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Final Report on

Recognition and Enforcement of Arbitral Award in the Territory of the Kingdom of Cambodia

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ABSTRACT

The role of arbitration in settling the disputes which involves national and transnational commercial transactions is steadily increasing in this era of globalization. International and national rules governing various aspects of commercial arbitration have contributed to the effectiveness of arbitration as an alternative to litigation.

The involvement of national courts is crucial to the overall efficacy of arbitration, both domestic and international. Instances calling for court intervention may appear at all stages of the arbitral proceedings. There is, however, a need to maintain a balance between the level of court involvement and the smooth functioning of arbitration – which is a contractual alternative to judicial dispute settlement.

This study deals with the challenges of the recognition and enforcement the arbitral awards in the territory of the kingdom of Cambodia with three criteria i.e., the legal framework, institutional and the qualification of the mechanism. Notably, this paper will give the detail of the theoretical of the international instruments and the institutional of the arbitrations.

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LIST OF ABBREVIATIONS

AA	:	Arbitration Act of Singapore
ADR	:	Alternative Dispute Resolution
CCP	:	Code of Civil Procedure of Cambodia
EU	:	European Union
IAA	:	International Arbitration Act of Singapore
ICC	:	International Chamber of Commerce
ICSID	:	International Center for the Settlement of Investment Disputes
LCA	:	Law on Commercial Arbitration of Cambodia
NAC	:	National Arbitration Centre
NCAC	:	National Commercial Arbitration Centre
NYC	:	New York Convention 1958
PCA	:	Permanent Court of Arbitration
RGC	:	Royal Government of Cambodia
ROS	:	The Republic of Singapore
SIAC	:	Singapore International Arbitration Centre
SIArb	:	Singapore Institute of Arbitrators
UNCITRAL	:	United Nations Conventions on International Trade Law
WTO	:	World Trade Organization

INTRODUCTION

Background

Over the last many decades the international trade has increased on the volume of transactions and parts involved in it. This is how year after year, with some exceptions, the number of international commercial transactions have grown. In direct relation with this, the actors involved in international trade have multiplied, not only natural and legal persons and states participate in international trade, now also participate Non-Governmental Organizations or International Organizations among others.

In consideration of the above the number and complexity of the disputes between the different actors is higher and have become more complex and need to be solved quickly. In this view the International Commercial Arbitration play an important way to settle the disputes between traders or investors.

The parties to the conflict choose arbitration because it is a quicker way than the national courts to solve the disputes, also because the arbitration is objective and gives more confidence to the parts involved on the justice of the decision to be reached, and because the arbitrators are experts in the matters to be addressed.

Arbitration is one of the most effective Alternative Dispute Resolution ("ADR") approaches to resolving disputes outside the courts. Arbitration is often considered for the resolution of disputes, most commonly used in relation to international commercial transactions. The use of this approach is preferred due to their affordability, speed, privacy, and neutrality.

Statement of problems

After the conflict been settle, the winning party has to request the domestic court of the losing party to recognize and enforce the arbitral awards in their territory. The request for

recognition and enforcement is the legal mechanism that help winning party has a legal right to request the national court of the losing party to recognize and enforce of any arbitral awards or foreign court judgements in their territory. But the arbitration also needs to be reliable. What does this mean? Does it mean that when an award in an arbitration proceeding is reached, it is necessary that the award can be recognized and enforced successfully in other countries than the seat country of the arbitration.

Of course, in Cambodia, the commercial arbitration has been emerged quite long after the country was joined the free market principle based on liberal democracy rules influenced by international community. The implementation of the commercial arbitration in Cambodia has been of course influenced after Cambodia joined World Trade Organization (WTO). However, the institution seems new and other concept of the arbitration is new as well, which made the enforcement of the commercial award in Cambodia seems not working well yet. So far only a couple commercial arbitration cases has been ruled in the National Commercial Arbitration Center and other international commercial arbitration awards has been enforced in Cambodia. But it seems they are not really enforced properly. There are many issues which need to be reconsidered seriously by the Cambodia government for improving the condition of the commercial award arbitration enforcement and recognition.

Research objective

Since all states have the differences of the legal and judicial systems and the decisions depend on the states sovereignty, the recognizing and enforcing the arbitral awards will face some of the challenges or would be refusal by the domestic court of the losing party. The recognizing and enforcing the arbitral awards in Cambodia has many challenges. These key challenges involving the legal framework, institutional and the qualification of the mechanism.

To answer these challenges, this paper will find out the room for improvement of the issues on recognition and enforcement of the commercial arbitration award in Cambodia. This paper takes the position that lesson learned of the concept theories as well as the experiences of other countries that contributes to develop as well as reform the process in Cambodia of the recognize and enforce the arbitral awards in the territory of Cambodia and the mechanism and institutions in Cambodia.

Research question

To deal with the objectives mentioned above, the main research question is how the commercial arbitration award recognizes and enforces in Cambodia? To answer this research question, this paper aims to provide the sub research question as follows:

1) what is the concept of commercial arbitration and how does it work (commercial arbitration rules) and how the arbitral award enforces?
2) how the commercial arbitration work in Singapore (institution, arbitration rules and enforcement of the award), and
3) how commercial arbitration work in Cambodia (historical background, institution, arbitration rules, enforcement of award)?

Scope and limitation of the research

To answer the research questions above, this paper outlines the international conceptual theories and its effective institutional and mechanism as the basis comparative analysis between Singapore and Cambodia jurisdiction of implementation. This analysis will be used to bring out the lessons for improving the system in Cambodia. This research will focus on the jurisdiction of Singapore with respect of three main criteria, which include institution, legal framework and their mechanisms. The Main focusing of the paper will only highlight three main area of legal

framework, institutional framework and other related mechanisms for seeking the issues for improvement on recognition and enforcement of commercial arbitration award in Cambodia.

Since the time is constraint, the author will have a limited time to conduct mostly the desk study therefore this paper will not be fully research based. it only highlights the most main challenges for improvement. It will have limitation which it needs to conduct further research in the future.

Research methodology

In this order of ideas is necessary to analyze if Cambodia is a reliable country to get the recognition and enforcement of foreign arbitral awards. Because it is very important that traders have confidence if they have a favorable award, that they can get recognition and enforcement of it in Cambodia by the application, of the New York Convention of 1958 about Recognition and Enforcement of Foreign Arbitral Awards and the Code of Civil Procedure of Cambodia as well as the laws or regulations that governing the arbitration process in Cambodia.

The main research methodology for answering this research question is to use the comparative study analysis with combination of the international relations and legal analysis. The paper will conduct mostly the desk study by collecting relevant primary and secondary sources in the area of commercial arbitration and some small peer to peer discussion with relevant person in the commercial arbitration area as well as other senior officials in the Ministry of Justice and some law firm in Cambodia for better references in this area.

Literature review

This paper generally based on the secondary sources, such as relevant laws and regulations and conducting system of Singapore and Cambodia. This research also draws the information and experiences as well as the best practice of the mentioned countries.

Structure of research

This paper consists of three chapters, excluding the introduction, which will describe on the background and problem statement, purpose of the study, research questions and methodology and structure of the study. The first chapter presents the concept of the commercial arbitration, the definitions, how does it work and enforcement procedure. The second chapter will look the opportunities and experiences of commercial arbitration in Singapore in respective to three criteria of arbitration rules, institution and the mechanisms. The third chapter will focus on the current situation of the implementation of the Royal Government of the Kingdom of Cambodia jurisdiction mechanism, including the challenges it faces based on the three criteria. The final chapter consists of conclusions and recommendations.

CHAPTER 1: THE CONCEPT OF COMMERCIAL ARBITRATION

1.1. Overview

International arbitration provides an efficient and effective means of resolving international disputes – including international commercial, investment and state-to-state disputes.

Commercial arbitration can be international or domestic institution, which is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allows the parties to avoid in internal courts. This is a mean of settling the disputes by referring to the third parties, arbitrators, that chose by the parties for making a decision based on the evidence and arguments presented to the arbitration panel. The final decision of the arbitration panel will be binding due to the agreement between parties before the disputes arise.

1.1.1. The History of International Arbitration

Controversies between sovereign states that are not settled by diplomatic negotiation or conciliation are often referred, by agreement of both parties, to the decision of a third disinterested party, who arbitrates the dispute with binding force upon the disputant parties. Such arbitration between states has a long history; it was used between city-states in ancient Greece[1] and also in the Middle Ages, when the pope often acted as the sole arbitrator.[2]

The modern development of international arbitration can be traced to the Jay Treaty (1794) between Great Britain and the United States, which established three arbitral commissions to settle questions and claims arising out of the American Revolution.[3] Most significant was the Alabama claims arbitration under the Treaty of Washington (1871), by

[1] J. Ralston, "International Arbitration from Athens to Locarno, P. 153, 1929.
[2] Fraser, "A Sketch of the History of International Arbitration", 11 Cornell L.Q. 179, P. 190-191, 1925-1926.
[3] Art 5, 6 & 7 of the Jay Treaty 1794.

which the United States and Great Britain agreed to settle claims arising from the failure of Great Britain to maintain its neutrality during the American Civil War.[4]

Commissions consisting of members drawn from both disputant countries often were used in the 19th century to settle pecuniary claims for the compensation of injuries to aliens for which justice could not be obtained in foreign courts. Such was the purpose of a convention in 1868 between the United States and Mexico, by which claims of citizens of each country arising from the Civil War were settled. Boundary disputes between states were also often settled by arbitration.[5]

International arbitration was given a more permanent basis by the Hague Conference of 1899, which adopted the Hague Convention on the pacific settlement of international disputes, which included chapters on International Arbitration[6] and revised by a conference in 1907. A Permanent Court of Arbitration, composed of a panel of jurists appointed by the member governments, from which the litigant governments select the arbitrators, was established at The Hague in 1899.[7]

1.1.2. The Definition of Arbitration

In general, arbitration was known as one of the other ADR approaches, which is settle the disputes out of the court or before the court jurisdiction. But, there is no clear defined the definition of the word arbitration. According to the Article II (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention 1958, stated that "Each Contracting State shall recognize and enforce an agreement in writing under which the parties undertake to submit to arbitration…", the term of national

[4] Art 1 of the Treaty of Washington 1871.
[5] Woolsey, "Boundary Disputes in Latin-America", 25 Am. J. Int'l L., P. 324-325, 1931.
[6] Art 15 – 29 of the Convention for the Pacific Settlement of International Disputes (First Hague Conference), 1899.
[7] Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference, 94 Am. J. Int'l L. 4, P. 16-17, 2000.

laws and the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law) defined as being unnecessary, although a definition had been proposed by the Secretariat.[8] Nevertheless, some content have been given to its terms and the principal characteristics are (1) arbitration is a peaceful mechanism of settlement the disputes; (2) arbitration is a consensual; (3) arbitration is a private procedure; and (4) arbitration leads to a final and binding decision of the rights and obligations of the parties.[9]

Moreover, the following definitions of arbitration are representative of international commentary on subject:

"two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private person will resolve if for them and if the arbitration runs it full course … it will not be settled by compromise, but by a decision."[10]

"a mode of resolving disputes by one or more peoples who derive their authority from agreement of the parties and whose decision is binding upon them."[11]

"a contractual method for the relatively private settlement of disputes."[12]

"the voluntary submission by the parties of a dispute for decision by recognized and regular procedure other than litigation."[13]

1.1.3. The Definition of Commercial

It has become common to speak of international "commercial" arbitration, but there is no clear concept of what is meant by "commercial". It is doubtful whether that should be

[8] Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, A/CN.9/207, paras. 29-30.
[9] UNCTAD/EDM/Misc.232/Add.38, 2005, P.5.
[10] A. Redfern & M. Hunter (eds.), "Law and Practice of International Commercial Arbitration.", paras 1-3, 4th eds., 2004.
[11] P.de Vries Henry, "International Commercial Arbitration: A Contractual Substitute for National Courts." 57 Tul. L. Rev. 42, P. 42-43, 1982.
[12] W. Reisman, L. Craig, W. Park & J. Paulsson, "International Commercial Arbitration." 1997.
[13] Roebuck Derek, "A Short History of Arbitration." 1998.

defined in the model law.[14] As early as the 1923 Protocol on Arbitration Clause, the Contracting States recognized the validity of an arbitration clause "by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, …"[15] This Protocol also provided that, Each Contracting States reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law."

The New York Convention 1958 also not limited to the arbitration in respect of commercial disputes. The limitation only by the States make the necessary declaration and only 91 of the current 168 Contracting States have done so.[16] However, in those 44 States the application of the Convention is dependent on what is considered as commercial under the national law.

If we take a look to the European Union, there also no defined the definition of "Commercial" under the 1961 European Convention on International Commercial Arbitration, which was the first international instrument to refer to international commercial arbitration by name. The Convention was limited in application "to arbitration agreements concluded for the purpose of settling disputes arising from international trade between …" No matter how broad the interpretation of "international trade", many forms of economic activity would seem not to have been included.

Moreover, the definition of "Commercial" under the Model Law 1958, was appeared in the text of the footnote as follow "The term 'commercial' should be given a wide interpretation

[14] Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216, para. 19, 23 March 1982.
[15] Art 1 para 1 of the Geneva Protocol on arbitration clauses of 1923.
[16] The official list of Contracting States to the New York Convention with any declarations or reservations they may have made can be found on the web site of the United Nations Treaty Collection, UNTC.

so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."[17]

1.2. International Arbitration

International arbitration may be either "Institutional" or "*ad hoc*". International arbitration is sometimes called a hybrid form of international dispute resolution, since it combines elements of civil law procedure and common law procedure, as well as allowing the parties a significant opportunity to design the arbitral procedure under which their dispute will be resolved.[18]

The modern view is that arbitration is governed by the law of the place in which it takes place, Therefore, in that sense every arbitration taking place within a State is a domestic arbitration in that State. However, the parties have the right to choose the place of arbitration, thereby choosing the applicable law of arbitration, that it could be foreign or international arbitration.[19] Furthermore, the contexts of the foreign arbitration and international are not the same. For example, an arbitration that takes place in State X is a foreign arbitration in State Y. It does not matter whether the arbitration is commercial or non-commercial, from different countries or that one or all are from State X. Since even a domestic arbitration in State X is a

[17] UNCITRAL Model Law on International Commercial Arbitration, 21 June 1958.
[18] "International Arbitration." International arbitration information by Aceris Law LLC, What Is International Arbitration? • Arbitration (international-arbitration-attorney.com).
[19] Article 28 (1) Chapter VI of the UNCITRAL Model Law on International Commercial Arbitration 1985.

foreign arbitration in State Y, the courts of State Y would be called upon to apply the New York Convention 1958 to enforcement of a clause calling for arbitration in State X and to the enforcement of any award that would result.

In contemporary legal systems, international commercial arbitration is an approaches by which international business disputes can be definitively resolved, in compliance to the parties' agreement, by independent, non-judicial decision makers, selected by or for parties an opportunity to be heard.[20] International Arbitration can take place either within or outside of the state of the parties, in cases where there are ingredients of foreign origin relating to the parties or the subject matter of the dispute. The law applicable to the conduct of the arbitration and the merits of the dispute may be parties domestic law or foreign law, depending on the contract in this regard, and the rules of conflict of laws.[21]

The New York Convention 1958 and other international arbitration conventions applies only to arbitration agreements that have some "foreign" or "international" element, and not to purely domestic agreements.[22] Under many national legal regimes, where "international" or "foreign" arbitration agreements are often subject to legislative and/or judicial regimes distinct from those applicable to domestic arbitration agreements. That is true, for example, under the UNCITRAL Model Law, which is limited by Article 1(3) to "international" matters.[23] In these jurisdictions, domestic arbitration agreements, arbitral proceedings and awards are often subject to different, non-international legal regimes.[24]

[20] G. Born, "International Commercial Arbitration", Kluwer Law International, Vol I, P.64-65, 2009.
[21] "Domestic & International Arbitration.", Legal Service India.com, Domestic & International Arbitration (legalservicesindia.com).
[22] *Supra note 9* P. 275–277.
[23] Article 1(3) of the Model Law.
[24] *Supra note* 9, P. 109-110.

1.3. Why Parties Choose Arbitration?

Arbitration is widely regarded as the preferred of solving international commercial disputes. That is true for a number of reasons because, its provides a neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions.[25] While far from perfect, international arbitration is rightly regarded as suffering fewer ills than litigation of international disputes in national courts and as affording parties more practical, efficient and neutral dispute resolution than available in other forums.[26]

1.4. International Commercial Arbitration

1.4.1. General background

International commercial arbitration is a work in progress. The first events took place some hundred years ago, in 1923.[27] There are negotiations currently going in the United Nations Commission on International Trade Law (UNCITRAL) that may lead to new developments.

1.4.2. Legal Regime Governing International Commercial Arbitration

International commercial arbitration is governed by a complex legal regime. That regime includes (a) international arbitration conventions, especially the New York Convention 1958, (b) institutional arbitration rules, incorporated by parties' arbitration agreements, and (c) arbitration agreements, given effect by international arbitration conventions and national arbitration legislation.

[25] Repa Barbara Kate, "Arbitration Pros and Cons: Learn about the advantages and disadvantages of arbitration.", NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html.
[26] "New Letter News: Why to choose arbitration to resolve a dispute?" Garrigues, 28 March 2019, https://www.garrigues.com/en_GB/new/why-choose-arbitration-resolve-dispute.
[27] The Geneva Protocol on Arbitration Clauses of 1923.

1.4.3. New York Convention 1958

The first modern international commercial arbitration conventions were the 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters[28] and the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards.[29] The Protocol provided for the recognition of international commercial arbitration agreements, requiring contracting states to refer parties to such agreements to arbitration.[30] The Convention, on the other hand, provided for the recognition of arbitral awards made in other contracting states.[31]

The Geneva Protocol and Convention were succeeded by the New York Convention 1958.[32] this Convention, this modern day, is the most significant contemporary legislative instrument in the field of international commercial arbitration. It establishes a universal constitutional charter for the international arbitral process, whose expansive terms have allowed both national courts and arbitral tribunals to construct long-lasting, effective mechanisms for enforcing international arbitration agreements and awards.[33]

The Convention was adopted to address the needs of the international business community and to improve the legal regime provided by the Geneva Protocol and Geneva Convention. The Convention was negotiated principally at a three-week conference – the United Nations Conference on Commercial Arbitration – attended by 45 states in the Spring of 1958.[34]

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[28] Geneva Protocol on Arbitration Clauses in Commercial Matters ("Geneva Protocol"), 27 L.N.T.S. 158 (1924).
[29] Geneva Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention"), 92 L.N.T.S. 302 (1929). *See Supra note* 9, P. 58-63.
[30] Art 1 of the Geneva Protocol 1923.
[31] Art 1 of the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards.
[32] Art 7 (2) of the New York Convention 1958. *See* 330 U.N.T.S., No. 4739, volume-330-i-4739-english.pdf (un.org).
[33] G. Born, "International Commercial Arbitration: Law and Practice.", Kluwer Law International, 2012.
[34] Sanders Peter, A.J. van den Berg ed., Kluwer Law International, "The History of the New York Convention, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention.", ICCA Congress Series No. 9, Paris 1998, 11 (1999), 1999.

1.4.3.1. Scope of the Convention

The scope of this convention is to recognize and enforce of foreign arbitral awards when were made in the territory of another State or when it is not considered as domestic awards in the State where their recognition and enforcement are sought.[35] According to the Article 1 (I) of the NYC, the question is, whether an award is domestic or foreign is importance because in many jurisdictions the enforcement proceedings are different for foreign and domestic awards, moreover, the differences approaches of national legal systems to the enforcement of arbitral awards, including the grounds for non-enforceability, it has occurred that enforcement has been refused in one State but granted in another.[36] In this regard, the Swedish law[37] section 52 stipulate the foreign arbitral awards that "An award made abroad shall be deemed to be a foreign award. In conjunction with the application of this Act, an award shall be deemed to have been made in the country in which the place of arbitration is situated." However, the criteria for certify the award as domestic or foreign is not clearly defined. In Greek case law, the award defines as foreign if the arbitrators have applied foreign procedural law, just the same, the award consider as domestic if the arbitrators have applied the procedural law of Greek.[38]

1.4.3.2. The main objectives of the Convention

The Convention was recognizing as an importance of the international arbitration as a peaceful means to settling the international commercial disputes and focuses on two main objectives, first is, the recognition of the arbitral agreements.[39] This valid arbitration agreement

[35] Article 1 (I) of the New York Convention 1958.
[36] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT "Dispute Settlement: International Commercial Arbitration", 5.7 Recognition and Enforcement of Arbitral Awards: New York Convention, resolution number, Page 7, 2003, https://unctad.org/system/files/official-document/edmmisc232add37_en.pdf.
[37] Arbitration Act of 1999 (SFS 1999: 116).
[38] FOUSTOUCOS, Anghélos C. and KOUSSOULIS, Stelios, National Report – Greece, in: International Handbook on Commercial Arbitration, Kluwer Law International, The Hague/London/New York (2002), p. 40.
[39] Article 2 (I) of the New York Convention 1958.

shall be in writing, which the contract should be sign by the parties to the dispute or contained in an exchange of letter or telegrams that required by the Article 2 of the NYC.

Second objective is, the recognition and enforcement of the foreign arbitral awards[40]. It required the contracting states to recognize and enforce the arbitral awards when were made in the territory of another State or when it is not considered as domestic awards in the State where their recognition and enforcement are sought. This require the signatory parties of the Convention covert the arbitral award which make inside or outside the territory of the other Contracting States into a judgement enforceable by the national court. [41]

1.4.4. European Convention

The 1961 European Convention on International Commercial Arbitration[42] entered into force in 1964, and 31 states are currently party to it. Most European states (excepted the United Kingdom, the Netherlands, or Finland) are party to the Convention, while some ten non-EU states are parties, including Russia, Cuba and Burkina Faso.[43] The Convention consists of 19 articles and an annex.

The Convention addresses the three principal phases of the international arbitral process –arbitration agreements, arbitral procedure and awards. With regard to arbitration agreements,[44] the Convention does not expressly provide for their presumptive validity, but instead (in Articles V and VI) confirms the arbitrators' competence-competence and the authority of national courts to consider jurisdictional objections on an interlocutory basis. With regard to the arbitral procedure, the Convention confirm the autonomy of the parties and the arbitrators

[40] Article 1 of the New York Convention 1958.
[41] Lucy Greenwood, "A New York Convention Primer", AMERICAN BAR ASSOCIATION, September 12, 2019, https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-ny-convention-primer/#:~:text=What%20is%20the%20New%20York,of%20foreign%20arbitration%20awards%20worldwide.
[42] "European Convention on International Commercial Arbitration", 21 April 1961, 484 U.N.T.S. 349.
[43] *Ibid.*
[44] Art 2 (1), 4 & 5 of the European Convention on International Commercial Arbitration of 1961.

(or arbitral institution) to conduct the arbitral proceedings.[45] With regard to awards, the Convention is designed to supplement the New York Convention, dealing in Article IX only with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions (and not with other obligations of courts to recognize awards).[46]

1.4.5. The ICSID Convention

The International Center for the Settlement of Investment Disputes ("ICSID") is a specialized arbitration institution, established pursuant to the so-called "ICSID Convention" or "Washington Convention" of 1965.[47] This Convention is designed to facilitate the settlement of investment disputes that the parties have agreed to submit to ICSID.[48] Investment disputes are defined as controversies that arise out of an investment and are between a Contracting State or designed state entity and a national of another signatory state.[49] As to such disputes, the Convention provides both conciliation[50] and arbitration procedures. ICSID arbitrations are governed by the ICSID Convention and the ICSID Arbitration Rules.[51]

The ICSID Convention contains a number of comparatively unusual provisions relating to international arbitration. First, the Convention provides that, absent agreement by the parties, ICSID arbitrations are governed by the law of the state that is party to the dispute "and such rules of international law as may be applicable.[52] In contrast, neither the New York Convention nor European Convention[53] contains comparable substantive choice-of-law provisions. Second,

[45] Art 3, 4, 5, 6, 7 and annex of the European Convention on International Commercial Arbitration of 1961.
[46] *Supra note* 35, p. 96.
[47] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, D.C, 18 March 1965, 575 U.N.T.S 159 (No. 8359) (1966).
[48] Art 25 (1) of the ICSID Convention of 1965.
[49] Amerasingle, "Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes Between States and National of Other States, 47 Brit. Y.B. International Law, p. 227, 1974-75.
[50] Chapter 3 of the ICSID Convention.
[51] C. Schreuer, "The ICSID Convention: A Commentary Art. 44." paras. 1-4, 8-10 & 30-35, 2001.
[52] Art 42 of the ICSID Convention.
[53] Art 7 of the European Convention on International Commercial Arbitration of 1961.

ICSID awards are directly enforceable in signatory states, without any method of review in national court.[54] Third, when a party challenges an ICSID award, the Convention empowers the Chairman of the Administrative Council of ICSID to appoint an *ad hoc* committee to review and possibly annul, rewards;[55] if an award is annulled it may be resubmitted to a new arbitral tribunal.[56] The ICSID annulment mechanism was initially criticized, on the gourds that it permits unduly extensive appellate review, also the possibilities for political influence; more recent commentary and experience has been generally favorable.[57]

1.4.6. International Arbitration Institution and Rules

International arbitrations may be either "institutional" or "*ad hoc*." There are important differences between these two forms of arbitration, both theoretical and practical.

An arbitral institution is an indispensable element in institutional arbitration.[58] Institutional arbitrations are governed by institutional arbitration rules, which have been integrated into the arbitration agreement between the parties. Institutional arbitrations are conducted pursuant to institutional rules and in practice are almost always overseen by an appointing body, which is responsible for forming the arbitral tribunal, fixing the arbitrators' compensation and similar matters. In contrast, *ad hoc* arbitrations are conducted without the benefit of an appointing authority or pre-existing arbitration rules, subject only to the parties' arbitration agreement and applicable national arbitration legislation.[59]

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[54] Art 53 & 54 of the ICSID Convention.
[55] Art 52 ICSID Convention; C. Schreuer, "The ICSID Convention: A Commentary Art. 52." paras. 340-349, 355-387, 2001.
[56] *Ibid*, para 489.
[57] D.A. Redfern, "Arbitration International", Vol 3, Issue 2, 1 April 1987, Pages 98, 12 December 2014.
[58] Li Eric, "Institutional Arbitration." JUS MUNDI, lasted updated 16 February 2021, https://jusmundi.com/en/document/wiki/en-institutional-arbitration.
[59] Sundra Rajoo, "Institutional and Ad hoc Arbitrations: Advantages and Disadvantages.", The Law Review 2010, p.548, 2010.

1.4.5.1. Choice of Arbitration Rules

Many countries have arbitration laws that provide a legal framework for the conduct of arbitrations. However, subject to mandatory requirements of the applicable law, parties are free to agree upon the procedure for their arbitration (or simply accept the default procedure under that law).[60] A basic choice is between arbitration under "institutional" rules and arbitration under *ad hoc* rules.

1.4.5.2. Institutional Arbitration

Institutional arbitrations are administered by specialized arbitral institutions. A number of organizations provide institutional arbitration services for international users, sometimes tailored to especially commercial or other needs. The best-known international commercial arbitration institutions are the International Chamber of Commerce ("ICC"), the American Arbitration Association ("AAA") and its International Centre for Dispute Resolution ("ICDR"), the London Court of International Arbitration ("LCIA") and the Singapore International Arbitral Centre ("SIAC") and so on.[61]

An institutional arbitration is one in which a specialized institution intervenes and assumes responsibility for the arbitration proceedings' administration.[62] Those arbitral institutions have declared sets of procedural rules that apply where parties have agreed to arbitration in compliance to such rules, typically by incorporating such rules in their arbitration agreements.[63] These rules set out the fundamental procedural framework for arbitral

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[60] "Quickguides: International Arbitration Clauses.", Ashurst, 14 May 2021, https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide-international-arbitration-clauses/.

[61] "International Commercial Arbitration: Arbitral Institutions.", SIDLEY, https://www.sidley.com/en/global/services/global-arbitration-trade-and-advocacy/international-commercial-arbitration/sub-pages/arbitral-institutions/.

[62] "Institutional vs. 'ad hoc' arbitration.", Pinsent Masons, 12 August 2011, https://www.pinsentmasons.com/out-law/guides/institutional-vs-ad-hoc-arbitration.

[63] Tamrakar Vasudha and Garima Tiwari, "Ad Hoc And Institutional Arbitration.", National Law Institute University, http://www.legalserviceindia.com/article/l64-Ad-Hoc-and-Institutional-Arbitration.html.

proceedings and typically authorize the arbitral institution to assist in selecting arbitrators in particular disputes, to resolve challenges to arbitrators, to designate the place of arbitration, to fix the fees payable to the arbitrators and to review the arbitrators' awards to reduce the risk of unenforceability.[64] Each institution has a staff, with the size varying significantly from one institution to another, and a decision-making body.

It is fundamental that arbitral institutions do not themselves arbitrate the merits of the parties' dispute. This is the responsibility of the individuals selected by the parties or institution as arbitrators. In practice, arbitrators are almost never employees of the arbitral institution, but instead are private persons selected by the parties. If parties cannot agree upon an arbitrator, most institutional rules provide that the host institution will act as an "appointing authority," to choose the arbitrators in the absence of the parties' agreement.

1.4.5.3. *Ad Hoc* Arbitration

Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution.[65] Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration.[66] *Ad hoc* arbitration agreements often select an arbitrator or arbitrators to resolve the dispute without institutional supervision. The parties will sometimes also select a pre-existing set of procedural rules designed for ad hoc arbitrations. For international commercial disputes, UNCITRAL has published a set of such rules, the UNCITRAL Arbitration Rules, which are discussed below.

In *ad hoc* arbitrations, parties usually designate an appointing authority to select the arbitrator(s) if the parties cannot agree and to consider any subsequent challenges to members of the tribunal. If the parties fail to select an appointing authority, then arbitration statutes in

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[64] *Ibid.*
[65] "Ad hoc arbitration—an introduction to the key features of ad hoc arbitration.", Lexis Nexis, Ad hoc arbitration—an introduction to the key features of ad hoc arbitration | Legal Guidance | LexisNexis.
[66] *Supra note* 63.

many states permit national courts to appoint arbitrators, but this may be less desirable than having an experienced appointing authority do so.

1.4.5.4. UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules govern an important position in contemporary arbitration practice. The objective of the Rules was to create a predictable procedural framework for international arbitrations which was acceptable to common law, civil law and other legal systems, as well as capital-importing and exporting interests.[67] The Rules, which were first promulgated by the U.N. General Assembly in December 1976, were revised in 2010.[68]

Like most institutional rules, the UNCITRAL Rules prescribe a basic procedural framework for arbitrations. This includes provisions for initiating an arbitration,[69] appointed and challenge of arbitrators,[70] conduct of the arbitral proceedings,[71] choice of applicable law,[72] awards[73] and arbitration costs.[74] The Rules also contain provisions[75] confirming the separability of the arbitration clause and the tribunal's power (competence - competence) to consider jurisdictional objections. Under the Rules, the Permanent Court of Arbitration (PCA) serves a *sui generis* function of designating an appointing authority when requested, unless the parties have agreed to a different appointment mechanism.[76]

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[67] Report of the Secretary General on the Revised Draft Set of Arbitration Rules, UNCITRAL, 9th Session, Introduction, para. 17, UN Doc. A/CN.9/112 (1975).
[68] "UNCITRAL Arbitration Rules", United Nations Commission on International Trade Law, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.
[69] Art 3 & 4 of the UNCITRAL Arbitration Rules 1976.
[70] Art 7 – 16 of the UNCITRAL Arbitration Rules 1976.
[71] Art 17 – 32 of the UNCITRAL Arbitration Rules 1976.
[72] Art 35 of the UNCITRAL Arbitration Rules 1976.
[73] Art 33 – 39 of the UNCITRAL Arbitration Rules 1976.
[74] Art 40 – 43 of the UNCITRAL Arbitration Rules 1976.
[75] Art 23 of the UNCITRAL Arbitration Rules 1976.
[76] Art 7 (2)(b) of the UNCITRAL Arbitration Rules 1976.

The revised Rules allow for more liberal joinder of parties and specify that the tribunal's power includes the authority to grant injunctions and order the preservation of evidence.[77] In a departure from the approach of other arbitration rules, the revised Rules give the parties the option to waive recourse against an award.[78]

1.4.5.5. International Court of Chamber

Based in Paris,[79] with a branch offices in Hong Kong, New York, Singapore, Abu Dhabi and São Paulo[80] the International Chamber of Commerce ("ICC") is, by most accounts, the world's leading international arbitration institution.[81] The ICC has promulgated a set of ICC Rules of Arbitration (which are periodically revised, most recently as of January 1st, 2021) as well as the ICC Rules of Optional Conciliation and the ICC Rules for Expertise. Under the ICC Arbitration Rules, the ICC (through its International Court of Arbitration ("ICC Court")) is extensively involved in the administration of arbitrations.[82]

Under the ICC Rules, the ICC Court and its Secretariat are responsible for service of the initial Request for Arbitration;[83] fixing advances on costs of the arbitration;[84] confirming parties' nominations of arbitrators;[85] appointing arbitrators if the parties are unable to agree upon a presiding arbitrator or sole arbitrator;[86] considering challenges to the arbitrators;[87]

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[77] *Supra Note* 76.
[78] "The revised UNCITRAL Arbitration Rules.", The In-House Lawyer - The magazine of choice for counsel, October 2010, https://www.inhouselawyer.co.uk/legal-briefing/the-revised-uncitral-arbitration-rules/#nine.
[79] "INTERNATIONAL CHAMBER OF COMMERCE (ICC) INTERNATIONAL COURT OF ARBITRATION", Paris Arbitration: Home of International Arbitration, http://parisarbitration.com/en/glossaire/international-chamber-commerce-icc-international-court-arbitration/.
[80] Aceris Law LLC, "ICC Arbitration", Aceris Law International Arbitration Law Firm, 05 December 2020, https://www.acerislaw.com/icc-arbitration/.
[81] *Ibid.*
[82] Latham & Watkins, "Guide to International Arbitration." Latham & Watkins' International Arbitration Practice, P. 14, 2017.
[83] Art 4 & 5 of the ICC Rules of Arbitration.
[84] Art 36 of the ICC Rules of Arbitration.
[85] Art 11 - 13 of the ICC Rules of Arbitration.
[86] Art 13 of the ICC Rules of Arbitration.
[87] Art 14 of the ICC Rules of Arbitration.

approving so-called "Terms of Reference",[88] which define the issues in the arbitration; reviewing tribunals' draft awards for defects;[89] and fixing the arbitrators' fees.[90] The ICC Rules are similar to the UNCITRAL Rules in providing a broad procedural framework for arbitral proceedings. As with most institutional rules, only a basic procedural framework is provided, with the parties and arbitrators accorded substantial freedom to adopt procedures tailored to particular disputes. Unusually, the ICC Rules require a "Terms of Reference" and procedural timetable to be adopted by the tribunal at the outset of proceedings and that an award be rendered within six months.[91] Also unusually, the ICC Rules provide for the ICC Court to review draft awards before they are finalized.[92] The ICC Rules were extensively revised as of 2012, with the objective of making the arbitral process more efficient.[93] Under the revised Rules, tribunals are required to conduct a case management conference and granted express authority to conduct the arbitration efficiently.[94] Also, streamline the process of constituting the tribunal[95] and establish an "Emergency Arbitrator" mechanism to deal with interim relief prior to constitution of the tribunal.[96] In addition, the 2012 Rules permit liberal joinder of parties and consolidation of disputes.[97]

The ICC's administrative fees and the fees of the arbitrators are based principally on the amount in dispute between the parties.[98] The ICC Rules require that the parties pay an advance

[88] Art 23 of the ICC Rules of Arbitration.
[89] Art 33 of the ICC Rules of Arbitration.
[90] Art 37 of the ICC Rules of Arbitration.
[91] Art 31 (1) of the ICC Rules of Arbitration.
[92] Art 34 of the ICC Rules of Arbitration.
[93] "2012 sees new ICC Rules of Arbitration enter into force", International Chamber of Commerce, 04 January 2012, https://iccwbo.org/media-wall/news-speeches/2012-sees-new-icc-rules-of-arbitration-enter-into-force/.
[94] Art 22 & 24 of the ICC Rules of Arbitration entered into force on 1 January 2021.
[95] Art 11 – 13 of the ICC Rules of Arbitration entered into force on 1 January 2021.
[96] Art 29 of the ICC Rules of Arbitration entered into force on 1 January 2021.
[97] Art 7 – 10 of the ICC Rules of Arbitration entered into force on 1 January 2021.
[98] Appendix III – Arbitration Costs and Fees of the ICC Rules of Arbitration entered into force on 1 January 2021.

on the costs of the arbitration calculated by the ICC Court.[99] The advance on costs is equally divided between the claimant and the respondent, although one party may pay the full amount in order to enable the arbitration to proceed if the other party defaults.[100] The ICC Rules have sometimes been criticized as expensive and cumbersome, although recent amendments reflect concerted efforts to address this concern.[101]

1.4.7. What is Arbitration Agreement?

Arbitration is based on an agreement of the parties. The parties authorize and provide the power or mandate to the arbitrators to settle their present or future disputes under the arbitration agreement. By concluding the arbitration agreement, the parties, in general, waive the application of laws and rules meant or designed to regulate proceedings before State courts and assume at least implicitly, those that apply to arbitration and general principles of legal proceedings.[102] The arbitration agreement is governed by the freedom of contract,[103] however, there are many limitation to this agreement. As stated in Article 5(1)(a) of the NYC,[104] the agreement is regulated by general rules of law regarding contract formation, including invalidity and capacity of the parties. The arbitration agreement may also be judged unreasonable or unconscionable for being too one-sided.

Over the past century, the legal framework for enforcing international arbitration agreements has undergone important changes, evolving from a position of relative disfavor to one of essentially universal support. International conventions (most notably the New York

[99] Art 7 of the ICC Rules of Arbitration entered into force on 1 January 2021.
[100] *Ibid.*
[101] ICC, "Techniques for Controlling Time and Costs in Arbitration", ICC Publication No. 843, 2007.
[102] Tang Zheng Sophia, "Jurisdiction and Arbitration Agreements in International Commercial Law", ROUTLEDGE RESEARCH IN INTERNATIONAL COMMERCIAL LAW, 2014, P.112.
[103] The following are among the most important elements of a good arbitration clause: (1) the substantive law(s) applicable to the dispute; (2) the seat of arbitration; (3) the procedural rules applicable; and (4) the language(s) to be used.
[104] "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 . . ."

Convention), national law (likes the UNCITRAL Model Law), and institutional arbitration procedures make up this legal framework. When their jurisdictional requirements are satisfied, these instruments provide a robust and highly effective framework for enforcing international arbitration agreements.

1.4.6.1. The Definition of Arbitration Agreement

The formation of an arbitration agreement is an agreement between two or more parties that one or more arbitrators will resolve a dispute that has arisen or which may arise.[105]

Under Article 2 of the NYC and Article 7 of the UNCITRAL Model Law, the term of "Agreement" provided the same meaning, that the "agreement shall be in writing" may be either an "arbitration clauses in a contract" or an "arbitration agreement". As well as, Article 1 of the European Convention,[106] "'Arbitration Agreement' shall mean either an arbitral clause in a contract or an arbitration agreement the contract or arbitration agreement being signed by the parties, or …"

1.4.6.2. The Arbitration Agreement

The agreement of the parties to submit any disputes or differences between them to arbitration is the cornerstone of modern international arbitration.[107] Before there can be a valid arbitration, there must first be a valid agreement to arbitrate.[108] This is recognized both by national laws and by international treaties. For example, under both the New York

[105] "Arbitration Agreement – Definition, Purpose and Interpretation", LexisNexis, https://www.lexisnexis.co.uk/legal/guidance/arbitration-agreements-definition-purpose-interpretation.
[106] Art 1 (2)(a) of the European Convention on International Commercial Arbitration of 1961 Done at Geneva, 21 April 1961.
[107] Shonk Katie, "what is an Arbitration Agreement?: The ins and outs of contractual agreement to engage in arbitration.", Program on negotiation, Harvard Law School, 24 May 2021, https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement/#:~:text=adversaries%20into%20partners.-,What%20is%20an%20arbitration%20agreement%3F,that%20arises%20with%20your%20counterpart.
[108] Stim Richard, "Arbitration Clauses in Contracts: Should you include an arbitration clause in your contract?", NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-clauses-contracts-32644.html.

Convention[109] and the Model Law,[110] recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some in capacity, or if the agreement was not valid under its own governing law.

The validity of arbitration depends on the arbitration agreement that's why it is very important and basically there are were two types of arbitration agreement.[111] First is, an arbitration clause is the most common used in a contract. This clause is to make it sure that the parties agreed that any dispute which arises out of or in relation to the contract will be referred to arbitration, either *ad hoc* or under the rules of an arbitral institution.[112] Since arbitration clauses are drawn up and agreed before any dispute has arisen, they must consider the future: to the possibility that a dispute may occur and that if it does, it will be resolved by recourse to arbitration rather than to the courts of law.

The second type of agreement is submission agreement, that is made after a dispute has actually arisen.[113] it will usually be more detailed than an arbitration clause because once a dispute has arisen, it is possible to spell out in some detail what the dispute is about and how the parties propose to deal with it.

1.5. Procedural of the Recognition and Enforcement of Commercial Arbitration Awards

The NYC is now hailed as 'one of the most important and successful United Nations treaties in the context of international trade law, also the cornerstone of the international

[109] Art 5 of the New York Convention 1958.
[110] Art 35 of the UNCITRAL Model Law on International Commercial Arbitration 1985.
[111] Alan Redfern and Martin Hunter, "Redfern and Hunter on International Arbitration" 7th eds, Oxford University Press, P. 86, 2009.
[112] "International Commercial Arbitration: 5.2 The Arbitration Agreement", United Nations Conference on Trade and Development: Dispute Settlement, New York and Geneva, P. 3, 2005.
[113] *Ibid.*

arbitration system.[114] The Convention's drafters foresight in establishing severe standards for recognizing and enforcing foreign arbitral awards while leaving contracting states free to impose more liberal rules for recognition and enforcement, as embodied in Article VII (1), is critical to its success.

By treating awards provided in international commercial arbitration in a uniform manner irrespective of where they were made, the UNCITRAL Model Law draws a new distinction approach between "international" and "non-international" awards instead of the traditional approach between "foreign" and "domestic" awards.[115] This new approach is based on substantive grounds rather than territorial borders, which are irrelevant in international matters due to the minimal importance of the venue of arbitration. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place.[116] Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions. By modelling the recognition and enforcement rules on the relevant provisions of the NYC, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.[117]

1.5.1. Recognition and Enforcement of Awards

The enforcement procedure under the NYC contain two purposes, first is, the contracting states are binding to recognize and enforce the arbitral award in accordance with the rules of the territory where the award relied upon,[118] in other words, the general obligation of the

[114] Message from the Secretary of UNCITRAL, newyorkconvention1958.org.
[115] Art 1(3)(b) of the UNCITRAL Model Law on International Commercial Arbitration 1985.
[116] Art 20 of the UNCITRAL Model Law on International Commercial Arbitration 1985.
[117] "Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration", UNCITRAL Model Law on International Commercial Arbitration.
[118] Article 3 of the New York Convention 1958.

contracting parties to recognize the binding force of the arbitral award and to grant their recognition.[119] Moreover, the Article 3 of the NYC mentioned the so called "Favorability Principle", which set two mandate, (1) contracting states are obliged to recognize and enforce foreign arbitral awards with the grounds for refusal provided under the Article 5 of the NYC and (2) the contracting states shall not impose of harder terms such as condition or fees or high cost on the recognition or enforcement the awards.[120]

Currently, the 168 Contracting States to this Convention have agreed that they will "recognize the arbitral awards as binding and enforce them in compliance with the rules of procedure" in force in the State. Those rules may not contain "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[121], The requirements for the enforcement of an award are limited to the duly authenticated original or a duly certified copy of the award; the original or a duly certified copy of the arbitration agreement; and a translation of these documents.[122]

Whereas, an award made under the UNCITRAL Model Law is binding on all parties to the proceeding.[123] If a party fails to comply with the award, the successful party can seek to have that award recognized and enforced in domestic courts.

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[119] RIVERA, Julio C, "Las Normas de Procedimiento Locales y la Convención. Remisión al Procedimiento Vigente y sus Posibles Contradicciones con la Convención" in TAWIL, Guido, (editor). El Arbitraje Comercial Internacional, Buenos Aires: Abeledo-Perrot, p. 323, (2008). Free translation of the author.
[120] AGUILAR, Fernando, "Convención de Nueva York: Cincuenta Años" in TAWIL, Guido, (editor). El Arbitraje Comercial Internacional, Buenos Aires: Abeledo-Perrot, pp. 345-357, (2008).
[121] Art 3 of the New York Convention 1958.
[122] AGUILAR, Fernando, "Convención de Nueva York: Cincuenta Años" in TAWIL, Guido, (editor). El Arbitraje Comercial Internacional, Buenos Aires: Abeledo-Perrot, pp. 345-357, (2008).
[123] Art 35 (1) of the UNCITRAL Model Law on International Commercial Arbitration 1985.

1.5.1.1. Request for Recognition and Enforcement of Awards

Article 4 of the NYC set out the requirements to be met by the claimant to obtain the recognition and enforcement, the party requesting for recognition and enforcement shall apply the duly authenticated original or a duly certified copy of the award; the original or a duly certified copy of the arbitration agreement; and a translation of these documents.[124] In other words, the submission of the original of the award and arbitration agreement must be authenticated, or if the party submit the copy, it must be certified.[125] Yet, a further question may arise is to which national law the award is to be authenticated or the copies certified, in other words, should we apply the law of the court of recognition and enforcement, or the law of the country where the award was made.[126] Not difference from the NYC, article 35 (2)[127] of the UNCITRAL Model Law provided the same requirement of the request to the Contracting State with the Article 4 of the NYC.

1.5.1.2. Grounds for Refusal Recognition and Enforcement of Awards

According to the Article 5 of the NYC, this article set the limited and interpreted restrictively to the contracting parties, in purpose of ruling out the request of recognition and enforcement of an arbitral award under the NYC may refuse the request on the grounds.[128]

These grounds divided into two parts, first part is, the grounds that defendant can be base and prove his petition for the refusal of the recognition and enforcement is sought.[129] These

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[124] *Ibid.*

[125] VAN DEN BERG, Albert Jan, The New York Arbitration Convention of 1958, Deventer/Netherlands (1981), p. 251.

[126] ICCA Yearbook (1997), p. 252, 1997.

[127] The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

[128] United Nations UNCITRAL, New York Convention 1958 Guide "Article V", developed by SHEARMAN & STERLING and Colombia Law School, in cooperation with UNCITRAL, 2011-2021, Article V - Guide - NYCG 1958 (newyorkconvention1958.org).

[129] *Ibid.*

grounds can be invoked by the party against the request to recognize and enforce of the awards is sought and cannot be invoked by the court where the recognition and enforcement of the award is request.[130] These grounds were stated in the Article 5 (1) of the NYC such as, (a) The incapacity of the party and invalid of the agreement; (b) Violate the process; (c) Difference submitted under the arbitration agreement; (d) The process was not under the law of the country of the arbitration took place; and (e) the award was not binding or suspended by the authority of the contracting state. This first part is intended to protect the interests of the defendant.[131]

In addition, Article 5 (II) is the second part of the grounds for refusal, where to provide the grounds that the court where the recognition and enforcement is sought in the state territory can base to refuse this request. Those grounds only can be invoked by the court where the recognition and enforcement of the award is demand and cannot be invoked by the party against the recognition and enforcement of the award is sought.[132] The grounds for refusal that provided under the Article 5 (II) of the NYC are , (a) the subject under the arbitration agreement is not possible to settle under the arbitration mechanism[133] ; and (b) the award was contrary the public policy of that country.[134] The second part of the grounds for refusal, in purpose to serve the vital interests of the forum country.[135] Furthermore, under the Article 6 of the NYC, the national court may use its discretion when deciding whether to adjourn the decision on enforcement in cases where a party has sought setting aside or suspension of the award.[136]

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[130] *Supra note 36.*

[131] CRAIG, W. Laurence, PARK, William W., PAULSSON, Jan, International Chamber of Commerce Arbitration, Oceana Publications, Inc., Dobbs Ferry, NY, (3rd ed. 1998), p. 684.

[132] MARQUEZ, Stephanie, El orden público y su función como límite a la eficacia, reconocimiento y ejecución de los laudos arbitrales internacionales en Chile. (Master's degree thesis in law). Law School. Universidad de Chile. Santiago, 2009.

[133] Article 5 (2)(a) of the New York Convention 1958.

[134] Article 5 (2)(b) of the New York Convention 1958.

[135] *Supra note 36.*

[136] United Nations UNCITRAL, New York Convention 1958 Guide "Article VI", developed by SHEARMAN & STERLING and Colombia Law School, in cooperation with UNCITRAL, 2011-2021, Article VI - Guide - NYCG 1958 (newyorkconvention1958.org).

The UNCITRAL Model Law's grounds for refusing to enforce an arbitral judgement are similar to those provided in the New York Convention.[137] Article 36 of the UNCITRAL Model Law is virtually identical to Article V of the Convention and subjects the enforcement to the exceptions grounded in the Convention.[138] Three fundamental features of the framework concerned must be identified: (1) exhaustive list of exceptions to enforcement excluding review of the merits of the award; (2) discretion to enforce an award notwithstanding the grounds to refuse enforcement; and (3) preclusion of parties' objections.

1.6. Conclusion

The arbitration is one of the most successful ADR approach, especially on the commercial dispute, which is governing by the international instruments such as the NYC and the UNCITRAL Model Law. These two instruments also provided some guideline to the Contracting States on the arbitral process, the term of arbitration agreement and term of setting aside as well as the refusal of enforcement. Moreover, there are many international institutions play the role of settling the international commercial dispute, for example, the ICSID, PCA, Hong Kong Arbitration Centre, ICC and the SIAC. These institutions are governing by their own arbitration rules that pursuant to the international standard.

[137] Polkinghorne, M., Biggs, J., Dai, A. C., & Obamuroh, T, "Grounds for Refusing Recognition or Enforcement. UNCITRAL Model Law on International Commercial Arbitration", P. 928, 25 Feb 2021.
[138] *Ibid,* P. 929.

CHAPTER 2: THE OPPORTUNITIES AND EXPERIENCES OF COMMERCIAL ARBITRATION IN SINGAPORE

2.1. Overview

After years of steady growth in arbitration, Singapore is moving onto the next phase of consolidating its position as a leading arbitration hub. As of 2018, Singapore is the most popular seat in Asia for arbitration, and the third most popular worldwide.[139] A large part of the credit for this success goes to the successful implementation of the New York Convention in Singapore.

The commercial arbitration, especially the Singapore International Arbitration Centre (SIAC) received 400 new cases in between 2017 – 2018 and more than 1000 cases filing in 2020.[140] Moreover, Singapore Arbitrations were known of a number of factors, (1) an independent judiciary on the cutting edge of complicated arbitration-related legal issues, (2) have a strong respect for the rule of law and (3) world-class infrastructure and facilities specifically dedicated to hosting arbitrations.[141]

Singapore became a signatory to the New York Convention on 21 August 1986 with one reservation to the Convention, that apply its provisions only to awards made in the territory of another Contracting State.[142] The first legislation implementing the NYC was the Arbitration (Foreign Awards) Act 1986.[143] Afterward, this Act was eventually replaced by the International Arbitration Act 1994 (IAA),[144] that the provisions are based on the UNCITRAL Model Law

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[139] "Queen Mary University of London International Arbitration Survey", 2018.
[140] Henderson, et al, "Arbitration procedures and practice in Singapore: overview", Thomson Reuters: Practical Law, https://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[141] *Ibid.*
[142] "Status – Convention on the Recognition and Enforcement of Foreign Arbitral Award , New York, 1958, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/Conventiononvention_status.html.
[143] Act No 24 of 1986 (repealed).
[144] Act No 23 of 1994 (since revised and amended).

and continue to give effect to the NYC.[145] The IAA has since undergone two revisions and five amendments, the most recent amendment having been introduced in 2020.[146] From 1994 to 2020, the sections of the IAA mirroring or referring to the NYC have remained largely unchanged. For that reason, the decisions of Singapore courts interpreting Section 6 (2)[147] and Section 31 (2)(4) of IAA[148] remain good law.

Moreover, there is an institute in Singapore, that train the arbitrators called "Singapore Institute of Arbitrators ("SIArb")." SIArb was established in 1981 and is a neutral professional body, that train the arbitrators in Singapore with a wide related to the disputes, except criminal and family law matters.[149]

2.2. Singapore Commercial Arbitration Institution

With the assistance of the government's policy to facilitate the best arbitral Centre in the region, Singapore has grown in attractiveness for international arbitration.[150] Furthermore, Singapore is recognized as a neutral forum for the holding of international commercial arbitration which is in a geographically convenient location and is supported by a physical, legal and political infrastructure that is sophisticated, skilled and of high integrity.[151]

Singapore International Arbitration Centre ("SIAC") is the most successful disputes settlement center in the region, especially Southeast Asia.[152] SIAC was established in 1991 with a non-profit organization to administer arbitrations under its own rules and committed to fulfil

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[145] *Ibid.*
[146] "Legislative History", Cap. 143A, Rev. Ed. 2002.
[147] Similar to Art 2 (3) of the New York Convention 1958 on referral to arbitration.
[148] Repeating of the Art 5 (1) & (2) of the New York Convention 1958 on the recognition and enforcement.
[149] "Singapore Institute of Arbitrators (SIArb)", Linkedin, https://sg.linkedin.com/company/siarb1981.
[150] STA Law Firm, "Singapore: Singapore International Arbitration Centre", Mondaq, Dubai, 21 May 2019, https://www.mondaq.com/arbitration-dispute-resolution/807232/singapore-international-arbitration-centre.
[151] Prof. Pryles Michael, "Singapore: The Hub of Arbitration in Asia", SIAC, https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia.
[152] *Ibid.*

with neutrality and independence in its role as an international arbitral institution.[153] Specifically, the companies based in the region where the parties or their lawyers can travel to Singapore for the tribunal easily.[154] The SIAC, on 3 December 2020, opened their first office outside of Asia in New York.[155] The U.S. was the fourth top foreign user of SIAC, that after India, Philippines and China.[156] As an increasing the number of popularity of arbitral institution, not only in Asia, SIAC mark a new record for their institution with more than 1000 cases during the global pandemic in 2020, since it establishment of the centre.[157]

The establishment of the SIAC for the purpose of facilitating institutional arbitration.[158] SIAC mainly interested in disputes in commercial, construction or engineering, corporate, shipping, trade and insurance.[159] SIAC has a list of arbitrators[160] from all over the world around 380 arbitrators with a spread expertise, depth of knowledge and experience and 204 of those experts are based in the Asian region.[161] At the request of the parties or the tribunal, SIAC provide the parties with a range of services such as the facilities and assistance required to properly arrange the arbitrary proceedings, including the accommodation, secretarial and translation of the tribunal during the trial.[162]

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[153] Maxwell Chambers, "Arbitration & ADR Institutions", Singapore Law Watch, https://www.singaporelawwatch.sg/About-Singapore-Law/Arbitration-ADR/arbitration-adr-institutions.
[154] *Supra note 149.*
[155] Sheppard Mullin Richter & Hampton LLP, "The Singapore International Arbitration Center Opens Office in New York", JD Supra, 12 January 2021, https://www.jdsupra.com/legalnews/the-singapore-international-arbitration-3564153/.
[156] "SIAC Annual Report", https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20AR_FA-Final-Online%20(30%20June%202020).pdf.
[157] *Supra Note 154.*
[158] "Singapore International Arbitration Centre", Hangzhou International Arbitration Court, 13 June 2013, http://www.ci-ca.org/English/caseShow_44.html.
[159] SIAC Covid-19 Updates: Highlights", SIAC, https://www.siac.org.sg/71-resources/frequently-asked-questions.
[160] "Our Arbitrators: SIAC Panel", SIAC, https://www.siac.org.sg/our-arbitrators/siac-panel.
[161] *Supra Note 153.*
[162] Francis Xavier, Chong Boon Leong & Chandra Mohan, "An Overview of Arbitration Internationally and in Singapore", Focus, https://v1.lawgazette.com.sg/2001-8/Aug01-focus4.htm.

2.3. SIAC Arbitration Rules

The AA (Cap 10)[163] and IAA[164] are the two relevant rules that govern the conduct of arbitration in Singapore, which AA rules on the domestic arbitration and IAA applies to both international and non-international arbitration.[165]

The AA applies to any arbitration where the place of arbitration is Singapore and where Part II of the IAA not apply.[166] The AA was enacted to align the laws applicable to domestic arbitration with the 1985 UNCITRAL Model Law.

For international arbitration agreements, the applicable statute is the IAA, which applies to international arbitrations as well as non-international arbitrations where parties have a written agreement for Part II of the IAA or the Model Law to apply.[167] The IAA gives the Model Law, with the exception of Chapter VIII thereof, "the force of law in Singapore."[168] Under the IAA, an arbitration is international if (I) at least one of the parties has its place of business[169] in any state other than Singapore, at the time the arbitration agreement was concluded; (II) the agreed place of arbitration is situated outside the state in which the parties have their place of business;[170] (III) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place to which the subject matter of the dispute is most closely connected is situated outside the state in which the parties have their place of business;

[163] Arbitration Act 1986 Chapter 10, revised edition 2002.
[164] International Arbitration Act Chapter 143, revised edition 2002.
[165] Aceris Law LLC, "International Arbitration in Singapore", Aceris Law, 16 August 2018, International Arbitration in Singapore • Aceris Law LLC.
[166] Sect. 3 of the AA.
[167] Sect. 5(1) of the IAA.
[168] Sect. 3(1) of the IAA.
[169] Sect. 5(3)(a)(b) of the IAA.
[170] Sect. 5(1)(b)(i) of the IAA.

[171] or (IV) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[172]

2.3.1. Conduct of Arbitration

Arbitration in Singapore can be conducted under Ad Hoc rules or administered by an arbitration institution and the SIAC is the only arbitration institution in Singapore. The SIAC administers its cases by its own rules of arbitration which are agreed by the parties in their arbitration agreement[173] and SIAC also administer the arbitrations of any other specific that agreed by the parties, for example UNCITRAL Arbitration Rules.[174]

In addition, the arbitrators of the Ad Hoc arbitration will appoint by the SIAC.[175] Most appointments for SIAC-administered arbitrations are made from its Panel of Accredited Arbitrators, which is made up of a regional panel and an international panel of experts.[176] The President of the Court of Arbitration of SIAC is the default statutory appointing authority for arbitrators under the IAA and the Arbitration Act.[177]

2.3.1.1. Administration Fees

Parties pay an administration fee, when an arbitration is administered by the SIAC.[178] The administrative fee is calculated using a published schedule and is based on the amount of the claim or counterclaim.[179] For international arbitrations, the maximum administration fee chargeable is now capped at S$ 95,000.[180] Where the SIAC is only asked to appoint an

[171] Sect. 5(1)(b)(ii) of the IAA.
[172] Sect. 5(2) IAA.
[173] Section 4.7.2 of the paper.
[174] *Supra note 68.*
[175] Rule 9.1 of the SIAC Arbitration Rules, 6th edition, 1 August 2016.
[176] Parties are free to nominate their own arbitrator if so provided in the arbitration agreement.
[177] Sect. 8(2) of the IAA; Sect. 13 of the AA.
[178] Rule 1.1 of the SIAC Arbitration Rules, 6th edition, 1 August 2016.
[179] The Schedule of Fees of the SIAC Arbitration Rules, 6th edition, 1 August 2016.
[180] *Ibid.*

arbitrator, only an appointment fee is charged.[181] The arbitrator appointment fee, on the other hand, is a flat fee, not dependent on the amount of claim. Where a case is administered by SIAC, no separate fee has to be paid for the appointment of the arbitrator.

2.3.2. Arbitrability[182]

In Singapore, any dispute can be arbitrated unless it is opposed to Singapore's public policy or is not amenable to arbitration.[183] There is no fully comprehensive list of non-arbitrable matters; nonetheless, it is widely agreed that matters involving public interest, such as citizenship, patent validity, or company winding-up, are not arbitrable.[184]

2.3.3. Arbitral Process

2.3.3.1. Arbitration Agreement

There is no distinction between submission agreement and arbitration clause under the AA and IAA.[185] Under these two statutes, the term of "Arbitration Agreement" is an agreement by the parties to submit to arbitration or certain disputes that have arisen or may arise between them, whether contractual or not.[186] It could be in the form of a contract's arbitration clause or a separate agreement.[187] The arbitration agreement must be in writing; and it is deemed to be in writing if its contents is recorded in any form, including electronic communications, regardless of whether the arbitration agreement or contract was concluded orally, by conduct, or other methods.[188]

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[181] The appointment fee is payable where a request for appointment of arbitrator(s) is made in an *ad hoc* case. The fee is payable by the party requesting the appointment. A request for appointment must be accompanied by payment of the appointment fee prescribed.

[182] Aceris Law LLC, "The Concept of Arbitrability in Arbitration", Aceris Law, 16 January 2019, https://www.acerislaw.com/the-concept-of-arbitrability-in-arbitration/.

[183] Sect. 11 of the IAA; Sect. 48 of the AA.

[184] Aloe Vera of America, Inc — Asianic Food (S) Pte Ltd v. Chiew Chee Boon, SGHC 78, 2006.

[185] "International Arbitration 2021 / Singapore", Global Legal Insights, International Arbitration Laws and Regulations | Singapore | GLI (globallegalinsights.com).

[186] Sect. 2A(1) of the IAA; Sect. 4(1) of the AA.

[187] Sect 2A(2) of the IAA; Sect. 4(2) of the AA.

[188] Sect. 2A(3)-(5) of the IAA; Sect. 4(3)-(5) of the AA.

An arbitration agreement is deemed, which is constituted in two situations that provide under the IAA and AA; (a) Where a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply but is not denied, an effective arbitration agreement is deemed to exist,[189] and (b) a reference in a bill of lading to a charterparty or some other document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the bill of lading.[190] As well, arbitration agreement is independent of other terms of contract.[191] The doctrine of separability facilitates the concept of competence-competence, which gives the arbitrator the power to rule on his own jurisdiction. Both domestic and international arbitrations in Singapore, arbitrators are given express statutory power to decide on their "own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".[192]

If the arbitral tribunal resolves on the issue of its jurisdiction as a preliminary question, the High Court can review the decision, whether positive or negative.[193] An appeal to the Court of Appeal on this issue is permitted with leave of the High Court; the decision of the High Court refusing to grant leave to appeal to the Court of Appeal is not appealable.[194]

Both the IAA and AA, provide for the stay of judicial proceedings initiated in breach of arbitration agreements in order to enforce them.[195] By showing constraint in exercising jurisdiction over the subject matter, the concept of a "stay" effectively suspends judicial

[189] Sect. 2A(6) of the IAA; Sect. 4(6) of the AA.
[190] Sect. 2A(8) of the IAA; Sect. 4(8) of the AA.
[191] Art. 16(1) of the Model Law on International Commercial Arbitration, IAA; Sect. 21(2) of the AA.
[192] *Ibid;* Sect. 21(1),(3) of the AA.
[193] Sect. 10 of the IAA; Sect. 21(9) of the AA.
[194] Sect. 10(4)-(5) of the IAA.; Sect. 21A(1)-(2) of the AA.
[195] Sect. 6 of the IAA; Sect. 6 of the AA.

proceedings.[196] If the parties do not complete the arbitration process, they may revive the court proceeding.

When a court issues a stay, the court may impose orders in relation to the property involved in the dispute in order to protect the parties' interests.[197] The court has the power to dismiss proceedings if no further action has been taken for at least two years after a stay order has been issued.[198]

2.3.3.2. Appointment of Arbitrators

Aside from the parties' specific criteria, no special qualifications are necessary of any arbitrator.[199] Arbitrators can be of any nationality[200] and are not need to be legally trained since many of the arbitrators in Singapore are lawyers.

Disclosure of all circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence is required of arbitrators acting under the Arbitration Act,[201] the IAA[202] and the SIAC Rules.[203] The obligation to disclose is going and run from the time of appointment and continues throughout the arbitration proceedings.[204]

Additionally, parties are freely of choosing the applicable procedure for appointment of arbitrators. Both in domestic or international arbitration, if the parties fail agree on an appointing method or jointly appoint a sole arbitrator, each party may apply to the President of

[196] Like courts in many common law jurisdiction, courts in Singapore takes the view that an arbitration agreement does not automatically oust the court's jurisdiction and would not dismiss the cases brought before them, unlike in many civil law jurisdictions, where would dismiss the actions or decline to exercise jurisdiction.
[197] *Supra note 195.*
[198] Sect. 6(4) of the IAA; Sect 6(4) of the AA.
[199] Art. 12(2) Model Law on International Commercial Arbitration; Sect. 14(3)(b) of the AA.
[200] Art. 11(1) Model Law on International Commercial Arbitration, IAA; Sect. 13(1) of the AA.
[201] Sect. 14(1) of the AA.
[202] Art. 12 Model Law on International Commercial Arbitration, IAA.
[203] Rule 10. 4, SIAC Arbitration Rules, 6th edition, 1 August 2016.
[204] Sect. 14(2) of the AA; Art. 12(1) of the Model Law, IAA; Rule 2.1 of Code of Ethics for an Arbitrator of SIAC; Rule 10.5 of the SIAC Rules.

the SIAC Court of Arbitration for appointment.[205] In cases where the SIAC Rules apply, the procedure for appointing arbitrators is governed by those rules.[206]

If the reference which comes within the IAA is to a panel of three arbitrators and the parties have not agreed on an appointment procedure, each party shall appoint an arbitrator and the third arbitrator shall be appointed by agreement of the parties.[207] If the parties cannot agree on the third arbitrator's appointment, the President of the SIAC Court of Arbitration, as the statutory appointing authority, will make the appointment (upon a party's request).[208]

In any other case, if, under an appointment procedure, a party or contractual appointing body fails to take such steps as may be required or the parties do not agree on a default procedure, any party may request to the President of the Court of Arbitration of SIAC to take the necessary measures.[209]

The decision of the President of the Court of Arbitration of SIAC with regard to the appointment of arbitrators is not subject to any appeal,[210] under the IAA. However, under the Arbitration Act, appointments by the President of the SIAC may be challenged under the statutory grounds set out in Sect. 14(3) Arbitration Act, specifically (a) justifiable doubts as to independence and impartiality and (b) lack of qualifications agreed by the parties.[211]

[205] Sect. 13(3)(b) of the AA, Art. 6 & 11(3)(b) of the Model Law; Sect. 8(2) of the IAA.
[206] Rules 6 to 9, SIAC Rules.
[207] Sect. 9A of the IAA.
[208] Sect. 13(4) of the AA, Sect. 9A of the IAA.
[209] Sect. 13(5) of the AA; Art. 11(4) Model Law; Sect. 8(2) of the IAA.
[210] Art. 11(5) of the Model Law, IAA.
[211] Sect. 13(7) of the AA states that "No appointment by the appointing authority shall be challenged except in accordance with this Act".

2.3.3.3. Arbitral Procedure

Generally, the parties are free to choose the procedure of arbitration[212] where the place of arbitration is in Singapore. The tribunal can conduct the arbitration in a manner which it considers appropriate, as long as the parties have no agreement to the procedure.[213]

2.3.3.3.1. Oral Hearing

Normally, the tribunal shall make its finding on documents by oral hearing which is held in arbitration when the parties agreed to do so. The tribunal has the power to decide whether to hold oral hearings for the presentation of evidence or for oral arguments, or to proceed on the basis of documents only, subject to any contrary agreement.[214] The tribunal is required to hold a hearing where so requested by any party to the arbitration. In addition, under the AA, IAA and SIAC Rules, stipulate that, "Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall, upon the request of a party, hold such hearings at an appropriate stage of the proceedings."[215]

2.3.3.3.2. Local Arbitrators

Arbitrators in Singapore are not governed by the judicial rules of evidence. The Evidence Act,[216] which apply in all court proceedings, but not to its own application presented to any court or officer nor to proceedings before an arbitrator.[217]

[212] Sect. 23(1) of the AA; Art. 19(1) of the Model Law, IAA.
[213] Sect. 23(2) of the AA; Art. 19(2) of the Model Law, IAA.
[214] Sect. 25 of the AA, Art. 24(1) of the Model Law, IAA; Rule 21.1 of the SIAC Rules.
[215] Sect. 25(2) of the AA; Article 24(1) of the Model Law, IAA; Rule 21.1 of the SIAC Rules.
[216] Evidence Act, Chapter 97, 1893 revised edition 1997.
[217] Sect. 2(1) of the Evidence Act.

2.3.3.4. Arbitral Awards

2.3.3.4.1. Definition of Arbitral Awards

Under the Arbitration Act and IAA, an award is “a decision of the arbitral tribunal on the substance of the dispute and included any interim, interlocutory or partial award.”[218] Moreover, any orders or directions made pursuant to the arbitrator's statutory powers under both Acts are specifically excluded from the definition.[219] Also, any decisions, orders, or directions which do not determine matters in dispute shall not be considered "awards" even they are labeled as such by the tribunal.[220]

Pursuant to part III of the IAA, which deals with “Foreign Award”, the definition of an “Arbitral Award” is that provided in Article I of the NYC “include[s] not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” [221]

2.3.3.4.2. Time limit for a tribunal to make the award

The Arbitration Act does not impose any time limits on a tribunal to make an award..[222] Unless the parties agree otherwise, the court may, on the request of any party or the arbitral tribunal, extend the time limit set forth in the arbitration agreement.[223]

Further, the court can only extend the time limit if it believes that serious injustice would be done otherwise.[224] Unless the Registrar extends the time or the parties agree otherwise, the

[218] Sect. 2(1) of the IAA; Sect. 2(1) of the Arbitration Act.
[219] Sect. 28 of the Arbitration Act; Sect. 12 of the IAA.
[220] Government of the Republic of the Philippines v. Philippines International Air Terminals Co, Lnc, SGHC 206, 2006.
[221] Sect. 27(1) of the IAA.
[222] Sect. 16(1)(b) of the AA.
[223] Sect. 36 of the AA.
[224] Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd & Others, SGHC 20, 2010.

SIAC Rules require the tribunal to render the award within 45 days of the closing of the hearing.[225]

Not different from the arbitration agreement, an arbitral award must be in writing as well as, signed by the arbitrator(s).[226] In the case where the arbitration with two or more arbitrators, the IAA and Arbitration Act require only a majority of the arbitrators to have signed the award if the reason for the omission is stated.[227] The tribunal's decision will be decided by a majority of the arbitrators on the panel..[228] Unless the parties agree otherwise or the award is on agreed terms, the award must include reasons.[229] The date and place of the arbitration must be stated in the award.[230] Where the SIAC Rules apply, the award must be presented to the SIAC Registrar, who will transmit certified copies to the parties after all arbitration fees have been paid.[231] All arbitral awards made as a result of arbitration proceedings undertaken in Singapore are authenticated and certified by the SIAC.

An award once made[232] is valid and binding to the parties[233] and requires no further step of registration or fiat to give it effect.

2.3.3.4.3. Correction, Interpretation and Additional Award

Both of the domestic and international arbitrations, arbitrators are permitted to make corrections in any award due to "any errors in computation, any clerical or typographical errors or other errors of similar nature".[234] Corrections may be made either on the tribunal's own

[225] Rule 32.2 of the SIAC Rules.
[226] Art. 31(1) of the Model Law, IAA; Sect. 38(1) of the AA.
[227] Art. 31(1) of the Model Law, IAA; Sect. 38(1)(b) of the AA.
[228] Art. 29 of the Model Law, IAA; Sect. 19 of the AA; Rule 28.5 of the SIAC Rules,
[229] Art. 31(2) of the Model Law, IAA; Sect. 38(2) of the AA.
[230] Art. 31(3) of the Model Law, IAA; Sect. 38(3) of the AA.
[231] Rule 32.8 of the SIAC Rules.
[232] Sect. 19B(3) of the IAA; Sect. 44(3) of the AA provide that the award is made when it is "signed and delivered" in accordance with Art. 31 of the Model Law and Sect. 38 of the AA respectively.
[233] Sect. 44(1) of the AA; Sect. 19B(1) of the IAA.
[234] Art. 33(1)(a) of the Model Law, IAA; Sect. 43(1)(a) of the AA, Rule 33.1 of the SIAC Rules.

initiative within thirty days of the date of the award or there is no longer than thirty days of the date of receipt of the award at the request of any of the parties to the tribunal.[235] However, the period of thirty days shall be extended by the tribunal on the ground of necessity.[236] The procedure for award correction is limited to "obvious errors in calculation, phraseology, or reference," and it cannot be used to reopen the award on its merits.[237]

For the request for interpretation of a specific point or part of the award shall be free for the parties apply to the tribunal,[238] and there must be within thirty days of the receipt of the request, the same period with the request for correction, and the interpretation will form part of the award.[239]

Any party can request the tribunal to make an additional award as to the claims presented, by notice to the tribunal and other party, if any claim made in the proceeding was omitted from the award and in the absence of any contrary agreement.[240] If the tribunal considers the request to be justified, the additional award must be made within forty-five days of receipt of the request under the SIAC Rules[241] and may be made within sixty days under AA and IAA.[242]

2.3.3.5. Appeal Against the award

Only arbitrations governed by the domestic Arbitration Act allow for appeals to a court against awards based on a question of law.[243] The right of appeal can be excluded by agreement; an agreement to dispense with reasons for the tribunal's award is deemed as an agreement to exclude the jurisdiction of the Court.[244] An appeal may be filed only with the consent of the

[235] Art. 33(1)(2) of the Model Law; Sect. 43(1)(3) of the AA; Rules 33.1 and 33.2, SIAC Rules.
[236] Sect. 43(6) of the AA; Art 33(4) of the Model Law.
[237] Tay Eng Chuan v United Overseas Insurance Ltd, SGHC 193, 2009.
[238] Art. 33(1) of the Model Law, IAA; Sect. 43(1) of the AA.
[239] Sect. 43(2) of the AA; Article 33(1) of the Model Law, IAA.
[240] Art. 33(3) of the Model Law, IAA; Sect. 43(4) of the AA; Rule 36.3, SIAC Rules.
[241] Rule 33.3 of the SIAC Rule.
[242] Art.33(3) of the Model Law, IAA; Sect.43(5) of the AA.
[243] Sect. 49 of the AA. No appeal is permitted under the IAA.
[244] Sect. 49(2) of the AA.

parties or with the approval of the High Court and it must be filed within twenty-eight days of the date of the award.[245] The court must be satisfied before granting leave to appeal that:[246]

(a) the determination of the question will substantially affect the rights of one or more of the parties;

(b) the question is one which the arbitral tribunal was asked to determine;

(c) on the basis of the findings of fact in the award —

(i) the decision of the arbitral tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

In addition, before filing an appeal, the applicant must exhaust all applicable arbitral proceedings of appeal or review, as well as any other remedies provided under Section 43 of the Arbitration Act.[247] When the High Court rules on the merits of an appeal and refuses leave to appeal to the Court of Appeal, the right to appeal to the Court of Appeal is terminated.[248]

On appeal, the court can either confirm, vary, or return the award in whole or in part to the tribunal for reconsideration in light of the court's decision, or set it aside in whole or in part.[249] However, the court will not use its power to set aside the award unless it is satisfied that remanding the case to the tribunal for reconsideration would be inappropriate.[250]

[245] Sect. 50(3) of the AA.
[246] Sect. 49(5) of the AA.
[247] Sect. 50(2) of the AA.
[248] Sect. 49(7) (11) of the AA; Ng Chin Siau and Others v How Kim Chuan, SGCA 46, 2007.
[249] Sect. 49(8) of the AA.
[250] Sect. 49(9), Arbitration Act.

2.3.3.5.1. Others Condition to be Set Aside the Award

Under the Arbitration Act and the IAA, within three months of the applicant's receipt of the award, the applicant must file an application to set aside the award by originating summons.[251] The grounds of setting aside of the domestic arbitration award were mentioned under Section 48 of the Arbitration Act, as well as, Section 24 of the IAA and Article 34(2) of the Model Law, which are for the international arbitration award to be set aside.[252]

2.4. Enforcement of Arbitral Awards

2.4.1. Enforcement of Local Arbitral Awards

Enforcement of arbitral awards requires the leave of the court, which are made in Singapore by way of execution proceedings, whether in a domestic[253] or international arbitration.[254]

2.4.1.1. Applications are to be made to the High Court

Applications are to be made to the High Court,[255] and must be made within six years after the making of the award for leave to enforce the award.[256]

2.4.1.2. Debtor may apply to set aside the order

A judgment or order of the court, that leave to enforce an award, is often applied for and granted *ex parte*[257] and the order so obtained served on the debtor. The debtor has fourteen days from the date of service of the order granting leave, or such other period as the court granted

[251] Sect. 48(2) of the AA; Art 34(3) of the Model Law, IAA.
[252] Kohe Hasan, et al, "Singapore: Applicable requirements as to the form of arbitral awards", Gar, 08 June 2021, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/singapore.
[253] Sect. 46(1) of the AA.
[254] Sect. 19 of the IAA.
[255] Order 69 and Order 69A of the Rules of Court, 1996 revised edition 2014.
[256] Sect. 6 of the Limitation Act Cap. 163, 1959 revised 1996.
[257] Order 69 Rule 14 and Order 69A Rule 6 of the Rules of Court.

leave may specify, to apply to have the order set aside.[258] During that time period, or until the debtor's application to set aside the order is fully decided, the award will not be enforced.[259]

2.4.1.3. Grounds for the court to refuse enforcement of the award

The grounds on which the court may refuse enforcement of the award are silent under the Arbitration Act and IAA.[260] However, to keep within the spirit of Section 47 of the Arbitration Act[261] the grounds for refusal to enforce shall be no wider than those, which relate to the setting aside of the award.

An award made under the IAA may only be refused enforcement if the grounds for setting aside, being the exclusive recourse against the award, exist.[262]

2.4.2. Enforcement of Foreign Arbitral Awards

2.4.2.1. Foreign awards made in a New York Convention country other than Singapore

The procedure for the enforcement of foreign arbitral awards made in a Contracting State of the NYC other than Singapore[263] is set out in Part III of the IAA.

With the leave of the High Court, these awards may be enforced in Singapore by action[264] or in the same manner as a judgment or order to the same effect. If leave is granted, a judgment in accordance with the award will be entered.[265] Such awards are also recognized as binding for all purposes on the parties between whom they were made, and may be used by any of those parties as a defense, set-off or otherwise in any judicial process in Singapore.[266]

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[258] Order 69 Rule 14(4) & Order 69A Rule 6(4) of the Rules of Court.
[259] *Ibid.*
[260] *Supra note 252.*
[261] which limits challenges to awards to those set out within the Arbitration Act.
[262] PT First Media TBK v Astro Nusantara International BV & Ors, para 99, 1 SLR 372, 2014.
[263] *Supra Note 142*; Singapore having made the reciprocity reservation set out in Art I (3) of the NYC 1958.
[264] Alexander G Tsavliris & Sons Maritime Co v. Keppel Corp Ltd, 2 SLR 113, 1995.
[265] Sect. 19 & 29 of the IAA.
[266] Sect. 29(2) of the IAA.

The Court of Appeal can hear an appeal from the High Court's decision on the enforcement of a foreign award.[267] Moreover, the application, must be made within six years after the making of the award, for leave to enforce a foreign award made in the NYC Contracting State.[268]

The procedure for enforcing a NYC award is similar to the procedure for enforcing an award rendered under the IAA in Singapore.[269] In addition, the award and arbitration agreement produced to the court shall, upon mere production, be received by the court as *prima facie* evidence of the matters to which it relates.[270] As a result, the role of court in examining these documents produced for enforcement purposes is formalistic and does not include a substantive examination.[271]

The case cannot be reviewed on the merits by the court hearing the application for enforcement of a foreign award, however, it may refuse to allow the award to be enforced in Singapore if the grounds set out in Sect. 31(2) IAA has been proved.[272] These grounds are the same as those outlined in Article V of the NYC.

2.4.2.2. Foreign awards made in countries or territories which are not signatories to the New York Convention

The foreign awards made in countries or territories that are not signatories to the NYC may be enforced in Singapore in the same way as a judgment or order to the same effect, with

[267] Sect. 6(1)(c) of the Limitation Act Cap. 163.
[268] Order 69A Rule 6 of the Rules of Court.
[269] Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd), SGHC 108, 2010.
[270] Sect. 30 (2) of the IAA.
[271] Sect. 31(2) of the IAA provides as follows: A court so requested may refuse enforcement of a foreign award if the person against…
[272] Sect. 34 of the Supreme Court of Judicature Act, Chapter 322, 1969 revised edition 2007.

the leave of the High Court, following an amendment to the Arbitration Act that took effect on May 16, 2003.[273] If leave is granted, a judgment in accordance with the award will be entered.[274]

In compliance with section 4 of the Arbitration (International Investment Disputes) Rules[275] lays out the procedure for enforcing awards granted under the ICSID Convention.[276]

2.4.2.3. Arbitral awards made in England and others Commonwealth jurisdiction

An arbitral award made in England or others Commonwealth jurisdiction[277] with which Singapore has reciprocal judgment recognition agreements may be enforced if the award has become enforceable as a judgment of that court under the law in force in the place where it was made.[278] Due to the procedure is more onerous for the applicant, and many Commonwealth jurisdictions are now parties to the NYC, this approach is no longer relevant.

Within twelve months after the date of the judgment, an application for registration of a judgment based on such an award must be filed.[279]

2.4.2.4. Court has discretion to allow enforcement

The court hearing the case has the discretion to allow the judgment to be enforced in Singapore based on the "just and convenient" criteria.[280] There is no judgement shall be order to be registered by the court if the original court acted without jurisdiction; if the debtor did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; if the

[273] Sect. 46(1) (3) of the AA.
[274] *Ibid.*
[275] ARBITRATION (INTERNATIONAL INVESTMENT DISPUTES) ACT, CHAPTER 11, 1968 revised edition 2012.
[276] *Ibid;* Sect 9.
[277] Reciprocal Enforcement of Commonwealth Judgments (Extension) (Consolidation) Notification, CHAPTER 264, SECTION 5, 1925, revised edition 1999.
[278] *Ibid.*
[279] Sect. 3 (1) of the RECIPROCAL ENFORCEMENT OF COMMONWEALTH JUDGMENTS ACT, CHAPTER 264, 1921 revised edition 1985.
[280] *Ibid.*

debtor was not duly served with the process; if judgment was obtained by fraud; if an appeal is pending; or if it is contrary to the public policy of Singapore.[281]

2.4.2.5. Certification and authentication of awards for enforcement overseas

A party seeking to enforce an arbitral award outside the territory of Singapore in a jurisdiction that is a party to the NYC will be required by the foreign court before which enforcement is sought to comply with Article IV (1) of the NYC.[282]

2.5. Conclusion

After the establishment of the SIAC in 1991, Singapore becoming the most successful of the settle the commercial dispute with the arbitration mechanism compare to the other countries. This institution is not difference from other where there have their own arbitration rules. The arbitration process in Singapore is the model law for the developing countries that want to strengthening their arbitral process, due to their government has adopted a lot of kind of laws, regulations and guideline, that make sure their proceedings are accept by their citizens and other around the world. Currently, this institution has deploy in the U.S in order to promote their success to every corner of the world.

[281] Sect. 3 (2) of the RECIPROCAL ENFORCEMENT OF COMMONWEALTH JUDGMENTS ACT, CHAPTER 264, 1921 revised edition 1985.
[282] Sect 1.5.1.1, Chapter 1 of this paper.

CHAPTER 3: COMMERCIAL ARBITRATION IN CAMBODIA

3.1. Historical Background

Cambodia, a country that has survived a long civil war for more than two decades and whose economy has been completely wrecked during that time, has chosen a free market policy to expand and improve its economic relationships with other countries in the area and throughout the world. With intensive efforts to develop the country, Cambodia has finally become a World Trade Organization (WTO) member in 13 October 2004.[283] This is the most successful and part of the advantages of becoming a member of WTO, which is help Cambodia to increase and strengthen business relationships with the other WTO's members, such a means to obtain more direct and indirect foreign investments. At the same time, one of its disadvantages is the commercial environment challenge between state members. Thus, the Royal governments of Cambodia need to improve its economic and business environment with all means in order to attract the foreign investments to the country. Since we haven't had sufficient standardized legislation and regulations to govern business problem; and neither the commercial court doesn't exist yet; nor has a reliable ADR Systems not well performed, so most of the investors who confront to commercial dispute seek for the intervention from outside of the country. These problems present serious barriers to business people who wish to do business in Cambodia.

Concretely, Cambodia has been set up its own National Arbitration Center (NAC) which is set to offer a commercial dispute resolution.[284] The establishment of the NAC attempts to be the first institutional arbitration that provides an extra-judicial mechanism to the business

[283] "Cambodia and the WTO", World Trade Organization, WTO | Cambodia - Member information.
[284] Kimsay, Hor. "National Arbitration Center launched." March 05, 2013, https://www.phnompenhpost.com/business/national-arbitration-center-launched.

community with fair, quick, less expensive and certainty of resolution in Cambodia.[285] It can contribute to improve, strengthen and ensure business environment since it helps to make a better climate of business and also to create trust among business community. It has been noted that *"what they really want is a clear and final resolution of a dispute, as such, that arbitration may be the preferable process for them"*.[286] In respond to this need, the NAC plays an important role to make a good facility for commercial dispute resolution and efficiency.

3.2. National Arbitration Center

The National Arbitration Center ("NAC"), currently known as National Commercial Arbitration Centre ("NCAC") was established under Article 10, Chapter 3 of the Law on Commercial Arbitration (LCA) as an independent national institution with the competence to arbitrate the entire dispute related to commercial activities.[287] Moreover, the related Sub-Decree on "Organization and Functioning of the National Arbitration Center" issued by Cambodian Prime Minister, Samdech Akka Moha Sena Padei Tech Hun Sen, on August 12th, 2009 in order to ensure the high quality of commercial arbitration in Cambodia.[288] This provision contains 7 chapters and divided into 56 articles.[289]

The NAC is designed to play a major role in promoting arbitration, as well as training arbitrators and providing commercial arbitration services in Cambodia. The NAC is established under the auspices of the Ministry of Commerce,[290] though in due course it is expected to become a self-governing non-profit institution.[291] The organization of the NAC is described in

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[285] "IFC helps Establish Cambodia's First National Arbitration Center to Resolve Commercial Dispute", August 10, 2009, http://www.pressreleasepoint.com/ifc-helps-establish-cambodia

[286] Demand for ADR Service in Cambodia, *The Establishment of Commercial Arbitration Services in Cambodia*, IFC World Bank Group: Private sector discussion No 24, September 2009, at A 6.

[287] Article 10 of the Law on Commercial Arbitration of Cambodia dated March 6, 2006.

[288] Sub-Decree on Organization and Functioning of the National Arbitration Center, issued by Cambodia Prime Minister in August 12, 2009.

[289] *Ibid.*

[290] *Supra Note* 287.

[291] Article 1 of the Sub-Decree on Organization and Functioning of the National Arbitration Center.

the chapter 3 of the NAC Sub-Decree. The NAC's organization is described in detail in Chapter 3 of the NAC Sub-Decree. The institution shall be run by a "Executive Board"[292] of no more than seven members,[293] accompanying by the General Secretariat, which will organize to support and facilitate the implementation of the Executive Board's policies, as well as other NAC activities.[294]

3.3. NCAC Arbitration Rules[295]

Proceedings administered by the NCAC will proceed according to the Arbitration Rules of the NCAC (NCAC Rules) and the LCA, which adopted in 2006, and is modeled after the UNCITRAL Model Law,[296] but does not include the features existing under the 2006 amendments. Moreover, NCAC Rules were developed by taking into consideration the rules of the most well respected international arbitration centers.

3.3.1. Arbitral Process

In order to commence arbitration proceedings, the claimant shall submit a notice of arbitration to the General Secretariat of the NCAC,[297] and General Secretariat of the NCAC will then send notice to the respondent. When the respondent receives the notice from the General Secretariat, the arbitration proceedings begin.[298] After the commencement of the arbitration proceedings, the tribunal must be appointed. The tribunal shall be composed of an odd number of arbitrators, typically one or three.[299] So long as the persons selected meet the

[292] Art 16 of the LCA stipulated that: The Composition of Executive Board that manages the National Arbitration Center shall be elected among its members by the General Assembly. The Chairman of Executive Board shall be the Chairman of the National Arbitration Center.
[293] Article 8 of the Sub-Decree.
[294] Article 26 of the Sub-Decree.
[295] Arbitration Rules of the National Commercial Arbitration Center of Kingdom of Cambodia, July 11, 2014 and revised March 28, 2021, came into force June 28, 2021.
[296] UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985.
[297] Rule 7 of the NCAC Rules, 2014.
[298] Rule 7.7 of the NCAC Rules, 2014.
[299] Rule 10.2 of the NCAC Rules, 2014; Art 18 of the LCA.

qualification criteria set out in the NCAC Rules.[300] Parties may generally appoint any arbitrator who is registered with the NCAC or any person who has served or is registered as a commercial arbitrator with any local or international commercial arbitration institution.[301]

If the parties shall not agree on the number of arbitrators to be chosen, then three arbitrators will be appointed under the NCAC Rules.[302] Besides, the parties are freely of choosing the laws of any jurisdiction which are applicable to the dispute[303] and language(s).[304]

Where the tribunal has been appointed, it will hold a preliminary hearing in which it will setting a schedule for the proceedings.[305] Also, the tribunal will decide whether or not the proceedings should be conducted through the submission of documents as well as other materials only, or oral hearings should be held.[306]

A party may seek protective relief from the tribunal through interim measures at any time during the arbitration proceeding.[307] Interim measures are necessary and urgent measures which do not prejudice the final judgment of the tribunal with regard to the merits of the case. Interim measures include, for example and without limitation, orders: (a) to maintain or restore the status quo pending resolution of the dispute; (b) to take action that would prevent, or to refrain from taking action that is likely to cause (i) current or imminent harm or (ii) prejudice to the arbitration process itself; (c) to provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) to preserve evidence that may be relevant and material to the resolution of the dispute.[308]

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[300] Rule 11.1 of the NCAC Rules, 2014.
[301] Rule 11.1 of the NCAC Rules, 2014.
[302] Rule 10 of the NCAC Rules, 2014.
[303] Rule 17.1 of the NCAC Rules, 2014.
[304] Rule 18.1 of the NCAC Rules, 2014; Art 30 of the LCA.
[305] Rule 20.2 of the NCAC Rules, 2014.
[306] Rule 24.1 of the NCAC Rules, 2014.
[307] Rule 28 of the NCAC Rules, 2014.
[308] Rule 28.2 of the NCAC Rules, 2014.

3.3.2. Arbitral Award

The tribunal shall declare the proceedings closed once all of the parties' evidence has been presented. The tribunal has forty-five days from that time to submit a draft award to the NCAC General Secretariat for scrutiny.[309] The NCAC will review the drafting award and give any suggestion revisions regarding the form of the award, but will not review the merits of the case of the award.[310]

The tribunal will issue the award to the parties once the NCAC has scrutinized it, and the parties will have thirty days to request any modification, correction, amplification, or interpretation of the award.[311]

The arbitral award shall be final and binding on the parties.[312] The parties should be informed that, under the NCAC Rules, awards may only be issued in English or Khmer after consultation with the parties, regardless of the language(s) of the arbitration proceedings.[313]

3.3.3. Arbitration Fees

If the parties choose to submit their dispute to arbitration under the NCAC for final resolution, the parties shall be required to pay certain fees to the NCAC. In compliance to the Fee Schedule of the NCAC adopted on 11 July 2014, these fees include (i) a Registration Fee fixed at two hundred and fifty United States Dollars per claim or counterclaim; (ii) an Arbitrator Appointment Fee fixed at three hundred United States Dollars per arbitrator; (iii) The NCAC charges an Administration Fee based on a sliding scale, dependent on the amount in dispute. The Administration Fee is charged for the service it provides in the case administration.; and

[309] Rule 35.1 (a) of the NCAC Rules, 2014.
[310] Rule 35.1 (b) of the NCAC Rules, 2014.
[311] Rule 38 of the NCAC Rules, 2014.
[312] Rule 37 of the NCAC Rules, 2014.
[313] Rule 18.3 of the NCAC Rules, 2014.

(iv) a Tribunal Fee, which is based on a sliding scale that is determined by the amount in dispute and the number of arbitrators.[314]

3.3.4. New Arbitration Rules

Since the establishment of the NCAC in 2006 and officially launched in 2013 until 2021, with the current arbitrators of sixty,[315] this institution received a total of 25 cases, in between 2015 to September 2020, with sum in dispute more than 72 million USD.[316] Moreover, in 2020, the NCAC is in process of reviewing and amending its Rules that adopted in 2014.[317] This reviewing and amending, in purposes, "*to deliver an effective mechanism for commercial dispute resolution despite ongoing challenges related to the global pandemic*"[318] and to enhancing as well as strengthening the major changes such as; remote hearing, expedited procedure and emergency arbitrator.[319]

The NCAC began a process to change its 2014 NCAC Arbitration Rules in order to keep up to date with regional and global developments in commercial arbitration and to better serve its users. The revised arbitration rules were adopted on March 28, 2021, and will take effect on June 28, 2021.[320]

As already mentioned above, this 2021 Rules revised with the purposes of, first is the remote hearing where the arbitral tribunal can be hearing by videoconference, telephone or using other communications technology means with participants in one or more geographical

[314] "FEES: NCAC Schedule of Fees." NCAC, 2020, Fees | National Commercial Arbitration Centre (NCAC).
[315] "About Us: Members." NCAC, 2020, Members | National Commercial Arbitration Centre (NCAC).
[316] "Statistics." NCAC, 2020, Statistics | National Commercial Arbitration Centre (NCAC).
[317] Sarath, Sorn. "Arbitration rules under review." Khmer Times, July 28, 2020, https://www.khmertimeskh.com/50749327/arbitration-rules-under-review/.
[318] Bun Youdy, president of the NCAC, told The Phnom Penh Post on December 16, 2020.
[319] "Commercial Arbitration in Cambodia: The New NCAC Rules 2021 Are Out Now." SokSiphana&associates, June 8, 2021, https://www.soksiphana.com/resources/alerts/commercial-arbitration-in-cambodia-the-new-ncac-rules-2021-are-out-now/.
[320] "Arbitration Rule: Foreword." NCAC, March 28, 2021.

places or in a combined form , in this new environment.[321] Second is the expedited procedure[322] and emergency arbitrator,[323] as a new feature for the first time of the NCAC Rules.

3.4. Setting Aside the Arbitral Award

Setting aside an arbitral award refers to contesting the arbitral award before enforcement proceedings have begun at the seat of arbitration. The grounds for setting aside an award are defined by the law of the seat of the arbitration, for example, in Cambodia is chosen, the LCA shall be apply. In compliance to the LCA, the arbitral award shall be setting aside only if the party making the application furnishes proof that:[324]

- A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing, any indication by the parties, under the law of the Kingdom of Cambodia;
- the party making the application was not given proper notice of the appointment of an arbitrator(s) or of the arbitral proceedings, or was otherwise unable to effectively present his case;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

[321] *Ibid.*
[322] Art 9 of the NCAC Rules 2014, revised edition March 8, 2021.
[323] Chapter 3 of the NCAC Rules 2014, revised edition March 8, 2021.
[324] Art 44 (2) of the LCA.

- 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 this the Arbitration Law from which the parties cannot derogate;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or
- the recognition of the award would be contrary to public policy of the Kingdom of Cambodia.

3.5. Recognition and Enforcement the Arbitral Award

The procedure of request for enforcing the award in Cambodia, pursuant to Article 45 to the LCA, has the same merit as Article IV of the NYC.[325] Both domestic and foreign award, the claimant must submit a motion to the respective court along with supporting documentation, such as the duly authenticated original arbitration award or duly certified copy, and the original arbitration agreement or a duly certified copy.[326] In case that the agreement or award is made in other language, the claimant must submit a certified translation into Khmer as well.[327]

3.5.1. Enforcement of Domestic Arbitral Award

Parties in the arbitration, the domestic arbitral award, shall be voluntarily execute the arbitral award between them with the merit the award. The claimant can file an application with the Court of First Instance, where it has the territorial jurisdiction over the debtor or its property, in requesting it to subject an "order to enforce the arbitral award".[328]

[325] Sect. 1.5.1.1 of the paper.
[326] Art. 45 para 2 of the LCA.
[327] *Ibid.*
[328] Art. 353 (5) of the Code of Civil Procedure of the Kingdom of Cambodia, July 3, 2006.

However, pursuant to Article 42 of the LCA, an arbitral award which is rendered under the NCAC rules, the party shall be request to the Court of Appeal that has the Jurisdiction over recourse, recognition, and enforcement of arbitral award.

3.5.2. Enforcement of Foreign Arbitral Award

Since Cambodia is a party to the NYC, with other 164 Contracting States, at the moment, shall recognize arbitral award as binding and enforce them issued in other Contracting States.[329] Thus, foreign arbitral awards can be enforced in Cambodia. The signatory states required to establish the mechanisms for enforcing foreign arbitral awards in their territories.

In Cambodia, the motion seeking execution of a foreign arbitral award shall be submitted to the Court of Appeals.[330] The claimant can file an application, the same with the enforcing domestic arbitral award,[331] in requesting it to subject an "order to enforce the arbitral award" to the Court of Appeal.[332] However, the opposing party has sixty days to object to the recognition and enforcement of the award by appealing to the Supreme Court[333] and the decision shall be final and binding and is not subject to any further appeal.[334]

3.5.3. Grounds for the court to refuse recognition and enforcement of the award

Both domestic and foreign or international arbitral award, that rendered under the arbitration of other countries, shall be refuse by the Court of Appeal to recognize and enforce, if the court is sought proof that:[335]

[329] Art. 3 of the New York Convention 1958.
[330] Art. 6 of the Law on New York Convention 1958, July 23, 2001; Art. 353 (6) of the Code of Civil Procedure of the Kingdom of Cambodia, July 3, 2006.
[331] Sect. 3.5.1 of the paper.
[332] Art. 353 (6) of the Code of Civil Procedure of the Kingdom of Cambodia, July 3, 2006.
[333] Art. 9 of the Law on New York Convention 1958, July 23, 2001; Art 43 of the LCA.
[334] Art. 23 of the Law on New York Convention 1958, July 23, 2001.
[335] Art. 15 of the Law on New York Convention 1958, July 23, 2001; Art 46(1) (2) of the LCA; Art 353 (3) (4) of the Code of Civil Procedure of the Kingdom of Cambodia, July 3 2006.

- A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing, any indication by the parties, under the law of the Kingdom of Cambodia;
- the party making the application was not given proper notice of the appointment of an arbitrator(s) or of the arbitral proceedings, or was otherwise unable to effectively present his case;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this the Arbitration Law from which the parties cannot derogate;
- the award has not yet become binding on the parties in the country in which, or under the law of which, that award was made, or the award has been set aside or suspended by a court in the country which the award was made;
- subject matter of the dispute is not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or
- recognition of the award would be contrary to public policy of the Kingdom of Cambodia.

3.6. Challenges of the Enforcement of Arbitral Award in Cambodia

Even Cambodia have many laws and regulations related to the arbitration proceeding, especially the commercial arbitration, the enforcement of the arbitral award, both domestic and foreign or international award, remain some challenges in Cambodia. The challenges of the enforcement of the arbitral awards in Cambodia with three criteria; the challenges of legal framework, institutional and the mechanism of the proceeding.

3.6.1. Legal Framework Challenges

The Most important vehicle for better enforcement of any mechanism is starting from the clear setting laws and related regulations to guide all other elements. Without good law or policy, other mechanisms cannot be enforced effectively.

After the adoption of the LCA, we can notice that, this law based on the international instruments, especially the NYC and UNCITRAL Model Law, on the requesting the domestic court procedures such as; the request for enforcement, set aside, refusal and appeal against the award. These request procedures of the LCA, as well as, the Law on the Approval and Implementation of the United Convention on Recognition and Enforcement of Foreign Arbitral Award ("Law on New York Convention") which came into forced in 2001, were translated and followed by the NYC and UNCITRAL Model Law. By this point, the requesting procedures step shall be play the important role of ensuring the qualification of the recognition and enforcement of the court of Cambodia in accordance to the international standard.

Furthermore, the LCA and the Law on New York Convention as well as the Code of Civil Procedure of Cambodia ("CCP") provided the same procedures of the enforcement the award, where the procedure shall be request to the Appeal Court for a judgment to force the other party to enforce the award as binding. In contrast, the LCA and the CCP, which adopted the same year in 2006, and with difference merit of the enforcement of the domestic arbitral award that the Article 353 (5) of the CCP shall have the jurisdiction by the Court of First Instance, and

Article 42 of LCA where the award rendered by the NCAC shall be refer to the Court of Appeal. As a result, whether the request to enforce the domestic arbitral award shall be referring to Court of First Instance or Court of Appeal. Moreover, these laws, are lack of the legal basis even the CCP is the main legal instrument related to the civil matters, and with only one article to govern the enforcement procedure of the domestic and foreign or international arbitral award.

Besides, there are no any other laws or regulations, as well as declaration, regarding to the commercial arbitration stipulate the additional procedures of enforcement.[336] By comparing to the Singapore enforcement procedure, there are two basic legal frameworks, the AA and IAA as well as the related to the implementing procedure such as limitation Act, Rule of Court, Evidence Act and the Reciprocal Enforcement of Commonwealth Judgment Act and so on.

3.6.2. Institutional Challenges

Since NCAC just official launched in 2013, this institution remains a low number of credit and popularity, especially the domestic and foreign investors in Cambodia. In addition, the believe of the investors to this institution still remain limit due to any circumstances related to the laws, regulations and the quality of the arbitrators.

As we can see, nearly 10 years after the established of the NCAC, the cases receiving are in the low number, compare to other countries, and the quality especially the capacity building of the arbitrators. There is no a permanent institution that governing on the training of the arbitrators. Moreover, LCA have no provided this training institution and the qualification of the arbitrators were in a narrow of became an arbitrator in Cambodia. Also, under this law, there no any notion on the capacity monitoring of the arbitrators or the members of the NCAC. The institution itself, has no share any assessment the capacity building of the arbitrators.[337]

[336] The discussion on "ADR policy drafting" with H.E. CHIN Malin, Secretary of States, Ministry of Justice, June 16th, 2021.

[337] "The Establishment of Commercial Arbitration Services in Cambodia." International Finance Corporation, No. 24, P. 21, September 2009.

Likewise, this institution has no provided the mediation mechanism, which is kind of a ADR approach to help the conflict parties not to spend too much time and money on settling their dispute. This approach can help both parties to mediate, negotiate and settle the dispute before the third party involve.

3.6.3. Mechanism Challenges

The mechanism of the arbitral process and the court proceeding in Cambodia have no clearly define and explanation where the conflict during the process shall be arise at any time. The court intervenes, which is mentioned in Article 19 (3), (4) and (5) of the LCA, is when the court can appoint the arbitrator(s) to the tribunal, but have no any instruction either or procedure, how the court can appoint the arbitrator(s). There is no crystal clearly whether any party shall be request directly to the court to appoint arbitrator(s) or by request through the NCAC institution to the court or NCAC have the full mechanism to appoint. However, under the Rule 10.2 of the NCAC Arbitration Rules 2014 and Article 25.2 of the NCAC Arbitration Rules 2021, NCAC, through its Appointment Committee, shall appoint or designate the arbitrator(s). In this point, whether the court can intervene the appointment procedure or not, or when the court can appoint the arbitrator(s)?[338] Whether any party can request the court that provided under Article 6 of the LCA, to appoint any arbitrator(s) or not?

Another challenge is, under the CCP Article 353 (5),[339] there have no clear define what kind of the conflict that settle by the arbitral tribunal shall be enforce by the Court of First

[338] Respondek, Andreas (editor). "Asia Arbitration Guide." Alliance of German Business Lawyers in Asia, 7th (Extend and Revised) Edition, P. 59-60, February 2021.

[339] A motion seeking an execution ruling with regard to a domestic arbitration award shall fall within the jurisdiction of the court having jurisdiction over the domicile/residence of the Debtor-in-Execution in accordance with Article 8 (Jurisdiction determined by domicile), and if no such court can be determined through said Article, then the court of first instance having jurisdiction over the location of the property that is subject to the claim or of the property that can be attached.

Instance, moreover, the arbitral award shall be enforce by Appeal Court when the award rendered by the domestic or international or foreign institution.

Another challenge of the institutional, there no any notion of the cooperation and connection between NCAC and the courts on providing assisting and other institution on the arbitral proceeding, as well as the guideline to ensure the relations or any activities between each other. Moreover, both institutions have no any purposes of making any mechanism or strategy on implementing their relations. Also, there is no the basic mechanism or legal framework relate to the preparing on the enforcing the award. As well, either the Ministry of Commerce nor Ministry of Justice shall be preparing the draft law or regulation related to the organizing these mechanisms.

Last but not least, the capacity development of the arbitrators is one of the most important mechanism in order to insure that the arbitrators shall be professionalism and experienced.[340] Moreover, the government, as well as the laws or regulations, does not mentioned about the need of the institutional building and the assessment, which is the only mechanism to certify that this would be independence and neutral or not.

3.7. Conclusion

Cambodia, after the period of the civil war, with the economic and investment growth day by day, the government has reform and strengthen the laws and judicial system in the country to be better and compliance with the international standard. Especially, the ADR mechanism, which is the most important part to ease the civil cases overload at the court and as the neutral settlement the dispute. As a result, there is an arbitration centre in Cambodia, the NCAC, where settling the commercial disputes and as a means to strengthen neutrality of the out of court settlement the dispute. However, even Cambodia have the arbitration institution

[340] *Supra Note* 336.

and the governing law related to the arbitration process, the challenges of the legal framework, institutional and the other mechanisms remain the fail of the enforcement both domestic and foreign or international arbitral awards.

CONCLUSION

As have been discuss above, the international arbitration is considered the most traditional method of resolving controversies and disputes arising from international business transactions. Especially, in this 21st century, when the international trade daily increase as notice and the Economic integration in the world is a strong commitment from all the nations where they agreed that this sector will be enlarged as soon as possible. During this economic integration many issues in the economic transaction among states in this region as well as with other countries and multinational corporations in the world will become more and more complex and it needs to set up any effective conflict resolution mechanisms to support and improve this business transaction. The arbitration services, mostly, is a great and effective mechanism, which will provide many benefits regarding the use of arbitration centres in the region. In the case of the arbitration centres, there are considered to be neutral and flexible. If there are any cases which were settled in a court then there is a possibility of a country's advantage over another foreign investor, making a high influx of unfair agreements. If parties do decide to settle commercial disputes in national courts, then there is a possibility the media will grab hold and exploit any undercover secrets they may have at the time. In arbitration process, decisions are final and there is no way to undue the given decision unlike in a national court where there is always a possibility for appeals. While the need of the arbitration increase, the world come with a lot of arbitration centers where deploy in the developed countries.

Under the international instruments, especially the NYC and UNCITRAL Model Law, states were provided a global approach of settling the dispute, which is out of court jurisdiction, with the win-win strategy, neutral and flexible. Moreover, where the investment increasing every day, the needs of the commercial arbitration shall be enlarging and the laws that governing the process shall be up to date. Especially the developed countries, for example

Singapore, the arbitration Rules of the SIAC have been revised to the 6th edition in 2006. The laws and regulations to support their arbitration process, mostly follow to the international instruments, that provide the best qualities and responsibilities to the international stage. This is the most successful model, where is the practice to the developing countries. Furthermore, Singapore just deploy their arbitration centre in the United State, in purpose to promote and develop their institution from the regional to the world, as well as to promote the best model and process of their success in developing the ADR mechanism.

Cambodia, where is one of a developing country in the ASEAN region and the modern ADR system in Cambodia is still at a young age, the modernization and development as well as enhance of the legal and judicial systems, play the important key of build and building trust of the foreign and international investors in Cambodia. The establishment of the NCAC in 2013, is one of most successful in developing and enhancing the quality and needs of settling the dispute out of court jurisdiction. This centre is a part of decreasing the civil cases overload in the courts and build more trust and confidential of the conflict parties. Moreover, this centre, which have their own rules that in compliance to the national laws and regulations, the arbitral award shall be fulfill with the society environment in Cambodia and this mechanism is remain neutral flexible and short period of time settling the dispute. Notwithstanding that, since the established of this centre, the case receiving only 25 cases from 2015 to September 2020, compare to other states in the region, this number of cases, still in a limit and far from others especially Singapore.

The quality of the arbitrators training still limit. The laws no crystal clear define the court proceeding and the period of the duration after the award rendered as well as the mechanism of the intervene and communicate between courts and arbitration centre. Especially, there are no any laws or regulations as well as the guideline of the process, during and after render the court

warrant. The legal framework, institutional execution and the relevant mechanisms remain difficulties of the enforcing both domestic and international or foreign arbitral award.

RECOMMENDATION

To improve the challenges, Cambodian government and other relevant stakeholders should improve the following areas:

- Legal framework
  - The government should review or amended the Article 353 (5) of the CCP, in purpose to define what kind of dispute that settle by the domestic arbitration mechanism, shall be enforce by the jurisdiction of the court having territorial jurisdiction over the debtor in execution by application of Article 8 or the Court of First Instance.
  - Review the relevant laws or regulations from other countries, especially Singapore law, on the arbitration process and how their court proceeding as well as the period of time that the award can request for a warrant to enforce in Cambodia.
  - The government shall revise the Article 42 of the LCA, which the arbitral award that rendered by the NCAC shall be effect by this article or arbitral award from other institution shall be the same manner to recourse, recognition, and enforcement by the Court of Appeal.
  - Provide a law or regulation in order to promote the effectiveness of the arbitral award, which is equally of the enforcement with court judgement in Cambodia.
- Institutional framework
  - The government should enhance and promote the arbitrator training centre more effective and better educate. The SIArb of the Singapore which is the best model and practice that governing on the training worldwide.
  - Provide the mediation mechanism before the arbitration process.
  - Adopt any laws or regulations or mechanism on governing the quality control of the arbitrators that should once a year.

- Promote the effectiveness of the arbitral award, which is equally with court judgement, in Cambodia.
- Ensure that the Rules would be compliance with the international standard and the need of the dispute parties.

- Coordination mechanisms
  - Provide a better connection between the institution and the court on the experiences and the technical assistance of the judiciary.
- Capacity building and institutional building
  - The government should adopt a law or regulation regarding to the capacity building of the arbitrators with a standard of the training centre.
  - Provide an assessment on the quality of the arbitrators, their attitude and experience.
  - The government should provide some technical assistance on the institutional building on the internal rules and the decision making.

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