submission of disputes to arbitration vs. litigation*

This comparison cannot be neatly made for Singapore, because Singapore attracts many arbitration cases from outside itself that would not in any event be heard in Singapore's domestic court system. With this qualifier, based on the 2017 Annual Report of the Supreme Court of Singapore, for the year 2017, the High Court of Singapore received 6,953 filings of civil originating processes.<sup>64</sup> In 2018, SIAC received 402 new arbitration filings.<sup>65</sup>

#### D. *Participation by foreign counsel in international arbitrations*

As a starting point, only advocates and solicitors of the Supreme Court of Singapore may practise law in Singapore and appear and plead in Singapore's courts.<sup>66</sup> However, foreign lawyers may register to practise in permitted areas of Singapore law (which include banking law, corporate law, IP law and maritime law) and foreign law under section 36B or 36C of the Singapore Legal Profession Act.

For the purpose of arbitration, parties may be represented by any person of their choice.<sup>67</sup> There is no requirement that chosen representatives are even lawyers. Foreign lawyers are permitted to represent parties in Singapore arbitrations and give advice in relation to them. However, should a party wish to make an arbitration-related court application, it must retain Singapore counsel for that purpose.<sup>68</sup>

#### E. *Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

Based on statistics from the 2018 SIAC Annual Report, in 2018 parties filed claims spanning sectors such as trade (27%), commercial (19%), maritime/shipping (18%), corporate (15%), construction/engineering (11%), and others such as energy, employment, banking/finance, aviation, insurance/reinsurance, IP and property leasing (10%).<sup>69</sup>

##### 2. Time taken for enforcement/annulment proceedings

Enforcement or annulment proceedings typically take three to six months in the first instance. Appeals to the Court of Appeal take between six and nine months.

##### 3. Percentage of awards annulled/not enforced

No information was available.

#### F. *Statistics/information on the length of court proceedings in commercial cases*

Based on statistics from the 2017 Annual Report of the Supreme Court of Singapore, the Supreme Court of Singapore endeavours to achieve at least 90 per cent compliance with the following court waiting periods. In 2017, all of the following set targets were achieved:<sup>70</sup>

- a. High Court trials: 8 weeks from setting down;
- b. High Court originating summonses: 6 weeks from filing (*inter-partes*), 3 weeks from filing (*ex-parte*);
- c. High Court summonses: 3 weeks from filing, except for applications for summary judgment which will be 5 weeks from filing (based on statutory minimum periods); and
- d. Appeals to the Court of Appeal: Ready to be heard in 15 weeks from the date of Notification to collect the Records of Proceedings (if before 2 Judges), or 19 weeks from the date of Notification to collect the Records of Proceedings (if before 3 Judges).

The 2019 World Bank Doing Business ranking indicates that it takes about 164 days to resolve a commercial dispute in a first-instance court in Singapore<sup>71</sup> – 6 days for filing and service of court processes, 118 days for trial and judgment and 40 days for enforcement of judgment.<sup>72</sup> Singapore ranks extremely highly in the East Asia & Pacific region, where it takes an average of 581.1 days to resolve commercial disputes in first-instance courts.<sup>73</sup> In terms of overall ease of enforcing contracts, Singapore scored 84.53 of 100 and ranked 1st of 190.<sup>74</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

#### G. *Statistics on judges and lawyers per capita*

According to statistics from the Singapore Judicial College, the total number of judges and judicial officers in Singapore does not exceed 200, and there are about 5,000 practising advocates and solicitors in the country.<sup>75</sup> With a population of about 5.8 million, this works out to a ratio of about 1 judge per 29,000 people and 1 lawyer per 1,160 persons.

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

In Singapore there is no clear extension of legal aid to businesses, though it may be possible. There is scope for legal aid in small arbitrations. Legal aid in Singapore is governed by the Legal Aid and Advice Act 1995, which outlines that in the Act 'aided persons' is a person who is issued a Grant of Aid and, where such a person is a minor, includes his guardian.<sup>76</sup> The Interpretation Act defines a 'person' and 'party' to include any company or association or body of persons, corporate or unincorporate.<sup>77</sup> Businesses may therefore fall under that and be able to get legal aid. The Singapore Legal Aid Bureau offers legal aid for cases dealt with in the Singapore courts. It is available to Singapore citizens and permanent residents who are in Singapore and who pass the 'means test' (persons with a disposable income of not more than S\$10,000 per year and a disposable capital of not more than S\$10,000) and the 'merits test' (a good reason for bringing or defending a case under the law).<sup>78</sup>

The Singaporean Law Society provides arbitration and mediation schemes. There are costs involved with this assistance, except for the pro bono arbitration scheme implemented in 2012 for smaller disputes involving up to \$20,000.<sup>79</sup> The Law Society of Singapore also offers a Community Legal Clinic and a Criminal Legal Aid Scheme, where commercial matters may be covered

by the inclusion of statutes like the Prevention of Corruption Act (Cap. 241) to those where legal aid applies.<sup>80</sup>

Through the Law Society's pro bono services there is legal aid for community organisations, which might allow scope for saying that legal aid is available for businesses. The Community Organisation Clinic offers free basic legal advice on operational issues for charities, voluntary welfare organisations, non-profit organisations, and social enterprises in Singapore that have an objective to meet community concerns or needs.<sup>81</sup> The Project Law Help advises on non-litigation commercial legal services including issues in corporate law, employment law, intellectual property, and property law.<sup>82</sup>

#### *B. Third-party funding*

In 2017, the Singapore Parliament legislated to simultaneously abolish the common law torts of maintenance and champerty and to explicitly permit third-party funding.<sup>83</sup> The abolishment of the torts of maintenance and champerty was made by the introduction of the new section 5A to the Singapore Civil Law Act, and, in concert with this, the new section 5B of the Singapore Civil Law Act and section 107(3A) of the Singapore Legal Profession Act were implemented to permit third-party funding.<sup>84</sup>

Section 5B of the Singapore Civil Law Act stipulates that third-party funding for prescribed dispute resolution proceedings shall not be contrary to public policy or otherwise be illegal by reason of being a contract for maintenance or champerty, and section 107(3A) of the Singapore Legal Profession Act provides that Singapore's prohibition of contingency fees does not prevent a solicitor from:

- a. introducing or referring a third-party funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;
- b. advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and
- c. acting on behalf of the solicitor's client in any dispute arising out of the third-party funding contract.

At present, based on the Singapore Civil Law (Third-Party Funding) Regulations 2017, third-party funding is permitted only for international arbitration and related matters.<sup>85</sup> There are also specific requirements for third-party funders in order for them to be able to fall under the rubric of section 5B of the Singapore Civil Law Act 1999 and section 107(3A) of the Singapore Legal Profession Act. For instance, the third-party funder has to have a paid-up share capital of not less than \$5 million or the equivalent amount in foreign currency or not less than \$5 million or the equivalent amount in foreign currency in managed assets.<sup>86</sup>

Several leading third-party funders including IMF Bentham, LCM Finance, and Woodsford Litigation Funding have a presence in Singapore.

#### *C. Contingency fees*

Contingency fees remain expressly prohibited for advocates and solicitors of the Supreme Court of Singapore under section 107(1)(b) and section 107(3) of the Singapore Legal Profession Act 2009.<sup>87</sup>

However, section 107(3A) of the Singapore Legal Profession Act 2009, introduced in 2017, provides that, for the avoidance of doubt, Singapore's prohibition of contingency fees does not prevent a solicitor from:

- a. introducing or referring a third-party funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;
- b. advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and
- c. acting on behalf of the solicitor's client in any dispute arising out of the third-party funding contract.

#### D. Insurance for legal expenses

After the event (ATE) insurance is available in Singapore. ATE insurance covers the costs incurred in defending or pursuing a claim and may be purchased after a dispute has arisen.<sup>88</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Straits Settlements Arbitration Ordinance XIII of 1809.
- 3 Singapore Arbitration Ordinance 14 of 1953.
- 4 Singapore Arbitration Act 1953 (Cap. 10).
- 5 Mohan Pillay (2014), 'The Singapore Arbitration Regime and the UNCITRAL Model Law', *Arbitration International*, Vol. 20 Issue 4, 355, 356.
- 6 Singapore Academy of Law – Law Reform Committee, *Report on Review of Arbitration Laws* (August 1993).
- 7 Pillay (2014), 'The Singapore Arbitration Regime and the UNCITRAL Model Law', 355, 356–57; See also Singapore Parliamentary Reports, Vol. 73, col. 2214 on the sitting of 5 October 2001 (where Singapore's Minister of State for Law explained that when the IAA 1994 was enacted, it was decided that the migration to the UNCITRAL Model Law should be undertaken in a phased manner).
- 8 Pillay (2014), 'The Singapore Arbitration Regime and the UNCITRAL Model Law', 355, 357.
- 9 Ibid.
- 10 Ibid.
- 11 See e.g., comments of Lai J in *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333 [29].
- 12 AA 2001, s 49.
- 13 Singapore Final Report of Review of Arbitration Laws Committee, LRRD No. 3/2001 (revised 4 October 2001), 33. N.B. The merits of this argument were examined in Mohan Pillay (2014), 'The Singapore Arbitration Regime and the UNCITRAL Model Law', 355, 363.
- 14 AA 2001, s 45(2).
- 15 Singapore International Arbitration (Amendment) Act 2001 (Act No. 38 of 2001).
- 16 Singapore International Arbitration (Amendment) Act 2002 (Act No. 28 of 2002).
- 17 Singapore Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act No. 42 of 2005).
- 18 Singapore International Arbitration (Amendment) Act 2009 (Act No. 26 of 2009).
- 19 Singapore International Arbitration (Amendment) Act 2012 (Act No. 12 of 2012) and Singapore Foreign Limitation Periods Act 2012 (Act No. 13 of 2012).

- 20 Singapore Statutes (Miscellaneous Amendments) Act 2016 (Act No. 16 of 2016).
- 21 Singapore International Arbitration (Amendment) Act 2001 (Act No. 38 of 2001).
- 22 Singapore International Arbitration (Amendment) Act 2002 (Act No. 28 of 2002).
- 23 Singapore Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act No. 42 of 2005).
- 24 Singapore International Arbitration (Amendment) Act 2009 (Act No. 26 of 2009).
- 25 Singapore International Arbitration (Amendment) Act 2012 (Act No. 12 of 2012); Singapore Foreign Limitation Periods Act 2012 (Act No. 13 of 2012).
- 26 Singapore Statutes (Miscellaneous Amendments) Act 2016 (Act No. 16 of 2016).
- 27 Singapore Statutes (Miscellaneous Amendments) Act 2003 (Act No. 9 of 2003).
- 28 Singapore Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act No. 42 of 2005).
- 29 Singapore International Arbitration (Amendment) Act 2009 (Act No. 26 of 2009).
- 30 Singapore International Arbitration (Amendment) Act 2012 (Act No. 12 of 2012); Singapore Foreign Limitation Periods Act 2012 (Act No. 13 of 2012).
- 31 Singapore Statutes (Miscellaneous Amendments) Act 2016 (Act No. 16 of 2016).
- 32 Singapore Statutes (Miscellaneous Amendments) Act 2003 (Act No. 9 of 2003), s 3.
- 33 Singapore Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act No. 42 of 2005).
- 34 Singapore International Arbitration (Amendment) Act 2009 (Act No. 26 of 2009); Singapore International Arbitration (Amendment) Act 2012 (Act No. 12 of 2012); Singapore Foreign Limitation Periods Act 2012 (Act No. 13 of 2012); Singapore Statutes (Miscellaneous Amendments) Act 2016 (Act No. 16 of 2016).
- 35 Robert Merkin and Johanna Hjalmarsson (2016), *Singapore Arbitration Legislation Annotated*, 2nd edn, Informa, 22–23.
- 36 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 37 Ibid.
- 38 IAA 1994, Sch 2.
- 39 AA 2001, ss 46, 48.
- 40 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 13 August 2019.
- 41 Singapore Arbitration (International Investment Disputes) Act (2012 Rev Ed, Cap. 11).
- 42 UNCITRAL, 'United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)' <[https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements)> accessed 31 August 2019.
- 43 See e.g. Baker & McKenzie (2019), 'Singapore Mediation Convention' <<https://www.bakermckenzie.com/en/insight/publications/2019/08/singapore-mediation-convention>> accessed 31 August 2019; Ashurst, 'The Singapore Convention on Mediation' <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-singapore-convention-on-mediation/>> accessed 31 August 2019.
- 44 See e.g. Baker & McKenzie (2019), 'Singapore Mediation Convention'; Ashurst, 'The Singapore Convention on Mediation'.
- 45 e.g. Baker & McKenzie (2019), 'Singapore Mediation Convention'; Ashurst, 'The Singapore Convention on Mediation'.
- 46 UNCTAD Investment Policy Hub, 'Singapore' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 47 Asian Regional Integration Center, 'FTAs: Singapore' <[aric.adb.org](http://aric.adb.org)> accessed 31 August 2019.
- 48 *Tomolugen Holdings v Silica Investors* [2016] 1 SLR 373 (SGCA) [63].
- 49 *PT Asuransi Jasa Indonesia v Dexia Bank* [2007] 1 SLR(R) 597 (SGCA) [59].
- 50 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 (SGHC) [145].
- 51 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 (SGHC) [146].

- 52 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 (SGHC) [147].
- 53 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Ors & Anor Appeal* [2014] 1 SLR 372 (SGCA).
- 54 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Ors & Anor Appeal* [2014] 1 SLR 372 (SGCA) [65]-[71].
- 55 *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 (SGCA).
- 56 *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 (SGCA) [46].
- 57 *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 (SGCA) [46].
- 58 *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 (SGCA) [46].
- 59 SIAC Annual Report 2018.
- 60 Singapore Chamber of Maritime Arbitration, 'About Us' <<https://www.scma.org.sg/about-us>> accessed 5 September 2019.
- 61 Singapore Chamber of Maritime Arbitration, *2018 Year In Review*, 1.
- 62 Singapore Academy of Law – Law Reform Committee, *Report on Review of Arbitration Laws* (August 1993).
- 63 Singapore Final Report of Review of Arbitration Laws Committee, LRRD No. 3/2001 (revised 4 October 2001).
- 64 Supreme Court of Singapore, 2017 Annual Report, 54.
- 65 SIAC Annual Report 2018, 15.
- 66 Singapore Legal Profession Act (2009 Rev Ed, Cap. 161), Part IV.
- 67 Singapore Legal Profession Act (2009 Rev Ed, Cap. 161), s 35.
- 68 IBA Arbitration Guide: Singapore (January 2018) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=21CE7804-1003-4E5C-965C-7BAE72749128>> accessed 13 August 2019.
- 69 SIAC Annual Report 2018, 17.
- 70 Supreme Court of Singapore, 2017 Annual Report <<https://www.supremecourt.gov.sg/docs/default-source/default-document-library/supreme-court-2017-arb5ce3133f22f6eceb9b0ff0000fcc945.pdf>> accessed 13 August 2019.
- 71 The State Courts of Singapore.
- 72 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/singapore#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/singapore#DB_ec)> accessed 15 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 73 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 74 Ibid.
- 75 Singapore Judicial College, Message from the Chief Justice <<https://www.supremecourt.gov.sg/sjc/about-the-college>> accessed 13 August 2019.
- 76 Legal Aid and Advice Act (Chapter 160). (Original Enactment: Act 20 of 1995), Revised Edition 2014 <<https://sso.agc.gov.sg/Act/LAAA1995#pr2->> accessed 14 September 2019.
- 77 The Statutes of the Republic of Singapore. Interpretation Act of 1965, Revisited Edition of the Laws Act (2002). C. I, s 2.
- 78 Singapore Legal Aid Bureau, 'Do I qualify for legal aid?' <<https://www.mlaw.gov.sg/content/lab/en/eligibility/do-i-qualify-for-legal-aid.html>> accessed 13 August 2019.
- 79 The Law Society of Singapore, Dispute Resolution Schemes: Arbitration. <https://www.lawsociety.org.sg/For-Public/Dispute-Resolution-Schemes/Arbitration-Scheme> accessed 14 September 2019.
- 80 Law Society of Singapore, 'Community Legal Clinic' <<http://probono.lawsociety.org.sg/Pages/Community-Legal-Clinic.aspx>> accessed 13 August 2019; Law Society of Singapore, 'Criminal Legal Aid Scheme' <<http://probono.lawsociety.org.sg/Pages/Criminal-Legal-Aid-Scheme.aspx>> accessed 13 August 2019.

- 81 Law Society Pro Bono Services: Community Organisation Clinic <<http://www.lawsocprobono.org/Pages/Community-Organisation-Clinic.aspx>> accessed 14 September 2019.
- 82 Law Society Pro Bono Services: Project Law Help <<http://www.lawsocprobono.org/Pages/Project-Law-Help.aspx>> accessed 14 September.
- 83 Singapore Civil Law (Amendment) Act 2017 (Act No. 2 of 2017).
- 84 Singapore Civil Law Act (1999 Rev Ed, Cap. 43) ss 5A, 5B; Singapore Legal Profession Act (2009 Rev Ed, Cap. 161) s 107(3A).
- 85 Singapore Civil Law (Third-Party Funding) Regulations 2017, reg. 3.
- 86 *Ibid.*, reg. 4.
- 87 Singapore Legal Profession Act (2009 Rev Ed, Cap. 161). See also *Law Society of Singapore v Lau See Jin Jeffrey* [2017] 4 SLR 148 (Court of Three Judges).
- 88 Getting the Deal Through, 'Dispute Resolution 2018, Singapore', Edmund Kronenburg and Tan Kok Peng.

# SOLOMON ISLANDS<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Solomon Islands was historically a British protectorate from 1893 to 1978 and known then as the British Solomon Islands Protectorate. It took its present name in 1975 and became fully independent of Britain on 7 July 1978. As a British protectorate, the laws in force in England, including common law and certain Acts of Parliament were applicable in Solomon Islands. Among these laws was the United Kingdom Arbitration Act 1950 (the '1950 Act').

The 1950 Act was a statute of general application and applied to Solomon Islands.<sup>2</sup> The 1950 Act governed arbitration proceedings in Solomon Islands until 1987.<sup>3</sup>

### B. *Description of prior legislation and reasons for its replacement*

The Constitution of Solomon Islands 1978 preserved the application of Acts of Parliament of the United Kingdom that were of general application and in force on 1 January 1961. These laws were, however, subject to the Constitution or Acts of Parliament of Solomon Islands. The Solomon Islands legal system is essentially a hybrid of local customary law and British common law.<sup>4</sup> It encompasses Acts of Parliament of Solomon Islands, customary law, English common law, and certain Acts of Parliament of the United Kingdom.<sup>5</sup>

The court structure in Solomon Islands mainly comprises a Court of Appeal, and a High Court. The Court of Appeal is the highest appellate court in Solomon Islands.<sup>6</sup> It has jurisdiction to hear and determine appeals of High Court decisions in civil and criminal matters. The High Court has unlimited original jurisdiction to hear and determine any civil or criminal matters under the laws of Solomon Islands. The High Court also has jurisdiction to supervise proceedings before subordinate courts.<sup>7</sup> Subordinate courts include magistrate courts, with jurisdiction in less serious cases, as well as local courts and customary courts which have jurisdiction in customary law and local by-laws.<sup>8</sup>

In 1987, the National Parliament of Solomon Islands enacted the Arbitration Act 1987, which currently governs arbitration in Solomon Islands, and repealed the 1950 Act.

Repealing the 1950 United Kingdom Arbitration Act was a move directed towards the indigenisation of applicable laws in post-independence Solomon Islands.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The principal arbitration Statute in Solomon Islands is the Arbitration Act 1987 (the '1987 Act').<sup>9</sup> It was enacted on 5 August 1987 and became effective on 8 September 1987. It was enacted to provide a procedure for local arbitration and judicial review of arbitration awards. The 1987 Act appears to be partially modelled on the long-repealed English Arbitration Act 1889.<sup>10</sup>



*B. Scope of application to domestic and international arbitrations*

The 1987 Act makes no reference to international arbitration, and Solomon Islands does not have a separate arbitration statute for international arbitration. The Act was probably designed with domestic arbitration in mind; that is, 'to provide a procedure for local arbitration'.<sup>11</sup> Nevertheless, international arbitration proceedings seated in Solomon Islands will most likely be governed by the provisions of the 1987 Act.

*C. Details and/or relevant amendments and modifications*

1. The 1987 Act has not been revised or amended since its enactment. It retains certain provisions which are unsuitable for modern-day international arbitration practice. In 2017 the Solomon Islands Government issued terms of reference regarding the overhaul of the country's dispute resolution regime, which included the question on how to best incorporate customary dispute resolution mechanisms. Due to a change in government, the initiative was not concluded.<sup>12</sup>

*D. Relationship to the UNCITRAL Model Law*

Solomon Islands has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (the 'Model Law'). The 1987 Act is not based on the Model Law.

*E. Departure(s) (if any) from the UNCITRAL Model Law*

The 1987 Act departs from the Model Law in several respects. Under the 1987 Act:

- a. The arbitration agreement is not separable from the main agreement;
- b. Arbitrators do not have the statutory power to determine their jurisdiction;
- c. An arbitration agreement is still referred to and defined as a 'submission';
- d. Arbitrators lack powers to grant orders of interim relief;
- e. The default number of arbitrators in the absence of agreement by parties is one arbitrator;
- f. Reference to the appointment and use of 'umpires' in the arbitration proceedings;
- g. An award can be appealed to the court on questions of law, and questions of law can be stated to the court for its opinion during the arbitration proceedings;
- h. There are limited but vague grounds for setting aside an award, namely: misconduct by an arbitrator and the improper procurement of the arbitration or the award; and
- i. There are excessive opportunities for court interference with the arbitral process.<sup>13</sup>

*F. Powers and duties of arbitrators*

The 1987 Act empowers arbitrators to administer oaths or take affirmation of the parties and witnesses,<sup>14</sup> to state an award in the form of a special case for the opinion of the court,<sup>15</sup> and to correct clerical errors in an award.<sup>16</sup>

### G. Arbitrator immunity

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

## III. INTERNATIONAL INSTRUMENTS

### A. Signatory to the New York Convention

Solomon Islands is not a party to the 1958 New York Convention.

As the country is not a signatory to the New York Convention, foreign arbitral awards are generally not entitled to recognition and enforcement by the courts of Solomon Islands and are difficult to enforce. Thus, enforcement is generally left to the discretion of the High Court and, if this is challenged, to the Court of Appeal.<sup>17</sup> Further, no case law dealing with the enforcement of foreign arbitral awards could be found on the relevant databases.

### B. Reservations to the New York Convention

This query is not applicable to this jurisdiction.

### C. Method of domestic implementation of the New York Convention

This query is not applicable to this jurisdiction.

### D. Other international/regional treaties

Solomon Islands is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>18</sup> It signed the ICSID Convention on 12 November 1979 and ratified it on 8 September 1981. The ICSID Convention became effective in Solomon Islands on 8 October 1981.<sup>19</sup>

Solomon Islands is a member of the PACER Plus Agreement, which has not yet entered into force.<sup>20</sup> Solomon Islands has also entered into four free trade agreements, which are currently all in effect (Melanesian Spearhead Group, Pacific ACP–EC Economic Partnership Agreement, Pacific Island Countries Trade Agreement, South Pacific Regional Trade and Economic Cooperation Agreement).<sup>21</sup>

## IV. RELEVANT CASE LAW

### A. Approach of the national courts to the enforcement of arbitration agreements

There are no important or recent cases from which to draw guidance.<sup>22</sup> Arbitral practice in Solomon Islands is generally limited.

### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

No information was available.

### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

There are no recent important decisions that have interpreted or comprehensively discussed the 1987 Act. Arbitral practice in Solomon Islands is generally limited.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Institutional arbitration does not exist in practice, and Solomon Islands does not have any arbitration institution. In general, Solomon Islands arbitration practice is not prevalent. It is suggested that the 1987 Act is rarely used and that parties tend to resort to court litigation to resolve their commercial disputes.<sup>23</sup>

### B. Measures to strengthen institutional arbitration capabilities

There are currently no known efforts by the Solomon Islands government or industry bodies aimed at strengthening institutional arbitration capabilities in Solomon Islands.

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

The practice of law in Solomon Islands is exclusive to persons who have been admitted or provisionally admitted as legal practitioners, whose names are on the roll of legal practitioners, and have a valid practising certificate issued by the Chief Judge.<sup>24</sup> Foreign lawyers can also qualify and be certified to practise law in Solomon Islands. They have been known to practise law before the Solomon Islands courts. There are, however, concerns regarding the sufficiency of the existing regulatory framework for legal practitioners as some foreign lawyers have been known to practise law in Solomon Islands without regulation.<sup>25</sup>

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

No information was available.

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 497 days to resolve a commercial dispute in a first-instance court in Solomon Islands – 45 days for filing and service of court processes, 182 days for trial and judgment and 270 days for enforcement of judgment.<sup>26</sup> Solomon Islands ranks above the East Asia & Pacific region, where it takes an average of 581 days to resolve commercial disputes in first-instance courts.<sup>27</sup> In terms of overall ease of enforcing contracts, Solomon Islands scored 43.49 of 100 and ranked 156 of 190.<sup>28</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>29</sup>

### G. Statistics on judges and lawyers per capita

There was no available information on the exact number per capita of judges and lawyers in Solomon Islands.

Solomon Islands appears to operate an 'expatriate model' in the appointment of judges to their courts. They tend to rely on foreign judges from other common law countries. For example, members of the Court of Appeal include senior judges from Australia, New Zealand, and Papua New Guinea.<sup>30</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information on legal aid being available to businesses or for arbitration. The Solomon Islands Constitution guarantees the availability of legal aid through the Office of the Public Solicitor. The Office of the Public Solicitor shall 'provide legal aid, advice and assistance to persons in need in such circumstances and subject to conditions as may be prescribed by Parliament'.<sup>31</sup> A 'person in need' is not defined by the Constitution. The Laws of Solomon Islands Chapter 30 on the Public Solicitor discusses the provisions of legal aid.<sup>32</sup> In particular, the Public Solicitor shall provide legal aid to any person when directed by the High Court to do so, but legal aid is particularly for those who have been charged with a criminal offence.<sup>33</sup> It is thus unclear if legal aid will be available for alternative forms of commercial dispute resolution such as arbitration and mediation, or whether businesses can get legal aid. It is, however, believed that the wording of the constitution's provision on legal aid is sufficiently broad to accommodate all forms of dispute resolution.

### B. *Third-party funding*

There is no literature on the applicability of the rules of champerty and maintenance in Solomon Islands. The law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished in the United Kingdom by statute in 1967;<sup>34</sup> however, the rule of maintenance and champerty survived as a public policy exception.<sup>35</sup> The jurisprudence on the application of the rule of maintenance and champerty suggests that Solomon Islands courts will not easily find an agreement champertous due to a third party's pecuniary advantage in a litigation.<sup>36</sup>

### C. *Contingency fees*

No information was available.

### D. *Insurance for legal expenses*

The Insurance Act 1986 regulates the business of insurance in Solomon Islands. It contains no reference to legal expenses insurance. It is unclear if legal expenses insurance is in practice available or offered by insurance companies in Solomon Islands. There is also no active legal protection insurance provider in the market.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.

- 2 Arbitration Act 1987, s 31 available at <<http://www.parliament.gov.sb/files/legislation/Acts/1987/THE%20ARBITRATION%20ACT%201987.pdf>> accessed 11 July 2019.
- 3 *Coral Seas Ltd v Gilmore* [1981] SBFJCA 1; [1980–1981] SILR 119 (17 March 1981).
- 4 Nexus Commonwealth Network, 'Solomon Islands' <[http://www.commonwealthofnations.org/sectors-solomon\\_islands/business/legal/](http://www.commonwealthofnations.org/sectors-solomon_islands/business/legal/)> accessed 11 July 2019.
- 5 Constitution, s 76 <<http://extwprlegs1.fao.org/docs/pdf/sol132844.pdf>>
- 6 Commonwealth Governance, 'Judicial System of Solomon Islands' <[http://www.commonwealthgovernance.org/countries/pacific/solomon\\_islands/judicial-system/](http://www.commonwealthgovernance.org/countries/pacific/solomon_islands/judicial-system/)> accessed 21 May 2019.
- 7 Constitution, s 84.
- 8 Commonwealth Governance, 'Judicial System of Solomon Islands'.
- 9 The Trade Disputes Act 1981 provides for the limited arbitration of trade disputes.
- 10 Although the 1987 Act post-dates and succeeds the 1950 Act, the provisions of the 1987 Act are more like the United Kingdom Arbitration Act 1889 than the 1950 Act. The 1987 Act omits several provisions contained in the 1950 Act and contains less detailed and more obsolete provisions than the 1950 Act. For example, unlike the 1950 Act, the 1987 Act does not define or refer to an 'arbitration agreement' but instead makes reference to a 'submission'.
- 11 Arbitration Act 1987, p 3.
- 12 Anonymous source.
- 13 For instance, to replace arbitrators, issue binding decisions on points of law raised during the arbitral proceedings and to assist on evidentiary matters. See generally the Arbitration Act 1987.
- 14 Arbitration Act 1987, s 8(a).
- 15 *Ibid.*, s 8(b).
- 16 *Ibid.*, s 8(c).
- 17 World Bank Group, 'Investing Across Borders – Solomon Islands' <<http://iab.worldbank.org/Data/ExploreEconomies/solomon-islands?topic=arbitrating-commercial-disputes>> accessed 11 July 2019.
- 18 ICSID (2018), '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 10 March 2019.
- 19 *Ibid.*
- 20 Australian Government, Department of Foreign Affairs and Trade, 'Pacific Agreement on Closer Economic Relations (PACER) Plus' <<https://dfat.gov.au/trade/agreements/not-yet-in-force/pacer/Pages/pacific-agreement-on-closer-economic-relations-pacer-plus.aspx>>, accessed 12 September 2019.
- 21 Asia Regional Integration Center, 'FTAs: Solomon Islands' <[aric.adb.org](http://aric.adb.org)> accessed 30 September 2019.
- 22 The recent decision in *Agricom Pte Ltd v Russell Islands Plantation Estates Ltd* involving an application to compel arbitration is not entirely representative. The court refused to stay the plaintiff's action for judgment on admission, pursuant to section 5 of the 1987 Act, because of the applicant/defendant's admission of liability to the effect that there was no dispute to be referred to arbitration and that the proceedings commenced by the plaintiff in the court ought to be determined by the court. Available at <<http://www.paclii.org/cgi-bin/sinodisp/sb/cases/SBHC/2001/34.html?stem=&synonyms=&query=arbitration>> accessed 21 May 2019.
- 23 'World Bank Group, 'Investing Across Borders – Solomon Islands'.
- 24 Legal Practitioners Act 1987, s 5.
- 25 Francesca Butler (2018), 'A Professional Project in the South Pacific: Regionalism and Reforming Solomon Islands', *Legal Profession*, Vol. 42 No. 2 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2729&context=ilj>> accessed on 21 May 2019.

- 26 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/solomon-islands#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/solomon-islands#DB_ec)> accessed on 27 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 27 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 28 Ibid.
- 29 Ibid.
- 30 Ibid.
- 31 Constitution of Solomon Islands 1978 with amendments, s 92(4).
- 32 The Law of Solomon Islands Chapter 30 of the 1996 Edition, Public Solicitor.
- 33 Constitution of Solomon Islands 1978 with amendments, s42(4) (a) and (b).
- 34 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 35 See country report for England & Wales regarding the treatment of the public policy exception of maintenance and champerty to date in that jurisdiction.
- 36 For example, *Emery v Hashimoto* [1996] SBCA 7 para 1: 'The courts have taken an increasingly more liberal view of the practice of the supporting of litigation by a third party'; *Re Taisol Investment Corporation (SI) Ltd, Emery and Sullivan v Hashimoto* [1995] SBHC 79; *Slater and Gordon v Ross Mining (Solomon Islands) Ltd* [2000] SBCA 2 (private international law question).

## SOUTH AFRICA<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The South African legal system has its roots in Roman-Dutch law, but it was also influenced by the English common law.<sup>2</sup>

Historically, the South Africa arbitral legislation was composed by the Arbitration Act 1898 of the Cape of Good Hope,<sup>3</sup> the Arbitration Act 1898 of Natal,<sup>4</sup> the Arbitration Ordinance of the Transvaal 1904,<sup>5</sup> and the Arbitration Proclamation of South-West Africa.<sup>6 7</sup> These pieces of legislation were repealed on 14 April 1965, when the South African Arbitration Act 1965, No. 42 of 1965 ('Arbitration Act 1965') entered into force (it remains in force for domestic arbitrations). The Arbitration Act 1965 was based on the English Arbitration Acts of 1889 and 1950.<sup>8</sup>

#### B. *Description of prior legislation and reasons for its replacement*

After entering into force on 14 April 1965, the Arbitration Act 1965 was amended on three occasions: with the Justice Laws Rationalisation Act 18 of 1996, the General Law Amendment Act 49 of 1996, and the Prevention and Combating of Corrupt Activities Act 12 of 2004. None of these amendments, however, resulted in any substantial changes in how arbitral proceedings were conducted in South Africa. The Arbitration Act 1965 was, as a result, generally considered not reflective of the modern trends and best practices.

In 1998, the South African Law Reform Commission (SALRC) recommended the adoption of the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration<sup>9</sup> to modernise the Arbitration Act 1965. Among the reasons for the reform, the Commission stated:

[The Arbitration Act] was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international arbitrations. By present-day standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (i.e. the principle that the arbitral tribunal's jurisdiction is derived from the parties' agreement to resolve their dispute outside the courts by arbitration). In short, the 1965 Act is widely perceived by those involved in international arbitration as being totally inadequate for this purpose.<sup>10</sup>

Although the urge for reforms started in the late 1990s, the Arbitration Act 1965 was only partially replaced in 2017, with the enactment of the International Arbitration Act 2017, No. 15 of 2017. ('International Arbitration Act')<sup>11</sup> The International Arbitration Act adopts the UNCITRAL Model Law with its 2006 amendments, and it has been in force since 20 December 2017. From that date onwards, the South Africa arbitral legislation comprises the Arbitration Act 1965, with its scope restricted to domestic arbitrations, and the International Arbitration Act.<sup>12</sup>

## II. CURRENT ARBITRAL IEGISLATION

### A. *Date of enactment*

The Arbitration Act regulating domestic arbitration was enacted on 14 April 1965,<sup>13</sup> and the International Arbitration Act was enacted on 20 December 2017.<sup>14</sup>

### B. *Scope of application to domestic and international arbitrations*

Domestic arbitrations are governed by the Arbitration Act 1965. International arbitrations are governed by the International Arbitration Act 2017. Article 7 of the International Arbitration Act establishes that the matters subject to international commercial arbitration are

[A]ny international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless (a) such a dispute is not capable of determination by arbitration under any law of the Republic; or (b) the arbitration agreement is contrary to the public policy of the Republic.

### C. *Details and/or relevant amendments and modifications*

The International Arbitration Act 2017 has not been amended thus far.

The Arbitration Act 1965, applicable to domestic arbitrations, was amended three times as described above, although none of these amendments has significantly changed the regulation of the arbitration procedure.

### D. *Relationship to the UNCITRAL Model Law*

The International Arbitration Act 2017 adopts the UNCITRAL Model Law with the 2006 amendments, and it only provides for minor adaptations.

The Arbitration Act 1965 is based on the English Arbitration Acts of 1889 and 1950.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The Model Law was adopted by South Africa with certain amendments, in order to better adjust it to the local practice. In a 2016 speech, the Deputy Minister of Justice and Constitutional Development of South Africa, J H Jeffrey, explained the content of these amendments:

The Model Law envisages a State adopting this law to exercise a choice between Options I and Option II in article 7 of the Model Law, regarding the form of an arbitration agreement. It is proposed that Option I be selected because it reflects existing South African law by requiring an arbitration agreement to be in writing.

Article 9 of the Model Law states the principle that for a court to order interim measures regarding a dispute subject to arbitration is not inconsistent with the arbitration agreement. It does not, however, provide any indication of the scope of the court's powers. It was therefore suggested that a paragraph be added with a reference to the article which sets out the scope of these powers.

Article 10 allows State parties the freedom to determine the number of arbitrators for appointment, failing which the default position in the Model Law is three arbitrators. The proposal that the default position should be



one arbitrator is in line with existing South African law, and it also promotes a less expensive process.

Article 12 provides for an arbitrator to be challenged where there are 'justifiable doubts' regarding his or her independence and impartiality. There has recently been an increase in the number of challenges being made in international arbitration. A new paragraph is therefore proposed which sets out the current South African standard regarding removal of an arbitrator on the basis of bias. The other ground for removal which is used in some other jurisdictions is 'a real danger of bias' as opposed to 'a reasonable apprehension of bias', the preferred ground in South Africa.

It is proposed that article 18 be amended to state that each party shall be given a reasonable opportunity, instead of a full opportunity of presenting its case. This is in line with the 2010 UNCITRAL Conciliation Rules and discourages court applications based on minor procedural irregularities. This is also in-line with the approach of the Constitutional Court in the *Lufuno Mphaphuli* case.<sup>15</sup>

It is suggested that the term 'seat of the arbitration', which is used in South African practice, be used rather than the term 'place of the arbitration' as used in the UNCITRAL text. The wording has been clarified to distinguish clearly between the juridical seat and the geographic location of a hearing.

A further amendment gives the tribunal express powers to award interest and costs, unless the parties agree otherwise. It is suggested that the tribunal should have these powers, where the parties fail to make their own arrangements. Few sets of international arbitration rules deal with the question of interest.<sup>16</sup>

#### F. Powers and duties of arbitrators

Although arbitrators are not subjected to any specific ethical code of conduct, and neither does the law impose limitations on who can serve as an arbitrator, an arbitrator must be impartial, independent and neutral.<sup>17</sup>

The International Arbitration Act partially adopted the Model Law provisions in respect to the powers conferred to arbitrators. Among the powers to grant interim awards, the International Act provides for precautionary measures. The Act did not adopt, however, provisions set out in articles 17B and 17C of the Model Law (preliminary orders), or articles 17E, 17F, and 17G, which regulate matters related with preliminary orders.

As discussed above, the domestic Arbitration Act does not grant extensive powers to arbitral tribunals. However, this does not prevent the parties' right to expressly provide for such powers in their agreement, or when determining their procedural choices for the arbitration. It is important to note that the domestic Act authorises an arbitrator to issue 'interim awards' (section 26), which have the same effects as an 'award', as provided for in section 1.

#### G. Arbitrator immunity

The domestic Arbitration Act 1965 is silent on arbitrator immunity. In theory, an arbitrator could be held liable for breach of mandate in a domestic arbitration, but South African case law has no such precedent.<sup>18</sup>

The International Arbitration Act 2017 provides for immunity of arbitrators and arbitral institutions in article 9. The provision establishes a subjective criterion for arbitrators' immunity – that is, arbitrators are immune to claims discussing

acts or omissions of arbitrators' functions, unless the claim presents evidence of bad faith.

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*<sup>19</sup>

South Africa became a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 3 May 1976.<sup>20</sup>

#### B. *Reservations to the New York Convention*

South Africa has not made any reservations to the New York Convention.<sup>21</sup>

#### C. *Method of domestic implementation of the New York Convention*

The New York Convention was firstly given effect in South Africa through the Recognition and Enforcement of Foreign Arbitral Awards (REFAA Act),<sup>22</sup> which entered in force on 13 April 1977. However, after the approval of the International Arbitration Act 2017, the provisions of the 1977 Act were repealed and replaced by the provisions of the International Arbitration Act 2017, which incorporated the New York Convention in chapter three of the Act.<sup>23</sup>

#### D. *Other international/regional treaties*

Even though the SALRC has recommended that South Africa accede to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), this step has never been adopted by the South African Government. In view of this fact, South Africa, alongside India and Brazil, is one of the most notable exceptions among developing countries that is not party to the ICSID Convention.

Furthermore, as a final step of the reforms in the arbitration legal framework, on 13 July 2018 a new law for protection of investments entered into force in South Africa (Protection of Investment Act, 2015).<sup>24</sup> The 2015 Investment Act has been strongly criticised for the diminished protections offered to foreign investors, and the abolishment of investor-state arbitration.<sup>25</sup>

South Africa has signed 40 bilateral investment treaties in total, of which 13 are currently in force (Zimbabwe, Nigeria, Russian Federation, Finland, Greece, Senegal, Sweden, Mauritius, China, Islamic Republic of Iran, Italy, Cuba, and Republic of Korea).<sup>26</sup> The country is in a process of terminating previous BITs and entering into new treaties in accordance with the Protection of Investment Act 2015.

South Africa has also entered into four free trade agreements, all of which are in force (Agreement Establishing the African Continental Free Trade Area (AfCFTA),<sup>27</sup> the Southern African Development Community (SADCFFTA),<sup>28</sup> COMESA–EAC–SADC Tripartite Free Trade Area,<sup>29</sup> and the Southern African Customs Union (SACU)<sup>30</sup>). South Africa is not a party to the Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) Convention.

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

Arbitration is becoming more popular in South Africa and it is presented as a good alternative to court proceedings especially in commercial cases. The

strongest perceived advantages of arbitration are related to (i) the possibility to choose arbitrators; (ii) cost; (iii) expediting of proceedings and (iv) flexibility of the proceedings.<sup>31</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The standard for refusing enforcement of an arbitral award on the grounds of public policy is determined in article 31(1)(b) of the International Arbitration Act. Section 3 of the same article specifies:

Without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award is contrary to the public policy of the Republic if:

a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the party resisting recognition or enforcement; or

the making of the award was induced or affected by fraud or corruption.

Considering that the International Arbitration Act has only recently entered into force, the public policy threshold as established in the Act has not yet been tested by South African courts. However, under the Arbitration Act 1965, the South African Constitutional Court refused enforcement to an arbitral award on the grounds of public policy in the 2014 decision of *Cool Ideas v Hubbard*.<sup>32</sup>

The parties had a dispute over the quality of certain construction works performed by the appellant and the respondent therefore refused to make the final payment. The plaintiff instead started an arbitration claiming the costs for reparatory works, with the appellant seeking the outstanding sums as a counter-claim. The arbitral tribunal awarded the appellant its outstanding costs. When the appellant sought to enforce the award, the respondent resisted enforcement on the basis that the appellant was not a registered home builder under applicable South African law. The Constitutional Court of South Africa refused enforcement of the award on public policy grounds on the basis that the provision of construction services by an unregistered builder constitutes a criminal offence.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Recently, the Constitutional Court decided in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*<sup>33</sup> that section 34 of the South African Constitution<sup>34</sup> was not directly applicable to arbitration, and by choosing arbitration instead of court proceedings a party was not waiving her constitutional right to have a 'dispute that can be resolved by the application of law decided in a fair public hearing before a court', but was choosing to solve the dispute via private arbitration. More importantly, the court interpreted section 33(1) of the domestic Arbitration Act 1965 in light of the South African Constitution and concluded that the provisions of the domestic Arbitration Act were not an invitation for court intervention in the arbitration proceedings, and the grounds for setting aside an award should be interpreted strictly by South African courts.

Another recent decision worth mentioning was ordered by the South Gauteng High Court in Johannesburg, which granted an anti-suit injunction to stop

court proceedings in Zambia while arbitration proceedings are not finalised in South Africa. The South African High Court granted an urgent interim interdict to stop proceedings in favour of Vedanta Resources, against Konkola Copper Mines (KCM), and it determined the Zambian Government to halt the sale of KCM. Vedanta is the main shareholder of KCM, which is 20 per cent owned by the ZCCM (a Zambian state-owned company). ZCCM has started winding-up proceedings against KCM in Zambian courts, alleging a breach of the terms of its licence. Vedanta, however, argues that such breach did not happen, and in view of the arbitration clause choosing South Africa as a seat for potential disputes arising from the contract, requested an interim relief to prevent ZCCM from pursuing winding-up proceedings until the decision on the arbitration – to be requested by Vedanta – is final.<sup>35</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

Most arbitrations in South Africa are institutional and domestic.<sup>36</sup> However, an increase in both international arbitration<sup>37</sup> and the use of ad hoc arbitration involving state-owned entities<sup>38</sup> has been reported.

Currently, South Africa has six arbitral institutions.<sup>39</sup> The two longest established are the Association of Arbitrators Southern Africa (AASA),<sup>40</sup> founded in 1979, and the Arbitration Foundation of Southern Africa (AFSA), founded in 1996. The AASA has a role compared to the Chartered Institute of Arbitrators in the United Kingdom.<sup>41</sup> The AASA has issued a code of conduct for arbitration practitioners; participated in the promotion of courses; training and membership certification in arbitration; and other alternative dispute resolution methods. The AFSA describes itself as 'the national leader in all types of appropriate dispute resolution'.<sup>42</sup> The Association administers disputes providing special sets of rules in accordance with the size and complexity of the matter, and it also maintains panels of experts. Its caseload is mainly domestic, but the institution has offered support to international disputes on some occasions.<sup>43</sup>

The other four institutions are, the China–Africa joint arbitration centre (CAJAC), the Commission for Conciliation, Mediation and Arbitration (CCMA), the Equillore group, and Tokiso.

With branches in Johannesburg and in Shanghai, CAJAC was created by a joint initiative between the Shanghai International Arbitration Centre in China, and the AFSA and Africa ADR in South Africa. This institution was created specifically to attend the business needs of investors between African countries and China, due to the intensified commercial relations between them.<sup>44</sup>

The CCMA offers arbitration services for labour disputes and it 'is an independent body, [which] does not belong to and is not controlled by any political party, trade union or business'.<sup>45</sup> Equillore is 'a neutral third-party that offers modern dispute management processes whilst remaining rooted in legal tradition',<sup>46</sup> and it offers services in disputes related to commercial, public sector, labour, and consumer matters. Similarly, Tokiso is a private and independent group which offers dispute resolution processes and support services for commercial, employment, and community disputes.<sup>47</sup>

While AFSA is the most prominent local arbitral institution, the preferred international institutions in cases involving South African parties are the

International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA).<sup>48</sup> Particularly in the relation to the ICC, although the Institution does not have a case management team based in South Africa, it has a national committee in the country and an office in Johannesburg.<sup>49</sup>

Finally, South African nationals and entities are prominent users of the ICC rules. In 2017, the ICC, for instance, reported 25 cases in total involving South African parties – the largest participation of African countries measured by ICC in that year. Most cases were not seated in South Africa.<sup>50</sup>

*B. Measures to strengthen institutional arbitration capabilities*

The government has been strengthening international arbitration generally by engaging with stakeholders in a public consultation process. Among African countries, South Africa is recognised as one of the states in which arbitration practice is most prominent, although this status has not been linked to any governmental measures. In the opinion of some commentators, apart from the approval of new legislation to support the modern practice of arbitration, little has been done by the South African Government to enhance arbitration practice in the country. On the other hand, some industry bodies are described as having a more proactive role, especially because of their participation in the creation of arbitral organisations and institutions.<sup>51</sup>

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

South Africa does not restrict foreign lawyers from acting as counsels in international arbitration proceedings.<sup>52</sup> However, foreign lawyers need to qualify in South Africa in order to practise in the country as attorneys. Practitioners from some countries which have a similar legal system to South Africa<sup>53</sup> may be exempted from this requirement.<sup>54</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

Arbitration is the preferable method to solve controversies in a wide range of disputes in South Africa. These disputes are often related to commercial contracts and, therefore, are likely to involve issues of performance of breach of contractual obligations.<sup>55</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 600 days to resolve a commercial dispute in a first-instance court in South Africa – 30 days for filing and service of court processes, 490 days for trial and judgment and 80 days for enforcement of judgment.<sup>56</sup> South Africa ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>57</sup> In terms of overall

ease of enforcing contracts, South Africa scored 54.10 of 100 and ranked 115 of 190.<sup>58</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

The World Justice Project Rule of Law Index – an index created to measure the adherence of countries to the rule of law – listed South Africa in the 47th position in its global rank in its 2019 report. This position was classified in the report as within the range of countries with medium adherence to the rule of law. In order to have a comparative view, this classification puts South Africa in the fifth position in sub-Saharan Africa, behind Namibia, Mauritius, Rwanda, and Botswana.<sup>59</sup>

#### G. *Statistics on judges and lawyers per capita*

With a population of 56,717,156 people,<sup>60</sup> South Africa has 249 permanent judges and 2,003 magistrates.<sup>61</sup> Additionally, the legal profession in the country, similar to that of England, is divided between advocates (barristers) and attorneys (solicitors). According to the Law Society of South Africa, as at January 2019 there were 27,223 practising attorneys in the country – an increase of more than 48 per cent in the number of South African attorneys in the previous 10 years – and 2,083 members of the Bar.<sup>62</sup>

## VI. FUNDING FOR LEGAL CLAIMS

#### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information to indicate that legal aid is provided for businesses or for arbitration in South Africa. Legal Aid South Africa (LASA), established through the South African Constitution and the Legal Aid South Africa Act 2014, administers legal assistance programmes throughout the country. LASA does assist in matters of contract law but neither the 2014 Act nor LASA provide much guidance as to eligible persons.<sup>63</sup> In South Africa's Interpretation Act 1957, a 'person includes any company or any body of persons corporate or unincorporated'.<sup>64</sup> The Legal Practice Council, also offers pro bono services but this assistance is provided for individuals only.<sup>65</sup>

No information is available regarding legal aid for arbitration or other alternative dispute resolution mechanisms.

#### B. *Third-party funding*

Third-party funding is not explicitly regulated in South Africa and there is only limited literature addressing the subject.<sup>66</sup> The doctrines of maintenance and champerty were part of South Africa's English heritage. However, these doctrines have never received much attention in practice.<sup>67</sup> '[I]t appears that litigation funding has quietly become part of the South Africa landscape, getting little to no resistance in the face of what used to be portrayed as contra bonos mores champertous agreements.'<sup>68</sup> There are three leading cases establishing the parameters of third-party funding: *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others*,<sup>69</sup> *PricewaterhouseCoopers Inc and others v National Potato Co-operative Limited*,<sup>70</sup> and *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Another*.<sup>71</sup> In the 2004 case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*, for example, the Supreme Court of Appeal found that an agreement between

a claimant and a non-lawyer which traded finance for the litigation for a share of the reward was not contrary to public policy.<sup>72</sup> In summary, South African courts are likely to recognise the validity of third-party funding agreements, as long as the case does not involve any form of bad faith or intent.<sup>73</sup> However, the South African courts have not yet definitively ruled on the validity of third-party funding agreements in relation to arbitration procedures.<sup>74</sup>

At least three professional funders are actively present in the South African market.<sup>75</sup> Additionally, commentators observed that there is another market niche for legal claims' financing within the financial institutions which have a litigation funding department. These financial institutions provide financing especially on small cases, and to local litigation disputes.<sup>76</sup>

### C. Contingency fees

Contingency fees are legal and considered another funding option for legal claims in South Africa. Contingency fee agreements are regulated by the Contingency Fees Act,<sup>77</sup> which imposes certain requirements for the validity of this sort of agreement. Some of these requirements are that the agreement shall be concluded in writing and in the form prescribed by the Minister of Justice. Moreover, the Act also requires that the client has been informed about other ways of financing the litigation.

### D. Insurance for legal expenses

Legal expense insurance appears to be available in South Africa. This insurance is regulated by the Short-Term Insurance Act.<sup>78</sup> It appears that South Africa permits and offers different types of policies, which cover 'almost any violation of a person's rights'.<sup>79</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Miles, J, Fagbounlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – a review of Key Jurisdictions*, Sweet & Maxwell, 217.
- 3 Act 29 of 1898.
- 4 Act 24 of 1898.
- 5 Ordinance 24 of 1904.
- 6 Proclamation 3 of 1926.
- 7 For further information about the historical legislation see Thomas Winship (1925), *Law and Practice of Arbitration in South Africa*.
- 8 Gerhard Rudolph and Darryl Bernstein (2017), 'South Africa', in *The 2017 Baker McKenzie International Arbitration Yearbook* <<https://globalarbitrationnews.com/wp-content/uploads/2017/06/South-Africa.pdf>> accessed 27 August 2019.
- 9 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 10 See SALRC (1998), 'Project 94 Arbitration: An International Arbitration Act for South Africa' (para. 1.3) <[http://www.justice.gov.za/salrc/reports/r\\_prj94\\_july1998.pdf](http://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf)> accessed 27 January 2019.
- 11 International Arbitration Act, 2017 (Act No. 15 of 2017).
- 12 In order to define what is an international arbitration – as opposed to a domestic proceeding – '[t]he International Act incorporates Art. 1(3) of the Model Law'. See Patrick

- M M Lane; and R Lee Harding (2018), 'National Report for South Africa', in Paulsson and Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, 2.
- 13 South African Arbitration Act 1965, No. 42 of 1965.
- 14 South African International Arbitration Act 2017, No. 15 of 2017.
- 15 The case referred to by the Hon J H Jeffery is *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*, CCT 97/07 [2009] ZACC 6.
- 16 South African Government official website (2016), 'Deputy Minister John Jeffery: International Arbitration – the Dawn of a New Era in South Africa Seminar' <<https://www.gov.za/speeches/dawn-new-era-south-africa-seminar-14-oct-2016-0000>> accessed 27 August 2019.
- 17 Werksmans Attorneys (2018), 'South Africa', in *Arbitration Guide IBA Arbitration Committee*, 3 <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Arbcountryguides.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx)> accessed 28 August 2019.
- 18 Ibid.
- 19 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 20 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed on 31 July 2019.
- 21 Ibid.
- 22 Act No. 40 of 1977
- 23 Lane and Harding (2018), 'National Report for South Africa', 1.
- 24 Act No. 22 of 2015, available at <http://www.thedti.gov.za/gazettes/39514.pdf>
- 25 PoliticsWeb (2018), 'A punch to the nose of foreign investment', Peter Leon <<https://www.politicsweb.co.za/opinion/a-punch-to-the-nose-of-foreign-investment>> accessed 27 August 2019; BBrief (2018), 'Protection of Investment Act becomes law and may deter foreign investment', Ian Matthews <<https://www.bbrief.co.za/2018/07/16/protection-of-investment-act-becomes-law-and-may-deter-foreign-investment/>> accessed 27 August 2019.
- 26 UNCTAD Investment Policy Hub <<https://investmentpolicyhub.unctad.org/IIA/CountryBits/176#iialInnerMenu>> accessed 27 August 2019. The BITs in force were signed with Cuba, Republic of Korea, China, Mauritius, Sweden, Italy, Finland, Russian Federation, Greece, Islamic Republic of Iran, BLEU, Nigeria, Zimbabwe and Senegal.
- 27 Tralac, 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.
- 28 See Southern African Development Community <<https://www.sadc.int>> accessed 30 September 2019.
- 29 Tralac, 'SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents' <<https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>> accessed 30 September 2019.
- 30 EFTA, 'Southern African Customs Union' <<https://www.efta.int/free-trade/free-trade-agreements/sacu>> accessed 30 September 2019.
- 31 Werksmans Attorneys (2018), 'South Africa', 3.
- 32 *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16 (5 June 2014).
- 33 2009(4) SA529 (CC)
- 34 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
- 35 Reuters (2019), 'South African court blocks Zambian plan to sell Vedanta copper mine', Tanish Heiberg and Helen Reid <<https://www.reuters.com/article/us-zambia-mining-vedanta/south-african-court-blocks-zambian-plan-to-sell-vedanta-copper-mine-idUSKCN1U11Y6>> accessed 28 August 2019.



- 36 Werksmans Attorneys (2018), 'South Africa', 3.
- 37 Ibid.
- 38 Simmons & Simmons (2015), 'Arbitration in Africa: high stakes and big claims in resolving disputes in Africa' in *Client Insight* (Legal Business, July/August), 104 <<http://www.simmons-simmons.com/-/media/files/corporate/external%20publications%20pdfs/africa%20insight.pdf>> accessed 28 August 2019.
- 39 Different sources mention different centres, which seems to indicate that this number is not exhaustive, but it refers to the most common, or well-known centres.
- 40 The Association of Arbitrators Southern Africa (AASA) website is available at <<http://www.arbitrators.co.za/>> accessed 28 August 2019.
- 41 Lane and Harding (2018), 'National Report for South Africa', 5.
- 42 The Arbitration Foundation of Southern Africa (AFSA) website is available at <<http://www.arbitration.co.za/pages/default.aspx>> accessed 29 August 2019.
- 43 Herbert Smith Freehills (2017), 'Commercial Arbitration In Africa: Present And Future' <<https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future>> accessed 29 August 2019.
- 44 The CAJAC website is available at <[http://www.shiac.org/CAJAC/index\\_E.aspx](http://www.shiac.org/CAJAC/index_E.aspx)> accessed 28 August 2019.
- 45 The CCMA website is available at <<http://www.ccma.org.za/>> accessed 28 August 2019.
- 46 The Equillore website is available at <<http://www.equillore.com/>> accessed 28 August 2019.
- 47 The Tokiso website is available at <<https://tokiso.co.za/>> accessed 28 August 2019.
- 48 Simmons & Simmons (2015), 'Arbitration in Africa: high stakes and big claims in resolving disputes in Africa', in *Client Insight* (Legal Business), 104 <<http://www.simmons-simmons.com/-/media/files/corporate/external%20publications%20pdfs/africa%20insight.pdf>> accessed 28 August 2019.
- 49 See the ICC South Africa website, available at <<http://www.iccsa.org.za/>> accessed 28 August 2019.
- 50 ICC Dispute Resolution Bulletin (ICC, issue 2, 2018) <<https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>> accessed 28 August 2019.
- 51 See David Butler (2018), 'Attitude of South African Courts Towards Arbitration', in Emilia Onyema (ed.), *Rethinking the Role of African National Courts in Arbitration*, 179.
- 52 Werksmans Attorneys (2018), 'South Africa', 3.
- 53 At present Swaziland, Namibia, Lesotho and the former Transkei, Bophuthatswana, Venda and Ciskei states.
- 54 The Law Society of South Africa, 'Foreign lawyers' <<https://www.lssa.org.za/about-us/about-the-attorneys-profession/foreign-lawyers>> accessed 28 August 2019.
- 55 Werksmans Attorneys (2018), 'South Africa', 3.
- 56 World Bank (2019), Doing Business, 'Enforcing Contracts' <<https://www.doingbusiness.org/en/data/exploreconomies/south-africa>> accessed 28 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 57 Ibid.
- 58 Ibid.
- 59 World Justice Project (2019), 'Rule of Law Index', 19 <[https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf)> accessed 28 August 2019.
- 60 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 61 The Law Society of South Africa, 'Statistics for legal profession 2017/2018' <<https://www.lssa.org.za/upload/files/LSSA%20STATS%20DOC%202017-18.pdf>> accessed 28 August 2019.

- 62 Ibid.
- 63 Legal Aid South Africa, 'How it works' <<https://legal-aid.co.za/how-it-works/>> accessed 17 September 2019; Legal Aid South Africa Act, Act No. 39 of 2014.
- 64 Interpretation Act 33 of 1957, c 1 at s 2.
- 65 Legal Practice Council, 'Members of the Public' <<https://lpc.org.za/members-of-the-public/>> accessed 17 September 2019.
- 66 Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017), *Third-Party Funding in International Arbitration*, Kluwer Law International, 10.03.
- 67 Third-party funding was held to be permissible as early as 1894 in the case of *Hugo & Moller v Transvaal Loan, Finance and Mortgage Co*, 1894 (1) OR 336. See also Nieuwveld and Sahani (2017), *Third-Party Funding*, 10.03.
- 68 Third-party funding was held to be permissible as early as 1894 in the case of *Hugo & Moller v Transvaal Loan, Finance and Mortgage Co*, 1894 (1) OR 336. See also Nieuwveld and Sahani (2017), *Third-Party Funding*.
- 69 *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Stoller & Manning Attorneys and Others* 2001 (4) SA 360 (W).
- 70 *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA).
- 71 *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Another* (2014) (1) SA 141 (WCC).
- 72 *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA).
- 73 Nieuwveld and Sahani (2017), *Third-Party Funding*, 215.
- 74 Ibid.
- 75 Litigation Funders SA, Christopher Consulting: Comprehensive Litigation Solutions and The South African Litigation Funding Company.
- 76 Nieuwveld and Sahani (2017), *Third-Party Funding*, 217.
- 77 Act No. 66 of 1997, available at <<http://www.justice.gov.za/legislation/acts/1997-066.pdf>> accessed 28 August 2019.
- 78 Act No. 53 of 1998.
- 79 Nieuwveld and Sahani (2017), *Third-Party Funding*, 212.

## SRI LANKA<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The legal system of the Democratic Socialist Republic of Sri Lanka ('Sri Lanka') is a mixture of Roman-Dutch law, English common law, and local customary law.<sup>2</sup> Formal regulation concerning the reference to and conduct of arbitration proceedings were introduced by the British Colonial Government.

#### B. *Description of prior legislation and reasons for its replacement*

The first instance of formal regulation for arbitration proceedings was the Arbitration Ordinance No. 15 of 1856.<sup>3</sup> Thereafter, chapter 51 of the Civil Procedure Code 1889 was promulgated by the British Government.<sup>4</sup> Subsequently, the Reciprocal Enforcement of Foreign Judgments Ordinance No. 41 of 1921 was enacted.<sup>5</sup> However, '[t]he Preamble to the 1995 [Arbitration] Act recites that it provides for the conduct of arbitral proceedings, gives effect to the New York Convention and *repeals earlier legal regimes for arbitration: the Arbitration Ordinance, cap 93 and the Code of Civil Procedure, cap 101*.'<sup>6</sup>

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

The primary national legislation dealing with and regulating arbitration is the Arbitration Act No. 11 of 1995 ('the Arbitration Act'). It came into effect on 30 June 1995 and is currently in force.

#### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act governs both domestic and international arbitration proceedings. In this regard, '[t]he 1995 Act is noteworthy in that it virtually makes no distinction between domestic and international arbitration'.<sup>7</sup> In such regard, Sri Lanka gives 'uniform treatment given to both domestic and international arbitration and awards arising out of them'.<sup>8</sup>

#### C. *Details and/or relevant amendments and modifications*

The 1995 Arbitration Act 'completely overhauled the pre-existing legal regime for arbitration in Sri Lanka'.<sup>9</sup>

#### D. *Relationship to the UNCITRAL Model Law*

The 1995 Arbitration Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, and on the Draft Swedish Arbitration Act of 1994.<sup>10</sup> However, the Arbitration Act has not incorporated the 2006 revisions to the Model Law.<sup>11</sup> Further, the Arbitration Act, though based on the Model Law, exhibits some departure from it. Illustratively, it prescribes a uniform standard for both international and domestic awards for the purposes of annulment and enforcement proceedings.<sup>12</sup>

Also, Sri Lanka has not made the commercial reservation under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'); accordingly, the scope of arbitration agreements is broad.<sup>13</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

Sri Lanka's Arbitration Act 'is not a mere word-for-word reproduction of the Model Law. It incorporates many innovative provisions, retains a very few provisions derived from the repealed regimes and makes significant changes to the Model Law.'<sup>14</sup> By this token, there is a departure in the Act's section 4, as it 'contains a provision termed "arbitrability of the dispute" which is not found in the Model Law'.<sup>15</sup> According to the Act's section 4, 'any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration, unless the matter is contrary to public policy or is incapable of determination by arbitration'.<sup>16</sup> Otherwise stated, section 4 of the 1995 Act requires that disputes be 'arbitrable' and employs a public policy test to make this determination – a feature that does not appear in the UNCITRAL Model Law.<sup>17</sup>

Another difference between the Act and the Model Law can be found in the appointment of arbitrators. In this vein, '[t]he prima facie preclusion of nationality as a ground for not appointing an arbitrator in the Model Law (Article 11(1)), is not reproduced in the 1995 Act'.<sup>18</sup>

Similarly, 'the prescription for a judicial determination of any controversy in relation to this matter, as contained in the Model Law, has not been followed [by the Arbitration Act]'.<sup>19</sup>

Finally, '[t]here are substantial variations between the Arbitration Act and the Model Law with respect to their prescriptions on the conduct of arbitral proceedings'.<sup>20</sup> In this regard, it has been stated:

Article 18 of the Model Law, which provides for equality of treatment and opportunity for the parties, has been omitted from the Act. Instead, [s]ection 15 of the 1995 Act, which is a much more comprehensive provision encompassing matters beyond the Model Law's prescription, deals with 'duties of Arbitral tribunal'.<sup>21</sup>

#### *F. Powers and duties of arbitrators*

Section 15 of the Arbitration Act states that: 'the arbitral tribunal [has] to deal with any dispute submitted to it in an impartial, practical and expeditious manner (section 15(1))'.<sup>22</sup> Similarly, section 15(2) of the same Act 'requires the tribunal to afford all the parties an opportunity of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person'.<sup>23</sup>

#### *G. Arbitrator immunity*

According to the Arbitration Act, 'an arbitrator is not liable for negligence in respect of anything done or left undone as an arbitrator. However, an arbitrator could be liable for fraud or for anything done or omitted in that capacity'.<sup>24</sup>

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention<sup>25</sup>*

Sri Lanka became a signatory to the New York Convention on 9 April 1962.

#### *B. Reservations to the New York Convention*

Sri Lanka has not made any reservations under the Convention. The provisions of the New York Convention are given effect to by way of the 1995 Arbitration Act.

### C. *Method of domestic implementation of the New York Convention*

The Arbitration Act of 1995 'incorporates the key provisions of the New York Convention which enables the enforcement of foreign arbitral awards in Sri Lanka, subject to the limitative criteria set out under the Convention's Article V'.<sup>26</sup>

### D. *Other international/regional treaties*

Sri Lanka is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).<sup>27</sup> Sri Lanka ratified the Convention on 12 October 1967 and it entered into force in the country on 11 November 1967.<sup>28</sup>

Sri Lanka has signed 26 bilateral investment agreements with different states, of which 24 are in force (Czech Republic, Australia, Islamic Republic of Iran, Germany, Pakistan, Indonesia, Egypt, Thailand, United States of America, Italy, China, Norway, Denmark, Finland, Netherlands, Sweden, Malaysia, Belgium-Luxembourg Economic Union, Japan, Switzerland, Romania, France, Republic of Korea, and United Kingdom).<sup>29</sup> Sri Lanka has also entered into five free trade agreements (FTAs) all of which are signed and in effect (Asia-Pacific Trade Agreement, Sri Lanka-Singapore FTA, India-Sri Lanka FTA, Pakistan-Sri Lanka FTA, and South Asian Free Trade Area).<sup>30</sup>

## IV. RELEVANT CASE LAW

### A. *Approach of the national courts to the enforcement of arbitration agreements*

The Supreme Court has held that it cannot re-examine the merits of the dispute in annulment proceedings.<sup>31</sup>

### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The 1995 Arbitration Act stipulates '[t]here is in the provision no indication of disputes that could be contrary to public policy (an inherently elastic and largely uncertain concept) or otherwise inarbitrable. Nevertheless, a valid arbitration agreement will be recognized and enforced by the court at the instance of the party willing to use arbitration'.<sup>32</sup>

In *Kiran Atapattu v Janashakthi General Insurance Co. Ltd.*,<sup>33</sup> the court has construed public policy exceptions in a narrow fashion.

### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The Supreme Court has rendered that courts must give effect to the New York Convention by leaning in favour of giving effect to the arbitration agreement and the resulting award.<sup>34</sup>

## V. ARBITRATION LANDSCAPE

### A. *Institutional arbitration*

In Sri Lanka there are the following two arbitral institutions: (i) Sri Lanka National Arbitration Centre (1985); and (ii) the Institute for the Development of Commercial Law and Practice Arbitration Centre (1996).<sup>35</sup> However, it appears that most arbitration proceedings are conducted on an ad hoc basis.

*B. Measures to strengthen institutional arbitration capabilities*

Commentators assert that there is no concrete survey on attitudes of individuals and corporations towards arbitration.<sup>36</sup> Nonetheless, '[s]ince the enactment of the 1995 Act, the Institute for the Development of Commercial Law and Practice (ICLP) has established an Arbitration Centre in Colombo that has ambitious plans to become a regional institution for international commercial dispute resolution'.<sup>37</sup> Likewise, the insertion of an arbitration clause is common by most finance corporations as well as contracts executed by the Board of Investment of Sri Lanka.<sup>38</sup> Arbitration is also commonplace in the construction industry in Sri Lanka.<sup>39</sup>

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

The 1995 Arbitration Act states that a party to a dispute may be represented by an attorney-at-law. In this vein, section 23 states: 'Unless otherwise agreed in writing by the parties to the arbitration agreement, a party to an arbitration agreement: (a) may appear before the arbitral tribunal personally or, where the party is a body of persons, whether corporate or unincorporated, by an officer, employee or agent of that body; and (b) may be represented by an attorney-at-law if the party so desires.'<sup>40</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

In Sri Lanka, institutional arbitration is very common for resolving disputes within the construction industry.<sup>41</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

Civil and commercial litigation normally takes five years, because of an under-resourced justice delivery system.<sup>42</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 1,318 days to resolve a commercial dispute in a first-instance court in Sri Lanka – 62 days for filing and service of court processes, 1,000 days for trial and judgment and 256 days for enforcement of judgment.<sup>43</sup> Sri Lanka ranks below the South Asia region, in which it takes an average of 1,101.6 days to resolve commercial disputes in first-instance courts.<sup>44</sup> In terms of overall ease of enforcing contracts, Sri Lanka scored 41.16 of 100 and ranked 164 of 190.<sup>45</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>46</sup>

*G. Statistics on judges and lawyers per capita*

In 2011 to 2012, there were 133 magistrates judges and 119 district judges in Sri Lanka.<sup>47</sup> The World Bank estimates that Sri Lanka has a ratio of 1.5 judges per 100,000 of the population, which is estimated to be lower compared to

other middle-income Asian countries.<sup>48</sup> There does not appear to be any information regarding the number of lawyers.

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no provision for nor restriction to businesses in Sri Lanka receiving legal aid in the relevant Act. Legal aid is offered in Sri Lanka and subject to the terms of the Legal Aid Law No. 27 of 1978.<sup>49</sup> The Legal Aid Commission (LAC) was established by the Act with the main objective being to provide legal aid to 'deserving persons' in Sri Lanka.<sup>50</sup> There is no definition of 'deserving persons' in the Act but under the Sri Lankan Interpretation Act 'person' includes persons whether corporate or unincorporated so perhaps businesses could be included.<sup>51</sup> There is legal aid provided through the Commission for senior citizens, migrant workers, prisoners, women, and differently abled persons as well as for helping people with their right to information requests.<sup>52</sup>

### B. *Third-party funding*

No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Sri Lanka or the availability of third-party funding in that jurisdiction. Given that Sri Lanka's legal system is based on a mixed legal system (whereby the systems in question treated the permissibility of third-party funding differently) and continued to be after it became part of the British Empire<sup>53</sup> no supposition can be made whether third-party funding is permissible in Sri Lanka. However, the prohibition of contingency fees suggests that third-party funding prima facie will not be permissible.

### C. *Contingency fees*

Lawyers in Sri Lanka are not permitted to enter into contingency fee arrangements with their clients.<sup>54</sup>

### D. *Insurance for legal expenses*

Insurance is provided in Sri Lanka and litigants may avail themselves of policies to limit liability to third parties.<sup>55</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 L Cooray (1975), 'Common Law in England and Sri Lanka', *International and Comparative Law Quarterly*, 24, 553, 555, 556.
- 3 Dilumi de Alwis (2015), 'National Report for Sri Lanka', in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, ICCA, 1–42.
- 4 Ibid.
- 5 Ibid.
- 6 Amazu A Asouzu and Vikram Raghavan (2000), 'The Legal Framework for Arbitration in Sri Lanka – Past and Present', *Journal of International Arbitration*, Vol. 17 No. 6, 4. Emphasis added.
- 7 Ibid., 4.

- 8 Ibid., 11.
- 9 Ibid.
- 10 Dharshanie Illukpitiya and Arvind Rodrigo (2011), 'Sri Lanka', in Michael Moser and John Choong (eds), *Asia Arbitration Handbook*, OUP.
- 11 de Alwis (2015), 'National Report for Sri Lanka', 17.
- 12 Asouzu and Raghavan (2000), 'The Legal Framework for Arbitration in Sri Lanka', 4.
- 13 Ibid., 4.
- 14 Ibid., 1.
- 15 Ibid., 5.
- 16 Ibid., 5.
- 17 Ibid., 5.
- 18 Ibid., 5.
- 19 Ibid., 5.
- 20 Ibid., 7.
- 21 Ibid., 7.
- 22 Ibid., 7.
- 23 Ibid., 7.
- 24 Ibid., 6.
- 25 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 26 Aruna D De Silva, 'International Arbitration in Sri Lanka: is institution-led change the answer?' (*Academia Edu*), <[https://www.academia.edu/33263438/International\\_Arbitration\\_in\\_Sri\\_Lanka\\_is\\_institution-led\\_change\\_the\\_answer\\_1](https://www.academia.edu/33263438/International_Arbitration_in_Sri_Lanka_is_institution-led_change_the_answer_1)> accessed 28 March 2019.
- 27 ICSID, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 28 August 2019.
- 28 Ibid.
- 29 UNCTAD Investment Policy Hub, 'Sri Lanka' <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/198/sri-lanka?type=bits>> accessed 28 August 2019.
- 30 Asian Regional Integration Center, 'FTAs: Sri Lanka' <[aric.adb.org](http://aric.adb.org)> accessed 28 August 2019.
- 31 *Light Weight Body Armour Limited v Sri Lanka Army* 2007 (1) SLR 411.
- 32 Asouzu and Raghavan (2000), 'The Legal Framework for Arbitration in Sri Lanka', 5.
- 33 *Kiran Atapattu v Janahakthi General Insurance Co. Ltd.* [2013] (Supreme Court) Appeal 30-31/2005 (decided on 22 February 2013).
- 34 *Elgitread Lanka (Private) Limited v Bino Tyres (Private) Limited* SC (APPEAL) No. 106/08 (decided on 27 October 2010).
- 35 de Alwis (2015), 'National Report for Sri Lanka', 1–42.
- 36 Illukpitiya and Rodrigo (2011), 'Sri Lanka'.
- 37 Asouzu and Raghavan (2000), 'The Legal Framework for Arbitration in Sri Lanka', 11.
- 38 Illukpitiya and Rodrigo (2011), 'Sri Lanka'.
- 39 Asouzu and Raghavan (2000), 'The Legal Framework for Arbitration in Sri Lanka', 11.
- 40 Arbitration Act 1995, s 23.
- 41 Asouzu and Raghavan (2000), 'The Legal Framework for Arbitration in Sri Lanka', 11.
- 42 World Bank (2013), 'Sri Lanka Justice Sector Review' <<http://documents.worldbank.org/curated/en/255751468164662812/pdf/776620LK0ESW0P00Box377382B00PUBLIC0.pdf>> accessed 23 May 2019.
- 43 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/sri-lanka#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/sri-lanka#DB_ec)> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.



- 44 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 45 Ibid.
- 46 Ibid.
- 47 World Bank (2013), 'Sri Lanka Justice Sector Review', 43.
- 48 Ibid.
- 49 Practical Law (2018), 'Litigation and Enforcement in Sri Lanka: Overview', D L and F De Saram <[https://uk.practicallaw.thomsonreuters.com/w-017-0989?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-017-0989?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed 23 May 2019.
- 50 Legal Aid Law (No. 27 of 1978), Section 3 'Object of the Commission' ss 2 <[http://www.commonlii.org/lk/legis/num\\_act/lal27o1978122/s3.html](http://www.commonlii.org/lk/legis/num_act/lal27o1978122/s3.html)> accessed 30 September 2019.
- 51 Sri Lanka Interpretation Act Chapter 12 Law No. 29. 1974.
- 52 Legal Aid Commission of Sri Lanka, 'Developmental Legal Aid Desks' <<http://www.legalaid.gov.lk/index.php/developmental-legal-aid>> accessed 15 September 2019.
- 53 Cooray (1975), 'Common Law in England and Sri Lanka', 553, 556, 557.
- 54 Practical Law (2018), 'Litigation and Enforcement in Sri Lanka: Overview'.
- 55 Ibid.

# ST KITTS AND NEVIS<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

St Kitts and Nevis is one of the countries forming part of the English-speaking Caribbean.<sup>2</sup> St Kitts and Nevis's legal system is based on English common law.<sup>3</sup> Thus, English jurisprudence, as well as decisions from the British Commonwealth tradition, are of a persuasive authority in St Kitts and Nevis.<sup>4</sup> In 1974, St Kitts and Nevis adopted wholesale the English Arbitration Act 1950 via an amendment to its Arbitration Act 1907, Chapter 3:01 ('SKAA').<sup>5</sup> St Kitts and Nevis achieved full independence on 19 September 1983.

### B. *Description of prior legislation and reasons for its replacement*

The SKAA entered into force on 1 October 1907.<sup>6</sup> It was then amended by Act No. 4 of 1974 and Act No. 7 of 1976.<sup>7</sup> These amendments gave effect to the English Arbitration Act 1950 in the jurisdiction.<sup>8</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The SKAA was enacted on 1 October 1907.<sup>9</sup> In 1974–76, this was amended in order to adopt wholesale the English Arbitration Act 1950.

### B. *Scope of application to domestic and international arbitrations*

The same law (the SKAA) governs both domestic and international arbitration proceedings.

### C. *Details and/or relevant amendments and modifications*

There have been no further amendments to the SKAA post-1976. Although the SKAA was reissued in a revised edition in 2002, this did not involve any amendments to the act itself.<sup>10</sup>

One article discusses generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and harmonise the Commonwealth Caribbean countries' legislation.<sup>11</sup> The author reports that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee, a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes occurring in the international arbitration legal framework in the second half of the twentieth century, such as the establishment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and the UNCITRAL Model Law on International Commercial Arbitration.

After years of discussion and analysis, the Committee presented two drafts proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within

the region was set forth, as well as the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.<sup>12</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions recommended by the Committee were never implemented. As a result, the St Kitts and Nevis Arbitration Act does not reflect modern trends and best practices. Certain commentators,<sup>13</sup> in an attempt to identify why the proposals of the Project were never implemented, speculate that the project was too ambitious. They also highlight that implementing the legislative reforms in all countries would be too burdensome and time-consuming. Besides these reasons, some other opinions point out that:

[M]ost of the individuals ... were apathetic toward the concept of harmonization of arbitral legislation in the region. The general feeling, according to Ms. Straker, was that there were many other more important matters that had to be addressed first by the Commonwealth Caribbean territories.<sup>14</sup>

[T]he business community of the Commonwealth Caribbean [held] that the process of arbitration was deemed to be neither speedier nor less expensive than the adjudicatory process, especially in view of the fact that in most cases the parties had to go to court to enforce awards in their favour. Commercial disputants, according to Mr. Thompson, felt more comfortable with the courts in the islands.<sup>15</sup>

Hence, the St Kitts and Nevis arbitral legislation is still based on the 1950 English Arbitration Act. There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of the Caribbean Community and Common Market (CARICOM). It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>16</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The arbitration legislation, being based on the English Arbitration Act 1950, is not based on the UNCITRAL Model Law.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

Some notable differences between the English Arbitration Act 1950 and the UNCITRAL Model Law are that, under the English Arbitration Act 1950:

- a. The arbitration agreement is not separable from the main agreement;
- b. Arbitrators do not have the statutory power to determine their jurisdiction;
- c. Arbitrators lack powers to grant orders of interim relief;
- d. The default number of arbitrators in the absence of agreement by parties is one arbitrator; and
- e. There is reference to the appointment and use of 'umpires' in the arbitration proceedings.

#### *F. Powers and duties of arbitrators*

Considering that the national law adopts verbatim the English Arbitration Act 1950, the powers and duties of the arbitrators are the same as the ones accorded therein.

The Arbitration Act provides that arbitrators can:

- a. administer oaths or take the affirmations of the parties and witnesses appearing;<sup>17</sup> and
- b. correct in an award any clerical mistake or error.<sup>18</sup>

It also provides for the default power to issue interim awards<sup>19</sup> and order specific performance to the extent allowed to High Courts,<sup>20</sup> unless contrary intention is expressed in the agreement. The Act also provides for other additional powers such as the power to order costs.<sup>21</sup>

#### G. Arbitrator immunity

The applicable English Arbitration Act 1950 is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

St Kitts and Nevis is not a party to the New York Convention.<sup>22</sup>

#### B. Reservations to the New York Convention

This query is not applicable to this jurisdiction.

#### C. Method of domestic implementation of the New York Convention

This query is not applicable to this jurisdiction.

#### D. Other international/regional treaties

Although St Kitts and Nevis is not a party to the New York Convention, it is a member of the Organization of American States (OAS). All OAS states are bound by the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, which 'ensur[es] extraterritorial validity of judgments and arbitral awards rendered in [the OAS's] respective territorial jurisdictions'. Companies doing business within OAS states, including the United States and/or the five Non-Convention states in the OAS, should be aware of this treaty and its potential assistance in enforcing an award.<sup>23</sup>

St Kitts and Nevis is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').<sup>24</sup>

St Kitts and Nevis also participates in the Partnership Agreement between the members of the African, Caribbean and Pacific group of states and the European Community and its member states, signed on 23 June 2000. The purpose of this Agreement is to strengthen the cooperation between the signatories who shall support development and modernisation of mediation and arbitration systems.<sup>25</sup>

The state has also been a party of CARICOM since 1974.<sup>26</sup> As part of it, the Revised Treaty of Chaguaramas establishing the CARICOM single market and economy, providing investment provisions, applies to St Kitts and Nevis as well.<sup>27</sup>

With respect to bilateral investment treaties, St Kitts and Nevis has currently one BIT signed but not in force, with the United Arab Emirates.<sup>28</sup>

St Kitts and Nevis is not a contracting state to the 1899 Convention for the Pacific Settlement of International Disputes and is not a contracting state to the 1907 Convention for the Pacific Settlement of International Disputes.<sup>29</sup>

#### IV. RELEVANT CASE LAW

##### *A. Approach of the national courts to the enforcement of arbitration agreements*

There is no information available on national courts' approach towards the enforcement of arbitration agreements in St Kitts and Nevis.

##### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The English Arbitration Act 1950 that applies in St Kitts and Nevis by virtue of Chapter 3:01 of the Laws of St Kitts and Nevis adopts the following grounds for refusing enforcement of an arbitral award:

(1) In order that a foreign award may be enforceable Conditions for under this Part of this Act it must have – (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed; (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties; (c) been made in conformity with the law governing the arbitration procedure; (d) become final in the country in which it was made; (e) been in respect of a matter which may lawfully be referred to arbitration under the law of England;

(2) a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that – (a) the award has been annulled in the country in which it was made; or (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

Provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(3) If a (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section; entitling him to contest the validity of the award, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.<sup>30</sup>

There is no available jurisprudence on this section.

##### *C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

There are no cases available that interpret the New York Convention. However, there has been an investment arbitration claim against St Kitts and Nevis, which has resulted in dismissal on a jurisdictional basis.<sup>31</sup>

#### V. ARBITRATION LANDSCAPE

##### *A. Institutional arbitration*

There is no information on whether institutional arbitration is common in St Kitts and Nevis. Apparently at least one institution is established in the

state, 'The Arbitrator' Conflict Resolution Service in St Kitts and Nevis.<sup>32</sup> The Arbitrator' Conflict Resolution Service provides arbitration and mediation services.

*B. Measures to strengthen institutional arbitration capabilities*

No information was available.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

It appears that foreign lawyers cannot practise in St Kitts and Nevis without being admitted to the Bar. According to the United Kingdom Law Society, solicitors qualified in England and Wales are capable of being admitted to the local bars of the Caribbean countries, including St Kitts and Nevis.<sup>33</sup>

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 578 days to resolve a commercial dispute in a first-instance court in St Kitts and Nevis – 28 days for filing and service of court processes, 400 days for trial and judgment and 150 days for enforcement of judgment.<sup>34</sup> St Kitts and Nevis ranks below average in the Latin America & Caribbean region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>35</sup> In terms of overall ease of enforcing contracts, St Kitts and Nevis scored 65.51 of 100 and ranked 51 of 190.<sup>36</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

*G. Statistics on judges and lawyers per capita*

There is no general information available; however, according to the Organisation of Eastern Caribbean States (OECS) Bar Association, there are currently 44 attorneys registered with the St Kitts and Nevis Bar.<sup>37</sup> With regard to judges the judiciary consists of six magistrates and judges.<sup>38</sup> With a population of about 55,000, the ratio of lawyers to population and judges to population is approximately 1:1,250 and 1:9,000 respectively.

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no mention of legal aid in St Kitts and Nevis being provided to businesses or for alternative forms of dispute resolution such as arbitration.<sup>39</sup> The Government of St Kitts and Nevis established the St Kitts – Nevis Legal

Aid and Advice Centre in 2005.<sup>40</sup> Legal aid is available to all persons of St Kitts and Nevis with a fee relative to income, i.e. an income of \$8,000 per year or less means one is only required to pay the application fee, while those with a salary ranging between \$10,000 and \$12,000 will pay an application fee and half of the legal fee.<sup>41</sup> If it is found that the individual cannot afford to pay these set fees then the service is provided pro bono.<sup>42</sup> The centre puts emphasis on providing aid to women, the elderly, and youths, who need legal advice and representation in court.

However, the legal aid scheme does not apply to arbitration and most commercial disputes.<sup>43</sup>

#### B. *Third-party funding*

Specific information discussing the current applicability of the doctrines of champerty and maintenance in St Kitts and Nevis was not available, and neither was information regarding the availability of third-party funding in the country. However, given that St Kitts and Nevis has its legal system based on English common law, and the rule of maintenance and champerty applied at the time of independence,<sup>44</sup> it is reasonable to assume that the rule of maintenance and champerty is still applicable.

This is confirmed by the jurisprudence of the Eastern Caribbean Supreme Court. In *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited*, the court was required to decide whether a funding agreement was disclosable on the basis that it was champertous.<sup>45</sup> In reaching its decision, the court indicated that the doctrines of champerty and maintenance apply in the Eastern Caribbean jurisdictions but that funding agreements may not necessarily fall foul of the doctrines. The issue in each case is whether 'a funding agreement has a tendency to corrupt justice'.<sup>46</sup> As the court explained:

The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.<sup>47</sup>

It appears therefore that while the doctrines of champerty and maintenance apply, funding agreements may, in the appropriate circumstances, still be permissible.

#### C. *Contingency fees*

St Kitts and Nevis falls within the group of the OECS and the OECS Bar Association.<sup>48</sup> Contingency fee agreements are permitted by the code of ethics adopted by the members of the OECS Bar Association.<sup>49</sup> Where there is no Legal Profession Act in a particular OECS member state, and no mention of contingency fees in the respective Legal Profession Acts, the OECS Code of Ethics Provision is adopted.

*D. Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117, Vol. 63 No. 1.
- 3 US Department of State (2018), *Saint Kitts and Nevis Investment Climate Statement 2018*.
- 4 St Kitts and Nevis Arbitration Act 1907.
- 5 Ibid.
- 6 Ibid.
- 7 Ibid.
- 8 Ibid.
- 9 Ibid.
- 10 Ibid.
- 11 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
- 12 Ibid.
- 13 Ibid., 123.
- 14 Ibid., 124.
- 15 Ibid., 124.
- 16 Caribbean Radio, 'Draft model arbitration bill for CARICOM states being reviewed by committee', <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>> accessed 12 September 2019.
- 17 The English Arbitration Act 1950, section 12(3).
- 18 Ibid., section 17.
- 19 Ibid., section 14.
- 20 Ibid., section 15.
- 21 Ibid., section 18.
- 22 New York Arbitration Convention, 'List of Contracting States' <<http://www.newyorkconvention.org/list-of-contracting-states>> accessed 27 August 2019.
- 23 Latham & Watkins LLP (2014), 'The ABCs of Arbitrating Outside of the New York Convention', Joanna Rosen, Yi-Chin Ho <<https://www.lw.com/thoughtLeadership/lw-international-arbitration-newsletter-june-2014>> accessed 27 August 2019.
- 24 See ICSID, 'Member States' <[icsid.worldbank.org](https://icsid.worldbank.org)> accessed 30 September 2019.
- 25 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, 2000, art. 21 <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3185>> accessed 27 August 2019.
- 26 CARICOM, The Caribbean Community, 'Members. Saint Kitts and Nevis' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/st-kitts-and-nevis>> accessed 27 August 2019.



- 27 The Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy <<https://caricom.org/about-caricom/who-we-are/our-governance/the-revised-treaty>> accessed 27 August 2019.
- 28 <sup>[28]</sup> UNCTAD Investment Policy Hub, 'Saint Kitts and Nevis' <[investmentpolicy.unctad.org](https://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 29 ICSID Lawyers, 'Saint Kitts and Nevis Arbitration' <<https://www.icsidlawyers.com/citypage.php?cityid=SaintKittsArbitration>> accessed 27 August 2019.
- 30 English Arbitration Act 1950, s 37.
- 31 *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v Federation of St Kitts and Nevis* (ICSID Case No. ARB/95/2).
- 32 The Arbitrator, 'Serving Saint Kitts and Nevis' <<http://arblawyerkn.com/>> accessed 27 August 2019.
- 33 The Law Society, 'How to practise in the Caribbean' <<https://communities.lawsociety.org.uk/caribbean/how-to-practise-in-the-caribbean/5044595.article>> accessed 27 August 2019.
- 34 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/st-kitts-and-nevis#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/st-kitts-and-nevis#DB_ec)> accessed 27 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 35 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 36 Ibid.
- 37 The OECS Bar Association, 'Members' <<http://www.oecsbar.org/index.php/en/members/members-st-kitts-nevis>> accessed 27 August 2019.
- 38 The Official Website of St Kitts and Nevis, 'Judiciary' <<https://www.gov.kn/>> accessed 27 August 2019.
- 39 The Official Website of St Kitts and Nevis, Ministry of Justice, Legal Affairs and Communication, Legal Aid and Advice Centre <<https://www.gov.kn>> accessed 14 September 2019.
- 40 Ibid.
- 41 St Kitts and Nevis Observer (2005), 'Legal Aid Centre Now Operational' <<http://www.thestkittsnevisobserver.com/law/legal-aid-centre-now-operational/>> accessed 27 August 2019.
- 42 The Official Website of St Kitts and Nevis, Ministry of Justice, Legal Affairs and Communication, Legal Aid and Advice Centre.
- 43 Ibid.
- 44 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 45 *Tetiana Lereimeieva v Estera Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153.
- 46 Ibid.
- 47 Ibid., 153–54.
- 48 OECS Bar Association, 'Code of Ethics' <<http://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/code-of-ethics>> accessed 27 August 2019.
- 49 Ibid.

# ST LUCIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

1. St Lucia is a sovereign state within the Commonwealth located in the Windward Islands in the Lesser Antilles, and one of the countries forming part of the English-speaking Caribbean.<sup>2</sup> Because it was both a French and English colony before it gained independence on 22 February 1979, the legal system is a mix of civil and English common law.<sup>3</sup>

The arbitration law in St Lucia is based on the English Arbitration Act 1950.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

St Lucia has only issued one commercial arbitration legislation, the Arbitration Act, Chapter 2:06, Act 29 of 1955 which was amended by Act 5 in 2004. No other legislation has been enacted.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act was enacted in 1955 and entered into force on 15 October 1955.

### B. *Scope of application to domestic and international arbitrations*

As the arbitration law of St Lucia is composed solely of the Arbitration Act and its scope is not limited; it seems to apply to both domestic and international arbitrations. The lack of differentiation between domestic and international arbitration is probably due to the fact that during the development of arbitration in the English-speaking Caribbean the English courts made no such distinction.<sup>5</sup>

### C. *Details and/or relevant amendments and modifications*

The Arbitration Act was amended by Act 5 of 2004. No information was found on the amendments made and the reasons thereof. When comparing the English Arbitration Act 1950 and the Arbitration Act of St Lucia as in force of today, it seems the modifications made were minor and concerned mostly editorial changes. However, the schedules attached to the St Lucia Arbitration Act differ from the English Arbitration Act 1950. The Geneva Protocol on Arbitration 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 attached to the English Arbitration Act 1950 were both signed by St Lucia but are not attached to the Arbitration Act. Instead, three schedules are attached to the Arbitration Act: Schedule 1 on Provisions to be Implied in [an] Arbitration Agreement, Schedule 2 on Matters in Respect of Which the Court May Make Orders and Schedule 3 providing for model clauses.

No jurisprudence or literature is available commenting on the current arbitration legislation of St Lucia. However, the analysis of the provisions of the Arbitration Act indicates that the Act has provisions that do not reflect modern trends and best practices. For example, some noteworthy differences between the Arbitration Act and the United Nations Commission on International Trade Law's 1985 Model Law on International Commercial

Arbitration ('UNCITRAL Model Law')<sup>6</sup> are (i) the inclusion of umpires; (ii) the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures; and (iii) lack of provisions on separability of the arbitral agreement.

Additionally, some articles discuss generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and unify the Commonwealth Caribbean countries' legislation. One author reported that in 1988 an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation amongst the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes occurring in the international arbitration legal framework in the second half of the twentieth century, such as the enactment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'),<sup>7</sup> the UNCITRAL Arbitration Rules, and the UNCITRAL Model Law.

After years of analysis, the Committee concluded two drafts, proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth, as well as the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.'<sup>8</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions recommended by the Committee were never implemented. As a result, the St Lucian Arbitration Act, as with many other arbitral legislations of Commonwealth Caribbean countries, does not reflect modern trends and best practices until today. Lubic, trying to identify why the proposals of the Project were never implemented, affirmed that in his opinion the project was too ambitious. He also states that implementing the legislative reforms in all countries would be too burdensome and time-consuming.<sup>9</sup>

There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of the Caribbean Community and Common Market (CARICOM). It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>10</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The Arbitration Act is not based on the UNCITRAL Model Law and neither is the English Arbitration Act 1950.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

The Arbitration Act is not based on the UNCITRAL Model Law, but on the English Arbitration Act 1950. There are a number of ways in which the Arbitration Act departs from the UNCITRAL Model Law including in relation to:

a. the inclusion of umpires (section 8);

- b. the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures;
- c. lack of challenge procedure;
- d. lack of enforcement of interim measures;
- e. power of courts to revoke the arbitration agreement in case of fraud; and
- f. lack of provisions on separability of the arbitral agreement.<sup>11</sup>

#### *F. Powers and duties of arbitrators*

According to section 15 of the Arbitration Act arbitrators have the power '(a) to administer oaths to or take the affirmations of the parties and witnesses appearing; and (b) to correct in an award any clerical mistake or error arising from any accidental slip or omission'. Further, section 26 of the Arbitration Act states the powers and remuneration of referees and arbitrators, determining that '[i]n all cases of reference to a referee or arbitrator, the referee or arbitrator shall be deemed to be an officer of Court, and subject to the Code of Civil Procedure and to rules of Court shall have such authority and conduct the reference in such manner as the Court may direct'.

#### *G. Arbitrator immunity*

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

St Lucia is not a party to the New York Convention.

#### *B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

#### *C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction.

#### *D. Other international/regional treaties*

St Lucia is a party to the Geneva Convention 'by virtue of extension notices issued by the British Government' in 1933.<sup>12</sup>

St Lucia is a contracting state to the Convention on the settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'). The ICSID Convention was signed and ratified on 4 June 1984 and entered into force on 4 July 1984.<sup>13</sup>

St Lucia currently has bilateral investment treaties with Germany and the United Kingdom which entered into force on 22 July 1987 and 18 January 1983, respectively.<sup>14</sup>

St Lucia has been a member of CARICOM since 1 May 1974.<sup>15</sup> As part of it, the Revised Treaty of Chaguaramas establishing the CARICOM single market and economy, providing investment provisions, applies to St Lucia as well.<sup>16</sup> As a member country, St Lucia has accepted the original jurisdiction of the Caribbean Court of Justice (CCJ) in Trinidad and Tobago to hear and determine cases related to interstate trade between St Lucia and other countries within the Caribbean.<sup>17</sup> In its original jurisdiction, the CCJ interprets

and applies the Revised Treaty of Chaguaramas and is an international court with compulsory and exclusive jurisdiction in respect of the interpretation of the treaty. In its appellate jurisdiction, the CCJ hears appeals as the court of last resort in both civil and criminal matters from those member countries which have ceased to allow appeals to the Judicial Committee of the Privy Council. Presently, the London-based Privy Council is St Lucia's final appeals court but there have been calls to move over to the CCJ.<sup>18</sup>

St Lucia is one of the founding member countries of the Organisation of Eastern Caribbean States (OECS).<sup>19</sup> OECS is an international intergovernmental organisation dedicated to economic harmonisation and integration, protection of human and legal rights and the encouragement of good governance among independent and non-independent countries in the Eastern Caribbean.<sup>20</sup> As a member country St Lucia accepted the jurisdiction of the Eastern Caribbean Supreme Court (ECSC).<sup>21</sup>

St Lucia is also a member of the Bolivarian Alliance for the Peoples of our America ('ALBA'). ALBA is an international cooperation organisation which is mainly associated with socialist and social democratic governments; its main purpose is to achieve regional economic integration based on a vision of social welfare. In April 2013, the member countries met to discuss the establishment and implementation of regional bodies for the solution of investment disputes.<sup>22</sup>

St Lucia also participates in the partnership agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its member countries, signed on 23 June 2000. The purpose of this Agreement is to strengthen the cooperation between the signatories who shall support development and modernisation of mediation and arbitration systems.<sup>23</sup>

St Lucia has also been a World Trade Organization member since 1 January 1995.<sup>24</sup>

#### IV. RELEVANT CASE LAW

##### A. *Approach of the national courts to the enforcement of arbitration agreements*

There was no information available on the national courts' approach towards the enforcement of arbitration agreements in St Lucia.

##### B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Arbitration Act does not contain a provision on the refusal of enforcement on the grounds of public policy. No further information was found.

##### C. *Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

Only a few arbitration cases have been reported by the Eastern Caribbean Supreme Court.<sup>25</sup> There are none that relate to St Lucia directly. However, as far as St Lucia's Arbitration Act has comparable provisions with Arbitration Acts that have been the subject of an Eastern Caribbean Supreme Court decision<sup>26</sup> those decisions will have precedent value.

The only decision internationally discussed which involves St Lucia is *RSM Production Corporation v Saint Lucia*.<sup>27</sup> The arbitration concerned the alleged breach of contractual obligations involving an oil and gas exploration contract.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

In November 2013 the Dispute Resolution Association (DRA) was created in St Lucia. The purpose of the DRA is to develop and promote the use of effective and economical methods of dispute resolution in all its forms as well as to provide services to individuals and corporations who wish to resolve conflicts out of court. Its mission is to provide the administrative framework necessary to support the provision of dispute resolution services.<sup>28</sup> The DRA also provides for a Fast Track, Construction, Insurance and Employment Arbitration Panel.

The arbitration clause suggested by the DRA is as follows: 'Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Saint Lucia before one arbitrator. The arbitration shall be administered by the Dispute Resolution Association Incorporated pursuant to its UNCITRAL Model Rules (as revised in 2010). This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from the court of Saint Lucia.'

### B. Measures to strengthen institutional arbitration capabilities

No information was available.

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

No information was available.

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

Looking at the established panels at the DRA, arbitration seems to be used in construction, insurance, and employment disputes.<sup>29</sup>

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 645 days to resolve a commercial dispute in a first-instance court in St Lucia – 21 days for filing and service of court processes, 444 days for trial and judgment and 180 days for enforcement of judgment.<sup>30</sup> St Lucia ranks above the Latin America & Caribbean region, in which it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>31</sup> In terms of overall ease of enforcing contracts, St Lucia scored 59.67 of 100 and ranked 75 of 190.<sup>32</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>33</sup>

The World Justice project (WJP) Rule of Law Index places St Lucia in the 38th place out of 126 countries worldwide in the WJP Rule of Law Index 2019 edition. St Lucia's score places it at 8th out of 30 countries in the Latin American and Caribbean region and 6th out of 38 among upper middle-income countries.<sup>34</sup>

Concerned about the state of the justice system, in March 2005 Prime Minister Hon. Dr Kenny D Anthony challenged the local justice system to work towards regaining the trust of the citizenry. In his words, 'Where for example, some citizens have come to distrust local justice, we must seek ways to improve their circumstances by improving access to adequate representation, by improving accountability and transparency in the justice system. We must seek to demystify the systems of justice administration so that citizens feel empowered and not disenfranchised.'<sup>35</sup>

#### G. *Statistics on judges and lawyers per capita*

According to the OECS Bar Association, there are currently 63 lawyers acting in St Lucia. No information is available regarding the total number of judges in the country, which has a population of around 180,000 (2019).<sup>36</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no information stating that legal aid is available for businesses or commercial arbitration in Saint Lucia. The 2018 Legal Aid Regulations states that 'aided persons' means a person who has been granted a legal aid certificate and is entitled to legal aid, and, where that person is a child or vulnerable person, includes his or her 'next friend'.<sup>37</sup>

In 2007 St Lucia established a legal aid system – the Legal Aid Board. Its purpose was to provide legal representation in areas where persons accused do not have the economic capacity to fund their own representation.<sup>38</sup> The service is based on the applicant's means (income, savings, resources, assets) and the merits of the case.<sup>39</sup> The Legal Aid Clinic assists in most criminal cases and a selection of civil matters including some contract or tort matters.<sup>40</sup> In 2016 the Government of St Lucia pledged more support for the island's legal aid programme.<sup>41</sup> It is unclear whether this has been forthcoming.

### B. *Third-party funding*

Specific information discussing the current applicability of the doctrines of champerty and maintenance in St Lucia were not located, and no information was found regarding the availability of third-party funding in the country. However, given that St Lucia's legal system is based on English common law, and the rule of maintenance and champerty applied at the time of independence,<sup>42</sup> it is reasonable to assume that the rule of maintenance and champerty is still applicable.

This is confirmed by the jurisprudence of the Eastern Caribbean Supreme Court. In *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited*, the Court was required to decide whether a funding agreement was disclosable on the basis that it was champertous.<sup>43</sup> In reaching its decision, the court indicated that the doctrines of champerty and maintenance apply in the

Eastern Caribbean jurisdictions but that funding agreements may not necessarily fall foul of the doctrines. The issue in each case is whether 'a funding agreement has a tendency to corrupt justice'.<sup>44</sup> As the court explained:

The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.<sup>45</sup>

It appears therefore that while the doctrines of champerty and maintenance apply, funding agreements may, in the appropriate circumstances, still be permissible.

### C. Contingency fees

In accordance with the OECS Bar Association Code of Ethics '[a]n attorney-at-law may, with the prior agreement of the client, charge a contingency fee not exceeding twenty percent and reasonable commission on collection of liquidated claims'.<sup>46</sup>

According to an article in the local newspaper contingency agreements have not gained much momentum in St Lucia and are only used in a small percentage of cases.<sup>47</sup>

### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 The Commonwealth, 'Saint Lucia: Constitution and Politics' <<http://thecommonwealth.org/our-member-countries/saint-lucia/constitution-politics>> accessed 14 May 2019; Florida State University College of Law, 'Commonwealth Caribbean Law Research Guide: St Lucia' <<https://guides.law.fsu.edu/caribbean/stlucia>> accessed 14 May 2019; Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117, Vol. 63 No. 1.



- 3 Florida State University College of Law, 'Commonwealth Caribbean Law Research Guide: St Lucia'.
- 4 Dispute Resolution Association, 'St Lucia Arbitration Act' <<http://www.drastlucia.org/index.php/st-lucia-arbitration-act>> accessed 14 May 2019; Global Arbitration Review (2017), 'The rise of arbitration in the Caribbean', Francois Lassalle <<https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146888/bvi-international-arbitration-centre>> accessed 14 May 2019.
- 5 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
- 6 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 8 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
- 9 Ibid.
- 10 The Caribbean Radio, 'Draft Arbitration Bill for CARICOM States being Reviewed by Committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>> accessed 12 September 2019.
- 11 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 12 Dirk Otto (2010), 'Article VII', in Herbert Kronke, Patricia Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 443–74.
- 13 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 15 May 2019.
- 14 Foreign Trade Information System, 'Information on Saint Lucia' <[http://www.sice.oas.org/ctyindex/LCA/LCABITS\\_e.asp](http://www.sice.oas.org/ctyindex/LCA/LCABITS_e.asp)> accessed 15 May 2019.
- 15 CARICOM Caribbean Community, 'Caricom' <<https://www.caricom.org/>> accessed 15 May 2019.
- 16 Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy <[https://caricom.org/documents/4906-revised\\_treaty-text.pdf](https://caricom.org/documents/4906-revised_treaty-text.pdf)> accessed 15 May 2019.
- 17 Ibid.
- 18 Caribbean News Now (2018), 'St Lucia attorney calls for putting judicial house in order before CCJ switch', Natalie Dabreo <<https://www.caribbeannewsnow.com/2018/11/08/st-lucia-attorney-calls-for-putting-judicial-house-in-order-before-ccj-switch/>> accessed 28 May 2019.
- 19 Organisation of Eastern Caribbean States, 'About the OECS' <<https://www.oecs.org/>> accessed 4 July 2019. The other state members are Antigua and Barbuda, St Kitts and Nevis, Montserrat, Anguilla, the British Virgin Islands, Dominica, St Lucia, St Vincent, the Grenadines and Martinique.
- 20 Organisation of Eastern Caribbean States, 'About the OECS'.
- 21 The Eastern Caribbean Supreme Court consists of two divisions, a Court of Appeal and a High Court of Justice. The Court of Appeal is itinerant, traveling to each Member country and Territory, where it sits at various specified dates during the year to hear appeals from the decisions of the High Court and Magistrates Courts in Member countries in both civil and criminal matters. (Eastern Caribbean Supreme Court, 'Court Overview' <<https://www.eccourts.org/court-overview/>> accessed 15 May 2019).
- 22 Kluwer Arbitration Blog (2013), 'Investment Arbitration and Latin America: Irreconcilable Differences', Mariano Tobías de Alba Uribe <<http://arbitrationblog.kluwerarbitration.com/2013/05/21/>>

- investment-arbitration-and-latin-america-irreconcilable-differences/> accessed 15 May 2019.
- 23 EUR-LEX, Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member countries, of the other part, signed in Cotonou on 23 June 2000 available at 'Document 22000A1215(01)' <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22000A1215\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22000A1215(01))> accessed 15 May 2019.
- 24 World Trade Organization, 'Saint Lucia and the WTO' <[https://www.wto.org/english/thewto\\_e/countries\\_e/saint\\_lucia\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/saint_lucia_e.htm)> accessed 15 May 2019.
- 25 The Eastern Caribbean Supreme Court consists of two divisions, a Court of Appeal and a High Court of Justice. The Eastern Caribbean Supreme Court is composed of the Chief Justice, who is the Head of the Judiciary, five (5) Justices of Appeal, High Court Judges; and High Court Masters, who are primarily responsible for procedural and interlocutory matters. The Court of Appeal judges are based at the Court's Headquarters in Castries, St Lucia where administrative and legal support is provided under the supervision of the Court Administrator and Chief Registrar respectively. The High Court Judges are each assigned to, and reside in, the various Member countries. The High Court Registry is headed by a legally trained Registrar who co-ordinates the provision of the necessary administrative and legal support for the functioning of the High Court. See Eastern Caribbean Supreme Court, 'Court Overview'.
- 26 See, for example, the decisions of the Eastern Caribbean Supreme Court regarding Antigua and Barbuda: *VT Leaseco Limited v Fast Ferry Leasing Limited, Rapid Explorer Operations Inc.*, ECSC, High Court of Justice (Civil), Claim No. ANUHCV 0312/2005, 13 July 2007', in Albert Jan Van den Berg (2009) (ed.), *Yearbook Commercial Arbitration*, Volume 34, ICCA & Kluwer Law International, 399–403; *Canisby Limited v Flat Point Development Limited*, ECSC, Court of Appeal, Claim No. ANUHCV 0312/2005, 13 February 2017, available at <<https://www.eccourts.org/canisby-limited-v-flat-point-development-limited/>> accessed 29 August 2019.
- 27 ICSID Case No. ARB/12/10, case details available at ICSID, 'Case Details' <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/10>> accessed 15 May 2019.
- 28 Dispute Resolution Association, 'About the DRA' <<http://www.drastlucia.org/index.php/about>> accessed 15 May 2019.
- 29 Dispute Resolution Association, 'Panels' <<http://www.drastlucia.org/index.php/arbitration-panels>> accessed 15 May 2019.
- 30 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/st-lucia#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/st-lucia#DB_ec)> accessed 27 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 31 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 32 Ibid.
- 33 Ibid.
- 34 St Lucia Times (2019), 'Saint Lucia Slips in Global Rule of Law Index' <<https://stluciatimes.com/saint-lucia-slips-in-global-rule-of-law-index/>> accessed 15 May 2019.
- 35 Government of Saint Lucia (2005), 'PM called for justice system to regain people's trust,' Claudia Monlouis <<http://www.govt.lc/news/pm-called-for-justice-system-to-regain-people-s-trust>> accessed 15 May 2019.
- 36 Worldometer, 'Saint Lucia Population (live)' <<https://www.worldometers.info/world-population/saint-lucia-population/>> accessed 15 May 2019.
- 37 Legal Aid Regulation 2018 Interpretation Section 2 [http://slugovprintery.com/template/files/document\\_for\\_sale/laws/4197/S.I.%2066%20of%202018%20secure.pdf](http://slugovprintery.com/template/files/document_for_sale/laws/4197/S.I.%2066%20of%202018%20secure.pdf)

- 38 Government of Saint Lucia (2007), 'Legal Aid Becoming a Reality in Saint Lucia', Chris Satney <<http://www.govt.lc/news/legal-aid-becoming-a-reality-in-saint-lucia>> accessed on 15 May 2019.
- 39 The Voice (2015), 'Legal Aid In St. Lucia', Trudy O Glasgow, <<https://thevoiceslu.com/2015/01/legal-aid-st-lucia/>> accessed 15 May 2019.
- 40 Ibid.
- 41 Government of Saint Lucia (2016), 'Legal Aid Office to receive additional personnel', Julita Peter, <<http://www.govt.lc/news/legal-aid-office-to-receive-additional-personnel>> accessed 15 May 2019.
- 42 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 43 *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153.
- 44 *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153.
- 45 *Tetiana Leremeieva v Estera Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153–54.
- 46 OECS Bar Association, 'Code of Ethics' <<http://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/code-of-ethics>> accessed 15 May 2019, Part B: Mandatory Provisions and Specific Prohibitions.
- 47 The Voice (2015), 'Legal Aid In St Lucia'.

# ST VINCENT AND THE GRENADINES<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

St Vincent and the Grenadines is a former British colony that gained its independence on 27 October 1979.<sup>2</sup> As a former British colony, the legal system of St Vincent and the Grenadines is based on the English common law.<sup>3</sup> The arbitration law of St Vincent and the Grenadines is based on the English Arbitration Act of 1950.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

1. Arbitration in St Vincent and the Grenadines is governed by the Arbitration Act 1952 No. 10 (the 'Arbitration Act').<sup>5</sup> St Vincent and the Grenadines also enacted the Trade Disputes (Arbitration and Inquiry) Act 1940 (the 'Trade Disputes Act') which provides for the arbitration of trade disputes.<sup>6</sup> These statutes have not been replaced since they were adopted.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act was enacted on 10 April 1952.<sup>7</sup> The Trade Disputes Act was enacted on 21 October 1941.<sup>8</sup>

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act does not differentiate between domestic and international arbitration and therefore seems to apply to both types of arbitration.

### C. *Details and/or relevant amendments and modifications*

The Arbitration Act states that it has been amended multiple times, including in 1967, 1978, and 1980. No information was found regarding the reasons for the amendments. A comparison of the English Arbitration Act 1950 and the 1952 Arbitration Act of St Vincent and the Grenadines suggests that any amendments were minor and mostly concerned editorial changes. There are four schedules to the Arbitration Act: the First Schedule on Provisions to be implied in arbitration agreements, Second Schedule on Matters in respect of which the court may make orders, Third Schedule on Protocol on arbitration clauses, and Fourth Schedule on the Convention on the execution of foreign arbitral awards.

Additionally, some articles discuss generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and unify the Commonwealth Caribbean countries' legislation. One author reported that in 1988, an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes occurring in the international arbitration legal framework after the second half of the twentieth century – such as the enactment of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'),<sup>9</sup> the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and

the 1985 UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law').

After years of analysis, the Committee concluded two drafts, proposing a domestic and an international arbitration act. The drafts were based on the UNCITRAL Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth as well the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.<sup>10</sup>

Although the project was successful in producing the drafts and the report, the new acts and the suggestions by the Committee were never implemented. As a result, the Arbitration Act of St Vincent and the Grenadines, as with many other arbitral legislations of Commonwealth Caribbean countries, remains the same as in the colonial period.<sup>11</sup>

However, there is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of the Caribbean Community and Common Market (CARICOM). It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>12</sup>

#### *D. Relationship to the UNCITRAL Model Law*

The arbitration legislation is not based on the UNCITRAL Model Law and is instead modelled after the English Arbitration Act 1950, as noted above.

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

There are a number of ways in which the Arbitration Act departs from the UNCITRAL Model Law including:

- a. the inclusion of umpires;
- b. the lack of provisions granting powers to the arbitral tribunal to rule on its own jurisdiction, or to order interim measures;
- c. lack of challenge procedure;
- d. lack of enforcement of interim measures;
- e. power of courts to revoke the arbitration agreement in case of fraud; and
- f. lack of provisions on separability of the arbitral agreement.<sup>13</sup>

#### *F. Powers and duties of arbitrators*

The Arbitration Act provides that arbitrators can: (a) administer oaths or take the affirmations of the parties and witnesses appearing and (b) correct in an award any clerical mistake or error.<sup>14</sup> Further, section 26 of the Arbitration Act states that '[i]n all cases of reference to a referee or arbitrator, the referee or arbitrator shall be deemed to be an officer of Court, and subject to the Code of Civil Procedure and to rules of Court shall have such authority and conduct the reference in such manner as the Court may direct'.

#### *G. Arbitrator immunity*

The Arbitration Act does not provide for arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*

St Vincent and the Grenadines became a party to the New York Convention on 12 September 2000.<sup>15</sup>

#### B. *Reservations to the New York Convention*

St Vincent and the Grenadines has made two reservations to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>16</sup>

#### C. *Method of domestic implementation of the New York Convention*

It is unclear how the New York Convention has been given effect to in St Vincent and the Grenadines. The Arbitration Act includes a separate schedule with all of the provisions concerning the execution of foreign arbitral awards in the Protocol on Arbitration Clauses dated 24 September 1923.<sup>17</sup> However, it does not mention or include the provisions of the New York Convention.

#### D. *Other international/regional treaties*

St Vincent and the Grenadines acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention') on 7 August 2001.<sup>18</sup>

St Vincent and the Grenadines also participates in the partnership agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its member countries, signed on 23 June 2000. The purpose of this Agreement is to strengthen the cooperation between the signatories to support the development and modernisation of mediation and arbitration systems.<sup>19</sup>

The state has also been a party to CARICOM since 1974.<sup>20</sup> As part of it, the Revised Treaty of Chaguaramas establishing the CARICOM single market and economy, providing investment provisions, applies to St Vincent and the Grenadines as well.<sup>21</sup>

St Vincent and the Grenadines is part of the Organisation of Eastern Caribbean States (OECS).<sup>22</sup> It became a member on 18 June 1981.<sup>23</sup> As a member country, St Vincent and the Grenadines has accepted the jurisdiction of the Eastern Caribbean Supreme Court.<sup>24</sup>

St Vincent and the Grenadines is also a member of the Bolivarian Alliance for the Peoples of our America ('ALBA').<sup>25</sup> On April 2013, the member countries met to discuss the establishment and implementation of regional bodies for the resolution of investment disputes.<sup>26</sup>

St Vincent and the Grenadines has entered into two bilateral investment treaties, both of which are in force (Taiwan and Germany).<sup>27</sup>

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

Although the court in St Vincent and the Grenadines has not had the opportunity to specifically address the question of the enforceability of

arbitration agreements, its general attitude, based on obiter statements it expressed in *Benjamin Exeter et al v Winston Gaymes et al*,<sup>28</sup> is likely to be pro-arbitration. In that case, it noted, in passing: 'It cannot be doubted that in some commercial matters, involving the litigation of private rights, the parties may voluntarily agree to limit their right of access to court. In that regard, it is not uncommon to find an arbitration clause whereby the parties voluntarily agree to submit their dispute to arbitration. The considerations of justice arise simply as between the disputants; no additional public interest falls for consideration.'<sup>29</sup>

The Eastern Caribbean Supreme Court has several judgments on the enforcement of arbitration agreements. However, these judgments do not refer to arbitration agreements under the Arbitration Act and do not appear to be otherwise related to St Vincent and the Grenadines. However, as far as St Vincent and the Grenadines' Arbitration Act has comparable provisions with Arbitration Acts that have been the subject of an Eastern Caribbean Supreme Court decision<sup>30</sup> those decisions will have precedent value.

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The public policy exception is contained in section 39 of the Arbitration Act. There is no jurisprudence available on how the courts of St Vincent and the Grenadines have applied the exception.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

There is a relative dearth of jurisprudence on the interpretation of the New York Convention or domestic arbitration legislation in this jurisdiction. In a recent judgment *In the Matter of Genesis Investment Funds Limited (In Liquidation)*<sup>31</sup> the St Vincent and the Grenadines High Court, while finding that the claimant should amend their Fixed Date Claim Form to reflect that they were seeking enforcement as opposed to mere recognition, did not rule out the possibility that, notwithstanding arguments by the defendant as to the unenforceability of the award, the arbitral award could be enforced in St Vincent and the Grenadines, pursuant to the Arbitration (New York Convention Awards and Agreements) Act, CAP 119, section 4 and the Arbitration Act, CAP 17, section 20. It noted, 'The claimants are therefore at liberty to file their application to amend their pleadings. If that application is therefore successful, the matter will proceed to trial and the arguments against the enforceability of the award will be entertained at that time.'<sup>32</sup>

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

There are no arbitral institutions in St Vincent and the Grenadines.

*B. Measures to strengthen institutional arbitration capabilities*

No information was available.

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

The Arbitration Act is silent on this question. Under the Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act CAP 24, a person wishing to practise law as a barrister or solicitor before the courts of St Vincent and the Grenadines must first be admitted as a barrister or solicitor in that country (sections 71–73). Reference is made in the Act to lawyers needing to be admitted to the roll if they wish to practice before a 'court' in St Vincent and the Grenadines, which is defined in section 2 as the Eastern Caribbean Supreme Court, and not an arbitral tribunal.

There is no explicit provision in St Vincent and the Grenadines restricting a foreign lawyer from appearing before an arbitral tribunal, as long as they do not appear, without first having been called to the bar, before a domestic court.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

No information was available.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 595 days to resolve a commercial dispute in a first-instance court in St Vincent and the Grenadines – 30 days for filing and service of court processes, 445 days for trial and judgment and 120 days for enforcement of judgment.<sup>33</sup> St Vincent and the Grenadines ranks above the Latin America and the Caribbean region, in which it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>34</sup> In terms of overall ease of enforcing contracts, St Vincent and the Grenadines scored 63.66 of 100 and ranked 56 of 190.<sup>35</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>36</sup>

Additionally, in terms of the judiciary structure and reported caseload, according to the Eastern Caribbean Supreme Court Annual Report 2017–2018, the Registry of the Court of Appeal staff has 14 people in charge of the case management department.<sup>37</sup> The report mentions that, in 2017, 441 appeals in total were filed in the high courts and magistrates courts, considering all the nine member countries of the OECS. In the same year, 20 court sittings were scheduled, of which one court sitting was originated from St Vincent and the Grenadines judgments. Moreover, the report notes that 67 written judgments were delivered, of which four were originated from St Vincent and the Grenadines courts. Finally, the report also points out that 814 oral judgments were uttered, although no specific data is available for the number of cases related to each member country. None of the significant cases reported discuss arbitration related issues.<sup>38</sup>

*G. Statistics on judges and lawyers per capita*

According to the OECS Bar Association, there are currently 11 lawyers acting in St Vincent and the Grenadines.<sup>39</sup> There are two High Court judges and five magistrates that serve the entire country,<sup>40</sup> which has a population of around 110,652 (2019).<sup>41</sup>



## VI. FUNDING FOR LEGAL CLAIMS

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is little information on the legal aid scheme in St Vincent and the Grenadines. It seems unlikely that they provide legal aid for businesses or for commercial dispute resolution. St Vincent and the Grenadines is a member of the OECS Bar Association, which has the aim of encouraging the establishment of schemes of legal aid.<sup>42</sup> The Attorney General states that it provides legal aid services but there is no information on these services.<sup>43</sup> There is no legislation around legal aid.

### B. *Third-party funding*

No literature and jurisprudence appeared to be available on the doctrines of champerty and maintenance in St Vincent and the Grenadines or on the availability of third-party funding in the country. However, since St Vincent and the Grenadines is based on the English common law, and the rules of maintenance and champerty applied at the time of independence,<sup>44</sup> it is likely that the rules still exist in St Vincent and the Grenadines by virtue of the common law.<sup>45</sup>

This is confirmed by the jurisprudence of the Eastern Caribbean Supreme Court. In *Tetiana Lereimeieva v Eстера Corporate Services (BVI) Limited*, the court was required to decide whether a funding agreement was disclosable on the basis that it was champertous.<sup>46</sup> In reaching its decision, the court indicated that the doctrines of champerty and maintenance apply in the Eastern Caribbean jurisdictions but that funding agreements may not necessarily fall foul of the doctrines. The issue in each case is whether 'a funding agreement has a tendency to corrupt justice'.<sup>47</sup> As the court explained:

The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.

The Court is also concerned to avoid another mischief traditionally associated with champerty, that the third-party funder may improperly seek to influence the outcome of proceedings. While each case will turn on its own facts, tell-tale signs which may reasonably prompt further inquiry include that the funding agreement is said to offer the funder a significant financial advantage conditional upon the outcome of the proceedings, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution. Some such tell-tale signs are present here.<sup>48</sup>

It appears therefore that while the doctrines of champerty and maintenance apply, funding agreements may, in the appropriate circumstances, still be permissible.

### C. Contingency fees

In accordance with the OECS Bar Association Code of Ethics '[a]n attorney-at-law may, with the prior agreement of the client, charge a contingency fee not exceeding twenty percent and reasonable commission on collection of liquidated claims'.<sup>49</sup>

### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 The Commonwealth, 'Saint Vincent and the Grenadines: History' <<http://thecommonwealth.org/our-member-countries/barbados/history>> accessed 4 September 2019.
- 3 Organization of American States, 'Legal System of Saint Vincent and the Grenadines' <[https://www.oas.org/juridico/MLA/en/vct/en\\_vct-int-des-sys.doc](https://www.oas.org/juridico/MLA/en/vct/en_vct-int-des-sys.doc)> accessed 4 September 2019.
- 4 Arbitration Review of the Americas (2018), 'The Rise of Arbitration in the Caribbean' <<https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146888/bvi-international-arbitration-centre>> accessed 19 April 2019. See also Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117, Vol. 63 No. 1.
- 5 The Arbitration Act 1952 No. 10, chapter 17.
- 6 The Trade Disputes Act 1940, chapter 153.
- 7 The Arbitration Act 1952 No. 10, chapter 17.
- 8 The Trade Disputes Act 1940, chapter 153.
- 9 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 10 Lubic (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean'.
- 11 Ibid.
- 12 The Caribbean Radio, 'Draft Arbitration Bill for CARICOM States being Reviewed by Committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>> accessed 12 September 2019.
- 13 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302.
- 14 The Arbitration Act 1952 No. 10, Chapter 17, Art. 15.
- 15 New York Arbitration Convention, 'Contracting States – List of Contracting States' <<http://www.newyorkconvention.org/list+of+contracting+states>> accessed 19 April 2019.
- 16 'New York Convention Guide' [http://newyorkconvention1958.org/index.php?l=cmspage&page id=11&menu=581&opacview=-1](http://newyorkconvention1958.org/index.php?l=cmspage&page%20id=11&menu=581&opacview=-1)> accessed 13 August 2019.
- 17 The Arbitration Act 1952 No. 10, Chapter 17, Fourth Schedule.
- 18 ICSID (2019), 'List of Contracting States and Other Signatories of the Convention' <<https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>> accessed 23 April 2019.

- 19 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its member states, of the other part (adopted 23 June 2000, entered into force 1 April 2003) art 21 <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3185>> accessed 9 March 2019.
- 20 CARICOM, 'The Caribbean Community' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/st-vincent-and-the-grenadines>> accessed 31 August 2019.
- 21 Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy <[https://caricom.org/documents/4906-revised\\_treaty-text.pdf](https://caricom.org/documents/4906-revised_treaty-text.pdf)> accessed 31 August 2019.
- 22 It is an international intergovernmental organisation dedicated to economic harmonisation and integration, protection of human and legal rights, and the encouragement of good governance among independent and non-independent countries in the Eastern Caribbean.
- 23 Organisation of Eastern Caribbean States, 'About the OECS' <<https://www.oecs.org/homepage/about-us>> accessed 31 August 2019.
- 24 The Eastern Caribbean Supreme Court consists of two divisions, a Court of Appeal and a High Court of Justice. The Court of Appeal is itinerant, traveling to each member country and territory, where it sits at various specified dates during the year to hear appeals from the decisions of the High Court and Magistrates Courts in member countries in both civil and criminal matters. (Eastern Caribbean Supreme Court, 'Court Overview'.)
- 25 It is an international cooperation organisation which is mainly associated with socialist and social democratic governments, and its main purpose is to achieve regional economic integration based on a vision of social welfare.
- 26 Kluwer Arbitration Blog, 'Investment Arbitration and Latin America: Irreconcilable Differences' <<http://arbitrationblog.kluwerarbitration.com/2013/05/21/investment-arbitration-and-latin-america-irreconcilable-differences/>> accessed 31 August 2019.
- 27 UNCTAD Investment Policy Hub, 'Saint Vincent and the Grenadines' <[investmentpolicy.unctad.org](https://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 28 Case No. SVGHCVP2016/0021, <<https://www.eccourts.org/benjamin-exeter-et-al-v-winston-gaymes-et-al/>> accessed 31 August 2019.
- 29 *Benjamin Exeter et al v Winston Gaymes et al.*, Case No. SVGHCVP2016/0021 at para 34.
- 30 See, for example, the decisions of the Eastern Caribbean Supreme Court regarding Antigua and Barbuda: *VT Leaseco Limited. Fast Ferry Leasing Limited, Rapid Explorer Operations Inc.*, ECSC, High Court of Justice (Civil), Claim No. ANUHCV 0312/2005, 13 July 2007', in Albert Jan Van den Berg (2009) (ed.), *Yearbook Commercial Arbitration*, Volume 34 ICCA & Kluwer Law International, 399–403; *Canisby Limited v Flat Point Development Limited*, ECSC, Court of Appeal, Claim No. ANUHCV 0312/2005, 13 February 2017, available at <<https://www.eccourts.org/canisby-limited-v-flat-point-development-limited/>> accessed 29 August 2019.
- 31 Case No. SVGHCVP2017/0169, <<https://www.eccourts.org/koninklijke-kpn-n-v-et-al-v-genesis-investments-funds-limited-in-liquidation-et-al/>> accessed 31 August 2019.
- 32 *Genesis Investment*, Case No. SVGHCVP2017/016, para 49.
- 33 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/st-vincent-and-the-grenadines#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/st-vincent-and-the-grenadines#DB_ec)> accessed 4 September 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 34 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 35 *Ibid.*
- 36 *Ibid.*

- 37 Eastern Caribbean Supreme Court (2019), 'Eastern Caribbean Supreme Court Annual Report 2017–2018' <<https://www.eccourts.org/annual-report-2017-2018/>> accessed 13 August 2019.
- 38 Ibid.
- 39 OECS, 'St Vincent and the Grenadines' <<https://oecsbar.org/index.php/en/members/members-st-vincent-and-grenadines>> accessed 4 September 2019.
- 40 [http://www.judiciary.gov.vc/judiciary/index.php?option=com\\_content&view=featured&Itemid=40](http://www.judiciary.gov.vc/judiciary/index.php?option=com_content&view=featured&Itemid=40), accessed 12 Sept 2019 & [https://www.indexmundi.com/saint\\_vincent\\_and\\_the\\_grenadines/government\\_profile.html](https://www.indexmundi.com/saint_vincent_and_the_grenadines/government_profile.html), accessed 12 Sept 2019.
- 41 Worldometer, 'St Vincent and the Grenadines Population (live)' <<https://www.worldometers.info/world-population/saint-vincent-and-the-grenadines-population/>> accessed 15 May 2019.
- 42 OECS Bar Association, 'Aims and Objectives' <https://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/aims-objectives> accessed 15 September 2019.
- 43 Government of Saint Vincent and Grenadines Ministry of Legal Affairs, 'General Information' <http://legal.gov.vc/legal/index.php/general-information-sp-2133033632> accessed 15 September 2019
- 44 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 45 Jamaican Bar Association, 'Access to Justice – Third Party Litigation Funding and Contingency Fee Arrangements' <[http://www.jambar.org/index.php?option=com\\_phocadownload&view=category&download=393:JAMBAR%20Presentation%20-%20Access%20to%20Justice%20and%20Litigation%20Funding%20-%20Final&id=16:november-conference-2015&start=10&Itemid=105](http://www.jambar.org/index.php?option=com_phocadownload&view=category&download=393:JAMBAR%20Presentation%20-%20Access%20to%20Justice%20and%20Litigation%20Funding%20-%20Final&id=16:november-conference-2015&start=10&Itemid=105)> accessed 15 May 2019.
- 46 *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153.
- 47 *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153.
- 48 *Tetiana Leremeieva v Eстера Corporate Services (BVI) Limited*, ECSC British Virgin Islands in the HCJ Commercial Division, Claim No. BVIHCM2017/0118 (4 April 2019), 153–54.
- 49 OECS Bar Association, 'Code of Ethics' <<http://www.oecsbar.org/index.php/en/about-us/about-oecs-bar/code-of-ethics>> accessed 15 May 2019, Part B: Mandatory Provisions and Specific Prohibitions.

# TONGA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The Kingdom of Tonga ('Tonga'), often referred to as the 'friendly islands', became a constitutional monarchy in 1845 and has remained so. Tonga became a British protectorate in 1900 but gained its independence from the United Kingdom in 1970.<sup>2</sup> It joined the Commonwealth of Nations in 1970. Tonga's legal system essentially comprises Acts of the Tongan Legislative Assembly, English common law and statutes of general application.<sup>3</sup> To date, Tonga has not had a legal framework for arbitration.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

This query is not applicable to this jurisdiction.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Tonga does not have an arbitration statute. Limited arbitration is provided for under the Foreign Investment Act 2000. This Act provides that arbitration of investment disputes under it shall be governed by the English Arbitration Act 1996.

### B. *Scope of application to domestic and international arbitrations*

This query is not applicable to this jurisdiction.

### C. *Details and/or relevant amendments and modifications*

This query is not applicable to this jurisdiction.

### D. *Relationship to the UNCITRAL Model Law*

This query is not applicable to this jurisdiction.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

This query is not applicable to this jurisdiction.

### F. *Powers and duties of arbitrators*

This query is not applicable to this jurisdiction.

### G. *Arbitrator immunity*

This query is not applicable to this jurisdiction.

## III. INTERNATIONAL INSTRUMENTS

### A. *Signatory to the New York Convention*

Tonga is not a party to the 1958 New York Convention.<sup>5</sup>

### B. *Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

### C. *Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction.

#### *D. Other international/regional treaties*

Tonga is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention').<sup>6</sup> It signed the ICSID Convention on 1 May 1989 and ratified it on 21 March 1990. The ICSID Convention became effective in Tonga on 20 April 1990.<sup>7</sup>

Tonga has entered into one bilateral investment treaty which is currently in force with the United Kingdom.<sup>8</sup> Tonga has also signed four free trade agreements, three of which are in effect (Pacific ACP–EC Economic Partnership Agreement, Pacific Island Countries Trade Agreement, and the South Pacific Regional Trade and Economic Cooperation Agreement).<sup>9</sup>

### **IV. RELEVANT CASE LAW**

#### *A. Approach of the national courts to the enforcement of arbitration agreements*

As Tonga is not a signatory to the New York Convention and does not have a legal framework for arbitration, foreign arbitral awards are generally unenforceable. There also appears to be no case law dealing with the enforcement of foreign arbitral awards.

#### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

No information was available.

#### *C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

No information was available.

### **V. ARBITRATION LANDSCAPE**

#### *A. Institutional arbitration*

Tonga has no arbitral institution. It has no legal framework for arbitration that can support the existence of an arbitral institution.

#### *B. Measures to strengthen institutional arbitration capabilities*

This query is not applicable to this jurisdiction.

#### *C. Submission of disputes to arbitration vs. litigation*

This query is not applicable to this jurisdiction.

#### *D. Participation by foreign counsel in international arbitrations*

The practice of law in Tonga is exclusive to persons whose names are on the roll of law practitioners and have a valid practising certificate.<sup>10</sup>

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

This query is not applicable to this jurisdiction.

##### 2. Time taken for enforcement/annulment proceedings

This query is not applicable to this jurisdiction.

##### 3. Percentage of awards annulled/not enforced

This query is not applicable to this jurisdiction.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 350 days to resolve a commercial dispute in a first-instance court in Tonga – 7 days for filing and service of court processes, 263 days for trial and judgment and 80 days for enforcement of judgment.<sup>11</sup> Tonga ranks above the East Asia & Pacific region, in which it takes an average of 581 days to resolve commercial disputes in first-instance courts.<sup>12</sup> In terms of overall ease of enforcing contracts, Tonga scored 57.32 of 100 and ranked 94 of 190.<sup>13</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>14</sup>

*G. Statistics on judges and lawyers per capita*

No information was available on the statistics of judges and lawyers per capita in Tonga.

The court structure in Tonga comprises the Privy Council, Court of Appeal, Supreme Court, Magistrate Courts, and Land Courts.<sup>15</sup> The Privy Council is more of a body appointed by the King to assist him than a court. It has jurisdiction over appeals from the Land Courts in relation to hereditary estates and titles. The Court of Appeal is the highest appellate court. It has exclusive jurisdiction to hear and determine criminal and civil appeals from the Supreme Court and appeals from Land Courts in all matters except those relating to hereditary estates and titles.

The Supreme Court has original jurisdiction in certain civil and criminal matters and appellate jurisdictions over decisions of the Magistrate courts. The Magistrates Courts and Lands Courts are the lower courts. While the Magistrate Court has jurisdiction over certain criminal and civil matters, Land Courts apply the Land Act 1927 and have jurisdiction over questions of title affecting land or any interest in land.<sup>16</sup>

Finally, Tonga operates an 'expatriate model' in the appointment of judges to Tonga appellate courts.<sup>17</sup> This means that these courts are constituted or are predominated by judges who are foreign nationals, mainly New Zealanders. Tonga only recently, in June 2018, celebrated the first appointment of a local lawyer to the Tonga Supreme Court Bench.<sup>18</sup>

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

In 2013 the Tongan Government was discussing the Legal Aid Bill, which was initiated to provide the framework of a system of legal aid in Tonga to provide this basic need for people who cannot afford a lawyer to help them.<sup>19</sup> There is little information on the Bill except that the government could see that help was needed for family law issues, criminal law, domestic violence issues, inheritance law, and property laws. It cannot be said whether legal aid would have been provided to businesses or to arbitration. There is no legal aid regime in Tonga as this Bill was not passed into law.

*B. Third-party funding*

No jurisprudence or literature on the applicability of the rules of champerty and maintenance in Tonga appears to be available. The law of Tonga is largely derived from the English common law. The crimes and torts of champerty and

maintenance were abolished by statute in the United Kingdom in 1967 but a champertous agreement may still be treated as contrary to public policy and unlawful.<sup>20</sup> As this was the law applied at the time of independence in 1970 it is likely to be still applicable in Tonga.

#### C. Contingency fees

No information was available. The Legal Practitioners Act 1989 is silent on this issue and it has not been specifically addressed by the courts.

#### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 July 2019.
- 2 International Centre for Not-For-Profit Law (2007), 'Law and Civil Society in Tonga: A Review of the Enabling Legislative Framework', David Lidimani <<http://www.icnl.org/research/library/files/Tonga/TongaReport.pdf>> accessed 23 May 2019.
- 3 Pacific Islands Legal Information Institute (2001), 'Tonga System of Government Information' <<http://www.paclii.org/to/government.html>> accessed 10 July 2019; International Centre for Not-For-Profit Law (2007) 'Law and Civil Society in Tonga: A Review of the Enabling Legislative Framework'.
- 4 Asian Development Bank (2008), 'Transforming Tonga: A Private Sector Assessment Summary' <<https://www.adb.org/sites/default/files/institutional-document/32222/psa-ton.pdf>> accessed 23 May 2019; C Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, United Nations, 285.
- 5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention); New York Arbitration Convention, 'Contracting States' <[www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries)> accessed 1 April 2019.
- 6 ICSID (2018), '2018 Annual Report' <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 10 March 2019.
- 7 Ibid.
- 8 UNCTAD Investment Policy Hub, 'Tonga' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 31 July 2019.
- 9 Asian Regional Integration Center, 'FTAs: Tonga' <[aric.adb.org](http://aric.adb.org)> accessed 31 July 2019.
- 10 Legal Practitioners Act 1989, s 3.
- 11 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/tonga#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/tonga#DB_ec)> accessed 10 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 12 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 13 Ibid.
- 14 Ibid.



- 15 Pacific Islands Legal Information Institute (2001), 'Tonga Courts System Information' <<http://www.pacii.org/to/courts.html>> accessed 22 May 2019.
- 16 Ibid.
- 17 Natalie Baird (2013), 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific', *Canterbury Law Review*, Vol. 19, 80 <<http://www.nzlii.org/nz/journals/CanterLawRw/2013/4.pdf>> accessed 22 May 2019.
- 18 RNZ (2018), Dateline Pacific, 'Local lawyer finally appointed to Tonga's Supreme Court bench' <<https://www.radionz.co.nz/international/programmes/datelinepacific/audio/2018651364/local-lawyer-finally-appointed-to-tonga-s-supreme-court-bench>> accessed 22 May 2019.
- 19 Tongan Attorney-General Public Information Announcement 'The Bills being considered by the Legislative Assembly' 2012.
- 20 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

# TRINIDAD AND TOBAGO<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

On 31 August 1962, the Republic of Trinidad and Tobago ('Trinidad and Tobago') gained independence from the United Kingdom.<sup>2</sup> Being a former United Kingdom colony, the legal system of Trinidad and Tobago is deeply influenced by English common law.<sup>3</sup>

The Arbitration Act No. 5 of 1939 of Trinidad and Tobago is based on the English Arbitration Act 1889.<sup>4</sup>

### B. *Description of prior legislation and reasons for its replacement*

The Arbitration Act was amended by Act No. 22 in 1981 and Act No. 36 in 1997.<sup>5</sup> The Arbitration (Foreign Arbitral Awards) Act 1996 was legislated to implement the international obligations arising out of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').<sup>6</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

The Arbitration Act was enacted on 4 May 1939.<sup>7</sup>

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act governs both domestic and international arbitration proceedings.<sup>8</sup>

### C. *Details and/or relevant amendments and modifications*

There have been two amendments on the Arbitration Act 1939. The Act No. 22 of 1981 has amended section 2 and 24 of the Arbitration Act but the Act No. 22 of 1981 was never brought into operation.<sup>9</sup> The government issued Act No. 36 of 1997, which made a provision for the limitation of time for commencing arbitration proceedings.<sup>10</sup> The Act substituted the words in section 24, from 'but without prejudice to the fore-going provisions of this section' to 'but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings'.<sup>11</sup>

Additionally, some articles discuss generically the arbitral legislation of the Caribbean region, and some historical steps that attempted to modernise and unify the Commonwealth Caribbean countries' legislation. One author reported that in 1988 an initiative led by the Caribbean Law Institute (CLI) created the Arbitration Project Advisory Committee – a project with the purpose of modernising and unifying the arbitral legislation among the Commonwealth Caribbean countries. According to the author, this initiative was inspired by the changes that occurred in the international arbitration legal framework in the second half of the twentieth century, such as the enactment of the New York Convention,<sup>12</sup> the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the Model Law on International Commercial Arbitration 1985 (the 'Model Law').

After years of analysis, the Committee concluded two drafts, proposing a domestic and an international arbitration act. The drafts were based on

the Model Law and they were aligned with principles of modern arbitration. Moreover, the Committee also presented a report which 'called for the establishment of a Caribbean Arbitration Centre. The reality that arbitration proceedings were not considered expeditious within the region was set forth as well the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.'<sup>13</sup>

Although the Arbitration Project was successful in producing the drafts and the report, the new acts and the suggestions by the Committee were never implemented. As a result, the Arbitration Act of Trinidad and Tobago, as with many other arbitral legislations of Commonwealth Caribbean countries, remains the same.<sup>14</sup>

There is a Draft Arbitration Bill, modelled after the UNCITRAL Model Law, presently being discussed by the Legal Affairs Committee of Caribbean Community and Common Market (CARICOM). It is anticipated that the Bill will be approved by the Committee and then sent to the respective jurisdictions for parliamentary action.<sup>15</sup>

#### *D. Relationship to the UNCITRAL Model Law*

Trinidad and Tobago has not adopted the UNCITRAL Model Law on International Commercial Arbitration.<sup>16</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

Trinidad and Tobago's Arbitration Act is not based on the Model Law but is based on the English Arbitration Act 1889.<sup>17</sup>

The Arbitration Act differs from the Model Law in several respects, including:

- a. The arbitration agreement is not separable from the main agreement;<sup>18</sup>
- b. Arbitrators do not have the power to determine their jurisdiction;<sup>19</sup>
- c. Arbitrators lack powers to grant orders of interim relief;<sup>20</sup>
- d. The default number of arbitrators in the absence of agreement by parties is one arbitrator;<sup>21</sup>
- e. Reference to the appointment of an 'umpire' to resolve deadlocks in the appointment of arbitrators;<sup>22</sup>
- f. There are limited grounds for setting aside an award, namely: misconduct by an arbitrator and the improper procurement of the arbitration or the award;<sup>23</sup> and
- g. There are excessive opportunities for court interference with the arbitral process such as power of the court to set aside appointment of arbitrator in certain circumstances,<sup>24</sup> to remit award for reconsideration,<sup>25</sup> and to enlarge the time for making an award.<sup>26</sup>

#### *F. Powers and duties of arbitrators*

The powers of arbitrators are set out in article 15 of the Arbitration Act: 'The arbitrators or umpire acting under an arbitration agreement shall, unless the arbitration agreement expresses a contrary intention, have power (a) to administer oaths to or take the affirmations of the parties and witnesses appearing; and (b) to correct in an award any clerical mistake or error arising from any accidental slip or omission.'

Further, section 26 of the Arbitration Act states the powers and remuneration of referees and arbitrators, determining that '[i]n all cases of reference to a referee or arbitrator, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and subject to Rules of Court shall have such authority and conduct the reference in such manner as the Court may direct'.

*G. Arbitrator immunity*

The Arbitration Act is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

*A. Signatory to the New York Convention*

Trinidad and Tobago became a party to the New York Convention on 14 February 1966.<sup>27</sup>

*B. Reservations to the New York Convention*

Trinidad and Tobago has made two reservation to the New York Convention: first, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation), and second, that the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law (i.e. the reservation on 'commercial' subject matters).<sup>28</sup>

*C. Method of domestic implementation of the New York Convention*

The New York Convention is given effect in the country through the Arbitration (Foreign Arbitral Awards) Act 1996.<sup>29</sup>

*D. Standard for refusing enforcement of an arbitral award on the grounds of public policy*

The Arbitration (Foreign Arbitral Awards) Act 1996 adopts the same grounds on recognition and enforcement of awards as provided in the New York Convention.<sup>30</sup>

*E. Other international/regional treaties*

Trinidad and Tobago is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention').<sup>31</sup> Trinidad and Tobago ratified the Convention on 3 January 1967 and the Convention entered into force in the country on 2 February 1967.<sup>32</sup>

Trinidad and Tobago is also a party of the partnership agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its member states, signed on 23 June 2000. The purpose of this Agreement is to strengthen the cooperation between the signatories who shall support development and modernisation of mediation and arbitration systems.<sup>33</sup>

The state has also been a party of CARICOM since 1973.<sup>34</sup> The Revised Treaty of Chaguaramas establishing the CARICOM single market and economy, providing investment provisions, applies to Trinidad and Tobago as well.<sup>35</sup>

Trinidad and Tobago has signed 13 bilateral investment agreements, of which 12 are in force (Guatemala, Switzerland, Mexico, Germany, Republic of Korea, China, Spain, Cuba, Canada, United States of America, France and the United Kingdom).<sup>36</sup>

#### IV. RELEVANT CASE LAW

##### *A. Approach of the national courts to the enforcement of arbitration agreements*

Arbitration agreements can be enforced under the Arbitration Act 'in the same manner as a judgment or order of the Court to the same effect and in such case judgment may be entered in terms of the award'.<sup>37</sup> The courts in Trinidad and Tobago have decided that their inherent jurisdiction to supervise does not extend to arbitration.<sup>38</sup>

##### *B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Arbitration (Foreign Arbitral Awards) Act 1996 adopts the same grounds on recognition and enforcement of awards as provided in the New York Convention.<sup>39</sup> There do not appear to be any decisions or judgments that have interpreted the public policy exception.

##### *C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

There do not appear to be any decisions or judgments that have interpreted the New York Convention.<sup>40</sup>

#### V. ARBITRATION LANDSCAPE

##### *A. Institutional arbitration*

The Dispute Resolution Centre is the only arbitral institution in Trinidad and Tobago.<sup>41</sup> It was initially developed by the Trinidad and Tobago Chamber of Industry and Commerce, and officially launched on 24 August 1996 by the Honourable Chief Justice, Michael de la Bastide. The Centre is a completely autonomous and neutral organisation, administered by its own board of directors.<sup>42</sup> The Dispute Resolution Centre is authorised to recommend arbitrators and manage the logistical operations for arbitrations filed with the International Court of Arbitration in Paris, but with the intention of being heard locally.<sup>43</sup>

No information was found on how many cases the Centre has administered. Cases usually are related to contract, corporate, commercial banking and finance, insurance, construction, energy, manufacturing, personal injury, negligence, sports family, libel/defamation, land and estate, landlord/tenant, property, industrial, relations, employment, debt recovery and nuisance.<sup>44</sup>

##### *B. Measures to strengthen institutional arbitration capabilities*

No information was available. However, in 2012, the Government of Trinidad and Tobago commissioned a Cabinet in the Ministry of Legal Affairs to promote and consolidate alternative dispute resolution on a national scale. The Dispute Resolution Centre is mandated to provide alternative dispute resolution practices and processes within all offices of the Government of Trinidad and Tobago by devising a policy and overarching legislation to guide the implementation of alternative dispute resolution.<sup>45</sup>

##### *C. Submission of disputes to arbitration vs. litigation*

No information was available. However, the latest annual report of the Dispute Resolution Centre shows that the Centre facilitated 23 mediations, arbitrations and adjudications in 2015.<sup>46</sup>

*D. Participation by foreign counsel in international arbitrations*

No information was available.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

The sectors where arbitration is routinely used are contract, corporate, commercial, banking and finance, insurance, construction, energy, manufacturing, personal injury, negligence, sports, family, defamation, land and estate, landlord/tenant, intellectual, property, industrial relations, employment, data recovery and nuisance.<sup>47</sup>

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 1,340 days to resolve a commercial dispute in a first-instance court in Trinidad and Tobago – 85 days for filing and service of court processes, 1,195 days for trial and judgment and 60 days for enforcement of judgment.<sup>48</sup> Trinidad and Tobago ranks below the Latin America & Caribbean region, in which it takes an average of 768.5 days to resolve commercial disputes in first-instance courts.<sup>49</sup> In terms of overall ease of enforcing contracts, Trinidad and Tobago scored 35.62 of 100 and ranked 174 of 190.<sup>50</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>51</sup>

Additionally, the Court of Appeals takes approximately 2.46 years to dispose civil matters. The High Court takes approximately 2.24 years to dispose a case.<sup>52</sup>

*G. Statistics on judges and lawyers per capita*

No information was available.

## **VI. FUNDING FOR LEGAL CLAIMS**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is currently no legal aid for arbitration in Trinidad and Tobago and there is no information to indicate that legal aid is provided for businesses. The Legal Aid and Advice Act 1976 provides for mediation services, but not arbitration. Section 23(1A) states that, 'where a legal aid certificate is granted the Director may require the applicant to submit to mediation as a means of resolving the matter, if, in the opinion of the Director, mediation is considered to be appropriate, in the circumstances'. The Legal Aid Authority (LAA), the governing body of the legal aid scheme, will fund the cost of

the mediator.<sup>53</sup> The only other representation the LAA will provide is for proceedings in the Supreme Court, Supreme Court referrals, the Environment Commission, and applications for the Grant of Probate and Letters of Administration.<sup>54</sup>

Commercial matters are not listed in the exempted proceedings, leaving open the possibility of assistance for businesses.<sup>55</sup> Additionally, a 'person' includes a corporation in Trinidad and Tobago's Interpretation Act.<sup>56</sup>

#### B. *Third-party funding*

No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Trinidad and Tobago or the availability of third-party funding in that jurisdiction. However, given that Trinidad and Tobago's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied at the time of its independence in 1962, it is reasonable to assume that the rule of maintenance and champerty is likely still applicable in Trinidad and Tobago.

#### C. *Contingency fees*

Contingency fees are prohibited in Trinidad and Tobago. Both the Code of Ethics and Legal Profession Act proscribe lawyers from charging contingency fees.<sup>57</sup> This is specifically provided for by paragraph Rule 10(3) Part B: 'An Attorney Shall not charge a contingency fee save and except reasonable commissions on collection of liquidated claims with prior agreement of client.'

This is underpinned by Rule 7(2) Part B of the Code of Ethics, which states: 'An attorney shall not enter into an agreement for a charge or collect a fee in contravention of these Rules or any other law', and Rule 10(1) Part B of the Code of Ethics, which states that: 'An attorney shall not charge fees that are unfair and unreasonable.'

#### D. *Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 The Commonwealth, 'Trinidad and Tobago History' <<http://thecommonwealth.org/our-member-countries/trinidad-and-tobago/history>> accessed 29 August 2019.
- 3 The Commonwealth, 'Judicial System in Trinidad and Tobago' <[www.commonwealthgovernance.org/countries/americas/trinidad\\_and\\_tobago/judicial-system/](http://www.commonwealthgovernance.org/countries/americas/trinidad_and_tobago/judicial-system/)> accessed 29 August 2019.
- 4 University of Leicester (2018), 'Arbitration in the Americas: Report on a Survey of Arbitration Practitioners', 51 <<https://www2.le.ac.uk/departments/law/research/arbitration/files/arbitration-in-the-americas-report-on-a-survey-of-arbitration-practitioners>> accessed 29 August 2019. See also Legal Insights, 'Trinidad and Tobago Arbitration Legislation' <<http://www.fitzwilliamstone.com/overview-of-the-arbitration-act-2.html>> accessed 8 April 2019.
- 5 The Arbitration Act 1939, Chapter 5:01 <[https://rgd.legalaffairs.gov.tt/laws2/Alphabetical\\_List/lawspdfs/5.01.pdf](https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/5.01.pdf)> accessed 29 August 2019.

- 6 The Arbitration (Foreign Arbitral Awards) Act 1996, <[http://rgd.legalaffairs.gov.tt/laws2/alphabetical\\_list/lawspdfs/5.30.pdf](http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/5.30.pdf)> accessed 29 August 2019. See also University of Leicester (2018), 'Arbitration in the Americas: Report on a Survey of Arbitration Practitioners', 51.
- 7 The Arbitration Act 1939, Preamble.
- 8 University of Leicester (2018), 'Arbitration in the Americas: Report on a Survey of Arbitration Practitioners', 51.
- 9 The Arbitration Act 1939, Note on Amendment.
- 10 The Arbitration Act 1939, section 24.
- 11 Ibid.
- 12 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention).
- 13 Lubic, R B (1994), 'Present Status of International Commercial Arbitration in the English Speaking Caribbean', *Rev Jur UPR* 117, Vol. 63 No. 1.
- 14 Ibid.
- 15 The Caribbean Radio, 'Draft Arbitration Bill for CARICOM States being Reviewed by Committee' <<https://www.thecaribbeanradio.com/draft-model-arbitration-bill-for-caricom-states-being-reviewed-by-committee/>> accessed 12 September 2019.
- 16 Peter D Maynard (2014), 'International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?', *Carib. L.R.*, Vol. 36.
- 17 University of Leicester (2018), 'Arbitration in the Americas: Report on a Survey of Arbitration Practitioners', 51. See also 'Legal Insights, 'Trinidad and Tobago Arbitration Legislation'.
- 18 Model Law, art. 16(1).
- 19 Model Law, art. 16(1).
- 20 Model Law, art. 17.
- 21 The Arbitration Act 1939, section 4 (first schedule); cf. Model Law, art. 10 (providing that the default number of arbitrators shall be three).
- 22 The Arbitration Act 1939, section 4 (first schedule).
- 23 The Arbitration Act 1939, section 19; cf. Model Law, art. 34(2) (grounds for setting aside award to include incapacity of a party, lack of proper notice of appointment of arbitrator or arbitral proceedings, inability of a party to present case, awards exceed terms of reference, non- arbitrability of dispute and award contravenes public policy).
- 24 The Arbitration Act 1939, section 9.
- 25 The Arbitration Act 1939, section 18.
- 26 The Arbitration Act 1939, section 17.
- 27 See 'New York Convention Guide' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 28 Ibid.
- 29 The Arbitration (Foreign Arbitral Awards) Act 1996.
- 30 New York Convention, art. V.
- 31 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 28 August 2019.
- 32 Ibid.
- 33 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (adopted 23 June 2000, entered into force 1 April 2003), art. 21 <<https://investmentpolicyhub.unctad.org/IIA/country/70/treaty/3185>> accessed 10 April 2019.
- 34 The Caribbean Community, 'CARICOM' <<https://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/barbados>> accessed 22 March 2019.



- 35 Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy <<https://investmentpolicyhub.unctad.org/IIA/country/17/treaty/3151>> accessed 10 April 2019.
- 36 UNCTAD Investment Policy Hub, 'Trinidad and Tobago' <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/212/trinidad-and-tobago?type=bits>> accessed 28 August 2019.
- 37 Arbitration Act, Cap. 5:01, 1939, art. 20.
- 38 High Court of Justice of Trinidad and Tobago, Judgment H.C. 765 2005 14 <[http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/PEMBERTON/2005/cv\\_05\\_765DD21oct2005.pdf](http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/PEMBERTON/2005/cv_05_765DD21oct2005.pdf)> accessed 29 May 2019; See also High Court of Justice of Trinidad and Tobago, Judgment H.C. 600/2007. CV.2007-00600,<[http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/j\\_jones/2007/HC\\_07\\_00600DD20oct2010.pdf](http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/j_jones/2007/HC_07_00600DD20oct2010.pdf)> accessed 29 May 2019.
- 39 New York Convention, art. V.
- 40 See New York Convention, 'Court Decisions – Decisions per Country' <<http://www.newyorkconvention.org/court+decisions/decisions+per+country>> accessed 31 July 2019.
- 41 'The Dispute Resolution Centre' <<https://disputeresolutioncentre.org.tt/>> accessed 28 August 2019.
- 42 Trinidad and Tobago Chamber of Industry and Commerce, 'Mediation & Arbitration Services & ADR Training' <<https://chamber.org.tt/programmes-services/mediation-arbitration-services-adr-training>> accessed 18 April 2019. The Board is administered by Dennis Gurley S.C., Geoffrey M. Abdullah, Stephanie Daly S.C, Robin Otway, Baliram Sawh and Toni Sirju-Ramnarine.
- 43 Dispute Resolution Centre, 'Arbitration' <<https://disputeresolutioncentre.org.tt/alternative-dispute-resolution/arbitration/>> accessed 28 August 2019.
- 44 Ibid.
- 45 Legal Affairs, 'The National Centre for Dispute Resolution' <<http://www.legalaffairs.gov.tt/ncdr.html>> accessed 18 April 2019.
- 46 Dispute Resolution Centre, '2015 Annual Report' <<https://drc.paradoxstudiosstt.com/wp-content/uploads/2018/05/2015-ANNUAL-REPORT-1.pdf>> accessed 18 April 2019.
- 47 Dispute Resolution Centre, 'Arbitration'.
- 48 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreconomies/trinidad-and-tobago#DB\\_ec](https://www.doingbusiness.org/en/data/exploreconomies/trinidad-and-tobago#DB_ec)> accessed 29 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 49 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 50 Ibid.
- 51 Ibid.
- 52 Trinidad and Tobago Law Courts, 'Annual Report–Judiciary of Trinidad and Tobago' <[http://www.ttlawcourts.org/annualreport2017/2017-2018%20Annual%20Report%20-%20Judiciary%20of%20Trinidad%20and%20Tobago\\_1.pdf](http://www.ttlawcourts.org/annualreport2017/2017-2018%20Annual%20Report%20-%20Judiciary%20of%20Trinidad%20and%20Tobago_1.pdf)> accessed 19 April 2019.
- 53 Legal Aid and Advice Act 1976, c 7:07 at ss 23(1A) and (1B).
- 54 Legal Aid and Advice Act 1976, c 7:07 at Second Schedule.
- 55 Legal Aid and Advice Act 1976, c 7:07 at Second Schedule.
- 56 Interpretation Act, Act 2 of 1962, c 3:01 at s 16(1).
- 57 The Legal Profession Act 1986, Chapter 90:03, art. 10 (3); Code of Ethics, arts 10(1), 7(2).

# TUVALU<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

Tuvalu, in the South Pacific, is an island nation within the British Commonwealth. As a former British colony, it gained its independence in 1978.<sup>2</sup> As declared by the Laws of Tuvalu Act 1987, the five sources of law in Tuvalu are the Constitution, Acts of Parliament, customary law, applied laws, and the common law. Tuvalu's arbitral legislation appears to be largely based on the English Arbitration Act of 1950.

### B. *Description of prior legislation and reasons for its replacement*

The Arbitration Act of Tuvalu was enacted in 1992. The Act has been included under chapter 7.04 of the revised laws of Tuvalu of 2008. It is unclear whether the Arbitration Act has been revised itself.<sup>3</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Tuvalu's Arbitration Act was enacted in 1992 and is currently included in chapter 7.04 of the revised laws of Tuvalu of 2008.

### B. *Scope of application to domestic and international arbitrations*

The Arbitration Act does not make a distinction between domestic and international arbitration, nor does it mention international arbitration.

### C. *Details and/or relevant amendments and modifications*

It is unclear whether the Arbitration Act itself has been revised.

### D. *Relationship to the UNCITRAL Model Law*

As of today, Tuvalu has not adopted the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 ('UNCITRAL Model Law').<sup>4</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The Tuvalu Arbitration Act is rather sparse compared to the UNCITRAL Model Law. Many major provisions in the UNCITRAL Model Law on, for example, the nature of arbitration agreements, the jurisdiction of arbitral tribunals, and how arbitral proceedings are conducted, are missing and do not have corresponding provisions in the Tuvalu Arbitration Act.

The Tuvalu Arbitration Act provides for procedures that are either slightly different from the UNCITRAL Model Law or are missing altogether. For example, in section 12, the Tuvalu Arbitration Act provides that arbitrators or umpires can make awards at any time, and that the High Court can lengthen the time otherwise provided. But the UNCITRAL Model Law does not have a provision on when an award must be made by.

There is only one provision in the Tuvalu Arbitration Act on the enforcement of awards, section 25, which treats arbitral awards like a judgment or court order to the same effect. There is no provision on the recognition of arbitral awards or for setting them aside, save for section 22(2), which allows for

setting aside of awards by the High Court if 'an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration, or award has been improperly procured'. Otherwise section 23(3) permits a court to render an arbitration agreement without effect. However, no grounds are listed.

As mentioned above, the Arbitration Act, does not make a distinction between domestic and international arbitrations, nor does it mention international arbitration. It also does not mention recognition or enforcement of foreign arbitral awards.

#### *F. Powers and duties of arbitrators*

The powers of the arbitrator under the Tuvalu Arbitration Act are contained in section 11, which concerns conduct of proceedings, witnesses, etc.

According to this section, arbitrators have the power to examine all matters related to the dispute and request documents from the parties if deemed necessary, as well as 'administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under the agreement'.<sup>5</sup> Additionally, according to sections 12 and 13 of the Arbitration Act, arbitrators also have the power to make an award or interim award if deemed necessary.<sup>6</sup>

Arbitrators are also given powers not usually accorded to them. In particular, according to section 14, 'unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the High Court to order specific performance of any contract other than a contract relating to land or any interest in land.'<sup>7</sup>

All these powers are subject to the arbitration agreement. In other words, if an arbitration agreement provides otherwise, it prevails.

#### *G. Arbitrator immunity*

The Tuvalu Arbitration Act 1992 does not provide for arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Tuvalu is not a party to the 1958 New York Convention.<sup>8</sup>

#### *B. Reservations to the New York Convention*

This query is not applicable to this jurisdiction.

#### *C. Method of domestic implementation of the New York Convention*

This query is not applicable to this jurisdiction.

#### *D. Other international/regional treaties*

Tuvalu has neither signed nor ratified the ICSID Convention.<sup>9</sup> Further, Tuvalu does not seem to have signed or ratified any bilateral investment treaties. But it has signed several multilateral investment treaties, such as the Cotonou Agreement, which provide for arbitration in the event of a dispute.<sup>10</sup>

Tuvalu has signed four free trade agreements, three of which are in effect (South Pacific Regional Trade and Economic Cooperation Agreement, Pacific ACP–EC Economic Partnership Agreement and the Pacific Island Countries Trade Agreement).<sup>11</sup>

#### IV. RELEVANT CASE LAW

##### A. Approach of the national courts to the enforcement of arbitration agreements

No information was available.

##### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

Tuvalu's Arbitration Act does not mention 'public policy' at all, as well as any other grounds on which an award can be refused enforcement. As mentioned above, section 25 provides that 'an award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award'.<sup>12</sup>

Section 22 of the Act provides that the High Court may set aside an award if 'an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured'.<sup>13</sup>

##### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

No information was available.

#### V. ARBITRATION LANDSCAPE

##### A. Institutional arbitration

From the data available, Tuvalu does not appear to have arbitral institutions.<sup>14</sup> The International Chamber of Commerce ('ICC Statistics') indicate that in 2017 there were no parties from Tuvalu.<sup>15</sup>

##### B. Measures to strengthen institutional arbitration capabilities

No information was available.

##### C. Submission of disputes to arbitration vs. litigation

No information was available.

##### D. Participation by foreign counsel in international arbitrations

The People's Lawyer Act is silent on this question.

##### E. Relevant statistical data

###### 1. Sectors where arbitration is routinely used

No information was available.

###### 2. Time taken for enforcement/annulment proceedings

No information was available.

###### 3. Percentage of awards annulled/not enforced

No information was available.

##### F. Statistics/information on the length of court proceedings in commercial cases

The court hierarchy in Tuvalu is laid down in section 119 of the Constitution. It consists of the (English) Privy Council, the Court of Appeal, the High Court and such other courts and tribunals as are provided for or under Acts of Parliament. The Magistrates' Courts Ordinance and the Islands Courts Ordinance make provision for inferior courts.<sup>16</sup>

However, data appears to be unavailable as to the length of court proceedings in commercial cases in Tuvalu. The latest World Bank ranking on enforcement of contracts does not have data on Tuvalu.<sup>17</sup>

*G. Statistics on judges and lawyers per capita*

There is no available information regarding the number of judges per capita. According to one study, in 2011 there was one lawyer in private practice in the whole country out of a population of 10,544 at the time. There were also 10 government in-house lawyers.<sup>18</sup>

## VI. FUNDING FOR LEGAL CLAIMS

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Tuvalu does not appear to have an established legal aid regime and therefore has no provision for legal aid to businesses or in arbitration. There is no Act specifically on legal aid. A judge on the Tuvalu Court of Appeal has the power to assign legal aid to a needy appellant under s 46 of the Court of Appeal Rules 2009.<sup>19</sup>

There are People's Lawyers, who are akin to public defenders in the criminal context and provide legal advice in a certain class of civil cases. Legal fees are set forth and regulated by the People's Lawyer (Fees) Regulation.<sup>20</sup> But, there is no mention of legal aid in the People's Lawyer Act 1988, which is legislation set up to provide legal advice to the public.<sup>21</sup> Further, practitioners are not encouraged to undertake more pro bono work.<sup>22</sup>

*B. Third-party funding*

There is no jurisprudence or literature on the applicability of the rules of champerty and maintenance in Tuvalu. The law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967<sup>23</sup> but a champertous agreement may still be treated as contrary to public policy and unlawful. As this was the law applied at the time of independence it is likely still applicable in Tuvalu.

Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to occur in Tuvalu.

*C. Contingency fees*

Historically, there have been no lawyers in private practice in Tuvalu. There are People's Lawyers, who are akin to public defenders in the criminal context and provide legal advice in a certain class of civil cases. Legal fees are set forth and regulated by the People's Lawyer (Fees) Regulation.<sup>24</sup> The Regulation does not provide for contingency fees at all. In fact, it sets out the exact amount of money that needs to be charged per hour given the particularities of the case, e.g., whether the client is a person or entity, and whether it is a Tuvalu citizen or not.<sup>25</sup> No ethics rules in Tuvalu that address fees, much less contingency fees, that People's Lawyers can charge have been identified, save for those contained in the Regulation.

*D. Insurance for legal expenses*

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Commonwealth Network – Tuvalu, 'Welcome to Tuvalu / Tuvalu in the Commonwealth' <<http://www.commonwealthofnations.org/country/tuvalu/>> accessed 27 August 2019.
- 3 Tuvalu Arbitration Act 1992 <[http://www.paclii.org/tv/legis/consol\\_act\\_2008/aa137/](http://www.paclii.org/tv/legis/consol_act_2008/aa137/)> accessed 27 August 2019.
- 4 Gary B Born (2018), 'Integration and Dispute Resolution in Small States', in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States*, Springer, 227.
- 5 Tuvalu Arbitration Act 1992, section 11(3).
- 6 Tuvalu Arbitration Act 1992, sections 12 & 13.
- 7 Tuvalu Arbitration Act 1992, section 14.
- 8 Born (2018), 'Integration and Dispute Resolution in Small States', 225.
- 9 See ISCID, 'List of Contracting States and other Signatories of the Convention' <[icsid.worldbank.org](http://icsid.worldbank.org)> accessed 31 August 2019.
- 10 UNCTAD Investment Policy Hub, 'Tuvalu' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 27 August 2019.
- 11 Asian Regional Integration Center, 'FTAs: Tuvalu' <[aric.adb.org](http://aric.adb.org)> accessed 27 August 2019.
- 12 Tuvalu Arbitration Act 1992, section 25.
- 13 Tuvalu Arbitration Act 1992, section 22(2) and (3).
- 14 C Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, United Nations, 293.
- 15 ICC Dispute Resolution Bulletin 2018 (issue 2), 54.
- 16 Jennifer Corrin and Don Paterson (2017), *Introduction to South Pacific Law*, 4th edn, Intersentia, 419–20. See also Pacific Islands Legal Information Institute (2001), 'Tuvalu Courts System Information' <<http://www.paclii.org/tv/courts.html>> accessed 27 August 2019.
- 17 See World Bank (2019), *Doing Business*, 'Enforcing Contracts'.
- 18 South Pacific Lawyers Association (2011), 'Needs Evaluation Survey for South Pacific Lawyer Associations – Final Report', 5, 14. See also Commonwealth Network – Tuvalu, 'Find Legal Expertise in Tuvalu' <<http://www.commonwealthofnations.org/sectors-tuvalu/business/legal/>> and Niles N Bilimoria (2017), 'Choices for the South Pacific Region's Bar Associations and Law Societies?', in Petra Butler and Caroline Morris (eds), *Small States in a Legal World*, Springer.
- 19 Court of Appeal Rules 2009, s 46 <[https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/2009/2009-0000/CourtofAppealRules2009\\_1.pdf](https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/2009/2009-0000/CourtofAppealRules2009_1.pdf)> accessed 31 August 2019.
- 20 People's Lawyer (Fee) Regulations <[https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/2012/2012-0005/PeoplesLawyerFeesRegulations\\_1.pdf](https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/2012/2012-0005/PeoplesLawyerFeesRegulations_1.pdf)> accessed 27 August 2019.
- 21 People's Lawyer Act 1988 <[https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1988/1988-0008/PeoplesLawyerAct\\_1.pdf](https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1988/1988-0008/PeoplesLawyerAct_1.pdf)> accessed 31 August 2019.
- 22 South Pacific Lawyers Association (2011), 'Needs Evaluation Survey for South Pacific Lawyer Associations – Final Report', 32.

- 23 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'
- 24 People's Lawyer (Fee) Regulations <[https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/2012/2012-0005/PeoplesLawyerFeesRegulations\\_1.pdf](https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/2012/2012-0005/PeoplesLawyerFeesRegulations_1.pdf)> accessed 27 August 2019.
- 25 See article 3 and schedule 1 of the People's Lawyer (Fee) Regulation.

# UGANDA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Uganda ('Uganda') is a common law country by virtue of it being a former British protectorate from 1894 to 1962. The country attained independence on 9 October 1962. After independence, Uganda's first law governing arbitration was the Ugandan Arbitration Act 1964.<sup>2</sup>

### B. *Description of prior legislation and reasons for its replacement*

The Ugandan Arbitration Act 1964 was used until 19 May 2000, when it was replaced by the Ugandan Arbitration and Conciliation Act 2000 ('Ugandan ACA 2000').<sup>3</sup>

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Arbitration in Uganda is currently governed by the Ugandan ACA 2000,<sup>4</sup> which was enacted by the Parliament of Uganda on 19 May 2000.

### B. *Scope of application to domestic and international arbitrations*

Section 1 of the Ugandan ACA 2000 states that the Act shall apply to domestic and international arbitration.

### C. *Details and/or relevant amendments and modifications*

In 2008, the Ugandan ACA 2000 was amended to make provision for Ugandan Government funding of the Centre for Arbitration and Dispute Resolution.<sup>5</sup> This Centre has been operational since then and its institutional decisions (for instance on disputed tribunal appointments or interpretation of arbitration agreements) are made publicly available online.<sup>6</sup> 106 of these decisions have been made available to date.<sup>7</sup>

In March 2017, the Uganda Law Reform Commission published an Issues Paper recommending further reform to be undertaken for many of the substantive provisions of the Ugandan ACA 2000.<sup>8</sup>

### D. *Relationship to the UNCITRAL Model Law*

The Ugandan ACA 2000 was based on the 1985 United Nations Commission on the International Trade Law's Model Law on International Commercial Arbitration ('UNCITRAL Model Law'), although with some modifications.

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

The key differences are that, under the Ugandan ACA 2000:

- a. parties may affirm, through a written agreement, the right to lodge an appeal on questions of law arising either from domestic arbitral proceedings or the awards;
- b. the parties have limited rights with respect to interim measures of protection; and
- c. the time limits to request a correction or interpretation of an award or an additional award are shorter.<sup>9</sup>



#### F. Powers and duties of arbitrators

Section 17 of the Ugandan ACA 2000 is titled 'Power of Arbitral Tribunal' and states as follows:

(1) Unless the parties agree, the appointing authority may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, and the arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) The appointing authority or a party with the approval of the appointing authority may seek assistance from the centre in the exercise of any power conferred on the appointing authority under subsection (1).

(3) If a request is made under subsection (2), the court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under subsection (1) as it would have in civil proceedings before that court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the court.

#### G. Arbitrator immunity

The Ugandan ACA 2000 is silent regarding the immunity of an arbitrator. The Uganda Law Reform Commission in its 2017 Issues Paper on Reform on the Arbitration and Conciliation Act has flagged this as an issue to be examined.<sup>10</sup>

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Uganda became a party to the 1958 New York Convention on 12 February 1992.<sup>11</sup>

#### A. Reservations to the New York Convention

Uganda has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>12</sup>

#### B. Method of domestic implementation of the New York Convention

The New York Convention is given effect by provisions within Part III of the Ugandan ACA 2000.

#### C. Other international/regional treaties

Uganda is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention').<sup>13</sup>

Uganda has entered into 15 bilateral investment treaties, six of which are in force (France, Denmark, Netherlands, the United Kingdom, Switzerland, and Germany).<sup>14</sup> Uganda is also a party to the Agreement Establishing the African Continental Free Trade Area (AfCTA),<sup>15</sup> and the Common Market for Eastern and Southern Africa (COMESA).<sup>16</sup>

### IV. RELEVANT CASE LAW

#### A. Approach of the national courts to the enforcement of arbitration agreements

Local courts reportedly take a pro-arbitration approach and will not intervene unnecessarily in arbitrations. Challenges to awards in the courts are also generally unsuccessful.<sup>17</sup>

*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Ugandan Supreme Court considered the issue of public policy in setting aside an arbitral award in the case of *National Social Security Fund v Alcon International Ltd*<sup>18</sup> and held as follows:

On what amounts to public policy, the Kenyan case of *Christ for All Nations vs Apollo Insurance Co Ltd*<sup>19</sup> indicated that public policy would cover anything that was either inconsistent with the Constitution or the Laws of Kenya whether written or unwritten that was against the national interest of Kenya [or] was contrary to justice and morality. In this case, it is not enough to simply show that a party was misled. [The] Court must be satisfied that some form of reprehensible conduct has contributed substantially to the award being obtained. As has been proved Alcon deliberately misled NSSF by substituting one company with another. The arbitral award was then given on the basis of fraudulent information which might not have otherwise happened. The award was obtained contrary to public policy. Accordingly, I would allow this ground of appeal.

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

The case of *Mike Harley v Overseas International Fisheries Ltd*<sup>20</sup> demonstrates the pro-arbitration approach of the Ugandan courts. In this case, the court stated:

I would observe that we must not be ready to set aside awards where parties have agreed to abide by a decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings...

The case of *Babcon Uganda Ltd v Mbale Resort Hotel Ltd*<sup>21</sup> limits rights of appeal against arbitral awards to the strictly limited circumstances under section 38 of the Ugandan ACA 2000. In this case, which had its judgment handed down in 2015, the following was stated:

Section 9 of the ACA satisfied the foregoing standard. It is very clear in ousting court[s]' general jurisdiction. It bars the courts from intervening beyond the limited or special jurisdiction permitted under the ACA. This, in my view, must extend to an appeal to this Court as this would be tantamount to intervention by the Court of Appeal in a proceeding under the ACA. Such intervention is barred unless it is authorized by the ACA and it is not so authorized. ... No right of appeal to the Court of Appeal exists under the ACA beyond what is provided under Section 38(3) of the ACA.

## V. ARBITRATION LANDSCAPE

*A. Institutional arbitration*

The main arbitration institution in Uganda is the Centre for Arbitration and Dispute Resolution (CADR). It reportedly hears about 70 cases per year.<sup>22</sup>

*B. Measures to strengthen institutional arbitration capabilities*

In March 2017, the Uganda Law Reform Commission published an Issues Paper recommending that further reform be undertaken for many of the substantive provisions of the Ugandan ACA 2000.<sup>23</sup> Topics considered include

the immunity of arbitrators, limitations concerning interim and preliminary measures, the scope of matters that are arbitrable, and definition and form requirements for arbitration agreements.<sup>24</sup>

*C. Submission of disputes to arbitration vs. litigation*

No information was available.

*D. Participation by foreign counsel in international arbitrations*

Sections 64 and 65 of the Ugandan Advocates Act 2000 prohibit unqualified persons from practising Ugandan law or holding themselves out as being qualified. Section 13 of the 2000 Act permits the Ugandan Chief Justice to grant any legal practitioner of any country temporary admission to the right to practise in Uganda in relation to specific matters. There are, however, no restrictions on the participation and appearance of foreign lawyers in arbitration proceedings in Uganda.

Section 11 of the ACA 2000 permits persons of all nationalities to act as arbitrators (unless agreed otherwise by the parties). Implicit in this provision is the proposition that foreign lawyers can also participate as arbitrators provided the parties to the proceedings are agreeable to it.

*E. Relevant statistical data*

1. Sectors where arbitration is routinely used

Arbitration is reportedly routinely used in the following areas: banking, construction, credit, insurance, intellectual property, sale of goods, telecommunications, transport, manufacturing, and electricity supply.<sup>25</sup>

2. Time taken for enforcement/annulment proceedings

The ACA 2000 provides that an arbitral award shall be recognised as binding and upon application in writing to the court. The Act also provides that an arbitral award is enforceable as a court decree. The Ugandan Limitation Act provides that court decrees are enforceable within 12 years from the date of issuance.

An application to set aside/annul an arbitral award should be made within one month from the date of the award.

The time taken in the actual enforcement/annulment proceedings is at the court's discretion, influenced by the availability of the judge, availability of the parties and their lawyers and the case backlog.

3. Percentage of awards annulled/not enforced

No information was available.

*F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 490 days to resolve a commercial dispute in a first-instance court in Uganda – 20 days for filing and service of court processes, 365 days for trial and judgment and 105 days for enforcement of judgment.<sup>26</sup> Uganda ranks slightly above average in the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>27</sup> In terms of overall ease of enforcing contracts, Uganda scored 60.60 of 100 and ranked 71 of 190.<sup>28</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

### G. Statistics on judges and lawyers per capita

According to the Ugandan Judiciary website there are 396 judges in Uganda.<sup>29</sup> Uganda has a total population of approximately 45 million, working out to a ratio of about 1 judge per 114,000 citizens. Information is not readily available on the total number of lawyers in Uganda.<sup>30</sup>

### H. Jurisdiction's overall approach to arbitration

Local courts reportedly take a pro-arbitration approach and will not intervene unnecessarily in arbitrations. Challenges to awards in the courts are also generally unsuccessful.<sup>31</sup>

Section 11 of the Ugandan ACA 2000 permits persons of all nationalities to act as arbitrators (unless agreed otherwise by the parties). Implicit in this provision is the proposition that foreign lawyers can also participate as arbitrators provided the parties to the proceedings are agreeable to it.

Uganda is a signatory to various international conventions, e.g. the New York Convention and ICSID Convention, which allow parties to subject their disputes to foreign law as the applicable law. This therefore necessitates the participation of foreign lawyers.

## VI. FUNDING FOR LEGAL CLAIMS

### A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)

There is no information in Uganda to indicate that legal aid is provided for businesses; nor is there any mention of assistance in commercial dispute resolution. The legal aid scheme in Uganda is still a work in progress and the main concern is in regard to legal assistance in criminal matters. In Uganda, government legal aid is provided to a person that is charged with a crime leading to a death or life imprisonment sentence.<sup>32</sup>

The Uganda Law Society has had a Legal Aid Project since 1992 and the Uganda Law Development Centre has a Legal Aid Clinic set up to provide legal assistance for indigent and vulnerable persons in the country.<sup>33</sup> Other programmes such as the United States Agency for International Development project is working to provide legal aid in settling alternative dispute resolution, so this may include arbitration.<sup>34</sup>

### B. Third-party funding

In the case of *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor*, the Supreme Court of Uganda rejected arguments by counsel that maintenance and champerty were no longer offences but found that the rules of maintenance and champerty violated public policy.<sup>35</sup> The Court held:<sup>36</sup> 'The argument by counsel ... that champerty and maintenance doctrines are not relevant any more to our legal jurisprudence because of statute law and the strong civil justice system is not plausible. Champerty and maintenance doctrines have been codified in the Advocates Act. It is now not only a matter of common law, but also statute law protecting the public.'

There does not appear to be any specific regulation providing a carve out of the rules of maintenance and champerty for third-party funding. Hence, the inference is that the rules of maintenance and champerty are still applicable in Uganda and third-party funding might therefore not be legally permissible.<sup>37</sup>

### C. Contingency fees

The rules of maintenance and champerty apply in Uganda and contingency fee agreements appear to be prohibited under section 74(1)(c) of the Advocates Act 2000.<sup>38</sup>

### D. Insurance for legal expenses

Uganda's Lion Assurance (now part of the Sanlam Group) offers a Legal Guard Insurance plan, which is a legal expenses insurance covering both civil and criminal proceedings and which can include coverage of lawyer's fees, court fees and witness attendance costs.<sup>39</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 31 August 2019.
- 2 Cap. 55 of 1964.
- 3 Cap. of 2000.
- 4 Ugandan Arbitration and Conciliation Act 2000.
- 5 Ugandan Arbitration and Conciliation (Amendment) Act (No 3 of 2008).
- 6 ULII (Uganda Legal Information Institute), 'Centre for Arbitration and Dispute Resolution Decisions' <<https://ulii.org/ug/judgment/center-for-arbitration-and-dispute-resolution>> accessed 15 August 2019.
- 7 Ibid.
- 8 Uganda Law Reform Commission, 'Issues Paper on Reform on the Arbitration and Conciliation Act Cap. 4' (March 2017).
- 9 GAR, 'Construction Arbitration in East Africa' <<https://globalarbitrationreview.com/chapter/1139730/construction-arbitration-in-east-africa>> accessed 15 August 2019. cf. UNCITRAL Model Law on International Commercial Arbitration, Art 33.
- 10 Uganda Law Reform Commission, 'Issues Paper on Reform on the Arbitration and Conciliation Act Cap. 4' (March 2017).
- 11 See New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 31 July 2019.
- 12 Ibid.
- 13 ICSID, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 15 August 2019.
- 14 UNCTAD Investment Policy Hub, 'Uganda' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 15 August 2019.
- 15 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.
- 16 United Nations Economic Commission for Africa, 'COMESA – Common Market for Eastern and Southern Africa' <[uneca.org](http://uneca.org)> accessed 22 August 2019.
- 17 Thomson Reuters Practical Law Arbitration Blog, 'Arbitration in Africa: Swithin J Munyantwali, Uganda, part 1 of 2' <<http://arbitrationblog.practicallaw.com/arbitration-in-africa-swithin-j-munyantwali-uganda-part-1-of-2/>> accessed 15 August 2019. See for instance *Roko Constructions Ltd v Mohammed Mohammedi* [2015] UGCA 180.
- 18 Supreme Court Civil Appeal 15 of 2009 (decision handed down on 8 February 2013).
- 19 (2002) 2 EA 366.
- 20 Comm. Court Misc. Cause No. 605 of 2001.
- 21 Court of Civil Appeal Civil Appeal 87 of 2011.

- 22 Thomson Reuters Practical Law Arbitration Blog, 'Arbitration in Africa: Swithin J Munyantwali, Uganda, part 1 of 2'.
- 23 Uganda Law Reform Commission, 'Issues Paper on Reform on the Arbitration and Conciliation Act Cap. 4' (March 2017).
- 24 Ibid.
- 25 Thomson Reuters Practical Law Arbitration Blog, 'Arbitration in Africa: Swithin J Munyantwali, Uganda, part 1 of 2'.
- 26 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/uganda#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/uganda#DB_ec)> accessed 15 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 27 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 28 Ibid.
- 29 The Judiciary, 'The Republic of Uganda: Judicial Officers' <<http://judiciary.go.ug/data/smenu/91/Judicial%20Officers.html>> accessed 15 August 2019.
- 30 Although the Uganda Law Society maintains a register of Ugandan advocates, see Uganda Law Society, 'Advocates in Uganda' <<http://www.uls.or.ug/members/compliance/>> accessed 15 August 2019, the total number of advocates is not set out.
- 31 Thomson Reuters Practical Law Arbitration Blog, 'Arbitration in Africa: Swithin J Munyantwali, Uganda, part 1 of 2'.
- 32 Constitution of the Republic of Uganda. *supra* n. 4 at s 28(32)(e)
- 33 Latham & Watkins (2016), *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, 663.
- 34 Uganda Law Society, Annual Report 2014 <[http://www.uls.or.ug/site/assets/files/1022/uls\\_annual\\_report-2014.pdf](http://www.uls.or.ug/site/assets/files/1022/uls_annual_report-2014.pdf)> accessed 31 August 2019.
- 35 *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* (Civil Appeal No.02 of 2013) [2008] UGSC 9 (3 July 2014).
- 36 *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* (Civil Appeal No.02 of 2013) [2008] UGSC 9 (3 July 2014).
- 37 *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* (Civil Appeal No.02 of 2013) [2008] UGSC 9 (3 July 2014).
- 38 *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* (Civil Appeal No.02 of 2013) [2008] UGSC 9 (3 July 2014).
- 39 Uganda Insurers Association, 'Lion Assurance introduces Legal Guard' <<http://uia.co.ug/lion-assurance-introduces-legal-guard/>> accessed 15 August 2019.

# UNITED REPUBLIC OF TANZANIA<sup>1</sup>

## I. HISTORY OF ARBITRAL LEGISLATION

### A. *Relationship with existing or prior English Arbitration Act(s)*

The very first Arbitration Act of the United Republic of Tanzania ('Tanzania'), the Arbitration Act Cap 15 (the 'Act'), came into effect on 22 May 1931 and was based on the English Arbitration Act 1889.<sup>2</sup>

### B. *Description of prior legislation and reasons for its replacement*

The Act was modified in 1957 and re-published in 2002.<sup>3</sup> No information was found as to the reasons during the replacement.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

As noted above, the current Arbitration Act of Tanzania, enacted in 1931 and modified in 1957, was re-published in 2002.<sup>4</sup>

### B. *Scope of application to domestic and international arbitrations*

The Act regulates both international and domestic arbitration proceedings.<sup>5</sup>

### C. *Details and/or relevant amendments and modifications*

There is no information as to whether any amendments or modifications have been made to the Act after its re-publication in 2002, but the Act is widely regarded as not reflective of the modern trends and best practices and a colonial relic, since it does not incorporate any of the standards set out in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 ('the Model Law')<sup>6</sup> and has been scarcely revised since its initial enactment.<sup>7</sup>

It is suggested that a draft new law based on the English Arbitration Act 1996 is under consideration by the Government of Tanzania.<sup>8</sup>

### D. *Relationship to the UNCITRAL Model Law*

The Arbitration Act does not incorporate the UNCITRAL Model Law or the 2006 revisions made to it.<sup>9</sup>

### E. *Departure(s) (if any) from the UNCITRAL Model Law*

Some of the major differences between the domestic arbitration law and the Model Law include:

- a. With respect to the number of arbitrators – under the Model Law, three arbitrators are the established requirement, while the Tanzanian Arbitration Act (Schedule 1) provides for a single arbitrator.<sup>10</sup>
- b. Another difference is that while the Model Law does not prescribe who may sit as an arbitrator, the Tanzanian Act specifically provides that a sitting judge cannot sit as an arbitrator.<sup>11</sup>
- c. With respect to arbitrators' duties – while the Model Law provides for the impartiality and independence of the arbitrators, the Tanzanian Arbitration Act requires only impartiality.<sup>12</sup>

### F. *Powers and duties of arbitrators*

According to section 10 of the 2002 Act, the arbitrators or umpire shall have the following powers, unless the parties agree differently:

- a. to administer oaths to the parties and witnesses appearing;
- b. to state a special case for the opinion of the court on any question of law involved; and
- c. to correct in an award any clerical mistake or error arising from any accidental slip or omission.<sup>13</sup>

#### G. *Arbitrator immunity*

The Tanzanian Arbitration Act is silent on arbitrator immunity but given that the Arbitration Act is silent, the likelihood is that they are not immune.<sup>14</sup> Yet, it is suggested by one source that 'an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as an arbitrator unless the act or omission is shown to have been in bad faith and constitutes an intentional breach of duty'.<sup>15</sup>

### III. INTERNATIONAL INSTRUMENTS

#### A. *Signatory to the New York Convention*

Tanzania became a party to the New York Convention on 12 January 1956.<sup>16</sup>

#### B. *Reservations to the New York Convention*

Tanzania has made one reservation to the New York Convention, in particular, that the Convention only applies to awards made in the territory of another contracting state (i.e. the reciprocity reservation).<sup>17</sup>

#### C. *Method of domestic implementation of the New York Convention*

Although Tanzania has ratified the New York Convention, it has not enacted any legislation to incorporate the Convention into its domestic municipal law. As such, the New York Convention does not have a binding effect in Tanzania,<sup>18</sup> and enforcement of foreign awards faces a range of challenges.<sup>19</sup>

#### D. *Other international/regional treaties*

Tanzania is also a party to the Geneva Convention on the execution of Foreign Arbitral Awards, 1927, and the same is given effect to through Part IV of the Arbitration Act. Accordingly, awards that are the subject of the Geneva Convention may be executed in Tanzania.<sup>20</sup>

Tanzania has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('the ICSID Convention') which entered into force on 17 June 1992.<sup>21</sup> No reservations or exceptions have been made.

The country has also signed 20 bilateral investment treaties. Out of those, 10 are in force (Canada, China, Mauritius, Switzerland, Italy, Finland, Sweden, Denmark, the United Kingdom, and Germany).<sup>22</sup>

### IV. RELEVANT CASE LAW

#### A. *Approach of the national courts to the enforcement of arbitration agreements*

A recently decided case from the High Court refused to annul an ICC award passed against a Tanzanian public utility.<sup>23</sup> The court upheld the award, refused to intervene, and directed the enforcement of the award.<sup>24</sup>



*B. Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The Tanzanian Arbitration Act does not contain the 'public policy' ground for setting aside an award. In particular, according to section 16 of the Act, the court may set aside the award where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured and serious irregularities affected the tribunal, the proceedings or the award. Misconduct and serious irregularities include the negligent conduct of the proceedings by the arbitrator and a behaviour that causes one or all of the parties involved to lose confidence in their abilities to settle the dispute out of court.<sup>25</sup>

*C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention*

No decisions on the New York Convention rendered by the Tanzanian courts were found, but there is one decision rendered by an English court where the arbitration agreement provided for arbitration in Tanzania and was governed by Tanzanian law, which is worth mentioning.

In that case, Dowans Holding S.A. and Dowans Tanzania ('Dowans') entered into an electricity supply agreement with Tanzania Electric Supply Co. Ltd (TANESCO), a state-owned utility company ('the Agreement'). The Agreement provided for arbitration in Tanzania under Tanzanian law in accordance with the Rules of Arbitration of the International Chamber of Commerce.<sup>26</sup>

TANESCO purported to terminate the Agreement on the basis that it was void ab initio for contravening the Tanzanian Public Procurement Act 2004. As a result, Dowans commenced arbitral proceedings in Tanzania. The arbitral tribunal found that the Agreement was valid and rendered an award against TANESCO. TANESCO applied to have the award set aside in the Tanzanian courts. Meanwhile, Dowans obtained enforcement of the award in the English High Court pursuant to section 101(2) of the English Arbitration Act 1996, which provides for enforcement as a judgment or order of the court of a New York Convention award, as defined by the Act.

TANESCO then applied to the court to have the enforcement order set aside pursuant to section 103(2)(f) of the English Arbitration Act (incorporating article V(1)(e) New York Convention regarding the refusal to recognise or enforce an award where the award is not yet binding, has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made).

Alternatively, it sought to adjourn the issue of recognition or enforcement pending final determination of the Tanzanian proceedings pursuant to section 103(5) of the English Arbitration Act (incorporating article VI New York Convention regarding adjournment of the decision on the recognition or enforcement of the award where an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, it was made).

Dowans opposed the application and requested, in the event an adjournment was granted, partial recognition of the award and/or an order for security. The High Court granted TANESCO's application for an adjournment. However, it also granted Dowan's application for an order for security. In essence, the court's decision was as follows:

- a. First, the court considered that the fact that there was a challenge to the award pending before the Tanzanian courts did not mean that the award was 'not yet binding' within the meaning of that section. It noted that there was no definition of the word 'binding' in the NYC or under the Act. It also referred to the New York Convention's abolition of the requirement in the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 of double exequatur (i.e., the need, before an award could be enforced in another jurisdiction, that it first have been rendered enforceable in the country in which, or under the law of which, it was made).
- b. Second, the court observed that even if the award has been set aside in the home jurisdiction, there was still discretion to set aside, enforce or adjourn the award both pursuant to section 103(2)(f) and article V(1)(e) New York Convention. In the court's view, its discretion under section 103(2)(f) would inevitably be exercised in the same manner as the discretion to adjourn under section 103(5).
- c. Third, the court found that TANESCO's prospects of success in the proceedings before the Tanzanian courts were not fanciful and hence real, such as to justify an adjournment, but only coupled with an order for security.

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

The prominent arbitral institutions include the National Construction Council and the Tanzania Institute of Arbitrators.<sup>27</sup>

There is no information as to whether institutional arbitration is common in Tanzania.

### B. Measures to strengthen institutional arbitration capabilities

Since 2017, the Tanzanian Government has implemented strict measures regarding foreign investment which, according to some, has negatively impacted on Tanzania's global reputation in arbitration generally.<sup>28</sup> First, Tanzania passed several laws the purpose of which is to limit foreign ownership of natural resources. Second, Tanzania has also terminated its bilateral investment treaty with the Netherlands.<sup>29</sup> Further, the Tanzanian Government has recently amended its Public Private Partnership Act. Pursuant to the amendment, Tanzania limited agreements with the Government that are subject to the Public Private Partnership Act to arbitration before local arbitral institutions – i.e. either the National Construction Council or the Tanzania Institute of Arbitrators.<sup>30 31</sup>

2. The government has also limited the recourse to arbitration when it comes to disputes concerning natural resources, such as the Written Laws (Miscellaneous Amendments) Act 2017.<sup>32</sup> It is suggested that the purpose of this whole new amendment is so that the government can retain control over the oil & gas and mining industries. This, however, similar to the amendment above, turned out to have a very negative effect on Tanzania, since currently the state is facing a number of investor-state claims.

### C. Submission of disputes to arbitration vs. litigation

There are no official statistics on the percentage of disputes submitted to arbitration.

*D. Relevant statistical data*

1. Sectors where arbitration is routinely used

There is no information on the sectors where arbitration is routinely used, but after the new amendments to the law and many restrictions imposed, those will not be many.

2. Time taken for enforcement/annulment proceedings

No information was available.

3. Percentage of awards annulled/not enforced

No information was available.

*E. Statistics/information on the length of court proceedings in commercial cases*

In 2016, the World Bank published a Development Report on Tanzania and stated that the 'the court system receives about 200,000 cases (both filed and pending) per year in all types and levels of courts, of which about 120,000 are disposed of annually (that is, a disposal rate of about 60 percent), thereby causing perpetual increase in backlogs and compounding delays'.<sup>33</sup> Systems and processes which depend on manual procedures struggle with inefficient case management.<sup>34</sup>

The 2019 World Bank Doing Business ranking indicates that it takes about 515 days to resolve a commercial dispute in a first-instance court in Tanzania – 60 days for filing and service of court processes, 365 days for trial and judgment and 90 days for enforcement of judgment.<sup>35</sup> Tanzania ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>36</sup> In terms of overall ease of enforcing contracts, Tanzania scored 61.66 of 100 and ranked 64 of 190.<sup>37</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.<sup>38</sup>

*F. Participation by foreign counsel in international arbitrations*

Generally foreign lawyers will not have rights to conduct cases in Tanzanian courts. If a foreign lawyer is admitted to the roll, holds a valid practising certificate and meets the general immigration requirements, such individual will enjoy rights of audience before the Tanzanian courts.<sup>39</sup>

*G. Statistics on judges and lawyers per capita*

According to the 2006 World Bank Report on Tanzania, in the Tanzanian court system there are about 100 judges, 45 registrars and 1,000 magistrates, 40 court administrators, and 5,000 court clerks and support staff.<sup>40</sup>

## **VI. FUNDING FOR LEGAL CLAIMS**

*A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

There is no express provision of legal aid for businesses or in arbitration. Tanzania has a network of legal aid providers (TANLAP), which works in the legal sector to strengthen the capacity of legal aid providers and ensure the improvement of legal aid provisions.<sup>41</sup> The Constitution of Tanzania in article 13(6) provides for legal representation in both civil and criminal cases and there is the Legal Aid (Criminal Proceedings) Act 1969.<sup>42</sup> In 2017 the

Legal Aid Act was passed, which discusses legal aid in relation to civil and criminal matters but not in relation to commercial dispute resolution.<sup>43</sup> The Interpretation Act defines a 'person' as meaning any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated.<sup>44</sup> Therefore a business might be able to get legal aid.

#### B. Third-party funding

The Supreme Court of Uganda in *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor*<sup>45</sup> referencing the Tanzanian case of *Mkono & Co Advocates v JW Land War 1977 Ltd*<sup>46</sup> states 'the doctrines [of maintenance and champerty] are still applicable in Tanzania under the reception clause notwithstanding the fact that even in the country of their origin they have undergone some changes'.<sup>47</sup>

It is therefore reasonable to assume that the doctrine of maintenance and champerty is still be applicable in Tanzania and third-party funding might therefore not be legally permissible.

#### C. Contingency fees

Contingency fee agreements are prohibited.<sup>48</sup>

#### D. Insurance for legal expenses

Insurance for legal costs may be available, although an uncommon practice.<sup>49</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 16 September 2019.
- 2 Karel Daele (2013), 'Tanzania', in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide*, Wolters Kluwer. See also, 'Chapter 9: Tanzania', in Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell, 153–68.
- 3 Edward Torgbor (2013), 'Part III: East Africa – Chapter 3: Arbitration in East Africa: An Overview,' in Bosman, *Arbitration in Africa: A Practitioner's Guide*.
- 4 Ibid.
- 5 Arbitration Act Cap. 15 of 2002, available <<https://www.wipo.int/edocs/lexdocs/laws/en/tz/tz022en.pdf>> accessed on 26 June 2019.
- 6 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17, 24. I.L.M. 1302
- 7 John Miles, Nicola Muriuki et al. (2017), 'The Development of International Arbitration in Africa', in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, Walters Kluwer, 904. Also see, Julius Cosmas (2015), 'The State of International Commercial Arbitration in Tanzania: A Comparative Critique and Call for Reform', *US-China L. Rev.*, Vol. 12, 513–29.
- 8 See Practical Law, 'Litigation and enforcement in Tanzania: overview', Aisha Ally and Dr Wilbert B Kapinga <[https://uk.practicallaw.thomsonreuters.com/0-546-3066?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/0-546-3066?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk)> accessed on 26 June 2019.
- 9 See Global Arbitration Review, 'Arbitration in 47 Jurisdictions 2009' <<https://www.mkono.com/pdf/Tanzania%2018.pdf>> accessed on 26 June 2019.

- 10 See Mkono & Co Advocates, 'Tanzania', Nimrod Mkono, Wilbert Kapinga and Karel Daele <[https://www.mkono.com/pdf/Arbitration\\_getting\\_the\\_deal\\_through\\_2007.pdf](https://www.mkono.com/pdf/Arbitration_getting_the_deal_through_2007.pdf)> accessed on 26 June 2019.
- 11 Ibid.
- 12 Ibid.
- 13 Arbitration Act Cap. 15 of 2002, available <<https://www.wipo.int/edocs/lexdocs/laws/en/tz/tz022en.pdf>> accessed on 26 June 2019.
- 14 Ibid.
- 15 See Simmons & Simmons (2014), 'Arbitral Dispute Resolution Legal Framework in Tanzania' <<http://www.elexica.com/en/legal-topics/dispute-resolution-commercial/22-arbitral-dispute-resolution-legal-framework-in-tanzania>> accessed on 26 June 2019.
- 16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention); 'Contracting States' <<http://www.newyorkconvention.org/list+of+contracting+states>> accessed on 26 June 2019 <http://www.newyorkconvention.org/list+of+contracting+states>
- 17 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1958) 330 UNTS 38 (New York Convention); New York Arbitration Convention, 'Contracting States'.
- 18 New York Arbitration Convention, 'Ratification – United Republic of Tanzania' <<http://www.newyorkconvention.org/implementing+act+-+united+republic+of+tanzania>> accessed on 26 June 2019.
- 19 See Gabagambi Liberatus Cosmas (2015), 'Critical Analysis on the Challenges Facing Legal and Institutional Frameworks on Recognition and Enforcement of Foreign Arbitral Awards in Tanzania', *J.L. Policy and Globalization*, Vol. 39, 165–77.
- 20 New York Arbitration Convention, 'Ratification – United Republic of Tanzania'.
- 21 See ICSID, 'Member States' <[icsid.worldbank.org](http://icsid.worldbank.org)> accessed on 26 June 2019.
- 22 UNCTAD Investment Policy Hub, 'Tanzania, United Republic of' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed on 3 October 2019.
- 23 *Tanzanian Electric Supply Co Ltd v (1) Dowans Holding SA (Costa Rica) and (2) Dowans Tanzania Ltd (Tanzania)*, Miscellaneous Civil Application No. 8 of 2011 before the High Court of Tanzania, Dar es Salaam, 28 September 2011.
- 24 'Chapter 9: Tanzania', in Miles, Fagbohunlu and Shah (2016), *An Introduction to Arbitration in Africa – a Review of Key Jurisdictions*, 153–68. This has been characterised as a welcome reform concerning judicial attitude in respect of international arbitration.
- 25 Arbitration Act Cap. 15 of 2002, available <<https://www.wipo.int/edocs/lexdocs/laws/en/tz/tz022en.pdf>> accessed on 26 June 2019.
- 26 *Tanzanian Electric Supply Co Ltd v (1) Dowans Holding SA (Costa Rica) and (2) Dowans Tanzania Ltd (Tanzania)*, Miscellaneous Civil Application No. 8 of 2011 before the High Court of Tanzania, Dar es Salaam, 28 September 2011.
- 27 Kariuki Muigua (2016), 'Arbitration Institutions in East Africa', in Emilia Onyema (ed.) *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, Wolters Kluwer.
- 28 See CGTN Africa (2018), 'Economists Question Tanzania's Withdrawal from International Arbitration' <<https://africa.cgtn.com/2018/09/14/economists-question-tanzanias-withdrawal-from-international-arbitration/>> accessed on 26 June 2019; Kluwer Arbitration Blog (2018), 'A Wind of Change! Tanzania's Attitude towards Foreign Investors and International Arbitration', Ibrahim Amir <<http://arbitrationblog.kluwerarbitration.com/2018/12/28/a-wind-of-change-tanzanias-attitude-towards-foreign-investors-and-international-arbitration/>> accessed on 26 June 2019; African Law & Business (2018), 'Keeping it local – Tanzania curtails investors' recourse to international arbitration', Kwandwo Sarkodie <<https://www.africanlawbusiness.com/>>

- news/8816-keeping-it-local-tanzania-curtails-investors-recourse-to-international-arbitration> accessed on 26 June 2019.
- 29 *The East African* (2018), 'Tanzania Ends Investment Treaty with Netherlands', Christopher Kidanka <<https://www.theeastafican.co.ke/business/Tanzania-ends-investment-treaty-with-Netherlands/2560-4794614-3ywb8l/index.html>> accessed on 26 June 2019.
- 30 The Public Private Partnership (Amendment) Act, 2018.
- 31 See CGTN Africa (2018), 'Economists Question Tanzania's Withdrawal from International Arbitration'; Kluwer Arbitration Blog (2018), 'A Wind of Change! Tanzania's Attitude towards Foreign Investors and International Arbitration'; African Law & Business (2018), 'Keeping it local – Tanzania curtails investors' recourse to international arbitration'.
- 32 Allen & Overy (2017), 'Briefing note: New laws create potential for arbitration claims against Tanzania' <<http://www.allenoverly.com/publications/en-gb/Pages/Briefing-note-New-laws-create-potential-for-arbitration-claims-against-Tanzania.aspx>> accessed on 26 June 2019.
- 33 See World Bank (2016), 'Project Appraisal Document on a Proposed Credit in the amount of SDR 47.1 Million (US\$65 Million Equivalent) to the United Republic of Tanzania for a Citizen-Centric Judicial Modernisation and Justice Service Delivery Project' <<http://documents.worldbank.org/curated/pt/675631467995078064/pdf/PAD1600-PAD-P155759-IDA-R2016-0048-1-Box394875B-OUO-9.pdf>> accessed on 26 June 2019.
- 34 Ibid.
- 35 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/tanzania#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/tanzania#DB_ec)> accessed on 27 July 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
- 36 World Bank (2019), Doing Business, 'Enforcing Contracts'.
- 37 Ibid.
- 38 Ibid.
- 39 The Citizen (2016), 'Foreign lawyers: Test for EA protocol' <https://www.thecitizen.co.tz/news/Foreign-lawyers--Test-for-EA-protocol/1840340-3045196-d518h8z/index.html>, accessed on 12 Sept 2019.
- 40 World Bank (2016), 'Project Appraisal Document on a Proposed Credit in the amount of SDR 47.1 Million'.
- 41 Tanzania Network of Legal Aid Providers, 'Tanzania Legal Aid Report 2017' <[http://internationallegalaidgroup.org/images/miscdocs/ILAG\\_2017\\_National\\_Report\\_-\\_Tanzania\\_-\\_Ms\\_Christina\\_Kamili.pdf](http://internationallegalaidgroup.org/images/miscdocs/ILAG_2017_National_Report_-_Tanzania_-_Ms_Christina_Kamili.pdf)> accessed 26 June 2019
- 42 Ibid.
- 43 Legal Aid Act, 2017 s 3 Interpretation and ss 27–36
- 44 The Interpretation of Laws Act, c. 1, s 2 (4). [https://www.tanzania.go.tz/egov\\_uploads/documents/INTERPRETATION%20OF%20LAWS%20ACT.pdf](https://www.tanzania.go.tz/egov_uploads/documents/INTERPRETATION%20OF%20LAWS%20ACT.pdf)
- 45 *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* Civil Appeal No.02 2013, UGSC [2014], available at <<https://ulii.org/node/15701>> accessed on 3 October 2019.
- 46 [2002] EA 145.
- 47 *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* Civil Appeal No.02 2013, UGSC [2014], available at <<https://ulii.org/node/15701>> accessed on 3 October 2019.
- 48 See Practical Law, 'Litigation and enforcement in Tanzania: overview'.
- 49 Ibid.

## VANUATU<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Vanuatu ('Vanuatu'), in the South Pacific, is an island nation within the British Commonwealth. As a former colony, it gained its independence in 1980.<sup>2</sup> As a result of its former joint administration by Britain and France, Vanuatu has a variety of sources of law: constitutional law, statutory law, English and French laws, joint regulations, and customary law.<sup>3</sup>

#### B. *Description of prior legislation and reasons for its replacement*

Vanuatu has no legislation dealing with arbitration of commercial disputes.<sup>4</sup>

### II. CURRENT ARBITRAL LEGISLATION

#### A. *Date of enactment*

This query is not applicable since there is no specific arbitration act.

#### B. *Scope of application to domestic and international arbitrations*

Any arbitration proceedings seated in Vanuatu are governed by the country's common law.<sup>5</sup>

#### C. *Details and/or relevant amendments and modifications*

Since the end of 2016, a task force created by the Asian Development Bank and the United Nations Commission on International Trade Law (UNCITRAL) has developed a project called 'Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific'. The task force promotes the ratification of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), and the adoption of an Arbitration Law modelled after the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Regional Centre for Asia and the Pacific has been working to create a favourable environment for dispute settlement and engages in coordinating activities with international and regional organisations to advance law reform projects in the South Pacific Region.<sup>6</sup>

#### D. *Relationship to the UNCITRAL Model Law*

As of today, Vanuatu has not adopted the UNCITRAL Model Law.<sup>7</sup> Since all arbitration proceedings seated in Vanuatu are governed by the country's common law, which includes provisions from English common law and French civil law, arbitration agreements are generally and not specifically enforceable.<sup>8</sup>

#### E. *Departure(s) (if any) from the UNCITRAL Model Law*

This query is not applicable to this jurisdiction.

#### F. *Powers and duties of arbitrators*

This query is not applicable to this jurisdiction.

#### G. *Arbitrator immunity*

Vanuatu law is silent on arbitrator immunity. It is unclear whether such immunity may otherwise exist.

### III. INTERNATIONAL INSTRUMENTS

#### A. Signatory to the New York Convention

Vanuatu is not a party to the New York Convention.

#### B. Reservations to the New York Convention

This query is not applicable to this jurisdiction.

#### C. Method of domestic implementation of the New York Convention

This query is not applicable to this jurisdiction.

#### D. Other international/regional treaties

Vanuatu has not concluded any other international or regional treaties intending to further arbitration. The state is neither a signatory nor contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention').<sup>9</sup>

Consultations, mediation, and arbitration are dispute resolution mechanisms used in regional and bilateral trade agreements that Vanuatu is a party of. For example, the Melanesian Spearhead Group is an intergovernmental organisation with its own preferential trade agreement. Disputes under the Melanesian Spearhead Group trade agreement have a tiered dispute resolution clause that includes consultations, mediation, and arbitration.

The Pacific Agreement on Closer Economic Relations Plus, signed in 2017 but not currently in force, contains a chapter on consultations and dispute settlements which Vanuatu is a part of.<sup>10</sup>

Vanuatu has signed two bilateral investment treaties, neither of which are in force (China and the United Kingdom).<sup>11</sup> Vanuatu has also signed five free trade agreements, four of which are in force (Pacific Island Countries Trade Agreement, Pacific ACP–EC Economic Partnership Agreement, Melanesian Spearhead, Group, and the South Pacific Regional Trade and Economic Cooperation Agreement).<sup>12</sup>

### IV. RELEVANT CASE LAW

#### A. Approach of the national courts to the enforcement of arbitration agreements

There are two important cases that the courts continue to cite regarding the position of Vanuatu on enforcement of arbitral agreements: *Dick v Property Ltd*<sup>13</sup> and *SPIE-EGC Ltd v FIFA*.<sup>14</sup> There appears to be vast case law and a pro-arbitration environment. The Supreme Court of Vanuatu uses case law from the English Court of Appeal to substantiate its rulings.<sup>15</sup>

#### B. Approach of the national courts to the public policy exception in setting aside and enforcing awards

Since Vanuatu has no arbitration legislation dealing with commercial or investment arbitration, case law was reviewed in order to determine if the Supreme Court of Vanuatu has identified a standard for refusing enforcement. There are no reported cases on this matter.

#### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention



The Supreme Court of Vanuatu appears to have a pro-arbitration approach that has been reflected in case law, especially in the cases of *Dick v Property Ltd*<sup>16</sup> and *SPIE-EGC Ltd v FIFA*.<sup>17</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

The available data indicates that there is no arbitral institution based in Vanuatu,<sup>18</sup> and the International Chamber of Commerce statistics show that in 2017 there were no parties from this jurisdiction.<sup>19</sup>

### B. Measures to strengthen institutional arbitration capabilities

Case law from the Supreme Court of Vanuatu shows that the courts have implemented a pro-arbitration environment. The government has also promoted investment agreements with countries of the region. However, no specific measures have been found on strengthening institutional arbitration in Vanuatu.

### C. Submission of disputes to arbitration vs. litigation

No information was available.

### D. Participation by foreign counsel in international arbitrations

According to section 21 of the Vanuatu Legal Profession Act 2005, foreign lawyers may appear in legal matters in Vanuatu; however, they need to be approved by the Admissions Committee for temporary admission in public interest according to article 21.<sup>20</sup>

### E. Relevant statistical data

#### 1. Sectors where arbitration is routinely used

No information was available.

#### 2. Time taken for enforcement/annulment proceedings

No information was available.

#### 3. Percentage of awards annulled/not enforced

No information was available.

### F. Statistics/information on the length of court proceedings in commercial cases

The 2019 World Bank Doing Business ranking indicates that it takes about 430 days to resolve a commercial dispute in a first-instance court in Vanuatu – 30 days for filing and service of court processes, 200 days for trial and judgment and 200 days for enforcement of judgment.<sup>21</sup> Vanuatu ranks above the East Asia and Pacific region, where it takes an average of 581.1 days to resolve commercial disputes in first-instance courts.<sup>22</sup> In terms of overall ease of enforcing contracts, St Lucia scored 49.27 of 100 and ranked 136 of 190.<sup>23</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

With regard to the efficiency of the legal system, it has been observed that in 2017 some disputes were still pending before Vanuatu's courts that were filed prior to 2001.<sup>24</sup>

### G. Statistics on judges and lawyers per capita

There appears to be no available information regarding the number of judges per capita.<sup>25</sup> In 2011, the practitioner to population ratio for Vanuatu was 1 private lawyer per 5,614 people while there were 37 government in-house lawyers.<sup>26</sup>

## VI. FUNDING FOR LEGAL CLAIMS

### A. Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)

Vanuatu does not appear to have an established legal aid regime and therefore has no provision for legal aid to businesses or in arbitration. There is very little information on legal aid in Vanuatu and there is no legislation on legal aid. The Public Solicitor is to provide legal assistance to needy persons but there is no mention of legal aid.<sup>27</sup> The University of the South Pacific is funding the Community Law Information Centre, and through it students assist clients who cannot afford private legal advice.<sup>28</sup> The 2011 South Pacific Lawyer's Association report nevertheless states that the Vanuatu Law Society seeks to provide legal aid services, though it does not yet do so.<sup>29</sup> As of today, it is unclear whether any relevant provisions have been adopted.

### B. Third-party funding

No jurisprudence or literature on the applicability of the rules of champerty and maintenance in Vanuatu could be located. The law of this jurisdiction is largely derived from the English common law. The crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967<sup>30</sup> but a champertous agreement may still be treated as contrary to public policy and unlawful. As this was the law applied at the time of independence it is likely still applicable in Vanuatu.

Although some jurisdictions in the region have abolished the prior English common law and have indicated an interest in facilitating a third-party funding market, this has yet to occur in Vanuatu.

### C. Contingency fees

No information was available.

### D. Insurance for legal expenses

No information was available.

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Commonwealth Network – Vanuatu, 'Welcome to Vanuatu / Vanuatu in the Commonwealth' <<http://www.commonwealthofnations.org/country/vanuatu/>> accessed 31 August 2019.
- 3 Don Paterson (1993), 'Vanuatu', in Michael A Ntummy (ed.), *South Pacific Islands Legal Systems*, University of Hawaii Press, 367–69.
- 4 Simon Greenberg, Polly Pope and Björn Gehle (2010), 'International Commercial Arbitration practice in Australia, New Zealand and the Pacific Islands', in Horacio A Grigera Naón and Paul E Mason (eds), *International Commercial Arbitration Practice:*

- 21st Century Perspectives*, LexisNexis, 15-12. See also fns. 53 and 66 indicating that arbitration is briefly mentioned in the 1983 Trade Disputes Act and in the Judicial Services and Courts (Amendment) Act 2008.
- 5 Greenberg, Pope and Gehle (2010), 'International Commercial Arbitration practice in Australia, New Zealand and the Pacific Islands', 15-14.
  - 6 United Nations Commission on International Trade Law, 'UNCITRAL Regional Centre for Asia and the Pacific' <[https://uncitral.un.org/en/TA/regionalcentre\\_asia\\_pacific](https://uncitral.un.org/en/TA/regionalcentre_asia_pacific)>, accessed 27 August 2019.
  - 7 Gary B Born (2018), 'Integration and Dispute Resolution in Small States', in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States*, Springer, 227.
  - 8 Ibid. Nevertheless, the 2019 World Bank Doing Business Report for Vanuatu indicates in the relevant part that the courts will usually enforce valid arbitration clauses or agreements. See World Bank Group (2019), 'Doing Business 2019: Training for Reform – Economy Profile: Vanuatu', 45–46 <<http://www.doingbusiness.org/content/dam/doingBusiness/country/v/vanuatu/VUT.pdf>> accessed 31 August 2019.
  - 9 ISCID, 'Database of ICSID Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 15 August 2019.
  - 10 Pacific Agreement on Closer Economic Relations Plus, 2017 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5586/download>> accessed 27 August 2019.
  - 11 UNCTAD Investment Policy Hub, 'Vanuatu' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
  - 12 Asian Regional Integration Center, 'FTAs: Vanuatu' <[aric.adb.org](http://aric.adb.org)> accessed 30 September 2019.
  - 13 [2013] VUSC 2.
  - 14 [2003] VUCA 11.
  - 15 *Dick v Property Ltd* [2013] VUSC 2, Civil Case 130 of 2012.
  - 16 [2013] VUSC 2.
  - 17 [2003] VUCA 11.
  - 18 C Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law*, United Nations, 293.
  - 19 ICC Dispute Resolution Bulletin 2018 (issue 2), 54.
  - 20 Republic of Vanuatu, Legal Profession Act No. 49 of 2005, article 21.
  - 21 World Bank (2019), Doing Business, 'Enforcing Contracts' <[https://www.doingbusiness.org/en/data/exploreeconomies/vanuatu#DB\\_ec](https://www.doingbusiness.org/en/data/exploreeconomies/vanuatu#DB_ec)> accessed 31 August 2019. The methodology used to obtain this information includes a study of the codes of civil procedure and other court regulations as well as questionnaires completed by local litigation lawyers and judges.
  - 22 Ibid.
  - 23 Ibid.
  - 24 Ballantine (2017), 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands'.
  - 25 The website of the Judiciary of Vanuatu provides for a list of the current Judges of the Supreme Court and of the Magistrates of the Magistrates Court. See Judiciary of the Republic of Vanuatu, 'Supreme Court Judges' <<https://courts.gov.vu/about-us/supreme-court/judges>> accessed 29 August 2019; and 'Magistrates' <<https://courts.gov.vu/about-us/magistrates-court/magistrates>> accessed 29 August 2019.
  - 26 South Pacific Lawyers Association (2011), 'Needs Evaluation Survey for South Pacific Lawyer Associations – Final Report', 5, 14. See also Commonwealth Network – Vanuatu,

- 'Find Legal Expertise in Vanuatu' <<http://www.commonwealthofnations.org/sectors-vanuatu/business/legal/>> accessed 29 August 2019; and Nilesh N Bilimoria (2017), 'Choices for the South Pacific Region's Bar Associations and Law Societies?', in Petra Butler and Caroline Morris (eds), *Small States in a Legal World*, Springer.
- 27 Government of Vanuatu, Ministry of Justice and Community Services, Public Solicitor's Office <https://mjcs.gov.vu/index.php/justice-sector/public-solicitors-office> accessed 16 September 2019.
- 28 University of the South Pacific, 'Overview of the Community Law Information Centre' <<https://www.usp.ac.fj/index.php?id=8402>> accessed 27 August 2019.
- 29 South Pacific Lawyers Association (2011), 'Needs Evaluation Survey for South Pacific Lawyer Associations – Final Report', 32.
- 30 Compare Criminal Law Act 1967 (UK), s 14(2): 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

## ZAMBIA<sup>1</sup>

### I. HISTORY OF ARBITRAL LEGISLATION

#### A. *Relationship with existing or prior English Arbitration Act(s)*

The Republic of Zambia ('Zambia'), formerly known as Northern Rhodesia, is a landlocked country located in South-Central Africa.<sup>2</sup> Zambia was historically administered by the British South African Company until 1924, when Zambia was transferred to the British Colonial Office and established as a protectorate.<sup>3</sup> Zambia eventually became independent in October 1964.<sup>4</sup>

As a former British colony, Zambian general law is based on English common law.<sup>5</sup> This forms part of the Zambian legal system also comprising statutory law and tribe-specific customary laws.<sup>6</sup> Arbitration in Zambia is primarily governed by the Arbitration Act No. 19 of 2000 (the 'Arbitration Act 2000') and the Arbitration (Court Proceedings) Rules 2001 (the 'Rules'). The Arbitration Act 2000 repealed the Arbitration Act of 1933. While the legal framework for arbitration in Zambia includes Zambian general law<sup>7</sup> and thus English common law, it is less clear whether the prior domestic legislation for arbitration in Zambia, the Arbitration Act of 1933, was impacted by, or borrowed from the United Kingdom's Arbitration Act(s).

However, the Arbitration Act 1889 of the UK applies to the Zambian Arbitration Act of 1933. Under section 22 of the Arbitration Act of 1933, if a contract provides that any arbitration under that contract will be governed by provisions of the Arbitration Act 1889 of the UK, then such contract will be read as if Part II of the Arbitration Act of 1933 (where the bulk of statute law on arbitration in Zambia can be found) were substituted for the English statute.<sup>8</sup> This is also consistent with the provisions under the English Law (Extent of Application) Act as amended by Act No. 6 of 2011, which sets out the extent to which English law is applicable to Zambia. Under this Act, it appears that any Arbitration Act(s) which were in force in England on 17 August 1911 would apply to the laws of Zambia, subject to the Zambian Constitution and to any other written law.<sup>9</sup>

#### B. *Description of prior legislation and reasons for its replacement*

The Arbitration Act of 1933 was repealed and replaced by the Arbitration Act 2000 to reflect the newly adopted United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ('UNCITRAL Model Law').<sup>10</sup> Some of the changes include the following:

- a. The repealed Arbitration Act of 1933 is silent on whether the disputing parties can designate and give powers to appoint an arbitrator to a body corporate or an individual. However, Article 11(2) of the First Schedule to the Arbitration Act 2000 (i.e. the UNCITRAL Model Law as adopted) confers onto parties the freedom to agree on a procedure of appointing the arbitrator or arbitrators;
- b. The repealed Arbitration Act of 1933 provided that the High Court had unfettered powers to intervene and supervise arbitration proceedings. This provision was removed in the Arbitration Act 2000, resulting in less intervention in arbitral proceedings by Zambian Courts;<sup>11</sup>
- c. Article 20(1) of the First Schedule to the Arbitration Act 2000 (i.e. the UNCITRAL Model Law as adopted) provides that an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on

the parties and on any persons claiming through or under them. This level of clarity far surpasses section 16(2) of the Arbitration Act of 1933, which provided that '[a]n award may be conditional or in the alternative'; and

- d. The rules for which an application to set aside an arbitral award may be made were also clarified in Article 34 of the First Schedule to the Arbitration Act 2000 (i.e. the UNCITRAL Model Law as adopted). Previously, these were only set out in section 15 Arbitration Act of 1933, which only provided for two specific instances for which an arbitral award may be set aside, the scope of which are unclear.<sup>12</sup>

The Arbitration Act 2000 also clarifies the position on the recognition and enforcement of arbitral awards by having regard to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>13</sup> (the 'New York Convention').<sup>14</sup> This replaces sections 27 and 28 of the Arbitration Act of 1933, which pertain to the effect of foreign awards and the conditions for the enforcement of such awards.

## II. CURRENT ARBITRAL LEGISLATION

### A. *Date of enactment*

Today, arbitration in Zambia is primarily governed by the Arbitration Act No. 19 of 2000 (the 'Arbitration Act 2000') and the Arbitration (Court Proceedings) Rules 2001. The Arbitration Act 2000 repealed the Arbitration Act of 1933.

### B. *Scope of application to domestic and international arbitrations*

While the Arbitration Act 2000 governs both domestic and international arbitration proceedings,<sup>15</sup> section 8 of the Act distinguishes the law applying to both.

Under section 8(1) of the Act, where domestic arbitration is concerned, the UNCITRAL Model Law applies, subject to the other provisions of the Arbitration Act 2000. In other words, the Act takes precedence over the UNCITRAL Model Law on all matters of domestic arbitration.

However, under section 8(2) of the Act, where international arbitration is concerned, articles 8, 9, 35, and 36 of the UNCITRAL Model Law must apply to the arbitration. These provisions relate to the arbitration agreement and substantive claims before the court, arbitration agreement and interim measures by the court, recognition and enforcement of arbitral awards, and grounds for refusing recognition or enforcement respectively.

### C. *Details and/or relevant amendments and modifications*

Since the Arbitration Act of 1933 predates the UNCITRAL Model Law, none of its provisions are based on it. Thus, the Arbitration Act 2000 repealed the Arbitration Act of 1933 to reflect Zambia's adoption of the UNCITRAL Model Law.

### D. *Relationship to the UNCITRAL Model Law*

The Arbitration Act 2000 is based on the UNCITRAL Model Law (without the 2006 amendments), adopted with modifications to certain articles.<sup>16</sup>

These modified articles are: articles 1 (scope of application), 2 (definition and rules of interpretation), 3 (receipt of written communications), 7 (definition and form of arbitration agreement), 8 (arbitration agreement and substantive claim

before court), 9 (arbitration agreement and interim measures by court), 11 (appointment of arbitrators), 15 (appointment of substitute arbitrator), 17 (power of arbitral tribunal to order interim measures), 25 (default of a party), 31 (form and contents of award and costs and expenses of arbitration), 34 (application for setting aside as exclusive recourse against arbitral award), 35 (recognition and enforcement) and 36 (grounds for refusing recognition or enforcement).<sup>17</sup>

Further, the Model Law (without the 2006 amendments) and its constituent documents provide interpretation guidelines for arbitral tribunals and courts in interpreting the Arbitration Act 2000.<sup>18</sup>

#### *E. Departure(s) (if any) from the UNCITRAL Model Law*

As mentioned above, articles 1, 2, 3, 7, 8, 9, 11, 15, 17, 25, 31, 34, 35, and 36 of the UNCITRAL Model Law are modified by certain provisions in the Arbitration Act 2000. These divergences are:

- a. Section 3 of the Arbitration Act 2000 defines the scope of the Act applying to every arbitration agreement and every arbitral award whether made before or after the commencement of the Act, while Article 1 (scope of application) of the UNCITRAL Model Law does not.
- b. Article 2 (definitions and rules of interpretation) of the UNCITRAL Model Law was expanded under section 2 of the Arbitration Act 2000 to include more definitions and greater details on the existing defined terms.
- c. While Article 3 (receipt of written communications) of the UNCITRAL Model Law is provided under the First Schedule of the Arbitration Act 2000 to have been modified by section 13 (appointment of substitute arbitrator) of the Arbitration Act 2000, both provisions pertain to entirely different matters and it is unclear what the modification is. However, it is noted that there is no corresponding section for receipt of written communications in the Arbitration Act 2000 at all.
- d. Article 7 (definition and form of arbitration agreement) of the UNCITRAL Model Law was modified under section 2(1) of the Arbitration Act 2000 to include all agreements 'whether in writing or not'. Section 9 of the Arbitration Act 2000 further provides guidance on what an agreement in writing is, and provides that an agreement otherwise than in writing by reference to terms which are in writing is to be treated as an agreement in writing.
- e. Article 8 (arbitration agreement and substantive claim before court) of the UNCITRAL Model Law only allows the court to refer the parties to arbitration if a party so requests not later than when submitting his first statement on the substance of the dispute. This was modified under section 10 of the Arbitration Act 2000 to allow the court to stay the court proceedings and refer the parties to arbitration if a party so requests at any stage of the proceedings and notwithstanding any written law.
- f. Section 11 of the Arbitration Act 2000 subjects the parties' ability to request from the court an interim measure under article 9 (arbitration agreement and interim measures by court) of the UNCITRAL Model Law to certain requirements, set out in sections 11(2)–(4).
- g. While article 11(1) (appointment of arbitrators) of the UNCITRAL Model Law only provides that a person shall not be precluded from acting as an arbitrator because of his nationality, section 12(1) of the Arbitration Act 2000 mentions 'nationality, gender, colour or creed'. Section 12(4) also

- omits the phrase 'or other authority specified in article 6' from article 11(4). Section 12(6) changes the phrase 'or other authority' from article 11(5) to 'or arbitral institution'.
- h. Section 13 of the Arbitration Act 2000 adds two additional sub-sections (2) and (3) to the original Article 15 (appointment of substitute arbitrator) of the UNCITRAL Model Law. Sub-section (2) pertains to the effect of replacing arbitrator(s) on the hearings, while sub-section (3) pertains to the validity of an order or ruling made prior to the replacement of an arbitrator.
  - i. Section 15 of the Arbitration Act 2000 modifies article 25 (default of a party) of the UNCITRAL Model Law by adding sub-section (d), which provides that the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim if the claimant fails to prosecute the claim within a reasonable time and cannot show sufficient cause, unless otherwise agreed by the parties.
  - j. Section 16 of the Arbitration Act 2000 modifies Article 31 (form and contents of award) of the UNCITRAL Model Law by adding sub-sections (5), (6) and (7). Sub-section (5) pertains to the costs and expenses of the arbitration, sub-section (6) pertains to any interest that the arbitral tribunal may award, and sub-section (7) pertains to the arbitral tribunal's power to make an interim, interlocutory or partial award.
  - k. Section 17 of the Arbitration Act 2000 modifies article 34 (application for setting aside as exclusive recourse against arbitral award) of the UNCITRAL Model Law by amending sub-section (2)(a)(iv) – Article 34(2)(a)(iv) provides that a ground to set aside the award is that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Model Law; section 17(2)(a)(iv) provides for a similar ground for setting aside, except that if there is no such agreement between the parties, the award may also be set aside on the grounds that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Arbitration Act 2000 or the law of the country where the arbitration took place.
  - l. Section 17 further adds a fifth ground for setting aside under sub-section (a)(v) – where the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. There is also an additional ground for setting aside under sub-section (b)(iii) – where the court finds that the making of the award was induced or effected by fraud, corruption or misrepresentation.
  - m. Article 35 (recognition and enforcement) of the UNCITRAL Model Law is reproduced in section 18 of the Arbitration Act 2000, save for the reference to the modified section 19 (discussed below) as opposed to article 36 of the Model Law.
  - n. Section 19(1)(b) of the Arbitration Act 2000 modifies article 36 (grounds for refusing recognition or enforcement) of the UNCITRAL Model Law by adding a ground for refusing recognition or enforcement of an arbitral award under sub-section (1)(b)(iii) – if the court finds that the making of the award was induced or effected by fraud, corruption or misrepresentation.



#### *F. Powers and duties of arbitrators*

The Arbitration Act 2000 governs the powers and duties that are imposed upon arbitrators, including but not limited to the following:

- a. Under Article 12(1) of the First Schedule to the Arbitration Act 2000 (i.e. UNCITRAL Model Law), a person who is approached for possible appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.
- b. Under article 14 of the Arbitration Act 2000, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute and the arbitral tribunal may require any party to provide appropriate security in connection with any such measure.
- c. Under section 16(1) of the First Schedule to the Arbitration Act 2000 (i.e. UNCITRAL Model Law), the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. When an objection as to jurisdiction is raised, article 16(3) of the First Schedule to the Arbitration Act 2000 (i.e. UNCITRAL Model Law) empowers the arbitral tribunal to either decide the matter as a preliminary issue or make an award on the merits.
- d. Under section 22 of the Arbitration Act 2000, a person who has acted as arbitrator in arbitral proceedings must not act as counsel for, or representative of, any of the parties in legal proceedings which were the subject of the arbitral proceedings. Such arbitrator also cannot be presented as a witness in legal proceedings which were the subject of the arbitral proceedings.

#### *G. Arbitrator immunity*

Section 28(1) of the Arbitration Act 2000 provides that '[a]n arbitrator, an arbitral or other institution or a person authorised by or under the Act to perform any function in connection with arbitral proceedings is not liable for anything done or omitted in good faith in the discharge or purported discharge of that function'. The Arbitration Act 2000 further provides at section 28(2) that witnesses in arbitral proceedings enjoy the same protection from liability as witnesses appearing before a court of law.

### **III. INTERNATIONAL INSTRUMENTS**

#### *A. Signatory to the New York Convention*

Zambia became a party to the New York Convention on 14 March 2002.<sup>19</sup>

#### *B. Reservations to the New York Convention*

Zambia has not made any reservations to the New York Convention.<sup>20</sup>

#### *C. Method of domestic implementation of the New York Convention*

Section 31 of the Arbitration Act 2000 provides that a 'New York Convention award shall be recognised as binding, in the manner provided for in this Act, on the persons in relation to whom it was made and shall be enforceable in accordance with Article 35 and 36 of the [UNCITRAL Model Law]'. The Arbitration Act 2000 reproduces the New York Convention in the Second Schedule to the Act.

#### D. Other international/regional treaties

Zambia is a member State of the International Centre for Settlement of Investment Disputes and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention') on 17 June 1970.<sup>21</sup> The Investment Disputes Convention Act No. 18 of 1970 gives effect to the ICSID Convention in Zambia. To date, there has been no ICSID case involving any Zambian parties.<sup>22</sup>

Zambia has entered into 14 bilateral investment treaties, of which six are in force (Mauritius, Italy, Netherlands, France, Switzerland, and Germany).<sup>23</sup> Zambia has also signed four free trade agreements, all of which are in force (Agreement Establishing the African Continental Free Trade Area (AfCTA),<sup>24</sup> the Southern African Development Community (SADCFTA),<sup>25</sup> COMESA–EAC–SADC Tripartite Free Trade Area,<sup>26</sup> and the Southern African Customs Union (SACU)<sup>27</sup>).

### IV. relevant case law

#### A. Approach of the national courts to the enforcement of arbitration agreements

The Arbitration Act 2000 makes the law clear on the court's ability to exercise its jurisdiction when legal proceedings are subject to an arbitration agreement. Deference towards the autonomy of the parties is set out in section 10 of the Arbitration Act 2000, which provides:

A court before which legal proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Rule 4 of the Arbitration Rules 2001 further provides the procedure for which a stay application under section 10 of the Arbitration Act 2000 may be made.

National courts have generally supported the arbitral process via a pro-enforcement approach in relation to arbitration agreements. The Supreme Court of Zambia held in *Zambia National Holdings Limited and another v The Attorney General*<sup>28</sup> that where parties have agreed on arbitration as the method of dispute resolution, the court's jurisdiction is ousted unless the agreement is null and void, inoperative or incapable of being performed. Such a ruling is consistent with section 10 of the Arbitration Act 2000. The court further reinforced parties' freedom to opt for arbitration over litigation in the event of a dispute, in *Leonard Ridge Safaris Limited v Zambia Wildlife Authority*.<sup>29</sup>

Nevertheless, the court has emphasised that such amenability to arbitration is notwithstanding the fact that the court retains a discretion not to stay the proceedings in favour of litigation, where the plaintiff demonstrates that the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>30</sup> The wording of the arbitration agreement must be closely studied.<sup>31</sup>

One such example would be in the case of *Flodac BV v Wangwa Roses Ltd*.<sup>32</sup> There was an application for a stay of court proceedings based on the following arbitration clause: 'The Agreement and this addendum shall be construed in all respects in accordance with the Laws of the Netherlands

and for this purpose the parties hereby submit themselves to the jurisdiction of the courts of the Netherlands and in particular to the Arbitration Act of the Netherlands.' The High Court of Zambia rejected the stay application on the basis that it 'is inoperative and incapable of being performed as it provides for the settlement of disputes between the parties by both litigation and arbitration at the same time ... which does not amount to an arbitration agreement at all'.

Another example is *Nyambe v Total Zambia Limited*,<sup>33</sup> involving an arbitration agreement with the phrase 'at any time during the continuance of this agreement'. The court allowed an appeal against the stay of proceedings on the ground that since the agreement had already been terminated by the respondent, it was no longer in continuance and thus the arbitration clause is inoperative and incapable of being performed.<sup>34</sup> Thus, the lower court had erroneously stayed the proceedings and referred the matter to arbitration.

Courts in Zambia are viewed as 'always be[ing] inclined to stay proceedings where there is a valid arbitration agreement between the parties'.<sup>35</sup> The basis for this appears to be the parties' freedom of contract. In *Yougo Limited v Pegasus Energy (Zambia) Limited*<sup>36</sup> the High Court of Zambia stated that '[b]y referring this matter to arbitration, the court will give effect to the intention of the parties as agreed in their contract and will enhance the principle of freedom of contract'. Such sentiments echo the position of English courts on the enforcement of arbitration agreements.<sup>37</sup>

2. Further, national courts have generally respected the decision-making of arbitral tribunals by recognising that the courts have a limited scope of review of arbitral awards. In *Savenda Management Service Limited v Stanbic Bank Zambia Limited*,<sup>38</sup> the court stated as follows:

[A]llowing the said application would amount to changing the decision of the Arbitrator with regard to the period within which the payment should have been made. In our view, Courts do not have jurisdiction to sit as appellate courts to review and alter arbitral decisions.<sup>39</sup>

Under section 18(1) of the Arbitration Act 2000, an arbitral award, irrespective of the country in which it was made, is recognised as binding, and shall be enforced upon application in writing to the competent court. The only exclusive recourse available to a dissatisfied party is to set aside the award on the grounds set out in section 17 of the Arbitration Act 2000, which must be applied for not later than three months from the date on which the applicant had received the award. The courts apply this time limit strictly.<sup>40</sup>

The courts are viewed as regularly recognising and enforcing arbitration awards.<sup>41</sup> In *Fratelli Locci Sri Estrazion Minerarie v Road Development Agency*,<sup>42</sup> the High Court for Zambia held that '[t]he integrity of the arbitral process must be preserved by not reviewing an award or part thereof unless on cogent grounds'.

National courts also complement the arbitration system in Zambia. For instance, the Arbitration (Court Proceedings) Rules contain extensive provisions for making applications in court<sup>43</sup> for matters relating to, inter alia, stay of proceedings, request for interim measures of protection, appointment of arbitrators, challenge of arbitrators or jurisdiction of arbitral tribunal, enforcement and setting aside of awards.

B. *Approach of the national courts to the public policy exception in setting aside and enforcing awards*

The standard for refusing enforcement of an arbitral award on the grounds of public policy in Zambia appears to be stringent and case-specific.<sup>44</sup>

3. In *Zambia Telecommunications Co Ltd v Celtel Zambia Ltd*,<sup>45</sup> the Supreme Court recognised that 'public policy' has not been defined in the Arbitration Act 2000.<sup>46</sup> Nevertheless, the Supreme Court held that it is public policy that a person ought to be tried by an impartial tribunal.<sup>47</sup> Thus, the court set aside an award on the grounds of public policy for the reason that the chairman of the arbitral tribunal did not disclose the fact that he had been appointed to another arbitral tribunal by one of the lawyers in an arbitration that he was chairing. As a result, this non-disclosure created a perception of possible, or likelihood of bias. This was also the decision reached in the 2019 case of *Tiger Limited v Engen Petroleum (Z) Limited*.<sup>48</sup>

The High Court for Zambia has noted in *Fratelli Locci Sri Estrazion Minerarie v Road Development Agency*<sup>49</sup> that the decisions in these abovementioned cases show that 'a very high standard of proof is set for a person applying to set aside an award on an allegation that it is contrary to public policy'. The court then subsequently held that there must be proof that the arbitral tribunal has done 'gross injustice' for an award to be set aside.<sup>50</sup>

#### C. Other key judicial decisions on the applicable arbitration legislation or the New York Convention

To date, there are no cases in Zambia that have interpreted the New York Convention. The only case that mentioned the New York Convention is *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*,<sup>51</sup> which merely mentioned the New York Convention in the context of it being consistent with the UNCITRAL Model Law.<sup>52</sup>

There are 24 cases in Zambia that involve the Arbitration Act 2000, but only a few pertain to decisions that involve an interpretation of the Act:

- a. In *Zambia Telecommunications Co Ltd v Celtel Zambia Ltd* and *Tiger Limited v Engen Petroleum (Z) Limited* (discussed above), the Supreme Court of Zambia recognised that 'public policy' as a ground for setting aside an arbitral award under section 17 of the Arbitration Act 2000 has not been defined. Both cases set aside the respective arbitral awards on the ground that there was a perception of possible, or likelihood of, bias caused by an arbitrator's non-disclosure of his conflicting interest.
- b. *Ndilila Associates v Supply Connections Limited*<sup>53</sup> involved a situation where the parties to the arbitration had agreed to appoint a sole arbitrator but could not agree on who to appoint, thus the appellant made a request for the Court of Appeal of Zambia to take the necessary measures. The court held that such a request was made prematurely because under section 12(3)(b) of the Arbitration Act 2000, the appellant ought to have first requested the Zambia Institute of Arbitrators to appoint an arbitrator.<sup>54</sup>
- c. *Cash Crusaders Franchising (Pty) Limited v Shakers and Movers Zambia Limited*<sup>55</sup> concerns an interpretation of section 17(3) of the Arbitration Act 2000. The appellant alleged that the Deputy Registrar of the lower court erred in law in wrongfully construing the meaning of section 17(3) by ordering an extension of three months in which the respondent would make an application to set aside the arbitral award notwithstanding the fact that time had expired and that the Arbitration Act 2000 did not confer such authority on the High Court. The High Court for Zambia agreed with the appellant – 'although there is the

use of the word "may" in [section 17(3)], the wording is such that it makes it explicitly clear that no application to set aside may be made after three months'.<sup>56</sup> The court held that section 17(3) prescribes a mandatory period of three months within which to apply to set aside an award.<sup>57</sup>

d. In *Mbazima v Tobacco Association of Zambia*,<sup>58</sup> the respondent submitted that in order for the court to exercise its jurisdiction to set aside the arbitral award under section 17(2)(b)(iii) of the Arbitration Act 2000 ('the making of the award was induced or effected by fraud, corruption or misrepresentation'), it is important to consider the meaning of the phrase 'the making of the award was induced or effected by fraud'.<sup>59</sup> The High Court for Zambia referred to the Supreme Court of Zambia case of *Sablehand Zambia Limited v Zambia Revenue Authority*<sup>60</sup> where the court held that<sup>61</sup>:

where fraud is an issue in the proceedings, then a party [*sic*] or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, that at the trial of the cause, the party alleging fraud must equally lead evidence, so that the allegations is [*sic*] clearly and distinctly proved.

e. Further, if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.<sup>62</sup> The applicant must also show that the evidence of fraud now relied upon was not such as could have been obtained or produced at the arbitration hearing with reasonable diligence and must show that the evidence in question is so material that its production would probably have affected the result.<sup>63</sup> On the facts, the High Court found that there was no fraud.

f. In *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*,<sup>64</sup> the Supreme Court of Zambia held that the Arbitration Act 2000 only contains enabling and incidental provisions while the substance of the Zambian arbitration law is to be found in the First Schedule. The court further held that 'in applying the Arbitration Act one must at all times look at the First Schedule, first, and only where a particular Article is not applicable, does one resort to the section in the Act that has modified the Article'.<sup>65</sup> On the facts at hand, this meant that the appellant's argument that articles 13 and 16 of the Model Law are subordinate to section 17 of the Arbitration Act 2000 is untenable.<sup>66</sup>

g. Further, in the same case, the Supreme Court of Zambia held that even though section 17 of the Arbitration Act 2000 does not make a distinction between a final award and interim or interlocutory award, the appellant ought to have sought recourse under article 16 of the Model Law (reflected under the First Schedule of the Arbitration Act 2000) rather than section 17 of the Arbitration Act 2000.<sup>67</sup> This is because article 16 provides for specific recourse against a decision on jurisdiction handed down as a preliminary question, which was the case on the facts. In effect, the two reliefs under section 17 and article 16 are separate and distinct without any interplay between the two.<sup>68</sup> Further, the former is not subordinate to the latter.<sup>69</sup>

h. In *Savenda Management Service Limited v Stanbic Bank Zambia Limited*,<sup>70</sup> one issue pertained to the interpretation of section 20(3) ('the award shall be deemed to be, and shall be enforceable in the same manner as, an order of the court') of the Arbitration Act 2000. The appellant argued that on a common sense interpretation of the section, the award, like an order of the High Court, could be stayed and a party could apply to pay the amount due

in instalments.<sup>71</sup> The Court disagreed and held that the section does not give the High Court jurisdiction to allow a party to arbitration to pay the sum decided in that arbitral award in instalments.<sup>72</sup> This is because section 20(1) of the Arbitration Act 2000 clearly provides that an award made by an arbitral tribunal is final and binding on the parties.<sup>73</sup> Section 20(3) does not give the court jurisdiction to alter the arbitral award in any way, but rather relates purely to procedural aspects of enforcement of an arbitral award.<sup>74</sup>

## V. ARBITRATION LANDSCAPE

### A. Institutional arbitration

The following are the national arbitral institutions in Zambia:<sup>75</sup>

- a. The Chartered Institute of Arbitrators – Zambia Branch (CI Arb Zambia) was founded in 2011. It is the only active entity in Zambia that trains arbitrators, regulates arbitration practice, and conducts arbitrations under its rules. The Institute is recognised in Zambia as an arbitral institution pursuant to section 23 of the Arbitration Act 2000.<sup>76</sup>
- b. The Zambia Centre for Dispute Resolution (ZCDR) was incorporated in 2001 as a private company limited by guarantee. ZCDR is also recognised in Zambia as an arbitral institution and used to conduct arbitration courses offered by the Institute in Zambia. It is not currently active.<sup>77</sup>
- c. The Zambia Association of Arbitrators (ZAA) was registered under the Societies Act No. 46 of 1958 and is also recognised in Zambia as an arbitral institution. It mainly provides a forum for interaction by its members, including mediators and arbitrators from various professional bodies.<sup>78</sup>

Overall, parties in Zambia rarely apply specific rules of procedure in arbitral proceedings and often rely on the provisions of the UNCITRAL Model Law (First Schedule to the Arbitration Act 2000).<sup>79</sup> Further, the Chartered Institute of Arbitrators (Zambia Branch) recently published its rules of procedure, principally derived from the Model Law. These rules are likely to be used by parties when the Branch is the appointing authority.<sup>80</sup>

### B. Measures to strengthen institutional arbitration capabilities

An important development is the recognition of CI Arb Zambia as an arbitral institution, as previously the ZAA was the only active arbitral institution in the country.<sup>81</sup> CI Arb Zambia has undertaken certain initiatives aimed at strengthening institutional arbitration in Zambia including organising arbitration conferences and training for arbitration users. A recent example of CI Arb Zambia initiatives is the launch of the CI Arb Zambia Young Members Group (YMG).<sup>82</sup> The YMG is a special interest group of CI Arb which was re-launched a few years ago to support the involvement of young people below the age of 40 years in the dispute resolution community.<sup>83</sup>

### C. Submission of disputes to arbitration vs. litigation

There is no statistical data available on the percentage of disputes in Zambia that are submitted to arbitration. However, there appears to have been an increase in the number of arbitration cases in Zambia over the years.<sup>84</sup>

### D. Participation by foreign counsel in international arbitrations

Under section 6 of the Legal Practitioners Act No. 22 of 1973, a person cannot practise law in Zambia unless he is duly qualified in accordance with the

provisions of sections 11 or 12 of the same Act. Section 11 sets out a long list of necessary professional and academic qualifications.

For lawyers from other jurisdictions, section 11(2) is instructive. This section provides that even if the person has not met the academic and professional requirements of sub-section (1), he may still be admitted as a practitioner in Zambia if he is a qualified lawyer (by whatever name called in the jurisdiction) and thereby has a right of audience before courts exercising original civil or criminal jurisdiction in a self-governing state, or was part of a member state, of the Commonwealth of Nations and which applies as its predominant basic system of law the common law or a legal system founded upon the common law. The remaining sub-sections of section 11(2) set out the remaining requirements for such a person to be qualified to practise law in Zambia.<sup>85</sup> In other words, it is not impossible for a lawyer from another jurisdiction to appear in legal matters in Zambia.

It is not clear from the Legal Practitioners Act whether these restrictions similarly apply to arbitration proceedings in Zambia. Although section 3 of the Act provides for certain officers that are exempt from provisions of the Act, there is no mention of arbitration whatsoever.

#### *E. Relevant statistical data*

##### 1. Sectors where arbitration is routinely used

No information was available.

##### 2. Time taken for enforcement/annulment proceedings

No information was available.

##### 3. Percentage of awards annulled/not enforced

No information available. However, as noted above, Zambian courts appear to be more amenable towards enforcing arbitral awards.

#### *F. Statistics/information on the length of court proceedings in commercial cases*

The 2019 World Bank Doing Business ranking indicates that it takes about 611 days to resolve a commercial dispute in a first-instance court Zambia – 21 days for filing and service of court processes, 470 days for trial and judgment and 120 days for enforcement of judgment.<sup>86</sup> Zambia ranks above the sub-Saharan Africa region, where it takes an average of 655.1 days to resolve commercial disputes in first-instance courts.<sup>87</sup> In terms of overall ease of enforcing contracts, Zambia scored 50.82 of 100 and ranked 130 of 190.<sup>88</sup> The enforcing contracts score captures the time and costs for resolving commercial disputes through a local first-instance court and the quality of judicial processes of such court.

#### *G. Statistics on judges and lawyers per capita*

There is minimal available data on the number of lawyers in Zambia per capita. As of 2018, there were 1,080 qualified lawyers in Zambia.<sup>89</sup> This number was expected to rise exponentially from 2018 to 2019 with over 300 new lawyers being qualified in April 2018.<sup>90</sup> The official total population in Zambia is unknown, but it appears that the United Nations Development Programme has estimated the population in Zambia to be 13,474,959 as of 2019.<sup>91</sup>

As of 2016, there were 74 judges in the Superior Courts of Zambia, comprising the Supreme Court (13 judges), the Constitutional Court (7 judges), the Court

of Appeal (12 judges) and the High Court (42 judges).<sup>92</sup> Under the Superior Courts (Number of Judges) Act No. 9 of 2016, there must be 13 judges of the Supreme Court including the Chief Justice and Deputy Chief Justice,<sup>93</sup> 13 judges of the Constitutional Court including the President and the Deputy President,<sup>94</sup> 19 judges of the Court of Appeal including the Judge President and the Deputy Judge President,<sup>95</sup> and 60 judges of the High Court.<sup>96</sup> It is unclear whether these numbers had been met as of 2019.

Under section 120 of the Constitution of Zambia No. 2 of 2016, the judiciary comprises the superior courts, subordinate courts, small claims courts, local courts, and courts as prescribed. The subordinate courts are presided over by magistrates, while the small claims courts are presided over by commissioners. According to a public lecture by Honourable Chief Justice Annel M Silungwe on 22 November 1979, there are about 415 local courts, presided over by eight senior presiding justices, 407 presiding justices, assisted by 428 ordinary justices.<sup>97</sup> There are about 42 subordinate courts, presided over by 7 senior resident magistrates, 12 resident magistrates, 22 Class I magistrates, 30 Class II magistrates, and 25 Class III magistrates.<sup>98</sup> There is no available data on the number of such justices, magistrates, and commissioners in 2019.

## VI. funding for legal claims

### A. *Legal aid regimes for commercial dispute resolution (e.g. litigation, arbitration, mediation)*

Legal aid seems to be available for arbitration in Zambia. There is no indication as to whether legal aid is available to businesses, though it may be. Legal aid is governed by the Legal Aid Act No. 34 of 1972. The Act provides for the granting of legal aid (as defined in section 3 of the Act) in civil and criminal matters to persons whose means are inadequate to engage practitioners to represent them.<sup>99</sup> The Interpretation Act defines a 'person' as including any company or association or body or persons, corporate or unincorporate.<sup>100</sup> Therefore a business may be able to get legal aid. There are several legal aid regulations following the Legal Aid Act that set out how the application is to be made, ascertainment of means and the grant of legal aid.

Under section 21 of the Act, where all the parties to a proceeding or contemplated proceeding apply for legal aid and the Director of Legal Aid considers that the dispute is of a nature which could properly be the subject of arbitration, the Director may, as a condition of the granting of legal aid, require the parties to submit the dispute to arbitration.<sup>101</sup>

The Zambian Ministry of Justice recently held consultations on the challenges of providing legal aid to the people of Zambia effectively and efficiently and produced the comprehensive National Legal Aid Policy in October 2018.<sup>102</sup> Prior to the enactment of this policy, legal aid services were provided by both the state and non-state actors. The policy aims to provide a coordinated institutional framework for efficient and effective access to justice. The policy highlights the problems in the current situation, establishes a set of guiding principles to abide by, sets out policy objectives and measures to achieve these objectives, and finally lays down an implementation framework.

Although the Legal Aid Act lacks clarity on whether alternative methods of dispute resolution such as arbitration and mediation can obtain legal aid, the National Legal Aid Policy expressly clarifies that '[l]egal aid under the Legal Aid



Act can include not only all assistance given preliminary or incidental to actual proceedings, but also assistance given out of court to avoid proceedings by arriving at a compromise or giving effect to any such compromise'.<sup>103</sup> The definition of 'legal assistance' in the National Legal Aid Policy also makes this abundantly clear.<sup>104</sup>

#### B. *Third-party funding*

It is unclear whether the rule of maintenance and champerty applies in Zambia to restrict the third-party funding of claims. No jurisprudence or literature appears to be available on the current applicability of the doctrines of champerty and maintenance in Zambia or the availability of third-party funding in Zambia. Zambia's legal system is based on English common law, and the crimes and torts of maintenance and champerty applied in the United Kingdom at the time of Zambia's independence in 1962. However, since Zambian courts largely consider English authorities to be highly persuasive, the Zambian courts are likely to consider English authorities in examining the doctrine of maintenance and champerty.<sup>105</sup> Hence, the inference can be drawn that the rules of maintenance and champerty only constitute a public policy ground to hold a contract illegal in limited circumstances.<sup>106</sup>

#### C. *Contingency fees*

Contingency fees are prohibited under Rules 8 and 9 of the Legal Practitioners' Practice Rules 2002,<sup>107</sup> which provides:

9. (1) Subject to sub-rule (2) a practitioner shall not, in respect of any claim arising from death or personal injury, either enter into an arrangement for the introduction of clients with or act in association with any person, not being a practitioner whose business is to make, support or prosecute, whether by action or otherwise, and whether by a practitioner or agent or otherwise, any claim arising from death or personal injury and who in the course of such business solicits or receives contingency fees in respect of such a claim.

(2) Sub-rule (1) shall not apply to an arrangement or association with a person who solicits or receives contingency fees only in respect of proceedings in a country outside Zambia, to the extent that a local lawyer in that country would be permitted to receive a contingency fee in respect of such proceedings.

#### D. *Insurance for legal expenses*

Legal expenses insurance (also known as legal protection insurance) is not provided for under the Insurance Act No. 10 of 1968. However, it appears that such insurance is available in Zambia from some local insurance companies, such as Meanwood General Insurance<sup>108</sup> and NICO Insurance.<sup>109</sup>

## Notes

- 1 This country report provides a broad overview of the arbitral landscape in the jurisdiction. It is not designed or intended to provide a comprehensive analysis of the development and current state of law and may therefore not reflect nuances in the arbitral regime. The report has been updated as of 30 September 2019.
- 2 Miles, J, Fagbohunlu, T and Shah, K (2016), *An Introduction to Arbitration in Africa – A Review of Key Jurisdictions*, Sweet & Maxwell, 231.
- 3 *Ibid.*

- 4 Ibid.
- 5 Ibid., 232.
- 6 Africa Legal Network (2015), *Investment Guide – Zambia*, 6 (Note, however, that although the Zambian customary law is based on the norms and cultures of the various tribes in Zambia, such law may be set aside if the customs contradict the written law or offend English principles of justice, good conscience and equity).
- 7 Kenneth Kaoma Mwenda (2004), 'Arbitration Law in Zambia, The Efficacy of the Legal Framework', *The East African Law Journal* (The legal framework for arbitration in Zambia mainly includes public policy, creative problem-solving, legislation, the common law, doctrines of equity, African customary law, and principles of public international law).
- 8 Mwenda (2014), 'Arbitration Law in Zambia, The Efficacy of the Legal Framework'.
- 9 English Law (Extent of Application) Act as amended by Act No. 6 of 2011, section 2.
- 10 United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration 1985, UN Doc A/40/17, 24 I.L.M 1302.
- 11 Miles, Fagbohunlu and Shah (2016), *Arbitration in Africa: A Review of Key Jurisdictions*, 233.
- 12 Arbitration Act of 1933, section 15 provides: 'Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.'
- 13 United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 330 UNTS 38.
- 14 Arbitration Act 2000, section 31.
- 15 International Comparative Legal Guides (2018), *Zambia: International Arbitration 2018*, 2.2; See also Arbitration Act 2000, Preamble ('An Act to repeal and replace the Arbitration Act with provisions for domestic and international arbitration...').
- 16 Arbitration Act 2000, section 8; See also UNCITRAL (2019), 'Status' <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 10 June 2019.
- 17 See Arbitration Act 2000, First Schedule; UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' (United Nations, 2019) <[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status)> accessed 6 June 2019.
- 18 Arbitration Act 2000, s 2(3).
- 19 New York Arbitration Convention, 'Contracting States' <<http://www.newyorkconvention.org/countries>> accessed 6 June 2019.
- 20 Ibid.
- 21 ICSID, 'Member States' <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>> accessed 7 June 2019.
- 22 ICSID (2019), 'Cases, Advanced Search' <<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>> accessed 10 June 2019.
- 23 UNCTAD Investment Policy Hub, 'Zambia' <[investmentpolicy.unctad.org](http://investmentpolicy.unctad.org)> accessed 30 September 2019.
- 24 'Agreement Establishing the African Continental Free Trade Area' <<https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html>> accessed 30 September 2019.
- 25 Southern African Development Community <<https://www.sadc.int>> accessed 30 September 2019.
- 26 Tralac, 'SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents' <<https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>> accessed 30 September 2019.
- 27 EFTA, 'Southern African Customs Union' <<https://www.efta.int/free-trade/free-trade-agreements/sacu>> accessed 30 September 2019.

- 28 *Zambia National Holdings Limited and another v The Attorney General* (1993/1994) Z.R. 115.
- 29 *Leonard Ridge Safaris Limited v Zambia Wildlife Authority* unreported (2008) Z.R. 97.
- 30 *Konkola Copper Mines Plc v NFC Africa Mining Plc – Appeal No 118/2006*.
- 31 *Audrey Nyambe v Total Zambia Limited Appeal No 29/2011*, at J9.
- 32 *Flodac BV v Wangwa Roses Ltd* unreported 2009/HPC/137 (cited in Miles, Fagbohunlu and Shah (2016), *Arbitration in Africa: A Review of Key Jurisdictions*, 235–236).
- 33 *Nyambe v Total Zambia Limited* (SCZ Judgment No. 1/2015) [2015] ZMSC 2 (12 January 2015).
- 34 *Nyambe v Total Zambia Limited* (SCZ Judgment No. 1/2015) [2015] ZMSC 2 at J9–J12.
- 35 Miles, Fagbohunlu and Shah (2016), *Arbitration in Africa: A Review of Key Jurisdictions*, 236.
- 36 *Yougo Limited v Pegasus Energy (Zambia) Limited* (2008/HPC/0299) [2011] ZMHC 11 (5 September 2011).
- 37 *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd’s Rep 265 (‘Only in the simplest and clearest cases i.e. where it is readily and demonstrable that the respondent has no ground at all for disputing the claim, should the party be deprived of his contractual right to arbitrate.’).
- 38 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017), at J24.
- 39 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017), at J24.
- 40 Miles, Fagbohunlu and Shah (2016), *Arbitration in Africa: A Review of Key Jurisdictions*, 243; Paolo Marandola, Candy Marandola and Ivan Marandola v Gianpietro Milanese, Guiseppe Della Bianca, Susy Della Bianca Cragno, Vincenzo Milanese and Alberto Milanese (Appeal No. 130/2008) [2014] ZMSC 140 (29 January 2014), at 146–147; *Cash Crusaders Franchising (PTY) Limited v Shakers and Movers Zambia Limited* (2008/HP/ARB/NO.001) [2012] ZMHC 40 (8 July 2012), J8–J9.
- 41 International Comparative Legal Guides, *Zambia: International Arbitration 2018*, 11.3 (25 July 2018).
- 42 *Fratelli Locci Sri Estrazion Minerarie v Road Development Agency* (2016/HPC/ARB/0493) [2017] ZMHC (30 June 2017), at J23.
- 43 Under section 3 of the Rules, ‘court’ refers to the High Court, the Industrial Relations Court, the Lands Tribunal and all subordinate courts.
- 44 International Comparative Legal Guides, *Zambia: International Arbitration 2018*, 11.5 (25 July 2018).
- 45 *Zambia Telecommunications Co Ltd v Celtel Zambia Ltd SCZ No. 34 of 2008*.
- 46 *Zambia Telecommunications Co Ltd v Celtel Zambia Ltd SCZ No. 34 of 2008*, at 782.
- 47 *Zambia Telecommunications Co Ltd v Celtel Zambia Ltd SCZ No. 34 of 2008*, at 782.
- 48 *Tiger Limited v Engen Petroleum (Z) Limited* (Appeal No. 63/2013) [2019] ZMSC 22 (20 March 2019).
- 49 *Fratelli Locci Sri Estrazion Minerarie v Road Development Agency* (2016/HPC/ARB/0493) [2017] ZMHC (30 June 2017), at J23.
- 50 *Fratelli Locci Sri Estrazion Minerarie v Road Development Agency* (2016/HPC/ARB/0493) [2017] ZMHC (30 June 2017), at J23.
- 51 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited* (Appeal No. 199/2016) [2017] ZMSC 18 (10 March 2017).
- 52 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited* (Appeal No. 199/2016) [2017] ZMSC 18 (10 March 2017), 258.
- 53 *Ndilila Associates v Supply Connections Limited* (Appeal No. 22/2016) [2017] ZMCA 13 (30 June 2017).
- 54 *Ndilila Associates v Supply Connections Limited* (Appeal No. 22/2016) [2017] ZMCA 13 (30 June 2017), at J14.

- 55 *Cash Crusaders Franchising (PTY) Limited v Shakers and Movers Zambia Limited* (2008/HP/ARB/NO.001) [2012] ZMHC 40 (8 July 2012).
- 56 *Cash Crusaders Franchising (PTY) Limited v Shakers and Movers Zambia Limited* (2008/HP/ARB/NO.001) [2012] ZMHC 40 (8 July 2012) at J8-J9.
- 57 *Cash Crusaders Franchising (PTY) Limited v Shakers and Movers Zambia Limited* (2008/HP/ARB/NO.001) [2012] ZMHC 40 (8 July 2012) at J8-J9.
- 58 *Mbazima v Tobacco Association of Zambia* (2015/HP/ARB/009) [2018] ZMHC 12 (9 February 2018).
- 59 *Mbazima v Tobacco Association of Zambia* (2015/HP/ARB/009) [2018] ZMHC 12 (9 February 2018).
- 60 *Sablehand Zambia Limited v Zambia Revenue Authority* (2005) Z.R. 109 (S.C).
- 61 *Mbazima v Tobacco Association of Zambia* (2015/HP/ARB/009) [2018] ZMHC 12 (9 February 2018), at J24.
- 62 *Mbazima v Tobacco Association of Zambia* (2015/HP/ARB/009) [2018] ZMHC 12 (9 February 2018), at J24.
- 63 *Mbazima v Tobacco Association of Zambia* (2015/HP/ARB/009) [2018] ZMHC 12 (9 February 2018), at J25.
- 64 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited* (Appeal No. 199/2016) [2017] ZMSC 18 (10 March 2017).
- 65 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*, at 259-260.
- 66 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*, at 259-260.
- 67 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*, at 265.
- 68 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*, at 265.
- 69 *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited*, at 265.
- 70 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017).
- 71 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017) at 1409.
- 72 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017) at 1414.
- 73 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017) at 1414.
- 74 *Savenda Management Service Limited v Stanbic Bank Zambia Limited* (Appeal No. 002/2015) [2017] ZMSC 79 (2 September 2017), at 1416.
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