前　言

本书的研究课题由中国国际经济贸易仲裁委员会(以下简称贸仲委)委托中国政法大学仲裁研究院和国际法学院组成课题组完成并编写出版。中国政法大学杜新丽教授担任课题组负责人并主持编写和最终统稿。继《“一带一路”沿线国家国际仲裁制度研究(三)》选择印度、沙特、马来西亚、捷克、比利时、澳大利亚六国仲裁制度作为研究对象之后,编写组又选取了巴基斯坦、土耳其、瑞士、西班牙、印度尼西亚、越南六个国家,在大量掌握第一手资料的基础上,对各国仲裁制度进行系统研究,主要内容包括仲裁制度的历史沿革、现行仲裁法律制度及实践、仲裁机构的特点、法院对仲裁裁决的承认与执行以及中国当事人在交易中的争端防范和解决,尤其对中国企业在这些国家的商事活动中如何规避风险、合规经营、有效解决争端提供了建议和指南。

具体分工如下:李伯轩讲师撰写第一章“瑞士仲裁制度研究”,张建教师撰写第二章“印度尼西亚仲裁制度研究”,车路遥教师撰写第三章“西班牙仲裁制度研究”,覃华平副教授撰写第四章“巴基斯坦仲裁制度研究”,薛童讲师撰写第五章“土耳其仲裁制度研究”,王林叶博士撰写第六章“越南仲裁制度研究”。此外,郝梓林、李佳阔、吴辉、方思嘉同学参与了课题资料的收集和整理工作。

初稿完成后,贸仲委仲裁研究所李兵主任对报告全文进行了统稿,贸仲委副主任兼秘书长王承杰,党委书记兼副秘书长李虎,副秘书长徐伟,仲裁院副院长赵健、谷岩等对报告进行了审稿。贸仲委仲裁研究所的张蓓、刘纲、赵劲欣、粟撒、梁意亦为本报告的数据收集、文字核校、排版印刷等工作付出了大量努力。在此一并表示由衷感谢!

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CHAPTER 01 >>

第一章

瑞士仲裁制度研究

瑞士联邦(以下简称瑞士)北邻德国,西邻法国,南邻意大利,东邻奥地利和列支敦士登。全境以高原和山地为主,有“欧洲屋脊”之称。1815 年的维也纳会议确认了瑞士的永久中立国地位。此后,瑞士从未卷入过任何形式的战争。1848 年,瑞士制定宪法,设立瑞士联邦委员会,成为统一的联邦制国家。[1]

瑞士是一个高度发达的资本主义国家。人均 GDP 常年位居世界前列。它常被列为全球经济最发达、社会最安定、居民生活质量最高的国家之一。它还拥有丰富的旅游资源,素有“世界公园”的美誉。此外,由于其稳定的金融体系和严格的保密制度,瑞士成了全球投资者的安全避风港。[2]

近年来,中国与瑞士的经贸往来日益频繁。在贸易方面,中国是瑞士的第三大贸易伙伴,仅次于欧盟和美国;瑞士则是中国在欧洲的第七大贸易伙伴。2017 年,中瑞双边货物进出口总额为 377.9 亿美元。其中,瑞士对中国的出口额为 244.8 亿美元;瑞士自中国的进口额为 133.1 亿美元。在投资方面,自 2015 年起,中国对瑞士的投资进入了快速上升期。贝克·麦坚时国际律师事务所发布的

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〔1〕 载中华人民共和国外交部网站:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679618/1206x0_679620/,最后访问日期:2018 年 11 月 15 日。

〔2〕 载中华人民共和国外交部网站:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679618/1206x0_679620/,最后访问日期:2018 年 11 月 15 日。

报告《概览:中国对北美及欧洲的投资对比》显示瑞士已跃居成为中国在欧洲投资的第六大目的地,仅次于意大利、法国、英国、荷兰和德国。另外,瑞士对中国的投资也在逐年递增。来华投资的瑞士企业数量在不断上涨,所涉领域呈现出多样化的趋势。

尽管瑞士不是“一带一路”沿线国家,但它将在“一带一路”建设中发挥独特的作用。这与瑞士的自身优势有关。第一,瑞士具有创新优势。中瑞两国可在企业、高校、科研机构间开展可再生能源、现代生态农业、节能环保、医药等领域的创新合作。这将为中欧共建“一带一路”起到示范和引领作用。第二,瑞士具有贸易优势。瑞士是首个同中国签署并实施自由贸易协定的欧洲大陆国家。“一带一路”的一端是蓬勃发展的亚太经济体,另一端是全球最大的发达国家集团欧盟。中瑞自由贸易协定充当了中欧深层次经贸合作的探路石。第三,瑞士具有金融优势。苏黎世是全球著名的金融中心之一。2015 年 3 月,瑞士申请成为亚洲基础设施投资银行意向创始成员国。瑞士将在金融方面为“一带一路”建设提供必要的助力。第四,瑞士具有外交优势。瑞士是世界贸易组织、世界卫生组织等著名国际机构的所在地。在“一带一路”的背景下,瑞士可在中国与国际组织的联系方面发挥重要的桥梁和纽带作用。

“一带一路”倡议的提出为中瑞两国关系的进一步发展注入了新的动力。随着两国间的合作和往来日益频繁,更多的涉外纠纷也会随之而来。因此,了解瑞士的仲裁法律制度对于走出国门的中国当事人而言是十分必要的。

一、瑞士仲裁制度发展的历史沿革

在美国南北战争期间,虽然英国声明保持中立,但它当时却暗中为美利坚联盟国南军制造了一艘名为“阿拉巴马号”的巡洋舰。南军利用该巡洋舰摧毁了美利坚合众国的68 艘船只。1863 年 10 月,美利坚合众国驻英国大使亚当斯(Charles Francis Adams)提出严正抗议,要求英国赔偿一切损失,并表示美国愿将此案交付仲裁。1872 年,“阿拉巴马号索赔案”(Alabama Claims Case)被提交至位于瑞士日内瓦的国际仲裁庭解决。该案被认为是瑞士仲裁传统的起源。[1]

如今的瑞士已经成为最受当事人欢迎的国际仲裁地之一。它有着“理想的仲裁地”之美誉。[2] 其深受当事人青睐的原因是多方面的。其一,瑞士一贯恪守中立。希望借由仲裁获得公正结果的当事人自然愿意选择这一中立国作为仲裁地。

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〔1〕 Manuel Arroyo(ed.) *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, p. 3.

〔2〕 陈卫佐:《瑞士新国际仲裁法初探》,载《武汉大学学报》(哲学社会科学版)1997 年第 6 期。

其二,瑞士地处欧洲的中心且基础设施健全。这为国际仲裁的进行提供了便利。其三,瑞士是一个多语国家,其官方语言包括德语、法语和意大利语。这对于国际仲裁的当事人而言亦颇具吸引力。除了上述原因之外,另一重要原因便是瑞士有着发达的仲裁法律制度。

瑞士是一个联邦制国家,由 26 个州组成。他们分别是苏黎世、伯尔尼、卢塞恩、乌里、施维茨、上瓦尔登、下瓦尔登、格拉鲁斯、楚格、弗里堡、索罗图恩、巴塞尔城、巴塞尔乡、沙夫豪森、外阿彭策尔、内阿彭策尔、圣加仑、格劳宾登、阿尔高、图尔高、提契诺、沃州、瓦莱、纳沙泰尔、日内瓦、汝拉。[1] 1898 年,瑞士修改了联邦宪法。新的联邦宪法赋予了瑞士联邦制定民法的立法权。法学家欧根·胡贝尔(Eugen Hubel)受任起草民法典。欧根于 1900 年完成了由人、亲属、继承、物权四编组成的民法典草案。1902 年,瑞士联邦政府将该草案公布并交由 31 人组成的专家委员会讨论。《瑞士民法典》于 1907 年由联邦议会一致通过并自 1912 年 1 月 1 日起施行。尽管民事实体法被划归联邦立法权的范围,但是民事程序法仍然属于各州的立法事项。仲裁一向被视为民事程序的组成部分,所以仲裁问题是由各州自行立法加以规制。然而,各州民事诉讼法典中与仲裁有关的规定颇为不同,这导致了瑞士联邦内仲裁规则的严重碎片化。

1969 年 3 月 27 日,各州司法部长会议通过了旨在统一各州仲裁法规的《关于仲裁的州际条约》。在瑞士的 26 个州中,除卢塞恩外的其余 25 个州先后加入了该州际条约。《关于仲裁的州际条约》由 9 章 46 个条款组成。第 1 章为通则,涉及适用范围、仲裁庭所在地、仲裁庭所在地适格的司法机关。第 2 章为仲裁协议,涉及仲裁条款、仲裁客体、仲裁协议的形式、排除法律专业人士的禁止、仲裁庭的权限、对仲裁庭权限的申诉。第 3 章为仲裁员的指定和任命,涉及仲裁员的人数、当事人指定仲裁员、司法机关任命仲裁员、未决案件、仲裁员接受任命、仲裁秘书、仲裁庭行使职权的期间、无正当理由的迟延。第 4 章为仲裁员的回避、罢免和替换,涉及仲裁员的回避、仲裁庭的回避、提出回避的时限、回避的异议、仲裁员的罢免、仲裁员的替换。第 5 章为仲裁程序,涉及仲裁程序的确定、被聆听的权利、临时措施、司法机关的协助、第三方的介入、赔偿、费用的预付。第 6 章为仲裁裁决,涉及合议与裁决、部分裁决、裁决的内容、当事人的和解、裁决的提交和通知。第 7 章为仲裁裁决的无效和修

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〔1〕 载中华人民共和国外交部网站:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679618/1206x0_679620/,最后访问日期:2018 年 11 月 15 日。

改,涉及裁决无效的情形、提出裁决无效的时限、中止效果、裁决发回仲裁庭更正、宣告无效、裁决的修改、裁决修改的时限。第 8 章为裁决的执行,涉及执行力的宣告。第 9 章为最终条款,涉及司法机关的监管程序和生效。

《关于仲裁的州际条约》在一定程度上起到了统一瑞士联邦内仲裁法规的作用。它为日后瑞士成为国际仲裁的理想地打下了基础。然而,《关于仲裁的州际条约》仍有以下两点明显的不足:一是该州际条约所含的大量强制性规定未能充分满足国际仲裁对于灵活性的需要;二是该州际条约赋予当事人的诸多使仲裁裁决归于无效的便利不利于仲裁定分止争目标的实现。

1987 年 12 月 18 日,瑞士联邦议会通过了《瑞士联邦国际私法》(Switzerland's Federal Statute on Private International Law)。该法的第 12 章针对国际仲裁作出详细的规定,内容十分丰富,包括仲裁的适用范围、可仲裁性问题、仲裁协议的订立和效力认定、仲裁庭的组成、对仲裁员的拒绝、未决案件的处理、仲裁程序的确定、临时措施的采取、取证的途径和程序、法院的协助、仲裁庭的管辖权、裁决适用的法律、部分裁决、仲裁裁决的作出、裁决的终局性、法院的管辖权、上诉权的放弃、裁决的交存[1]与强制执行、外国仲裁裁决的承认与执行等均在其中得到了体现。

与《关于仲裁的州际条约》相比,《瑞士联邦国际私法》第 12 章的新颖性体现在以下三个方面。第一,适用范围的变化。《关于仲裁的州际条约》可适用于瑞士国内仲裁和国际仲裁,而《瑞士联邦国际私法》第 12 章仅适用于国际仲裁。[2]《瑞士

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〔1〕 根据《瑞士联邦国际私法》第 193 条第 1 款的规定,一方当事人可自费将仲裁裁决的副本交存至仲裁庭所在地的瑞士法院。该条款表明裁决的交存是非强制性的而且并非裁决执行的必经程序。

〔2〕 如今,瑞士的国内仲裁和国际仲裁受两套不同的规则调整。前者由《瑞士民事诉讼法典》第 3 部分加以规制,而后者则由《瑞士联邦国际私法》第 12 章加以规制。《瑞士民事诉讼法典》第 3 部分包含该法典的第 353 条至第 399 条。其内容涉及适用范围(第 353 条)、可仲裁性(第 354 条)、仲裁庭所在地(第 355 条)、适格的法院(第 356 条)、仲裁协议(第 357 条)、仲裁协议的形式(第 358 条)、对仲裁庭管辖权的质疑(第 359 条)、仲裁员的人数(第 360 条)、当事人指定仲裁员(第 361 条)、法院指定仲裁员(第 362 条)、披露义务(第 363 条)、仲裁员接受指定(第 364 条)、仲裁秘书(第 365 条)、仲裁庭的任期(第 366 条)、拒绝仲裁员(第 367 条)、质疑仲裁庭(第 368 条)、质疑程序(第 369 条)、仲裁员的罢免(第 370 条)、仲裁员的替换(第 371 条)、仲裁程序的待决状态(第 372 条)、仲裁程序通则(第 373 条)、临时措施(第 374 条)、取证(第 375 条)、第三方的参与(第 376 条)、反请求(第 377 条)、费用的预缴(第 378 条)、费用的担保(第 379 条)、法律援助(第 380 条)、适用的法律(第 381 条)、合议和决定(第 382 条)、临时裁决和部分裁决(第 383 条)、仲裁裁决的内容(第 384 条)、当事人的和解(第 385 条)、通知和寄存(第 386 条)、仲裁裁决的效力(第 387 条)、仲裁裁决的更正、解释和修改(第 388 条)、联邦最高法院的反对(第 389 条)、州法院的反对(第 390 条)、附属原则(第 391 条)、存有异议的仲裁裁决(第 392 条)、反对的事由(第 393 条)、发回更正或修改(第 394 条)、法院的决定(第 395 条)、仲裁裁决的审查(第 396 条)、申请审查的时限(第 397 条)、审查的程序(第 398 条)、发回仲裁庭(第 399 条)。

联邦国际私法》第176条第1款规定,“本章规定适用于仲裁庭位于瑞士且至少有一方当事人在缔结仲裁协议时在瑞士既没有住所也没有习惯居所的一切仲裁”。由此可见,在《瑞士联邦国际私法》中,仲裁的国际性是以当事人的住所和习惯居所为认定标准的。第二,当事人自治权的强化。此种强化在《瑞士联邦国际私法》的多处文本中均有所体现。比如,该法第179条第1款规定,“依据当事人协议任命、撤回或更换仲裁员”;第182条第1款规定,“当事人双方可直接或通过参照仲裁机构的仲裁规则约定程序规则”;第187条第1款规定,“仲裁庭适用当事人选择的法律规则”;等等。第三,法院干预的弱化。《瑞士联邦国际私法》试图将法院对仲裁的干预降到最低限度。这体现在该法的多个条款中。比如,根据该法第179条第2款的规定,只有在当事人未就仲裁员的任命、撤回或更换达成协议且仲裁庭向其所在地的州法院请求协助的情况下,州法院才能类推适用州法律中的相关规定来任命、撤回或更换仲裁员;根据该法第180条第3款的规定,如果当事人约定排除了州法院的该项权力,仲裁庭所在地的州法院无权就仲裁员被拒绝一事作出决定;根据该法第183条第2款的规定,只有在当事人不自动服从仲裁庭作出的决定且仲裁庭向有管辖权的法庭提出请求的情况下,法院才能予以协助。

自1987年至今,《瑞士联邦国际私法》已经颁行了三十多个年头。该法以其独特的编撰体例、易用性和先进性而享誉全球。它不仅为各国的国际私法研究提供了宝贵的素材而且对他国国际私法的制定起到了示范作用。2014年11月,瑞士国际法协会举办了以瑞士国际私法的修订为主题的研讨会。多数与会者认为尚且无须对《瑞士联邦国际私法》进行根本性的变革。该法的整体结构和大部分内容应予以保留,但是必要的更新不可避免。2017年1月11日,瑞士联邦议会公布了一份《瑞士联邦国际私法》第12章的修正案。这份修正案旨在实现以下目标:第一,使第12章的规定能够与联邦最高法院的判例法相协调;第二,澄清第12章中至今仍有争议的某些问题;第三,进一步凸显当事人的自治权;第四,使第12章的规定更易被国外的仲裁从业者理解和适用。

该修正案主要涉及以下几个关键问题:

第一,仲裁裁决的更正和修改。尽管联邦最高法院的判例和法学理论均认可仲裁裁决是可以被更正和修改的,但是现行的第12章并未为仲裁裁决的更正和修改提供明确的法律依据。根据修正案,当事人有权向仲裁庭提出更正仲裁裁决的请求以及向联邦最高法院提出修改仲裁裁决的请求。当事人在以下三种情形下可以提出修改仲裁裁决的请求:(1)当事人在仲裁庭作出裁决后发现其在仲裁程序中

不可能发现的重要事实或证据;(2)当事人有证据证明仲裁裁决受到了不法行为的影响,对当事人造成了损害;(3)当事人在仲裁庭作出裁决后发现足以引发对仲裁员质疑的事实。

第二,仲裁协议的形式。依据现行《瑞士联邦国际私法》第 178 条第 1 款的规定,仲裁协议必须采用书面形式,具体形式包括电报、电传、传真,或其他任何能够被文字加以佐证的通信方式。该书面形式的要求必须被协议的各方当事人遵守,否则仲裁协议将被认定为无效。这是一条十分严苛的规定。修正案对此作出了修改。修正案提出只要协议的一方当事人遵守书面形式的要求,仲裁协议便是有效的。比如,书面要约中含有仲裁条款,受要约人以口头形式作出了承诺,则双方当事人之间的仲裁协议便是有效的。

第三,仲裁地。依据现行《瑞士联邦国际私法》第 179 条第 2 款的规定,若当事人未就仲裁员的指定达成协议,仲裁地的法院有权代为指定仲裁员。然而,如果当事人未适当选定仲裁地,如他们指定瑞士为仲裁地或根本未选定仲裁地,仲裁便无法继续进行。本着“利于有效性”(*in favorem validitatis*)的原则,修正案规定首先收到代为指定仲裁员请求的法院有权代为指定仲裁员。以此种方式组成的仲裁庭可在组成之后再行确定仲裁地。

第四,临时措施。依据现行《瑞士联邦国际私法》第 183 条第 2 款的规定,如果当事人未自愿履行临时措施,只有仲裁庭有权向法院请求协助。修正案将此项请求协助的权利同样赋予了当事人,因为请求仲裁庭作出临时措施决定的当事人亦有获得法院协助的充分需求。

第五,仲裁费用。现行《瑞士联邦国际私法》未涉及仲裁费用的问题。联邦最高法院曾指出仲裁庭无权就仲裁费用作出有法律约束力的决定。然而,修正案肯定了仲裁庭有权决定仲裁费用的金额以及费用的分担方式,除非当事人另有约定。

第六,语言。目前,提交至瑞士联邦最高法院的关于修改或撤销仲裁裁决的请求必须以瑞士的官方语言之一(德语、法语、意大利语)提出。修正案对此作出了修改。修正案肯定了此类请求可以以英语向联邦最高法院提出,尽管法院的决定仍会以官方语言之一作出。这是瑞士仲裁制度迈向国际化的重要一步。

除了上述六点之外,修正案还对现行《瑞士联邦国际私法》进行了若干语言和技术性的修改。

截至 2017 年 5 月 31 日,所有利害关系方均可以对修正案提出意见和建议。根据这些意见和建议,瑞士司法部将进一步完善该修正案并随后将其再次提交至联

邦议会。截至本书出版时,该修正案尚未生效,但可以预见的是,《瑞士联邦国际私法》第12章的修订已经是势在必行。未来的第12章将会更加适应现代的国际仲裁实践。瑞士的国际仲裁将会更具吸引力。

二、瑞士仲裁法律制度综述

《瑞士联邦国际私法》第12章专门适用于国际仲裁。该章包含了《瑞士联邦国际私法》的第176条至第194条。下文将对该章的内容加以介绍。

(一)适用范围

依照瑞士现行的法律制度,瑞士国内仲裁应适用《瑞士民事诉讼法典》第3部分的规定,而国际仲裁应适用《瑞士联邦国际私法》第12章的规定。《瑞士联邦国际私法》第176条明晰了何为"国际仲裁"。根据该条的规定,国际仲裁的国际性体现为在仲裁协议达成之时,至少有一方当事人在瑞士境内既无住所又无惯常居所。

在确定当事人的住所时,需要区分自然人的住所与法人的住所。依照普通法系的理论,自然人的住所是自然人居住、家庭生活、社会和市民生活的中心地。自然人的住所可以分为三类:第一类是原始住所,即自然人因其出生而获得的住所;第二类是选择住所,即自然人根据自己的意愿选择的住所;第三类是从属住所,即特殊的自然人因其对他人的依附关系而获得的住所。[1]《瑞士联邦国际私法》第20条对自然人的住所进行了界定。根据该条规定,自然人的住所是指其怀有永久居住的意愿居住的地方。

关于法人的住所,各国的确定标准不尽相同。从目前的情况来看,各国的立法体例可以大致概括为以下几种:第一,以营业中心地为法人住所地;第二,以管理中心地为法人住所地;第三,以法人章程规定的住所地为法人住所地;第四,以法人成立地为法人住所地;等等。根据《瑞士联邦国际私法》第21条的规定,公司以其总公司所在地为住所地;总公司的住所地依合同或公司章程确定;合同或章程未作出规定的,以公司的实际管理地为其住所地。

惯常居所的认定通常需要考虑客观和主观两个方面的要素。客观要素是指当事人在一国居住的事实,而主观要素是指当事人在一国停留的定居意思与选择自由。[2]《瑞士联邦国际私法》第20条规定,惯常居所是指当事人在某国居住一定

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〔1〕 单海玲:《论涉外民事关系中住所及惯常居所的法律适用》,载《比较法研究》2006年第2期。

〔2〕 杜新丽:《从住所、国籍到经常居所地——我国属人法立法变革研究》,载《政法论坛》2011年第3期。

期限的处所,即使该期限十分短暂。

(二)可仲裁性

一项争议只有在具备可仲裁性的情况下才能通过仲裁方式得以解决。关于何种争议可以被提交仲裁、何种争议不能被提交仲裁,各国法律的规定不尽相同。可仲裁性是个十分重要的问题,因为它关系仲裁协议的有效性、仲裁管辖权的确定、仲裁裁决的承认和执行、仲裁裁决的撤销等。可仲裁性可以被细分为客观可仲裁性和主观可仲裁性。[1] 客观可仲裁性关乎争议标的的性质。一般而言,具备客观可仲裁性的争议应具有可争讼性且涉及可自由处分的财产权益。[2] 主观可仲裁性关乎争议的主体。具备主观可仲裁性的争议通常发生在平等的主体之间,[3]但主观可仲裁性亦牵涉公主体签订仲裁协议的主体资格问题。[4] 《瑞士联邦国际私法》对于争议的客观可仲裁性和主观可仲裁性均作出了规定。

在客观可仲裁性方面,各国的法律规定不尽相同。在实践中,可仲裁事项的划分标准大致可以分为以下三种。第一种是将当事人是否享有自由处分的权利作为认定可仲裁事项的标准。比如,《法国民法典》第 2059 条规定:“凡是可自由处分的权利,均可提交仲裁解决。”意大利、西班牙、荷兰、比利时、韩国、印度尼西亚等国也采纳了这一标准。第二种是将当事人能否通过和解解决争议作为认定可仲裁事项的标准。比如,《瑞典仲裁法》第 1 条规定,凡属于能以协议方式和解的民事问题,均可提交仲裁解决。奥地利、澳大利亚等国也采纳了这一标准。第三种是将争议是否涉及经济利益或具有财产性质作为认定可仲裁事项的标准。比如,《德国民事诉讼法典》第 1030 条第 1 款规定:“任何一项涉及经济利益的请求,都可成为仲裁协议的标的。”《瑞士联邦国际私法》采用的是第三种标准;该法第 177 条第 1 款规定,任何具有财产性质的纠纷均可以被提交仲裁。

少数国家在其国内法中详细列举了具有财产性质的可仲裁事项。比如,加拿大不列颠哥伦比亚省《国际商事仲裁法案》第 1 条第 6 款列举了 16 种可仲裁事项,

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〔1〕 Bernard Hanotiau、Olivier Caparasse:《〈纽约公约〉第 5 条下的可仲裁性、正当程序以及公共政策——以法国与比利时为视角》(上),傅攀峰译,宋连斌校,载广州仲裁委员会主办:《仲裁研究》第 34 辑,第 59 页。

〔2〕 乔欣、李莉:《争议可仲裁性研究》(上),载《北京仲裁》2004 年第 2 期。

〔3〕 乔欣、李莉:《争议可仲裁性研究》(上),载《北京仲裁》2004 年第 2 期。

〔4〕 Bernard Hanotiau、Olivier Caparasse:《〈纽约公约〉第 5 条下的可仲裁性、正当程序以及公共政策——以法国与比利时为视角》(上),傅攀峰译,宋连斌校,载广州仲裁委员会主办:《仲裁研究》第 34 辑,第 59 页。

包括:(1)供应或交换货物或服务的贸易交易;(2)销售协议;(3)商事代理;(4)开发协议或租让;(5)合营企业或者其他工业或商业合作的形式;(6)航空、海上、铁路或公路货物或旅客运输;(7)工程建筑;(8)保险;(9)许可;(10)代理经营;(11)出租;(12)咨询;(13)工程;(14)融资;(15)银行;(16)投资。[1]《瑞士联邦国际私法》并未采用列举式的立法体例。依据瑞士联邦最高法院的观点,该法第 177 条第 1 款中"具有财产性质的纠纷"意指任何伴有金钱方面诉求的纠纷。这类纠纷可以基于合同、侵权、公司责任、继承、反垄断、婚姻、知识产权等形形色色的法律关系而产生。[2] 由此可见,瑞士联邦最高法院倾向于对"具有财产性质的纠纷"进行宽泛的解释。

关于主观可仲裁性,《瑞士联邦国际私法》第 177 条第 2 款规定,如果仲裁协议的一方当事人是国家或者是由国家支配的企业或组织,那么该方当事人不得援引其本国法律对其作为仲裁当事人的资格或争议的可仲裁性提出异议。依照传统观点,具备主观可仲裁性的争议应发生在平等主体之间。所谓平等主体是指争议的当事人具有平等的法律地位,即享有权利和承担义务的资格是平等的。比如,基于传统的主观可仲裁性标准,《法国民事诉讼法典》第 2060 条规定,与公共集团或公共机构相关的纠纷不可被提交仲裁。然而,随着时代的发展,主观可仲裁性标准已经有所松动。如今,法国法院主张任何签有仲裁协议的公共机构在仲裁裁决被作出之后都不可声称因根据本国法律其无签订仲裁协议的行为能力而请求执行法院拒绝承认与执行相关的仲裁裁决。[3] 于 1873 年在比利时成立、总部设在荷兰的国际法研究所于 1989 年发布的《关于国家、国有企业或者国家机构和外国企业之间的仲裁的决议》第 5 条规定:"国家、国有企业或国家机构不可以其不具备参与仲裁的主体资格为由抵制业已经其同意的仲裁。"《瑞士联邦国际私法》第 177 条第 2 款与法国法院的观点以及上述决议条款有着异曲同工之处。他们均旨在肯定公主体参与仲裁的可能性及确保公主体参与仲裁时结果的确定性和可预见性。这实则是善意原则的具体体现。

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〔1〕 程德钧、王生长主编:《涉外仲裁与法律》(第 2 辑),中国统计出版社 1994 年版,第 334 页。

〔2〕 Manuel Arroyo(ed.) *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, p. 49.

〔3〕 Bernard Hanotiau、Olivier Caparasse:《〈纽约公约〉第 5 条下的可仲裁性、正当程序以及公共政策——以法国与比利时为视角》(上),傅攀峰译,宋连斌校,载广州仲裁委员会主办:《仲裁研究》第 34 辑,第 60 页。

《瑞士联邦国际私法》第177条第2款约束了两类主体:国家以及国家支配的企业或组织。国际法意义上的国家是指由定居在确定领土上并在一定的政权组织领导下的居民组成的具有主权的社会。国家必须具备四个要素,即定居的居民、确定的领土、政府和主权。〔1〕对“国家支配的企业或组织”应做广义理解。任何由国家实际操控的企业或组织均属于《瑞士联邦国际私法》第177条第2款中的“国家支配的企业或组织”,而无须国家在该企业或组织中享有任何法律上的地位。此外,第177条第2款的适用并不以一国对其支配的企业或组织在仲裁协议的签订方面施加影响作为前提。

(三)仲裁协议

仲裁协议是指双方当事人据以将他们之间即将发生或业已发生的关于某一确定法律关系的契约性或非契约性争议交付仲裁并由仲裁庭就争议作出裁决的一致的意思表示。〔2〕仲裁协议既可以表现为合同中的仲裁条款也可以是一项单独的协议。〔3〕仲裁协议是触发仲裁的终极依据。〔4〕一项有效的仲裁协议是仲裁庭行使管辖权的前提,也是法院承认与执行依此协议作出的仲裁裁决的前提。

《瑞士联邦国际私法》第178条第1款涉及仲裁协议的形式要件。根据该条规定,以书面形式,包括电报、电传、传真或其他可构成书面证明的通信方式,作出的仲裁协议方为有效。仲裁协议的书面形式要求已被写入有关国际仲裁的国际法律文件中。比如,1958年《承认及执行外国仲裁裁决公约》(以下简称《纽约公约》)第2条第1款和第2款规定,当事人以书面协定承允彼此间所发生或可能发生之一切争议,如关涉可以仲裁解决事项之确定法律关系,无论是否具有契约性质,应提交仲裁时,各缔约国应承认此项协定,所谓“书面协定”是指当事人所签订或在互换函电中所载明的契约仲裁条款或仲裁协定;《联合国国际贸易法委员会国际商事仲裁示范法》备选案文一第7条第1款和第2款规定,仲裁协议是指当事人同意将他们之间一项确定的契约性或非契约性的法律关系中已经发生或可能发生的一切争议或某些争议交付仲裁的协议,仲裁协议应为书面形式。由此可见,《瑞士联邦国际私法》对于仲裁协议的书面形式要求与《纽约公约》和《联合国国际贸易法委员会国际

〔1〕 周忠海主编:《国际法》,中国政法大学出版社2008年版,第109~110页。

〔2〕 李浩培编著:《国际民事程序法概论》,法律出版社1996年版,第203页。

〔3〕 陈卫佐:《国际性仲裁协议的准据法确定——以仲裁协议的有效性为中心》,载《比较法研究》2016年第2期。

〔4〕 李昌超:《仲裁协议合意不当及其救济》,载《社会科学家》2018年第1期。

商事仲裁示范法》的相关规定是相契合的。

《瑞士联邦国际私法》第178条第2款涉及仲裁协议的实体有效性。如果仲裁协议无效,则仲裁庭对当事人之间的争议便无管辖权,仲裁庭所作出的仲裁裁决亦无法得到承认与执行。对于国际仲裁协议是否存在以及是否有效的判断必须以某一国家的法律作为依据。因此,国际仲裁协议的准据法具有十分重要的意义。从目前各国的立法情况来看,国际仲裁协议准据法的确定方法大致包括以下几种:第一,适用当事人明示或默示选择的法律;第二,适用仲裁地国家的法律;第三,适用主合同的准据法;第四,适用申请执行仲裁协议所在地国家的法律;第五,适用与仲裁协议有最密切联系的国家的法律等。[1]《瑞士联邦国际私法》第178条第2款规定,只要仲裁协议符合当事人所选择的法律或支配争议标的的法律,尤其是适用于主合同的法律或瑞士的法律所规定的条件,该协议即为有效。由此可见,该条款实则融合了前述数种国际仲裁协议准据法的确定方法。此规定体现了"利于有效性"(*in favorem validitatis*)的原则,因为只要仲裁协议符合《瑞士联邦国际私法》第178条第2款所列的三个法之一,其有效性便能得到承认。在瑞士国际商事仲裁实践中,位于瑞士的仲裁庭通常首先审查仲裁协议依瑞士法是否有效。如果有效,则仲裁庭无须继续审查仲裁协议在当事人选择的法或支配争议标的的法下的有效性。《瑞士联邦国际私法》第178条第2款的规定已经被其他国家借鉴和效仿。比如,《西班牙仲裁法》第9条第6款规定,在仲裁含有国际性因素的情况下,若双方当事人所选择的仲裁协议准据法或争议实体的准据法或西班牙法所规定的条件被满足,仲裁协议即有效。

《瑞士联邦国际私法》第178条第3款涉及仲裁协议的独立性。仲裁协议的独立性又称仲裁协议的分离性或自治性。它是指尽管作为仲裁协议表现形式之一的仲裁条款是合同中的一个条款,但是此条款与它所从属的主合同是两个相互独立的合同,如果争议涉及主合同是否存在及其有效性的问题,或者主合同无效或失效,仲裁条款作为双方当事人约定的解决合同争议的条款,仍可以独立存在,并不因为主合同无效或失效而当然无效或失效。[2] 仲裁协议的独立性已经在许多国家的立法中得到了体现。比如,1996年《英国仲裁法》第7条规定:"除非当事人另有

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〔1〕 陈卫佐:《国际性仲裁协议的准据法确定——以仲裁协议的有效性为中心》,载《比较法研究》2016年第2期。

〔2〕 赵秀文:《论仲裁条款独立原则》,载《法学研究》1997年第4期。

约定,不能因为一个协议的无效、不存在或已经失效,而将作为该协议一部分的仲裁条款视为无效、不存在或已经失效,该协议应被视为可分割的协议。”又如1998年《德国民事诉讼法典》第1040条第1款规定:“仲裁庭可以对其管辖权和与此相关的仲裁协议的存在及其效力作出裁定,为此,构成合同一部分的仲裁条款应当被视为一项独立于合同其他条款的协议。”我国《仲裁法》第19条第1款规定:“仲裁协议独立存在,合同的变更、解除、终止或者无效,不影响仲裁协议的效力。”《瑞士联邦国际私法》第178条第3款规定,对仲裁协议的有效性不得以主合同可能无效为理由而提出质疑。可见,该条规定与当前国际上的立法趋势是一致的。

(四)仲裁庭的组成

《瑞士联邦国际私法》第179条规定:(1)仲裁员的任命、撤职或更换应依据当事人的协议;(2)若当事人未达成此种协议,仲裁庭所在地的法官可以类推适用《瑞士民事诉讼法典》中关于仲裁员任命、撤职或更换的规定;(3)接到任命仲裁员请求的法官应作出任命,除非经简单查明当事人之间不存在仲裁协议。

根据《瑞士联邦国际私法》第179条的规定,仲裁员的任命、撤职或更换首先应依当事人的协议进行。这体现了对当事人意思自治的尊重。当事人意思自治原则是商事仲裁法的首要原则。[1] 意思自治既是仲裁制度的灵魂也是仲裁制度生命力的源泉。[2] 意思自治原则可以追溯至古罗马法,但是古罗马法仅是孕育了意思自治的精神,却未将意思自治抽象为私法原则。后来,私法自治的理念随之得以广泛传播。被誉为契约自由典范的1804年《法国民法典》的第1134条规定,依法成立的契约在缔结契约的当事人之间具有相当于法律的效力。民商事仲裁源于原始社会氏族部落首长对内部纠纷的居中公断,其作为一项制度为政治国家所接纳是在古希腊、古罗马时代。在此后漫长的历史进程中,政治国家将仲裁视为纯粹的私人事务因而对此无意强加干涉。意思自治原则在仲裁制度中的最终确立应归功于商品经济的飞速发展以及政治国家与市民社会二元结构的分立。[3] 如今,仲裁的民间性和自治性已经在世界范围内得到了普遍的认可。国家对仲裁的干预被限制在合

〔1〕 [英]施米托夫:《国际贸易法文选》,赵秀文译,中国大百科全书出版社1993年版,第611页。

〔2〕 刘俊、吕群蓉:《论仲裁庭组成与仲裁之价值》,载广州仲裁委员会主办:《仲裁研究》第10辑,第15页。

〔3〕 刘俊、吕群蓉:《论仲裁庭组成与仲裁之价值》,载广州仲裁委员会主办:《仲裁研究》第10辑,第16页。

理的范围之内。[1] 意思自治原则在现代仲裁制度中的体现之一便是当事人可以自行决定仲裁庭的组成。

根据《瑞士联邦国际私法》第 179 条第 2 款的规定，若当事人未达成与仲裁员的任命、撤职或更换有关的协议，仲裁庭所在地的法官可以类推适用《瑞士民事诉讼法典》中的相关规定。仲裁员的任命、撤职或更换规定在《瑞士民事诉讼法典》第 361 条至第 371 条。第 361 条至第 366 条涉及仲裁庭的组成。这 6 个条款分别规定了当事人指定仲裁员、法院指定仲裁员、披露义务、仲裁员接受指定、仲裁秘书和仲裁庭的任期。第 367 条至第 371 条涉及对仲裁员的质疑、撤职或更换。这 5 个条款分别规定了拒绝仲裁员、质疑仲裁庭、质疑程序、仲裁员的罢免和仲裁员的替换。

《瑞士联邦国际私法》第 179 条第 3 款要求接到任命仲裁员请求的法官应作出任命，除非经简单查明当事人之间不存在仲裁协议。实践中，当事人因主观或客观原因无法就委任仲裁员达成合意的情况屡见不鲜。当事人委托其信赖的个人或机构代为选定仲裁员的行为实则是间接运用意思自治的一种表现。《瑞士联邦国际私法》第 179 条第 3 款旨在保证仲裁程序的顺利进行。法官对仲裁员的指定应有利于纠纷的迅速解决及保证当事人受到平等对待。

仲裁庭的组成一般适用“非平衡性规则”，即仲裁庭通常由 1 名或 3 名仲裁员组成。[2] 关于仲裁庭能否由偶数名仲裁员组成，国际上有两种相对立的立法例。第一种是禁止偶数名仲裁员组成仲裁庭。采取这种立法例的国家包括法国、意大利、埃及等。我国《仲裁法》第 30 条也明确规定仲裁庭由 3 名仲裁员或 1 名仲裁员组成。由此可见，我国《仲裁法》未给偶数名仲裁员组成仲裁庭留下余地。这种立法例有利于保证程序的顺利推进，但未充分尊重当事人的意思自治。第二种是允许偶数名仲裁员组成仲裁庭。采取这种立法例的国家的仲裁法规定当事人可以合意决定仲裁员的人数，即使所选人数为偶数。这些国家的法律同时规定了当偶数名仲裁员组成的仲裁庭无法形成多数意见时的补救措施。比如，英国法中的公断人制度，即倘若当事人选定的偶数名仲裁员就仲裁的程序或实体事项无法形成多数意见，仲裁裁决应当依据在已选定仲裁员之外另行委任的一名公断人的意见作出。这种立法例更加注重对当事人意思自治的尊重。《瑞士联邦国际私法》未提及

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〔1〕 杨树明、冯佳：《市民社会视野下的仲裁制度》(下)，载广州仲裁委员会主办：《仲裁研究》第 7 辑，第 11 页。

〔2〕 乔欣：《比较商事仲裁》，法律出版社 2004 年版，第 50 页。

仲裁员的数量问题。当事人可以自由决定仲裁员的数量,甚至可以指定偶数名仲裁员。如果仲裁庭由偶数名仲裁员组成,其中1名仲裁员应被赋予当仲裁庭无法形成多数意见时投决定票的权力。[1] 然而,在实践中,1名或3名仲裁员组成的仲裁庭仍是常态。

(五)对仲裁员的质疑

《瑞士联邦国际私法》第180条第1款规定了当事人可对仲裁员提出质疑的三种情形:一是仲裁员不具备当事人约定的资质;二是出现了当事人所选仲裁规则规定的质疑事由;三是当事人有合理的理由怀疑仲裁员的独立性。

仲裁的好坏取决于仲裁员的好坏。对于仲裁员的资质,不同学者有不同的描述,例如,德扎雷(Dezalay)和盖斯(Garth)认为仲裁员应具备裁判能力强、中立性和专业化的特征;[2] 摩希斯(Moses)认为特定行业的知识和经验、法律背景、学历、语言熟练程度和业界名声等均与仲裁员的资格密切相关;[3] 席尔(Schill)认为仲裁员应当具备适用实体法和程序法有效处理具体争议,理解商事交易活动,以及有效推进仲裁程序的能力;[4] 邓瑞平将仲裁员资质的一般要求概括为行为能力、道德品质、专业素质和语言能力。[5] 有的仲裁机构对仲裁员的资质作出了要求。比如,《关于解决国家与他国国民间投资争端公约》第14条第1款规定,受指派的仲裁员必须具备良好的道德品质,并且在法律、商务、工业或金融方面具有公认的资格。有的国内法规也对仲裁员的资质作出了要求。比如,《美国仲裁协会商事仲裁员指南》将正直、合理裁判、专业知识扎实等列为仲裁员应具备的特征。事实上,仲裁员的资质涉及两个层面:一是仲裁员法定的任职资格和仲裁机构聘任仲裁员的标准;二是特定案件的当事人对仲裁员资质提出的要求。后者体现出当事人的意思自治在仲裁员选任中的渗透。原则上,当事人有权提出其认为有必要的任何资格条件,但在实践中,为了确保仲裁庭的顺利组成,当事人提出的条件应具有严格意义上的

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〔1〕 Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, p. 79.

〔2〕 Karen S. Walch, “Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order”, *Ohio State Journal on Dispute Resolution*, 1998, Vol. 12, p. 828.

〔3〕 M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University, 2008, pp. 117 – 118.

〔4〕 Stephen W. Schill, “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator”, *Leiden Journal of International Law*, 2010, Vol. 23, pp. 421 – 423.

〔5〕 邓瑞平主编:《国际商事仲裁法学》,法律出版社2010年版,第228~231页。

必要性。如果仲裁员不具备当事人约定的资格条件,当事人便可依据《瑞士联邦国际私法》第 180 条第 1 款第 1 项对仲裁员提出质疑。该条款反映出《瑞士联邦国际私法》对当事人意思自治的尊重。

《瑞士联邦国际私法》第 180 条第 1 款第 2 项规定,如果出现了当事人合意选择的仲裁规则所规定的可以对仲裁员提出质疑的情形,则当事人可以对仲裁员提出质疑。施米托夫认为,仲裁实质上是解决争议的一种合同制度,作为一种合同安排,仲裁应当受当事人意思自治的支配。〔1〕当事人通过行使自治权使仲裁的整个过程能够按照其意愿进行。当事人的自治权体现在仲裁的诸多方面,包括当事人有权共同决定适用某一仲裁机构的仲裁规则。〔2〕《瑞士联邦国际私法》第 180 条第 1 款第 2 项实际上从侧面反映出该法对当事人意思自治的尊重。

《瑞士联邦国际私法》第 180 条第 1 款第 3 项涉及仲裁员的独立性问题。公正性是与独立性相近的一个概念。对于两者之间的关系,不同学者的观点有所不同。瓦迪(Vardy)等学者认为公正性与独立性有交叉却不重合。〔3〕交叉体现在仲裁员可以既独立又公正;不重合体现在独立的仲裁员可能非公正地对待各方当事人或者非独立的仲裁员却能够公正行事。独立性意味着仲裁员不存在或者未保持事实上或法律上的外部依赖关系。独立性强调当事人、当事人的雇员、顾问、代理律师、与当事人有关的第三人、其他仲裁员等外部人士,未因其与仲裁员在经济上、专业上、个人生活方面的联系而对后者造成影响。公正性则要求仲裁员对每一方当事人没有任何偏袒并且对案件保持没有偏见的思想状态。独立性和公正性之间是相辅相成的关系。〔4〕考驰(Koch)等学者却主张独立性和公正性的含义并无实质性的区别。比如,1999 年《瑞典仲裁法》第 8 条仅规定仲裁员应保持公正性,但该条款所列举的仲裁员不公正的情形在其他许多国家被视为仲裁员缺乏独立性的表现。他们认为,法律并无必要同时规定仲裁员的独立性和公正性,其中之一经扩大解释便可包容另一项。〔5〕世界各国对于仲裁员的独立性和公正性基本上采取了三种立

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〔1〕［英］施米托夫:《国际贸易法文选》,赵秀文译,中国大百科全书出版社 1993 年版,第 674 页。

〔2〕董连和:《论我国仲裁制度中的意思自治原则》,载《清华大学学报》(哲学社会科学版)2006 年第 3 期。

〔3〕Tibor Vardy, *International Commercial Arbitration*, West Group, 2003, pp. 131 – 132.

〔4〕参见张圣翠、张心泉:《我国仲裁员独立性和公正性及其保障制度的完善》,载《法学》2009 年第 7 期。

〔5〕Christopher Koch, "Standards and Procedures for Disqualifying Arbitrators", *Journal of International Arbitration*, 2003, Vol. 20, p. 332.

法模式:第一种模式是法律明确要求仲裁员同时具备独立性和公正性;〔1〕第二种模式是法律仅规定仲裁员的独立性或仲裁员的公正性;第三种模式是法律并未直接规定仲裁员的独立性或公正性,但对于独立性和公正性的要求在撤销、拒绝承认和执行仲裁裁决的事由中得以体现。〔2〕《瑞士联邦国际私法》采取了上述第二种体例,即仅规定仲裁员的独立性,并将此作为当事人对仲裁员提出质疑的理由之一。

(六)仲裁程序

《瑞士联邦国际私法》第182条包含三个条款。第182条第1款规定,当事人可以直接或参照仲裁规则确定仲裁程序,亦可使仲裁程序受制于其选择的程序法;第182条第2款规定,如果当事人未确定仲裁程序,仲裁庭应代为决定;第182条第3款规定,无论当事人或仲裁庭所选的仲裁程序如何,仲裁庭均应确保当事人受到平等对待以及当事人的意见被聆听。

当事人选择仲裁程序的自治权已经得到了国际法、国内法和仲裁规则的肯定。比如,1985年《联合国国际贸易法委员会国际商事仲裁示范法》第19条第1款规定:“在不违背本法规定的情况下,当事人各方可以自由地就仲裁庭进行仲裁所应遵循的程序达成协议。”此处所说的“程序”既包括仲裁机构的仲裁规则也包括特定国家的程序法。在国内法方面,德国、俄罗斯、奥地利、比利时、日本、阿根廷等许多国家的仲裁法均允许当事人合意确定仲裁程序。此外,许多仲裁规则肯定了当事人有权自主选择适用于仲裁程序的仲裁规则,甚至有权根据具体情况对所选仲裁规则作出修改。比如,2000年《美国仲裁协会国际仲裁规则》第1条第1款规定:“当事人书面同意按本仲裁规则仲裁争议……应根据仲裁开始之日有效的本规则进行,当事各方可以书面形式对本规则进行任何修正。”1997年《日本商事仲裁协会商事仲裁规则》第2条、1998年《伦敦国际仲裁院仲裁规则》序言、1997年《国际商会仲裁规则》第15条第1款等也有类似的规定。〔3〕《瑞士联邦国际私法》第182条第1款是对当事人选择仲裁程序自治权的确认。

《瑞士联邦国际私法》第182条第2款规定:“若双方当事人未确定仲裁程序,

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〔1〕 例如,2003年《西班牙仲裁法》第17条、2003年《日本仲裁法》第18条、2005年《丹麦仲裁法》第15条、2005年《马来西亚仲裁法》第11条等。

〔2〕 参见张圣翠、张心泉:《我国仲裁员独立性和公正性及其保障制度的完善》,载《法学》2009年第7期。

〔3〕 乔生:《国际商事仲裁程序的法律适用及其新发展》,载《现代法学》2003年第5期。

仲裁庭应当根据需要直接确定或者参照法律或仲裁规则确定仲裁程序。”这一规定旨在弥补当事人未就仲裁程序达成合意所造成的仲裁程序的缺失。相似的规定亦出现在其他国家的国内法以及仲裁规则之中。比如,《国际商会仲裁规则》第15条第1款规定:“仲裁庭审理案件的程序受本规则管辖,本规则没有规定的,受当事人商定的规则管辖,或当事人未商定时,受仲裁庭决定的规则管辖。”在实践中,如果仲裁协议写明了仲裁地,仲裁庭在多数情况下会选择适用仲裁地国的程序法。

《瑞士联邦国际私法》第182条第3款规定,无论当事人或仲裁庭所选的仲裁程序如何,仲裁庭均应保证当事人受到平等对待以及当事人的意见被聆听。该条款所说的“当事人受到平等对待”,要求仲裁庭在仲裁的各个阶段在所有程序性事项上平等地对待各方当事人;该条款所说的“当事人的意见被聆听”,强调当事人有权就所有与案件结果相关的事实表达自己的观点,进行法律辩论,以及呈递证据。[1] 如今,正当程序原则得到了各国法院的重视。凡是违反正当程序的裁决很可能会被仲裁地法院以程序不当为由撤销。仲裁地法院所进行的程序性事项的司法审查实际上是对当事人和仲裁庭的仲裁程序选择权施加必要的限制。《瑞士联邦国际私法》第182条第3款旨在为当事人和仲裁庭选择仲裁程序的自由划定一个边界。相似的规定还出现在其他国家的仲裁法中。比如,《德国民事诉讼法典》第1042条规定,各方当事人应受到平等的对待并且应被给予充分的陈述案件的机会。如果仲裁庭适用当事人约定的德国法以外的程序法致使上述规定遭到违反,则当事人可提出撤销裁决之诉。[2]

(七)临时措施

《瑞士联邦国际私法》第183条规定:(1)除非当事人另有约定,仲裁庭可以应当事人的请求采取临时措施;(2)如果相关当事人未自愿执行临时措施,仲裁庭可提请法院予以协助,法院应适用自己的法律;(3)仲裁庭或法院可以要求当事人提供适当的担保作为采取临时措施的前提。

仲裁中的临时措施是指在仲裁程序开始前或者进行过程中,法院或仲裁庭根据一方当事人的申请,针对另一方当事人的财产或持有的证据或正在从事的行为

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〔1〕 Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, pp. 108 – 109.

〔2〕 乔生:《国际商事仲裁程序的法律适用及其新发展》,载《现代法学》2003年第5期。

所采取的临时性强制措施。[1] 临时措施制度旨在防止当事人利用其所处的优势地位转移或销毁证据或财产,致使仲裁裁决无法被作出,或是即便被作出,也难以得到执行。[2] 临时措施大致可以分为四种:一是维持现状的措施;二是保存证据的措施;三是与取证有关的措施;四是便于裁决执行的措施。[3]

临时措施制度已被写入许多仲裁规则之中。比如,《国际商会仲裁规则》第 23 条规定,除非当事人另有约定,案卷移交仲裁庭后,经当事人申请,仲裁庭可以裁令实施其认为适当的临时措施,在案卷移送仲裁庭之前,或在此之后适当的情形下,当事人亦可向有管辖权的司法机关申请采取临时措施;《美国仲裁协会国际仲裁规则》第 22 条规定,经任何一方当事人请求,仲裁庭认为有必要时可对争议标的采取任何临时措施,当事人中任何一方向司法当局要求采取临时措施,不得认为与仲裁协议的规定有抵触,或认为系对该协议的放弃;《澳大利亚国际商事仲裁中心规则》第 28 条规定,除非双方当事人书面达成其他协议,仲裁庭有权采取临时措施,被申请方有义务配合执行临时措施,仲裁庭有权在任何时候依据任何一方的申请更改、中止或终止临时措施,在特殊情况下,仲裁庭有权自主更改、中止或终止临时措施。

根据《瑞士联邦国际私法》第 183 条第 1 款的规定,除非当事人另有约定,仲裁庭仅能应当事人的请求而无权自发采取临时措施。至于仲裁庭在何种情形下可裁令采取临时措施,《瑞士联邦国际私法》并无明文规定。在实践中,仲裁庭一般在下列条件均满足时才会裁令采取临时措施:第一个条件是初步证据显示仲裁庭享有管辖权;第二个条件是初步证据显示若仲裁庭不采取临时措施,请求方的利益将会受损,而且临时措施对被请求方利益可能造成的损害小于在无临时措施情况下请求方的利益所遭受的损害;第三个条件是请求方赢得案件的合理可能性;第四个条件是请求方适当地提供了担保。[4]

尽管《瑞士联邦国际私法》第 183 条未指明法院能否裁令采取临时措施,但是学界和实务界对此问题已经达成了共识。在仲裁庭组成之前,当事人只能从法院获得临时措施的保护。倘若仲裁庭已经组成,当事人可以选择请求仲裁庭或者法

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〔1〕 鲍冠艺、黄伟:《论仲裁庭下达临时措施的执行——兼析〈示范法〉临时措施执行规则》,载广州仲裁委员会主办:《仲裁研究》第 17 辑,第 19 页。

〔2〕 李晶:《国际商事仲裁中临时措施在中国的新发展——以民诉法修改和仲裁规则修订为视角》,载《西北大学学报》(哲学社会科学版)2014 年第 6 期。

〔3〕 戴晨、王英民:《国际商事仲裁临时措施法律问题研究》,载《法学杂志》2008 年第 2 期。

〔4〕 Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, pp. 119 – 120.

院裁令采取临时措施。在某些情况下,当事人向法院提出请求更为有效,因为在临时措施未被执行时,法院具备强制执行的权力。

《瑞士联邦国际私法》第 183 条第 2 款规定,倘若相关当事人未自愿执行临时措施,仲裁庭可提请法院予以协助,法院应适用自己的法律。学界和实务界对于如何理解"法院应适用自己的法律"仍有争议,但是他们已经在以下两点达成了共识:第一,被请求的法院应就自己的管辖权作出决定,并且应根据法院地法确定协助执行的程序;第二,被请求的法院仅能采取法院地法中的执行措施。

《瑞士联邦国际私法》第 183 条第 3 款规定,仲裁庭或法院可以要求当事人提供适当的担保作为采取临时措施的前提。在通常情况下,仲裁庭或法院会依临时措施被请求方的请求要求请求方提供担保。然而,如果临时措施可能会给被请求方造成巨大损失,仲裁庭或法院亦可依职权要求请求方提供担保。担保的形式和担保的金额由仲裁庭或法院自由裁量决定。

(八)取证

证据为正义之基础。[1] 仲裁中的证据是指在仲裁程序中依据法律认定案件事实所需的一切客观材料。[2] 证据对于当事人维护自身的合法权益,对于仲裁庭查明案件事实都具有十分重要的意义。整个仲裁活动涉及两类判断:一是事实判断;二是法律判断。事实判断要以证据作为依据,而法律判断则以事实判断作为前提。[3] 各方当事人参加仲裁程序的目标是要说服仲裁员采纳对本方有利的事实。整个仲裁程序的推进以至仲裁裁决的作出可被视为仲裁员对当事人依据特定规则呈现的证据进行判断进而得出结论的过程。

《瑞士联邦国际私法》第 184 条第 1 款规定,仲裁庭应当自己进行取证。《瑞士联邦国际私法》未指明证据的种类,但实践中常见的证据可以分为以下几类:一是文档;[4] 二是证人证言;三是专家证言;四是调查记录。取证程序属于仲裁程序的组成部分。因此,取证程序应依照《瑞士联邦国际私法》第 182 条确定,即先由当事人合意决定,若当事人未达成此种合意,则由仲裁庭代为决定。

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〔1〕 何家弘主编:《新编证据法学》,法律出版社 2000 年版,第 16 页。

〔2〕 张斌生:《仲裁法新论》,厦门大学出版社 2004 年版,第 251 页。

〔3〕 汪祖兴:《完善我国仲裁证据制度若干问题思考——以民事诉讼证据制度为参照》,载陈光中、江伟主编:《诉讼法论丛》第 10 卷,第 464 页。

〔4〕 此处所说的文档包括各种文字、通信、图片、绘画、程序或数据,无论是在纸上还是以电子、音频、视频或任何其他手段得以记录或保存。

仲裁庭的取证并非总是顺利的。证人或是持有证据的第三人不愿配合致使仲裁庭取证困难的情况时有发生。仲裁庭本身并无采取强制措施的权力,所以法院协助取证是十分必要的。《瑞士联邦国际私法》第 184 条第 2 款规定,如果需要司法机关协助取证,仲裁庭或经仲裁庭同意的当事人可以向仲裁庭所在地的法院提出请求。关于法院协助取证,有两点需要注意:一是法院无权自发地向仲裁庭提供协助,法院的协助必须是基于仲裁庭或是经仲裁庭同意的当事人的请求;二是仅仲裁庭所在地的法院可以应仲裁庭或经仲裁庭同意的当事人的请求协助取证。

(九)仲裁庭的管辖权

《瑞士联邦国际私法》第 186 条规定:(1)仲裁庭应自行决定其管辖权;(2)对仲裁庭管辖权的异议必须于被申请人就案件实质问题作出答辩之前提出;(3)仲裁庭通常应以初步裁决的形式对自己的管辖权作出决定。

《瑞士联邦国际私法》第 186 条第 1 款涉及仲裁庭自裁管辖权原则。该原则又称“管辖权/管辖权”原则,是指仲裁庭有权裁判自己的管辖权,并且不受法院相关诉讼程序的影响。[1] 该原则有利于保障仲裁的效率和自治化。如果法院对仲裁庭管辖权的干预不受限制,那么仲裁进程将会受阻,当事人的意思自治也将受损。[2] 如今,这一原则已经发展成为仲裁法的一项普遍原则,在国际和各国国内仲裁立法和实践中得到了广泛的认可和应用。

自裁管辖权原则发端于德国。1955 年,德国高等法院认定仲裁员对作为其权限基础的仲裁协议的范围有作出最终决定的权力。此后,该原则开始在欧洲大陆蔓延。1961 年《欧洲国际商事仲裁公约》第 5 条第 3 款规定,仲裁庭有权决定仲裁协议是否存在并有权对自己的管辖权作出决定。1966 年《欧洲统一仲裁法》亦采纳了自裁管辖权原则。

1965 年《关于解决国家与他国国民间投资争端公约》第 41 条规定,仲裁庭应是其本身权限的决定人;争端一方提出的反对意见,认为该争端不属于中心的管辖范围,或因其他原因不属于仲裁庭的权限范围,仲裁庭应加以考虑,并决定是否将其作为先决问题处理,或与该争端的是非曲直一并处理。该公约是第一个采纳仲裁庭自裁管辖权原则的世界性公约。以此为起点,该原则在国际范围内得以迅速发

〔1〕 王瀚、李广辉:《论仲裁庭自裁管辖权原则》,载《中国法学》2004 年第 2 期。

〔2〕 高田甜:《论国际商事仲裁之自裁管辖权原则》,载《世界贸易组织动态与研究》2008 年第 5 期。

展。1976 年《联合国国际贸易法委员会仲裁规则》第 21 条第 1 款规定:“仲裁庭应有权就其管辖权所提出的异议,包括对仲裁条款或单独的仲裁协议的存在和效力所提出的任何异议,进行裁决。”1985 年《联合国国际贸易法委员会国际商事仲裁示范法》第 16 条第 1 款规定:“仲裁庭可以对其自己的管辖权,包括对仲裁协议的存在或效力的任何异议,作出裁定。”《联合国国际贸易法委员会仲裁规则》和《联合国国际贸易法委员会国际商事仲裁示范法》对仲裁庭自裁管辖权原则的确认,对于该原则被各国仲裁法以及仲裁机构的仲裁规则所采纳起到了显著的推动作用。在国内法层面上,仲裁庭自裁管辖权原则已经被写入英国、法国、德国、比利时、荷兰、保加利亚、埃及、西班牙、瑞典、印度、新加坡等国的国内法中;在仲裁规则层面上,该原则已经出现在了《巴黎国际商会仲裁规则》《伦敦国际仲裁院仲裁规则》《新加坡国际仲裁中心仲裁规则》《美国仲裁协会国际仲裁规则》等规则之中。[1]

在《瑞士联邦国际私法》第 186 条第 1 款承认仲裁庭自裁管辖权的基础上,该法第 186 条第 2 款和第 3 款分别针对当事人对仲裁庭管辖权提出异议的时间以及仲裁庭自裁管辖的时间作了释明。《瑞士联邦国际私法》第 186 条第 2 款规定,对仲裁庭管辖权的异议必须于被申请人就案件实质问题作出答辩之前提出。倘若被申请人未在该条款规定的时间内及时对仲裁庭的管辖权提出异议,那么被申请人将被视为不可撤回地放弃了提出此种异议的权利。《瑞士联邦国际私法》第 186 条第 3 款规定,仲裁庭通常应以初步裁决的形式对自己的管辖权作出决定。该条款意味着原则上仲裁庭应将被申请人对其管辖权提出的异议作为一个先决问题来加以处理。然而,该条款中的“通常”(as a rule)一词实际上为仲裁庭延后自裁管辖提供了法律上的依据。

(十)适用的法律

《瑞士联邦国际私法》第 187 条规定:(1)仲裁庭应依据当事人选择的法律裁决案件,若当事人未作此种选择,则应依据与案件有最密切联系的法律裁决案件;(2)当事人可以授权仲裁庭依公平善意原则裁决案件。从法律适用的角度来看,国际商事仲裁可以分为依法仲裁和友好仲裁。《瑞士联邦国际私法》第 187 条第 1 款规定的是依法仲裁的情形,而该条第 2 款规定的是友好仲裁的情形。

自 20 世纪 80 年代以来,国际商事仲裁中的意思自治原则得到了广泛的认可。该原则的重要体现之一便是当事人有权自行选择解决争议的实体法。当事人合意

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〔1〕 王瀚、李广辉:《论仲裁庭自裁管辖权原则》,载《中国法学》2004 年第 2 期。

选择的法律已经成了仲裁庭审理国际商事案件首选的法律依据。[1] 这一点在许多仲裁法和仲裁规则中已经有所体现。比如,《联合国国际贸易法委员会国际商事仲裁示范法》第 28 条第 1 款规定,“仲裁庭应按照当事各方选定的适用于争议实体的法律规则对争议作出决定”;《国际商会仲裁规则》第 17 条第 1 款规定,“当事人应自由约定由仲裁庭适用于争议实体的法律规则”;《联合国国际贸易法委员会仲裁规则》第 35 条第 1 款规定,“仲裁庭应适用各方当事人指定适用于实体争议的法律规则”;等等。

在当事人未就案件实体问题的法律适用达成合意的情况下,仲裁庭应依据什么法来对案件作出裁决呢?从目前的情况来看,国际上主要有四种立法例:第一种是仲裁庭依据仲裁地的冲突规范确定准据法;[2]第二种是仲裁庭适用其认为适当的冲突规范确定准据法;[3]第三种是仲裁庭依据最密切联系原则确定准据法;第四种是仲裁庭适用其认为适当的法律。[4]《瑞士联邦国际私法》第 187 条第 1 款采纳的是第三种立法例,即以最密切联系原则确定准据法。最密切联系原则是在 20 世纪六七十年代美国冲突法革命中逐渐形成的一种引入注目的学说。[5] 有学者认为该原则已然成为当今国际私法界共通的语言和趋势。[6]《瑞士联邦国际私法》第 187 条第 1 款正是这一趋势下的产物。

《瑞士联邦国际私法》第 187 条第 2 款涉及友好仲裁的问题。友好仲裁通常是指仲裁庭经争议当事人授权,在其认为适用严格的法律规范会导致不公平结果的

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〔1〕 乔生:《论当事人意思自治原则在国际商事仲裁领域的地位与发展趋势》,载《山东社会科学》2003 年第 5 期。

〔2〕 在 1975 年之前,国际商会的仲裁员通过适用仲裁地的冲突规范确定实体问题的准据法。国际法学会 1957 年的一个决议明确提到争议实体问题准据法的确定必须依据仲裁庭所在地的冲突法规则。参见宋连斌:《比照适用抑或特别规定:从国际商事仲裁的法律适用谈起》,载《武汉大学学报》(哲学社会科学版)2004 年第 6 期。

〔3〕 例如,《欧洲国际商事仲裁公约》第 7 条第 1 款规定,“当事人可通过协议自行决定仲裁员就争议所适用的实体法;如果当事人没有决定应适用的法律,仲裁员可按照其认为可适用的冲突规则的规定,适用某种准据法”;《联合国国际贸易法委员会国际商事仲裁示范法》第 28 条第 2 款规定,“当事人没有指定任何适用法律的,仲裁庭应当适用其认为适用的法律冲突规范所确定的法律”;等等。

〔4〕 例如,《国际商会仲裁规则》第 17 条第 1 款规定:“当事人应自由约定由仲裁庭适用于争议实体的法律规则。在无此约定时,仲裁庭应适用其认为适当的法律规则。”

〔5〕 翁杰:《最密切联系原则的司法适用——以〈涉外民事关系法律适用法〉第 2 条为中心》,载《法律科学》(西北政法大学学报)2017 年第 6 期。

〔6〕 肖永平、王承志:《第三次冲突法重述:美国学者的新尝试》,载《武汉大学学报》(哲学社会科学版)2004 年第 1 期。

情况下,不按照严格的法律规范,而是依据其认为公平善意的标准进行仲裁并作出对争议当事人有约束力的裁决的一种商事仲裁方式。[1]《瑞士联邦国际私法》第187条第2款规定,当事人可以授权仲裁庭依公平善意原则(*ex aequo et bono*)裁决案件。*Aequo* 即为英文 equity,有公平、衡平之意;*bono* 则为英文 good faith,有善意之意。[2] 公平善意原则本是民法中的概念。在普通法国家,有普通法和衡平法之分。衡平法以公平和正义为原则,它既为普通法填补弥缺,又为普通法纠偏补弊。[3] 大陆法国家通过设置诚信、善意、公序良俗等一般原则填补法律缺漏,解决法规之间的冲突以及突破法律规定的僵硬束缚,从而实现真正的公平正义。[4] 事实上,普通法中的衡平法与大陆法中的诚信善意原则在性质和内容上并无本质区别。[5] 公平善意原则随后在国际法层面上亦得到了认可。《国际法院规约》第38条第1款规定,国际条约、国际习惯、一般法律原则为法院裁判应适用的法律,而司法判例和权威公法学家的学说可作为确立法律原则的辅助资料。该条第2款指出,法院有经当事国同意本着"公允及善良"原则裁判案件之权。

1961年《关于国际商事仲裁的欧洲公约》首次规定了国际商事仲裁中的友好仲裁。自20世纪80年代起,友好仲裁制度先后在大陆法国家和普通法国家中得到广泛接受。[6] 该制度亦出现在许多国际条约和仲裁规则之中。比如,《关于解决国家与他国国民间投资争端公约》第42条第3款规定,在双方同意的情况下,仲裁庭有按照公允及善良原则对争端作出裁决的权力;《联合国国际贸易法委员会仲裁规则》第35条第2款规定,在各方当事人明确授权的情况下,仲裁庭可作为友好和解人或按照公平合理的原则作出裁决;《国际商会仲裁规则》第17条第3款规定,在当事人同意授权的情况下,仲裁庭有权充当友好调停人或公平善意地作出决定。

1985年《联合国国际贸易法委员会国际商事仲裁示范法》的起草者曾指出虽然友好仲裁尚未被所有国家接受,但该制度被引入示范法是具有合理性的,因为:(1)示范法不应阻碍在一些法律体系中已经确立的仲裁立法和实践;(2)友好仲裁符合减少仲裁地在国际商事仲裁中重要性的政策导向;(3)友好仲裁的前提是当

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〔1〕 于文娟、刘惠荣:《试论国际商事仲裁中的友好仲裁制度》,载广州仲裁委员会主办:《仲裁研究》第12辑,第36页。

〔2〕 陈力、田曼莉:《友好仲裁初论》,载《当代法学》2004年第2期。

〔3〕 张文彬:《论私法对国际法的影响》,法律出版社2001年版,第18页。

〔4〕 陈力、田曼莉:《友好仲裁初论》,载《当代法学》2004年第2期。

〔5〕 何孝元:《诚实信用原则与衡平法》,台北,三民书局1977年版,第19页。

〔6〕 陈力、田曼莉:《友好仲裁初论》,载《当代法学》2004年第2期。

事人的授权,所以不存在误导弱势一方当事人的危险。如今,友好仲裁已经在国际商事仲裁中占据了一席之地,原因大致有二:一是当事人意思自治原则是国际商事仲裁的支柱,仲裁庭在当事人授权之下进行的友好仲裁正是该原则的又一体现;二是在国际商事仲裁中,灵活的法律适用有助于国际纠纷的解决,此种灵活性能够弥补现有法律规则的漏洞,解决法律之间的冲突以及纠正严格适用法律所带来的不公。

尽管友好仲裁已然得到了世界上多数国家的承认,但该制度赋予仲裁庭的宽泛的自由裁量权引起了学者的担忧。公平善意的概念抽象、模糊,其适用往往依赖仲裁员的主观标准。因此,在国际商事仲裁实践中,仲裁庭在友好仲裁中的权力通常受到以下限制:第一,仲裁庭的友好仲裁必须以当事人的明确授权为前提;第二,仲裁庭的友好仲裁不得违反有关国家的强制性法规和公共秩序;第三,仲裁庭的友好仲裁不得背离合同条款并应考虑可适用的商业惯例。

(十一)仲裁裁决的作出

《瑞士联邦国际私法》第 188 条和第 189 条涉及仲裁裁决的作出。第 188 条规定,除非当事人另有约定,仲裁庭可以作出部分裁决。第 189 条规定,仲裁庭应依当事人协议选择的程序和形式作出裁决;当事人未作选择的,仲裁庭应按少数服从多数的原则作出裁决,当无法形成多数意见时,由首席仲裁员裁定;仲裁裁决应采用书面形式,写明裁决的理由,注明日期,并经首席仲裁员签字。

部分裁决是指终局性地处理了当事人在仲裁中的部分而非全部主张,将剩余部分的主张留待后续仲裁程序中加以解决的仲裁决定。[1] 部分裁决对当事人而言是有约束力的,是可以被承认和执行的。部分裁决与临时裁决是有区别的。前者终局性地处理了当事人的主张(如裁定违约损害赔偿金),而后者则是处理与主张相关的事项(如准据法)而非主张本身。《瑞士联邦国际私法》第 188 条肯定了在当事人无相反约定的情况下,仲裁庭有权作出部分裁决。类似的规定还出现在了《英格兰仲裁法》第 47 条、《德国民事诉讼法典》第 301 条和第 1042 条、我国《仲裁法》第 55 条、[2]《印度仲裁与调解法》第 31 条第 6 款等国内法中。[3] 仲裁庭作出部分裁

〔1〕 [美]加里·B. 博恩:《国际仲裁:法律与实践》,白麟等译,陈卫佐等审校,商务印书馆 2015 年版,第 380 页。

〔2〕 我国《仲裁法》第 55 条规定:“仲裁庭仲裁纠纷时,其中一部分事实已经清楚,可以就该部分先行裁决。”

〔3〕 [美]加里·B. 博恩:《国际仲裁:法律与实践》,白麟等译,陈卫佐等审校,商务印书馆 2015 年版,第 380 页。

决的权力亦得到了许多仲裁规则的认可。比如,《国际商会仲裁规则》第 2 条第 3 项规定,该规则下的裁决包括中期、部分和最终裁决;《伦敦国际仲裁院仲裁规则》第 26 条第 7 款规定,“仲裁庭可以在不同时间就不同事项分别作出裁决,此类裁决具有与仲裁庭作出的任何其他裁决相同的法律地位和效力”;等等。赋予仲裁庭作出部分裁决的权力对于及时、有效地解决当事人之间的纠纷有着重要的意义。

《瑞士联邦国际私法》第 189 条第 1 款强调仲裁庭应依当事人协议选择的程序和形式作出裁决。该条款再次肯定了当事人的意思自治在国际商事仲裁中的重要地位。第 189 条第 2 款指出,仲裁裁决应采用书面形式,且应包含裁决的理由、日期和首席仲裁员的签字这三项内容。实际上,除了第 189 条第 2 款提及的这三项内容外,一个形式完备的仲裁裁决通常还包含以下内容:(1)当事人及其代理人的名字和地址;(2)仲裁员的名字;(3)仲裁庭所在地;(4)过往程序的简介;(5)当事人的诉求;(6)仲裁庭认定的事实;(7)仲裁费用的分配;等等。

(十二)仲裁裁决的撤销

《瑞士联邦国际私法》第 190 条第 1 款规定:“裁决自送达当事人之日起即具有约束力。”当事人可以约定裁决送达的方式,若无此种约定,仲裁庭可以自行决定送达的方式。在实践中,鲜有当事人会在仲裁协议中约定裁决送达的方式,但是若其选择的仲裁规则含有相关规定,则他们实际上间接地对送达方式达成了合意。送达的时间对于撤销仲裁裁决时限的计算有着十分重要的意义。按照瑞士法律的规定,撤销仲裁裁决的申请必须在裁决送达的次日起 30 日内提出,且该时限不得延长。

《瑞士联邦国际私法》第 190 条第 2 款列出了仲裁裁决可被撤销的五种情形:(1)独任仲裁员的指定或仲裁庭的组成不当;(2)仲裁庭错误地行使或未行使管辖权;(3)仲裁裁决超出提交仲裁庭的申诉范围或者对申诉之一未作出决定;(4)违反平等对待当事人的原则,或侵犯当事人被聆听的权利;(5)仲裁裁决违反公共政策。仲裁裁决的撤销是许多国家仲裁法普遍包含的一项制度。对于该制度的合理性,学者们持有不同的观点。[1] 一派学者认为仲裁裁决的撤销制度应当予以废除。他们主张该制度会使仲裁遭受不必要的双重干预,因为各国法院在承认和执行仲裁裁决之时便会对裁决进行司法审查,拒绝承认和执行仲裁裁决的事由与撤销仲裁

〔1〕 参见张圣翠:《论我国仲裁裁决撤销制度的完善》,载《上海财经大学学报》2012 年第 1 期。

裁决的事由十分相似。[1] 另一派学者则认为仲裁裁决的撤销制度具有独立的价值和意义。它能够为双方当事人提供主动的救济。一方面,倘若该制度被废除,对裁决存疑的胜诉方将无法在裁决被承认和执行之前获得必要的救济。一旦胜诉方提起裁决的执行程序,这便意味着其认同了裁决的结果。另一方面,对于败诉方而言,法院不予承认和执行仲裁裁决仅是其在胜诉方申请执行裁决之后所能获得的一种被动救济。倘若仲裁裁决的撤销制度被废除,败诉方将丧失主动使裁决归于无效的途径。[2]

需要注意的是,当事人仅能依据《瑞士联邦国际私法》第 190 条第 2 款所列的五项事由请求撤销仲裁裁决。换言之,该条款对撤销裁决事由的列举是一种穷尽式的列举。这反映出立法者拟将法院对仲裁的干预减小到最低限度。仲裁兼具契约性、自治性和司法性的特点。契约性是仲裁的基础,自治性是仲裁的本质,而司法性是仲裁裁决法律效力的保障和后盾。仲裁权具有民间属性,但仲裁庭依据仲裁权作出的裁决却具有与司法判决同等的法律效力。法院对仲裁裁决的撤销是司法权对仲裁权进行审查和监督最为严格的方式。一旦仲裁裁决被撤销,它便不再具有法律效力,其对双方当事人也不再具有约束力。[3] 尽管仲裁裁决的司法审查具有必要性,但是法院不应过度地干预仲裁的结果。否则,仲裁的独立价值和优势将被抹杀。如果仲裁庭作出的仲裁裁决在司法审查中频繁地被撤销,那么当事人的权利和义务将失去应有的可预见性,仲裁机构的公信力将受到损害,整个仲裁业的发展也会因此受到阻碍。[4]

《瑞士联邦国际私法》第 191 条规定,撤销仲裁裁决的请求只能向瑞士联邦最高法院提出。在有的国家,当事人可以先向下级法院提出撤销裁决的请求,此后可就下级法院作出的决定上诉至上级法院。然而,此种两级制的撤销程序增加了结案的时间和成本。相较而言,《瑞士联邦国际私法》第 191 条更有利于保障仲裁的效率和仲裁结果的稳定性。在实践中,瑞士联邦最高法院通常会在四个月内对撤销仲裁裁决的请求作出决定。相比于其他国家或地区持续数年的撤销程序,瑞士联邦最高法院的效率的确可圈可点。

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〔1〕 赵健:《国际商事仲裁的司法监督》,法律出版社 2000 年版,第 240 页。

〔2〕 谢新胜:《国际商事仲裁裁决撤销制度“废弃论”之批判》,载《法商研究》2010 年第 5 期。

〔3〕 舒瑶芝:《仲裁裁决效力探析》,载《当代法学》2002 年第 9 期。

〔4〕 章杰超:《论仲裁司法审查理念之变迁——以 N 市中院申请撤销国内仲裁裁决裁定为基础》,载《当代法学》2015 年第 4 期。

《瑞士联邦国际私法》第192条规定,如果双方当事人在瑞士均无住所、习惯居所和营业机构,他们可以在仲裁协议中明确约定或是在之后的书面协议中约定,放弃请求撤销仲裁裁决的权利或是将撤销裁决的事由限定在第190条第2款所列情形中的一项或数项。该条款的适用对象是在瑞士无住所、习惯居所和营业机构的当事人。简言之,只有在当事人与瑞士缺少地域上的联系时,他们才能在仲裁裁决的撤销问题上行使意思自治。当事人的意思自治必须以明示的方式或是体现在仲裁协议中或事后达成的协议中。当事人可以完全放弃请求撤销仲裁裁决的权利,或限缩《瑞士联邦国际私法》第190条第2款规定的撤销裁决的事由。[1]《瑞士联邦国际私法》第192条旨在使非瑞士的当事人能够自行调控瑞士法院对仲裁裁决的干预程度。相似的规定还出现在《瑞典仲裁法》第51条、《法国民事诉讼法典》第1522条、《土耳其仲裁法》第78条第6款、《比利时司法典》第1717条第4款等国内法中。

三、瑞士的仲裁机构

瑞士稳定的政治环境、中立国的国际地位、便利的地理位置、健全的法律制度等因素使其成为当事人心目中“理想的仲裁地”。[2] 瑞士的仲裁机构在国际上享有良好的声誉和重要的影响力。2004年之前,苏黎世商会仲裁院是瑞士国内最具代表性的常设仲裁机构。2004年,苏黎世商会连同其他数个州的商会共同组建了瑞士商会仲裁院。此后,瑞士商会仲裁院便成了瑞士仲裁机构的“领头雁”。

(一)苏黎世商会仲裁院

瑞士的苏黎世商会仲裁院(Court of Arbitration of the Zurich Chamber of Commerce)是全球最具影响力的常设仲裁机构之一。该仲裁院成立于1911年。苏黎世商会是仲裁院的上属领导和行政管理机构。在第二次世界大战以前,该仲裁院只受理苏黎世商会会员之间的争议案件。但在第二次世界大战之后,该院逐渐开始受理外国当事人之间的争议案件。第二次世界大战后,东西方集团呈现对峙的态势,第三世界国家相继独立和兴起。在这样的国际环境下,苏黎世商会仲裁院作为永久中立国的重要常设仲裁机构得到了许多国家当事人的偏爱。

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〔1〕《瑞士联邦国际私法》第190条第2款列有5项撤销裁决的事由,包括:(1)独任仲裁员的指定或仲裁庭的组成不当;(2)仲裁庭错误地行使或未行使管辖权;(3)仲裁裁决超出提交仲裁庭的申诉范围或者对申诉之一未作出决定;(4)违反平等对待当事人的原则,或侵犯当事人被聆听的权利;(5)仲裁裁决违反公共政策。

〔2〕 陈卫佐:《瑞士新国际仲裁法初探》,载《武汉大学学报》(哲学社会科学版)1997年第6期。

1976 年 11 月 3 日,苏黎世商会委员会通过了《苏黎世商会调解和仲裁规则》。该规则于 1977 年 1 月 1 日生效。根据该规则的规定,苏黎世商会设立一个调解委员会和一个仲裁院,以便在法院外解决商业纠纷,特别是那些牵涉商会成员或包含国际因素的工商公司之间的纠纷。但是,公司与雇员之间的纠纷除外。从其名称便可看出,该规则包含了一套调解程序和一套仲裁程序。前者规定在规则的第 2 章,后者规定在规则的第 3 章。只要一方当事人为苏黎世商会的会员,当事人便可将争议提交商会进行调解或仲裁。若双方当事人均不是商会会员,只有经苏黎世商会会长批准,商会才能对案件进行调解或仲裁。

《苏黎世商会调解和仲裁规则》中的调解程序旨在促使双方当事人通过谈判达成妥协,解决争议,而不诉诸正式的诉讼程序。意图利用调解程序解决争议的当事人一方或双方应以书面形式向苏黎世商会秘书处提出申请,并附以申请人一方或双方表示遵从《苏黎世商会调解和仲裁规则》中调解程序规定的声明。如果只有一方当事人申请调解,苏黎世商会秘书处须将申请通知另一方当事人,向他送达案情说明副本并要求另一方当事人在指定期限内书面声明是否同意进行调解以及是否遵从《苏黎世商会调解和仲裁规则》中调解程序的规定。倘若被通知的当事人拒绝调解,苏黎世商会秘书处应告知申请人不能进行调解。简言之,苏黎世商会的调解必须以双方当事人的同意为前提。如果当事人达成和解,调解员应将和解内容写成书面材料并由当事人签名。如果当事人未能达成和解,调解员应通知商会秘书处和当事人终止调解程序。未达成和解的当事人可以申请仲裁也可以采用其他方式解决争议。调解程序中提出的意见和建议对当事人没有约束力,在以后的争议解决程序中亦不能作为依据。双方当事人应各自交付由调解员规定的调解费用的一半,并对另一半负连带责任。不按此办理的应与调解员达成书面协议。若此项协议被写入调解书,则调解员应在调解书上签名确认。

《苏黎世商会调解和仲裁规则》中的调解程序与仲裁程序是相互独立的。当事人可以先行接受调解。如果双方当事人无法就他们之间的争议达成妥协,他们可以再行选用仲裁方式来解决争议。当事人也可以跳过调解程序直接将争议诉诸仲裁。苏黎世商会仲裁院对争议的管辖权源于当事人之间有效的仲裁协议。如果在案件被提交至仲裁院时,不存在有效的仲裁协议,苏黎世商会秘书处将要求双方当事人提交书面声明接受仲裁院对他们之间的争议加以裁决。对于并不复杂或涉案金额很小的争议,苏黎世商会的秘书处或会长可建议当事人指定独任仲裁员作出裁决。当事人可以在仲裁协议或补充协议中约定合议仲裁庭由 4 名或 5 名仲裁员

而非 3 名仲裁员组成。当事人可以约定仲裁庭应适用的实体法,也可以授权仲裁庭依照公平善意原则对案件作出裁决。若无此种约定和授权,对于涉外的法律关系,仲裁庭应适用由瑞士国际私法规则或与当事人有关的国际条约所确定的实体法。在申诉、答辩、反诉、抗诉、辩论等程序结束后,仲裁庭应进行内部审议。仲裁庭应在正式作出裁决前与双方当事人讨论其审议结果,以便当事人能以审议结果为基础以协议方式解决争议。如果当事人未能达成协议,则仲裁庭应依简单多数的原则作出裁决。仲裁庭成员和职员从当事人缴纳的仲裁费中按其工作情况获取报酬。数额由仲裁庭比照苏黎世州最高法院公布的当时有效的律师收费条例确定。

(二)瑞士商会仲裁院

2004 年,瑞士巴塞尔、伯尔尼、日内瓦、提契诺、纳沙泰尔、沃州和苏黎世的商会成立了联合商会,并共同组建了瑞士商会仲裁院(Swiss Chambers' Arbitration Institution)。瑞士商会仲裁院的仲裁规则名为《瑞士国际仲裁规则》(Swiss Rules of International Arbitration)。该规则取代了各商会以往的仲裁规则。《瑞士国际仲裁规则》于 2004 年施行,并于 2012 年被修订。瑞士商会仲裁院由各商会的一名代表和国家仲裁委员会的主席组成。仲裁院通过各地区的秘书处提供仲裁服务。各地区的秘书处负责对各自管辖的仲裁案件进行日常管理和监督。在各商会辖区内均设有一个区域仲裁委员会,负责指导《瑞士国际仲裁规则》在各自管辖的具体案件中的适用。区域仲裁委员会由经验丰富的仲裁从业人员组成。国家仲裁委员会由各区域仲裁委员会的成员组成。它有权向瑞士商会仲裁院提议修改《瑞士国际仲裁规则》。

瑞士商会仲裁院推荐当事人使用以下示范仲裁条款:基于本合同产生的或者与本合同有关的任何纠纷、争议或权利主张,包括涉及合同有效、无效、违约或合同终止的事项,均应根据提交仲裁申请时有效的瑞士商会仲裁院的《瑞士国际仲裁规则》以仲裁方式加以解决;仲裁员应为 1 名、3 名、1 名或 3 名;仲裁地应为瑞士城市,除非当事人约定仲裁地为瑞士以外的其他国家城市;仲裁程序应以选定的语言进行。

《瑞士国际仲裁规则》的主要内容如下:

1. 仲裁通知

申请人应通过向商会提交通知来启动仲裁程序。通知应包含将争议提交仲裁的要求;当事人及其代理人的姓名、地址和其他联系方式;仲裁条款或独立的仲裁协议的文本;引起纠纷或与纠纷有关的合同或其他法律文件;索赔的性质及索赔金

额的说明;请求的救济或赔偿;对仲裁员人数、仲裁语言和仲裁地点的建议;已提交仲裁费的确认单据等。如果仲裁通知未以英语、德语、法语或意大利语书写,秘书处可要求申请人提供仲裁通知的翻译文本。秘书处应毫不迟延地将仲裁通知副本及证据送交被申请人。

2. 对通知的答复

被申请人必须自收到通知之日起30日内向商会提交对通知的答复。答复应包含被申请人及其代理人的姓名、地址和其他联系方式;仲裁庭无管辖权的主张;对通知中所述事项的意见;对申请人请求的救济或赔偿的答辩;对仲裁员人数、仲裁语言和仲裁地点的建议等。任何反请求或抵消抗辩原则上应在对仲裁通知的回复中提出。

3. 仲裁庭的组成

仲裁案件一般交由独任仲裁员审理,除非争议的复杂性或争议金额表明案件交由3人仲裁庭审理更为合适。如果当事人在仲裁协议中约定案件由3人仲裁庭审理,但鉴于争议金额或其他情形,此种约定并不恰当,商会应当建议当事人考虑将案件交由独任仲裁员审理。如果案件由独任仲裁员审理,自被申请人收到通知之日起,或自当事人收到商会决定将案件交由独任仲裁员审理的通知之日起30日内,双方当事人应共同指定独任仲裁员。若双方当事人未能在上述期限内作出指定,商会将代为指定独任仲裁员。如果仲裁庭由3名仲裁员组成,双方当事人必须在仲裁协议约定的期限内或者在商会决定的期限内各自指定一名仲裁员。若一方当事人未指定本方的仲裁员,商会将代为指定。被指定的两名仲裁员必须自第2名仲裁员被确定之日起30日内共同指定第3名仲裁员担任首席仲裁员。如果被指定的两名仲裁员未能指定首席仲裁员,商会将代为指定。

4. 对仲裁员的异议

仲裁员在被指定前或被指定后均负有义务向当事人披露任何可能对其公正性或独立性产生合理怀疑的情形。若存在足以对仲裁员的公正性或独立性产生合理怀疑的情形,则任何一方当事人均可对该仲裁员提出异议。需要注意的是,对于己方指定的仲裁员,当事人只能基于该仲裁员被指定后知悉的原因对其提出异议。如果被质疑的仲裁员拒绝退出仲裁,特别委员会应对当事人的异议作出决定。特别委员会由国家仲裁委员会的成员组成,其主要职责是确保各区域仲裁委员会根据瑞士仲裁规则作出的决定的统一性。特别委员会就对仲裁员的异议作出的决定是终局性的,而且它无须说明决定的理由。

5. 仲裁程序

在遵守《瑞士国际仲裁规则》的前提下，仲裁庭可按照其认为合适的方式进行仲裁，但必须保证各方当事人受到平等的对待，并保证各方当事人陈述其主张的权利。在仲裁程序的初期，仲裁庭在与当事人协商后，应约定一份程序时间表用于指导案件的进行。在审理程序进行的任何阶段，仲裁庭可以安排听取证人（包括专家证人）的证言陈述，或听取口头辩论。经与当事人协商后，仲裁庭也可以决定根据文件以及其他材料进行审理。

6. 仲裁地

当事人可以自由约定仲裁地。如果当事人未作此种约定，或其约定不清楚或不完整，特别委员会将在综合考虑所有相关情形后确定仲裁地或要求仲裁庭确定仲裁地。

7. 庭审地

仲裁庭可以决定庭审地点。在考虑仲裁的具体情况后，仲裁庭可以在其认为合适的任何地点听取证人证言，举行仲裁员内部会议，查验货物、其他财产或文件。

8. 自裁管辖权

仲裁庭有权对任何针对其管辖权的异议作出决定，包括对仲裁条款或单独仲裁协议的存在或效力提出的异议。原则上，仲裁庭应该将任何针对其管辖权的异议作为先决问题作出裁定，但是仲裁庭也可以继续进行仲裁审理程序并根据案情对此作出裁定。

9. 语言

在符合当事人协议的前提下，仲裁庭应在成立后立即决定在仲裁审理程序中使用哪种或哪几种语言。该决定适用于仲裁请求、仲裁答辩、任何进一步的书面陈述及任何口头审理。若仲裁请求或仲裁答辩中的任何附件，以及在仲裁审理程序中提交的任何补充文件或附件不是以当事人协议规定的或仲裁庭决定的语言提交的，仲裁庭可以命令附带提交当事人协议规定的或仲裁庭确定的一种或几种语言的翻译文本。

10. 适用的法律

仲裁庭应根据当事人同意的法律裁决案件。如果当事人未就法律作出选择，则仲裁庭应适用与纠纷有最密切联系的法律。只有在得到当事人明示授权的情况下，仲裁庭才可以根据公平原则作出裁决。无论在何种情况下，仲裁庭的裁决均应根据合同的规定并应顾及交易所适用的商业惯例。

11. 仲裁费用

仲裁费用包括:(1)仲裁庭的报酬;(2)仲裁庭和书记员因仲裁而产生的差旅费及其他费用;(3)仲裁庭要求的专家建议及其他协助的费用;(4)证人在仲裁庭批准范围内的差旅费和其他费用;(5)案件审理过程中的法律代理与法律协助费用;(6)案件受理费以及行政费用;等等。

仲裁庭报酬的确定需要考虑争议的数量、案件的复杂程度、所花费的时间,以及与案件相关的其他情形,包括因和解而引起的仲裁审理程序的终止。《瑞士国际仲裁规则》详细规定了仲裁庭报酬的标准(如表1-1、表1-2所示)。

表1-1 独任仲裁员的报酬

单位:瑞士法郎

争议金额	最低额	最高额
0~300,000	争议金额的4%	争议金额的12%
300,001~600,000	12,000+超过300,000部分的2%	36,000+超过300,000部分的8%
600,001~1,000,000	18,000+超过600,000部分的1.5%	60,000+超过600,000部分的6%
1,000,001~2,000,000	24,000+超过1,000,000部分的0.6%	84,000+超过1,000,000部分的3.6%
2,000,001~10,000,000	30,000+超过2,000,000部分的0.38%	120,000+超过2,000,000部分的1.5%
10,000,001~20,000,000	60,400+超过10,000,000部分的0.3%	240,000+超过10,000,000部分的0.6%
20,000,001~50,000,000	90,400+超过20,000,000部分的0.1%	300,000+超过20,000,000部分的0.2%
50,000,001~100,000,000	120,400+超过50,000,000部分的0.06%	360,000+超过50,000,000部分的0.18%
100,000,001~250,000,000	150,400+超过100,000,000部分的0.02%	450,000+超过100,000,000部分的0.1%
超过250,000,000	180,400+超过250,000,000部分的0.01%	600,000+超过250,000,000部分的0.06%

表 1－2　三人仲裁庭的报酬

单位:瑞士法郎

争议金额	最低额	最高额
0～300,000	争议金额的 10%	争议金额的 30%
300,001～600,000	30,000 + 超过 300,000 部分的 5%	90,000 + 超过 300,000 部分的 20%
600,001～1,000,000	45,000 + 超过 600,000 部分的 3.75%	150,000 + 超过 600,000 部分的 15%
1,000,001～2,000,000	60,000 + 超过 1,000,000 部分的 1.5%	210,000 + 超过 1,000,000 部分的 9%
2,000,001～10,000,000	75,000 + 超过 2,000,000 部分的 0.95%	300,000 + 超过 2,000,000 部分的 3.75%
10,000,001～20,000,000	151,000 + 超过 10,000,000 部分的 0.75%	600,000 + 超过 10,000,000 部分的 1.5%
20,000,001～50,000,000	226,000 + 超过 20,000,000 部分的 0.25%	750,000 + 超过 20,000,000 部分的 0.5%
50,000,001～100,000,000	301,000 + 超过 50,000,000 部分的 0.15%	900,000 + 超过 50,000,000 部分的 0.45%
100,000,001～250,000,000	376,000 + 超过 100,000,000 部分的 0.05%	1,125,000 + 超过 100,000,000 部分的 0.25%
超过 250,000,000	451,000 + 超过 250,000,000 部分的 0.025%	1,500,000 + 超过 250,000,000 部分的 0.15%

注:首席仲裁员应取得全部费用的 40%～50%,其他仲裁员每位应取得全部费用的 25%～30%。

申请人在提交仲裁通知时须支付案件受理费。该费用是不可退的。具体的收费标准如下:(1)若争议金额低于 2,000,000 瑞士法郎,受理费为 4500 瑞士法郎;(2)若争议金额为 2,000,001～10,000,000 瑞士法郎,受理费为 6000 瑞士法郎;(3)若争议金额高于 10,000,000 瑞士法郎,受理费最高为 8000 瑞士法郎;(4)若争议金额不能确定,受理费为 6000 瑞士法郎。

商会的行政费用也是根据争议金额来计算的。具体的收费标准如下:(1)若争议金额小于 2,000,000 瑞士法郎,不收取行政费用;(2)若争议金额为 2,000,001～10,000,000 瑞士法郎,行政费用为 4000 瑞士法郎 + 0.2% ×(超过2,000,000 瑞士法郎的部分);(3)若争议金额为 10,000,001～20,000,000 瑞士法郎,行政费用为

20,000 瑞士法郎 +0.1% ×(超过 10,000,000 瑞士法郎的部分);(4)若争议金额为 20,000,001 ~50,000,000 瑞士法郎,行政费用为 30,000 瑞士法郎 +0.05% ×(超过 20,000,000 瑞士法郎的部分);(5)若争议金额为 50,000,001 ~100,000,000 瑞士法郎,行政费用为45,000瑞士法郎 +0.01% ×(超过 50,000,000 瑞士法郎的部分);(6)若争议金额高于 100,000,000 瑞士法郎,行政费用为 50,000 瑞士法郎。

原则上,仲裁费用应由败诉方承担。但是,如果仲裁庭考虑到案件的具体情况认为费用按比例分担是合理的,仲裁庭可以决定双方当事人按比例分担各项费用。各方当事人应按仲裁庭在组庭时决定的金额预缴仲裁庭的酬劳和商会的行政费用。如果被申请人提出反请求,或在仲裁庭认为合适的情况下,仲裁庭可为双方当事人分别确定仲裁预付款。倘若一方当事人未能缴付预付款,仲裁庭可暂停或终止仲裁程序。

四、瑞士法院对仲裁裁决的承认与执行

在国际商事交易中,双方当事人合意选择仲裁方式解决纠纷是出于对国际商事仲裁程序价值的肯定以及对仲裁裁决能在他国获得承认与执行的期待。[1] 仲裁裁决的承认与执行意味着仲裁程序对当事人权益的最终兑现。[2] 仲裁建立在双方当事人自愿的基础上。当事人理应及时履行仲裁庭作出的仲裁裁决。然而,在实践中,败诉方“耍赖”的情形时有发生。倘若发生此种情况,胜诉方有权寻求司法救济,即向有管辖权的法院提出承认与执行仲裁裁决的申请。仲裁裁决的承认与执行旨在以国家强制力为后盾保障裁决的效力。承认和执行是两个既有联系又有区别的概念。承认是指法院允许仲裁裁决所确认的当事人的权利和义务在其境内产生可予执行的法律效力,它是执行的前提。执行是指法院在承认仲裁裁决效力的基础上依照法律规定的执行程序对裁决予以强制实施。

在瑞士的法律体系中,多种规范与裁决的承认与执行相关。一是《纽约公约》。该公约为瑞士法院承认与执行外国仲裁裁决提供了直接的法律依据。瑞士于 1965 年 6 月 1 日批准了《纽约公约》。自 1965 年 8 月 30 日起,该公约对瑞士生效。二是瑞士与他国签订的关于仲裁裁决承认与执行的双边或多边条约。《纽约公约》第 7 条第 1 款规定:“本公约之规定不影响缔约国间所订关于承认及执行仲裁裁决之多

〔1〕 杜新丽:《跨国破产与国际商事仲裁的冲突与弥合》,载《比较法研究》2012 年第 1 期。

〔2〕 肖蓓:《〈纽约公约〉背景下我国对外国仲裁裁决承认及执行的实证研究》,载《现代法学》2016 年第 3 期。

边或双边协定之效力。”由此可见,《纽约公约》认可此类双边或多边条约的效力。三是《瑞士联邦国际私法》。《瑞士联邦国际私法》第 12 章中的若干条款涉及仲裁裁决的承认与执行问题。比如,该法第 192 条第 2 款规定:“如果当事人放弃所有对裁决的上诉权且裁决要在瑞士执行,类推适用 1958 年 6 月 10 日关于承认和执行外国仲裁裁决的纽约公约。”该法第 193 条第 2 款规定:“瑞士法院应当事人一方的申请证明裁决是可以强制执行的。”该法第 194 条规定:“外国仲裁裁决的承认和执行由 1958 年 6 月 10 日《关于承认和执行外国仲裁裁决的纽约公约》支配。”四是《瑞士债务执行与破产法》。该法被用于规制涉及给付金钱或提供担保的裁决或判决的执行。五是《瑞士民事诉讼法典》。《瑞士民事诉讼法典》第 386 条第 3 款和第 387 条提到了仲裁裁决的执行问题。前者规定了可执行性的证明,后者规定了仲裁裁决的效力。至于裁决如何得以执行则要参照该法典的第 335 条至第 346 条。

关于外国仲裁裁决的承认与执行,《瑞士联邦国际私法》第 194 条明确规定,外国仲裁裁决的承认和执行受 1958 年《纽约公约》调整。根据《纽约公约》第 1 条第 1 款的规定,外国仲裁裁决是指“因自然人或法人间之争议而产生且在申请承认及执行地所在国以外之国家领土内作成”的仲裁裁决。这一认定标准被学者们称为“地域标准”。[1] 换言之,如果一项裁决是由位于瑞士以外的仲裁庭作出的,那么该裁决将被瑞士法院视为外国裁决。仲裁地通常会被清楚地标注在仲裁裁决中。否则,瑞士法院需要对仲裁地加以确认。在一种特殊情况下,《纽约公约》适用于由位于瑞士的仲裁庭作出的仲裁裁决的承认和执行,即如果当事人在瑞士既没有住所又没有习惯居所或营业地,且他们在仲裁协议或事后的书面协定中明示地放弃就仲裁裁决向瑞士法院的上诉权,则《纽约公约》类推适用于当事人在瑞士提出申请的由位于瑞士的仲裁庭作出的仲裁裁决的承认和执行。

申请承认和执行仲裁裁决的当事人应在提出申请时提交:(1)裁决的正本或正式副本;以及(2)仲裁协议的正本或正式副本。按照《纽约公约》第 4 条第 2 款的规定,若仲裁裁决或仲裁协议不是以瑞士的官方语言(德语、法语和意大利语)之一写成的,当事人还应提交仲裁裁决或仲裁协议的译本。但在实践中,瑞士法院并未严格遵从《纽约公约》第 4 条第 2 款的要求。瑞士法院认为,如果受理案件的法官能够理解仲裁裁决和仲裁协议的原始语言,则申请人便无须另行提交该文件瑞士官

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〔1〕 高薇:《论仲裁裁决的国籍——兼论中国司法实践中的“双重标准”》,载《西北大学学报》(哲学社会科学版)2011 年第 5 期。

方语言的译本。

根据《纽约公约》第5条的规定,瑞士法院拒绝承认和执行外国仲裁裁决的事由可以分为两类:一类是需由被申请执行人证实的事由;另一类是需由瑞士法院依职权主动审查的事由。前一类事由具体包括:

(1)当事人无行为能力和仲裁协议无效。《纽约公约》第5条第1款第1项规定,如果订立仲裁协议的当事人依对其适用的法律为无行为能力,或者依仲裁协议选定的准据法,或者在未指明以何种法律为准据法时,根据仲裁地所在国法律,仲裁协议无效,则法院可以拒绝承认和执行仲裁裁决。

(2)仲裁违反正当程序。这里所说的违反正当程序的情形有两种:一是被申请执行人未被给予适当的通知;二是被申请执行人未能提出申辩。《纽约公约》第5条第1款第2项规定,如果被申请执行人未曾被给予有关指定仲裁员或仲裁程序的适当通知,或者被申请执行人由于除自身过失以外的原因未能提出申辩,则法院可以拒绝承认和执行仲裁裁决。该项事由包含两层含义。一方面,仲裁庭应当平等地对待双方当事人,保障他们的知情权以及陈述意见和提出申辩的机会,否则仲裁庭作出的裁决便可能无法得到承认和执行。另一方面,当事人应当积极认真地行使自己的权利,当事人怠于行使权利所导致的机会的丧失并不构成法院拒绝承认和执行仲裁裁决的理由。[1]

(3)仲裁庭超越权限。《纽约公约》第5条第1款第3项规定,如果仲裁裁决处理的事项不是双方当事人交付仲裁的标的或是超出仲裁协议规定的范围,则法院可以拒绝承认和执行仲裁裁决。仲裁庭的权限源于当事人的授权。换言之,仲裁庭对于当事人授权范围之外的事项不具有裁判权。公约的该条款还指出,如果交付仲裁事项的裁决内容可与未交付仲裁的事项分开,则裁决中关于交付仲裁事项的内容仍应得到承认和执行。简言之,该规定承认了“超裁”裁决的非“超裁”部分的有效性。

(4)仲裁庭的组成或仲裁程序违反当事人的协议或仲裁地法。《纽约公约》第5条第1款第4项规定,如果仲裁庭的组成或者仲裁程序与当事人之间的仲裁协议不符,或在当事人没有协议时,不符合仲裁地国法律,则法院可以拒绝承认和执行仲裁裁决。

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〔1〕 杜新丽:《论外国仲裁裁决在我国的承认与执行——兼论〈纽约公约〉在中国的适用》,载《比较法研究》2005年第4期。

(5)裁决不具约束力、已被撤销或者停止执行。《纽约公约》第5条第1款第5项规定,如果仲裁裁决对当事人未发生约束力,或者仲裁裁决已经被裁决地所在国或裁决所依据法律之国家的法院撤销或者停止执行,则法院可以拒绝承认和执行仲裁裁决。

除被申请执行人可依据《纽约公约》第5条第1款所列的5项事由向瑞士法院提出不予承认和执行外国仲裁裁决的抗辩外,如果瑞士法院经审查发现争议事项依据瑞士法律不具有可仲裁性或者裁决的承认和执行会违反瑞士的公共政策,则瑞士法院可援引《纽约公约》第5条第2款拒绝承认和执行外国仲裁裁决。与前述《纽约公约》第5条第1款所列的需由被申请执行人加以证实的5项事由不同,公约第5条第2款所列的两项事由需由瑞士法院依职权主动审查。

(1)争议事项不具可仲裁性。可仲裁性可分为客观可仲裁性和主观可仲裁性。前者涉及争议标的的性质,而后者涉及争议的主体。在客观可仲裁性方面,《瑞士联邦国际私法》第177条第1款规定,任何具有财产性质的纠纷均可以被提交仲裁。瑞士联邦最高法院倾向于对"具有财产性质的纠纷"进行宽泛的解释,即任何伴有金钱诉求的纠纷,无论其是基于合同、侵权、继承、反垄断、婚姻等法律关系,均可诉诸仲裁。在主观可仲裁性方面,《瑞士联邦国际私法》第177条第2款规定,如果仲裁协议的一方当事人是国家或者是国家所支配的企业或组织,那么该方当事人不得援引其本国法律对其作为仲裁当事人的资格或争议的可仲裁性提出异议。该条款既肯定了公主体参与仲裁的可能性,又确保了公主体参与仲裁时结果的确定性和可预见性。

(2)裁决的承认和执行违反瑞士的公共政策。公共政策(public policy)是普通法系国家的概念,大陆法系国家更倾向于使用公共秩序(public order)、保留条款、排除条款等称谓。[1] 当仲裁裁决的承认和执行与承认和执行地国的重大利益、基本政策、基本道德观念或法律基本原则相冲突时,公共政策便可以成为法院拒绝承认和执行裁决的理由。公共政策尚未有一个明确的定义。它的模糊性源于三个方面的原因:第一,公共政策是一个主权国家为维护其基本的社会、经济、政治、法律、宗教、道德观念和准则而设置的一道"安全阀",这要求它的概念应具有必要的弹性;第二,公共政策具有明显的地域性;第三,公共政策具有明显的时间性。《纽约

〔1〕 杜新丽:《论外国仲裁裁决在我国的承认与执行——兼论〈纽约公约〉在中国的适用》,载《比较法研究》2005年第4期。

公约》对公共政策的含义未作明确界定,所以判断一项外国裁决是否违反瑞士的公共政策需由瑞士法院自由裁量。从各国的仲裁实践来看,为了推动国际商事仲裁的发展,当前普遍的趋势是法院在承认和执行仲裁裁决时从窄解释、从严适用公共政策或公共秩序。

五、对中国当事人参与瑞士仲裁的建议

中国与瑞士长期以来保持着良好的经贸合作关系。2007 年,瑞士成为欧洲国家中首个承认中国完全市场经济地位的国家。2013 年,瑞士成为欧洲大陆国家中首个同中国签署自由贸易协定的国家。2015 年瑞士成为第一批加入亚洲基础设施投资银行的欧洲创始成员国之一。目前,中瑞经贸关系中的四大平台正积极推动双边合作走向深入。这四大平台包括:(1)中瑞自由贸易协定平台。中瑞自由贸易协定于2013 年7 月签署,2014 年7 月开始实施,它是中国与欧洲大陆国家签署的第一个自由贸易协定。(2)中瑞创新型战略伙伴关系平台。2016 年4 月8 日,习近平主席同瑞士联邦主席施奈德·阿曼共同宣布中瑞两国建立“创新型战略伙伴关系”。2017 年1 月,习近平主席在访问瑞士期间强调中方愿同瑞方将创新合作落到实处,加强在数字化、智能制造、产能等方面合作。(3)中国—中东欧国家合作平台。自 2012 年起,中国与中东欧 16 国[1]开展合作会晤机制,简称“16 +1 合作”。在 2016 年 11 月的“中国—中东欧里加峰会”上,瑞士作为观察员加入了“16 +1 合作”框架中。(4)“一带一路”倡议合作平台。在“一带一路”框架下,中国与瑞士已经开始施行“点对点”的合作模式。截至目前,甘肃省与索罗图恩州、江苏省与卢塞恩州、山东省与阿尔高州、广东省与苏黎世州、贵州省与上瓦尔登州、上海市与巴塞尔城州,以及昆明市与苏黎世市、长沙市与弗里堡市、北海市与卢加诺市、黄山市与因特拉肯市、香格里拉县与阿罗萨市、杭州市与卢加诺市、鄂尔多斯市与克莱恩—蒙塔纳市等已经结成了友好发展伙伴。

随着中瑞两国的经贸合作更加频繁和深入,更多的涉外纠纷也会随之而来。当纠纷发生时,如何能在纠纷解决中尽可能地维护自身利益成了中国当事人必须加以思考的重要问题。

(一)选择适当的纠纷解决方式

诉讼和仲裁是两种并行的争议解决方式。从目前的情况来看,许多当事人倾

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〔1〕 中东欧 16 国包括波兰、捷克、斯洛伐克、匈牙利、斯洛文尼亚、克罗地亚、波黑、塞尔维亚、黑山、罗马尼亚、保加利亚、阿尔巴尼亚、马其顿、爱沙尼亚、立陶宛和拉脱维亚。

向于以仲裁方式解决他们之间的商事纠纷。商事仲裁受到当事人偏爱的原因是多方面的。第一,从效率角度来看,当事人更易通过仲裁在较短时间内解决纠纷。第二,从灵活性角度来看,仲裁当事人可以协商确定仲裁地、仲裁员、仲裁程序、案件适用的法律等。第三,从专业性的角度来看,仲裁员常常是具备商业领域专业知识且熟悉相关法律规范的权威人士。第四,从保密性的角度来看,仲裁案件是非公开审理的。尽管仲裁有着上述优点,但是瑞士的商事诉讼对当事人而言依然具有不小的吸引力。这与瑞士颇具特色的商事诉讼制度有关。

在瑞士,民事案件和商事案件的诉讼程序有所不同。民事案件的解决应循着"调解法院—初等法院—州高等法院—联邦最高法院"的路径依次进行。一项民事纠纷先由调解法院的法官调解。调解法院并无裁判权。若调解不成,案件将被移交至初等法院。初等法院对案件作出裁判。对初等法院的裁判结果有异议的当事人可以依次向高级法院上诉,直至上诉至联邦最高法院。而商事案件的解决则是循着"商事法院—联邦最高法院"的路径进行。商事案件先由商事法院作出裁判。对商事法院的裁判结果有异议的当事人可上诉至联邦最高法院。商事法院有两类法官,即执业法官和专业法官。他们共同审理商事案件。执业法官是指熟悉法律知识、以法官为职业的公职人员;专业法官是指未必熟悉法律知识,但熟悉特定商事领域的专业知识,受聘审理特定案件的法官。专业法官由州议会选举产生,任期六年。商事法院对案件作出裁判遵循少数服从多数的原则。事实上,商事法院一般不会直接宣判,而是由执业法官主持调解。在商事法院受理的案件中,70% 的案件是以调解方式结案的。[1] 商事法院调解成功率高的原因在于:(1)法官的调解是建立在对当事人所持观点进行客观分析的基础上,这种调解注重的是以理服人;(2)当事人为避免长期诉讼所带来的负担常常自愿接受调解;(3)若调解不成,案件仍能进入裁判程序,参加调解的当事人并无后顾之忧。

瑞士商事诉讼的吸引力主要体现在两个方面。一是审理商事案件法官的专业度过硬。当事人选择仲裁而非诉讼的重要原因之一是仲裁员具备法官通常不具备的特定商业领域的专业知识和技能。然而,瑞士商事法院不但有执业法官还有专业法官。后者的出现正是为了弥补执业法官专业知识的不足。二是瑞士的商事诉讼有助于当事人平和地解决纠纷。剑拔弩张的纠纷解决方式会使当事人"扯破脸"。即便他们的纠纷得以解决,他们也难以维系此前的合作关系或是于将来开展

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〔1〕 赵军:《瑞士法院的诉讼程序》,载《人民法院报》2002 年 4 月 25 日,第 7 版。

新的合作。瑞士的商事法院格外重视调解。这为争端方在解决纠纷的同时维持良好的关系提供了可能。

除仲裁和诉讼外,瑞士商会仲裁院提供的调解服务亦是当事人可选择的纠纷解决途径。瑞士商会仲裁院成立于2004年;自2007年起,仲裁院开始提供调解服务。意图将争议提交至仲裁院调解的当事人可在合同中写入调解条款或是于争议发生后订立调解协议。调解条款的标准格式为:基于本合同产生的或者与本合同有关的任何纠纷、争议或权利主张,包括涉及合同有效、无效、违约或合同终止的事项,均应根据提交调解申请时有效的瑞士商会仲裁院的《瑞士商事调解规则》以调解方式加以解决;调解地应为瑞士城市,除非当事人约定调解地为瑞士以外的其他国家城市;调解程序应以选定的语言进行。调解协议的标准格式为:“当事人在此同意根据瑞士商会仲裁院的《瑞士商事调解规则》将以下争议以调解方式加以解决:(简要描述争议);调解地应为(瑞士城市,除非当事人约定调解地为瑞士以外的其他国家城市);调解程序应以(请填入选定语言)进行。”

《瑞士商事调解规则》是瑞士商会仲裁院调解纠纷的法律依据。该规则由8个部分31条组成。第一部分“先导规则”涉及规则的适用范围、调解申请的提交等。第二部分“调解员的选定”涉及调解员的数量、当事人指定调解员、仲裁院对调解员的确认、调解员的替换等。第三部分“调解员的资质和角色”涉及调解员的独立性、中立性和公正性、调解员的行为守则、调解员的角色等。第四部分“程序规则”涉及程序的进行、调解地、适用的法律、保密性、代理等。第五部分“调解的终止”涉及调解终止的情形、调解和解、后续程序等。第六部分“调解与仲裁”涉及诉诸仲裁、仲裁程序中的调解等。第七部分“责任的免除”涉及瑞士商会仲裁院、仲裁院的职员、调解员和受指派的专家的免责问题。第八部分“费用”涉及费率、费用的分摊、仲裁院的费用、调解员的费用、费用的预缴等。

瑞士商会仲裁院要求任何依据《瑞士商事调解规则》以调解员身份行事的人应当以书面形式承诺遵守《欧洲调解员行为守则》。该守则共有4条。第1条“调解员的资格和任命”涉及调解员的能力、调解员的任命、调解服务的推广。第2条“独立性和公正性”涉及调解员的独立性、中立性和公正性。第3条“调解协议、程序、和解和费用”涉及调解程序、程序的公正性、程序的终止、调解费用等。第4条是关于保密性的规定。

调解的费用主要包括两部分:瑞士商会仲裁院的费用和调解员的费用。在将争议提交仲裁院调解时,提出调解请求的双方当事人应各向仲裁院交付300瑞士法

郎的注册费。如果调解请求是由一方当事人提出的,则该方当事人应向仲裁院交付600瑞士法郎的注册费。仲裁院在收到全额的注册费后才会往下行事。注册费是不可退的。仲裁院还会收取调解员费用的10%作为管理费。管理费由调解员在调解程序结束后交至仲裁院。调解员的时薪原则上为200~500瑞士法郎。调解员的日薪原则上为1500~2500瑞士法郎。当事人和调解员可以约定其他费率,但无论如何,调解员须将其所收费用中的10%作为管理费交至仲裁院。

综上所述,除仲裁外,中国当事人还可以选择诉讼或调解方式解决其与他方当事人之间的商事纠纷。这三种纠纷解决方式各具特点。当事人可根据案件的具体情况作出适当的选择。

(二)充分利用意思自治

市场主体被赋予自主权是为了使其在市场经济活动中能够适应复杂多变的情势。意思自治是市场经济活的灵魂。每一个人都需要意思自治,只有这样他才能在自己的切身事务上自由地作出决定,表达其充分而真实的想法,并以自己的支配物来承担由此可能引发的责任,一个人只有做到充分的意思自治,才能充分地发展其人格,维护其尊严。[1] 作为私法自治的核心和灵魂,意思自治既是经济自由在法律上的必然要求,也是社会基本伦理要求在法律上的反映,其对促进现代私法制度的构筑和完善发挥了重要作用。[2]

服务于市场经济的商事仲裁也以意思自治作为自己的生命基础。[3] 在国际商事仲裁中,意思自治贯穿始终。它是国际商事仲裁最基本的原则,是整个仲裁制度赖以存在的基石。《瑞士联邦国际私法》的多处规定体现了对当事人意思自治的尊重。这是该法生命力的源泉,也是其受到学者和仲裁从业者称赞以及他国效仿的重要原因之一。意思自治在《瑞士联邦国际私法》中主要体现在以下方面:

(1)仲裁庭的组成。根据《瑞士联邦国际私法》第179条第1款的规定,仲裁员的任命、撤职或更换首先应依据当事人的协议进行。只有在当事人未就仲裁员的任命、撤职或更换达成协议的情况下,仲裁庭所在地的法官才可以类推适用《瑞士民事诉讼法典》第361条至第371条以确定仲裁庭的组成。此外,当事人有权对仲

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〔1〕 董连和:《论我国仲裁制度中的意思自治原则》,载《清华大学学报》(哲学社会科学版)2006年第3期。

〔2〕 丁丽柏、王琤:《论国际商事仲裁制度中的意思自治原则》,载《重庆大学学报》(社会科学版)2006年第1期。

〔3〕 谭兵主编:《中国仲裁制度研究》,法律出版社1995年版,第59页。

裁员的资质作出约定。如果仲裁员不具备当事人约定的资格条件,当事人可依据《瑞士联邦国际私法》第 180 条第 1 款第 1 项对仲裁员提出质疑。

(2)仲裁程序。当事人有权就仲裁程序作出约定。根据《瑞士联邦国际私法》第 182 条第 1 款,当事人可以直接约定仲裁程序,可以参照仲裁机构的仲裁规则确定仲裁程序,也可以使仲裁程序服从于其选择的其他程序法。只有在当事人未约定仲裁程序的情况下,仲裁庭才可以代为确定仲裁程序。

(3)适用的法律。根据《瑞士联邦国际私法》第 187 条,仲裁庭在作出裁决时应适用当事人选择的法律;若当事人未作出此种选择,仲裁庭应适用与案件有最密切联系的法律;当事人还可以授权仲裁庭依据公平善意原则进行友好仲裁。

(4)仲裁裁决。《瑞士联邦国际私法》第 189 条第 1 款规定,仲裁庭应依当事人协议选择的程序和形式作出裁决。该条第 2 款还规定,若当事人未作出选择,仲裁庭应按少数服从多数的原则作出裁决,当无法形成多数意见时,由首席仲裁员裁定;仲裁裁决应采用书面形式,写明裁决的理由,注明日期,并经首席仲裁员签字。

(5)裁决撤销权。《瑞士联邦国际私法》第 190 条第 2 款列出了仲裁裁决可被撤销的五种情形:①独任仲裁员的指定或仲裁庭的组成不当;②仲裁庭错误地行使或未行使管辖权;③仲裁裁决超出提交仲裁庭的申诉范围或者对申诉之一未作出决定;④平等对待当事人的原则或当事人被聆听的权利受到违反;⑤仲裁裁决违反公共政策。如果双方当事人在瑞士均无住所、习惯居所和营业机构,他们可以在仲裁协议中明确约定或是在之后的书面协议中约定,放弃请求撤销仲裁裁决的权利或是将撤销裁决的事由限定在第 190 条第 2 款所列情形中的一项或数项。

由此可见,当事人的意愿影响仲裁的诸多重要方面。中国当事人应积极且谨慎地行使自主权,以便在仲裁中最大限度地维护自身利益。比如,在仲裁庭的组成方面,考虑到仲裁之好坏取决于仲裁员,中国当事人可根据案件的特殊性对仲裁员的任职资格提出特殊的要求,并就仲裁员的任命、撤职和更换作出约定;在仲裁程序方面,中国当事人应约定或是选择其熟悉、便于其参与仲裁、有助于仲裁顺利推进且能够保障其程序性利益的程序性规则;在适用的法律方面,中国当事人应选择其熟悉、能够凭以预测裁决结果、足以维护其实体利益的法律作为仲裁庭作出裁决的规范依据。

尽管《瑞士联邦国际私法》在很大程度上体现了对当事人意思自治的尊重,但当事人自主权的行使仍然是有边界的。比如,根据《瑞士联邦国际私法》第 182 条第 3 款,当事人所选的仲裁程序不得使当事人受到不平等的对待或是使当事人的意

见无法被聆听;根据该法第192条第1款,只有在双方当事人在瑞士均无住所、习惯居所和营业机构的情况下,他们才能自愿放弃全部或部分的仲裁裁决的撤销权。中国当事人应当注意这些对当事人意思自治的限制,以便在《瑞士联邦国际私法》设定的边界内恰当地行使自主权。

当事人的意思自治可以体现在仲裁协议中也可以体现在事后的约定中。无论是以何种形式,当事人必须清楚地表达自己的意愿。需要注意的是,《瑞士联邦国际私法》第178条第1款规定了仲裁协议的形式要件。仲裁协议必须以书面形式,包括电报、电传、传真或其他可构成书面证明的通信方式作出,否则便是无效的。中国当事人切莫忽视该形式要件。

(三)善用程序性权利

《瑞士联邦国际私法》为双方当事人各设置了程序性权利,以保障当事人之间的纠纷能够通过仲裁得到公正解决。这些程序性权利是一方当事人用以对抗对方当事人以及仲裁庭不当行为的有利武器。因此,中国当事人有必要熟悉这些程序性权利以便能够对其妥善运用以维护自身利益。《瑞士联邦国际私法》赋予双方当事人的程序性权利主要体现在以下方面:

(1)对仲裁员的质疑。《瑞士联邦国际私法》第180条第1款规定,当事人有权在三种情况下对仲裁员提出质疑:一是仲裁员不具备当事人约定的资质;二是出现了当事人所选仲裁规则规定的质疑事由;三是当事人有合理的理由怀疑仲裁员的独立性。仲裁员的好坏直接决定了仲裁的好坏。因此,当对仲裁员的业务能力、公正性或独立性有所怀疑时,中国当事人应积极地行使质疑权。需要注意的是,根据《瑞士联邦国际私法》第180条第2款,中国当事人只能以任命仲裁员后知悉的事由对其任命的仲裁员提出质疑,并且必须立即将质疑的理由告知仲裁庭和对方当事人。

(2)临时措施。仲裁中的临时措施是指在仲裁程序开始前或者进行过程中,法院或仲裁庭根据一方当事人的申请,针对另一方当事人的财产或持有的证据或正在从事的行为所采取的临时性强制措施。[1] 临时措施制度旨在防止当事人利用其所处的优势地位转移或销毁证据或财产,致使仲裁裁决无法被作出,或者即便被作

〔1〕 鲍冠艺、黄伟:《论仲裁庭下达临时措施的执行——兼析〈示范法〉临时措施执行规则》,载《仲裁研究》2008年第4期。

出,也难以得到执行。[1] 根据《瑞士联邦国际私法》第 183 条,除非当事人另有约定,当事人有权请求仲裁庭采取临时措施;如果对方当事人未自愿执行临时措施,仲裁庭还可提请法院予以协助。在仲裁程序开始前或进行过程中,若有保存证据、维持财产现状或其他需要,中国当事人应及时向仲裁庭提出临时措施的请求。需要注意的是,临时措施毕竟是加诸于被申请人的一种强制措施,所以仲裁庭或法院有权要求提出申请的当事人提供适当的担保作为采取临时措施的前提。

(3)取证。取证问题规定在《瑞士联邦国际私法》第 184 条中。根据该条款,仲裁庭可以自行取证;如果需要司法机关协助取证,仲裁庭或经仲裁庭同意的当事人可以向仲裁庭所在地的法院提出请求。证据在仲裁中占据着举足轻重的地位。整个仲裁程序的推进以至仲裁裁决的作出其实是仲裁员对证据进行判断进而得出结论的过程。仲裁庭的取证有时会遇到阻碍,而仲裁庭本身并无采取强制措施的权力,所以法院协助取证是十分必要的。当事人可以请求法院协助取证,但需要注意的是,当事人向法院提出此类请求需以仲裁庭的同意为前提。

(4)仲裁裁决的撤销。根据《瑞士联邦国际私法》第 190 条第 2 款,当事人在以下五种情况下可申请撤销仲裁裁决:①独任仲裁员的指定或仲裁庭的组成不当;②仲裁庭错误地行使或未行使管辖权;③仲裁裁决超出提交仲裁庭的申诉范围或者对申诉之一未作出决定;④违反平等对待当事人的原则或侵犯当事人被聆听的权利;⑤仲裁裁决违反公共政策。裁决撤销制度为当事人提供了主动救济的路径。在裁决进入承认和执行程序之前,若中国当事人对裁决存有质疑,无论其作为胜诉方还是败诉方,均可利用该制度使裁决归于无效以维护自身利益。通常情况下,撤销仲裁裁决的请求应向瑞士联邦最高法院提出,但当事人可以约定由仲裁庭所在地的州法院代替联邦最高法院作出决定。

(5)仲裁裁决的承认和执行。《瑞士联邦国际私法》第 194 条明确规定,外国仲裁裁决的承认和执行受 1958 年《纽约公约》调整。若中国当事人为胜诉一方,而败诉方不履行或不适当履行裁决,中国当事人应积极寻求司法救济,即向法院申请裁决的承认和执行。在提出申请时,中国当事人应提交仲裁裁决的正本或正式副本以及仲裁协议的正本或正式副本。若受理案件的法官无法理解仲裁裁决或仲裁协议的原始语言,当事人还应提交以瑞士的官方语言(德语、法语和意大利语)之一制

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〔1〕 李晶:《国际商事仲裁中临时措施在中国的新发展——以民诉法修改和仲裁规则修订为视角》,载《西北大学学报》(哲学社会科学版)2014 年第 6 期。

作的仲裁裁决或仲裁协议的译本。倘若作为被申请执行人的中国当事人发现存在当事人无行为能力或仲裁协议无效,仲裁违反正当程序,仲裁庭超越权限,仲裁庭的组成或仲裁程序违反当事人的协议或仲裁地法,或者裁决不具约束力、已被撤销或者停止执行的情形,则中国当事人应及时向瑞士法院提出不予承认和执行外国仲裁裁决的抗辩。

总而言之,首先,中国当事人应了解瑞士的仲裁法规。瑞士仲裁法含有许多颇具特色的设计。这些特色之处有可能是中国当事人的知识盲点。倘若中国当事人对瑞士的仲裁法规一窍不通或是知之甚少,其利益便难以在现行法规下得到有效的维护。其次,中国当事人应积极运用规则维护自身利益。了解仲裁规则不是终极目标,更为重要的是,中国当事人应在规则的指引下积极参与仲裁。瑞士的仲裁法规赋予了当事人诸多程序性的权利。中国当事人应在必要时充分利用这些权利以维护自身利益,切莫怕麻烦。

附录一:

瑞士联邦国际私法　第12章(英文版)

Switzerland's Federal Statute on Private International Law

Chapter 12　International Arbitration

Article 176

I. Field of application; seat of the arbitral tribunal

(1) The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

(2) The parties may exclude the application of this chapter by an explicit declaration in the arbitration agreement or by an agreement at a later date and agree on the application of the third part of the Civil Procedure Code (CPC).

(3) The seat of the arbitral tribunal shall be determined by the parties, or the arbitral institution designated by them, or, failing both, by the arbitrators.

Article 177

II. Arbitrability

(1) Any dispute of financial interest may be the subject of an arbitration.

(2) A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.

Article 178

III. Arbitration agreement

(1) The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

(2) Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

(3) The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

Article 179

IV. Arbitrators

1. Constitution of the arbitral tribunal

(1) The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.

(2) In the absence of such agreement, the judge where the arbitral tribunal has its seat may be seized with the question; he shall apply, by analogy, the provisions of the CPC on appointment, removal or replacement of arbitrators.

(3) If a judge has been designated as the authority for appointing an arbitrator, he shall make the appointment unless a summary examination shows that no arbitration agreement exists between the parties.

Article 180

2. Challenge of an arbitrator

(1) An arbitrator may be challenged:

a) if he does not meet the qualifications agreed upon by the parties;

b) if a ground for challenge exists under the rules of arbitration agreed upon by the parties;

c) if circumstances exist that give rise to justifiable doubts as to his independence.

(2) No party may challenge an arbitrator nominated by it, or whom it was instrumental in appointing, except on a ground which came to that party's attention after such appointment. The ground for challenge must be notified to the arbitral tribunal and the other party without delay.

(3) To the extent that the parties have not made provisions for this challenge procedure, the judge at the seat of the arbitral tribunal shall make the final decision.

Article 181

V. *Lis Pendens*

The arbitral proceedings shall be pending from the time when one of the parties seizes with a claim either the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation in the arbitration agreement, from the time when one of the parties initiates the procedure for the appointment of the arbitral tribunal.

Article 182

VI. Procedure

1. Principle

(1) The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

(2) If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.

(3) Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.

Article 183

2. Provisional and conservatory measures

(1) Unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures.

(2) If the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge; the judge shall apply his own law.

(3) The arbitral tribunal or the state judge may make the granting of provisional or conservatory measures subject to appropriate sureties.

Article 184

3. Taking of evidence

(1) The arbitral tribunal shall itself conduct the taking of evidence.

(2) If the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the state judge at the seat of the arbitral tribunal; the judge shall apply his own law.

Article 185

4. Other judicial assistance

For any further judicial assistance the state judge at the seat of the arbitral tribunal shall have jurisdiction.

Article 186

VII. Jurisdiction

(1) The arbitral tribunal shall itself decide on its jurisdiction. It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.

(2) A plea of lack of jurisdiction must be raised prior to any defence on the merits.

(3) The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.

Article 187

VIII. Decision on the merits

1. Applicable law

(1) The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection.

(2) The parties may authorize the arbitral tribunal to decide *ex aequo et bono.*

Article 188

2. Partial award

Unless the parties otherwise agree, the arbitral tribunal may render partial awards.

Article 189

3. Arbitral award

(1) The arbitral award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties.

(2) In the absence of such an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the chairman alone. The award shall be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient.

Article 190

IX. Finality; Action for annulment

1. Principle

(1) The award is final from its notification.

(2) The award may only be annulled:

a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

b) if the arbitral tribunal wrongly accepted or declined jurisdiction;

c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;

d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

e) if the award is incompatible with public policy.

(3) Preliminary awards can be annulled on the grounds of the above paras. 2(a) and 2(b) only; the time limit runs from the notification of the preliminary award.

Article 191

2. Judicial authority to set aside

The sole judicial authority to set aside is the Swiss Federal Supreme Court. The

procedure follows Art. 77 of the Swiss Federal Statute on the Swiss Federal Supreme Court of June 17, 2005.

Article 192

X. Waiver of annulment

(1) If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).

(2) If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.

Article 193

XI. Deposit and certificate of enforceability

(1) Each party may at its own expense deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal.

(2) On request of a party, the court shall certify the enforceability of the award.

(3) On request of a party, the arbitral tribunal shall certify that the award has been rendered pursuant to the provisions of this statute; such certificate has the same effect as the deposit of the award.

Article 194

XII. Foreign arbitral awards

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

附录二:

瑞士国际仲裁规则

示范仲裁条款

基于本合同产生的或者与本合同有关的任何纠纷、争议或权利主张,包括涉及合同有效、无效、违约或合同终止的事项,均应根据提交仲裁申请时有效的瑞士商会仲裁院的瑞士国际仲裁规则以仲裁方式加以解决。

仲裁员应为(一名、三名、一名或三名);

仲裁地应为(瑞士城市,除非当事人约定仲裁地为瑞士以外的其他国家城市);

仲裁程序应以(请填入选定语言)进行。

前言

(a)为了协调当前的仲裁规则,巴塞尔商业与工业协会、伯尔尼商业与工业协会、日内瓦商业与工业协会、纳沙泰尔商业与工业协会、提契诺商业与工业协会、沃州商业与工业协会及苏黎世商业与工业协会于2004年起决定采用瑞士国际仲裁规则(以下简称瑞士规则或规则)取代各商会以前的仲裁规则。

(b)各商会成立瑞士商会仲裁院来提供仲裁服务。为了在瑞士规则下管理好仲裁案件,瑞士商会仲裁院成立了由在国际仲裁领域有丰富经验的从业人员组成的仲裁委员会(以下简称仲裁委)。仲裁委应根据本规则作出决定,也可以授权一个或多个成员或委员以各自内部规则为基础作出相关的特别决定。仲裁委秘书处(以下简称秘书处)协助仲裁委的日常工作。

(c)瑞士商会仲裁院以瑞士法或其他任何国家的可适用的法律为基础提供国内外仲裁服务以及其他的争端解决服务。

第一部分 总 则

适用范围

第一条

1.在仲裁中,当仲裁协议指定适用本规则,或者指定适用巴塞尔商业与工业协会、伯尔尼商业与工业协会、日内瓦商业与工业协会、纳沙泰尔商业与工业协会、提契诺商业与工业协会、沃州商业与工业协会、苏黎世商业与工业协会或任何其他采

用本规则之商业与工业协会的仲裁规则时，应适用本规则。

2. 当事人可以指定瑞士或其他任何国家为仲裁地。

3. 此版本规则自 2012 年 6 月 1 日起生效，并且，除非当事人另有约定，本规则应适用于在本规则生效日期之日或之后提交仲裁通知的所有仲裁程序。

4. 在将争议提交至按本规则仲裁时，当事人在法律允许的最大范围内将原本授予司法机构的仲裁监督权授予给仲裁委，包括延长仲裁庭的任期，以及根据本规则未规定的原因决定仲裁员回避。

5. 这些规则适用于所有仲裁，除非规则与仲裁案件适用的法律条款有冲突，而该法律条款又无法规避，则该等情况下适用该法律条文。

通知，期间的计算

第二条

1. 为本规则之目的，任何通知，包括告知、通信及建议，如果送达受送达人或其惯常住所、营业地或者其通信地址或电子邮件地址，或者在合理查询后仍然不能确定上述地址时，送达已知的受送达人的最后住所或营业地，即视为受送达人已经收到。依照上述方式送达通知之日应被视为受送达人收到该等通知之日。

2. 本规则项下的“期间”，自收到该通知、告知、通信及建议之日的次日起开始计算。如果该等期间之届满日为受送达人住所地或营业地的法定假期或非工作日，该等期间应顺延至此后的第一个工作日届满。在计算期间时，期间内的公共假期或非工作日应计入期间内。

3. 在合理的情形下，仲裁委可以延展或缩短任何由其确定的，或者其有权确定或更改的期限。

仲裁通知及对仲裁通知的回复

第三条

1. 提起仲裁的当事人（以下简称申请人；或在适用时，简称全体申请人）应按照附件 A 所列的任一地址向秘书处提交仲裁通知。

2. 仲裁程序应被视为自秘书处收到仲裁通知之日起开始。

3. 仲裁通知的份数应依其他当事方（以下简称被申请人；或在适用时，简称全体被申请人）的数目提交，并应同时另行向每位仲裁员及秘书处提交一份仲裁通知副本。仲裁通知中应包括：

(a)将争议提交仲裁的要求;

(b)当事人及其代表人的姓名、地址、电话和传真号码及电子邮件地址(如有);

(c)所引述的仲裁条款或单独仲裁协议的文本;

(d)指明引起纠纷或与纠纷有关的合同或其他法律文件;

(e)所主张权利的基本性质,以及对所涉金额(如有)的说明;

(f)所要求的救济或赔偿;

(g)对仲裁员人数(一名或三名)、仲裁语言和仲裁地点的建议(如果当事人事先并未对之达成协议);

(h)申请人对一名或多名仲裁员的指定(如果双方协议如此);

(i)对已按照附件 B(费用说明表)要求向附件 A 列出的相关账户通过支票或转账方式支付受理费的确认,该等支付自仲裁通知提交之日起生效。

4. 仲裁通知也可以包括:

(a)申请人根据本规则第七条的规定就独任仲裁员的指定提出建议;

(b)本规则第十八条项下的仲裁请求。

5. 如果仲裁通知内容不完整,或者,如果申请人没有按照要求的数量提交仲裁通知副本或附件,或者,受理费未付,秘书处可以要求申请人在适当的期限内就该等瑕疵加以补正。如果仲裁通知并未以英语、德语、法语或意大利语提交,秘书处可在同一期限内要求申请人提供仲裁通知的翻译文本。如果申请人在规定的期限内满足了该等要求,仲裁通知应被视为在秘书处收到最初的仲裁通知之日被有效提交。

6. 秘书处应毫不迟延地将仲裁通知副本及证据送交被申请人。

7. 被申请人应在收到仲裁通知的三十日内向秘书处提交对仲裁通知的回复。该等对仲裁通知的回复的份数应依其他当事方的数目提交,并应同时另行向每位仲裁员及秘书处各提交一份对仲裁通知的回复的副本。对仲裁通知的回复应尽可能地包括:

(a)被申请人及其代表的姓名、地址、电话和传真号码及电子邮件地址;

(b)认为依本规则组成之仲裁庭不具有管辖权的任何主张;

(c)被申请人对仲裁通知中根据本规则第三条之第三款(e)项的规定所述事项的意见;

(d)被申请人对仲裁通知中根据本规则第三条之第三款(f)项的规定所要求的救济或赔偿的答辩;

(e)被申请人根据本规则第三条之第三款(g)项的规定对仲裁员人数(一名或三名)、仲裁语言和仲裁地点的建议;

(f)被申请人对一名或多名仲裁员的指定,如果双方协议如此。

8. 对仲裁通知的回复也可以包括:

(a)被申请人根据本规则第七条的规定就独任仲裁员的指定提出建议;

(b)本规则第十九条项下的仲裁答辩。

9. 第三条第五款和第六款类推适用于对仲裁通知的回复。

10. 任何反请求或抵消抗辩原则上须在对仲裁通知的回复中提出。规则第三条第三款的规定同样适用于反请求或抵消抗辩。

11. 如果对仲裁通知的回复中并未提出反请求及抵消抗辩,或者,如果并未说明反请求及抵消抗辩的金额,仲裁委可以仅依照仲裁通知决定是否可能适用本规则第四十二条第二款(简易程序)。

12. 如果被申请人不提交仲裁通知书的回复,也不提出案件不应该按照本规则进行裁判的抗辩,那么仲裁委应该进行裁判,除非当事人之间确实没有适用本规则的协议。

合并仲裁和第三方加入

第四条

1. 正在依照本规则进行其他仲裁程序的当事人之间又有仲裁通知提出,仲裁委经过与当事人及任何已经确认的仲裁员协商后,可以决定将新的仲裁案件合并到正在进行的仲裁程序中。提出仲裁通知的当事人与正在进行的仲裁程序的当事人不一致时,仲裁委依然可以作出类似决定。在作出决定之时,仲裁委须综合考虑所有相关情形,包括仲裁案件之间的联系及现有的仲裁程序已经取得的进展。在仲裁委决定将新的仲裁案件合并到现有的仲裁程序进行审理时,所有程序的当事人被视作放弃指定仲裁员的权利,仲裁委可以撤销对仲裁员的任命和确认,并适用第二部分(仲裁庭组成)的条款。

2. 当一个或多个第三方请求加入依据本规则正在进行的仲裁程序或者依据本规则正在进行仲裁的当事人意图促使一个或多个第三方加入仲裁时,仲裁庭应在与所有各方当事人协商(包括将要合并加入的一方或多方),并且综合考虑所有其认为有关的与适当的情形后,对该等请求作出决定。

第二部分　仲裁庭组成

仲裁员的确认

第五条

1. 当事人或仲裁员们对仲裁员的指定,须由仲裁委加以确认后方可生效。仲裁委无义务说明某一仲裁员人选没有得到确认的理由。

2. 如果某一仲裁员人选没有得到确认,仲裁委可以:

(a)要求当事人一方或有关方,或者根据当时的情况要求有关仲裁员在合理的期限内作出新的指定;或者

(b)在特殊情况下直接进行指定。

3. 如果依据本规则仲裁庭组成失败,则仲裁委应全权处理该问题,可以撤销已经作出的指定,另行任命或重新任命仲裁员,并可指定其中一位担任首席仲裁员。

4. 如果仲裁庭被组建之前当事人达成了和解,或由于其他原因仲裁程序的继续进行不再有必要或变得不可能,那么秘书处应该预先通知当事人仲裁委将终止仲裁程序。任何一方可以要求仲裁委依据本规则组建仲裁庭,以便仲裁庭能够就当事人未能达成一致的费用作出决定。

5. 一旦受理费或临时费用预存按照附件 B(费用说明表)被支付并且所有的仲裁员都已经确认,秘书处应该不迟延地将文件送达仲裁庭。

仲裁员的人数

第六条

1. 如果当事人并未就仲裁员的数目达成协议,仲裁委应在考虑所有相关情形后,决定应该把案件交由独任仲裁员还是交由三人仲裁庭进行审理。

2. 原则上,仲裁委应将有关案件交由独任仲裁员审理,除非案件争议事项的复杂性和/或案件争议金额使将案件交由三人仲裁庭审理更合适。

3. 如果仲裁协议规定应组成多人仲裁庭,但是考虑争议金额或其他情形这种安排并不适当,仲裁委应征求当事人意见将该争议交由独任仲裁员审理。

4. 在争议金额不超过 CHF1,000,000(一百万瑞士法郎)时,应适用本规则第四十二条之第二款的规定(简易程序)。

独任仲裁员的指定

第七条

1. 如果各方当事人同意将纠纷交由独任仲裁员审理，则当事人应在被申请人收到仲裁通知之日起三十日内共同指定独任仲裁员，除非当事人在协议里另有约定。

2. 如果当事人并未就仲裁员数目达成协议，则当事人应在收到仲裁委将争议交由独任仲裁员审理的决定之日起三十日内共同指定独任仲裁员。

3. 如果当事人未能在规定的期限内指定独任仲裁员，仲裁委应自行指定。

双方或多方当事人的仲裁程序中对仲裁员的指定

第八条

1. 如果双方当事人间的争议将交由三人仲裁庭仲裁，双方应各指定一名仲裁员，除非双方另有约定。

2. 如果一方当事人没有按照仲裁委设定的或仲裁协议约定的期限指定仲裁员，仲裁委应指定仲裁员。除非当事人在协议里另有约定，在第二名仲裁员获得确认之日起三十日内，已获委任的两名仲裁员应指定第三名仲裁员，且该仲裁员担任仲裁庭的首席仲裁员。如果没有作出该等指定，应由仲裁委指定首席仲裁员。

3. 在多方当事人的仲裁程序中，仲裁庭的组成须按当事人的协议进行。

4. 在多方当事人的仲裁程序中，如果当事人对仲裁庭的组成程序未达成协议，仲裁委应为申请人或全体申请人设定初始三十日的期限作为指定一名仲裁员的期限，并应为被申请人或全体被申请人设定后续三十日的期限作为指定一名仲裁员的期限。如果一方当事人全体或各方当事人全体已经各自指定了仲裁员，应参照本规则第八条之第二款的规定指定首席仲裁员。

5. 在多方当事人的仲裁程序中，如果一方当事人或各方当事人全体没有指定仲裁员，仲裁委可以指定全部仲裁员并确定首席仲裁员。

仲裁员的独立和仲裁员的回避

第九条

1. 任何依照本规则进行仲裁审理的仲裁员均应是公正的，独立于当事人，并且应在任何时候都保持该种公正和独立。

2. 仲裁员候选人在一方为指定仲裁员而和他进行接触时，应向其披露可能对该

仲裁员候选人的公正和独立产生合理怀疑的任何情形。一旦一名仲裁员已经被指定或选定,该仲裁员应向当事人各方披露该等情形,除非他事先已告知当事人该等情形。

第十条

1. 任何仲裁员都可被申请回避,只要存在能对该仲裁员公正或独立地位产生合理怀疑的情形。

2. 对于自己指定的仲裁员,一方当事人只能基于其在指定该仲裁员后才获悉的该仲裁员应该回避的情形,申请该仲裁员回避。

第十一条

1. 申请仲裁员回避的一方当事人应在其知晓回避事项之日起的十五日内向秘书处递交回避申请。

2. 如果回避申请提出之日起十五日内,所有当事人不同意该回避,或被申请回避的仲裁员拒绝回避,仲裁委应对回避请求作出决定。

3. 仲裁委的决定为终局决定。仲裁委并无义务说明决定的理由。

仲裁员的解除

第十二条

1. 如果仲裁员不顾其他仲裁员或仲裁委的书面警告而没能履行其职责,仲裁委可以解除该仲裁员任命。

2. 该仲裁员应有机会向仲裁委阐明其立场。仲裁委的决定为终局决定,且并无义务说明决定的理由。

仲裁员的替代

第十三条

1. 根据第十三条第二款,在仲裁员需要被替换的情况下,代替的仲裁员应按照第七条、第八条规定的程序在仲裁委设定的时间内被指定或任命。本规定同样适用于一方当事人或仲裁员们无法作出指定或任命的情形。

2. 特殊情况下,在与当事人和其他仲裁员进行商讨之后,仲裁委可以:

(a)直接任命替代的仲裁员;或

(b)在程序结束后,委托其余仲裁员进行仲裁并作出决定或仲裁裁决。

第十四条

仲裁员被替代的，仲裁程序原则上应从被替代仲裁员停止履行职责时的阶段继续进行，除非仲裁庭另有决定。

第三部分　仲裁审理程序

总　　则

第十五条

1. 在遵守本规则的前提下，仲裁庭可以按照其认为合理的方式进行仲裁审理，但条件是仲裁庭应该保证各方当事人受到平等的对待并保证各方当事人陈述其主张的权利。

2. 在审理程序进行的任何阶段，仲裁庭可以安排听取证人（包括专家证人）的证言陈述，或听取口头辩论。经与当事人各方协商后，仲裁庭也可以决定根据文件以及其他材料进行审理。

3. 在仲裁审理程序的开始阶段，经与当事人各方协商后，仲裁庭应准备一个仲裁审理程序的暂行时间表。该时间表应提供给当事人各方并知会秘书处。

4. 当事人一方提交给仲裁庭的所有文件和信息均应在同时由该当事人提供给其他当事人。

5. 经与当事人各方协商，仲裁庭可以委任一名书记员。本规则第九条至第十一条的规定应参照适用于该书记员。

6. 当事人可以选定其他人来代表或协助他（们）。

7. 仲裁的所有参与者都应该遵守诚信原则，尽最大努力避免不必要的费用和延误，确保仲裁可以高效地进行。当事人应保证不迟延地履行仲裁庭或紧急仲裁员作出的任何裁决或命令。

8. 如果当事人同意，仲裁庭可以在当事人之间进行调解。当事人对此作出的任何同意将被视为放弃因仲裁员公正性而提出回避的权利，此种公正性的质疑来源于仲裁员的参与和在协商阶段获取的信息。

仲 裁 地

第十六条

1. 如果当事人各方并未指定仲裁地，或者如果该等指定不清楚或不完整，仲裁委应该在综合考虑所有相关情形后确定仲裁地，或应该要求仲裁庭确定仲裁地。

2. 在不影响确定仲裁地点的前提下,仲裁庭可以决定进行仲裁审理的地点。尤其在考虑仲裁的具体情形后,仲裁庭可以选择自己认为合理的任何地点听取证人证言及举行仲裁员内部会议。

3. 仲裁庭可以在自己认为合理的任何地点查验货物、其他财产或文件。有关各方应得到充分的通知以出席该等查验活动。

4. 仲裁裁决应被视为在仲裁地作出。

语　　言

第十七条

1. 在符合当事人各方协议的前提下,仲裁庭应在成立后立即决定在仲裁审理程序中使用的一种或几种语言。该决定适用于仲裁请求、仲裁答辩、任何进一步书面陈述及任何口头审理。

2. 若仲裁请求或仲裁答辩中的任何附件,以及在仲裁审理程序中提交的任何补充文件或附件不是以当事人间协议规定的或仲裁庭决定的语言提交的,仲裁庭可以命令附随提交当事人协议规定的或仲裁庭确定的一种或几种语言的翻译文本。

仲裁请求

第十八条

1. 除非仲裁请求为仲裁通知所涵盖,在仲裁庭确定的期限内,申请人应将其书面的仲裁请求送达被申请人及每位仲裁员。仲裁请求须附有合同副本;若合同中不包含仲裁条款,则须在仲裁请求中附有仲裁协议。

2. 仲裁请求应包括:

(a)当事人各方的姓名、地址;

(b)对支持其请求的事实的描述;

(c)争议要点;

(d)要求的救济或赔偿。

3. 原则上,申请人应在其仲裁请求中附上所有文件和其依据的其他证据。

仲裁答辩

第十九条

1. 除非仲裁答辩为对仲裁通知的回复所涵盖,在仲裁庭确定的期限内,被申请

人应将其书面的仲裁答辩送达申请人及每位仲裁员。

2. 仲裁答辩应对仲裁请求中第十八条第二款(b)至(d)项下的事项作出答辩。如果被申请人对仲裁庭的管辖权或组成提出异议,在仲裁答辩中应载明该等异议的事实及法律根据。原则上,被申请人应在其仲裁答辩中附上支持其答辩的所有文件和其依据的其他证据。

3. 本规则第十八条第二款中(b)至(d)项的规定也应适用于反请求及以抵销为目的而提出的请求。

对请求和答辩的修改

第二十条

1. 在仲裁审理进行当中,任何一方当事人均可修改或补充其请求或答辩,除非仲裁庭考虑该等修改的迟延情况,或作出该等修改会对另一方当事人不公平,或存在任何其他情况,认为不宜同意作出该等修改。但是,若修改后的请求超出了仲裁条款或独立的仲裁协议所涵盖的范围,则该等请求不可被修改。

2. 如果一方当事人修改或补充其请求、反请求或答辩,仲裁庭可以对仲裁费用作出调整。

对仲裁庭管辖权的异议

第二十一条

1. 仲裁庭有权对任何针对其管辖权的异议作出决定,该等异议也包括对仲裁条款或单独仲裁协议的存在或效力提出的异议。

2. 仲裁庭有权对包含仲裁条款之合同的存在或效力作出决定。为本规则第二十一条之目的,规定仲裁采用本规则并构成该合同组成部分的仲裁条款应被视为独立于合同其他条款的一项协议。仲裁庭作出该合同无效的决定并不使仲裁条款当然归于无效。

3. 原则上,对仲裁庭管辖权的异议应在对仲裁通知的回复中提起,无论如何最迟应该在本规则第十九条规定的仲裁答辩中提起;或者,如果存在反请求,最迟应该在对反请求的答辩中提出。

4. 原则上,仲裁庭应该对任何针对其管辖权的异议作为先决问题作出裁定。但仲裁庭也可以继续进行仲裁审理程序并根据案情对此作出裁定。

5. 仲裁庭对抵销抗辩拥有管辖权,即使所称的该等抗辩赖以产生的法律关系不

在仲裁协议条款涵盖的范围内,或者其属于另外一个仲裁协议或法院选择条款的涵盖范围。

进一步书面陈述

第二十二条

除仲裁请求和仲裁答辩之外,仲裁庭应当决定需要由当事人提交的进一步书面陈述,或可以由当事人提交的进一步书面陈述,并应当就该等进一步书面陈述设定期限。

期　　限

第二十三条

仲裁庭确定的提交书面陈述(包括仲裁请求和仲裁答辩)的期限不得超过四十五日。但是如果仲裁庭认为该等延期是适当的,仲裁庭可以延长该等期限。

证据及开庭

第二十四条

1. 各方当事人均有义务证明其依据的事实以支持其提出的请求或答辩。

2. 仲裁庭应决定所提交证据的可采性、关联性、重要性和证据力。

3. 在仲裁审理程序进行的任何时候,仲裁庭都可以要求当事人在仲裁庭确定的期间内提交文件、附件或其他证据。

第二十五条

1. 采用开庭审理的,仲裁庭应就开庭日期、时间和地点在事前给予当事人充分的通知。

2. 任何人均可担任证人或专家证人。任何一方当事人及其管理人员、雇员、法律顾问或律师对证人、潜在证人或专家证人进行询问并无不妥。

3. 口头审理前,在仲裁庭规定的时间内,证人和专家证人提供的证据可以其签署的书面陈述或书面报告的形式予以提供。

4. 在审理中,证人或专家证人可以在仲裁庭规定的条件和方式下被询问和调查。仲裁庭可以指导证人或专家证人通过远程通信的方式(如电视会议)接受询问和调查,这样证人就可以不用亲自到庭。

5. 如果仲裁庭根据案件具体情况认为有必要,或者当事人协商一致,仲裁庭应

安排开庭审理中口头陈述的翻译及庭审的记录。

6. 除非当事人另有协议，开庭审理不公开进行。仲裁庭可以要求证人或专家证人在其他证人或专家证人作证时退出庭审。

临时保护措施

第二十六条

1. 应一方当事人的申请，仲裁庭可以采取任何其认为必要或适当的临时措施。应一方当事人申请，或者特殊情况下经仲裁庭事先通知当事人，仲裁庭可以主动更改、中止或终止已经作出的临时措施决定。

2. 该等临时措施以临时裁决的形式作出。仲裁庭有权要求当事人提供适当的担保。

3. 特殊情况下，在临时措施请求尚未通知任何其他当事人时，假如该等通知最晚和初步命令一并发出，且其他当事人即将得到通知接受审问，则仲裁庭可以采取初步命令的方式作出临时措施决定。

4. 仲裁庭可以对任何由于不公正的临时措施或者初步命令而引起的损害请求作出裁决。

5. 当事人根据本规则提起仲裁并不视为其放弃任何根据法律向司法机构提出临时措施请求的权利。任何一方当事人向司法机构提出临时措施的请求并不能视为对仲裁协议的违反或放弃。

6. 仲裁庭拥有在临时裁决或最终裁决中对申请临时措施涉及的费用作出分配的裁量权。

仲裁庭指定的专家

第二十七条

1. 仲裁庭经与各方当事人协商，可以委任一名或多名专家就其将要决定的具体事项作出书面报告。仲裁庭应将其制作的一份专家工作提纲送交当事人。

2. 当事人各方均应向该等专家提供其要求的任何相关信息或提供其要求的任何相关文件或货物以供查验。当事人与该等专家就专家所要求的信息、文件或货物的关联性而产生的任何争议均应提交仲裁庭决定。

3. 收到专家报告后，仲裁庭应将报告的副本送交当事人，并且应该给予当事人对报告提出书面意见的机会。当事人有权查验专家出具报告所依据的任何文件。

4. 在出具报告后,应任一方当事人的要求,专家可以出庭陈述,当事人应有机会出庭并对专家进行质证。在该庭审中当事人可以提出专家证人以对争议要点提供证言。本规则第二十五条之规定应适用于该等庭审程序。

5. 本规则第九条至第十一条之规定应参照适用于仲裁庭委任的任何专家。

缺　　席

第二十八条

1. 如果在仲裁庭设定的期限内,申请人未能将其仲裁请求送交仲裁庭,并且没有对此提供充分的理由,仲裁庭应作出决定终止仲裁程序。如果在仲裁庭设定的期限内,被申请人未能将其仲裁答辩送交仲裁庭,并且没有对此提供充分的理由,仲裁庭应决定继续仲裁程序。

2. 如果在得到符合本规则规定的适当通知后,一方当事人未能出席庭审,并且没有对此提供充分的理由,仲裁庭可继续仲裁程序。

3. 如果负有提供文件和其他证据义务的一方当事人未能在仲裁庭设定的期限内提供该等文件和/或证据,并且没有对此提供充分的理由,仲裁庭可依其现有证据作出裁决。

审理程序终结

第二十九条

1. 如果当事人有合理的机会在即将作出裁决的事件中表达自己的立场,则仲裁庭可以宣布仲裁程序因该等事件而终结。

2. 仲裁庭可以在其认为由于特殊情形而有必要的时候,主动或应一方当事人的请求在作出裁决前的任何时候重新启动因第二十九条第一款而终结的审理程序。

弃　　权

第三十条

一方当事人知悉本规则项下或任何其他适用的程序法下的任何规定或要求未被遵守但仍继续进行仲裁程序,并且没有对该等不符及时提出其异议,应被视为放弃其提出异议的权利。

第四部分　裁　　决

决　　定

第三十一条

1. 仲裁庭由多名仲裁员组成的，仲裁庭的任何裁决或其他决定应依多数仲裁员的意见作出。如果不能形成多数意见，裁决应由首席仲裁员单独作出。

2. 经仲裁庭授权，首席仲裁员可以就程序问题作出决定，该等决定可为仲裁庭作出的修正所变更。

裁决的形式及效力

第三十二条

1. 在作出最终裁决之外，仲裁庭可以作出临时、中途的或部分裁决。如果适当，仲裁庭可在非最终的裁决中对费用作出裁决。

2. 裁决应以书面形式作出，并且应为终局的并对当事人各方均具有约束力。

3. 仲裁庭应说明裁决所依据的理由，除非当事人各方同意不说明理由。

4. 裁决应由仲裁员签名并注明作出裁决的日期和地点。仲裁庭由多名仲裁员组成但其中任何一名仲裁员没有签名的，裁决中应说明其没有签名的理由。

5. 裁决的公布适用于本规则第四十四条。

6. 经仲裁员签名的裁决原件应由仲裁庭送交当事人各方及秘书处。秘书处应保留裁决副本一份。

适用法律，友好公断人

第三十三条

1. 仲裁庭应根据各当事人同意的法律裁决案件。如当事人并未作出法律选择，应适用与纠纷有最密切联系的法律。

2. 只有得到当事人明示的授权，仲裁庭才可以根据公平的原则（作为友好公断人或依公允善良的原则）作出裁决。

3. 在任何情况下，仲裁庭均应根据合同规定并应考虑交易所适用的商业惯例作出裁决。

和解或其他终止仲裁程序的理由

第三十四条

1. 如果在裁决作出之前,当事人各方针对纠纷达成和解,仲裁庭应作出决定终止仲裁程序,或者,若双方当事人均提出请求并且仲裁庭接受该请求,仲裁庭可以以仲裁裁决的形式按照当事人协商同意的内容记录该等和解。仲裁庭没有义务为该等裁决说明理由。

2. 如果在裁决作出之前,因为第三十四条第一款没有列明的任何原因而使继续仲裁程序成为不必要或不可能,仲裁庭应提前通知当事人各方其将决定终止仲裁程序。除非当事人提出正当的理由反对,仲裁庭应有权作出该等决定。

3. 经仲裁员签名的终止仲裁程序之决定或按照当事人和解内容所作出的裁决文本应由仲裁庭送交当事人各方及秘书处。依当事人和解内容所作出的裁决应适用本规则第三十二条第二款、第四款、第五款、第六款的规定。

裁决的解释

第三十五条

1. 在收到裁决后的三十日内,任何一方当事人,经通知秘书处和其他当事人后,可请求仲裁庭对裁决予以解释。仲裁庭可以设定通常不超过三十日的期限以便其他当事人对此请求发表意见。

2. 解释须在收到请求后的四十五日之内以书面形式作出。仲裁委也可以延长该期限。该解释构成裁决的组成部分并应适用本规则第三十二条第二款至第六款的规定。

裁决的补正

第三十六条

1. 在收到裁决之后的三十日内,一方当事人经通知秘书处和其他当事人后,可请求仲裁庭对裁决中计算、文书或打印错误及其他类似错误予以补正。仲裁庭可以设定通常不超过三十日的期限以便其他当事人对此请求发表意见。

2. 仲裁庭可以在送交裁决书的三十日内自己决定作出该等补正。

3. 该等补正应以书面方式作出并应适用本规则第三十二条第二款至第六款的规定。

补 充 裁 决

第三十七条

1. 在收到裁决书之后的三十日内，一方当事人经通知秘书处和其他当事人后，可请求仲裁庭对仲裁程序中提起而被裁决书遗漏的请求予以补充裁决。仲裁庭可以设定通常不超过三十日的期限以便其他当事人对此请求发表意见。

2. 如果仲裁庭认为补充裁决的请求正当并认为该等遗漏的情形可以补正且无须进一步开庭审理或提交新的证据，仲裁庭应在收到该等请求后的六十日内对裁决进行补充。仲裁委可以延长该期限。

3. 补充裁决的作出应适用本规则第三十二条第二款至第六款的规定。

费　　用

第三十八条

仲裁裁决应确定仲裁费用。该术语“费用”仅包括：

(a) 仲裁庭费用：该费用应分列于每位仲裁员和书记员名下并由仲裁庭根据本规则第三十九条和第四十条第三至第五款的规定自行确定；

(b) 仲裁庭和书记员因仲裁而产生的差旅费及其他费用；

(c) 仲裁庭要求的专家建议及其他协助的费用；

(d) 证人在仲裁庭批准范围内的差旅费和其他费用；

(e) 仲裁审理程序进行中提出请求的法律代理与法律协助费用，但该等费用应限于仲裁庭确认为合理的数额范围之内；

(f) 以附件 B（费用说明表）为基础的受理费及行政费用；

(g) 受理费、紧急仲裁员的费用和开销，以及根据第四十三条第九款确定的紧急仲裁员需要的专家建议和其他协助的费用。

第三十九条

1. 仲裁的费用和开支在数量上应该是合理的，需要考虑争议的数量、仲裁案件对象的复杂程度、所花费的时间以及案件的其他相关情形，包括因和解而引起的仲裁审理程序终止。仲裁审理程序终止的，仲裁庭费用可少于附件 B（费用说明表）确定的最低数额。

2. 仲裁庭的费用和开支应依照附件 B（费用说明表）确定。

3. 仲裁庭应确定其成员间费用的分配。原则上，考虑到每位仲裁员所花费的时

间和精力,首席仲裁员应取得全部费用的40% ~50%,而其他仲裁员每位应取得全部费用的25% ~30%。

第四十条

1. 除非第四十条第二款另有规定,否则原则上,仲裁费用应由败诉方承担。但是,如果仲裁庭考虑案件的具体情况认为费用按比例分担更合理,仲裁庭可以决定双方当事人依比例分担上述各项费用。

2. 就本规则第三十八条(e)项下的法律代理与法律协助费用,仲裁庭应自行决定应由哪一方当事人承担该等费用,或者,如果仲裁庭认为按比例分担该等费用更合理,仲裁庭可裁决各方当事人按比例分担该等费用。

3. 仲裁庭决定终止仲裁审理程序或作出以当事人和解内容为依据的裁决书的,应在该等决定或裁决书正文中确定本规则第三十八条和第三十九条提到的仲裁费用。

4. 在作出裁决书、仲裁终止决定或对基于第三十五至第三十七条所提请求而作出决定之前,仲裁庭应将裁决书草案提交秘书处征求仲裁委同意或者根据第三十八条(a)至(c)项、(f)项及第三十九条作出调整。任何该等同意或调整对于仲裁庭都有约束力。

5. 仲裁庭不得因按照本规则第三十五条至第三十七条的规定进行其裁决书的解释、补正和补充而额外收取费用,除非有合理情况发生。

费用预存

第四十一条

1. 仲裁庭一旦组建,应在与仲裁委商议之后,要求各方当事人按同等数额预先交存本规则第三十八条(a)项至(c)项的费用以及第三十八条(f)项所指的行政性费用。任何一方根据附件B(费用说明表)支付的临时性存款都视为存款的一部分。仲裁庭应将该等要求提交秘书处一份副本。

2. 被申请人提出反请求或具有其他适当情形的,仲裁庭可以自行决定分别确定费用预存。

3. 在仲裁审理程序进行中,仲裁庭在与仲裁委商议后可以要求当事人追加费用预存。仲裁庭应提交一份该等要求的副本至秘书处。

4. 若当事人在收到预存费用的要求后十五日内没有足额缴付费用,仲裁庭应就此通知当事人以便其中之一或更多当事人缴纳所要求的预存费用。若该等费用仍然没有得到缴付的,仲裁庭可决定暂停或终止仲裁程序。

5. 在最终裁决中，仲裁庭应向当事人提供预存费用的账目。任何未被使用的余额应退还给当事人。

第五部分　其 他 条 款

简易程序

第四十二条

1. 如果当事人各方同意，或者如果本规则第四十二条第二款适用，仲裁程序应按照简易程序进行。该简易程序适用于本规则前述条款的规定，但有以下修正：

（a）文件资料只有在根据附件 B（费用说明表）第 1.4 条要求的临时费用预存支付之后才会被转交给仲裁庭。

（b）在提交对仲裁通知的回复后，当事人原则上有权提交一份仲裁请求，一份仲裁答辩（及反请求）及在情形适用时一份对反请求的仲裁答辩。

（c）除非各方当事人同意仅在书面证据的基础上对争议作出裁决，仲裁庭应举行一次庭审以进行口头辩论并质证证人证言及专家证人证言。

（d）裁决书应在秘书处向仲裁庭移交文件之日起的六个月内作出；在特殊情形下，仲裁委可以展延该期限。

（e）仲裁庭应在裁决书中简要说明其裁决理由，除非各方当事人同意不必说明理由。

2. 除非仲裁委根据所有相关情形另行决定，下列条款应适用于包括请求和反请求（或任何抵销抗辩）在内争议金额总计不超过 CHF1,000,000（一百万瑞士法郎）的所有案件：

（a）仲裁审理程序应按照本规则第四十二条第一款的规定以简易程序进行。

（b）除非仲裁协议规定须提交多人仲裁庭审理，案件应提交独任仲裁员审理。

（c）如果仲裁协议确定了多人仲裁庭方式，秘书处应建议当事人各方同意将案件提交独任仲裁员审理。如果当事人不同意将案件提交独任仲裁员审理，仲裁员的费用应按照附件 B（费用说明表）的规定予以确定，但任何情况下都不得低于根据附件 B 第 2.8 条规定的小时费率而确定的费用。

紧急救济

第四十三条

1. 除非当事人另有约定，在所有仲裁员被确认之前，如果一方当事人根据第二

十六条需要紧急救济措施,则可以向秘书处申请紧急救济程序(以下简称申请)。除第三条第三款(b)项至(e)项以外,申请还需包括:

(a)对所寻求救济措施的陈述和理由,特别地还要陈述构成紧急情况的理由;

(b)对仲裁语言、地点以及适用法律的意见;

(c)对向附件 A 列出的账户通过支票或转账方式支付受理费及附件 B(费用说明表)第 1.6 条所要求的紧急救济程序费用的确认。

2. 在接到申请、受理费和紧急救济程序的费用预存后,仲裁委应该立即指定独任紧急仲裁员并将文件转交给他,除非:

(a)当事人之间明显没有达成在本规则下进行仲裁的仲裁协议,或者

(b)当事人在申请中表示选择仲裁庭,且仲裁庭审理更为合适。

3. 如果当事人在提交仲裁通知之前提出紧急救济申请,且在申请后的十日内未提交仲裁通知,则仲裁委应该终结紧急救济程序。特殊情况下仲裁委可以延展该期限。

4. 规则第九条至第十二条同样适用于紧急仲裁员,但第十一条第一款和第十一条第二款规定的回避期限除外。对紧急仲裁员的回避期限缩短为三日。

5. 如果当事人没有决定好仲裁的地点,或者对仲裁地点的选择不明确或不完整,则仲裁委可以在不违背第十六条第一款关于仲裁地点规定的前提下决定紧急救济程序的地点。

6. 紧急仲裁员可以以自己认为合适的方式对紧急救济程序进行处理,考虑该程序的内在紧急性并确保任何一方当事人都有合理的机会针对申请作出陈述。

7. 对申请的裁决应在秘书处将文件转交给紧急仲裁员起的十五日内作出。如果当事人之间达成相关协议,或者在合理的情形下仲裁委作出相关决定,该期限可以被延展。对申请的裁决甚至可以在文件转交给仲裁庭的同时作出。

8. 紧急仲裁员作出的裁决效力等同于依据本规则第二十六条作出的裁决。经紧急仲裁员同意的措施可以被紧急仲裁员本身进行修改、暂停或终止,或者当文件转交给仲裁庭后,由仲裁庭作出该等决定。

9. 对申请的决定应该确认依据第三十八条(g)项产生的费用。在针对申请作出决定之前,紧急仲裁员应向秘书处提交决定的草案以征求仲裁委关于费用确认的同意或修正。该等费用应该从紧急程序费用预存中支付。根据第三十八条(d)项和(e)项产生的费用以及费用在当事人间的分摊由仲裁庭决定。如果未能组建仲裁庭,根据第三十八条(d)项和(e)项产生的费用以及费用在当事人间的分摊由

紧急仲裁员以单独的裁决方式决定。

10. 任何由紧急仲裁员授权采取的紧急措施在紧急程序根据第四十三条第三款终止之后，或仲裁程序终止之后，或最终仲裁裁决作出之后停止，除非仲裁庭在最终仲裁裁决中明确作出另外规定。

11. 除非当事人另有约定，紧急仲裁员不得在其参与过的、与争议有关的仲裁程序中担任仲裁员。

保密条款

第四十四条

1. 除非当事各方以书面方式另有明确的相反表示，否则，作为一项基本原则，当事人有义务对仲裁审理程序范围内尚未进入公众领域的所有对方当事人提交的材料、所有的裁决和决定进行保密，除非一方当事人为保护或实现自己的合法权利或者为执行或推翻裁决而在司法机关进行的法律程序中负有披露的法定义务，并且该等披露应限于法定的披露义务范围之内。本义务也适用于仲裁员，仲裁庭委任的专家，仲裁庭书记，瑞士商会仲裁院理事会成员、仲裁委委员、秘书处以及各商会的员工。

2. 仲裁庭的合议应保密。

3. 裁决书或决定可以全部公开、摘录性公开或者摘要性公开。但需满足下列条件：

(a)向秘书处提交公开请求；

(b)涉及当事人姓名的地方均已删除；并且

(c)在秘书处为此目的而设定的异议期限内没有当事方对该等公开提出异议。

责任排除

第四十五条

1. 瑞士商会仲裁院理事会成员、仲裁委委员、秘书处、各商会及其员工、仲裁员、仲裁庭委任的专家或仲裁庭书记员均不应就按照本规则进行仲裁有关的任何行为或疏忽承担责任，除非该等行为或疏忽被证明构成故意或重大过失。

2. 在裁决书或终止决定作出并且按照本规则第三十五条至第三十七条的规定进行修改、解释及补充的权利已过期或已经全部行使后，瑞士商会仲裁院理事会成员、仲裁委委员、秘书处、各商会及其员工、仲裁员、仲裁庭委任的专家或仲裁庭书记员均无义务就与仲裁有关的任何事宜向任何人作出说明。任何一方当事人都没有权利在因仲裁而发生的任何法律程序或其他程序中要求上述任何人员作证。

CHAPTER 02 >>

第二章

印度尼西亚仲裁制度研究

作为世界上最大的群岛国家,印度尼西亚(以下简称印尼)今已崛起为东南亚最大的经济体,其国土由位于太平洋与印度洋之间的17,508个大小不一的岛屿组成,其中有约6000个岛屿适宜人类居住,故而有"千岛之国"之称。[1] 印尼人口总数位居世界第四,其中穆斯林占国家人口的88%,系穆斯林人口最多的国家。[2] 印尼人民十分重视血缘亲情和长期合作关系,伊斯兰教义亦尤其教导其信徒珍视血缘亲情。就其政治进程而言,印度尼西亚的历史经历深刻地诠释了国家文化多元化的成因。尽管古代印尼群岛上曾存在过一些王国[3],但直至20世纪中叶印尼才

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〔1〕 印度尼西亚的领土东起新几内亚岛的巴布亚省,西至苏门答腊岛的亚齐省,北达婆罗洲大岛的加里曼丹,南隔海临澳大利亚,古爪哇语"努山塔拉"意为"大洲之间的岛屿",专指"千岛之国"的印度尼西亚。参见潘一宁:《新海丝路上的印度尼西亚与中国》,世界知识出版社2017年版,第4页。

〔2〕 参见中华人民共和国外交部网站:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/yz_676205/1206_677244/1206x0_677246/,最后访问日期:2018年11月15日。

〔3〕 如13世纪的麻喏巴歇王国(Majapahit)曾显赫一时。

正式作为一个独立的统一国家出现。[1] 在历史上的较长时期内(自 17 世纪至 1942 年),荷兰人曾占据了印尼的大量岛屿,并组建为荷属东印度殖民地,从而划定了印尼的地理边界。在经历了荷兰近 350 年及日本 3 年半的殖民统治后,印尼人民终于在 1945 年 8 月 17 日获得独立,成立印度尼西亚共和国。作为多元种族和多元文化的国家,印尼境内共有 300 多个部族,使用 50 多种语言,各部族有各自的文化特点。[2] 印尼首都为位于爪哇岛上的雅加达,全国以爪哇文化为主导,并在此基础上形成了印尼的政治文化。爪哇文化向来以和谐共生、求同存异、融合宽容为主导,强调部落居民互相团结、彼此协商,最终达到融合。[3] 浓厚的宗教色彩、宽容的文化传统、多民族多语言的族群聚居模式相互碰撞,深刻影响印尼的纠纷解决机制及社会治理方式。[4] 印尼一些部落纠纷解决主要依靠宗教首领或部落长老主持,非诉讼式的纠纷解决方法深深植根于其土著文化的土壤与特殊制度传统中,通过诉讼解决纠纷反而招致部落居民的反感,甚至遭受部落的制裁。[5] 本章以印尼仲裁的历史沿革、制度现状和未来趋势为中心,概览该国主要的仲裁机构及仲裁规则,剖析现行印尼仲裁法律制度的关键条款,旨在为中方当事人在该国参与仲裁提供建言。

一、印度尼西亚仲裁法律制度概况及历史沿革

从历史溯源来看,印尼的私法体系建立在荷兰民法的基础之上。尽管印尼早在 1945 年即已摆脱殖民统治成立独立国家,但在相当长一段时期内仍然继受了荷

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〔1〕 荷兰的殖民统治解释了当今印尼社会的许多方面,诸如立法制度、劳工关系、城市发展等,都深刻地留下了荷兰的烙印。在荷兰统治下,印尼人开始凝聚各方力量。自 1942 年日本入侵后,新生的民族主义演变为独立战争,并于 1945 年最终取得成功,成为去殖民化时代形成的新民族国家之一。取得独立后,印尼努力在不同利益集团之间保持平衡,努力维系内聚力,以抗衡印尼内部的差异和国际政治紧张局势造成的压力,从而缔造了多元、宽容、共存的社会状态以及相对稳定且和谐的国家秩序。[澳]阿德里安·维克尔斯:《现代印度尼西亚史》,何美兰译,世界知识出版社 2017 年版,第 2 页。

〔2〕 在统一的大国家、大民族政治框架下,“存异求同”被确立为印尼立国的格言,该格言源自根据佛典改编的爪哇神话《须陀素弥史诗》,不但被刻在印尼国徽上,还被写入印尼宪法文本中。参见吴崇伯:《举足轻重的东南亚大国——认识印度尼西亚》,山东大学出版社 2010 年版,第 111 页。

〔3〕 印尼人口中虽然绝大部分是穆斯林,且多数国民属逊尼派的沙斐仪教法学派,但伊斯兰教却并非国教,印尼是一个有着长久的宗教宽容历史的国度。除了伊斯兰教外,印度教、佛教、天主教、基督教都是官方所认可的宗教。参见中华人民共和国外交部网站:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/yz_676205/1206_677244/1206x0_677246/,最后访问日期:2018 年 11 月 15 日。

〔4〕 参见陈玉云:《印度尼西亚纠纷解决首选方式:仲裁》,载《人民法院报》2016 年 6 月 3 日,第 8 版。

〔5〕 参见陈玉云:《印度尼西亚仲裁制度述评》,载《司法改革论评》2016 年第 1 期。

兰民法的精神旨趣及核心条款。应经济全球化趋势下国际经贸发展之需,印尼的国内法适时进行了大量修订,在一些新的部门法中引入了普通法国家(如美国、澳大利亚等)的成功经验,但就其总体而言,印尼的仲裁制度与法律实践仍然留存了浓重的大陆法系印记。

如本章开篇所言,印尼固有的多元宗教、民族、文化元素使该国早已形成了“无讼”的理念根基。相应地,该国法院所受理的商事诉讼案件量相对较少,远不及印度、新加坡、美国等国家的受案总量。当然,导致这种情况的原因是多元的,法院案件量不多并不意味着商业社会中不存在经贸纠纷及法律争议,只是这些纠纷更多的是通过协商、调解、仲裁及其他替代性争议解决方式化解。[1] 除了文化因素外,当事人之所以不愿选择诉讼方式解决纠纷,也与诉讼本身的限制有关,尤其是在国际商事争议中,由于国际民商事诉讼广泛牵涉管辖权、法律适用、域外取证及送达、判决承认与执行等复杂环节,其耗时漫长、费用高昂,且当事人多担心法院所作判决具有不确定性及不可预见性,因此更青睐诉讼以外的替代性纠纷解决机制,这为仲裁在印尼的“生根成长”提供了广阔的空间。

从时间角度做纵向回顾可知,早在 19 世纪中期,仲裁即已被印尼官方接受为一种正式的、有拘束力的纠纷解决方式。[2] 然而,直至 1999 年,印尼立法机关才制定了专门的仲裁法。在 19 世纪中期至 1999 年这长达 150 年的历史进程中,所有在印尼境内进行的仲裁程序都是根据《荷兰民事诉讼法典》中的若干规定进行的,而对于当事人约定仲裁的能力等实体问题,则依据《印度尼西亚民法典》(以下简称《印尼民法典》)予以确定。为适应转型期的需求,自 20 世纪 90 年代以来,印尼已着手在其国内构建诉讼之外的替代性纠纷解决机制,这不仅包括仲裁,还包括了调解等非讼纠纷解决程序。1999 年 8 月 12 日,印尼颁行了第 30 号法令《仲裁和非讼纠纷解决程序法》(以下简称《印尼仲裁法》)。该法为非讼纠纷解决程序的制度化奠定了法律基础,优先于《荷兰民事诉讼法典》及《印尼民法典》的相关条款适用,其一直

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〔1〕 除第三方调解外,印尼最高法院还引入了法院附设调解(Court-annexed Mediation),这些替代性方法有效分散了法院的诉讼受案量,从而在一定程度上缓解了印尼法院所承受的压力。See Karen Gordon Mills, “National Report for Indonesia 2016”, in Jan Paulsson and Lise Bosman eds., *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, p. 1.

〔2〕 参见印尼 1847 年第 52 号国家公报、1849 年第 63 号国家公报。此外,《荷兰民事诉讼法典》第 3 编第 1 章第 615 条至第 651 条也是针对仲裁的法律规定,后被 1999 年印尼《仲裁和非讼纠纷解决程序法》所废止并被取代。See State Gazette No. 52 of 1847, in conjunction with No. 63 of 1849.

施行至今。[1]

值得提及的是，印尼政府对仲裁的支持力度经历了一个明显的转变过程：在荷属东印度时期（1800～1949 年），仲裁在印尼的争议解决实践中颇受青睐，在国际商事交易领域尤甚；这段时期内，商贸界在不同领域成立了各类专业仲裁协会。相比之下，在战后初期，印尼境内的仲裁案件数量锐减，仲裁市场受到了冲击。[2]20 世纪 90 年代末期，因受到世界经济危机的冲击，印尼政府及其国有企业曾就一些失败的大型基础设施建设项目提请投资仲裁，但多数案件均以政府及国有企业的败诉而告终，这使官方对仲裁的独立性及公正性持质疑的态度，从而对投资仲裁在印尼的发展产生过一定的抑制作用。[3]近年来，印尼政府先后在至少三起投资者与国家间仲裁案件中获胜，从而使其重获对仲裁的信心，因此相应地对仲裁持有支持的立场。[4]

随着仲裁实践的变迁，印尼的仲裁法律制度也在不断与时俱进、适时修订。以 1999 年为主线，可以清晰地概观印尼仲裁法律制度的结构与内容。下文将对比该部与《荷兰民事诉讼法典》、《联合国国际贸易法委员会国际商事仲裁示范法》（以下简称《示范法》）及其他当前国际上颇具代表性的仲裁立法，并总结印尼仲裁法律制度的特色所在。从仲裁实践的角度出发，在准确把握制度全貌的基础上，还应全面了解印尼境内现有的仲裁机构，以及仲裁与其他替代性争议解决机制（如调解）之间的衔接。本章将着眼于中国当事人在印尼参与仲裁的基本流程，从仲裁协议的拟定、仲裁程序的参与，直至仲裁裁决的作出及执行，进行全方位的评述，并对当事人作出相应的提示。

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〔1〕 Jean – Christophe Liebeskind, "New Developments in Foreign Arbitration: Indonesia – A Primer on the New Arbitration Law", in *Association Suisse de l' Arbitrage*, Kluwer Law International, 2000, pp. 283 – 286.

〔2〕 See Sudargo Gautama, "Some Legal Aspects of International Commercial Arbitration in Indonesia", *Journal of International Arbitration*, Vol. 7, Issue 4, p. 96.

〔3〕 See Karen Gordon Mills, "National Report for Indonesia 2016", in Jan Paulsson and Lise Bosman eds., *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, p. 4.

〔4〕 这三起典型的投资仲裁案件分别是：The Republic of Indonesia v. PT. Newmont Nusa Tenggara（仲裁地在雅加达，适用《联合国贸法会仲裁规则》）；Rafat Ali Rizvi v. The Republic of Indonesia（仲裁地在新加坡的 ICSID 案件）；Hesham Al Warraq v. The Republic of Indonesia（仲裁地在新加坡的 UNCITRAL 仲裁案件）。

二、《印尼仲裁法》的体例结构与基本内容

(一)仲裁协议制度

1. 仲裁协议的形式要件

与各国的仲裁立法相似,《印尼仲裁法》在结构上较为清晰,遵循仲裁程序进行的一般流程,其分别从仲裁程序的启动与进行、仲裁裁决的作出与执行等角度逐一展开。众所公认,存在有效的仲裁协议是仲裁庭取得管辖权的前提条件,也是仲裁程序能够顺利展开的先决要求,因此立法中关于仲裁协议的规定具有重要的实践意义。具言之,《印尼仲裁法》分别规定了仲裁协议的有效性要件、当事人缔约能力、可仲裁事项的范围、仲裁条款可分性、仲裁协议的执行等内容。

1999 年《印尼仲裁法》第 4 条对仲裁协议的书面形式设定了具体要求,该条第 2 款规定:“当事人约定通过仲裁方式解决争议的协议,应当包含在一份由各方当事人签署的文件中;当仲裁协议包含在信件、电传、电报、传真、电子邮件或其他通信形式的往来信函中时,应当附具一份证明当事人收到该信函的记录。”

对于仲裁协议的内容要件,根据订立仲裁协议的时间点将争议发生前所订立的仲裁协议或合同中的仲裁条款,与争议发生后所签订的仲裁协议作了区分,对后者设置了更严格的要求。该法第 7 条规定:“当事人可以约定他们之间已经产生或可能产生的争议应当通过仲裁方式解决。对于争议发生前所订立的仲裁协议或合同中的仲裁条款,仅需满足《印尼民法典》中关于合同有效要件的规定,表达明确的约定仲裁的意思表示即可。”具言之,《印尼民法典》第 1320 条规定,法律上有效成立的合同必须同时满足以下要件:(1)各方当事人具备法律上的缔约能力;(2)各方当事人基于自由意愿达成真实的合意,不存在强迫、错误或欺诈;(3)必须存在明确的标的物,必要时应对标的物的数量与质量作出具体陈述,且各方的义务必须清楚无误;(4)合同内容必须是合法的,不得违反法律、公共秩序或公共道德。

《印尼仲裁法》第 9 条则针对争议发生后所签订的仲裁协议作出了特别规定:在争议发生后当事人选择以仲裁方式解决争议的情况下,以仲裁作为争议解决方式的约定必须以双方签署的书面协议达成;当事人无法签署本条所称的书面协议的,此类协议必须由公证员以公证书的形式拟定。具言之,此类书面仲裁协议必须充分包含以下内容要素:(1)争议标的;(2)当事人的全称及住址;(3)仲裁员的全称及住址;(4)仲裁员或仲裁庭将作出裁决的地点;(5)仲裁秘书的全称;(6)争议的解决期限;(7)仲裁员愿意任职的声明;以及(8)争议当事人表达的愿意承担以仲裁方式解决争议将要产生的必要费用的声明。这八项要素是当事人在争议发生后

订立仲裁协议时必须满足的最低要求，欠缺任何一项要件都将导致仲裁协议无效。

值得一提的是，虽然没有明文规定临时仲裁（*ad hoc* arbitration）的效力，也没有将临时仲裁与机构仲裁区分开来予以单独规定，但由于上述八项要件中并不要求当事人必须约定特定的具体仲裁机构，由此便为临时仲裁在印尼的实践提供了法律基础。换言之，当事人在争议发生后拟定仲裁协议时，既可以约定仲裁机构的名称以开展机构仲裁，亦可仅在仲裁协议中订明上述八项内容，从而运用临时仲裁方式解决争议。此外，《印尼仲裁法》第 6 条第 9 款、第 13 条第 2 款也清晰地使用了临时仲裁的措辞，由此进一步肯定了在印尼开展临时仲裁的合法性。

在机构仲裁的情形下，为了防止当事人的仲裁意愿由于所签订的仲裁协议无法满足有效性要件而落空，印尼的多数仲裁机构都在仲裁规则的附件中或单独制定了示范仲裁条款。例如，印尼国家仲裁委员会（Indonesian National Board of Arbitration，BANI）就推荐希望通过印尼仲裁机构解决纠纷的当事人使用以下示范仲裁条款："由本合同产生的一切争议应在 BANI 的管理下按照 BANI 的仲裁程序规则由按照该规则指定的仲裁员作出有约束力的最终裁决。"〔1〕

2. 仲裁协议的当事人

根据《印尼仲裁法》第 1 条第 2 款的定义，仲裁当事人特指根据民法和/或公法而设立的法律实体，包括自然人、有限责任公司及基金会等。与此同时，《印尼民法典》关于合同的条款要求有效的协议必须由具备完全民事行为能力的当事人所签订。就其性质而言，仲裁协议亦属合同之一类，因此就意味着，仲裁当事人应具备完全的民事行为能力，这是保证仲裁协议有效成立的主体要件。就自然人而言，原则上所有具备民事行为能力者均有资格签订仲裁协议，但存在以下 2 个例外：其一，根据《印尼民法典》第 330 条的规定，未成年人（21 岁以下，但已婚者除外）不具备订立仲裁协议的能力；其二，根据《印尼民法典》第 433 条的规定，处于刑事拘押状态的自然人不具备订立仲裁协议的能力。就法人而言，应依其性质及公司的章程来确定其是否具备此类行为能力。值得一提的是，《印尼仲裁法》第 10 条明确规定：仲裁协议并不因某一方当事人死亡、破产、无力偿债、权利让与或义务承担而归于无效。然而，根据《印尼破产法》第 28 条的规定，当仲裁协议的一方当事人进入破

〔1〕 示范仲裁条款的原文表述为：All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules. Available at: http://www.baniarbitration.org/procedures.php, last visited on July 15, 2018.

产程序时,仲裁程序将无法继续进行而只能暂时中止,直至破产程序完毕后再恢复进行。除了自然人与法人之外,国有公司及政府也可依协议而成为仲裁的当事人。

此外,根据《印尼仲裁法》第 30 条的规定,仲裁协议以外的第三人可以参加和加入仲裁程序,但前提是他们对本案拥有相关利益,且他们的加入经过了争议各方当事人及审理争议的仲裁员或仲裁庭的共同同意。

3. 可仲裁事项的范围

仲裁协议中约定提交仲裁的事项,必须是有关国家法律所允许采用仲裁方式处理的事项。如果所约定的事项属于有关国家法律中不可仲裁的事项,该国法院将判定该仲裁协议是无效仲裁协议,并将命令中止该仲裁协议的实施或拒绝承认和执行已经依照该无效仲裁协议所作出的仲裁裁决。[1] 对可仲裁事项的范围限定在商事纠纷之内,且只有当事人可完全自主决定的事项引发的争议,才允许约定仲裁方式解决。在 1999 年颁行前,《荷兰民事诉讼法典》第 616 条明确列举了不可仲裁的具体事项,包括:因赠与及遗赠扶养协议而引发的争议,因借宿或服装供应引发的争议,与离婚、司法别居及婚姻关系的解除有关的身份争议及共同财产分割的争议等。通常认为,尽管 1999 年《印尼仲裁法》在很大程度上更新了原有的立法,但是旧法中这几项关于可仲裁事项范围的界定仍然适用。除此之外,涉及破产、专利、商标权属的纠纷,立法明确要求由国家公权力介入解决,因此这类纠纷也不能约定仲裁解决。特别值得注意的是,近期的立法将涉及破产及知识产权的纠纷排他地规定由新设立的商事法庭审理,从而进一步强化了此类纠纷的不可仲裁性。此外,对于《印尼反垄断法》及《印尼反不正当竞争法》等规范,印尼政府也设立了专门的机构来处理有关争议,因此竞争类案件也属于不可仲裁事项的范围之列。[2] 总结而言,确立的不可仲裁的事项可归纳为三类:第一类,当事人不能自行处理或不能通过和解解决的事项;第二类,关于民事身份的事项(包括父母与子女之间关系、离婚等);第三类,涉及属于公共和社会利益的事项。

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〔1〕 参见韩德培主编:《国际私法新论》,武汉大学出版社 2004 年版,第 527 页。

〔2〕 对于反垄断及反不正当竞争类争议,以国际商会仲裁院(ICC)为代表的仲裁机构开始逐渐放开受案范围,允许当事人选择仲裁方式解决此类纠纷。当仲裁庭、国内法院、国内的反垄断执法部门都有权处理相关争议时,机构间应当通过信息交换、意见咨询等方式避免对立裁决。在国内的反垄断执法部门已经先行作出决定的前提下,如果各方当事人均同意,则仲裁程序可以暂时中止,仲裁庭应及时地与执法部门进行沟通与合作,争取以最合理的方式为当事人解除后顾之忧。See Matti S. Kurkela et al., “Certain Procedural Issues in Arbitrating Competition Cases”, *Journal of International Arbitration*, Vol. 24, No. 2, 2007, p. 194.

4. 仲裁条款的可分性

仲裁条款的可分性，是指仲裁条款虽然附属于主合同，但与主合同形成了两项可分离或独立的契约。主合同关系当事人在商事交易方面的实体权利义务，而仲裁条款作为从合同，主要关系当事人通过仲裁方式解决争议的权利与义务。因此，仲裁条款具有保障当事人寻求司法外救济的程序权利的特殊性质，它具有相对独立性，其有效性不受主合同的影响。虽然没有采用“可分性”这一措辞，但却存在类似的表述。根据《印尼仲裁法》第 10 条的规定，仲裁协议并不应因为主合同的到期或无效而归于无效。这意味着，即使主合同无效，仲裁条款也并不当然无效，对主合同有效性的判断，仍应按照仲裁协议的约定向仲裁庭寻求裁判。

5. 或裁或审原则

1999 年《印尼仲裁法》承认了有效的仲裁协议具有排除诉讼管辖权的效果，要求法院尽可能减少对仲裁的司法干预。其第 11 条规定：书面仲裁协议将排除当事人向地区法院寻求解决包含在协议中的纠纷或意见分歧的权利；除非本法中另有特别规定，否则对于已经通过仲裁方式作出认定的任何争议，地区法院应当拒绝且不应干预此类争议的解决。不过，这一条款在实践运用中也可能会引发风险，导致法院最终误判仲裁协议的效力并直接行使诉讼管辖权，从而令当事人的仲裁意愿落空。在“PT 普鲁萨罕大港坦波诉 PT 印尼罗氏制药公司”案（PT Perusahaan Dagang Tempo v. PT Roche Indonesia，以下简称“PT 普鲁萨罕大港坦波”案）中，雅加达南区地区法院审理了当事人之间的一起合同纠纷，尽管被告曾经抗辩称当事人之间存在仲裁协议，并且对法院行使司法管辖权提出了异议，但法院却未曾理睬，而是径直对争议中的实体问题作出了判断。法院指出，本案中当事人争议的主要纠纷与合同没有关联，而是产生于因被告单方面终止合同而引发的侵权诉讼，因此涉案争议并不在仲裁协议的范围之内，也不应通过仲裁方式解决，由法院行使管辖权是可以接受的。基于纠纷的法律性质，本案法院最终行使了诉讼管辖权。然而，有学者对此案判决提出了质疑，称法院在解释争议具有法律性质并行使管辖权时，犯了严重错误，因为既然在本案中已经组成了仲裁庭，根据当事人的真实意愿，以及仲裁员在专业领域的过人知识，应当由仲裁庭基于相关的法律条款对仲裁协议

的有效性作出优先判断,而不是由法院过早地介入。[1]

不过,印尼仲裁实践中也存在一些反例,因法院过早地介入仲裁而对仲裁协议有效性作出了消极认定,从而导致仲裁条款无法发生效力,也使仲裁庭难以行使对自身管辖权进行认定的权利。例如,在“佩鲁萨罕·利特里克·内加拉诉陪顿”案(Perusahaan Listrik Negara v. Paiton)中,雅加达中央地区法院认定涉案仲裁协议无效。本案争议中的交易涉及一份购买电力的合同,合同是在 Perusahaan Listrik Negara(原告,一家印尼的国有电力公司)与 Paiton(被告,一家独立的电力生产商,由日本人、美国人及印尼人共同持有的合伙企业)之间签订的。原告诉称案件争议中的合同违背印尼的法律,也违背公共秩序及社会道德,因此应属无效;相应地,仲裁条款也当然无效,本案应通过诉讼解决,由雅加达中央地区法院予以管辖。而在答辩中,被告则提出了相反主张,即根据案涉合同第 18 条的仲裁条款对法院的诉讼管辖权提出了异议,声称因合同引发的争议应当遵照仲裁条款的约定排他地通过仲裁方式解决,而不应当进行诉讼。且被告还指出,根据仲裁条款独立性原则,即使原告声称涉案主合同无效,并不当然导致仲裁条款也无效,关于主合同有效性的争议,也无一例外地应当由仲裁庭解决。本案法院注意到了被告提出的管辖权异议,但只是简略地指出仲裁条款的存在是不适当的,因此并不能阻碍法院行使诉讼管辖权。遗憾的是,法院虽然否定了仲裁条款的效力而肯定了司法管辖权的形式,但没有进一步阐明究竟本案仲裁条款为何是不适当的(inappropriateness),以及仲裁条款何以被认定为无效。[2] 最终,当事人根据法院的管辖权决定而继续进行诉讼程序,仲裁协议没有发挥应有的作用。

(二)仲裁员制度

1. 仲裁员的资格要件

仲裁,本质上是第三方居中裁判的争议解决制度,仲裁员与当事人共同构成了国际商事仲裁活动的主体,并对争议解决具有决定性意义。仲裁员制度构成了整个仲裁法律制度的关键部分:一方面,仲裁员担负着满足当事人关于效率和公正诉

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〔1〕 See Gatot Soemartono, “Interpretation and Application of the New York Convention in Indonesia”, in G. A. Bermann ed., *Recognition and Enforcement of Foreign Arbitral Awards*, Springer International Publishing, 2017, p. 484.

〔2〕 See Gatot Soemartono, “Interpretation and Application of the New York Convention in Indonesia”, in G. A. Bermann ed., *Recognition and Enforcement of Foreign Arbitral Awards*, Springer International Publishing, 2017, p. 483.

求的职责;另一方面,仲裁员担负着引导国际商事仲裁功能实现的重要职责,不仅解决个案争议,还在一定程度上塑造和维护国际商事法律秩序。[1] 国际商事仲裁意思自治原则的首要体现即当事人有权选择自己信任的权威人士作为争议的裁判者;这种选择应当得到最大限度的承认和尊重。1999 年《印尼仲裁法》中分别确立了仲裁员的资格要件、仲裁员的委任、仲裁员的数量、仲裁员的回避、仲裁员任命的终止、仲裁员的责任等条款。其第 12 条规定了仲裁员应具备的资格:(1)具有完全的民事行为能力;(2)已满 35 周岁;(3)与当事人不属于二代以内的血亲或姻亲;(4)与仲裁裁决无经济利益或其他利害关系;(5)从事仲裁工作满 15 年,且为该领域的专家。在职的法官、检察官、法院职员或其他司法部门的官员不得担任仲裁员。此外,《BANI 仲裁规则》第 9 条第 5 款还对仲裁员的专业背景作了要求。该条规定:如果根据仲裁协议,争议的准据法是印尼法,则至少一名仲裁员(最好是但不必然是首席仲裁员)应当是一名法律专业的毕业生或者熟悉印尼法律且居住于印尼的法律从业者。[2] 除了仲裁规则与仲裁法所规定的资格要件外,当事人在具体案件中可自行选任仲裁员,而无须考虑国籍方面的因素。事实上,尽管以 BANI 为代表的印尼仲裁机构设置了仲裁员名册,但并非强制名册制,而是推荐名册制,只要当事人达成合意,其有权从名册之外挑选合格的专业人士担当仲裁员。除了资格限定外,在个案中担任裁判职能的潜在仲裁员还有义务披露可能对其独立性或公正性造成影响的各类信息,依据《印尼仲裁法》第 18 条第 1 款的规定,可能被当事人选任为仲裁员的潜在人士,有义务将可能影响其独立性及有碍其公正仲裁的任何情况告知各方当事人。据此,仲裁员对特定的信息负有披露义务,此种披露义务的存在,使当事人能够适时、充分知悉任何对独立和公正裁决具有消极影响的情况,从而选择是否适时对仲裁员提出回避申请或质疑仲裁员的公正性。

2. 仲裁员的委任

根据《印尼仲裁法》第 13 条第 1 款的规定,当事人可在仲裁协议中选定仲裁员,若当事人无法就仲裁员的选定达成一致意见,有管辖权的地区法院可以依法指定;第 13 条第 2 款则规定,在临时仲裁中,如果当事人就指定一名或多名仲裁员存在分歧,则当事人可请求地区法院院长指定一名或多名仲裁员解决争议。由此可

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〔1〕 参见林一:《国际商事仲裁中的意思自治原则——基于现代商业社会的考察》,法律出版社 2018 年版,第 276 页。

〔2〕 BANI Rules Article 9(5).

见,在印尼的仲裁程序中,法院在仲裁员的任命及仲裁庭的组成环节发挥了十分重要的角色。但应注意的是,根据立法的措辞,该法第 13 条第 1 款适用于机构仲裁,第 13 条第 2 款适用于临时仲裁;在机构仲裁中与临时仲裁中出现的组庭僵局应适用不同的解决方案。在机构仲裁的情况下,如果当事人选定了特定的仲裁机构,则原则上应适用该机构的仲裁规则进行仲裁,在仲裁员委任问题上应尊重当事人的意思自治,并依据机构仲裁规则进行。例如,根据《BANI 仲裁规则》第 10 条第 1 款,如果当事人无法就仲裁员人选形成一致意见,则 BANI 的主席将立即指定一名个人担任独任仲裁员,除非双方当事人明示仲裁庭由三名仲裁员组成。而在临时仲裁的情况下,则严格遵照第 13 条第 2 款,如果当事人无法就仲裁员的人选达成一致意见,则立法授权由地区法院院长履行指定仲裁员的职能。事实上,这一制度虽然属于特色条款,但并非印尼所特有。简言之,机构仲裁与临时仲裁中对仲裁员的委任主体是不同的:在机构仲裁中,即使当事人不能就仲裁庭的组成达成一致意见,仲裁机构也能够予以补救,因此实践中一般不涉及由法院指定仲裁员的问题;而在临时仲裁中,除非当事人另有特别约定,否则仲裁庭的组成并不涉及任何仲裁机构,一旦当事人无法对组庭事宜达成协议,并且没有明示授权某机构或某人任命,则当事人只能申请法院指定仲裁员。法院指定仲裁员的权力来自法律的明确授权,在承认临时仲裁的国家多有此类规定。例如,《瑞士联邦仲裁协约》规定,如果当事人无法就独任仲裁员或首席仲裁员的选任达成一致意见,并且仲裁协议又没有约定仲裁机构时,则由州高级普通民事法庭依一方当事人的请求指派仲裁员。日本、德国、英国、比利时、美国等大部分国家的仲裁立法都有类似规定,授予法院在必要时任命仲裁员的权力。相比之下,中国仲裁立法只认可机构仲裁,因此并没有在法律的具体条款中对法院指定仲裁员的权力作出明确规定。[1]

《印尼仲裁法》第 15 条第 1 款规定,在采用三人制合议仲裁庭时,当事人选定的两名仲裁员有权选任第三名仲裁员作为首席仲裁员。对于一方当事人不配合的情形,为了防止对仲裁程序的推进形成阻碍,立法设置了三人合议制仲裁转化为一人独任制仲裁的方案,这是印尼的特色制度。具言之,依据《印尼仲裁法》第 15 条第 3 款的规定,仲裁协议未选定仲裁员的,当事人应在收到仲裁通知后 30 日内,各自选定一名仲裁员。一方未能在规定期限内选定仲裁员的,另一方当事人选定的仲裁员可直接组成独任仲裁庭,该仲裁庭作出的裁决对双方当事人均有约束力。

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〔1〕 参见刘晓红、袁发强:《国际商事仲裁》,北京大学出版社 2010 年版,第 196 页。

双方当事人选定的仲裁员在接受聘任后 14 日内,未能选任第三名仲裁员的,一方当事人可请求法院指定。当事人采取独任仲裁庭处理仲裁事项的,须达成独任仲裁员的聘任协议。当事人无法达成一致意见的,双方均可提请有管辖权的法院指定独任仲裁员。

3. 对仲裁员的异议

1999 年允许当事人在合理的程序阶段对仲裁庭的组成人员提出质疑,异议的理由包括仲裁员不具有法定的资格要件,也包括在具体个案中存在各种可能影响仲裁独立性及公正性的利害关系。根据《印尼仲裁法》第 22 条的规定,如果有充分的理由和确凿的证据怀疑某仲裁员将不会独立地履行他/她的职责或在作出裁决时会有偏见,当事人有权提交回避请求;如果证实仲裁员与一方当事人或其各自的法定代理人存在家庭、经济或雇佣关系的,也可以提出回避请求。为了防止因仲裁员与当事人或代理人存在利益关联,以致影响案件裁决的独立性与公正性,《印尼仲裁法》及 BANI 等仲裁机构的仲裁规则都设置了仲裁员回避机制。具体而言,第 25 条设置了回避的具体程序,最终的决定权通常属于地区法院的院长,但如果当事人在仲裁协议中对仲裁程序的进行约定了特殊的规则,则当事人的约定可优先于法定条款。一旦确定某仲裁员应予回避,将导致其在组庭阶段已经赋予的职权归于终止,从而导致仲裁员的替换等问题。由此可见,在当事人约定了仲裁机构或约定适用某机构仲裁规则时,《印尼仲裁法》第 25 条充分尊重当事人在程序问题上的意思自治,对于仲裁员回避的具体程序,优先适用仲裁规则的特殊规定。例如,《BANI 仲裁规则》第 11 条规定:申请回避的当事人应当在知晓仲裁员身份之日起 14 日内以书面方式向 BANI 提出回避申请,并提交用于证实存在回避情形的书面文件;BANI 应当通过专门的团队审查当事人的回避申请并将审查结果及时告知被要求回避的仲裁员及各方当事人;如果被申请回避的仲裁员同意辞职,则应当按照同样的方式另行指定一名替换仲裁员;如果被申请回避的仲裁员拒绝回避,并且 BANI 的主席也认为回避申请没有充分的依据,则该名仲裁员应继续履行仲裁员职责。由此可见,在当事人选择 BANI 进行机构仲裁时,根据仲裁规则,回避申请的最终决定权将由 BANI 的主席行使,而不是由地区法院的院长行使,由此可防范司法对仲裁程序的不当干预,保持仲裁程序的自主性及独立性。此外,《印尼仲裁法》第 26 条规定,如果独任仲裁员或者首席仲裁员被替换,先前进行的全部庭审均应重新进行;如果被替换或回避的仲裁员并非独任或首席仲裁员,则仲裁程序可继续进行,只在仲裁庭成员之间重新进行争议的审理,以便提升争议解决的效率,避免无

限期地耗时和浪费仲裁资源。

(三)仲裁程序制度

1. 仲裁地的确定

在国际商事仲裁中,仲裁地是具有独特法律意义的专有概念,其不仅可作为确定裁决国籍的标准,还影响仲裁程序的法律适用,并直接关系裁决的跨国承认与执行,因此仲裁庭在进行仲裁程序前往往需要与当事人进行沟通,明确仲裁地在何处。实践中,仲裁地不同于一般意义上的开庭审理地点或仲裁庭合议的具体场所,约定了仲裁机构,并不当然意味着约定了仲裁地;类似地,约定了仲裁地,也并不当然意味着约定了仲裁机构。[1] 但是,考虑到诸多当事人因疏忽或有意而未在仲裁条款中明确仲裁地,为了防止争议发生后产生进一步的争议,《印尼仲裁法》第 37 条第 1 款规范了仲裁地的确定步骤,并授予了仲裁员及仲裁庭决定仲裁地的必要权力,该款规定:除非当事人自己已经确定仲裁地,仲裁地应由仲裁员或仲裁庭确定。该法第 37 条第 2 款还区分了法律意义上的仲裁地与地理意义上的庭审地:根据该款,如果认为必要,仲裁员或仲裁庭可以在仲裁地以外的其他地点进行开庭,以听取证人证言或进行合议。可见,仲裁地与开庭地是不同的概念。

2. 确定仲裁程序的基本原则

根据 1999 年《印尼仲裁法》第 31 条第 1 款,当事人可以在明示的书面协议中自由决定审理争议适用的仲裁程序规则,但不得与该法规定相抵触。据此,在具体的仲裁程序细节设定方面,如仲裁庭的组庭人数、审理方式、提交证据的截止时限等,当事人拥有较为充分的意思自治的空间,程序自治性原则为立法所认可。但与此同时,当事人的意思自治并非毫无限制,而是受制于仲裁地程序法中强制性条款的制约,仲裁立法中所确立的有关仲裁程序的强制性规定是正当程序原则的体现,也是当事人不得协议排除或加以突破的底线,其构成对仲裁程序的最低限度的要求,一旦违背,仲裁裁决将在司法审查环节遭遇撤销或拒绝执行。[2] 此外,《印尼仲裁法》第 31 条第 2 款还规定:“如果当事人自己没有确定应适用的仲裁程序,而仲裁员或仲裁庭已经按照第 12 条、第 13 条、第 14 条组成,则已经提交给仲裁员或仲裁

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〔1〕 参见杜新丽、宣增益主编:《国际私法》(第 5 版),中国政法大学出版社 2017 年版,第 342 页。

〔2〕 国际商事仲裁中意思自治原则的外部限制主要体现为国家立法层面的强行法及司法审查,具体区分为根本性限制与调整型限制,前者如诚实信用原则、公序良俗原则、公共秩序原则等,后者如禁止仲裁庭与某方当事人单独接触原则、一裁终局原则、仲裁庭由奇数仲裁员组成的规定等。参见林一:《国际商事仲裁中的意思自治原则——基于现代商业社会的考察》,法律出版社 2018 年版,第 119 页。

庭的全部争议均应按照本法之规定审理和裁决。”仲裁庭在进行仲裁程序时,也不得违反法律中的强制性规定,尤其是对于正当程序原则的基本要求;一旦违反,仲裁裁决可能被拒绝承认与执行。

在“希普纳/帕图哈诉佩鲁萨罕·利特里克·内加拉”案(Himpurna/Patuha v. Perusahaan Listrik Negara)中,希普纳(Himpurna)与帕图哈(Patuha)公司都是美国企业中美能源公司的子公司,这两家企业获得准许在印尼勘探和开发矿产资源,并与印尼公司佩鲁萨罕·利特里克·内加拉(Perusahaan Listrik Negara ,PLN)分别签订了两份独立的能源销售协议。之前印尼的矿产与能源部代表印尼政府批准了开发合同,但在项目完工前,由于总统签发禁令,两家子公司被迫中断了基础设施建设。最终,PLN 公司向两家子公司声明在禁令解除后再继续履约购买电力,但由于协商未成,两家子公司对 PLN 公司提出了仲裁请求。本案仲裁程序引发了较为激烈的争议,仲裁地从开始的印尼雅加达迁移至后来的荷兰海牙,印尼 PLN 公司指定的仲裁员普利亚特纳(Priyatna)教授遭到政治胁迫,受到外界公众乃至全球仲裁界的广泛关注。尽管印尼政府一再否认绑架事宜,但事后涉案仲裁员向外界披露了此事。在普利亚特纳教授被胁迫期间,另外两名仲裁庭组成人员继续进行仲裁程序并根据印尼法律作出了裁决。然而,这两名仲裁员却忽视了仲裁程序的准据法(印尼法),该法并不允许仲裁庭在仅开展一次庭审的基础上作出缺席裁决。最终,尽管胜诉方当事人持此裁决在印尼法院注册登记并申请承认与执行,印尼法院根据自然公正的基本程序原则拒绝承认与执行。[1] 此案仲裁裁决遭到理论与实务界的严厉批评,暂且无论一国政府通过政治胁迫手段对仲裁员实施人身威胁,单就仲裁程序本身来看,仲裁庭不顾当事人的约定、违背仲裁协议的明示条款,在约定的仲裁地以外进行仲裁程序即已构成程序违反,而在两名被申请人都缺席的前提下,单独凭借一次单方面的口头庭审就作出对缺席方不利的最终裁决,无论如何都不符合正当程序原则的要求,也正基于此,才导致裁决被拒绝承认与执行。

3. 证据规则

证据规则是指在举示证据、收集证据、核实证据、采信证据、运用证据时必须遵循的准则,包括证据能力、证明力、取证、质证、认证等一系列规则。与诉讼中的证据

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〔1〕 See Gatot Soemartono, “Interpretation and Application of the New York Convention in Indonesia”, in G. A. Bermann ed. , *Recognition and Enforcement of Foreign Arbitral Awards*, Springer International Publishing, 2017, p. 488.

规则相比,国际商事仲裁的证据规则在遵循自然公正原则的前提下,具有明显的灵活性,其主要特征如下:第一,尊重当事人意思自治;第二,仲裁庭具有广泛的权力;第三,遵守正当程序要求。[1] 尽管学理上对仲裁庭是否必然遵循仲裁地的诉讼证据规则存在争论,但在仲裁实践中,由于仲裁立法及仲裁规则本身对证据的提交、获取、使用、认定欠缺一套单独的规则体系,因此仲裁庭援用法院的诉讼证据规则并不罕见。根据1999年《印尼仲裁法》第4章的规范,印尼仲裁员有义务遵守在印尼法院中所通行的诉讼证据规则。如前文所言,印尼受到荷兰的影响,属于典型的大陆法系国家,因此其证据规则及开示(discovery)程序远不及普通法系的司法与仲裁实践中那么发达。一般而言,根据证明责任分配的基本原理,各方当事人只有义务对自身的陈述提供证据加以佐证。根据《印尼仲裁法》第46条第2款的规定,仲裁员或仲裁庭应当向当事人保障最后陈述的机会,使他们有机会在特定期限内以书面方式解释各自的立场,并提交必要的证据以支撑自己的主张。言外之意,除非存在证明责任倒置的法定情形,一方当事人没有义务对另一方当事人的肯定或否定性陈述承担证明责任。

4. 仲裁庭指定的专家

《印尼仲裁法》第49条与第50条规定了对证人证言的收集与运用程序,其中包括对专家证人和事实证人的运用。该法第37条第3款明确,对证人的盘问应当按照民事诉讼法的有关条款进行,这包括了《荷兰民事诉讼法典》(Reglement op de Rechtsvordering)、《荷兰民法典》(Burgerlijk Wetboek)、适用于爪哇与马都拉的商法(Herziene Inlandsch Reglement)以及适用于其他群岛的商事程序法(Rechtsreglement Buitengewesten)。就印尼的历史而言,上述立法文件中规定的证据规则既适用于诉讼,也适用于仲裁程序;《印尼仲裁法》第37条第3款只是对既有实践的进一步确认。事实上,仲裁庭具体适用这些证据规则时,比法院更灵活,裁量权的空间也更宽泛,对立法中的部分形式要求可以变通处理。

例如,《印尼仲裁法》第50条规定:仲裁员或仲裁庭可以请求一名或多名专家证人提供必要的协助,出具任何涉及案件特定事项的书面报告;当事人应当提供专家证人认为必要的任何细节和信息;仲裁员或仲裁庭应当将专家证人出具的任何书面报告的副本转交各方当事人,以便当事人给出书面答复;当专家证人的报告不够明确时,根据任何一方当事人的请求,仲裁庭可命令专家证人出庭进行口头作证

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〔1〕 参见邓瑞平主编:《国际商事仲裁法学》,法律出版社2010年版,第287~288页。

并接受询问。可见,立法的规定多采用“应当”等措辞;而相比之下,机构仲裁规则更为灵活。例如,《BANI 仲裁规则》第 23 条第 4 款允许仲裁庭自行决定证人的口头宣誓程序是否必要。该款规定:“在仲裁庭认为必要或任何一方当事人请求时,可以传唤专家证人或事实证人;仲裁庭可以要求此类证词以书面陈述的形式呈现;在仲裁庭自己认为必要时,或经任何一方当事人申请时,仲裁庭应当决定是否要求证人进行口头作证。”可见,与法律规定中的“应当”措辞不同,《BANI 仲裁规则》多采用“可以”等措辞,赋予仲裁庭在证据事项上较大的自由裁量权,保证程序的灵活性。正如前文所言,就程序的具体事项而言,规定在当事人选择的仲裁规则与立法条款不同时,可优先适用仲裁规则。值得一提的是,根据《荷兰民事诉讼法典》第 1905 条的规定,仅一名证人的口头证词不应当被采信;除非与其他辅助证据共同使用。此外,《荷兰民事诉讼法典》第 1910 条规定,亲属以及因离婚而产生争议的夫妻之间不能相互作证。这些规定在仲裁程序中也应予以适用。

5. 临时性保全措施

仲裁的临时性保全措施,是指由法院或仲裁庭发布的,旨在防止某一方当事人利用仲裁程序中的优势地位转移、隐匿或销毁证据或财产,避免仲裁程序因一方当事人的行为而无法顺利进行的具体举措。〔1〕 基于其功能、目标、手段的不同,临时性保全措施也被称为中间措施,具体涵盖了行为保全、财产保全、证据保全等类型。《印尼仲裁法》第 32 条既允许仲裁庭作出临时裁决(provisional award),也允许作出中间决定(interlocutory decision),所涉内容包括了裁决前的财产扣押及冻结、货物处置及变现、易腐易损货物的销售等。不过,仲裁庭并不能主动依职权发布临时措施,而只能依据当事人的请求进行。仲裁庭所作出的临时裁决或中间决定能否向法院申请承认与执行,也尚且存疑,主要顾虑在于可强制执行的对象通常仅限于具有拘束力的最终裁决。就性质而言,仲裁庭或仲裁机构作出的临时措施决定,不同于印尼国内法院发布的临时措施,后者可以根据《印尼民事诉讼法》中的执行程序申请强制执行,而前者所作出的中间裁决或临时命令却不受《印尼民事诉讼法》中执行程序的调整。这就会导致当事人对仲裁庭发布的临时救济命令的有效性产生质疑。严格意义上,这种临时措施也不能被称为《印尼仲裁法》中的“仲裁裁决”,因此难以适用《纽约公约》在其他成员国申请承认与执行。

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〔1〕 参见李晶:《国际商事仲裁中临时措施在中国的新发展——以民诉法修改和仲裁规则修订为视角》,载《西北大学学报》(哲学社会科学版)2014 年第 6 期。

不过,《BANI 仲裁规则》第 3 条第 2 款的定义打消了此种顾虑。根据该条款,仲裁裁决应当包括仲裁庭所作出的任何决定,无论是临时性的抑或终局性的,均属于裁决的范畴之列。通常为了防范一方滥用临时措施而对另一方的合法权益造成损害,法院有权力命令临时措施的申请人提供银行担保(bank guarantee);但仲裁庭无权发布中间裁决要求当事人提供担保,原因是中间裁决的调整事项范围仅限于为了推进仲裁程序所发布的具体保全事宜。[1] 而且,由于印尼没有采纳联合国国际贸易法委员会颁布的《示范法》[2],仲裁庭作出的临时措施在境外被申请承认与执行时,存在一定程度的不确定性,能否被承认与执行主要取决于法院地法的立场。

6. 仲裁第三人

社会纠纷的复杂性导致多方当事人之间的争议在仲裁实践中遭遇尴尬,仲裁协议相对性的现实障碍,催生了学者们对仲裁第三人制度的设想。[3] 《印尼仲裁法》允许第三人加入仲裁程序。该法第 30 条规定:仲裁协议以外的第三人可以参加和加入仲裁程序,但前提是他们对本案有相关利益,且他们的加入经过了争议各方当事人及审理争议的仲裁员或仲裁庭的同意。

7. 仲裁文书的送达

正如有学者所比喻的,如果将整个仲裁程序视为一条珍珠项链,申请仲裁、组成仲裁庭、提交答辩、提出反请求、开庭、合议、作出裁决等事项如同该条项链上一颗颗的珍珠;而送达无疑是串联这些程序环节的线条。[4] 无论是在诉讼程序中,还是在商事仲裁程序中,文书的送达都是在当事人与仲裁庭、仲裁机构之间沟通的关键步骤,是推进程序的必要环节。就其定义而言,所谓商事仲裁程序中的送达,是指国际商事仲裁程序的当事人、仲裁庭或仲裁机构将有关的仲裁资料交给其他当事人的活动。从现实意义来看,仲裁送达最直接的目的是将仲裁中的文书和材料送给

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〔1〕 See Karen Gordon Mills, “National Report for Indonesia (2016)”, in Jan Paulsson and Lise Bosman eds. ,*ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, p. 30.

〔2〕 1985 年《示范法》的临时措施条款在 2006 年被修改,为了保持贸法会通过的法律文件的一致性,贸法会于 2010 年修订其仲裁规则时也对临时措施制度进行了修订和完善,进一步扩大仲裁庭的权力。参见赵健:《联合国国际贸易法委员会仲裁规则修改问题初探》,载黄进、肖永平、刘仁山主编:《中国国际私法与比较法年刊》(2010·第 13 卷),北京大学出版社 2011 年版,第 373 页。

〔3〕 参见宋连斌、杨玲:《论仲裁第三人》,载《仲裁研究》2005 年第 3 期。

〔4〕 参见杨玲:《论国际商事仲裁程序中的送达问题》,载黄进、肖永平、刘仁山主编:《中国国际私法与比较法年刊》(2010·第 13 卷),北京大学出版社 2011 年版,第 378 页。

受送达人,使他们了解材料的内容,便于参与仲裁程序,行使答辩权、反请求权、被代理权、指定仲裁员和陈述案件等权利,从而推进仲裁程序的进行。关于送达的具体程序,机构仲裁中的送达取决于各机构仲裁规则的规定。而对临时仲裁的送达问题,1999 年《印尼仲裁法》第 8 条作出了非常明确且具体的规定。该条规定:在发生争议的情况下,申请人应当以挂号信、电报、电传、传真、电子邮件或快递等方式向被申请人送达仲裁通知。仲裁通知应至少列明以下内容:各方当事人的名称与地址;提及可适用的仲裁条款或仲裁协议;作为争议标的的协议或事项;仲裁请求的基础及所主张的索赔金额(若有);期望的解决方法;以及当事人之间达成的关于仲裁员人数的协议,或者如果未曾达成过此类协议,申请人可以就仲裁员的总体人数给出提议,但所提议的数量必须为奇数。

(四)仲裁裁决制度

1. 裁决的类型

1999 年《印尼仲裁法》第 5 章全面而系统地规定了仲裁裁决的类型、裁决的作出、裁决的形式要求、裁决所适用的法律及如何根据和解协议而作出裁决等问题。从第 5 章的标题可知,立法不仅承认仲裁庭作出的裁决,也认可仲裁机构所作出的有约束力的意见。具言之,根据《印尼仲裁法》第 52 条、第 53 条的规定,在争议产生之前,仲裁协议的当事人可以向印尼的仲裁机构(注意:不是仲裁庭)请求发布一份有约束力的法律意见,该意见既可能涉及某一法律要点,也可能关系某一合同条款的解释;此类意见不受到任何性质的上诉审查。事实上,发布法律意见是对仲裁机构争议解决服务的业务拓展;但在实践中,这项条款几乎从未启用过,属于实践效果尚待考察的“休眠条款”;绝大多数案件是通过裁决的方式结案的。对裁决的区分主要以作出时间为标准,具体分为最终裁决作出之前所作的裁决以及最终裁决。《印尼仲裁法》没有针对部分裁决或先行裁决进行专门规定。《BANI 仲裁规则》第 26 条允许仲裁庭发布部分裁决(partial award),然而并没有对部分裁决、临时裁决(interim award)、中间裁决(interlocutory award)等概念的使用进行准确的界定。[1]

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〔1〕 在印尼,能否对中间裁决、临时裁决向法院申请强制执行存在争议。尽管实践中尚未检验过这一问题,但从法律规范层面来看,通常只有具有终局性的、有约束力的裁决方可得到法院的强制执行。此外,《印尼仲裁法》第 32 条第 1 款的措辞非常有限,只有出于便利仲裁程序顺利进行的宗旨,为临时扣押财产、变卖新鲜货物、提存第三方货物等目的,方可作出中间裁决或临时裁决。See Karen Gordon Mills, “National Report for Indonesia (2016)”, in Jan Paulsson and Lise Bosman eds., *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, p. 33.

2. 裁决的作出

根据《印尼仲裁法》第57条的规定,自仲裁庭审终结后,仲裁庭应当在30日内作出裁决。当仲裁庭由独任仲裁员组成时,其对案件管理程序的控制直接关系争议解决的耗时;而当仲裁庭由三名或更多的仲裁员组成时,仲裁庭首先需要对争议的事实与法律问题进行合议与讨论,并在此基础上方可形成裁决,因此可能耗时更长。

如前文所言,在机构仲裁的情形下,允许当事人约定某一仲裁机构的同时适用该机构的仲裁规则,且该仲裁规则的适用优先于《印尼仲裁法》。至于仲裁立法与仲裁规则的分工,曾有学者专门予以详细阐述:仲裁规则是规定如何通过仲裁的方法解决当事人之间争议的程序性规则,其具有契约性,仅在当事人选择时才对当事人及仲裁庭具有约束力,且当事人选用某机构仲裁规则时也可适当地加以修改;但仲裁规则的适用及修改不得违反国家法律的强制性规定。而国家的仲裁立法所规范的是在该国境内进行的一切仲裁活动,规范的对象包括仲裁机构的设立及运行、仲裁协议的有效性及执行、仲裁程序中的要求,以及司法与仲裁之间的关系等。仲裁立法的适用具有法定性,无须当事人对其进行选择。在二者的适用关系及逻辑顺序方面,仲裁法可以作为仲裁规则的重要补充,如果当事人的仲裁协议或者仲裁规则未能对争议所涉的具体仲裁事项作出规定或规定不明确的,可以通过相关国家的国内仲裁立法加以补充与完善。〔1〕

《印尼仲裁法》自1999年施行以来,截至2019年1月1日,未曾进行过修订,难免与国际主流趋势及仲裁从业实践产生一定的差距。相比之下,以《BANI仲裁规则》为代表的机构仲裁规则更与时俱进,应时代需要而适时进行改进和完善,修订频率远高于《印尼仲裁法》。也正因如此,当事人多选择在BANI进行机构仲裁,并适用《BANI仲裁规则》。《BANI仲裁规则》在仲裁裁决的作出方面设置了较为灵活的规定,更为柔性化,更具亲和力,有利于发挥仲裁的比较优势,吸引当事人选择仲裁。例如,该规则第25条允许仲裁庭对裁决的作出时限进行延长,但必须征得双方当事人的同意。值得指出的是,当多名仲裁员对涉案争议持有不同意见时,往往需要进行投票或表决,从而由多数意见决定争议的处理结果。由于《印尼仲裁法》第8条要求仲裁庭的组成人员必须为奇数,因此达成多数意见通常不存在实质障碍。但作为极端情况,不排除多名仲裁员无法达成多数意见、各持己见、相持不下的

〔1〕 参见赵秀文:《论仲裁规则的性质及其与仲裁法之间的关系》,载《河北法学》2008年第6期。

情况;此时,《BANI 仲裁规则》第 27 条规定应以首席仲裁员的意见作为最终的裁判结果。同时,《印尼仲裁法》第 54 条第 1 款第 7 项允许仲裁庭内部存在意见分歧时每名仲裁员均可将各自的不同意见(dissenting opinion)写入裁决中,从而保证了意见的多元化和决策的民主化。根据《印尼仲裁法》第 58 条及《BANI 仲裁规则》第 34 条的规定,在裁决作出后的 14 日之内,如果发现裁决书中存在一些行政性、文字性、计算类、打印错误或笔误,或者裁决中对当事人提出的某些仲裁申请未作处理(漏裁),则当事人有权向仲裁庭提出更正或补充申请。[1] 这一条款为对裁决非因实体原因导致的形式错误进行更正提供了可能。

3. 裁决的形式

仲裁裁决,简言之,即仲裁员就争议作出的最终认定结果的书面文件记录。在很大程度上,它与法官作出的司法判决并无本质的区别。相应地,作为一份被法律赋予确定力、拘束力、执行力的裁决书,它应当满足特定的形式要求,符合立法所规定的书面要素。《印尼仲裁法》第 54 条第 1 款规定了仲裁裁决书所必须涵盖的事项:(1)措辞为"为了基于对万能的神的信仰的正义"的裁决标题;(2)各争端当事方的全称及其地址;(3)对争议所涉事项的简要描述;(4)各方当事人所持的立场;(5)仲裁员的全称及其住址;(6)仲裁员或仲裁庭关于全部争议的考虑及其结论;(7)仲裁庭内部存在意见分歧时每名仲裁员各自的意见;(8)裁决的命令;(9)作出裁决的地点和日期;以及(10)仲裁员或仲裁庭的签字。《BANI 仲裁规则》也规定了裁决书的形式要求,其虽然没有纳入《印尼仲裁法》第 54 条的全部要件,但基本上是与《印尼仲裁法》的规定相符的。《BANI 仲裁规则》第 29 条特别规定,除非当事人另有约定,仲裁裁决必须以书面形式作出,且应当陈述裁决所依据的理由。[2] 应特别述及的是,《印尼仲裁法》第 54 条第 2 款认可了缺员仲裁裁决的合法性。所谓缺员仲裁,通常是指,在仲裁过程中,仲裁庭的某一成员未参加案件审理、合议讨论或裁决签字的情况(多是出于仲裁员阻挠或拖延仲裁程序的目的)。对于国际商事

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〔1〕 See Karen Mills, "Arbitration in Indonesia", http://www.karimsyah.com/imagescontent/article/20050922160918.pdf, last visited on July 19, 2018.

〔2〕 之所以要求仲裁裁决书必须陈述所依据的理由,主要有以下几方面考虑:其一,当事人有权知道他们为何胜负;其二,有充分且正确的裁判理由和原因说明,可以减少败诉方的不满并带来教育意义;其三,给出原因的裁决通常更为容易得到尊重和执行;其四,要求仲裁员对自己的决定给出原因,可以强迫仲裁员客观、中立,减少偏见,有助于思维自律,总体上是一种良好的机制;其五,裁决书说理充分与否,也往往可以作为评价仲裁员能力水平、自信、思维的有效标准。参见杨良宜:《国际商务仲裁》,中国政法大学出版社 1997 年版,第 518 页。

仲裁规则中能否设置缺员仲裁制度以及缺员仲裁的合法性,学界曾有过争论,争论主要是从仲裁效率价值与当事人意思自治原则、当事人平等原则、仲裁庭合议原则之间的冲突进行辩论的。不过,总体上国际仲裁中对缺员仲裁制度逐渐趋于宽容。[1] 根据《印尼仲裁法》第54条第2款的规定,当仲裁庭有三名仲裁员时,如果一名仲裁员由于疾病或死亡而没有签字,裁决书的效力不受影响,但裁决书必须说明仲裁员没有签字的原因。

4. 裁决的法律适用

在程序问题解决之后,仲裁庭的主要任务是解决争议的实体问题。在国际商事仲裁中,实体问题的法律适用与法院确定涉外合同准据法的过程较为相似。首先,意思自治原则支持当事人自由选择争议实体问题的准据法,可选择的范围包括国际条约、国际惯例、某国国内法。其次,在当事人未选择法律时,通常允许仲裁庭决定纠纷实体事项应适用的法律,仲裁庭确定准据法的思路主要有两类:一是依据冲突规范的指引确定仲裁准据法;二是根据案件情况直接确定实体法。[2] 最后,除了依法仲裁外,仲裁庭还可以在各方当事人同意的前提下适用公允和善良原则(fairness and good faith)进行友好仲裁(amicable arbitration),此时仲裁庭的裁判方式更为灵活,而不必严格拘泥于法律条款的解释。[3] 1999年《印尼仲裁法》第56条就裁决应适用的法律作出了规定。根据该条的规定,仲裁员或仲裁庭应当依据相关法律规定或公平公正之原则作出裁决;当事人有权选择适用于解决他们之间可能产生或已经产生的争议所适用的法律。可见,印尼仲裁立法不仅认可了依法仲裁,还允许友好仲裁,在法律适用方面充分尊重当事人意思自治原则,并肯定了仲裁庭在确定准据法方面的重要角色,这符合当前国际仲裁实践的整体趋势。

5. 仲裁中的和解

根据《印尼仲裁法》第45条第2款的规定,如果当事人能够在仲裁程序的进行

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〔1〕 参见池漫郊:《缺员仲裁的合法性》,载《法学研究》2007年第6期;齐湘泉:《国际商事争议缺员仲裁合法性质疑》,载《比较法研究》2011年第5期;陈延忠:《国际商事仲裁缺员仲裁庭裁决效力问题研究——马绍尔群岛第一投资公司申请承认与执行伦敦海事裁决案述评》,载《国际经济法学刊》2009年第1期。

〔2〕 在依据冲突规范确定仲裁准据法的方法中,又可分为几类具体做法:适用仲裁地的冲突规范;适用仲裁庭认为合适的其他冲突规范;适用仲裁员本国的冲突规范;被申请承认和执行裁决地国家的冲突规范;与争议有最密切联系性国家的冲突规范等。参见霍政欣:《国际私法》,中国政法大学出版社2017年版,第339页。

〔3〕 Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 2003, p. 127.

过程中自行或经仲裁庭主持而达成和解方案(settlement),则仲裁庭可以应当事人之请求而起草一份确认其和解协议的裁决,即所谓的“和解裁决”(consent award)。[1] 不过,除非在有管辖权的法院进行过登记注册,否则原则上此类和解裁决并不具有与最终裁决同等的拘束力和强制执行力。如果当事人要求仲裁庭将和解协议制作成裁决书,则该裁决书与其他仲裁裁决书无异,必须满足《印尼仲裁法》第54条规定的各项条件,尤其是必须明确陈述裁决据以作出的理由,否则将对其可执行力产生消极影响。就时间点而言,当事人不仅可以在仲裁程序进行过程中请求仲裁员协助展开和解谈判,还可以在裁决作出后进行谈判。但无论如何,即便在谈判过程中,任何仲裁员都不能作为当事人的代理人,而必须始终保持中立和独立。

(五)外国仲裁裁决的承认与执行

如前文所言,仲裁早已成为被印尼官方认可且颇受当事人青睐的商事争议解决方法。在国际商事争议解决中,由于仲裁相比于诉讼更少受到当地公权力的干预和介入,因此外方当事人对仲裁的信赖度较高,通常会选择在合同中订入仲裁条款。仲裁实践的日积月累给相关理论研究提供了丰富的素材,针对印尼仲裁法的学术论著亦层出不穷。[2] 但当事人选择仲裁的目的不仅仅是追求仲裁庭就其争议作出一份可定分止争的裁决,更重要的是确保该裁决书能够被当事人所履行或被法院所强制执行。有学者指出,鉴于所有仲裁地在印尼的仲裁均被视为印尼国内仲裁,因此只有那些在该群岛以外作出的裁决才被归类为国际仲裁裁决,而不考虑当事人的国籍、争议标的所在地、案件所适用的准据法等因素。[3] 1999年《印尼仲裁法》虽然没有对“仲裁裁决”进行定义,但对“国际仲裁裁决”作出了明确定义。其第1条第9款规定:“‘国际仲裁裁决’指的是由仲裁机构或仲裁员个人在印度尼西亚共和国法域之外所作出的裁决,或者由仲裁机构或仲裁员个人按照印度尼西亚

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〔1〕 参见赵秀文:《国际商事仲裁法》(第3版),中国人民大学出版社2012年版,第313页。

〔2〕 See Mills Karen, *Arbitration Procedures in Indonesia*, *in Arbitration Procedures in Asia*, London, Sweet & Maxwell, 2001; Mills Karen, “Arbitration in Indonesia”, in Michael Moser ed., *Arbitration in Asia: A Compendium*, *Hongkong*, Butterworths Asia, 2001; Mills Karen, “Dispute Resolution in Indonesia”, in Michael Pryles, ed., *Dispute Resolution in Asia*, 2nd edition., Hague, Kluwer Law International, 2006; Mills Karen and Rakhmat Ilman, “Indonesia”, in *IBA Arbitration Guide*, 2013; Mills Karen and Tobing Priyanka, “Indonesia”, in *World Arbitration Reporter: International Encyclopedia of Arbitration Law and Practice*, Juris Publishing, 2012.

〔3〕 Andreas Respondek, *Asia Arbitration Guide*, Respondek & Fan Pte Ltd., Singapore, 2011, p. 141.

法律作出但是被视为国际仲裁裁决的裁决。”可见,地域标准(仲裁地)是界定外国仲裁裁决的首要标准,只有以印尼境外地点为仲裁地所作出的裁决才能被视为外国仲裁裁决。不过,从仲裁司法审查实践来看,仲裁地并非界定裁决涉外因素的唯一标准。在“佩塔米纳诉PT·利特里克石油公司案”(Pertamina v. PT Lirik Petroleum)中,印尼最高法院将根据《国际商会仲裁规则》在雅加达作出的裁决也识别为外国仲裁裁决,理由在于ICC是一家总部位于法国巴黎的国际仲裁机构,其仲裁规则天然具有国际性。[1] 据此可见,仲裁程序适用的规则,也是印尼法院界定外国仲裁裁决的重要辅助标准。

从承认与执行外国仲裁裁决的条件来看,外国仲裁裁决必须同时符合下列要求,才有可能得到印尼法院的承认与执行:其一,裁决作出地所在国应当与印尼就国际仲裁裁决的承认与执行签订了双边或多边条约(条约基础);其二,裁决事项应当属于印尼法律认定为商事法律关系的范畴(争议事项具有可仲裁性);其三,裁决仅限于印尼领土内执行,且不与公共秩序相冲突(公共秩序保留);其四,国际仲裁裁决在印尼执行必须获得雅加达中央法院签发的执行令状(先决程序);其五,印尼政府作为国际仲裁裁决一方当事人的,应由印尼最高法院签发执行令状,并由雅加达中央法院予以执行(更高级别的执行令状)。[2] 近年来,国际仲裁裁决在印尼申请承认和执行的情形有明显的增加趋势;2007年仅有1份国际仲裁裁决申请承认,至2013年已达15份。[3]

就法律渊源而言,印度尼西亚是1958年《纽约公约》的成员国,并且其在加入公约之际同时提出了商事保留与互惠保留。1981年8月5日,印尼正式批准了《纽约公约》,总统为此而签发了1981年第34号政令。根据加入《纽约公约》之际提出的保留声明,印尼法院对公约的适用存在两方面限制:首先,印尼将在互惠的基础上适用《纽约公约》,这意味着其只有可能按照公约承认和执行在另一个缔约国领土内作出的裁决;其次,印尼法院只有义务承认和执行对与特定类型的法律关系有关的争议所作出的裁决,这些争议无论是否具有契约性,根据印尼法律必须具有商事性质。因此只有在《纽约公约》160多个成员国内作出的具有商事性质的仲裁裁

〔1〕 Decision of the Supreme Court No. 904 K/Pdt. Sus/2009, 9 June 2010.

〔2〕 See PNB Jakarta, “International Arbitration Awards: Enforcement in Indonesia”, https://www.indonesia-investments.com/business/business-columns/international-arbitration-awards-enforcement-in-indonesia/item5500, July 23, 2018.

〔3〕 陈玉云:《印度尼西亚纠纷解决首选方式:仲裁》,载《人民法院报》2016年6月3日,第8版。

决,才有可能根据印尼仲裁法得到执行。对于 1981 年第 34 号总统政令与《纽约公约》之间的关系,曾有法官在具体案件中专门进行过阐述。在“PT 尼扎瓦诉保加利亚瓦尔纳航海公司案”(PT Nizwar v. Navigation Maritime Bulgars Varna)中,当事人向印尼最高法院申请签发外国仲裁裁决的执行令(writ of execution)。然而,印尼最高法院拒绝对本案裁决签发执行令,理由是,在 1981 年第 34 号总统政令中并没有相关的实施条例,因此即使印尼已经批准了《纽约公约》,印尼法院也没有义务受到公约中的条款拘束。该判决受到了印尼国内外仲裁界的广泛批评,因为其对总统政令的解读过于严苛。具体而言,讨论的焦点集中在《纽约公约》在印尼境内是否一项可自行执行的条约(self – executing convention);如果是自动适用的,即使印尼立法机关没有将之转化为国内立法或条例,法院也应当受到公约的约束,而不应当以各类借口拖延承认和执行。[1] 为了打消外界的顾虑,消除外国仲裁裁决在印尼法院承认与执行的不确定性,印尼最高法院于 1990 年发布了第 1 号条例,针对外国仲裁裁决在印尼法院的承认与执行设置了相应的条件与程序,规范十分详尽细致。根据该条例,当外国仲裁裁决同时满足三项要求时,印尼法院将予以承认与执行:其一,裁决必须是在与印尼同为某相互承认与执行仲裁裁决的双边或多边公约作出的(不过,印尼并没有加入或参与任何相互承认与执行仲裁裁决的双边条约,也没有加入相互承认与执行法院判决的双边条约,因此只有在其他《纽约公约》成员国境内作出的裁决才有可能在印尼境内得到承认与执行);其二,裁决的诉因仅限于根据印尼法律属于商法事项范围内的争议;其三,裁决不应当违反印尼法律、公共秩序或公共政策。[2]

至于在印尼申请承认与执行外国仲裁裁决的具体程序,则适用《印尼仲裁法》的规定。具言之,承认与执行外国仲裁裁决的申请应直接提交至雅加达中央地区法院,该法院是《印尼仲裁法》赋予在国际仲裁案件中签发执行许可令的管辖法院。但是,当印尼政府作为案件的一方当事人时,只有印尼最高法院拥有签发许可令的管辖权。这种规定是对 1999 年《印尼仲裁法》颁布之前已有实践的进一步确认。事实上,早在印尼最高法院于 1990 年颁布的第 1 号条例中,就对执行外国仲裁裁决设定了级别管辖方面的规则。根据 1990 年的第 1 号条例,只有对于在与印尼存在

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〔1〕 See Noah Rubins, “The Enforcement and Annulment of International Arbitration Awards in Indonesia”, *American University International Law Review*, Vol. 20, 2005, pp. 359 – 368.

〔2〕 The Supreme Court Regulation No. 1 of 1990 concerning the Procedure of the Enforcement of Foreign Arbitral Award, issued on 1 March 1990.

多边或双边条约关系的国家领土之内的裁决,当事人才能够向印尼法院申请签发执行许可令;而出于此种规定,在当事人向印尼法院申请承认与执行之前,需要先取得印尼派驻裁决作出地国的外交代表出具一份证书,借以证明裁决作出地国与印尼存在条约关系。此外,在申请执行令之前,仲裁裁决还必须在雅加达中央地区法院书记员处进行登记注册,但《印尼仲裁法》并没有对法院签发执行许可令设定确定的时限。〔1〕

总体来看,在外国仲裁裁决的承认与执行方面,1999 年《印尼仲裁法》规定的制度与实践具有如下 3 个方面特征:其一,从实体角度来看,只有国际仲裁裁决不违反公共秩序时,才可在印尼得到执行,而从程序角度来看,国际仲裁裁决只有获得雅加达中央地区法院签发的执行令后才可在印尼执行;其二,根据《印尼仲裁法》第 62 条的规定,在申请承认与执行外国仲裁裁决的案件中,法院只审查程序与形式问题,而不审查裁决的实体问题,也不重新评估裁决中运用的证据、判决;其三,只有法院对仲裁裁决作出否定性评价时,此类决定才可上诉。具体而言,当法院决定承认与执行外国仲裁裁决时,该项认定不容上诉;而当法院决定拒绝承认与执行外国仲裁裁决时,当事人可以对此提起上诉。不过,通过观察法院对仲裁实施司法审查的实践,有学者注意到,印尼法院基于公共秩序而对国际仲裁裁决实施司法审查的范围呈现出扩张的趋势,很多法院不但审查仲裁庭在事实认定方面的错误,还对可能涉及公共政策违反的事实基础进行全面且独立的重新审理。这种司法审查扩张的趋势很有可能对裁决的终局性及可执行性造成消极后果。〔2〕 事实上,这种对公共政策做扩张解读的做法,不但违背《印尼仲裁法》的初衷,也与《纽约公约》的基本精神相悖。在仲裁裁决的执行方面,《纽约公约》第 3 条确立了仲裁独立性原则,尽管允许国内法院进行司法介入,但此种介入以协助仲裁程序为目标,且属于有限的适度介入。〔3〕

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〔1〕 虽然《印尼仲裁法》没有对法院签发外国仲裁裁决执行许可令设定时限,但从实践来看,印尼法院对外国仲裁裁决签发许可令的耗时比国内裁决更短,执行效率更高,这反映了印尼法院支持国际商事仲裁的整体趋势。See Karen Gordon Mills, “National Report for Indonesia 2016”, in Jan Paulsson and Lise Bosman eds., *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, p. 44.

〔2〕 See Fifi Junita, “Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia”, in *Journal of International Arbitration*, Vol. 29, No. 4, p. 405.

〔3〕 《纽约公约》第 3 条规定:各缔约国应承认公断裁决具有拘束力,并依援引裁决地之程序规则及下列各条所载条件执行之。承认或执行适用本公约之公断裁决时,不得较承认或执行内国公断裁决附加过苛之条件或征收过多之费用。

三、印度尼西亚现行仲裁法制的主要特色

（一）在传承荷兰法典的同时追求创新

正如有些学者所观察到的，各国对仲裁法进行现代化的动机各不相同。在具有悠久仲裁传统和仲裁实践比较发达的国家（如英国、法国），立法机关颁布新的立法多是对已有的裁判经验进行法律编纂，从而消除法律渊源过于分散所引发的适用风险，巩固并促进其国际仲裁中心地位并强化竞争力；而对另一些国家而言，颁布、修订并完善仲裁立法，是创造自由而友好的投资环境所需要的。[1] 就印尼而言，1999 年《印尼仲裁法》的出台，取代了旧的仲裁法规，成为印尼仲裁制度的基本法律。该法案的制定，不仅是为了履行根据《纽约公约》所承担的国际义务，也是为了借助仲裁法改革的机遇来减轻法院的审判压力。值得一提的是，尽管这部立法保留了《荷兰民事诉讼法典》的若干规定，但其在传承的同时也有所创新：首先，该法鼓励当事人选用 ADR，以立法认可了多元化纠纷解决方式的合理运用；其次，根据这部立法的设计理念，一旦当事人选择了仲裁，则法院的介入和干预将受到严格的控制；最后，该法与其他国家的仲裁立法相似，也区分国内仲裁与国际仲裁，但其区分主要采用地域标准，无论当事人的国籍、争议标的物所在地、案件适用的准据法如何，凡是以印尼境内地点作为仲裁地的仲裁案件均被归为国内仲裁，只有那些在印尼领土外进行的程序才被视为国际仲裁。

就可仲裁事项而言，《印尼仲裁法》规定，仲裁程序适用于商业领域的纠纷处理。商业领域可包括商事、银行、金融、资本投资、工业和知识产权等领域。此外，为吸引外国投资，印尼与许多国家签订了一系列双边投资条约，明确约定仲裁为条约中纠纷解决的首选方式。可见，在印尼仲裁法律实践中，可仲裁事项不仅限于平等的私人间商事纠纷，还延伸至外国投资者与东道国政府间的跨国投资争端。

（二）《印尼仲裁法》并非以《示范法》为蓝本制定的立法

特别需要注意的是，《印尼仲裁法》并不是建立在《示范法》的基础上，且立法者无意将《示范法》作为蓝本进行修订，这就导致《印尼仲裁法》与《示范法》存在诸多差异：第一，印尼不认可通过并入方式（incorporation）或援引方式（reference）订立的仲裁条款，除非有明确的证据显示当事人确已阅读、知悉并同意从主合同以外的其他文件中所并入的仲裁条款；而《示范法》第 7 条第 6 款则认可此类并入式仲裁协

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〔1〕 参见张志：《仲裁立法的自由化、国际化和本土化——以贸法会仲裁示范法为比较》，中国社会科学出版社 2016 年版，第 60 页。

议。第二,在双方当事人之间订有仲裁协议时,《印尼仲裁法》仅规定法院在此时不具有审理案件的管辖权,但没有要求法院命令当事人执行仲裁协议,也没有设置更为有效的机制督促当事人按仲裁协议申请仲裁;而《示范法》第 8 条第 1 款则规定,在一方当事人就仲裁协议中约定仲裁的事项向法院提起诉讼时,法院应当让当事人诉诸仲裁,除非仲裁协议无效或不可执行。第三,《印尼仲裁法》中没有赋予仲裁庭在当事人就管辖权提出异议时的决定权,其明示条文中缺乏自裁管辖权原则;而《示范法》第 16 条则专门分 3 款详细规定了仲裁庭对管辖权异议(包括对仲裁协议的存在或效力的任何异议)作出认定的权力。第四,《印尼仲裁法》中对仲裁员设定了若干资格要件,但这些条件中并不包含对仲裁员国籍或居所的要求;而《示范法》第 11 条则专门对仲裁员的国籍问题作出了规定。第五,在语言方面,除非当事人另有特别约定,否则《印尼仲裁法》默认仲裁程序的工作语言为印尼语,而无论案件所涉的法律文件采用何种语言文字;《示范法》第 22 条则更为灵活,明确允许当事人选择仲裁语言,在当事人未作出约定或未达成一致意见的,则由仲裁庭确定程序中使用的工作语言,避免将某一国家的语言确定为默认语言。第六,《印尼仲裁法》规定案件原则上应当基于各方当事人所提供的书面材料进行审理,除非当事人明确约定进行口头庭审;而国际上通行的《示范法》第 24 条则作出了相反的规定,即原则上应当开庭审理,只有在当事人另有特别约定时才可运用书面审理或其他庭审方式。第七,在印尼作出的裁决必须进行说理,并且除了裁决中存在笔误、打印错误、计算失误或类似的情况外,原则上不允许当事人申请更正裁决;《示范法》第 33 条则不仅允许当事人申请更正,还允许仲裁庭在裁决作出之日起 30 日内主动更正裁决中的上述错误。第八,根据《示范法》第 34 条的规定,当事人如果对已经作出的仲裁裁决不服,唯一的追诉途径是申请撤销,撤销理由包括仲裁协议无效、当事人未得到进行仲裁程序的适当通知、裁决的事项超出仲裁协议或当事人仲裁请求的范围、仲裁庭的组成违反当事人的约定、争议事项不具有可仲裁性、裁决违背仲裁地公共政策等,相比之下,《印尼仲裁法》中规定的申请撤销裁决的法定事由比《示范法》中更为有限,主要涉及欺诈、伪造或隐匿实质性的文件材料等情况。

(三)印尼法院对公共秩序条款的解读呈现扩张趋势

如前文所述,印尼早在 1981 年 8 月 5 日就已正式成为《纽约公约》的成员国,而该公约第 5 条确立的拒绝承认与执行外国仲裁裁决的理由,通常被认为是穷尽的列举,基于条约必须信守原则,各缔约国在国内立法中不应设定额外的拒绝执行理由。

在印尼仲裁司法审查的实践中，以公共秩序条款为由拒绝执行外国仲裁裁决的案件仅有寥寥数例，但却受到了印尼国内外仲裁界的广泛关注。1991 年，在印尼为实施《纽约公约》而专门颁布承认与执行外国仲裁裁决的法律规章〔1〕后不久、1999 年《仲裁法》的起草工作尚未排上日程时，印尼最高法院审理的“ED & F 曼氏糖业有限公司诉亚尼哈里亚托案”［ED & F Man（Sugar）Limited v. Yani Haryanto，以下简称曼氏糖业公司案］中，法庭以涉案裁决违背印尼公共秩序为由拒绝承认与执行。〔2〕尽管在此案之后，印尼法院并没有再次适用公共秩序条款否定外国仲裁裁决，但这一案件引发的消极影响迄今仍未根除。〔3〕从案情来看，本案是一起关于进口食糖的买卖合同纠纷，申请人是卖方，而被申请人是买方，所购货物将销往印尼，裁决是在英国伦敦作出的。由于印尼 1971 年第 43 号总统政令规定政府物流局是官方认可的唯一有权从事糖类进口的法定主体，且印尼境内的糖业市场价格持续下滑，买方最终拒绝按照合同条款支付价款。后卖方以买方违约为由，按照合同中的仲裁条款向伦敦国际仲裁院（London Court of International Arbitration，LCIA）提出了仲裁申请并获胜。买方不仅没有自主履行裁决，而且向雅加达中央地区法院提起了诉讼，主张由于买卖合同违反了国家的强制性规定而归于无效，因此 LCIA 作出的裁决违背印尼公共秩序，应当拒绝承认与执行。最终，雅加达中央地区法院听取了买方的意见，对公共秩序的概念作了扩张解读，认定违背强制性规定即属违背公共秩序，最终拒绝执行裁决。这一案件为公共秩序条款的适用设定了极低的启动标准。依据此案，法院可以轻而易举地以外国仲裁裁决违背公共秩序而拒绝执行。但从长远来看，这一案件的消极意义大于积极意义，使境外当事人对印尼法院的司法审查与监督机制保持质疑与警惕。

在曼氏糖业公司案之后，印尼法院又先后以违反公共政策为由拒绝了另外几份 LCIA 作出的国际仲裁裁决。在“Bankers Trust International v. PT Mayora Indah 案”中，涉案争议源于因利率交换协议引发的金融衍生交易，主合同约定了争议准

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〔1〕 主要指印尼最高法院颁布的 1990 年第 1 号条例，该条例涉及执行外国仲裁裁决的程序。通常认为，《纽约公约》并没有因为印尼的签署和批准而自动地成为印尼法律制度一部分，其不是通过“纳入”（adoption）而是通过“转化”（transformation）的方式得以在印尼境内适用的，“转化”的具体体现即 1990 年第 1 号条例的通过与实施。See Fifi Junita, “Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia”, *Journal of International Arbitration*, Vol. 29, No. 4, 2012, p. 407.

〔2〕 ED & F Man（Sugar）Limited v. Yani Haryanto,［1991］1 Lloyd's Rep. 429.

〔3〕 Karen Gordon Mills, “National Report for Indonesia（2016）”, in Jan Paulsson and Lise Bosman eds., *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, p. 51.

据法为英国法,裁决由 LCIA 在伦敦作出。该案涉及平行程序的问题,当一部分争议尚在雅加达南区地区法院审理时,其他争议已经由仲裁庭在伦敦作出了终局裁决。后当事人向印尼法院申请承认与执行 LCIA 所作出的裁决,雅加达中央地区法院决定拒绝承认与执行本案裁决,理由是本案合同涉及赌博,因此违背了印尼的强制性法律规定,这不仅导致主合同无效,而且也致使仲裁条款归于无效,故针对本案争议作出的裁决违背了公共秩序,因此应被拒绝承认与执行。[1] 与此同时,雅加达中央地区法院还指出,本案涉及的争议还在印尼的另一个民事法院审判,如果在审判之时就对外国仲裁裁决予以承认及执行,而执行结果与南区法院的判决结果相反的话,无疑将会违反印尼的公共秩序,因此应当拒绝承认与执行。[2] 在“佩塔米纳诉卡拉哈博达斯公司”案(Pertamina v. Karaha Bodas)中,原告向被告授权开发矿产资源,但后来由于 1997 年金融危机的爆发,印尼总统先后发布 1997 年第 39 号政令、1997 年第 47 号政令、1998 年第 5 号政令中止和推迟了采矿计划。于是,被告在瑞士向原告提出了仲裁索赔请求,并在裁决中获胜。原告对裁决不满,于是在仲裁地瑞士法院申请撤销仲裁裁决,但撤销请求被瑞士法院驳回。后原告又在雅加达中央地区法院申请撤销瑞士裁决,地区法院最终支持了原告的撤销请求,在其裁判中,雅加达地区法院的法官指出,一旦执行本案裁决,将违背印尼总统发布的三项政令,这也就违背了印尼的公共秩序,故为了维护印尼的公共秩序,最终决定撤销本案裁决。由此可见,印尼法院继续保持了其一贯的立场,将印尼法律中的强制性规定理解为公共秩序;一旦国际裁决可能违背印尼法律的强制性条款,将遭到撤销或被拒绝执行。[3] 一种观点是,对于将强制性规定与公共秩序相等同的解释路径,不符合当今国际仲裁发展的总体趋势。[4] 2002 年,国际法学会在其发布的《关于公共政策作为拒绝执行国际商事仲裁裁决的工具的最终报告》中阐明:“国际公共政策的范围比国内公共政策更为狭窄,其包括三方面内容:一是国家希望保护

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〔1〕 Bankers Trust International v. PT Mayora Indah, The Decision of the District Court of South Jakarta No. 454/PDT. G/1999/PN. JAK. SEL, May 30, 2000.

〔2〕 此种解读,实际上是将公共政策的概念扩张至涵盖了任何存在平行程序的情形,从而成为拒绝承认与执行或撤销仲裁裁决的理由。石现明:《东盟国家国际商事仲裁法律制度研究》,云南大学出版社 2013 年版,第 239 页。

〔3〕 Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC. and PT Perusahaan Listrik Negara Persero (PLN), The Decision of the District Court of Central Jakarta No. 86/Pdt. G/2000/PN. JKT. PST.

〔4〕 参见王芳:《论英国法院承认与执行外国仲裁裁决中的公共政策抗辩问题》,载黄进、肖永平、刘仁山主编:《中国国际私法与比较法年刊》(2010·第 13 卷),北京大学出版社 2011 年版,第 434 页。

的,即使立法没有明确涉及但与正义或道德有关的根本原则,如禁止权力滥用原则、诚实信用原则;二是用于保障国家基本的政治、社会、经济利益的规则,即警察法;三是国家对其他国家或国际组织应当履行的义务。不过,仅仅违反一国法律的强制性规则,包括法院地法、合同准据法国家的法律、合同履行地法及仲裁地法,不能成为拒绝承认与执行外国仲裁裁决的理由,它必须同时构成国际公共政策才可以,否则将导致公共秩序保留这一制度的'安全阀'功能遭到削弱。"[1]为了真正体现支持仲裁的政策取向,限缩解释、从严适用公共政策原则应成为印尼仲裁制度发展的未来方向。

(四)以调解为代表的 ADR 与仲裁共同发展

如前文所述,印尼从来就不是一个乐于争讼的国度。相应地,争议解决的文化传统奠定了印尼法律制度的根基,除仲裁制度得到了可喜的发展外,随着非机构调解和临时仲裁的增加,印尼的独立调解机制亦逐渐发展壮大。为提升调解员与仲裁员的执业技能和专业化水平,印尼已设立了多个调解员、仲裁员培训机构,如印尼调解员协会和印尼独立调解员与仲裁员学院。商品贸易的发展和经济的全球化要求更加高效、便捷的纠纷解决程序,印尼正以积极的态度不断完善仲裁制度,以适应经济迅猛发展的需求。

自 2015 年以来,联合国贸法会第二工作组一方面主持修订《国际商事调解示范法》(UNCITRAL Model Law on International Commercial Conciliation),另一方面积极组织各国专业人士商定谈判《联合国关于调解所产生的国际和解协议公约》(United Nations Convention on International Settlement Agreements Resulting from Mediation),这使国际调解在整个争议解决机制中的角色越发重要。

2018 年 6 月 26 日,经过 85 个联合国成员国与 35 个国际政府间组织、非政府组织三年来的反复讨论,联合国贸法会第五十一届大会通过了《关于执行调解所产生的和解协议的公约》(草案)。该公约被命名为《新加坡调解公约》,其适用于国际商事调解所产生的和解协议的跨国承认与执行事项,并排除了消费者为解决私人纠

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〔1〕 *International Law Association New Delhi Conference* (2002), Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, at para. 48.

纷所订立的和解协议及与家事法、继承法或就业法有关的协议。[1] 联合国大会通过该公约草案和修订后的《国际商事调解示范法》后,将向成员国开放签署。《新加坡调解公约》将在第三个成员国签署 6 个月后生效。签署仪式预计将于 2019 年 8 月在新加坡举行。

值得一提的是,联合国贸法会早在 2002 年颁布了《国际商事调解示范法》。此次,联合国贸法会第二工作组在《新加坡调解公约》草案及示范法修正草案中提出,公约草案和示范法修正草案中将对示范法中“调解”的表述进行修订,即用“mediation”(调解)一词替换“conciliation”(协调),用“mediator”(调解员)一词替换“conciliator”(协调员)。第二工作组认为“mediation”是当事人请求一名或多名第三人协助其设法友好解决合同关系或其他法律关系所产生的或与之相关的争议的过程所广泛使用的术语,这样的修改是为了符合这些术语的实际用法和惯常用法,将有助于增进和提升公约和示范法的知名度。从其影响来看,《新加坡调解公约》的重要意义在于其首次推动了国际商事和解协议的执行。按照公约草案,公约适用于当事人为解决国际商事争议、经过调解而达成的书面协议。但是,公约不适用于以下三种协议:(1)经法院批准或在法院诉讼过程中缔结的和解协议;(2)可作为判决被法院执行的和解协议;(3)可作为仲裁裁决被执行的和解协议。这样规定的理由是上述协议可通过广泛适用的其他国际公约,如《纽约公约》或 2005 年《海牙选择法院协议公约》,得到承认或执行。《新加坡调解公约》将适用于上述公约不能适用的情形。[2]

《新加坡调解公约》第 5 条规定了拒绝承认与执行和解协议的法定情形。具言之,存在下列情形中任何一项的,缔约国可以拒绝执行和解协议:(1)和解协议一方当事人为无相应的行为能力;(2)和解协议无效,或根据适用的法律无法履行;(3)和解协议不具有约束力或不是最终的,或已被修改,或约定的履行义务条件未成就,或因约定不明而无法被执行;(4)调解员严重违反调解规则;(5)调解员未向当事人披露足以对其公正性、独立性产生合理怀疑的事项。公约草案最后两部分

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〔1〕 为了避免与《纽约公约》《海牙法院选择协议公约》等公约发生重复或适用冲突,《新加坡调解公约》第 3 条规定该公约不适用于经由法院批准或在法院诉讼程序中订立的协议,也不适用于已经记录在案并可作为仲裁裁决执行的协议。参见孙巍:《〈联合国关于调解所产生的国际和解协议公约〉立法背景及条文释义》,法律出版社 2018 年版,第 11 页。

〔2〕 参见上海国际仲裁中心:《国际仲裁资讯:〈新加坡调解公约〉的制定过程和主要内容》,载 https://mp.weixin.qq.com/s/pDpGx-baewtbRLlWdK756w,最后访问日期:2018 年 8 月 1 日。

关于调解员操守的规定，与《国际商事调解示范法》第5条第4、5款以及第6条第3款的相关规定一致。

尽管印尼迄今尚未加入联合国贸法会制定的《国际商事调解示范法》，但其一直作为委员会成员国派代表正式参与并密切跟踪《新加坡调解公约》的各项谈判工作；这与其国内丰富而悠久的调解实践息息相关，同时也与争议解决参与人士希冀调解协议能够顺利跨国执行的期望紧密相关。〔1〕在印尼整个国家的意思观念中，国民普遍信奉通过决策达成合意（musyawarah untuk mufakat）的原则，因而提倡采取私力救济方式、尽可能避免任何形式的对抗与冲突便成为调解在印尼落地生根的基石。〔2〕也正是在这种观念的指引下，印尼法院在受理诉讼案件前，往往要求原告必须证明其已经努力进行过和解而未达成一致意见，这主要是以争议双方相互之间的一封或多封信函作为证据。〔3〕与此相似，《BANI仲裁规则》中也要求仲裁庭先鼓励当事人通过友好协商谈判，尽可能自行解决争议，和解不成再启动仲裁程序。目前，印尼境内已有多家可为当事人提供调解等ADR服务及培训的专门组织，如2003年成立的印尼国家调解中心（National Mediation Center，Pusat Mediasi Nasional，PMN）专为当事人选择调解方式解决纠纷提供规则和配套设施，同时还可针对执业律师及在任法官提供培训，指导其有效地在诉讼及仲裁程序中运用调解方法，从而使争议的各方当事人实现最大限度的“双赢”效果。此外，印尼还在保险、环境等行业设立有专门的调解机构，如印尼保险协会（Dewan Asuransi Indonesia）、印尼环境法中心（Indonesian Center for Environmental Law）等。可见，印尼的仲裁制度并非唯一的替代性争议解决方法，调解等ADR机制为仲裁制度提供了有益的补充，且因符合印尼传统的争议解决文化而受到青睐。

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〔1〕 参见联合国国际贸易法委员会第二工作组：《拟定关于调解所产生国际商事和解协议的执行的文书：临时议程说明》（A/CN.9/WG.II/WP.204），载 https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/09/PDF/V1708309.pdf?OpenElement，最后访问日期：2018年7月23日。

〔2〕 See Benny S. Tabalujan, “The Indonesian Legal System: An Overview”, http://blog.sina.com.cn/s/blog_724a8b810106bsg8.html, July 23, 2018.

〔3〕 印尼最高法院发布的涉及法院调解程序的2003年第2号条例和2008年第1号条例均有此类规定。See Carol Liew, “Recent Developments in Mediation in East Asia”, in Arnold Ingen-Housz ed., *ADR in Business: Practice and Issues across Countries and Cultures*, Kluwer Law International, 2010, pp. 541-542.

四、印度尼西亚的主要仲裁机构及仲裁规则

(一)印尼国家仲裁委员会

印度尼西亚最主要的仲裁机构是BANI。[1] BANI的仲裁员名册中既有大量的当地法律及经贸专家,也有合理比例的国际仲裁员名单,被选定的仲裁庭组成人员有权公平地适用仲裁规则。从其内部治理结构及机构设置来看,BANI的主席将会根据仲裁规则的授权在当事人未选定仲裁员时充任指定机关(Appointing authority),主席协助组建仲裁庭的权力将优先于《印尼仲裁法》所规定的由相关法院委任仲裁员的权力。即使在BANI以外的其他仲裁机构所管理的案件或临时仲裁案件中,只要当事人达成合意,其仍可选择BANI的主席来代为指定仲裁员。除了提供仲裁规则及代为指定仲裁员之外,BANI还拥有充足的开庭室,并且能够提供秘书服务及其他案件管理服务,包括将BANI仲裁庭作出的裁决在相关法院进行注册登记,以便利裁决的执行等。就仲裁费用的收取而言,BANI借鉴了ICC的实践,根据仲裁请求的数额来计算。BANI将所收取的仲裁费用的52.5%作为机构的收入,以便维持机构的正常运营。作为仲裁机构,BANI最主要的职责是进行案件管理,并督促仲裁庭根据当事人的仲裁协议授权,基于案件所适用的准据法,在充分运用各种证据查明案件事实的基础上,对仲裁请求所涉的法律要点与事实要点作出裁决。但是,BANI并不对仲裁员进行培训或认证,印尼仲裁员的培训工作主要由特许仲裁员协会—印尼分会(Chartered Institute of Arbitrators – Indonesia Chapter)与卡里姆·赛亚律师事务所(Karim Syah Law Firm)联合进行;其向出众的法学毕业生、司法部及法院工作人员提供奖学金,培训通常在雅加达进行。

《BANI仲裁规则》主要存在以下亮点:

第一,其确立了仲裁庭自裁管辖权原则。仲裁庭有权决定自己的管辖权,是现代国际商事仲裁制度发展中的一个通行原则,此即所谓的“管辖权/管辖权原则”,亦称“仲裁庭自裁管辖权原则”。[2] 具言之,在仲裁程序启动后,当事人如果对仲裁协议的有效性或仲裁的争议事项范围提出异议,则应当由仲裁庭自身来对管辖权异议作出裁定,据此决定是否可对异议事项行使管辖权。《印尼仲裁法》中并没有明文确立自裁管辖权原则,其他涉及仲裁的立法条文中也没有此类措辞。但从印尼的仲裁实践来观察,可以发现,在当事人双方对案件的管辖权存在争议时,仲

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〔1〕 BANI的印尼语全称为Badan Arbitrase Nasional Indonesia,因此简称为BANI,特此说明。

〔2〕 参见宁敏、宋连斌:《评国际商事仲裁中的管辖权原则》,载《法学评论》2000年第2期。

裁庭通常会对这类争议行使管辖权。《BANI 仲裁规则》第 18 条对仲裁庭的此项权力进行了确认。

第二,其明确了多方当事人、多合同仲裁程序的组庭方式。近年来,随着国际商事交易形态朝着复杂化、精细化、专门化方向发展,原有的“一对一”式双方当事人的仲裁模式已经被逐渐打破,多名当事人、多合同争议开始涌现。[1]《印尼仲裁法》没有区分合同双方当事人的仲裁与合同多名当事人的仲裁,也没有明确在案件涉及多名当事人时如何选定仲裁员组成仲裁庭;但值得关注的是,《BANI 仲裁规则》第 10 条第 5 款明确了多名当事人仲裁时仲裁员的指定方法。根据该条的规定,在案件争议涉及三名以上当事人时,所有以申请人身份参与程序的主体应当被视为一个单一的主体;类似地,所有以被申请人身份参与程序的主体也应当被视为一个主体;所有的申请人应共同指定一位仲裁员,被申请人一方亦然。在同为申请人(或被申请人)的多方主体就仲裁员人选存在分歧意见且无法达成一致意见时,他们对仲裁员的选任权被视为留待 BANI 的主席来行使,主席应当代表该方当事人的集体委托来代为行使仲裁员任命权。作为多名当事人参与仲裁的特殊例外情形,经争议的多名当事人请求,BANI 的主席可以决定批准仲裁庭由三名以上的奇数仲裁员组成。

第三,其规范了仲裁庭审地点的界定标准。如前文所述,1999 年《印尼仲裁法》第 37 条第 2 款区分了法律意义上的仲裁地与事实意义上的庭审地点,但是第 37 条第 1 款仅仅规定了仲裁地的确定标准,却没有明确庭审地点的确定方法,庭审地点的确定仅以仲裁庭认为必要作为原则。《BANI 仲裁规则》第 13 条第 4 款则明确了仲裁庭审地点的确定步骤,以弥补 1999 年《印尼仲裁法》的缺憾。该款规定:仲裁庭的开庭地点应当在 BANI 指定的地点进行,但在仲裁庭认为必要的情况下,当事人可以另行协议约定其他的特定地点。仲裁庭可以请求在任何时间、在规定地点进行会见,以便勘验财产、检查货物或其他文件,但应提前通知各方当事人,以便其按时参加会见。仲裁庭的内部会议及开庭期也可以在任何时间、在庭审地点进行。如果仲裁庭认为必要,开庭方式包括互联网。

(二)印尼其他的仲裁机构

除了 BANI,印尼还根据不同行业的特点及差异化的宗教信仰而设置了其他若干仲裁机构。例如,由印尼资本市场监管机构于 2002 年设立的资本市场仲裁委员

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〔1〕 参见池漫郊:《多方多合同仲裁的主要法律问题研究》,厦门大学出版社 2006 年版,第 1 页。

会(BAPMI)即专门解决与资本市场相关的纠纷,担任其仲裁员除了要符合《印尼仲裁法》及《BANI 仲裁规则》的资格要件外,还必须具有印尼国籍;伊斯兰国家仲裁委员会(National Shariah Arbitration Board,Badan Arbitrase Syariah Nasional,BASN)由印尼乌里玛委员会设立,主要处理穆斯林之间的商事纠纷和伊斯兰的商业交易,特别是解决伊斯兰交易或根据伊斯兰教义与原则进行的交易所引发的争议,其裁判案件的准据法主要是伊斯兰法而非世俗法;2008 年成立的期货仲裁委员会(Badan Arbitrase Perdagangan Berjangka)旨在解决期货外汇争议,其受案范围尤其具有针对性、专业性、行业性。由此可见,选择在印尼进行仲裁并非只有 BANI 这一选项,当事人完全可以根据其交易的性质而择定不同的专门机构解决争议,仲裁员的专业技能有助于促使当事人更顺利地接受仲裁结果,也有益于给当事人提供调解与谈判的机会。

五、对中方当事人在印尼参与仲裁的风险提示及建议

(一)对中方当事人在印尼进行国际商事仲裁的总体提示

印尼历史上曾是东方海上丝绸之路及西方香料之路的必经之地,受惠于东西方贸易的汇聚,印尼群岛沿岸遍布的商港和城镇,如今已成为国际商贸、航运、转口贸易的中心,整体上已成为全球贸易网络的关键枢纽。作为印尼国民经济的重要支柱之一,印尼的对外贸易(主要体现为出口原材料、进口制成品)尤其发达;相应地,国际商事纠纷也颇为常见。对于赴印尼参与国际仲裁的中方企业而言,以下事项需要特别注意:第一,签订仲裁协议时,要特别关注中可仲裁事项的范围,保证争议解决选项的有效性,避免因欠缺某一方面的要件而导致仲裁协议或仲裁条款无效;第二,在参与仲裁程序的过程中,应熟悉印尼现有的仲裁机构及其仲裁规则,充分运用当事人意思自治原则,在选任仲裁员、组建仲裁庭、提交证据、确认仲裁地等环节,尽可能掌握主导权和参与权;第三,仲裁裁决作出后,如败诉方未能自动履行裁决所载明的义务,则胜诉方可向财产所在地及败诉方住所地的法院申请承认与执行,这既包括了在印尼法院申请执行中国裁决,也包括在中国法院申请执行印尼裁决,因此必须深刻了解《纽约公约》在印尼法院的适用,尤其应重点关注印尼法院对公共政策的解释动向,避免裁决被拒绝承认与执行。

(二)中国企业签订仲裁协议的注意事项

仲裁协议是国际商事仲裁的基石,是国际商事仲裁当事人提请仲裁的依据,也

是仲裁庭及仲裁机构对当事人之间的案件取得管辖权的基础。[1] 根据1999年《印尼仲裁法》第3条的规定，当双方当事人达成有效的仲裁协议，同意适用仲裁方式解决他们之间的争议时，就意味着放弃了通过国内法院采取司法诉讼的方式，并赋予了仲裁庭解决其争议的权力。因此，对于中国企业来说，以仲裁方式定分止争的第一步是订立有效的仲裁协议，这也是起草合同的重要步骤。具体而言，在签订仲裁协议的过程中，首先，要明确仲裁协议的准据法，如果以作为认定仲裁协议效力的准据法，应保证仲裁协议符合所规定的有效性要件；其次，中方企业应当在仲裁机构的选择、仲裁员的选任、仲裁规则的适用、仲裁地的博弈等方面力争谈判上游。

事实上，在中国与东盟国家（包括印尼）的贸易投资合同中，大多订有仲裁条款。同时，由于东盟国家的当事人对中国的仲裁机构普遍不太信任，因此在他们的要求和坚持下，许多中国与东盟国家的经贸合同都将争议提交至新加坡国际仲裁中心（Singapore International Arbitration Centre，SIAC）、吉隆坡区域仲裁中心等东盟国家的机构进行仲裁，这就使双方争议必须适用东盟国家的仲裁法。[2] 退而言之，即便双方约定将争议提交中国仲裁机构或其他国家的仲裁机构进行解决，裁决仍然可能需要在东盟国家境内的法院申请承认与执行。然而，截至目前，中国仲裁理论界与实务界对印尼仲裁法的研究整体上还非常薄弱，全面系统地研判印尼的仲裁法律制度、熟悉印尼仲裁行业的市场，有助于预防和规避在其境内仲裁或申请执行裁决所可能面临的法律风险，进而维护中方当事人的合法权益。

尤其应当注意的是，如果当事人欠缺订立仲裁协议的行为能力，将直接导致仲裁协议无效。在前文述及的曼氏糖业公司案中，卖方原本已在英国伦敦LCIA提起仲裁请求并获得有利裁决，买方却同时在雅加达中央地区法院提起宣告合同无效的诉讼，最终法院正是根据1971年第43号及1978年第39号总统政令认定买方无权从事糖业进口活动而认定主合同与仲裁条款均为无效。尽管本案裁决主要是基于《印尼民法典》，但不可忽视其对《纽约公约》适用的裁判意义。当然，在涉外商事仲裁中，法院主要依据《印尼民法典》第1320条及第1330条的冲突规范确定当事人的权利能力。

（三）中国企业参与印尼仲裁程序的注意事项

允许涉案当事人合意选择具体的仲裁机构、仲裁员及争议所适用的仲裁规则，

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〔1〕 参见徐伟功编著：《国际商事仲裁理论与实务》，华中科技大学出版社2017年版，第35页。

〔2〕 参见石现明：《东盟国家国际商事仲裁法律制度研究》，云南大学出版社2013年版，第1页。

如果双方当事人未就某类具体的程序事项作出约定,立法及仲裁规则中往往规定了候补性方案,仲裁庭亦可运用其自由裁量权对相关事宜作出合理安排。作为风险提示:如果中方当事人作为被申请人卷入印尼的仲裁程序,要选择具有较高专业能力和丰富仲裁经验的仲裁员;尤其是对首席仲裁员或独任仲裁员的选任,应根据具体个案的争议类型,尽量选择熟悉国际经贸规则的仲裁员,并兼顾仲裁员的时间安排和所在地域,在维护公正、提升效率的基础上降低争议解决的时间与费用成本。[1] 此外,当事人应当委派相关人员出庭,否则意味着允许了仲裁庭作出缺席裁决。具言之,仲裁庭审理案件不公开进行,申请人经传票传唤,无正当理由拒不到庭的,可以按撤回仲裁申请处理,仲裁庭视为完成职责。被申请人经首次传票传唤,无正当理由拒不到庭的,仲裁庭应当再传唤一次。被申请人在收到第二次传唤后 10 日内,无正当理由拒不到庭的,仲裁程序继续进行,仲裁庭将支持申请人的全部仲裁请求,但毫无根据或无法律依据的除外。当然,中方当事人同时要准确认识到,如果由于未能得到仲裁庭的适当通知而导致缺席裁决且未能陈述申辩意见的,应当尽可能在承认与执行程序中提出抗辩,或者通过撤销机制主动对仲裁裁决提出异议。在“特兰斯帕克资本有限公司诉 PT 萨博苏布尔马斯案”(Transpac Capital Pte Ltd v. PT Sumber Subur Mas)中,涉案争议产生于被申请人所发行的一系列债券。根据双方的合同安排,如果被申请人未能履行义务,则申请人有权要求偿付债券。后来,被申请人及其股东都未能按照投资协议的约定偿付债券,申请人在 SIAC 提起了仲裁索赔请求,被申请人及其股东都从未参与过仲裁程序。最终,尽管申请人获得了有利的仲裁裁决并向印尼法院申请承认与执行,但遭到被申请人的抗辩。经雅加达中央地区法院的审查,被申请人未出席仲裁程序系主动弃权而非仲裁通知未送达,最终签发了执行令。[2]

在“佩塔米纳诉卡拉哈博达斯公司案”中,雅加达中央地区法院撤销了在瑞士日内瓦作出的仲裁裁决,其撤裁理由正是被申请人未能得到指定仲裁员的通知。在本案中,根据争议双方当事人签订的合同,被申请人一方得到授权,有权在印尼境内开发有色金属矿产资源。然而,在矿产开发机会完工之前,由于 1997 年至 1998 年发生了亚洲经济危机,国际货币基金组织(International Monetary Fund,IMF)

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〔1〕 参见刘晓红、袁发强主编:《国际商事仲裁法案例教程》,北京大学出版社 2018 年版,第 112 页。

〔2〕 Decree of Chairman of the Central Jakarta District Court DAFT. No:070/2011 Eks Jo. SIAC Number 028/2009 (ARB028/09/MM) dated 1 September 2010.

迫使印尼总统签发了若干政令中止了大量的基础设施项目,其中受损的企业就包括了本案中的被许可方。为了索赔,本案被许可方提出了仲裁申请,并向印尼当事人送达了仲裁通知。在等待了一个半月后,被申请人仍然没有提交答辩,且并没有积极配合仲裁机构完成组庭工作,于是申请人申请 ICSID 秘书长代为指定仲裁员。最终,仲裁庭作出了有利于申请人的仲裁裁决。然而,雅加达中央地区法院最终撤销了仲裁裁决,理由之一在于法院认为仲裁机构超越了职权,没有允许被申请人指定仲裁员。尽管申请人向法院声称其已经根据《UNCITRAL 仲裁规则》按时向被申请人合理地送达了仲裁通知,但法院并未采信该项抗辩,也未接受关于弃权规则的陈述。〔1〕

此外,在仲裁语言上,中方当事人需要特别注意,《印尼仲裁法》规定,如果当事人没有相反约定,仲裁应使用印尼语。为了防止因语言不通所造成的误解,减少因翻译而额外增加的仲裁费用,建议中方当事人在订立仲裁协议之际,或最迟不晚于仲裁程序开始前,通过与对方当事人及仲裁机构、仲裁庭进行沟通,尽可能约定采用中文或英文进行仲裁程序。此外,如果当事人协议选择在 BANI 进行仲裁,还有权合意排除适用《BANI 仲裁规则》中的特殊条款,如通过仲裁协议来约定当事人有权获得仲裁庭的记录,当事人有指定他们希望的任何人担任仲裁员的绝对权利等。〔2〕

此外,如前文所述,在案件审理过程中,仲裁庭认为必要时或经当事人请求,可以传唤证人或专家证人出庭作证。证人或专家证人作证前,应当庭宣誓。仲裁庭可以要求证人或专家证人就其作证内容形成书面文件。当事人应当配合专家证人的要求提供全部信息。仲裁庭应当将专家证人的意见书副本提供给当事人,方便其制作书面答辩意见。当事人认为专家意见模糊不清的,可以要求专家证人进一步解释。作为《印尼仲裁法》及《BANI 仲裁规则》的特色,当事人应当充分熟悉印尼将仲裁与调解相结合的传统。原则上,当事人按时出庭的,仲裁庭应当先行调解。经仲裁庭调解,当事人达成和解的,仲裁庭应当制作调解书。调解书具有终局效力,对双方当事人均有约束力,当事人应当根据调解书的有关条款履行责任。调解不成功的,仲裁庭应当继续审理并作出裁决。

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〔1〕 See Gatot Soemartono, "Interpretation and Application of the New York Convention in Indonesia", in G. A. Bermann ed., *Recognition and Enforcement of Foreign Arbitral Awards*, Springer International Publishing, 2017, p. 486.

〔2〕 参见石现明:《东盟国家国际商事仲裁法律制度研究》,云南大学出版社 2013 年版,第 26 页。

值得一提的是,在印尼参加仲裁的当事人,需清楚地把握仲裁费用的有关情况。根据《印尼仲裁法》第76条第2款的规定,仲裁费用由四部分构成:(1)仲裁员的报酬;(2)仲裁员产生的差旅费及其他费用;(3)审理争议时要求的证人和专家证人的费用;(4)案件管理费用。当然,仲裁程序中还可能产生其他必要费用,如向代理律师支出的律师费、文件资料的翻译及公证费、因开庭产生的速录费用等。由于《印尼仲裁法》没有对仲裁费用的支付方式进行具体规定,所以此类事宜通常由仲裁庭按其认为适当的方式加以控制,包括要求申请人预先存入或支付特定比例的费用,待案件裁决结果作出后再对当事人之间费用承担的比例进行确定。根据《BANI仲裁规则》第36条的规定,仲裁费用由申请人索赔金额的特定比例构成,这与ICC的仲裁实践相似。具言之,该条规定:BANI应当向各方当事人寄送发票,要求其分别支付仲裁费用总金额一半的比例,并在发票中注明支付的最后期限。如果某一方当事人未能按期足额支付其应当承担的费用,则另一方当事人可以暂且代为支付,待裁决结果最终作出后再将未支付方的责任纳入考虑。除此之外,BANI也可以应当事人的请求,在仲裁程序进行的过程中根据具体需要而增加费用。[1]

(四)对中国企业跨境申请承认与执行印尼裁决的提示

就仲裁裁决的拘束力而言,在印尼作出的绝大多数裁决都能够通过当事人自动履行或由法院强制执行。然而,仲裁裁决的既判力与拘束力仅及于争议当事人双方。具言之,作为典型的大陆法系国家,印尼的法院与仲裁庭都没有遵循先例的义务,其所审理的每个案件都是依据对法律规范的解释和涉案事实的查明而独立认定的。实践中,法院的已决案件极少被公开出版或汇编,而仲裁庭所作出的裁决更是处于保密状态,即使在裁决执行程序中被法院登记注册,也并不对当事人以外的第三方披露。

当仲裁裁决存在错误时,立法并没有规定针对裁决实体错误的上诉机制。根据一裁终局的基本理念,仲裁裁决作出后,即刻获得了拘束力与执行力,根据《印尼仲裁法》第60条的规定,当事人既不能向仲裁庭或仲裁机构提起上诉,也不能向法院申请上诉。不过,针对裁决中严重的程序性错误,确立了仲裁裁决的撤销机制(annulment),其与裁决的承认与执行机制共同构成了印尼法院对仲裁裁决实施的司法审查与监督制度。根据《纽约公约》第5条第1款第5项的规定,有权撤销裁决

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〔1〕 BANI以索赔额为标准,制定了收取仲裁费用的费率表,载http://www.baniarbitration.org/costs.php,最后访问日期:2018年7月20日。

的法院既可以是仲裁裁决作出地的法院，也可以是仲裁程序所适用的准据法所属国的法院。因此，从法律条款来看，即便仲裁地不在印尼境内，但仲裁程序适用1999年《印尼仲裁法》时，印尼法院仍然享有撤销权，其可管辖申请撤销仲裁裁决的案件。但必须注意，印尼的仲裁实践与理论存在差异。2000年，雅加达中央地区法院曾经撤销了一起UNCITRAL仲裁案件中作出的国际裁决，该案裁决虽然以瑞士日内瓦为仲裁地，但案件程序所适用的法律为《印尼仲裁法》，当事人也在仲裁协议中多次述及应当适用印尼法进行仲裁程序。[1] 裁决被撤销后，一方当事人不满于雅加达法院的决定，向印尼最高法院提起上诉；后印尼最高法院裁判认定，印尼法院无权撤销本案裁决，即使《纽约公约》第5条第1款第5项的条文赋予了准据法所属国以裁决撤销权，但是仅将撤销案件局限于在印尼境内作出的国内裁决以及虽然具有国际因素但仲裁地在印尼境内的国际裁决。[2] 具言之，《印尼仲裁法》第70条规定了申请撤销（set aside）仲裁裁决的三类情形：其一，仲裁裁决依据的文件或证据系伪造；其二，裁决作出后发现一方当事人故意隐瞒对案件裁决具有决定性作用的文件；其三，一方当事人采取欺诈或胁迫的手段迫使仲裁庭作出裁决。

除了仲裁裁决的撤销程序外，在承认与执行程序中根据《纽约公约》提出不予执行的抗辩，也是当事人重要的裁决后救济机制。对于拒绝承认与执行的理由，《纽约公约》第5条进行了统一的规定：一类是需要由当事人举证证明的事实和理由，包括当事人没有行为能力和仲裁协议无效；仲裁程序违反自然公正之要求；越权裁决；仲裁庭的组成或仲裁程序违反当事人的约定或法律规定；仲裁裁决尚无约束力、被撤销或停止执行。另一类是法院依职权主动审查的事实和理由，包括争议事项不可仲裁、承认和执行该裁决违反法院地的公共政策。鉴于印尼是《纽约公约》的正式成员国，印尼法院只能根据《纽约公约》第5条所列明的理由拒绝承认和执行外国仲裁裁决；这些理由通常认为是穷尽性的列举。

从仲裁程序性错误的角度进行归纳，上述两大类拒绝执行的法定事由可以概括为如下四个方面：

第一，仲裁庭的管辖权有瑕疵，包括仲裁庭没有管辖权及仲裁庭超越管辖权两种情形。这不仅受到《印尼仲裁法》中关于可仲裁事项的限定，还受到仲裁协议约

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〔1〕 See Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F. 3d 357, 360 – 63 (5th Cir. 2003).

〔2〕 See Noah Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia", in *American University International Law Review*, Vol. 20, Issue 2, 2005, p. 377.

定的可提交仲裁的争议范围及当事人实际提请仲裁的事项限制,超越任何一项都将构成超裁。在“PT 普鲁萨罕大港坦波案”中,雅加达南区法院限缩解释了仲裁条款,将可仲裁事项的范围局限于商业与技术争议,其论证理由为:仲裁员被任命的理由主要是其在商业与技术领域拥有相关的专业知识,因此他们只能对涉及商业或技术的纠纷作出裁决,而不能对侵权争议作出裁判。[1]

第二,仲裁程序不当,包括仲裁庭的组成、仲裁程序的进行等不符合当事人的约定或违背法律的规定,或者程序违背自然公正的基本要求;实践中特指没有给予某一方当事人选定仲裁员或进行程序的适当通知(缺席审理),从而剥夺了未出席一方的程序权利。在“佩塔米纳诉卡拉哈博达斯公司案”中,当事人选择印尼法作为支配合同争议的准据法。最终雅加达中区法院撤销了本案裁决,理由在于仲裁庭忽视了应当遵照当事人的约定适用印尼法作为准据法,而是以不可抗力为由进行裁决;按照印尼法律,此种情形应导致裁决的撤销。[2]

第三,根据《纽约公约》第 5 条第 1 款第 5 项的规定,当仲裁裁决已经被裁决作出地或准据法所属国的法院撤销或者尚未对当事人产生拘束力,这也将导致裁决在印尼法院被拒绝承认与执行。印尼法院的仲裁司法审查实践中,尚没有针对这一项形成丰富的案例。但值得关注的是,即使当事人在仲裁地有管辖权的法院申请撤销仲裁裁决的请求遭到了拒绝,雅加达中区法院仍然有可能对裁决予以承认并执行。在“阿斯特罗努萨塔拉国际公司诉 PT 阿优达达普米拉米特拉案”(Astro Nusantara International v. PT Ayunda Prima Mitra)中,涉案事实产生于一起合资经营企业纠纷,双方当事人签署了会费及股东协议,一方当事人未能按照合同约定向另一方当事人在印尼境内提供电子卫星电视信号服务,后申请人根据合同中的仲裁条款、依据 2007 年《SIAC 仲裁规则》在 SIAC 提出了索赔请求。仲裁庭作出了若干有利于申请人的裁决,申请人向新加坡高等法院申请执行裁决。然而,尽管已经超出了《示范法》第 34 条规定的申请撤销仲裁裁决的时限,被申请人却向新加坡法院提出了执行异议,指出仲裁庭没有管辖权。最终,新加坡高等法院驳回了被申请人的异议,指出任何针对仲裁裁决提出的反对意见都必须在法律规定的时限内提出。特别值得关注的是,新加坡高等法院的决定为印尼法院承认与执行该仲裁裁决铺

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〔1〕 See Interlocutory Decision of the South Jakarta District Court No. 454/Pdt. G/1999/PN. Jak. Sel. issued on January 25,2000.

〔2〕 See Decision of the Central Jakarta District Court No. 86/Pdt. G/2002/PN. Jkt. Pst, issued on August 19,2002.

平了道路,奠定了法律基础。最终,申请人基于执行的目的在雅加达中央地区法院对本案仲裁裁决进行了登记注册;尽管被申请人再次提出不予执行的抗辩,但是经过全面的仔细审查,雅加达中央地区法院作出了有利于申请人的认定。最终,印尼最高法院也支持了雅加达中央地区法院的决定,对裁决予以承认并执行。[1]

第四,承认与执行仲裁裁决违背公共政策,也将导致裁决被拒绝承认与执行,如前文所介绍,尽管各国立法及国际公约都将公共政策作为拒绝执行外国仲裁裁决的法定理由,但对何为公共政策大多欠缺明确的界定,导致这一概念的实践内涵具有较大程度的模糊性和不确定性,需要法官在具体案件中运用自由裁量权加以判定。从实践情况来看,印尼法院对仲裁的司法监督整体上呈现出两大趋势:一是区分国际公共政策与法院地所在国的国内公共政策;二是对公共政策条款的含义持宽泛解释的立场。

(五)中国企业应充分了解印尼参与投资仲裁的概况

外国投资者在东道国进行投资时,也会与东道国政府因投资产生种种争端。这种争端不同于普通的私人间跨国商事争议:一方面,争端的双方当事人既涉及私人,也涉及政府;另一方面,争端的诉因既可能是特许协议的解释与适用等契约问题,也可能是因东道国采取征收或其他管制措施而引发的条约争端。因此,投资争端往往涉及多方利益,比商事争议更为复杂,处理的难度也更大。中国目前是印尼非油气产品第一大贸易伙伴,印尼不仅市场潜力巨大,而且矿产资源丰富,是"一带一路"东盟地区的关键一环。中国企业在印尼的投资项目众多,极易与当地政府产生纠纷。相应地,中国企业在赴印尼投资之际,有必要熟悉印尼关于投资争端解决的法律概况。

除国际商事仲裁外,印尼的投资仲裁制度也比较成熟。早在 1967 年,印尼的外国投资立法就针对国有化资产规定了仲裁作为争议解决方式,其中明确规定:若对外国投资予以国有化,必须给付投资者补偿;一旦投资者认为补偿数额不合理,即可将案件提交仲裁解决。2007 年,印尼实施了一部有关投资的新法律,即第 25 号法案。[2] 根据第 25 号法案的第 15 章第 32 条,外国投资者与东道国政府之间的争端可以通过多元方式予以解决,其中包括友好协商、国内仲裁或诉讼、国际仲裁等

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〔1〕 See Decision of the Supreme Court No. 808/K/Pdt. Sus/2011 issued on June 28,2012.

〔2〕 参见中华人民共和国商务部编:《国际贸易投资环境报告 2014》,上海人民出版社 2014 年版,第 191 页。

方式。该条规定:(1)当印尼政府与外国投资者发生投资争端时,当事人应当首先尽可能通过协商方式达成一致意见;(2)如果前述的和解努力宣告失败,投资争端可以按照印尼法律及规章通过仲裁或替代性争议解决方法或法院诉讼方式解决;(3)当印尼政府与本国投资者发生争端时,各方当事人可以根据当事人的协议通过仲裁的方式解决争端,如果未作出此种约定,则应通过诉讼方法解决;(4)当印尼政府与外国投资者发生争端时,各方当事人可以按照约定通过国际仲裁的方式予以解决。[1]

在国际条约方面,印尼是1965年《华盛顿公约》的缔约国,其早在1968年批准了该公约。[2] 此外,印尼还是2009年《东南亚国家联盟全面投资协议》(ASEAN Comprehensive Investment Agreement)的成员国,该协议第32条规定了投资者与国家间的争端解决。具言之,当投资者与东道国产生争端后,在向国际仲裁庭提出仲裁请求前,应尽可能首先通过友好协商达成一致意见。第33条则规定,投资者既可以向国内法院也可以向行政仲裁庭提出索赔请求,但前提是裁判机构对被诉的东道国具有管辖权;争端当事方也可以选择在ICSID运用投资仲裁解决争端,仲裁程序依照《华盛顿公约》及《ICSID仲裁规则》进行;在不符合ICSID仲裁管辖的受案范围时,争端当事方还可合意约定适用《ICISD附加便利规则》或《UNCITRAL仲裁规则》,或约定在吉隆坡区域仲裁中心或其他东盟的区域仲裁中心进行仲裁。

在BIT方面,印尼已经签署了众多的BIT,但政府官方尚未制定或颁布任何BIT范本。近年来,国际范围内关于投资者与国家间争端解决机制改革的呼声不断,这也影响了印尼对外缔结BIT的实践。2014年3月,印尼声称将终止荷兰与印尼BIT,在同一声明中,印尼还正式宣布将终止其所签署的所有67项BIT。根据这项声明所表达出的意图,印尼允许其与别国缔结的17项BIT在2016年5月之前失效,包括了BIT到期自动失效,或者根据BIT对其他缔约方发出必要的通知以表明其无意对尚未到期的BIT进行续期或更新。此外,印尼与阿根廷两国还达成了合意,以终止两国间的BIT,这项BIT的终止合意已经自2016年10月19日正式生效。与此同时,印尼还与另外四个国家(新加坡、巴基斯坦、西班牙、吉尔吉斯斯坦)发送

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〔1〕 See Karen Gordon Mills,“ National Report for Indonesia (2016)”, in Jan Paulsson and Lise Bosman eds. , *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 2016, pp. 54 – 55.

〔2〕 参见李莉、乔欣:《东盟国家商事仲裁制度研究》,中国社会科学出版社2012年版,第38~39页。

通知明确告知将不会再对到期的 BIT 进行重订。[1] 值得一提的是,尽管印尼政府大规模地与其他国家终止了 BIT,但鉴于不少 BIT 中包括了“日落条款”(Sunset Clause),外国投资者在此类 BIT 终止后的一段时期内仍然可能享有 BIT 赋予的利益,甚至可以根据此类 BIT 中的争端解决条款申请国际投资仲裁。[2]

在实践方面,迄今为止,印尼政府曾作为被申请人参加了 12 起投资仲裁案件;其中有 7 起案件是在 ICSID 进行的。在这些案件中,有 2 起达成了和解协议且申请人一方撤回仲裁请求,另有 2 起案件被合并为 1 起案件。此外,还有 4 起投资仲裁案件是根据《UNCITRAL 仲裁规则》进行的临时仲裁案件。在印尼参与的投资仲裁案件中,下列案件尤其受到国际社会的广泛关注:“拉法特阿里里兹维诉印尼案”(ICSID);[3]“哈萨姆阿瓦拉克诉印尼案”(UNCITRAL);[4]“阿姆科亚洲公司诉印尼案”(ICSID);[5]“PT 纽蒙特矿业公司诉印尼案”(ICSID);[6]“丘吉尔矿业公司与行星矿业有限公司诉印尼案”(ICSID);[7]“哈萨姆 T. M. 阿瓦拉克诉印尼政府案”(UNCITRAL);[8]“美孚亚洲控股有限公司诉印尼政府案”(ICSID)[9]等。总之,当中方企业以投资者身份与印尼政府官方发生投资争端时,要善用《华盛顿公约》及 BIT 中的投资仲裁机制,最大限度地运用法律武器与商业智慧维护权益。

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〔1〕 2016 年 6 月 20 日,印尼与新加坡 BIT 到期终止;2016 年 12 月 2 日,巴基斯坦与印尼 BIT 到期终止。

〔2〕 See Alvin Yeo and Smitha Menon, “Indonesia – Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor – State Dispute Settlement”, in *Asian Dispute Review*, 2016, Vol. 16, Issue 3, pp. 124 – 131.

〔3〕 2013 年 7 月 16 日,仲裁庭作出裁决,支持了印尼所提出的管辖权异议,认定中心对本案无管辖权,从而驳回了投资者的仲裁请求。See Rafat Ali Rizvi v. Republic of Indonesia, ICSID Case No. ARB/11/13.

〔4〕 See Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL.

〔5〕 1984 年 11 月 20 日,仲裁庭作出裁决;后当事人对裁决不满,提请 ICSID 专门委员会启动撤销程序,委员会于 1992 年 12 月 17 日作出决定,认定原裁决无误不予撤销。See Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1.

〔6〕 2014 年 8 月 29 日,ICSID 秘书长依据《ICSID 仲裁规则》第 44 条,认可了仲裁申请人撤回仲裁申请的请求,终止了本案的审理程序。See Nusa Tenggara Partnership B. V. and PT Newmont Nusa Tenggara v. Republic of Indonesia, ICSID Case No. ARB/14/15.

〔7〕 See Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40.

〔8〕 本案仲裁庭的管辖权根据是《伊斯兰会议组织会员国之间投资促进、保护和担保协定》。See Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL.

〔9〕 See Cemex Asia Holdings Ltd. v. Republic of Indonesia, ICSID Case No. ARB/04/3.

附录一:

印度尼西亚共和国仲裁与非讼纠纷解决程序法(英文版)

Law No. 30 of 1999
Concerning Arbitration and Alternative Dispute Resolution

Previous version

WITH THE GRACE OF GOD ALMIGHTY THE PRESIDENT OF THE REPUBLIC OF INDONESIA CONSIDERING, that:

a. Whereas, under prevailing regulations having the force of law, civil dispute resolution besides being submitted to the public courts also has the possibility of being submitted to arbitration and/or alternative dispute resolution;

b. Whereas, the current regulations having the force of law applicable to dispute resolution by means of arbitration are no longer sufficient to address developments in the business world and law in general;

c. Whereas, based on the considerations specified in points a and b, above, it is necessary to stipulate an Act concerning Arbitration and Alternative Dispute Resolution.

In View of:

1. Article 5 paragraph (1) and Article 20 paragraph (1) of the 1945 Constitution;

2. Basic Provisions of Judicial Authority Act (Law No. 14 of 1970) (State Gazette Book Number 74 of 1970, Supplement Number 2951);

With the approval of THE PEOPLE'S LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF INDONESIA HAS DECIDED: To promulgate this ARBITRATION and ALTERNATIVE DISPUTE RESOLUTION ACT.

Chapter Ⅰ General Provisions

Article 1 In this Act the following terms have the following meanings:

(1) Arbitration shall mean a mechanism of settling civil disputes outside the general courts based upon an arbitration agreement entered into in writing by the disputing parties.

(2) Parties shall be legal entities, based upon civil and/or public law.

(3) Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises.

(4) District Court shall mean the District Court having jurisdiction over the Respondent.

(5) Claimant shall mean the party submitting the request for resolution of the dispute by arbitration.

(6) Respondent shall mean the party opposing the Claimant in the resolution of the dispute by arbitration.

(7) Arbitrator [or arbitrator(s)] shall mean one or more persons designated by the parties in dispute or appointed by the District Court or by an arbitration institution to render an award regarding the particular dispute submitted for resolution by arbitration.

(8) Arbitration Institution shall mean a body designated by the parties in dispute to render an award with regard to a particular dispute. This institution may also give a binding opinion concerning a particular legal relationship where a dispute has not yet arisen.

(9) International Arbitration Awards shall mean awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator(s) which under the provisions of Indonesian law are deemed to be International Arbitration Awards.

(10) Alternative Dispute Resolution (or ADR) shall mean a mechanism for the resolution of disputes or differences of opinion through procedures agreed upon by the parties, i. e., resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment.

Article 2 This Act shall regulate the resolution of disputes or differences of opinion between parties having a particular legal relationship who have entered into an arbitration agreement which explicitly states that all disputes or differences of opinion arising or which may arise from such legal relationship will be resolved by arbitration or through alternative dispute resolution.

Article 3 The District Court shall have no jurisdiction to try disputes between par-

ties bound by an arbitration agreement.

Article 4 (1) In the event the parties have previously agreed that disputes between them are to be resolved through arbitration and have granted such authority, the arbitrators are competent to determine in their award the rights and obligations of the parties if these matters are not regulated in their agreement.

(2) The agreement to resolve disputes through arbitration, as specified in paragraph (1), shall be contained in a document signed by the parties.

(3) In the event the agreement for resolution of disputes by arbitration is contained in an exchange of correspondence, including letters, telexes, telegrams, faxes, E - mail, or any other form of communication, the same shall be accompanied by a record of receipt of such correspondence by the parties.

Article 5 (1) Only disputes of a commercial nature, and those concerning rights which, under the law and regulations, fall within the full legal authority of the disputing parties, may be settled through arbitration.

(2) Disputes which may not be resolved by arbitration are disputes where according to regulations having the force of law no amicable settlement is possible.

Chapter Ⅱ Alternative Dispute Resolution

Article 6 (1) Disputes or differences of opinion that are not of a criminal nature may be resolved by the parties through Alternative Dispute Resolution (ADR) based on their good faith, by waiving such resolution by litigation in the District Court.

(2) Resolution of disputes or differences of opinion through ADR, as contemplated in paragraph (1), shall be carried out through a direct meeting of the parties not later than fourteen (14) days and the outcome shall be set out in a written agreement.

(3) In the event the dispute or difference of opinion cannot be resolved, as contemplated in paragraph (2), then by a written agreement of the parties, the dispute or difference of opinion between the parties may be resolved through the assistance of one or more expert advisors or a mediator.

(4) If the parties fail to reach an agreement as to the resolution of such dispute within fourteen (14) days with the assistance of one or more expert advisors or a mediator, or the mediator is not successful in reconciling the parties concerned, such parties

may request an Arbitration or ADR Institution to appoint a mediator.

(5) After the appointment of the mediator by such arbitration or ADR institution, the mediation process shall be commenced within seven (7) days.

(6) Efforts to resolve disputes or differences of opinion through mediation, as contemplated in paragraph (5), shall be undertaken in confidentiality. The settlement reached shall be set out in a written agreement, signed by all parties concerned, within thirty (30) days.

(7) The written agreement for such resolution of the dispute or difference of opinion shall be final and binding on the parties concerned, shall be implemented in good faith, and shall be registered in the District Court within no more than thirty (30) days after it has been signed.

(8) The agreement for resolution of the dispute or difference of opinion contemplated in paragraph (7) shall be completely implemented within no more than thirty (30) days after its registration.

(9) If attempts to reach an amicable settlement, as contemplated in paragraphs (1) to (6), are unsuccessful, the parties, based on a written agreement, may submit the matter to resolution by an arbitration institution or *ad hoc* arbitration.

Chapter Ⅲ Conditions of Arbitration, Appointment of Arbitrators and Right of Recusal

First Part　Conditions of Arbitration

Article 7　The parties may agree that a dispute which arises, or which may arise, between them shall be resolved by arbitration.

Article 8　(1) In the event that a dispute arises, the Claimant shall inform the Respondent by registered letter, telegram, telex, fax, E – mail, or by courier that the conditions for arbitration to be entered into by the Claimant and Respondent are applicable.

(2) The notification of Arbitration, as contemplated in paragraph (1), shall expressly state at least the following: a. The names and addresses of the parties; b. Reference to the applicable arbitration clause or agreement; c. The agreement or matter being the subject of the dispute; d. The basis for the claim and the amount claimed, if any;

e. The method of resolution desired; and f. The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number.

Article 9 (1) In the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, their designation of arbitration as the means of resolution of such dispute must be given in a written agreement signed by the parties.

(2) In the event the parties are unable to sign the written agreement as contemplated in paragraph (1), such written agreement must be drawn by a Notary in the form of a notarial deed.

(3) The written agreement contemplated in paragraph (1) must contain: a. The subject matter of the dispute; b. The full names and addresses of residence of the parties; c. The full name and place of residence of the arbitrator or arbitrators; d. The place the arbitrator or arbitration panel will make their decision; e. The full name of the secretary; f. The period in which the dispute shall be resolved; g. A statement of willingness by the arbitrator(s); and h. A statement of willingness of the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.

(4) A written agreement not containing the matters specified in paragraph (3) will be null and void.

Article 10 An arbitration agreement shall not become null or void under any of the following circumstances: a. The death of one of the parties; b. The bankruptcy of one of the parties; c. Novation; d. The insolvency of one of the parties; e. Inheritance; f. Effectivity of requirements for the cancellation of the main contract; g. If the implementation of the agreement is transferred to one or more third parties, with the consent of the parties who made the agreement to arbitrate; or h. The expiration or voidance of the main contract.

Article 11 (1) The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.

(2) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.

Second Part　Conditions of Appointment of Arbitrators

Article 12　(1) The parties who may be appointed or designated as arbitrators must meet the following requirements: a. Being authorized or competent to perform legal actions; b. Being at least 35 years of age; c. Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties; d. Having no financial or other interest in the arbitration award; and e. Having at least 15 years experience and active mastery in the field.

(2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.

Article 13　(1) In the event the parties cannot reach agreement on the choice of arbitrators, or no terms have been set concerning the appointment of arbitrators, the Chief Judge of the District Court shall be authorized to appoint the arbitrator or arbitration tribunal.

(2) In an ad hoc arbitration, where there is any disagreement between the parties with regard to the appointment of one or more arbitrators, the parties may request the Chief Judge of the District Court to appoint one or more arbitrators for resolution of such dispute.

Article 14　(1) In the event the parties have agreed that a dispute arising shall be heard and decided upon by a sole arbitrator, the parties must endeavour to reach an agreement concerning the appointment of such sole arbitrator.

(2) The Claimant shall propose to the Respondent, by registered letter, telegram, telex, telefax, E – mail or courier service, the name of a person eligible to be appointed as sole arbitrator.

(3) If the parties have not reached agreement as to the sole arbitrator within fourteen (14) days after the Respondent receives the Claimant's proposal contemplated in paragraph (2), then at the request of one of the parties, the Chief Judge of the District Court may appoint the sole arbitrator.

(4) The Chief Judge of the District Court shall appoint a sole arbitrator from a list of names submitted by the parties or obtained from the arbitration organization or institution contemplated in Article 34, with due consideration of the recommendation of or objections to the person concerned submitted by the parties.

Article 15 (1) The appointment of two arbitrators by the parties shall constitute authority to the two arbitrators to elect and appoint a third arbitrator.

(2) The third arbitrator contemplated by paragraph (1) shall be appointed as the chair of the arbitration tribunal.

(3) If within no more than thirty (30) days after notification is received by the Respondent as contemplated in Article 8 paragraph (1), one of the parties has failed to appoint a person as member of the arbitration panel, the arbitrator chosen by the other party shall act as sole arbitrator and his/her award shall be binding upon both parties.

(4) In the event the two arbitrators appointed by the parties as contemplated in paragraph (1) do not succeed in appointing a third arbitrator within fourteen (14) days after the last arbitrator was appointed, then at the request of one of the parties the Chief Judge of the District Court may appoint the third arbitrator.

(5) No attempt may be made to nullify the appointment of an arbitrator made by the Chief Judge of the District Court as contemplated in paragraph (4).

Article 16 (1) An arbitrator appointed or designated may accept or refuse the appointment or nomination.

(2) The parties must be advised by the arbitrator(s), in writing, of the acceptance or rejection of the appointment, as contemplated in paragraph (1) within fourteen (14) days from the date of the appointment or designation.

Article 17 (1) By the appointment of one or more arbitrators by the parties in writing and the acceptance in writing of the appointment by the arbitrator(s), there is a civil contract between the appointing parties and the arbitrator(s) accepting the appointment.

(2) The appointment contemplated in paragraph (1) shall have the effect that the arbitrator or arbitrators will render an award fairly, justly, and in accordance with the prevailing stipulations (of law and contract), and the parties will accept such award as final and binding as mutually agreed.

Article 18 (1) A prospective arbitrator asked by one of the parties to sit on the arbitration panel shall be obliged to advise the parties of any matter which could influence his independence or give rise to bias in the rendering of the award.

(2) Anyone accepting an appointment as arbitrator as contemplated in paragraph

(1) shall inform the parties of his appointment.

Article 19 (1) In the event that an arbitrator states his/her acceptance of the appointment or designation as contemplated in Article 16, the arbitrator concerned may not withdraw his/her acceptance except with the approval of the parties.

(2) In the event the arbitrator contemplated in paragraph (1) who has accepted the appointment or designation, wishes to withdraw, such arbitrator shall submit a written request to the parties.

(3) In the event the parties may consent to the request to withdraw contemplated in paragraph (2) the arbitrator concerned may be released from his/her duties as arbitrator.

(4) In the event the request for withdrawal does not receive the consent of theparties the Chief Judge of the District Court may release such release of the arbitrator from his/her duties.

Article 20 In the event an arbitrator or arbitration tribunal, without valid reason, fails to render an award within the period specified, such arbitrator(s) may be ordered to pay to the parties compensation for the costs and losses caused by the delay.

Article 21 The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceedings to carry out the function of arbitrator or arbitration tribunal unless it is proved that there was bad faith in the action.

Third Part　Right of Recusal

Article 22 (1) A demand for recusal may be submitted against an arbitrator if there is found sufficient cause and authentic evidence to give rise to doubt that such arbitrator will not perform his/her duties independently or will be biased in rendering an award.

(2) Request for recusal of an arbitrator may also be made if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.

Article 23 (1) Application for recusal of an arbitrator appointed by the President of a District Court shall be submitted to the District Court concerned.

(2) Application for recusal of a sole arbitrator shall be submitted to the arbitrator concerned.

(3) Application for recusal of a member of an arbitration tribunal shall be submitted to the arbitration tribunal concerned.

Article 24 (1) An arbitrator who was not appointed by the Court, may only be recused for a reason which became known to the party applying for such recusal after the appointment of the arbitrator concerned.

(2) An arbitrator appointed by the Court may only be recused for a reason which became known to the Court after acceptance of such appointment.

(3) The party objecting to the appointment of an arbitrator made by the other party must submit its demand for recusal within fourteen (14) days after the appointment.

(4) In the event that matters, as contemplated in Article 22 paragraphs (1) and (2), become known at a later date, the request for recusal must be submitted not more than fourteen (14) days after such matters become known.

(5) The demand for recusal must be submitted in writing, either to the other party or to the arbitrator concerned, stating the reason for the demand.

(6) In the event the demand for recusal submitted by one of the parties is consented to by the other party, the arbitrator concerned must resign and a replacement arbitrator shall be appointed in accordance with the procedures set out in this Act.

Article 25 (1) In the event the request for recusal submitted by one of the parties is not consented to by the other party and the arbitrator concerned is unwilling to resign, the party concerned may submit its request for recusal to the Chief Judge of the District Court, whose decision on the matter shall bind the two parties, and shall not be subject to appeal.

(2) In the event the Chief Judge of the District Court decides that the request for recusal, contemplated in paragraph (1), is well founded, a replacement arbitrator shall be appointed in the manner applied to the appointment of the arbitrator to be replaced.

(3) In the event the Chief Judge of the District Court rejects the demand for recusal, the arbitrator shall continue to perform his/her duties.

Article 26 (1) An arbitrator's authority shall not be nullified by the death of the arbitrator and the authority shall thereupon be continued by a successor arbitrator appointed in accordance with this Act.

(2) An arbitrator may be dismissed from his/her mandate in the event that he/she

is shown to be biased or demonstrates disgraceful conduct, which must be legally proven.

(3) In the event that during hearing of the dispute an arbitrator dies, is incapacitated, or resigns, and so is unable to meet his/her obligations, a replacement arbitrator shall be appointed in the manner applicable to the appointment of the arbitrator concerned.

(4) In the event a sole arbitrator or the chair of the arbitration tribunal is replaced, all hearings previously held shall be repeated.

(5) In the event a member of the arbitration tribunal is replaced, the hearing of the dispute shall only be repeated among the arbitrators themselves.

Chapter Ⅳ Procedures Applicable Before the Arbitration Tribunal

First Part　Arbitration Procedures

Article 27　All hearings of arbitration disputes shall be closed to the public.

Article 28　The language to be used in all arbitration proceedings is Indonesian, except that the parties may choose another language to be used, subject to consent of the arbitrator or arbitration tribunal.

Article 29　(1) The parties in dispute shall have the same right and opportunity to put forward their respective opinions.

(2) The parties in dispute may be represented by counsel, pursuant to special power of attorney.

Article 30　Third parties outside the arbitration agreement may participate and join themselves into the arbitral process, if they have related interests and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal hearing the dispute.

Article 31　(1) The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in hearing the dispute, provided this does not conflict with the provisions of this Act.

(2) In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitration tribunal has been constituted in accordance with Articles 12, 13, and 14, all disputes which have been so referred to the arbitrator or ar-

bitration tribunal shall be heard and decided upon in accordance with the provisions in this Act.

(3) In the event, the parties have chosen an arbitration procedure as contemplated in paragraph (1) the time frame and venue of the arbitration must be agreed upon, and if these have not been so determined by the parties, they shall be decided upon by the arbitrator or arbitration tribunal.

Article 32 (1) At the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutorydecision to regulate the manner of running the examination of the dispute, including decreeing a security attachment, ordering the deposit of goods with third parties, or the sale of perishable goods.

(2) The period of implementation of the provisional award or other interlocutory decision contemplated in paragraph (1) shall not be counted into the period contemplated in Article 48.

Article 33 The arbitrator or arbitration tribunal has the authority to extend its term of office:

(1) if a request is made by one of the parties in specific special circumstances;

(2) as result of a provisional award or other interlocutory ruling being made; or

(3) if it is deemed necessary by the arbitrator or arbitration tribunal in the interests of the hearing.

Article 34 (1) Resolution of a dispute through arbitration may be referred to a national or international arbitration institution if so agreed upon by the parties.

(2) Resolution of a dispute through institutional arbitration, as contemplated in paragraph (1), shall be done according to the rules and procedures of such designated institution, except to the extent otherwise agreed upon by the parties.

Article 35 The arbitrator or arbitration tribunal may order that any document or evidence be accompanied by a translation into such language as determined by the arbitrator or arbitration tribunal.

Article 36 (1) The arbitral hearings of the dispute shall be done by written documents.

(2) Verbal hearings may be conducted with the approval of the parties concerned or if deemed necessary by thearbitrator or arbitration tribunal.

Article 37 (1) Unless the parties have themselves determined the venue of the arbitration, the same shall be determined by the arbitrator or arbitration tribunal.

(2) The arbitrator or arbitration tribunal may hear witness testimony or hold meetings, if deemed necessary, at a place or places outside the place where the arbitration is being held.

(3) Examination of witnesses and expert witnesses before the arbitrator or arbitration tribunal shall be carried out in accordance with the provisions of the Code of Civil Procedure.

(4) The arbitrator or arbitration tribunal may conduct examination of property in dispute, or of some other matter connected with the dispute, at the location of such property. If such is deemed necessary the parties shall be properly summoned so that they may also be present at such examination.

Article 38 (1) The Claimant shall submit its statement of claim to the arbitrator or arbitration tribunal within the period of time as determined by the arbitrator or arbitration tribunal.

(2) The statement of claim shall contain at the least: a. The full name and residence or domicile of the parties; b. A short description of the dispute, accompanied by evidence; and c. Clear contents of the claim being asserted.

Article 39 After receiving the statement of claim from the Claimant, the arbitrator or the chair of the arbitration tribunal shall forward a copy of such claim to the Respondent, accompanied by an order that the Respondent must file its response in writing within a period of not more than fourteen (14) days as from Respondent's receipt of the copy of Claimant's claim.

Article 40 (1) Immediately upon receipt of the response from the Respondent, the arbitrator or the chair of the arbitration tribunal shall provide a copy thereof to the Claimant.

(2) At the same time, the arbitrator or chair of the arbitration tribunal shall order the parties or their representatives to appear at an arbitration hearing fixed for no more than fourteen (14) days from the issuance of the order.

Article 41 In the event that the Respondent has not responded to Claimant's claim within the fourteen (14) day period contemplated in Article 39, the Respondent

shall be summoned to a hearing pursuant to the provisions set out in Article 40 paragraph (2).

Article 42 (1) In the response or no later than the first hearing the Respondent may submit a counterclaim and the Claimant shall be given an opportunity to respond thereto.

(2) Any counterclaim, as contemplated in paragraph (1), shall be heard and decided upon by the arbitrator or arbitration tribunal together with the main dispute.

Article 43 If on the day determined as contemplated in Article 40 paragraph (2) the Claimant for no good reason does not appear after being duly summoned, the statement of claim shall be declared null and void and the mandate of the arbitrator or arbitration tribunal deemed to have been completed.

Article 44 (1) If on the day determined pursuant to Article 40 paragraph (2), the Respondent for no good reason does not appear, but has been duly summoned, the arbitrator or arbitration tribunal shall immediately summon the Respondent again.

(2) If the Respondent for no good reason still does not appear at the hearing, within ten (10) days after receipt by it of the second summons, the hearing shall continue without the presence of the Respondent and the Claimant's claim shall be granted as a whole, unless the claim is unfounded or contrary to law.

Article 45 (1) In the event that the parties appear on the day determined, the arbitrator or arbitration tribunal shall first endeavour to encourage an amicable settlement between the disputing parties.

(2) In the event such attempt at amicable settlement, as contemplated in paragraph (1), is successful, the arbitrator or arbitration tribunal shall draw up a deed setting out such amicable settlement, which deed shall be binding on both parties and shall order the parties to comply with the terms of such amicable settlement.

Article 46 (1) The hearing(s) on the merits of the dispute shall proceed if the attempt at amicable settlement, as contemplated in Article 45 paragraph (1), should not prove successful.

(2) The parties shall be afforded a final opportunity to explain in writing their respective positions, and to submit evidence deemed necessary to support such position, within such time limitation as shall be determined by the arbitrator or arbitration tribunal.

(3) The arbitrator or arbitration tribunal shall be empowered to require the parties to provide such supplementary written submissions of explanations, documentary or other evidence as may be deemed necessary, within such time limitation as shall be determined by the arbitrator or arbitration tribunal.

Article 47 (1) Before there has been any response from the Respondent, the Claimant shall be entitled to withdraw its request for dispute resolution by arbitration.

(2) In the event that there has already been a response from the Respondent, any amendment or supplement to the Claimant's statement of claim shall be allowed only upon the consent of the Respondent; and any such amendment or supplement may only involve matters of fact and not the legal basis of the claim.

Article 48 (1) The hearings on the dispute must be completed within not more than one hundred and eighty (180) days from the formulation of the arbitral panel.

(2) Such time limitation may be extended upon consent of the parties or if required in accordance with the provisions of Article 33 hereof.

Second Part　Witnesses and Expert Witnesses

Article 49 (1) Upon the order of the arbitrator or arbitration tribunal, or at the request of the parties, one or more witnesses or expert witnesses may be summoned to give testimony.

(2) The costs of summoning such witnesses, or expert witnesses, and their travel expenses shall be borne by the party requesting such testimony.

(3) Any such witnesses or expert witnesses shall testify upon oath, given prior to such testimony.

Article 50 (1) The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses to provide a written report concerning any specific matter relating to the merits of the dispute.

(2) The parties shall be required to provide all details and information that may be deemed necessary by such expert witnesses.

(3) The arbitrator or arbitration tribunal shall provide copies of any report provided by such expert witnesses to the parties, in order to allow the parties to respond in writing.

(4) In the event that any matters opined upon by any such expert witness is insuf-

ficiently clear, upon request of either of the parties, such expert witness may be requested to give testimony in a hearing before the arbitrator(s) and the parties, or their legal representatives.

Article 51 Minutes of the hearings, and examination of witnesses, shall be drawn up by a secretary and shall cover all activities in the examination and arbitration hearings.

Chapter Ⅴ Opinion and Arbitral Award

Article 52 The parties to an agreement have the right to request a binding opinion from an arbitration institution concerning any particular legal point or points contained in or concerning their agreement.

Article 53 No appeal whatsoever may be filed against any binding opinion, as contemplated in Article 52.

Article 54 (1) An arbitration award must contain: a. A heading to the award containing the words “Demi Keadilan Berdasarkan KetuhananYang Maha Esa” (for the sake of Justice based on belief in the Almighty God); b. The full names and addresses of the disputing parties; c. A brief description of the matter in dispute; d. The respective position of each of the parties; e. The full names and addresses of the arbitrators; f. The considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole; g. The opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal; h. The order of the award; i. The place and date of the award; and j. The signature(s) of the arbitrator or arbitration tribunal.

(2) The effectivity of the award shall not be frustrated by the failure of one arbitrator (where there are three) to sign the award if such failure to sign is caused by illness or demise of such non-signing arbitrator.

(3) The reason for the failure of such arbitrator to sign, as contemplated in paragraph (2), must be set out in the award.

(4) The award shall state a time limitation within which the award must be implemented.

Article 55 When the examination of the dispute is complete the hearing shall be concluded, and a date shall be fixed for the rendering of the arbitration award.

Article 56 (1) The arbitrator or arbitration tribunal shall render its decision based upon the relevant provisions of law, or based upon justice and fairness.

(2) The parties are entitled to designate the choice of law to be applied to the resolution of disputes which may arise, or which have arisen, between or among them.

Article 57 The award shall be rendered not later than thirty (30) days after the conclusion of hearings.

Article 58 Within not more than fourteen (14) days after receipt of the award, the parties may submit a request to the arbitrator or arbitration tribunal to correct any administrative errors and/or to make additions or deletions to the award if a matter claimed has not been dealt with in such award.

Chapter Ⅵ Enforcement of the Arbitration Award

Article 59 (1) Within thirty (30) days from the date the arbitral award is rendered, the original or an authentic copy of the award shall be submitted for registration to the Clerk of the District Court by the arbitrator(s) or a legal representative of the arbitrator(s).

(2) The submission and registration, as contemplated in paragraph (1), shall be carried out by recording and signature at the end, or on the margin, of the award by the Clerk of the District Court and by the arbitrator or his/her representative, and such submission shall constitute a deed of registration.

(3) The arbitrator(s) or legal representative(s) shall deliver the original, or authentic copy, of the award and of the instrument of appointment of such arbitrator(s) to the Clerk of the District Court.

(4) Failure to comply with the requirements set out in paragraph (1) above shall render the arbitration award unenforceable.

(5) All costs connected with the making of the deed of registration shall be borne by the parties.

Article 60 The arbitration award shall be final and binding upon both parties to the dispute.

Article 61 In the event that the parties fail voluntarily to implement the arbitration award, the award may be enforced on the basis of an order from the Chief Judge of the

District Court at the request of one of the parties to the dispute.

Article 62 (1) The order referred to in Article 61 shall be issued not later than thirty (30) days after an application for execution of the award is submitted to the Clerk to the District Court.

(2) Prior to issuance of the order of execution, the Chief Judge of the District Court contemplated in paragraph (1) shall examine whether the arbitration award fulfils the requirements set out in Articles 4 and 5, and is not in conflict with public morality or order.

(3) In the event the arbitration award does not meet the requirements set out in paragraph (2) above, the Chief Judge of the District Court shall reject the request for execution and shall not order such execution, and there shall be no recourse whatsoever to the judgment of the Chief Judge of the District Court.

(4) The Chief Judge of the District Court shall not examine the substantive reasons or considerations upon which the arbitration award was based.

Article 63 The order of the Chief Judge of the District Court shall be set out in writing upon the original text and authentic copy of the arbitration award.

Article 64 An arbitration award bearing an order of execution from the Chief Judge of the District Court shall be enforced in accordance with the provisions (of the Code of Civil Procedure) on execution of judgments in civil cases which are final and binding. Second Part International Arbitration.

Article 65 The District Court of Central Jakarta shall be the court vested with the authority to handle matters of the recognition and enforcement of International Arbitration Awards.

Article 66 International Arbitration Awards will only be recognized and may only be enforced within the jurisdiction of the Republic of Indonesia if they fulfil the following requirements: (a) The International Arbitration Award must have been rendered by an arbitrator or arbitration tribunal in a country which, together with the Republic of Indonesia, is a party to a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards. (b) International Arbitration Awards, as contemplated in item (a), above, are limited to awards which, under the provisions of Indonesian law, fall within the scope of commercial law. (c) International Arbitration A-

wards, as contemplated in item (a), above, may only be enforced in Indonesia if they do not violate public order. (d) An International Arbitration Award may be enforced in Indonesia only after obtaining an order of Exequatur from the Chief Judge of the District Court of Central Jakarta. (e) An International Arbitration Award, as contemplated in item (a), in which the Republic of Indonesia is one of the parties to the dispute, may only be enforced after obtaining an order of Exequatur from the Supreme Court of the Republic of Indonesia, which order is then delegated to the District Court of Central Jakarta for execution.

Article 67 (1) Application for enforcement of an International Arbitration Award shall be made after the award is submitted for registration to the Clerk to the District Court of Central Jakarta Pusat by the arbitrator(s) or the legal representative thereof.

(2) The submission of the file of the application for enforcement, as contemplated in paragraph (1) above, must be accompanied by: a. the original International Arbitration Award, or a copy authenticated in accordance with the provisions on authentication of foreign documents, together with an official translation of the text thereof into the Indonesian language; b. the original agreement which is the basis for the International Arbitration Award, or a copy authenticated in accordance with the provisions on authentication of foreign documents, together with an official translation of the text thereof into the Indonesian language; c. a certification from the diplomatic representative of the Republic of Indonesia in the country in which the International Arbitration Award was rendered stating that such country and the Republic of Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards.

Article 68 (1) No appeal to either the High Court or the Supreme Court may be lodged against a decision of the Chief Judge of the District Court, as contemplated in Article 66(d), above, recognising and enforcing an International Arbitration Award.

(2) An appeal may be filed with the Supreme Court against a decision of the Chief Judge of the District court contemplated in Article 66(d), refusing to recognise and enforce an International Arbitration Award.

(3) The Supreme Court shall consider and rule upon an appeal submitted to it, as contemplated in paragraph (2) above, within a period of not more than ninety (90)

days after the application for appeal has been received by the Supreme Court.

(4) No appeal may be submitted against a decision of the Supreme Court, as contemplated in Article 66(e).

Article 69 (1) After the Chief Judge of the District Court of Jakarta Pusat has issued a writ of execution, as contemplated in Article 64, further enforcement shall be delegated to the Chief Judge of the District Court having jurisdiction to enforce it.

(2) An order of attachment may be made upon such assets and property of the party against whom the award was rendered as shall be requested in the application for such order.

(3) The procedure for seizure and attachment in enforcement of the award shall follow the procedures therefor asset out in the Code of Civil Procedure.

Chapter Ⅶ Annulment of Arbitration Awards

Article 70 An application to annul an arbitration award may be made if any of the following conditions are alleged to exist: (a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered; (b) after the award has been rendered documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or (c) the award was rendered as a result of fraud committed by one of the parties to the dispute.

Article 71 An application for annulment of an arbitration award must be submitted in writing within not more than thirty (30) days from the date such arbitration award was submitted for registration to the Clerk to the District Court.

Article 72 (1) An application for annulment of an arbitration award must be submitted to the Chief Judge of the applicable District Court.

(2) If the application as contemplated in paragraph (1) above is granted the Chief Judge of the District Court shall determine further the consequences of the annulment of the whole, or a part, of the arbitration award.

(3) The decision on the application for annulment shall be made by the Chief Judge of the District Court within not more than thirty (30) days from receipt of the aforesaid application.

(4) An application for an appeal against the decision of the District Court may be made to the Supreme Court, which latter shall decide the matter as the court of final instance.

(5) The Supreme Court shall consider and decide upon any such application to appeal, as contemplated in paragraph (4) above, within not more than thirty (30) days after such application to appeal is received by the Supreme Court.

Chapter Ⅷ The Termination of the Arbitrators' Mandate

Article 73 The mandate of the arbitrator(s) shall terminate under the following circumstances: a. An award has been rendered with respect to the matters in dispute; b. The time limitation, as determined in the arbitration agreement, including any extension thereto agreed upon by the parties, has expired; or c. The parties mutually agree to rescind the arbitrators' appointment.

Article 74 (1) The death of one of the parties shall not cause the mandate of the arbitrators to terminate.

(2) The term of the mandate of the arbitrators, as contemplated in Article 48, may be postponed for a period of not greater than sixty (60) days from the death of one of the parties.

Article 75 (1) In the event that one of the arbitrators passes away, or a demand for recusal or dismissal of one or more arbitrators is granted, the parties must appoint a replacement arbitrator.

(2) If the parties are unable to reach an agreement as to the appointment of the replacement arbitrator, as contemplated in paragraph (1) above, within thirty (30) days, the Chief Judge of the District Court shall, at the request of the interested party, appoint one or more replacement arbitrator(s).

(3) The replacement arbitrators shall have the duty to continue the resolution of the dispute concerned based on the most recent conclusions drawn.

Chapter IX Arbitration Fees

Article 76 (1) The arbitrators shall determine the arbitration fee.

(2) The fee contemplated in paragraph (1) above shall include: a. the arbitrators' honoraria; b. travel expenses and other costs incurred by the arbitrators; c. the

costs of witnesses and expert witnesses required in the hearings on the dispute; and d. administrative costs.

Article 77 (1) The arbitration fees shall be charged to the losing party.

(2) In the event that a claim is only partially granted, the arbitration fees shall be charged to the parties equally.

Chapter Ⅹ Transitional Provisions

Article 78 Disputes which have already been submitted to an arbitrator or arbitration tribunal by the time this Act comes into effect, but for which no hearings have as yet been held, shall be resolved based upon the provisions of this Act.

Article 79 Disputes which have already been submitted to an arbitrator or arbitration tribunal and with respect to which hearings have already been held by the time this Act comes into effect, but for which no award has as yet been rendered, shall be resolved based upon the laws and regulations prevailing prior to the enactment hereof.

Article 80 Disputes with respect to which an award has already been rendered by the time this Act comes into effect, which awards have been invested with permanent legal force, shall be implemented based upon the provisions of this Act.

附录二：

2018 年印度尼西亚国家仲裁委员会仲裁规则(英文版)

Arbitration Rules of the Indonesian National Board of Arbitration

CHAPTER Ⅰ Scope

Article 1 Arbitration Agreement

If the parties to a commercial agreement or transaction have agreed in writing that disputes in relation to that agreement or transaction shall be referred to arbitration before the Indonesian National Board of Arbitration ("BANI"), or under the Rules of BANI, then such disputes shall be settled under the administration of BANI in accordance with these Rules, subject to such modifications as the parties may agree in writing, so long as such modifications do not contradict mandatory provisions of law nor the policies of BANI. Amicable resolution of disputes through arbitration at BANI shall be based on goodwill of the parties based on cooperative and non-confrontational procedures.

Article 2 Prevailing Procedure

These Procedural Rules shall apply to arbitrations conducted by BANI. By designating BANI and/or choosing the BANI Procedural Rules for resolution of a dispute, the parties to the agreement or dispute shall be deemed to have agreed to waive the process of case examination through the District Court in connection with the agreement or dispute, and to execute any award made by the Arbitration Tribunal based on the BANI Procedural Rules.

CHAPTER Ⅱ General Stipulations

Article 3 Definitions

Unless specifically stipulated otherwise, the terms below shall have the following definitions when referred to herein:

a. "BANI Arbitration Tribunal" or "Tribunal", in capital letters or small letters, shall be the Tribunal formed according to the BANI Procedure and comprising one or

three or more arbitrators;

b. “Award”, in capital letters or small letters, shall be any award rendered by the Tribunal either interim or final;

c. “BANI” shall be the Indonesian National Arbitration Board;

d. “Board” shall be the governing board of BANI;

e. “Chairman” shall be the Chairman of the Board of BANI, unless and if it is clearly stated that what is meant is the Chairman of the Arbitration Tribunal. The BANI Chairman may appoint a Vice Chairman or other Members of the Board to perform the duties of the Chairman, as set forth in these Rules, for one or more specific arbitral references, in which case reference to the Chairman in these Rules will mean that the Vice Chairman or other members of the Board designated;

f. “Claimant” shall mean and refer to one or more claimants, or parties bringing the arbitral reference;

g. “Law” shall mean and refer to Law of the Republic of Indonesia No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution;

h. “Respondent” shall mean and shall refer to one or more Respondents or the parties to whom the petition for arbitration is addressed or against whom the arbitral reference is brought;

i. “Parties” shall mean the Claimant and the Respondent;

j. “Procedural Rules” or “Rules” shall mean and refer to the stipulations of these BANI Procedural Rules prevailing at the time of commencement of the arbitration, with due regard to the certain agreements that may have been made by the parties concerned, one and or another by observing the provision of Article 1;

k. “Secretariat” shall mean and refer to the administrative facility of BANI which shall be responsible for registration of the arbitral reference and other matters of an administrative nature in furtherance of the arbitration process;

l. “Secretary of the Tribunal” shall mean and refer to the secretary designated by BANI to assist in the administration of the arbitration proceeding in question; and

m. “Writing”, in capital letters or small letters, shall include not only documents written or printed on paper but also electronically created and/or transmitted documentation; such writings to include not only agreements but also exchange of correspondence,

minutes of meetings, telex, telefax, E-mail and other such communications; and no agreement, document, correspondence, notice or other instrument which is required to be in writing shall be denied legal effect solely for the reason that it is contained in an electronically created or transmitted message.

Article 4 Submission, Written Notice, and Deadline

1. Submission of written communication and number of copies

All written communication submissions to each party, together with each and every supporting document, must be handed over to the BANI Secretariat to be registered with adequate number of copies to enable BANI to give a copy of each communication to each party, to each of the arbitrators, and for filing at the BANI Secretariat. For this purpose, the parties and/or their attorneys must guarantee that BANI at any time shall have the latest address and telephone number, fax, E-mail that are relevant to the communication required. Each communication sent directly by the Tribunal to the parties shall be copied to the Secretariat and each communication sent by the parties to the Tribunal must be copied to the other party and to the Secretariat.

2. Communication with the Tribunal

Once the Arbitral Tribunal has been constituted, no communication shall be made by any party with any one or more of the arbitrators in any way relating to the arbitral reference except: (i) in the presence and/or with participation of the other party (if verbal); or (ii) with a copy sent simultaneously to the other party or parties, and to the Secretariat (if written).

3. Notice

Each notice that has to be given based on these Rules, unless the Tribunal instructs otherwise, must be given directly, through courier, facsimile or E-mail and shall be considered effective on the date of receipt or if the date of receipt cannot be determined, on the day after the delivery in question.

4. Time Calculation

Any period of time specified in or fixed under these Rules or under any applicable agreement to arbitrate, shall commence on the day following the date the notice or communication is deemed to be effective, as provided in Rule 4, paragraph (3), above.

Where the expiration date of any notice or time limit falls upon a Sunday or Indonesian national holiday, such time limit shall expire on the next business day following such Sunday or holiday.

5. Calendar Days

Reference to numbers of days in these Rules shall refer to calendar days.

6. Quick Resolution

By referring resolution of dispute to BANI in accordance with these Rules, all parties agree to pursue resolution of such dispute in good faith, endeavoring at all times to effect resolution of such dispute as quickly and efficiently as possible, not to take any unnecessary delaying action nor other step to impede the smooth and just arbitral process.

7. Proceeding Deadline

Unless specifically agreed upon by the parties, the proceeding shall be completed within a period of not longer than 180 (one hundred eighty) days from the date of composition of the full Tribunal. In special conditions where the dispute is of a highly complex nature, the Tribunal shall be empowered to extend the deadline upon notice to the parties.

Article 5 Representatives of Parties

1. The Parties may be represented in the arbitration by an individual or individuals chosen by them. In the first submission, namely in the Petition for Arbitration from the Claimant and likewise in the Reply of the Respondent on the Petition, each party must state the name, address data, and information as well as the position of each individual representing the party in the arbitration and such designation must be supported by a special power of attorney special duly stamped with enough copies as stipulated in Article 4 paragraph (1) above giving the right to the individual to represent the party in question.

2. However, if a party is represented by a foreign advisor or a foreign legal advisor in an arbitration case relating to dispute that abides by the Indonesian law, the foreign advisor or the foreign legal advisor may attend only if he is accompanied by an Indonesian advisor or legal advisor.

CHAPTER Ⅲ Commencement of Arbitration

Article 6 Petition for Arbitration

1. The arbitral procedure commences with the registration and filing the Petition for Arbitration by the party initiating recourse to arbitration (the "Claimant").

2. Designation of Arbitrator

In the petition for arbitration, the Claimant and in its reply on the petition the Respondent may designate an arbitrator or hand over the designation to the BANI Chairman.

3. Fees/Expenses

Petition for Arbitration must be accompanied by payment of the registration fee and the administrative fee in accordance with the BANI regulation.

The administrative fee shall include the administrative fee of the Secretariat, proceedings expenses and arbitrators fee.

If a third party beyond the arbitration agreement participates and joins in the process of dispute resolution through arbitration as referred to by Article 30 of Law No. 30 of 1999, then the third party shall be obliged to pay the administrative fee and other fees in connection with the participation.

4. Examination of arbitration case shall not be commenced before the administrative fee has been settled by the parties in accordance with the BANI regulation.

Article 7 Registration

1. After receiving the Petition for Arbitration and documents as well as the registration fee required, the Secretariat shall register the Petition in the BANI register.

2. The Board of BANI shall review the petition to determine whether or not the arbitration agreement or arbitration clause in the contract is adequate to provide a basis of authority for BANI to examine the dispute.

Article 8 Response of Respondent

1. If the Board determines that BANI is authorized to adjudicate the dispute, then after registration of the Petition, one or more Secretaries of the Tribunal must be designated to assist in the administration of the arbitration case.

2. The Secretariat shall give a copy of the Petition for Arbitration and the attached documents to the Respondent, and request the Respondent to submit its written response within a period of not longer than 30 (thirty) days.

3. Response

Within a period of not longer than 30 (thirty) days after receiving the submission of Petition for Arbitration, the Respondent shall be obliged to submit its Reply. In the Reply, the Respondent may designate an arbitrator or hand over the designation to the BANI Chairman. If, in the reply, the Respondent does not designate an arbitrator, then it shall be considered that the designation has absolutely been handed over to the BANI Chairman.

4. Extension of Period

The BANI Chairman shall be authorized, at the request of the Respondent, to extend the period for submission of reply and or the designation of an arbitrator by the Respondent with legitimate reasons, on the condition that the extension of period may not exceed 14 (fourteen) days.

CHAPTER Ⅳ Arbitration Panel

Article 9 Individuals empowered to be Arbitrators

1. Arbitration Panel

Except in special situations as referred to in Article 9 paragraph (2) below, only those who are recognized included in the list of arbitrators provided by BANI and/or having ADR/Arbitration certificate recognized by BANI may act as arbitrators based on these Rules that may be chosen by the parties.

The BANI list of arbitrators shall comprise arbitrators meeting the requirements, residing in Indonesia and in various jurisdictions throughout the world, either legal experts or non-legal practitioners and experts such as engineers, architects, and other individuals meeting the requirements. The list of arbitrators from time to time may be reviewed, added or amended by the Board.

2. External Arbitrator

In the event that the nature of the dispute requires an arbitrator possessing special expertise to properly adjudicate the dispute referred to BANI, a petition may be filed

with the Chairman of BANI to designate an arbitrator who is not listed in the BANI list of arbitrators on the condition that the arbitrator concerned meets the requirements referred to in paragraphs 1 above and 3, below. Each petition must clearly state the reason for the need for such an external arbitrator together with a complete curriculum vitae of the arbitrator being proposed. If the Chairman of BANI considers that there is no arbitrator in the BANI list of arbitrators with the required professional qualification, whilst the arbitrator requested does possess such qualification, is neutral and independent, then the Chairman of BANI may, based on his own consideration, approve the designation of the arbitrator.

If the Chairman of BANI does not approve the designation of the external arbitrator, the Chairman must recommend, or designate, with his own choice, an arbitrator alternative chosen from the BANI list of arbitrators or an expert meeting the requirements in the required field but is not registered in the BANI list of arbitrators. The Board may consider the designation of a foreign arbitrator who is recognized on the condition that the foreign arbitrator meets the qualification requirements and is prepared to comply with the BANI Procedural Regulation, including the stipulation regarding arbitrator fee, whereby the designating party shall be obliged to bear the travel, accommodation and other extraordinary expenses related to the designation of the foreign arbitrator.

3. Qualifications

Besides possessing ADR/Arbitration certificate as referred to in paragraph 1 above and/or other qualification recognized by BANI, all arbitrators must possess requirements as follows:

a. authorized or qualified to take legal actions;

b. being at least 35 years of age;

c. not having familial relationship based on descent and marriage down to the third generation, with any of the parties in dispute;

d. not possessing financial interest or anything whatsoever on the result of arbitration resolution;

e. experienced for at least 15 years and mastering actively the relevant field;

f. not serving or acting as judge, prosecutor, clerk of court, or other government

official.

4. Statement of Independence

Arbitrators who have been appointed in accordance to BANI Rules to handle the case, shall be obliged to sign a Statement of Independence as provided by BANI Secretariat.

5. Indonesian Law

If according to the arbitration agreement the dispute is governed by Indonesian law, at least one arbitrator, preferably but not necessarily the Chair, shall be a law graduate or practitioner who knows Indonesian law well and resides in Indonesia.

Article 10 Composition of Tribunal

1. Sole Arbitrator

If the Tribunal is to comprise only one sole arbitrator, the Claimant may, in the petition for arbitration, propose to the Chairman one or more individuals meeting the requirements as a recommendation to act as sole arbitrator. If the Respondent accepts one of the candidates nominated by the Claimant, with the approval of the Chairman, the individual may be designated as sole arbitrator. However, if there is no candidate nominated by the Claimant that is acceptable to the Respondent, unless both parties agree on a Tribunal comprising three arbitrators, the Chairman of BANI shall be obliged to immediately designate an individual who shall act as sole arbitrator, which designation may not be rejected or objection may not be lodged by either party except on demonstrable grounds of lack of independence or impartiality. If the parties do not accept a sole arbitrator, and/or the Chairman considers that the dispute in question is of a complex nature and/or the scale of the dispute in question or the quantum in dispute is such that a Tribunal comprising three arbitrators is clearly warranted, then the Chairman shall inform the parties of the matter and a period of 7 (seven) days shall be given to them each to designate an arbitrator chosen by them and if this is not complied with then the stipulation in Article 10 paragraph (3) below shall apply.

2. Designation Failure

In any case in which either party shall fail to designate or appoint an arbitrator within the time limitation as set out herein within not more than 14 (fourteen) days

from notice or request to do so, taking into consideration the provision in Article 8 (3), the Chairman shall be authorised to make such appointment on behalf of that party.

3. In Case of Three Arbitrators

If the Tribunal is to consist of three arbitrators, in case both parties have appointed their respective arbitrators, the Chairman of BANI will appoint an arbitrator to preside the Tribunal.

The appointment of the arbitrator who will preside the Tribunal shall take place after taking into consideration the proposals from the respective arbitrators of both parties which choice can be made from the list of BANI arbitrators.

4. If Number is not Fixed

If the parties have not agreed earlier regarding the number of arbitrators (such as one or three arbitrators), the Chairman shall be empowered to rule, based on the nature, complexity, and scale of the dispute in question, whether the case in question requires one or three arbitrators and, in such case, the stipulations in the previous paragraphs of Article 10 shall apply.

5. Multiple Parties

In case there are more than two parties in the dispute, then all of the parties acting as Claimant(s) shall be considered as a single party Claimant with regard to designation of arbitrator, and all parties being claimed against shall be considered as a single party Respondent for purposes of designation of an arbitrator. In the event that such multiple parties cannot agree upon the designation of an arbitrator within the allotted time frame, the selection of an arbitrator shall be deemed to have been left to the Chairman of BANI, who shall make the selection on their collective behalf. In special situations, if requested by a majority of the parties in dispute, the Chairman of BANI may approve the formation of a Tribunal comprising more than 3 arbitrators. Additional third parties may join in an arbitration case only insofar as this is allowed based on the stipulation of Article 30 of Law No. 30/1999.

6. Authority of Chairman of BANI

Final decision or approval regarding the designation of all arbitrators shall be in the hands of the Chairman of BANI. In giving such approval, the Chairman may request

additional information in connection with the independence, neutrality and/or criteria of the arbitrators being nominated. The Chairman may also consider the citizenship of the arbitrator nominated in connection with the citizenship of the parties in dispute by observing the standard requirements prevailing at BANI.

The Chairman shall make an effort to ensure that the decision with regards to the arbitrator designation is made or approved within a period of not longer than 7 (seven) days from the time the matter is submitted to him.

7. Acceptance of Arbitrators

An arbitrator candidate, within a period of 7 (seven) days from his or her designation, shall submit to BANI curriculum vitae and a written statement of willingness to act as arbitrator, in which statement he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.

Article 11 Challenge/Recusal of an Arbitrator

1. Challenge

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party wishing to make such challenge shall so notify BANI in writing within 14 (fourteen) days from the time it is advised of the identity of such arbitrator, attaching documentation establishing the basis for such challenge. Or, if the information which forms the basis of the challenge becomes known to the challenging party thereafter, such challenge must be submitted within 14 (fourteen) days after such information becomes known to the challenging party.

2. Replacement

BANI shall be obliged to review the exhibits through a special team and convey the result to the arbitrator being challenged and the other parties regarding the challenge. If the arbitrator being challenged agrees to resign, or another party agrees with the challenge, a replacement arbitrator shall be designated in the same manner as in the case of designation of the recused arbitrator, based on the stipulations in Article 10 above. Otherwise BANI may, but not required to, approve the recusal, in which case the Chairman of BANI shall designate a replacement arbitrator.

3. Recusal Failure

If the other party or arbitrator does not agree to the challenge, and the Chairman of BANI also considers that the challenge is groundless, then the arbitrator being challenged shall continue his duties as arbitrator.

4. Recusal of Designating Party

A party may challenge the arbitrator designated by itself only for reasons of which such party becomes aware after the appointment has been made.

Article 12 Replacement of an Arbitrator

1. Death or Disability

In the event, during the course of the arbitral proceedings, of the death or incapacitation of an arbitrator, a substitute arbitrator shall be appointed pursuant to the same paragraph of Article 10 as was applicable to the appointment or choice of the arbitrator being replaced.

2. Resignation of Arbitrator

The candidate or the arbitrator having conflict of interests with the case or the parties in dispute shall be obliged to resign.

Otherwise, once the Tribunal has been constituted, no arbitrator may resign from his/her post, except in the event he is challenged in accordance with the stipulations of this Rules of Procedures and laws and regulations.

3. Failure to Act

In case an arbitrator fails in performing his duties, on a *de jure* or *de facto* basis, to the extent that it becomes impossible for him to perform his function, as determined by the Chairman of BANI, then the procedure related to recusal and replacement of an arbitrator in accordance with the stipulations in Article 11 shall apply.

4. Repetition of Proceedings

If based on Articles 11, 12(1), or 12(3), a sole arbitrator is replaced, then proceedings, including the hearings conducted earlier must be repeated. If the Chairman of the Tribunal is replaced, each testimony hearing session earlier may be repeated if deemed necessary by the other arbitrators. If any other arbitrator is replaced, the other arbitrators shall brief the new arbitrator and no prior hearings shall be repeated except in

extraordinary circumstances where, and to the extent that, the Tribunal, in its sole discretion, deems necessary in the interests of natural justice. The repetition of any hearings for above reasons may be taken into account and, if the Tribunal deems it appropriate, the deadline for completion of case examination in the proceeding referred to in Article 4 paragraph (7) may be extended.

CHAPTER Ⅴ Arbitration Proceedings

Article 13 General Stipulations/Proceedings

1. Authority of Tribunal

After the formation or designation based on the stipulations in Chapter III above, the Arbitration Tribunal shall examine and rule on the dispute between the parties on behalf of BANI and therefore may exercise all of the authority possessed by BANI in connection with examination and passing of resolutions on the dispute in question. Before and during the proceeding period the Tribunal may make an effort to encourage amicable resolution between the parties. The effort to achieve amicable resolution shall not affect the deadline for examination in the proceeding referred to in Article 4 paragraph (7).

2. Confidentiality

All proceedings shall be conducted closed to the public, and all matters related to the arbitral reference, including documents, reports/notes on sessions, testimonies of witnesses and awards, shall be kept in strict confidence among the parties, the arbitrators and BANI, except to the extent required by law or otherwise as may be agreed by all parties to the dispute.

3. Natural Justice

Subject to these Rules and applicable law, the Arbitral Tribunal may conduct the arbitration in any such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a fair and equal opportunity of presenting its case.

4. Venue of Hearings

Hearings shall be conducted at a venue designated by BANI, and the agreement of the parties but may also be at another venue if deemed necessary by the Tribunal with the agreement of the Parties. The Arbitration Tribunal may request that meetings be held

to examine assets, other goods, or documents at any time and at the required place, with notice as required to the parties, to allow them to be able to attend the examination. Internal meetings and sessions of the Tribunal may be held at any time and venue, including over the internet, if the Tribunal deems this appropriate.

Article 14 Language

1. Language of Proceedings

If the parties have not agreed otherwise, the process of case examination shall be conducted in the Indonesian language, unless the Tribunal, taking into consideration the situation (such as existence of foreign parties and/or foreign arbitrators who cannot speak Indonesian, and/or where the transaction arising from the dispute is conducted in another language), deems it appropriate to use the English language or another language.

2. Document Language

If the original documentation submitted or relied upon by the parties in the submission of the case in question in a language other than the Indonesian language, then the Tribunal shall be empowered to determine whether or not the original documents must be accompanied by translation into the Indonesian language, or from the Indonesian language to another language. However, if the parties agree, or the Tribunal designates, that the language used in the case shall be a language other than the Indonesian language, then the Tribunal may request that the documents be submitted in the Indonesian language accompanied with translation by a sworn translator in the English language or the other language to be used.

3. Interpreter

If the Tribunal and/or any party requires the assistance of an interpreter during the proceeding, such interpreter shall be provided by BANI at the request of the Tribunal, and the fee of the interpreter shall be borne by the parties as deemed appropriate by the Tribunal.

4. Award Language

The Award shall be prepared in the Indonesian language, and if requested by one party or otherwise deemed appropriate by the Tribunal, in the English language or an-

other language. In case the original Award document is prepared in the English language or another language, an official translation shall be provided by BANI for registration purposes, and the cost for this shall be borne by the parties as instructed by the Tribunal.

Article 15 Applicable Law

1. Governing Law

The law that shall govern the substance of the dispute shall be the law that has been designated so to govern in the underlying commercial agreement between or among the parties in connection with which the dispute has arisen. In the absence of any such prior agreement by the parties as to the law that shall govern, the parties shall be free to designate the governing law on their mutual agreement. In the absence of any such agreement, the Tribunal shall have the authority to apply such rules of law as it deems appropriate, considering the circumstances of the matter.

2. Contract Stipulations

In applying the governing law, the Tribunal shall take into account the provisions of the underlying agreement as well as relevant trade practices and usage.

3. *Ex Aequo et Bono*

The Tribunal may assume the powers of an amiable composite and or *decide ex aequo et bono* where, and to the extent that, the parties have so agreed.

Article 16 Petition for Arbitration

1. Submission

The petition for arbitration which includes Statement of Claim submitted to BANI will be distributed to each member of the Tribunal and to the other party (or parties).

2. Conditions

The Petition for Arbitration must contain at least:

a. Name and address of each of the parties;

b. Information regarding facts supporting Petition for Arbitration;

c. Points at issue; and

d. The amount of relief or other remedy sought.

3. Documentation

The Claimant shall annex to the Statement of Claim a copy of the underlying agreement or agreements between or among the parties in connection with which the dispute has arisen and a copy of the agreement to arbitrate (if not included in the aforesaid underlying agreement), and may also annex all other documents deemed by the Claimant to be relevant. If additional documents or other evidence are intended to be submitted at a subsequent time, the Claimant should make reference to these in the Statement of Claim.

Article 17 Statement of Defense

1. Submission

Within a period of not longer than 30 (thirty) days the Respondent must submit its Statement of Defense to BANI to be conveyed to the Tribunal and the Claimant.

2. Conditions

The Respondent shall, in its Statement of Defense, address the matters enumerated under (b) and (c) of Article 16 paragraph (2) above. The Respondent may also annex to its Statement the documents on which it relies for its defense or shall make reference to any additional documents or other evidence intended to be submitted at a subsequent time.

3. Counterclaim

a. If the Respondent wishes to assert against the Claimant a counter-claim or set-off arising in connection with the dispute or in relation to the Claimant's claim, Respondent may submit such counter-claim or set-off together with its Statement of Defense or as the latest as the first hearing. The Tribunal shall have the authority, on application by the Respondent, to allow such counter-claim or set-off to be submitted at a later date if Respondent can establish that such delay is justified in accordance with the stipulations of Article 6 paragraphs (1) and (2) and Article 16 paragraphs (2) and (3).

b. Separate costs and fees shall be assessed with respect to such counter-claim or set-off in the same manner as for the primary claim, as provided in these Rules and the current schedule of fees as promulgated by BANI from time to time. Provided such ad-

ditional fees and costs have been paid by the parties, the counter-claim or set-off will be heard, considered, and decided simultaneously and jointly with the original claim.

c. Failure of the parties, or either of them, to pay the fees and costs assessed with respect to any counter-claim or set-off will not prevent nor delay continuation of the arbitral reference with respect to the main claim, which, provided the fees and costs have been paid with respect to such main claim, shall proceed as though no counter-claim or set-off had been asserted.

4. Response to Counter-claim

In the event that the Respondent has submitted a counter-claim or set-off, the Claimant (being a respondent thereunder) shall be afforded a period of thirty (30) days, or such other time limit as the Tribunal may deem appropriate, to submit its Answer to the counter-claim or claim for set-off, following the provisions of Article 17 paragraph (2) above.

Article 18 Jurisdiction

1. Kompetenz-Kompetenz

The Tribunal shall have the power to rule on any objection that it does not have jurisdiction, including any objection with respect to the existence or validity of the agreement to arbitrate.

2. Independent Arbitration Clause

The Tribunal shall be empowered to determine the existence of validity of an agreement in which the arbitration clause constitutes a part. For the purposes of this Rule an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A determination by the Tribunal that a contract is annulled by law shall not automatically annul the validity of the arbitration clause.

3. Denial Deadline

A contention that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense or, with respect to a counter-clam or set off arising in connection with the dispute in the Answer to the counter-claim or set off.

4. Interim Award

Normally, the Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, if it deems appropriate, the Tribunal may proceed with the arbitration and rule on such a contention in their final Award.

Article 19 Documents and Other Rulings

1. Procedural Hearing

After receipt of the submissions, the Tribunal must determine, on its sole discretion, whether or not the dispute can be resolved based on the documents alone, or it is necessary to call the parties to appear at a hearing. For such purpose the Tribunal may call for an initial procedural hearing, at which the schedule for other submissions, if any, and for hearings, if any, as well as other procedural matters shall be discussed with and/or communicated to the parties, either directly or through the BANI Secretariat.

2. Procedural rulings

The Tribunal shall, subject to these Rules, have full authority to determine the procedure and to make such rulings as it deems appropriate, which rulings shall be binding upon the parties. If the Tribunal deems it necessary, it may draw up Terms of Reference to be signed by the Tribunal and the parties. In any case the Secretary of the Tribunal shall take minutes of the proceedings and rulings of the Tribunal, which minutes, when signed by the Tribunal, shall constitute conclusive documentation of the proceedings.

3. Transcript

Should either of the parties wish to make a record of the proceedings, or any part thereof, upon approval of the Tribunal such party may engage the services of an independent reporter or secretary who shall deliver each transcript to the Tribunal for distribution to all parties. The costs of any such transcript shall be borne by the party or parties requesting same, such costs to be paid in advance to BANI for remittance by BANI to the reporter upon receipt of proper invoicing therefor.

4. Payable Fee

The examination of a case and/or session shall not be conducted before all of the arbitration fees, as notified by the Secretariat to the parties based on the extent of the

scale of the demand and the list of expenses that from time to time are announced by BANI, have been settled by one of or both parties.

5. Interlocutory Award

The Tribunal shall have the authority to make any provisional award or other interlocutory decision it may deem appropriate to regulate the manner of running the dispute, including decreeing a security attachment, ordering the deposit of goods with third parties, or the sale of perishable goods. The Tribunal shall be entitled to require security for the costs of any such measures.

6. Sanctions

The Tribunal shall have authority to impose sanctions on any party which fails or refuses to comply with any ruling made by the Tribunal or otherwise engages in conduct which impedes the smooth adjudication of the dispute by the Tribunal.

Article 20 Effort to Seek Amicable Resolution

1. Amicable Resolution

The Tribunal shall first endeavor to encourage the parties to make an amicable settlement either on their own or with assistance of an independent third party mediator or facilitator or with the assistance of the Tribunal if it is agreed upon by the parties.

2. Award on Amicable Agreement

If such a settlement can be reached, the Tribunal will prepare a written memorandum of such settlement, which memorandum shall have the force of a consent Award and shall be binding upon both parties and enforceable in the same manner as an Award of the Tribunal.

3. Failure to Resolve Amicably

If no settlement can be reached, the Tribunal will continue the arbitral procedure in accordance with these Rules.

Article 21 Default in Appearance

1. Failure of Claimant

In case the Claimant fails and/or does not come to the first session conducted by the Tribunal without a legitimate reason, then the Tribunal may declare the Petition for Arbitration annulled.

2. Failure of Respondent

In the event that the Respondent fails to submit its Response and/or its Statement of Defense, the Tribunal shall send written notice to the Respondent and allow a further time period of not more than fourteen (14) days in which to submit its Defense and/or appear at a hearing. In the event that the Respondent neither appears at a hearing, if properly called, nor submits its written Defense, the Tribunal shall send a second notice to the Respondent to appear or submit its Defense. If the Respondent fails to respond for the second time without any valid reason, the Tribunal may decide and make its award based upon the documents and evidence which have been submitted by the Claimant.

Article 22 Amendments and Subsequent Submissions

1. Amendments

Once the submissions, as aforesaid, have been completed, and once the initial hearing has been held, the parties shall not have the right to amend their Claims and/or Responses in any material manner, unless the Tribunal and all parties agree to such amendments. No claim may, however, be amended in such a manner that the amended claim falls outside the scope of the agreement to arbitrate.

2. Subsequent Submissions

The Tribunal shall decide which further evidences and/or written statements, in addition to the Statement of Claim and the Statement of Defense, shall be required from the parties or may be presented by them and shall fix the periods of time for submitting such statements. The Tribunal shall not be required to consider any additional submissions other than those which it has ruled to be appropriate.

Article 23 Evidence and Hearings

1. Burden of Proof

Each of the parties has the burden to explain its respective position, to submit evidence substantiating such position and to prove the facts relied upon it in support of its claim or defense.

2. Summary of Exhibits

The Tribunal may, if it considers it appropriate, require the parties either to address any enquiry or present any documentation the Tribunal deems necessary, and/or to

present a summary of all documents and other evidence which that party has presented and/or intends to present in support of the facts in issue set out in its Statement of Claim or Statement of Defense, within such time limits as the Tribunal shall deem appropriate.

3. Weight of evidences

The Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

4. Witnesses

If the Tribunal considers it necessary, and/or at the request of either party, expert witnesses or witnesses as to facts may be summoned. Such witnesses may be required by the Tribunal to present their testimony in a written statement first, on the basis of which the Tribunal shall determine, on its own or upon request of either party, whether oral testimony of any such witness shall be required.

5. Expenses of Witnesses

The party requesting the summons of a witness or expert witness must pay in advance all of the cost related to the presence of the witness. For this purpose the Tribunal may request that on the payment a deposit be made first to BANI.

6. Oath

Before giving their testimonies, the witnesses or expert witnesses may be requested to take an oath.

7. Conclusion of Proceeding

If the submission of exhibits, testimonies and proceedings are considered adequate by the Tribunal, the proceeding on the dispute shall be closed by the Chairman of the Tribunal who subsequently may designate a session for the final award announcement.

Article 24 Revocation of Arbitration

1. Revocation

So long as the Tribunal has not issued an Award, the Claimant shall have the right to revoke its claim upon written notice to the Tribunal, the other party and BANI. However, if the Respondent has already submitted its Statement of Defense, and/or counterclaim, the claim can only be revoked with the consent of the Respondent. If both parties agree to revoke the arbitration after the proceeding has been started, then such revo-

cation shall be carried out with through the issuance of a consent award by the Tribunal.

2. Refund of Payment of Expenses

In case of such revocation, if the proceeding has not been started yet, all of the cost paid, except registration fee, shall be returned to the Claimant and the administrative expenses of the BANI Secretariat that have been incurred shall be taken into account. If the proceeding or consultative meetings have been started, the administrative expenses including the expenses constituting the entitlement of the arbitrators deemed reasonable by the BANI Chairman, after consulting with the Tribunal, shall be taken into account in the refund.

CHAPTER Ⅵ The Award

Article 25 Final Award

Unless otherwise agreed by the parties, the Tribunal shall issue its final Award within 30 (thirty) days of the conclusion of the hearings, except in such case in which the Tribunal considers that the period must be extended adequately.

Article 26 Other Awards

Besides making a final Award, the Tribunal shall be entitled to make interim, interlocutory, or partial Awards.

Article 27 Majority

Where the Tribunal consists of three (or more) arbitrators, any award or other of the Tribunal shall be made based upon a decision of the majority of the arbitrators.

Any difference of opinion of the arbitrators regarding certain parts of the award may be stated in the award.

In the event that there is no majority accord upon the award, or any part thereof, the decision on such point or points shall be made by the Chairman of the Tribunal.

Article 28 Procedural Rulings

For matters of procedure, when there is no majority or when the Tribunal so authorizes, the Chairman of the Tribunal may decide on his/her own, subject always to revision, if any, by the Tribunal.

Article 29 Reasoned Award

The Award shall be made in writing and shall state the reasons upon which the Award is based, unless the parties have agreed that no reasons are to be given.

Award of the Tribunal shall be passed based on the legal stipulations or based on justice and propriety.

Article 30 Signing of Award

The Award shall be signed by the arbitrators and it shall contain the date and place in which it was rendered. If there are three arbitrators and one of them fails to sign, the Award shall state the reason for the absence of the signature

Article 31 Conveyance

Within a period of 14 (fourteen) days, the award that has been signed by the arbitrators must be given to each party, together with 2 (two) copies for BANI, and one of the copies shall be registered by BANI with the District Court concerned.

Article 32 Final and Binding

The award shall be final and binding on the parties. The parties undertake to carry out the Award without delay. In the Award the Tribunal may fix a time limit for the losing party to comply with the Award and impose penalty and/or interest at commercial rates for failure so to do.

Article 33 Registration

The confidentiality of the arbitral process shall not be interpreted to prevent registration of the Award with the appropriate District Court nor submission to any other court in any jurisdiction in which the successful party may wish to seek enforcement and/or execution thereof.

Article 34 Correction of Errors

Within not more than fourteen (14) days after receipt of the Award, the parties may submit a request to BANI for the Tribunal to correct any administrative errors and/or to make additions or deletions to the Award if a matter claimed has not been dealt with in such Award.

Article 35 List of Expenses

The costs of arbitration shall be fixed in a separate schedule annexed to these Rules. Such schedule may be revised or amended from time to time as deemed appropriate by BANI.

Article 36 Payment of Expenses

BANI shall invoice each of the parties for one half of the approximated costs, giving a time limit for payment thereof. If one party fails to pay its portion of the costs, the same may be paid in the first instance by the other party, and shall be subsequently taken into account in the award with the obligation of the party failing to pay.

BANI may, at the request of the Tribunal, increase the required costs, from time to time during the course of the arbitral reference where the Tribunal deems that the subject matter being considered or quantum claimed has increased above that which was first anticipated.

Article 37 Allocation

The Tribunal shall have authority to determine which party or parties shall be responsible for payment, or reimbursement to the other party, for the whole or any part of the costs, which allocation shall be made a part of the Award.

In general, where one party is fully successful, the other party shall bear the costs; and where each party is partially successful the costs will be allocated in accordance with the proportion of success of the claim of each party.

Article 38 Legal Service Fees

Except in extraordinary circumstances, the costs of legal representation of each party shall be borne by the party contracting such legal representation and will not normally be assessed against the other party. Where the Tribunal determines that a claim is frivolous or that one party has caused innumerable difficulties or delays in the progress of the arbitral reference, legal costs may be awarded to the adversely affected party.

Article 39 Execution Expenses

Costs of execution of the Award shall be borne by the losing party who fails voluntarily to comply with the terms of the Award.

Article 40 Exclusion of Liability

1. BANI, including the Board, the Secretariat, including the Board of BANI's Representatives and BANI's arbitrators, shall not be liable to any person for any negligence, act or omission in connection with any arbitration governed by these Rules.

2. BANI, including the Board, the Secretariat, including the Board of BANI's Representatives and BANI's arbitrators, shall not be under any obligation to make any statement in connection with any arbitration governed by these Rules.

Article 41 Exemption to Act As Witness or Expert at BANI Arbitration

1. No party shall seek to make the Chairman, vice-chairmen, the Secretary-General, officers, employees or any arbitrator act as a witness or expert in any legal proceedings in connection with any BANI arbitration governed by these Rules.

2. No party, the arbitration tribunal or the sole arbitrator shall seek to make any BANI arbitrator act as a witness or expert in any legal proceedings in connection with any BANI arbitration governed by these Rules.

Article 42 Decisions of the Board

The decisions of the Board with respect to all matters relating to an arbitration shall be binding upon the parties.

CHAPTER 03 >>

第三章

西班牙仲裁制度研究

西班牙王国(西班牙语:Reino de España,通称西班牙),是位于欧洲西南部的伊比利亚半岛、地处欧洲与非洲的交界处的议会君主制国家。从地理上看,西班牙总面积50.6万平方公里,其海岸线长约7800公里,地貌多山。[1] 西班牙的官方语言为西班牙语,而以西班牙语作为官方语言的国家数量位居世界第二,仅次于英语。根据世界银行的数据,2017年西班牙的GDP总量约为1.31万亿美元,位居所有国家中的第14位。[2] 在欧洲国家中,仅位于德国、英国、法国、意大利、俄罗斯之后。

西班牙是我国在政治、经济、文化等各领域广泛交往的重要伙伴之一。自1973年西班牙与我国建交以来,无论是在政府间还是民间层面上,两国都有着密切地合作往来。西班牙是我国在欧盟内第六大贸易伙伴,而我国是西班牙在欧盟外最大贸易伙伴。[3] 在贸易和投资领域,我国与西班牙皆呈现出领域上的互补关系,具有不同优势,这使两国合作具有促进双方经济发展的

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〔1〕 参见中华人民共和国外交部网:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679810/1206x0_679812/,最后访问日期:2018年11月20日。

〔2〕 具体数值为1,311,320,015,516.0美元。See DataBank, World Development Indicators, http://databank.worldbank.org/data/reports.aspx?source=2&series=NY.GDP.MKTP.CD,July 28,2018.

〔3〕《西班牙掀起中国文化热》,载中华网:https://news.china.com/zw/news/13000776/20181127/34527886.html,最后访问日期:2018年11月20日。

积极效果。同时,特别是借助西班牙与拉丁美洲的紧密关系,我国也在和西班牙共同开发第三方市场。西班牙也是”一带一路”倡议的积极回应者,其高层领导人多次参与我国”一带一路”倡议下的交流活动,并主动促进相关项目的启动和开展。

了解和研究西班牙的仲裁制度至少有以下三点重要意义。第一,由于我国与西班牙的商业和经济交往不断深化,商事纠纷亦会相应增加。对当地的仲裁制度环境有所认识会有效地帮助我国相关行业从业人员做好风险预防工作、降低应诉成本,并在权利和相关利益受到侵害时能够更加有效地利用仲裁法律工具,维护自己的利益并减小商业损失。第二,西班牙是典型地将《示范法》结合本国法律体系和社会环境转化为国内仲裁法律制度的国家。探讨西班牙仲裁制度,有助于理解其他国家基于《示范法》而建立起来的仲裁法律制度;同时,也为研究程序性制度的法律移植提供了典型的案例,有助于推敲法律移植的一般规律。第三,西班牙作为一个机构仲裁实践比较成熟的国家,其境内的仲裁机构发展出了一系列创新机制,如紧急仲裁员制度、仲裁的上诉制度,其有益之处值得研究并借鉴。

一、西班牙仲裁制度发展的历史沿革

(一)西班牙法律制度综述

要理解西班牙仲裁制度发展的历史沿革,有必要先对其基本的经济和政治制度变迁进行了解。中世纪时,西班牙地理区域内曾有多个政治统治中心并立,1492年“光复运动”取得胜利,西班牙才得以统一,并建立了西班牙王朝。该王朝时代的西班牙不仅空前繁盛,而且积极对外扩张,于欧洲、美洲、亚洲和非洲建立起大量殖民地。文艺复兴时期,西班牙作为欧洲最强大的国家,对欧洲乃至世界的经济、文化均有一定的影响。1588 年以后,以西班牙无敌舰队败给英国为转折,开始衰落。1939 年西班牙内战结束后,佛朗哥政权进行了长达 36 年的独裁统治。直到 1978 年,西班牙方才宣布改革,成功地制定了宪法,逐渐从先前的专制政体过渡到西方式民主政体。随即西班牙实行了议会君主制,并在国家组织形式上实行联邦制。[1]

西班牙的现行宪法颁布于 1978 年。该法规定了国家的政体,确立了分权机制。[2] 而奠定其联邦制基础的是 1979 年 10 月颁布的《西班牙区域自治法》。根据该法的规定,西班牙国土包括 17 个自治州和 50 个省以及海外的休达梅利亚地区。

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〔1〕 参见中华人民共和国外交部网:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679810/1206x0_679812/,最后访问日期:2018 年 11 月 20 日。

〔2〕 参见中华人民共和国外交部网:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679810/1206x0_679812/,最后访问日期:2018 年 11 月 20 日。

西班牙本土各州皆成立议会和政府，相对于国会和中央政府有相对独立的自治权力。[1]

西班牙王国的法律体系是一个典型的大陆法即民法法律体系，滥觞于罗马法。因此，构成西班牙法律渊源的主要为成文法法典及单行法案。支撑西班牙司法体系的主要法律文本为6/1985号《司法权力组织法》(Organic Law 6/1985 of the Judiciary Power)、1/2000号《西班牙民事司法法》(Law 1/2000 of Civil Judgement)、1882年9月14日《西班牙刑事司法法》(Law of September 14 1882 on Criminal Judgement)、29/1998号《西班牙行政管辖权法》(Law 29/1998 of Administrative Jurisdiction)以及修改后的《西班牙劳动程序法》(Law of Labour Procedure)和2/1989号《西班牙军事刑事程序组织法》(Organic Law 2/1989 that regulates Military Criminal Procedure)的2/1995号《西班牙皇家立法法令》(Royal Legislative Decree 2/1995)。这些法律文本涉及各个基本法律部门的司法和法律救济问题，构成了西班牙司法体系的规则框架。

在组织架构上，西班牙司法机构分为宪法法院和普通法院。宪法法院主要行使违宪审查权，对议会通过的法律及政府所颁布的法规享有充分的审查权，且公民可以对违反宪法的情况向宪法法院提出违宪之诉。普通法院级别设置为：最高法院、全国法院、大区高级法院、省级法院和市级独任法院。普通法院的审级为两级，实行两审终审制度。

(二)西班牙现代仲裁制度的演变

1953年12月22日，西班牙颁布了规范民商事仲裁活动的《西班牙仲裁法案》(以下简称1953年《西班牙仲裁法案》)。受当时政治环境和主导思想影响，1953年《西班牙仲裁法案》与其他采取西方传统“民主模式”国家的类似法律显著不同。当时西班牙的立法者不倾向于让当事人选择仲裁的方式来解决商事争议，而倾向于让当事人选择司法途径，以便让国家更有效地实施控制。1953年《西班牙仲裁法案》是出于促进经济发展的目的而颁布的，但该法案由于诞生在与外国断绝商事往来的时期，几乎没有考虑国际仲裁的问题。[2]

其后，基于对外开放和政治经济体制改革的需求，西班牙立法者开始致力于修

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〔1〕 参见《西班牙司法制度》，载中国法院网：https://www.chinacourt.org/article/detail/2004/07/id/126423.shtml，最后访问日期：2018年11月20日。

〔2〕 See Juan Ignacio Fernández Aguado, “Arbitration in Spain”, https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SPAIN.pdf, July 28, 2018.

改 1953 年《西班牙仲裁法案》。在这一时间跨度内,西班牙先后于 1975 年和 1977 年签订了 1961 年《欧洲国际商事仲裁公约》(European Convention on International Commercial Arbitration,以下简称《欧洲公约》)和 1958 年《纽约公约》,从而为融入国际商事仲裁秩序进行了法律规则上的准备。为了履行相应的公约义务,西班牙在国内仲裁体系还未成熟的情况下,实行了仲裁制度的国内与国际“双轨制”:对于国内仲裁,继续适用 1953 年《西班牙仲裁法案》;对于国际仲裁,直接适用西班牙缔结的上述国际条约。不过,西班牙从来没有停止过对该“双轨制”模式的改革,并且在制度上更加向国际仲裁开放;1981 年 5 月 22 日颁布的 1094/1981 号《西班牙皇家法令》就显现了这种改革的端倪。

1988 年 12 月 5 日,西班牙通过 36/1988 号《西班牙仲裁法案》(以下简称 1988 年《西班牙仲裁法案》)。该法案的颁布基于两点考虑:第一,因为西班牙国内法律体系中缺乏有效的国际仲裁机制,这使从事国际商事交往的当事人只得奔走于世界各地来寻求合适的仲裁场所,他们因而不得不面对不同的语言和文化环境,从而给西班牙带来经济和社会文化上的多重负面效果和损失;第二,全球商业实践的变化日新月异、花样翻新,如果没有国内和国际仲裁制度的统一,西班牙的商事从业者将无法第一时间享受外部变化所带来的便利。

面对先前的仲裁立法空缺,以及为了更加快速地与其他国家接轨,在 1988 年《西班牙仲裁法案》的立法过程中,西班牙选择以联合国国际贸易法委员会于 1985 年 7 月 21 日颁布的《示范法》为蓝本。[1] 《示范法》是联合国贸法会制定供世界各国用以在构建本国国际商事仲裁法律制度时予以转化或借鉴参考的指导性文本,其制定的宗旨是协调和统一各国的仲裁法律制度,为国际商事从事者提供争议解决的便利和高效,促进国际商事仲裁的发展。值得一提的是,西班牙在其仲裁法律体系的形成过程中,非常重视保持民商事纠纷解决制度整体上的一致性与系统性。[2] 因此,虽然 1988 年《西班牙仲裁法案》在很大程度上直接采纳了联合国贸法会的推荐做法,但也结合自己的需求和本国法律体系的特征发展出了一系列和《示范法》不同的制度和规则。

为了不断适应社会经济发展的具体需要,《西班牙仲裁法案》经历了数次修改,

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〔1〕 See the Model Law drawn up by the United Nations Commission on International Trade Law, June 21,1985 (Model Law of UNCITRAL), recommended by the General Assembly in Resolution 40/72, December 11,1985.

〔2〕 参见现行《西班牙仲裁法案》序言部分第 1 段。

但皆未改变1988年根据《示范法》所奠定的仲裁法律制度基本框架。2003年12月23日,西班牙颁布了60/2003号《西班牙仲裁法案》(以下简称2003年《西班牙仲裁法案》),并以之取代了1988年《西班牙仲裁法案》。在承认了1988年《西班牙仲裁法案》的立法价值和作用的前提下,2003年《西班牙仲裁法案》保留了其基础框架,仅对其中的一些较为过时的条款进行了局部修正。比如,明确了仲裁庭管辖权自裁决原则、当事人终结仲裁程序的能力等。随后,2003年《西班牙仲裁法案》又经历了数次修正。其历次修正案有13/2009号法案、1/2011号法案、5/2011号机构法案以及最新的42/2015号《关于修改西班牙民事程序法案和仲裁法案的法案》。下文中所提到的"《西班牙仲裁法案》",若无特殊说明,则皆为以60/2003号法案为基础并经过42/2015号法案修正后的《西班牙仲裁法案》。[1]

《西班牙仲裁法案》与《示范法》的主要区别可以归结为以下七点。[2]

第一,根据《西班牙仲裁法案》,任何可以由当事人约定的事项皆可仲裁。[3]

所谓"可以由当事人约定的事项",是指没有强行法规定,而可以由私人主体通过契约等私法上的行为方式根据合意进行约定或排除的事由。可见,凡是属于私人意思自治的范畴,即可以由私人自由处分的问题,皆为可以提交至某一西班牙仲裁庭仲裁解决的问题。在西班牙的法律体系中,属于强行法的范畴包括:刑事犯罪、税收、与劳动或家庭相关并涉及人格权等的规则。涉及这些领域的问题不可以由仲裁解决。可见,西班牙仲裁法中确立了一个极宽泛的可仲裁事由范围。反观《示范法》,由于其性质仅是为各国提供仲裁立法的指导,因此并没有明确限定可仲裁事项的范围。《示范法》第1条第1款规定"本法适用于国际商事仲裁",随即在脚注中,用开放式列举的方式给出了商事性质的法律关系的外延,其中包括:供应或交换货物或服务的任何贸易交易、销售协议、商事代表或代理、保理租赁、建造工厂、咨询、工程、使用许可、投资、筹资、银行、保险、开发协议或特许、合营和其他形式的工业或商业合作以及空中、海上、铁路或公路的客货载运。[4] 涉及上述交易而形成的法律关系的范围固然极其广泛,但《示范法》又规定可仲裁的"商事"关系范围要

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〔1〕 See Law 42/2015, October 5,2015, amending the Spanish Civil Procedure Act and the Arbitration Act.

〔2〕 See Alfonso Iglesia, Alberto Fortún and Iñigo Quintana, "Spain", https://globalarbitrationreview.com/jurisdiction/1000206/spain,July 15,2018.

〔3〕 参见《西班牙仲裁法案》第2条第1款。

〔4〕 参见《示范法》第1条第1款脚注2。

以一个国家的法律规定或者各国之间的协定所允许的类型为限。这意味着,适用《示范法》的国家可能对其进行自主的限制或缩小。综观《西班牙仲裁法案》,非但没有对其进行限缩,反而在任意法的范畴之内无限地扩大了该范围,因此无论是上述传统的商事关系,还是属于民事范畴的关系,即只要是当事人自由处分范围之内的,皆可以付诸仲裁途径解决。

第二,西班牙法不允许具有国家身份的仲裁当事人依照自己国家的国内法所赋予的特权去免除仲裁协议所产生的裁决的执行力。[1]

该特征主要涉及仲裁裁决执行中国家豁免的适用问题。在国家豁免问题上,各国态度和实践上的分歧与差异巨大,其原因在于国家在社会和经济生活中的参与程度各不相同,国有经济的重要程度在不同经济体中的差别也十分显著,甚至有些国家自身就对该问题持有摇摆不定的态度。为了给国家自主决定其对国家豁免制度设置问题上的自由,《示范法》没有就仲裁裁决的承认中一方是否可以主张国家豁免设立任何规则。但是,具体在各国采纳《示范法》的实践中,可以对该原则进行规定。西班牙是比较典型的在民商事仲裁中否认国家依照国内法主张豁免的国家。此种规定无疑反映了西班牙在 20 世纪 70 年代迫切实行改革、削弱国家对市场干预作用的鲜明态度。然而,这种对国家豁免主张的不宽容态度在其后的西班牙司法实践中有所减弱。1992 年,西班牙宪法法院在 TC 107/1992 案中认定国家当事人可以享有豁免权。[2] 在该案中,宪法法院的判决也明确了依照《西班牙司法权力组织机构法》第 21 条第 1 款、1961 年《维也纳外交关系公约》及 1963 年《维也纳领事关系公约》的相关规定,位于使馆与领馆内的财产不可以被执行。其后,西班牙在实践中并不一概否认民商事领域国家豁免的主张,在商事仲裁中亦然。

第三,在衡量仲裁案件是否具有涉外因素的问题上,西班牙法律将所涉及利益是否在境外视为一项判断涉外性的标准。[3]

根据《示范法》第 1 条第 3 款的规定,满足如下条件之一的,一个仲裁应当被视为国际仲裁,即涉外仲裁:(1)当事人的主要营业地分别位于不同国家;(2)仲裁协议中确定的或根据仲裁协议而确定的仲裁地点位于境外;(3)履行商事关系大部分义务的任何地点或争议事项的最密切联系地位于境外;(4)仲裁协议明确约定承认

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〔1〕 参见《西班牙仲裁法案》第 2 条第 2 款。

〔2〕 See SENTENCIA 107/1992, de 1 de julio (BOE núm. 177, de 24 de uztaila de 1992) ECLI:ES:TC:1992:107, http://hj.tribunalconstitucional.es/eu/Resolucion/Show/1994, July 20, 2018.

〔3〕 这有别于《示范法》的第 1 条第(3)和(4)项标准。

仲裁标的与一个以上的国家有关。而《西班牙仲裁法案》在承认这些判别标准的同时增加了额外规定,即将纠纷所涉及利益位于境外的仲裁也视为国际仲裁。因此,依照西班牙法,即便仲裁各方的营业地均位于西班牙境内,没有约定任何境外仲裁地点,没有境外最密切联系地,也没有关于标的是否位于多个国家的明确约定,只要所涉及的利益在西班牙境外,仍然可以被视为是国际仲裁。所涉及利益的外延也十分广泛,包括有形资产、在他国享有的知识产权、所拥有的他国公司股权或银行账户等。

第四,在缺乏特别约定时,《西班牙仲裁法案》对于仲裁庭的组成默认为独任仲裁庭。

换言之,如果当事人不特别约定仲裁庭由多名仲裁员组成,则仲裁庭仅由一名仲裁员组成。[1] 但根据《示范法》的规定,如果当事人没有约定,则仲裁庭应当由3名仲裁员组成。《示范法》所默认的三人仲裁庭,是我国当事人比较熟悉的仲裁庭组成方式,也是大多数国家所适用的方式。因此《西班牙仲裁法案》在此问题上的特殊规定值得关注。

第五,《西班牙仲裁法案》确定了仲裁员产生法律责任的主观要素,即主观恶意或重大过失。[2]

在仲裁员责任问题上,《示范法》没有作出特别规定。但就保障当事人的程序性权利而言,确定仲裁员在仲裁中的责任具有积极作用。仲裁活动作为一种程序性的法律关系,其所涉及的权利义务关系并不仅发生在申请人和被申请人之间,也发生在当事人和其他仲裁参与者与仲裁机构、仲裁庭及仲裁员之间。因此,仲裁机构、仲裁庭和仲裁员也是仲裁活动的权利义务主体,应当在享有职权和权利的同时,尽其义务以保障当事人的程序性权利。为了此种目的,《西班牙仲裁法案》设置了仲裁员的归责条款,以约束仲裁员的行为,从而保障仲裁当事人合法利益的实现。

第六,《西班牙仲裁法案》规定仲裁默认为保密进行,除非当事人有相反约定。[3]

保密进行,不仅是指对当事人的商业机密等依照法律法规应受保护的信息予

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〔1〕 参见《西班牙仲裁法案》第12条。

〔2〕 参见《西班牙仲裁法案》第21条。

〔3〕 参见《西班牙仲裁法案》第24条第2款。

以保密,也意味着仲裁过程自身不被公开,仲裁过程当中的文本交换不公布给其他方等。将仲裁默认为保密进行,意味着双方不经约定也可以享受被保密的待遇。这体现了对各方当事人商业活动的尊重。而《示范法》未就保密问题予以专门规定。

第七,《西班牙仲裁法案》比起《示范法》更倾向于认定仲裁协议具有有效性和可执行性。

根据《西班牙仲裁法案》的规定,就一个国际仲裁协议而言,只要依照当事人选择的可适用于仲裁实体问题的实体法或依照西班牙法是有效的,那么该仲裁协议就应当被认为是有效的。这是《西班牙仲裁法案》的特殊制度,而《示范法》中未见此类规定。

《西班牙仲裁法案》的数次修正案之间体现着一定程度上的连贯性,这在于它们皆是为了适应社会新状态下的商业活动新特点而产生的。以其最新的一次修改,即 2015 年 42/2015 号法案的最新修改为例,修改内容所关注的是提交仲裁的方式,这使仲裁活动更加倾向于适用书面提交方式。[1] 《西班牙仲裁法案》规定,一旦争议各当事人之间的仲裁协议符合《西班牙仲裁法案》的相关要求,即发生排斥法院审查仲裁所涉及实体问题的效力,除非有当事人就仲裁协议的该效力表示异议。为此,先前版本的《西班牙仲裁法案》第 11 条规定了异议作出的方式,并对普通程序(*juicio ordinario*)和口头程序(*juicio verbal*)的管辖权异议的程序作出区别规定:就普通程序而言,异议需要在该当事人回应对方主张的前 10 日之内以书面方式提出;而就口头程序而言,则需要在口头程序庭审后的 10 日之内以书面方式提出。所谓口头程序即被申请人直接在庭审期间以口述方式回应申请人的请求。而 2015 年修改后的《西班牙仲裁法案》第 11 条修改了关于口头程序的异议提出问题,要求口头程序的异议必须以与普通程序相同的方式作出,即要在被申请人回应请求的前 10 日之内以书面方式提出。经由这次修改,普通程序和口头程序在这个问题上就不再有区别。

上述修改显然使口头程序的进行比之前面临更多的程序要求,从而可能会阻却当事人选择口头程序。可见,该修订体现出西班牙仲裁法更加重视程序书面性的取向。此次修订的目的即努力适应现代商业活动的新需求。商业活动迅速和多变的特点使口头意思表示往往无证可查,且无法真实反映当事人所表达的完整含义,因而更重视书面程序的规定体现了在这种情形下对当事人充分进行意思表示

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〔1〕 参见《西班牙仲裁法案》第 11 条。

的保护。从该次修订中也可看到,西班牙对其仲裁法案的修改已经深入十分技术性的细节层面了。这种细致的特点与商业活动的成熟状态相适应。当事人要注意西班牙商事法律法规细节上的规定,以最大限度地保护在商业交往中的利益。

(三)西班牙仲裁制度的最新发展趋势

虽然西班牙的仲裁法律制度现已比较成熟,但它仍在蓬勃发展和完善之中。其中两个发展方向值得关注。其一,西班牙仲裁法律制度在发展中进一步细化和完善具体规则。例如,传统上,只有仲裁庭成员的中立性问题才是请求撤销仲裁裁决或认定裁决无效的依据。但是,近几年西班牙仲裁学界和实务界开始关注仲裁机构自身中立性的问题,并就仲裁机构若缺乏中立性而引起裁决撤销问题展开了讨论。其二,西班牙仲裁法律制度在发展中,将仲裁制度与其他纠纷解决方式予以融合统一,以方便当事人选择合适的方式来解决纠纷。在西班牙,当发生商事纠纷的时候,当事人仍更倾向于选择通过法院而不是仲裁来解决。但是,在2003年《西班牙仲裁法案》通过后,当事人选择仲裁而非诉讼解决的涉外纠纷数量逐年增多,仲裁逐渐成为可以替代诉讼程序的可靠途径。当事人选择在西班牙以仲裁的方式解决纠纷的重要原因是看中其效率和专业性。在涉外仲裁中,当事人可能倾向于认为仲裁庭可以更专业地考虑具体社会和文化背景,从而作出更符合具体案件需求的裁决。此外,当事人也会出于仲裁高效和便捷的特点选择仲裁。尽管仲裁所需时间视不同案件情况存在较大差别,但一般而言,从仲裁程序开始之日起算,仲裁案件一般在1~1.5年就可以得到裁决。

当然,当事人可能会出于仲裁的一些负面特征而选择不适用仲裁。比如,仲裁裁决一经作出后即发生强制执行力,缺乏可上诉性。虽然法院对仲裁负有监督职能,但与上诉不同的是,法院对仲裁裁决的审理一般仅限于仲裁活动或过程的合法性,而非裁决所基于的事实上或法律上的正确性。为了方便当事人在仲裁和司法途径中更加便于维护自己的利益,西班牙仲裁法的改革重点之一在于将仲裁和司法途径对接起来。

此外,当事人还可能会考虑其他替代性纠纷解决方式,如调解等。西班牙立法者也在试图完善规制这些途径的法律机制。2012年6月26日,西班牙颁布了5/2012号《西班牙民事和商事调解法案》。[1] 该法案为在西班牙进行的调解活动提供了较为稳定的法律框架。还有一些新兴的替代性纠纷解决方式,如专家决定

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〔1〕 See the Civil and Commercial Mediation Act 5/2012, July 26, 2012.

(expert determination)、建立争议委员会(dispute boards)等。这些方式在西班牙的使用目前还不常见,但是,随着人们对替代性纠纷解决方式的日益重视,这些途径的适用也会逐渐增多。特别是在建设部门等特殊的商业和工业领域,这些方法正在逐渐受到青睐。

2015 年 7 月 30 日,29/2015 号《西班牙关于在民事问题上的国际法律合作法》(Law 29/2015 on International Legal Cooperation in Civil Matters)颁布实施。该法为西班牙参与涉及国际仲裁等需要与他国合作的问题提供了一个基本框架。该法的颁布成为西班牙程序法律框架具有标志性的一步;它改变了西班牙传统的承认和执行仲裁裁决的途径,引入了更为现代化的机制。

二、西班牙仲裁法律制度综述

(一)仲裁法律制度概览

1. 法律渊源

(1)国内法渊源。

如前文所述,当前西班牙仲裁法的主要渊源是于 2003 年 12 月 23 日通过的 60/2003 号《西班牙仲裁法案》。该法的现行有效版本为经 2015 年修订后的版本。西班牙现行仲裁法所采取的是“单轨制”,即对国内和国际仲裁适用同样的法律。这使西班牙仲裁法有别于一些实行国内仲裁和国际仲裁分别立法模式的国家的仲裁法律制度。但如前文所述,西班牙从 1953 年起,曾实行过一段时期的“双轨制”,即将国际条约中缔结的商事仲裁规则适用于国际仲裁,而 1953 年《西班牙仲裁法案》只适用于国内仲裁。直到 1988 年,西班牙仲裁制度才转化为“单轨制”。现在,西班牙法律体系内国内仲裁与涉外仲裁所适用的规则并没有重大区别。由于《西班牙仲裁法案》是基于《示范法》而制定的,所以基本将国内和国际仲裁进行了统一。[1] 国内仲裁和国际仲裁仅有的区别在于仲裁条款的形式和内容[2]、仲裁的实质[3]和仲裁裁决的改正、澄清和补充[4]。此外,当仲裁地为西班牙以外的国家或地区时,关于西班牙法庭管辖权、临时措施、仲裁协议和仲裁裁决的承认与执行等规则会得以适用。[5]

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〔1〕 参见《西班牙仲裁法案》第 1 条。

〔2〕 参见《西班牙仲裁法案》第 9 条。

〔3〕 参见《西班牙仲裁法案》第 34 条。

〔4〕 参见《西班牙仲裁法案》第 39 条。

〔5〕 参见《西班牙仲裁法案》第 1 条第 2 款。

现行《西班牙仲裁法案》整部规则由序言和正文组成。序言介绍了《西班牙仲裁法案》的立法背景,强调了西班牙立法者致力于推进本国仲裁的国际化,同时也努力使国内仲裁法的修改保持法律体系的统一性和系统性。序言也明确了西班牙仲裁法基于《示范法》制定的意义,《示范法》由于体现了各法系之间的融合和妥协,可以帮助各国仲裁法律体系更快地实现国际化,促进西班牙境内国际仲裁的发展。同时,序言也重申在适当接纳《示范法》的同时,结合自身法律体系的特点和社会对法律的具体要求,对西班牙仲裁法进行适当修改、补充和创新的重要性。此外,序言就具体章节的基本内容以及其立法目的进行了说明,为法律适用中的解释提供了有权威性的依据。在序言所宣称的基本精神的指导下,《西班牙仲裁法案》全文包含 9 个章节共 46 条,每章的内容依次是基本条款、仲裁协议的要件和效力、仲裁员和仲裁庭的组成、仲裁庭的管辖权、仲裁员的行为规范、仲裁程序的终止方式、仲裁裁决的审查和撤销、仲裁裁决的强制执行、对外国裁决的承认和执行。正文后还有一些独立条款,处理的是《西班牙仲裁法案》的生效等问题,以及《西班牙仲裁法案》与其他特别法律法规的关系。

《西班牙仲裁法案》并非是唯一调整仲裁法律关系的规范。除《西班牙仲裁法案》以外,2015 年最新修订的《西班牙民事程序法案》中也有一些涉及仲裁问题的规定。譬如《西班牙民事程序法案》第 517 条及后续相关条款即规定了仲裁裁决的承认与执行。[1] 《西班牙民事程序法案》第 517 条规定的主要目的是明确相关机构可以采取公力救济行为的要件,即“执行行为”(西班牙文:acción ejecutiva,英文 executive action)的行使要件。[2] 根据《西班牙民事程序法案》第 517 条第 1 款的规定,相关机构实施执行行为的条件仅有一个,即需要基于有待执行、已被法律认可的权利(title)或利益,抑或理解为被该法律所认同的理由。继而,该条第 2 款以开放列举的方式明确了哪些权利或利益可以被认为是可执行的。该款列明了 8 项权利或利益,并在第 9 项中规定其他的特别法性质的法律和法规所承认的权利和利益也可以适用本条规定,作为可采取执行行为的理由。在这 8 项采取执行行为理由中,第

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〔1〕 See Ley N° 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law No. 1/2000 of January 7, 2000, on Civil Procedure] (modificada por la Ley Orgánica N° 16/2015, de 27 de octubre).

〔2〕 See Ley N° 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law No. 1/2000 of January 7, 2000, on Civil Procedure], LIBRO III, De la ejecución forzosa y de las medidas cautelares, TíTULO I De los títulos ejecutivos, CAPíTULO I De las sentencias y demás títulos ejecutivos, Artículo 517. Acción ejecutiva. Títulos ejecutivos.

2 项为“仲裁裁决(西班牙文:laudos,英文:awards)或确定的仲裁决定(西班牙文:resoluciones arbitrales firmes,英文:firm arbitral decisions)”。可见,正是因为存在该条规定,西班牙法院才有义务执行西班牙仲裁庭所作出的裁决决定,裁决才具有强制执行力。唯有如此,仲裁才成为可靠的纠纷解决途径。需要注意的是,《西班牙民事程序法案》相关条款并没有明确“确定的仲裁决定”的确切内涵。但一般而言,仲裁决定是指仲裁庭就仲裁中出现的程序性问题,如具体事由的可裁决性、仲裁庭的管辖权范围以及当事人仲裁请求的实体性事项作出的具有法律效力的决议。[1] 至于何为“确定的”,从一般实践来看,是指仲裁决定包含程序或实体性权利义务的修改和确认,且实施会产生程序或实体层面上权利义务的变动。因此,如果一项决定的实施不会带来任何权利义务变动即法律关系变动的后果,则不会被认为是可以执行的事由。

《西班牙民事程序法案》第 722 条规定了仲裁和司法程序中的预防措施。[2] 根据该条规定,仲裁参加方可以请求司法机构的干预,采取必要措施,以防止仲裁过程中所面临的种种风险。该条第 2 段也规定,当西班牙负有相关条约或公约义务的时候,当事人可以就在西班牙境外进行的仲裁程序中所面临的风险,向西班牙拥有管辖权的法院申请在西班牙境内对相对方采取适当措施。

西班牙其他民商事法律规则中也有涉及商事仲裁的规定。例如,西班牙于 2003 年 7 月修订的《西班牙破产法》[3] 规定了企业参与仲裁程序与其进行破产清算程序的关系。《西班牙破产法》第 52 条规定:“当事人宣布进行破产清算本身(*per se*)并不会影响该方所签订的任何调解或仲裁协议的效力。”但该条同时规定,如果法院认为该调解或仲裁条款或协议可能会妨碍破产清算协议的实施,则法院有权暂时中止该条款或协议的效力。此外,这种中止的决定不应影响任何国际条约义务的履行。[4] 在关于法院就破产问题的管辖权上,《西班牙破产法》第 8 条明确了审理破产问题的商事法院(西班牙文:tribunales mercantiles)就与破产程序相关

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〔1〕 参见《示范法》第 13、14、16 条等。这些条款中明确了仲裁庭可以就仲裁员资格和仲裁庭管辖权作出“决定”。

〔2〕 参见《西班牙民事程序法案》第 722 条“Precautionary measures in arbitration and international litigation”。

〔3〕 See Amendment of la Ley 22/2003, de 9 de julio, Concursal [Act 22/2003 of July 9, Insolvency].

〔4〕 See Amendment of la Ley 22/2003, de 9 de julio, Concursal, El apartado 1 del articulo 52 [Section 1 of Article 52].

的仲裁问题上的管辖权问题。该条第 4 款规定,法院可以为保护破产程序中债权人财产的目的而采取保全措施,但已经在仲裁程序中被涉及的财产为其例外;除非依照前述的第 52 条,该仲裁协议的效力已被中止。[1] 通过上述《西班牙破产法》的规定可以看到,西班牙仲裁制度的相关规范除集中在仲裁和民事诉讼的专门规定中,也体现在其他民商事法律部门的规则当中。而且,这些特定部门的具体规则往往涉及该部门相关法律关系与仲裁程序之间的联系。实务中,仲裁当事人在熟悉《西班牙仲裁法案》和《西班牙民事程序法案》等法律的同时,还需要就其所涉及的特定问题,对分散在不同领域的专门法律法规中有关仲裁的特别规定加以了解。

(2)国际法渊源。

在国际公约的缔结方面,西班牙于 1975 年签订了《欧洲公约》。1977 年,西班牙成为《纽约公约》的缔约国,且并未作出任何保留和声明。1994 年,西班牙签署了《华盛顿公约》;同年还签署了《能源宪章条约》(the Energy Charter Treaty)。[2] 《能源宪章条约》规范了能源领域的投资保护、能源贸易和运输保护、能源使用的效率以及争端解决等方面的问题。由于《能源宪章条约》建立了能源贸易和投资争端解决的有效途径,因而也被认为是仲裁机制的一部分。此外,作为 WTO 成员,西班牙也签署了《与贸易有关的投资措施协议》(the Agreement on Trade – Related Investment Measures,TRIMs)。

国家间往往就承认和执行仲裁裁决签订单独的国际条约。这些条约的基本内容为确认在对方国家境内作出的裁决于本国境内的效力,并规定各方在本国领土范围内执行对方国家境内作出的裁决的义务。就上述承认和执行仲裁裁决的专项问题,西班牙与多个国家签订了双边协议,其中包括:摩洛哥(1997 年 5 月 30 日)、保加利亚(1993 年 5 月 23 日)、中华人民共和国(1992 年 5 月 2 日)、墨西哥(1989 年 4 月 17 日)、巴西(1989 年 4 月 13 日)、乌拉圭(1987 年 11 月 4 日)、捷克(1987 年 5 月 4 日)、斯洛伐克(1987 年 5 月 4 日)、意大利(1973 年 5 月 22 日)、法国(1969 年 5 月 28 日)、哥伦比亚(1908 年 5 月 30 日)以及瑞士(1896 年 11 月 19 日)。

西班牙还与单个国家签订了一系列双边投资协议(bilateral investment treaties,BITs)。这些协议中规定了投资者与国家之间的争端解决制度。截至 2018 年 7 月,

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〔1〕 See Amendment of la Ley 22/2003, de 9 de julio, Concursal, El número 4 del articulo 8 [Paragraph No. 4 of Article 8].

〔2〕 See "Spain, the Energy Charter Treaty", https://energycharter.org/who – we – are/members – observers/countries/spain/, July 20, 2018.

西班牙已经成为71个双边投资协议的缔约方。在与西班牙缔结双边投资条约的国家中,有许多国家位于拉丁美洲,如阿根廷、玻利维亚、智利、墨西哥、尼加拉瓜等。在西班牙工商业和旅游部的官方网站上可以看到西班牙签订BITs的最新情况列表。[1] 西班牙还或独立或与欧盟国家一起缔结了多项含有投资条款的区域性条约。截至2018年7月,西班牙成为68个具有该种性质的区域性条约缔约方。[2]

2. 可仲裁事项

可仲裁事项关注的是具有可仲裁性的标的范围。所谓标的的“可仲裁性”,是指就具体一项争议而言,其涉及的特定法律关系依照法律规定是否可以被纳入可付诸仲裁途径解决之范围的属性。依照是否具有可仲裁性,争议可被划分为可以提交仲裁机构或仲裁庭解决的争议,以及无法诉诸仲裁解决而必须由法院专属管辖范围的争议。因此,标的具有可仲裁性是将一项争议纳入仲裁程序中并开启仲裁程序的基础和前提。

西班牙仲裁机构所受理的商事纠纷种类主要有货物买卖、能源买卖、出资与买卖、金融衍生品、合资经营企业、兼并与收购、建设工程和分销合同争议等。值得注意的是,并非所有的仲裁机构都受理依照法律具有可仲裁性的争议。就西班牙主要的仲裁机构而言,如西班牙仲裁院、巴塞罗那仲裁院、民商事仲裁院、马德里仲裁院等仲裁机构,皆受理各个种类的民商事纠纷。但西班牙不乏一些专门性或小型的仲裁机构,其章程或仲裁规则中明确排除了某些类型的争议,并将自己机构所受理的纠纷缩小在一定范围之内。因此,在实践中,签订仲裁协议的当事人应注意各仲裁机构所受理事项的区别。

同时,依照《西班牙仲裁法案》第2条的规定,只有当事人拥有自由处分权的事项才是可仲裁的。举例而言,刑事、收养、家庭等问题是不可仲裁的。就这个规定而言,如下两点需要进一步澄清:第一,即便是某些私法范畴的争议也是不可仲裁的,如婚姻、家庭等涉及不能仅使用金钱处分的人身权利;第二,西班牙立法直接规定工业产权和公司股份等(issues submitted to company by-laws)的争议为可仲裁争议。

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〔1〕 See Gobierno de España, Ministerio de Industria, Comercio y Turismo, “Reciprocal Investment Promotion and Protection Agreements (APPRIs)”, http://www.comercio.gob.es/en/inversiones-exteriores/acuerdos-internacionales/acuerdos-promocion-proteccion-reciproca-inversiones-appris/Pages/lista-appri-vigor.aspx, July 20, 2018.

〔2〕 See Investment Policy Hub, “International Investment Agreements Navigator: Spain”, http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/197#iiaInnerMenu, July 20, 2018.

对于如何判断国际仲裁中争议的可仲裁性问题,《西班牙仲裁法案》体现出了高度的灵活性。同仲裁协议的有效性规定相一致,只要依据当事人选择的适用于仲裁协议的法律、适用于仲裁实体问题的法律或西班牙法中任意一个,某事项是可仲裁的,那么即可认为该事项具有可仲裁性。《西班牙仲裁法案》第 22 条第 1 款具体规定了判断是否可仲裁的具体事由。

西班牙仲裁法承认管辖权自裁决原则,这意味着仲裁庭有权决定自身是否对一个案件具有管辖权。

3. 法律适用

根据《西班牙仲裁法案》第 34 条第 2 款的规定,如果一项仲裁是涉外仲裁,那么仲裁庭需要根据当事人的选择来决定实体法的法律适用。[1] 但是,西班牙的法律不承认反致。也就是说,所指向的外国法需是实体性法律,而非某国家或地区的冲突法。第 34 条第 2 款继而规定,如果当事人没有作出选择,仲裁庭需要选择最适当的法律。《西班牙仲裁法案》自身并没有提供任何何以选择适用法的具体操作方法。但是,《西班牙仲裁法案》第 34 条第 3 款明确规定,无论在何种情况下,仲裁庭在作出法律适用决定时,都需要结合仲裁所涉及合同的具体条款约定,并考虑可行的处理方法。[2] 结合《西班牙仲裁法案》第 4 条(a)项有关当事人意思自治约定的解释方法,[3] 第 34 条第 3 款可以被理解为一项关于仲裁庭决定实体问题准据法时应参照何种连接因素的规定。根据该款要求,仲裁庭必须要考虑仲裁当事人所签订的实体合同条款中的约定。一般而言,合同中所约定的合同履行地、标的所在地、合同各方所在地等皆可以成为判断准据法的依据。同时,关于如何理解“仲裁庭需要考虑可适用的处理方法”,由于法律规定较为宽泛,仲裁庭应该具有足够的自由裁量权去衡量“可适用的”(applicable)的含义。

4. 机构仲裁与临时仲裁

一般认为,机构仲裁流程的主持者、相关事务的管理者是一个永久性的专业机构,而并非为争议各方或争议各方委任的任何其他性质的第三方。[4] 根据《西班牙

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〔1〕 参见《西班牙仲裁法案》第 34 条第 2 款。

〔2〕 参见《西班牙仲裁法案》第 34 条第 3 款。

〔3〕 参见《西班牙仲裁法案》第 4 条(a)项。

〔4〕 See Pilar Perales Viscasillas, “The role of arbitral institutions under the 2010 UNCITRAL Arbitration Rules”, https://e - archivo. uc3m. es/bitstream/handle/10016/21705/role_perales_LA_2014. pdf, July 20, 2018.

仲裁法案》序言第2部分的规定:“仲裁机构是指被特定仲裁规则明确具体特征、为仲裁规则所规范并依照仲裁规则进行仲裁活动的任何实体、中心或组织。”〔1〕随即序言声明,“但是,争议各方可以就具体的仲裁规则达成一致,无须委托任何仲裁机构来进行仲裁;仲裁机构的仲裁规则也是各方自由选择的一部分”。〔2〕由此可见,《西班牙仲裁法案》不仅承认机构仲裁,也承认临时仲裁。

当前西班牙境内所进行的仲裁大多数是机构仲裁,但临时仲裁也并不罕见。当事人选择临时仲裁的理由主要是注重临时仲裁的灵活性,可以省去机构仲裁中一些就个案来说不必要的程序。比如,在机构仲裁中,自仲裁开始到仲裁机构组成的时间可能会持续长达几个月,因为仲裁机构需要一定时间去尽量避免任何可能会涉及挑战仲裁庭管辖权或仲裁员资格的风险产生。除此之外,有些仲裁机构的规则规定,仲裁庭拟作出的裁决必须首先经过仲裁机构的审查,以此来保证仲裁裁决的质量。但这个过程使裁决的作出时间大大增加。

有必要注意的是,《西班牙仲裁法案》所基于的蓝本,即《示范法》,最初就是为了临时仲裁而设置的。〔3〕《示范法》不包含任何关于机构仲裁的特殊考虑。〔4〕它是各国在制定临时仲裁法律规则时,会首先考虑参照的现成模板。〔5〕《示范法》的数次修改也并未在这一点上有实质性变动,〔6〕但从2010年修订后版本的序言中可见,《示范法》中所规范的“仲裁”范围是极其广泛的,其中包含“由仲裁机构主管的仲裁”。〔7〕也就是说,直到现在,机构仲裁也仅仅为《示范法》所考虑的仲裁类型中的一种。那些在《示范法》基础上制定自己的商事仲裁法律法规的国家,都倾向于

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〔1〕 参见《西班牙仲裁法案》序言,Ⅱ。

〔2〕 参见《西班牙仲裁法案》序言,Ⅱ。

〔3〕 See Pilar Perales Viscasillas, “The role of arbitral institutions under the 2010 UNCITRAL Arbitration Rules”, https://e-archivo.uc3m.es/bitstream/handle/10016/21705/role_perales_LA_2014.pdf, pp. 26-27, July 20, 2018.

〔4〕 See Jan PAULSSON/Georgios PETROCHILOS, Report on the Revision of the UNCITRAL Arbitration Rules, 2006, p. 12.

〔5〕 See Thomas Webster, “The Rules provide the leading set of arbitration rules for international ad hoc arbitration”, Handbook of UNCITRAL Arbitration. Sweet & Maxwell/Thomson Reuters, 2010, pp. 0-47.

〔6〕 See UNCITRAL Arbitration Rule (as revised in 2010).

〔7〕 同上,序言部分,原文为:“Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world…”

延续这种思路，即原则上不对机构仲裁和临时仲裁加以区分，而仅仅在特定问题上为它们各自设定少量的特殊规则。[1]

《西班牙仲裁法案》仅对机构仲裁有三方面的特殊规定，而其余规定则同时适用于机构仲裁和临时仲裁。其一，《西班牙仲裁法案》第 14 条设定了关于仲裁机构性质和作用的规定。根据第 14 条第 1 款的规定，争议各方可以委托一个章程允许其履行仲裁职能的公共机构，或一个细则允许其从事仲裁裁判活动的非营利性协会或实体来管理仲裁活动并指定仲裁员。[2] 该条第 2 款和第 3 款随即规定，上述这些仲裁机构需要依照其章程和细则履行仲裁职能，并需要保证仲裁员的独立性和资格适当，同时保障仲裁员产生过程的透明性。[3] 其二，《西班牙仲裁法案》为涉及公司股东或董事的纠纷设立了适用机构仲裁的特殊规则。根据《西班牙仲裁法案》“第 11 条之二”（Article 11 *bis*）第 3 款的规定，公司细则可以直接指名一个仲裁机构，以主持和管理股东或董事就与公司决议所引起的纠纷，为该纠纷的仲裁活动指定仲裁员。[4] 其三，《西班牙仲裁法案》第 21 条第 1 款规定了仲裁机构的法律责任。该条表明，仲裁机构与仲裁员均需要在受理仲裁之后遵循善意原则来履行职能，并应为自己在履行职能过程中因故意或过失而造成的损害负责。在机构仲裁中，受损害的仲裁参与方可以直接起诉仲裁机构，这种起诉的权利不受向仲裁员请求赔偿的行为影响。[5] 换言之，该条款直接赋予了仲裁机构独立承担主管仲裁活动中法律责任的能力。第 21 条第 1 款还规定了仲裁员和仲裁机构有依照仲裁规则为承担赔偿责任而设立相当数额的担保或保险的义务；但具有政府职能的公共机构不需要被此义务约束。[6]

除上述三个方面的特殊规定外，西班牙的机构仲裁和临时仲裁在法律上无特别区分，但这不能说明二者在仲裁实践中没有客观上的区别。实务中，机构仲裁之于临时仲裁的优势之一即将选定和委任仲裁员等工作交由一个有相当的资源、固

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〔1〕 See Pilar Perales Viscasillas, “The role of arbitral institutions under the 2010 UNCITRAL Arbitration Rules”, https://e-archivo.uc3m.es/bitstream/handle/10016/21705/role_perales_LA_2014.pdf, July 20, 2018.

〔2〕 参见《西班牙仲裁法案》第 14 条第 1 款。

〔3〕 参见《西班牙仲裁法案》第 14 条第 2 款。

〔4〕 参见《西班牙仲裁法案》第 11 条之二（*bis*），“Intra-enterprise arbitration”，第 2 款。

〔5〕 参见《西班牙仲裁法案》第 21 条第 1 款第 1 段。

〔6〕 参见《西班牙仲裁法案》第 21 条第 1 款第 2 段。

定流程和专业工作人员配备的机构来管理。[1] 根据联合国贸法会2013年所发布的《仲裁机构和其他相关实体依照UNCITRAL仲裁示范法的推荐做法》(Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitration under the UNCITRAL Arbitration Rules)中第30部分的总结,被指定的仲裁机构主要在以下六个方面具有特殊的功能:指定仲裁员、就对仲裁员的质疑作出决定、替换仲裁员、为决定仲裁费用提供帮助、参与关于成本和费用的审查机制、对赔偿的押金问题提供咨询意见。可见在这些方面,与临时仲裁中的裁判者相比,仲裁机构是有特殊作用的。在下文论述具体相关事项时,笔者将注意区分实践中临时仲裁或机构仲裁可能会面对的特殊问题,并对参与该种仲裁提出具体建议。

(二)仲裁协议

1. 仲裁协议的有效要件

关于仲裁协议的形式要件,参照《示范法》第7条、《西班牙仲裁法案》第9条第3款的规定,一个有效的仲裁协议必须为书面,必须由各当事人签名,并通过信件、电报、电传、传真或其他可以提供文字记录的通信方式进行信息交换。[2] 通过电子或光学设备缔结的协议,如通过电子邮件订立的协议,符合该要件的,视为有效。

至于实质性要件,《西班牙仲裁法案》第9条第1款规定仲裁协议可以以单个合同的形式或仲裁条款的形式订立。[3] 有效的仲裁条款必须明确表达当事人有意愿将已经发生或可能发生的特定的法律关系所引起的纠纷付诸仲裁途径解决。这些特定的法律关系既可以是合同关系,也可以是非合同关系。《西班牙仲裁法案》第9条第4款规定,如果一个仲裁协议包括在一份格式合同里,那么其有效性及解释需要依照这份合同的准据法来解释。[4] 第9条第5款规定,当一方当事人主张仲裁协议存在,且与另一方进行了意见交换时,如果另一方没有表示反对,则仲裁协议应当视为存在。[5]

关于国际仲裁即涉外仲裁,其有效性的要件更为宽松。根据《西班牙仲裁法案》第9条第6款规定,依照下列三种法律中任意一种,该协议符合有效的要件,那么就可以判断一个国际仲裁协议是有效的:(1)当事人选择适用于仲裁协议的法

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〔1〕 参见2012 UNCITRAL Recommendations, p. 1。

〔2〕 参见《西班牙仲裁法案》第9条第3款。

〔3〕 参见《西班牙仲裁法案》第9条第1款。

〔4〕 参见《西班牙仲裁法案》第9条第4款。

〔5〕 参见《西班牙仲裁法案》第9条第5款。

律;(2)适用于仲裁实体问题的法律;(3)西班牙法。如前文所述,这种宽松的国际仲裁协议有效性的条件构成了西班牙仲裁法之于《示范法》的特点之一。[1]

2. 仲裁协议具有可执行性的要件

西班牙的法院一般会采取尽量保障仲裁顺利进行的原则。这意味法院会尽量将仲裁条款或仲裁合同视为或解释为有效。根据《西班牙仲裁法案》第 9 条的规定,一个仲裁条款如果没有明确地体现当事人愿意将争议提交至仲裁途径解决的意图,就不应得到执行。

涉外仲裁的可执行性与其有效性条件一样,只要依据当事人选择适用于仲裁协议的法律、适用于仲裁实体问题的法律或西班牙法中任一可以认定仲裁协议具有可执行性,则一个涉外仲裁裁决就是可执行的。

3. 特殊形式仲裁协议的有效性

(1)多层争议解决协议。

多层(multi – tier)争议解决条款,是指包含多种纠纷解决方式的条款,如在仲裁前加入必需的前置条件,将当事人之间经过协商、调解或司法环节作为仲裁程序开启的前置要件。IBA 于 2015 年进行了一项研究,研究调查了世界上 51 个国家和地区,[2]最终发现这些国家和地区都存在审理多层争议解决条款的仲裁实践。虽然多层争议解决条款在西班牙并不常见,但西班牙司法实践曾经处理过围绕此类条款的争议。比如,依照司法实践,如果双方在仲裁协议或仲裁条款中约定的前置协商失败,那么可以依照《西班牙民事程序法案》第 403 条第 2 款解决。[3]

西班牙法庭倾向于认为,如果意思表达清晰无歧义,那么多层争议解决条款是有效且可以执行的。[4] 如果规定了协商等前置程序,却没有履行这些程序,依照《西班牙仲裁法案》,只要该协议表达了明确的双方同意仲裁的意愿,则其有效性和可执行性就不应被否决。

(2)包含多个当事人的仲裁协议。

关于包含多个当事人的仲裁协议有效性问题,《西班牙仲裁法案》也提供了特

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〔1〕 参见《西班牙仲裁法案》第 9 条第 6 款。

〔2〕 这 51 个地区包括西班牙,也包括中国、美国、欧洲大多数国家在内的经济体量较大的国家。See IBA Litigation Committee, "Multi – Tiered Dispute Resolution Clauses, 2015", https://www.ibanet.org/Document/Default.aspx? DocumentUid = 9C6E21DE – 043C – 44C9 – BE75 – 94CADECCF470, July 28, 2008.

〔3〕 参见《西班牙民事程序法案》第 403 条第 2 款。

〔4〕 参见《西班牙民事程序法案》第 403 条第 2 款。

殊规定。这类协议需要满足有效仲裁协议所需具备的一般要件,但同时也要符合《西班牙仲裁法案》所设立的特殊要件。关于多名当事人仲裁如何指定仲裁员的问题,《西班牙仲裁法案》设立了一个特殊条款。该条款规定,除非当事人之间另有约定,否则在三人组成仲裁庭的案件中,如果申请人是多人,则申请人需要共同选定一名仲裁员;如果被申请人是多人,则被申请人要共同选定一名仲裁员。申请人和被申请人分别选定的仲裁员将共同选定第三名仲裁员。如果多个申请人或多个被申请人没有对选定某一仲裁员的意见达成一致,在机构仲裁中,则应当按照该仲裁机构的仲裁规则,由仲裁机构指定仲裁员;在临时仲裁中,依照《西班牙仲裁法案》第 15 条的规定,由有管辖权法院应当事人要求指定仲裁员。[1]

(3)单边提起仲裁的协议。

单边提起仲裁的协议,是指一个协议赋予了当事人单边地付诸仲裁的权利。在这种协议中,各当事人并没有明确表达就特定问题提交至仲裁的意思,但概括地授权一方有权利将未来可能发生的纠纷提交至仲裁,而另一方必须接受。根据《西班牙仲裁法案》第 9 条第 1 款以及《西班牙民法典》第 1261 部分的规定,仲裁必须由各当事人同意,明确表示有付诸仲裁途径的意图方产生效力。也就是说,依照上述两个条款的规定,此种协议是无效的。

这种禁止单边提起仲裁规定的目的是防止商事活动的强势方利用该规则来强化自身不公平地位。如果一方具有单边提起仲裁的概括性权利,则当事人会在商业交往中受对方过多的限制甚至胁迫。此外,概括性地授权当事人提起仲裁,也无助于当事人就具体商事关系合同选择更有利于解决纠纷的途径,不符合仲裁的灵活、高效等特点。

4. 仲裁协议对非签署方的约束力

根据 IBA 的意见,仲裁协议在特定情况下可以约束非签署方。[2] 仲裁协议得以约束该非签署方的条件为:一个仲裁协议的非签署方与某个签署方之间有十分紧密的联系,或在主合同的履行中起到重要作用。

ICC 裁判的“Dow Chemical France v. Isover Saint Gobain 案”中明确了判定非签署方的联系和作用的标准,该案因此成为关于仲裁协议对非签署方产生约束力

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〔1〕 参见《西班牙仲裁法案》第 15 条。

〔2〕 See Carlos de los Santos: “Arbitration Guide: Spain”, IBA Arbitration Committee (Updated January 2018), p. 8.

的重要案例。[1] 在该案中,一个非签署方在多个公司所达成的交易中起到重要作用,因此被认为是从仲裁协议中获益且应当被该协议约束的。该案的判决理由在之后的裁决中经常被引用。

此外,仲裁协议的效力并不当然地、自动地及于一个当事人未签订协议的母公司,只有基于某些具体事实,才可以得出母公司应适用其子公司所签订的仲裁协议的结论。

受上述意见和实践的影响,西班牙的仲裁制度并不排除一个仲裁协议的效力在某些条件下可以及于非签署方的情形,但仲裁实践并不统一,两种做法都有,既有认定一个仲裁条款的效力不及于非签署方的案例,[2] 也不乏认定条款对非签署方有效的案例。[3]

(三)可仲裁性与管辖权

1. 仲裁程序与诉讼程序的冲突解决

仲裁程序与诉讼程序的冲突问题关乎的是某一纠纷同时被提交仲裁和法院解决的问题。根据 2011 年 5 月修改的《西班牙仲裁法案》第 11 条规定:(1)如果存在仲裁协议,法院就不能再去审理已经提交仲裁程序的纠纷。但是,司法程序中不接受法院审理的一方必须向法院提出管辖权异议。这种提出法院管辖权异议的行为被称为"宣示"(declinatoria)。(2)任何管辖权异议必须在特定期限内提出。关于期限的规定,主要由《西班牙仲裁法案》第 11 条规定。[4] 如前文所述,依照《西班牙仲裁法案》,根据所适用程序的不同,即适用普通程序还是口头程序,期限长度也是不同的。但经过 2015 年修正案的修订,二者的程序已经一致。之所以要限定管辖权异议作出的期限,一是为了保障争议解决的程序效率,从而尊重商事活动高效的要求,避免争议解决程序本身给当事人的商事利益带来过多损失;二是为了督促当事人随时且及时地注意自己的程序性权利,自发地避免自身损失。

如果各方参加了司法程序,即视为放弃仲裁程序。需要注意的是,如果一项仲裁已经在进行中,仲裁庭就可以继续仲裁程序,并有权决定自己是否具有管辖权,无论法庭是否已经开始审理管辖权。但是,根据《西班牙仲裁法案》第 11 条第 2 款

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〔1〕 See Dow Chemical France v. Isover Saint Gobain.

〔2〕 See Supreme Court, Civil Section, July 9,2007.

〔3〕 See Supreme Court, Civil Section, May 26,2005; La Coruña Court of Appeal, 4th Section, June 22,2005.

〔4〕 参见《西班牙仲裁法案》第 11 条第 1 款。

和第 3 款的规定,仲裁程序的进行并不等于任何当事人丧失其在司法体系中任何申请强制措施等程序性保障的权利。[1] 仲裁管辖权的建立仅仅标志法院无法就当事人之间的实体性问题进行审查和作出决定。此种详细规定说明西班牙民商事程序法律规范非常注意各争议解决途径之间的管辖权以及具体权限划分。在此规则体系内,管辖权本身并不是一概而论的整体性概念,而是包含各部门就不同事项、不同权限的划分问题。因此,当事人有必要关注仲裁和司法途径的具体关系,以便避免造成程序上的耽搁和开销上的浪费。

2. 仲裁庭的管辖权

依照《西班牙仲裁法案》第 22 条的规定,仲裁庭可以决定自己的管辖权,也可以就仲裁条款是否存在以及其有效性的任何反对性主张作出决断,同时可以对有关是否应让仲裁员回避等问题进行裁决。可见,西班牙仲裁法律体系承认仲裁庭管辖权自裁决原则。此外,也没有任何法律条款赋予法院直接就仲裁庭的管辖权作出决定的权力。法院的权力表现在仲裁程序结束后,在承认执行阶段应当事人的请求通过对仲裁庭管辖权的审查来决定如何进行司法救济。

(四)仲裁庭的组成

1. 仲裁员的选任

当事人可以就仲裁庭的组成和仲裁员的选定达成任何特殊约定。但对于缺乏此种约定的情形,《西班牙仲裁法案》提供了一些缺省规则(default rules)。缺省规则是任意性规则的一种,即可以供当事人根据意思自治原则,通过约定的方式自由排除的规则;但当当事人就特定问题缺乏约定的时候,法定的任意性规则将发生效力。《西班牙仲裁法案》第 15 条第 2 款的规定就属于这种规则。该款就仲裁员的选任问题进行了如下规定:[2]

(1)如果是独任仲裁,则任何一方提出指定仲裁员的请求时,法院都必须对仲裁员进行指定。

(2)如果由三个仲裁员组成仲裁庭进行仲裁,那么每个当事人需选定一名仲裁员,然后由被选定的两名仲裁员提名第三名仲裁员。第三名仲裁员将作为首席仲裁员出席在仲裁庭中。如果一方当事人由于没有收到对方的仲裁申请,而没有在 30 日内成功地选定一名仲裁员,则将由拥有管辖权的法院来指定本应由该当事人

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〔1〕《西班牙仲裁法案》第 11 条第 2 款、第 3 款。

〔2〕《西班牙仲裁法案》第 15 条第 2 款。

选定的仲裁员。同样地,当双方选定的两名仲裁员没有在他们中的后一人被选定后30日内就首席仲裁员达成一致时(30日的计算从最后一名仲裁员选定之时开始),也会由法院来指定该首席仲裁员。

(3)如前文所述,如果有多名申请人或被申请人,则多名申请人或被申请人将共同指定一名仲裁员。如果多名申请人或被申请人之间无法就仲裁员选定达成一致,则有相应管辖权的法院应该在应任何一方请求时,对仲裁员进行任命。

(4)当一个仲裁有三名以上仲裁员时,有管辖权的法院应在当事人提出请求的情况下对任何仲裁员进行指定。

如前文所述,上述规则都是在当事人缺乏同性质约定的情况下才适用的。当事人可以自由地就如何选任仲裁员进行条件和程序上的设定,且仅以强行法为限。因此,当当事人对仲裁员有特殊要求时,即可以对选定仲裁员的方式和条件通过约定的方式进行限制。

需要特别注意的是,上述规定指向的是临时仲裁。临时仲裁往往在客观上需要当事人在仲裁协议或合同的仲裁条款中明确仲裁员选任方式。[1] 这是因为,在争议已经发生后,由于缺乏可以类比机构仲裁中的仲裁机构指定机制,争议方会难以产生各方皆同意的仲裁员。在此种情况下,依照《西班牙仲裁法案》第15条的规定,将由对该仲裁享有监督权的国内法院来指定仲裁员。[2] 但这可能会使仲裁过程无法准确地体现当事人的意思,从而偏离临时仲裁的原意。因此,各方往往事先约定产生仲裁员的规则,避免仲裁员的选任出现困难而阻碍仲裁程序的顺利进行。在实践中,临时仲裁也往往会委托一个仲裁机构来帮助产生仲裁员。[3] 上述情况都说明,当采用临时仲裁时,有必要就发生争议后难以达成一致的部分事先确立规则,以防止争议发生后趋于被动。

2. 仲裁员的资格以及职业伦理要求

仲裁是司法途径的一个重要替代方法,而仲裁员的专业素质是仲裁公信力的保障。固然,现代仲裁是一种准商业服务,仲裁员过低的素质会对仲裁机构或仲裁员个人造成负面影响,有损其业内口碑,所以仲裁机构和仲裁员会自主地提高其整

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〔1〕 See The Arbitration Agreement, https://unctad.org/en/Docs/edmmisc232add39_en.pdf, Section 6.4.3 "Appointment of arbitrators", July 20, 2018.

〔2〕 参见《西班牙仲裁法案》第15条第2款。

〔3〕 See The Arbitration Agreement, https://unctad.org/en/Docs/edmmisc232add39_en.pdf, Section 6.4.3 "Appointment of arbitrators", July 20, 2018.

体水准。但是,由于仲裁行为的准司法性质,国家需要提供最基本的质量保障,以维护司法的权威性。各国仲裁法往往都规定了仲裁员的基本资质,这些资质规定有些是对于学位或学历的要求,有些是对需要取得的考试资格的要求,还有些是仲裁员需在特定领域从事工作达到一定年限的要求。就西班牙而言,根据《西班牙仲裁法案》第 15 条第 1 款的规定,除非另有约定,独任仲裁员应为法律职业从业者(jurist)。[1] 如果仲裁庭是由三人或三人以上组成的,那么至少有一个人必须为法律职业从业者。

除了要遵守《西班牙仲裁法案》中关于中立性和独立性的一般规定以外,身为仲裁员还应当遵守行业协会关于职业伦理的特殊守则。这些守则并不是强行性的。但是,有必要注意到如下两份由西班牙仲裁俱乐部[2]制定的文件:2008 年的《关于仲裁员独立性和中立性的推荐做法》(Recommendations on the Independence and Impartiality of Arbitrators)以及 2009 年的《优良仲裁实践典》(Code of Good Arbitration Practice)。尽管这两份文件没有任何法律效力,而仅仅作为一个建议性的渊源存在,但它们都为仲裁员的职业道德操守问题设立了可遵循的准则。当事人可能会认可这些准则,并将其纳入仲裁协议的约定当中,从而对仲裁活动发生约束作用。

3. 利益冲突的披露义务

各国仲裁法普遍规定,被拟选定或指定的仲裁员有义务进行相关信息披露,以排除或确认当事人对仲裁员的中立性和独立性的合理怀疑。显而易见,披露制度是对仲裁的公正性的重要保障。西班牙仲裁法也设立了披露制度。根据《西班牙仲裁法案》第 17 条第 2 款的规定,一名拟被选定或指定为仲裁员的人需要将他或她的任何可能会引起对他或她的中立性和独立性的正当怀疑的情况披露出来。一名仲裁员,从他或她被提名时起,就需要将任何此等情况毫无延迟地披露出来。

因此,利益冲突的披露义务,又可以被划分为两个具体义务:第一,任前披露义务,即被拟选定的仲裁员需要将任何可能让他人对自己的中立性和独立性产生正当怀疑的情况全部披露出来;第二,任期中的披露义务,即需要披露已成为仲裁员后发生的全部利益冲突的情况。

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〔1〕 参见《西班牙仲裁法案》第 15 条第 1 款。

〔2〕 Spanish Arbitration Club,于 2004 年建立,旨在给予仲裁执业者相关帮助以促进西班牙和葡萄牙语国家仲裁发展的组织。

就披露后如何衡量仲裁员利益冲突问题，前述的西班牙仲裁俱乐部所制定的《关于仲裁员独立性和中立性的推荐做法》为西班牙仲裁庭提供了适用于衡量利益冲突情况的规则。此外，还有必要提及《国际律师协会关于国际仲裁的利益冲突的指导》（IBA Guidelines on Conflicts of Interest in International Arbitration，以下简称《指导》）。[1]《指导》的制定者为成立于1947年的IBA，其成员主要为各国的律师协会，而其成立的首要目的是各国的法律行业从业者与协会之间的业务交流和信息交换，力求在世界范围内“影响国际法律改革的发展”。为此目的，IBA制定了一系列关于法律实践领域具体问题的指导性文件，供律师协会、具体的从业者以及他们的客户，乃至国家实体参考使用。《指导》由国际律师协会理事会于2004年5月22日通过，它提供了一个系统性又富有可操作性的国际仲裁披露程序指南。国际律师协会考虑到，在国际商事活动中，当事人、仲裁庭、仲裁机构和法院都会面临着何种信息需要披露以及适用何种标准进行披露的复杂问题；披露后可能出现的异议或回避申请也十分复杂。即便法律对上述问题进行了安排，也往往在细节上缺乏指导性。并且，各国就上述问题的规定也千差万别，容易造成跨国商事仲裁的障碍。因此，国际律师协会力图推出一套细致的标准，解决披露的具体规则和程序，以力求各国当事人、律师、仲裁员、仲裁机构和法院认可这些规则，帮助他们处理信息披露相关的活动。《指导》的特点在于，它拟定了红、橙、绿三类清单，分别列举的情形如下：红色清单表明客观第三方皆会对仲裁员的中立性和独立性产生正当怀疑的情况；橙色清单为从当事人的角度看，可能会对中立性和独立性产生正当怀疑的情况；而绿色清单则是客观视角下一般不会引起对中立性和独立性的质疑的情况。这三类清单使信息披露变得富有可操作性，也使披露后的程序更加清晰透明。目前在西班牙的国际仲裁实践中对《指导》的适用尚不普遍，更为常用的是西班牙仲裁俱乐部的文件。不过，《指导》的使用也显现出增多的趋势。

值得一提的是，当事人可以就如何挑战仲裁员或撤销仲裁员资格达成约定。无论是上述《关于仲裁员独立性和中立性的推荐做法》还是《指导》，虽然都并不具有正式的法律渊源上的效力，但却可以通过纳入当事人约定的方式来发生效力。此外，如果无此种约定，那么仲裁机构和法院在挑战仲裁员的过程中不施加任何作

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〔1〕 See IBA, “IBA ‘Guidelines on Conflicts of Interest in International Arbitration’ now available in multiple languages”, https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx, July 25, 2018.

用和干预。整个挑战仲裁员资格的过程完全由仲裁庭自主决定:意图挑战仲裁员的当事人需要在该仲裁员表示接受选定或指定之日起 15 日内提出请求,或者在意识到任何可能对该仲裁员独立性或中立性产生合理怀疑的情况出现后 15 日内提出请求。除非被挑战的仲裁员自动放弃其在该诉讼中的仲裁员地位,否则仲裁庭将决定该弹劾请求是否被支持。如果弹劾是不成功的,该弹劾也可以作为质疑方申请撤销仲裁裁决的理由之一。可见,就当事人未约定而适用缺省规则的规定而言,西班牙仲裁法律体系也体现了很强的尊重当事人意思自治、减少仲裁机构的干预的特点。这皆提醒当事人要尽量考虑仲裁活动的具体细节,将其约定于仲裁协议中,而不要过多期待仲裁机构等秉承公平等抽象原则进行干预。

(五)临时措施

依照《西班牙仲裁法案》第 23 条的规定,除非当事人另有约定,仲裁庭有权实施任何其认为就争议而言必要或适当的临时措施。如果一个当事人请求仲裁庭颁布“初步减损措施”(preliminary relief),仲裁员可以要求申请人提供必要担保。关于仲裁员的决定形式,法律没有施以特殊要求。一般而言,关于临时措施的决定形式可以为命令(order)或裁决(award),而后者具备更强的可执行性。无论是通过哪种形式作出,由仲裁庭作出的临时措施决定是可以通过法院得以执行的。

根据《西班牙仲裁法案》第 11 条第 3 款的规定,法院可以为支持仲裁而作出临时性救济。无论是国内仲裁还是涉外仲裁,也无论是在仲裁程序刚刚开始的阶段还是仲裁庭已经组成的阶段,法院需要根据当事人的请求而决定作出临时救济。特别值得说明的是,这些临时措施也可以针对第三方而非仲裁当事人作出。[1]

虽然《西班牙仲裁法案》并没有给如何颁布临时措施作出进一步规定,但一般而言,请求法院颁布强制措施的一方需要满足两个基本程序性条件:第一,“初步证据”,即 *fumus boni iuris* (prima facie case),是指在形式上可以初步断定损害或危险的存在;第二,“迟延会导致危险”,即 *periculum in mora*,是指如果法院拒绝颁布该临时措施,将会产生不利后果。此外,法院可以要求申请临时措施的一方提供担保。仲裁庭组成的事实并不影响临时措施的效力。

需要考虑的问题是,在何种程度上法院可以为取证而颁布临时措施?如果仲

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〔1〕 See Foster Wheeler Trading Company AG SA and Foster Wheeler Trading Company AG. v. National Company for Fishing. See also Marketing, Decision of the Court of First Instance of Madrid, number 69, June 28, 1999.

裁庭已经组成,这种措施是否需要经过仲裁庭的同意?根据《西班牙仲裁法案》第33条的规定,当事人可以请求法院就证据的采集和保全而进行协助(judicial assistance)。这种协助包括请求司法机关帮助调取相关证据,也包括在仲裁过程中应一方当事人的请求由法院直接颁布和采取保全证据的强制性措施。根据《西班牙仲裁法案》第33条第1款的规定,仲裁员或任何一方当事人取得仲裁庭同意后,都可以向法院提出证据保全的请求。这些请求包括从法院直接取得证据,或由法院采取相应措施使仲裁庭可以取得证据。

西班牙法院对采取临时措施的审核十分谨慎,也倾向于限制这些措施的适用,需要注意的是,仲裁庭没有应当事人请求向法院申请临时措施的义务。

(六)仲裁保密性

1. 仲裁默认保密性

根据《西班牙仲裁法案》第24条第2款的规定,当事人和仲裁机构皆负有就所收到的有关仲裁信息保密的义务。这项规定不仅适用于仲裁中交换的实体性信息,也适用于在审理过程中使用的一切性质的文件,包括双方所提交的文件和证物以及仲裁裁决等。

2. 商业秘密

西班牙仲裁法律目前并没有规定仲裁庭在保护商业秘密和秘密信息问题上的作用和权限。但是,实践中如果涉及商业秘密,仲裁庭一般倾向于谨慎对待。倘若一方当事人主张某一信息包含商业秘密,则仲裁庭会谨慎地处理包含这些信息的任何书面文件。如果争议方之间约定了一个保护敏感信息的方法或者机制,仲裁庭会倾向于认定该约定有效并遵从约定。

3. 保密性的特权规则

证据法中的特权,是指诉讼中,基于特定身份或某种法律关系的存在,而使特定当事人享有的就特定事项免于提供证据或组织他人提供证据的权利。此种规则常见于英美法系的仲裁规则中。[1] 西班牙仲裁法律体系中并没有类似的规定,但其他相关部门法中的强行性规定为特殊证据设立了特别限制,如商业秘密、军事机密和专业特权等,特定当事人或者特定机构可以借助明确声明的方式来免除提供证据的义务。

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〔1〕 See Henry S. Noyes, "Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick", 66 WASH. & LEE L. REV. 673 (2009), p. 675.

(七)证据和庭审

1. 证据

西班牙仲裁法并没有就证据问题作出专门规定。但无论是临时仲裁还是机构仲裁,当事人都可以自由约定证据规则。《国际律师协会国际商事仲裁取证规则》(IBA Rules on the Taking of Evidence in International Arbitration,以下简称《IBA 证据规则》)时常被当事人以约定的方式纳入仲裁协议。[1] 如前文所述,IBA 就仲裁实践中的具体问题提供了一系列详细的指导性文件。与前述的关于利益冲突披露的《指导》性质相同,《IBA 证据规则》也是一个供各当事人、律师、仲裁员和仲裁机构以及法院选择适用的一套具有高度可操作性的规则。该规则的最新版本由 IBA 理事会于 2010 年 5 月 29 日颁布。该规则包括前言和其余 9 条内容,包含了各种证据的取证程序,以及对证据进行采信及评定的规则和标准。

《IBA 证据规则》的适用虽然还未达到普遍的程度,但该规则的使用正在逐渐增多。特别是其有关证人书面陈述的规定,时常被引用于仲裁协议中。《IBA 证据规则》前言表明:“当事人和仲裁庭可以在仲裁程序中全部或部分采用《IBA 证据规则》,也可以酌情修改规则或以规则为指导安排程序。本规则无意限制国际仲裁的灵活性优势,当事人和仲裁庭可以根据每件仲裁案件的特定情况自行对本规则进行修改。”在实践中,仲裁庭也往往根据案件的具体情况,决定适用《IBA 证据规则》中的一部分,而排除另一部分的适用。[2]

2. 普通证人

证人证言环节通常会采取直接询问的方式。仲裁员有权利并通常会直接提问证人,这种提问往往发生在交叉询问之后。需要注意的是,证人提供声明并交叉询问的证言呈庭方式变得日益普遍。

西班牙仲裁法律并没有就证人资格作出特殊规定。西班牙法律也没有关于证人宣誓或确认属实的强制性规定。但是,根据《西班牙仲裁法案》第 26 条的规定,仲裁员需要在遵守法案其他具体条款规定的同时,依照他们认为合适的方式来主导仲裁过程。因此,如果仲裁员认为有必要,他们可以要求证人去保证或承诺他们

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〔1〕 See IBA, “Newly revised IBA Rules on the Taking of Evidence in International Arbitration”, https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx. 规则的中文文本参见 https://www.ibanet.org/Document/Default.aspx? DocumentUid = 485A3174 - 8EDA - 4871 - A2A1 - 1D7F0017C5A3。

〔2〕 参见《IBA 证据规则》前言第 2 款。

的言论属实;而这种实践并不罕见。[1]

3. 专家证人

(1)专家证人规则。

西班牙仲裁法承认专家证言是一种独立的证据形式。专家证言需要以报告的形式作出。根据《西班牙仲裁法案》第 32 条第 2 款的规定,除非当事人有相反约定,如果仲裁员认为必要,或者如果纠纷一方请求,那么作出报告的专家就应该参加质证环节、确认报告的内容以及接受交叉质询环节。目前该法案并没有关于专家证人的独立性和中立性的规定。

当事人邀请的证人与仲裁庭指定的证人是存在区别的。如果仲裁员指定了专家证人,那么该专家提供的证言一般被认为是更加中立的证据,比当事人所提供的专家证人的证言具有更强的证明力。关于仲裁庭指定的证人如何产生的问题,目前西班牙并没有必须从特定名单中产生的强制性规定,原则上仲裁庭具有较大的自主权。

(2)“并发证据”制度。

在一些国家的仲裁法律规则中,法庭允许专家证人同时提供证据(称为“热水澡”hot – tubbing,或称“并发证据”)。[2] 该制度由澳大利亚首创,其初衷是避免冗长而重复的交叉询问。根据该规则,各当事人所邀请的意见相左的专家需要事先向裁判者提交自己的书面意见。在庭上,不同意见的专家同时出庭,互相发问。裁判者和争议各方可就他们的发言进行询问。这种做法也被英国和美国在不同程度上采纳。

在西班牙,就一般情形而言,“并发证据”的使用并不普遍,但在案情复杂的仲裁中,由于当事人所指定的专家的观点往往呈现很大的差异,对其的使用也日益频繁。尽管“并发证据”在不同案件中的适用,因为实际情况的差异,呈现不同的路径,但一个基本方法是不变的,即让双方所指定的专家在仲裁庭主持下进行讨论。双方律师可以参与,并向双方的专家提出问题。同时,专家也可以彼此向对方提问。仲裁庭通常会要求当事人提交一个向专家提问的“问题清单”,以便作为庭审中的

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〔1〕 See Carlos de los Santos: “Arbitration Guide: Spain”, IBA Arbitration Committee (Updated January 2018), pp. 15 – 16.

〔2〕 See Steven Rares, “Using the ‘Hot Tub’: How Concurrent Expert Evidence Aids Understanding Issues”, http://www. fedcourt. gov. au/digital – law – library/judges – speeches/justice – rares/rares – j – 20131012, July 20, 2018.

参考。此外,仲裁庭会要求专家提交一个“共同意见”。这份意见需要清晰地写明哪些是各专家均同意的,哪些是他们没有达成一致的。该实践变得越发普遍。

4. 仲裁庭秘书

在西班牙仲裁制度中,目前并没有关于仲裁秘书的特殊规定,但实践中关于任用仲裁秘书的做法日益普遍。[1] 仲裁庭一般会询问当事人关于聘用仲裁秘书的意见,询问他们是否对秘书的担任情况有反对意见。在询问之前,需要告知当事人使用秘书的条件和费用。

5. 庭审程序规则

当争议各方选择机构仲裁的时候,一般等同于它们同意使用机构所设立的规则来作为庭审程序的依据。但在临时仲裁中,由于没有既定的规则,需要双方通过约定的方式明确庭审所应遵照的具体程序。在实践中,为了避免各方约定不周或对约定的解释产生冲突的情况发生,临时仲裁的各方通常会在仲裁协议中引用一个仲裁机构的程序性规则作为仲裁的依据。[2] 同样的问题也可能存在于庭审所使用的语言上。机构仲裁往往使用仲裁机构所在地的语言,或仲裁机构同意使用的在其服务范围之内的任何语言;但临时仲裁需要约定仲裁用语以及裁决所使用的准确语言。[3]

(八)仲裁裁决

1. 仲裁裁决有效的要件

根据《西班牙仲裁法案》第 37 条的规定,有效仲裁裁决必须满足下列要件:

(1)裁决必须以书面形式作出,内容和仲裁庭成员签名必须以书面的、可以被保存并且被用于查询的形式作出,需以电子、光学或其他格式为载体。

(2)裁决必须包含仲裁员的签名,且必须明确注明支持何方的意见。当有多名仲裁员而非一人独任仲裁时,必须要注有多数仲裁庭成员的签名或首席仲裁员的签名,且必须要写明少数仲裁员未能签名的理由。

(3)裁决必须阐明其作出裁决的理由,除非该裁决是基于《西班牙仲裁法案》第

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〔1〕 See Carlos de los Santos: “Arbitration Guide: Spain”, IBA Arbitration Committee (Updated January 2018), p. 17.

〔2〕 See The Arbitration Agreement, https://unctad.org/en/Docs/edmmisc232add39_en.pdf, Section 6.4.5 “Rules of procedure”, July 20, 2018.

〔3〕 See The Arbitration Agreement, https://unctad.org/en/Docs/edmmisc232add39_en.pdf, Section 6.4.9 “6.4.9 Determination of the language”, July 20, 2018.

36 条规定的依据当事人的协议而作出的。

(4)裁决必须注明仲裁裁决作出的时间和地点。2011 年 5 月修订的《西班牙仲裁法案》第 37 条第 2 款规定,无论在何种情况下,除非当事人另有约定,否则即便最终裁决所作出的时间超出了法律规定的期限,也必须注明裁决作出的时间。超期作出裁决并不影响裁决的可执行性,也不影响其有效性。超期裁决的后果是仲裁员需要对此承担一定的责任。

2. 对裁决的反对意见

依据《西班牙仲裁法案》第 37 条第 3 款的规定,仲裁员可在仲裁裁决中表达赞成或反对裁决的意见。就表达反对意见或保留意见的内容和形式,西班牙法律并没有特别规定。但可以确定的是,反对意见或者保留意见并不属于仲裁裁决的一部分,因而它们是不具有可执行性的。

3. 基于当事人约定的裁决

根据《西班牙仲裁法案》第 36 条的规定,仲裁裁决可以基于当事人约定而作出。关于如何终止仲裁程序的规定,可以在《西班牙仲裁法案》第 38 条第 2 款中找到依据。根据该条款规定,除因全部仲裁流程业已结束、仲裁庭作出仲裁裁决而终止仲裁程序外,还可以采取如下方式终结一起仲裁案件[1]:(1)仲裁请求撤销(除非被申请人对这种仲裁撤销申请表示反对,并且仲裁庭认为被申请人就该纠纷的最终裁决将有法律上的利益);(2)双方经协议决定终止仲裁;(3)仲裁庭认为仲裁程序没有必要或不可能继续下去。

4. 可适用的救济

关于仲裁法中所允许适用的救济途径是否受到某些特殊限制的问题,是案件当事人普遍关心的,因为这关乎其如何有效请求的问题,对此,《西班牙仲裁法案》并没有作出任何限制,仅规定救济的类型不能与公共政策相冲突。可见,只要请求的救济类型不与社会公共政策相冲突,均可以向仲裁庭提出。这彰显西班牙仲裁制度在救济措施上的开放态度。

(1)赔偿损失。

裁决中可以包含利息。依照西班牙仲裁法,当事人可以约定一个利率。如果缺乏此种约定,或者当前适用的实体法缺乏规定,那么仲裁员可以使用复利的计算方法,即不仅包含本金所产生的利息,还在下一个计息周期内,将之前的特定期间内

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〔1〕 参见《示范法》第 32 条。

产生的利息也计算利息的计息方法。中间裁决和临时裁决中的赔偿损失救济决定也是可以执行的。

(2)惩罚性救济。

西班牙法律禁止惩罚性救济。但如果合同中明确表明可以包含惩罚性救济的,仲裁庭就会倾向于在符合约定条件的情况下,依据比例原则来适当调整救济的金额。不过,包含此类救济的裁决往往执行起来会比较复杂。

(3)禁令。

禁令原本是普通法系中衡平法上的概念,是指以法庭判令的形式为了衡平的目的而采取的补救措施,命令当事人必须开始或停止某种行为。若任何一方不遵守禁令,将会产生民事或刑事上的法律责任,即可能需要支付罚金或面临刑罚。根据由 2000 年 1 月 7 日的《西班牙民事程序第二最终条款》(Amendment of la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil)第 722 条的规定,法院可以应当事人请求作出禁令。[1] 仲裁协议的任何一个当事人都可以向法院请求签发禁令。[2]

5. 仲裁裁决的更正和解释

根据《西班牙仲裁法案》第 39 条第 3 款的规定,仲裁庭可以更正或解释仲裁裁决。更正或解释可以依当事人请求启动,也可以依仲裁庭职权启动。

当仲裁庭基于当事人请求的修改仲裁裁决,当事人的此类请求需要在收到仲裁裁决的 10 日之内作出,除非争议双方就期限有其他约定。修改的范围仅包含计算错误、笔误、印刷错误或性质类似的其他错误。如果双方有约定,一方当事人可以在通知对方当事人后请求仲裁庭对裁决书的具体某一点或某一部分作出解释,也可以请求仲裁庭以当事人的某种主张为基础对裁决进行补充。收到当事人的请求后,仲裁庭须在 10 日内就错误的修正和澄清作出决定,期限为收到请求后的 20 日内。需要注意的是,如果是涉外仲裁,那么作出决定和补充修正仲裁裁决的期限分别为一个月和两个月。

当仲裁庭依职权对仲裁裁决进行更正,此种更正必须在裁决作出后的 10 日内完成。更正的范围仅包括计算错误、笔误、印刷错误或性质类似的其他错误。

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[1] See SECOND FINAL PROVISION. Amendment of la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Act 1/2000, of 7th January, on Civil Procedure]. Article 722.

[2] 参见《西班牙仲裁法案》第 15 条。

（九）费用

1. 费用负担分配的方法

西班牙仲裁法还涉及何方承担仲裁费用的问题。仲裁庭有权决定由谁来承担仲裁费用。如果当事人双方有关于费用的约定，则首先需要考虑双方的约定。《西班牙仲裁法案》并没有就仲裁费用的承担比例分配作出直接规定，因此，“仲裁失败方承担费用”的做法并不一定适用。如果双方无约定，那么仲裁庭并没有义务裁定失败方承担费用。一般而言，决定仲裁费用负担需要考虑多种因素。仲裁庭不仅需要考虑各方的输赢，即多大程度上主张被支持，还需要考虑各方在仲裁过程中的表现以及在何种程度上侵犯了对方的利益。

关于仲裁费用所覆盖的开销种类，根据《西班牙仲裁法案》第 37 条第 6 款的规定，[1] 仲裁费用一般包括支付仲裁员的报酬以及他们的开销；必要时，各方律师或代理人的报酬和开销以及支付给仲裁机构的服务费和管理费也涵盖其中。费用一般并不包括证人和专家的旅费、住宿费，也不包括当事人处理内部事务的花销。

2. 仲裁庭的自由裁量权

如前文所述，《西班牙仲裁法案》就费用负担问题未作出规定，这就意味着仲裁庭在决定费用负担的问题上并没有任何法律直接赋予的义务。因此，仲裁庭如果认为有必要，可以行使其自由裁量权减轻或免除一方的费用负担。

仲裁庭有权依照各方在仲裁中的表现，或者各方的单个主张分别被支持的程度来决定费用负担。除此之外，仲裁庭也可以适用《西班牙民事程序法案》中所设立的标准对费用负担作出决定。该标准规定，当一方完全胜利的时候，其所支付的诉讼费用应当得到全部支持，即完全由另一方补偿；而当各方都在一定程度上获胜时，应分别依自己请求被支持的程度来分担仲裁费用。此外，法院无权审查仲裁庭关于仲裁费用的决定。

三、西班牙商事仲裁机构

在西班牙，有 50 多个仲裁机构，每年管理 500 ~ 700 个仲裁案件。在实践中，少数几个颇具规模的仲裁机构管理着大多数案件。关于此种国内仲裁机构，比较重要的有：西班牙仲裁院（Corte Española de Arbitraje）、巴塞罗那仲裁庭（Tribunal Arbitral de Barcelona）、民商事仲裁院（Corte Civil y Mercantil de Arbitraje）、马德里商会仲裁院（Corte de Arbitraje de la Camara Oficial de Comercio e Industria de Ma-

〔1〕 参见《西班牙仲裁法案》第 37 条第 6 款。

drid)。这些仲裁机构均制定有各自的仲裁规则。机构聘任名单中的仲裁员既可审理纯粹的国内纠纷,也可审理具有涉外因素的纠纷。

(一)西班牙仲裁院

西班牙仲裁院,也译作西班牙仲裁法庭,于1989年成立,位于西班牙首都马德里。该仲裁院向西班牙商业、工业与航海商会的高等会议(High Council of Chambers of Commerce, Industry and Navigation)负责。该仲裁院可以受理所有国内和国际商事纠纷,对当事人来自的国家以及所在的经济或商业部门没有限制。

依照西班牙仲裁院的章程,其基本功能有如下几点:组织和主持仲裁、指定仲裁员、监督仲裁程序的进行、保证仲裁裁决的执行、减少不同争端解决案件结论不同或相冲突的情况、发布关于商事仲裁实践的报告、与其他的国际仲裁机构缔结合作协议。与其他仲裁机构相比,西班牙仲裁院的仲裁规则因其显著的时代特征而受到国内外工商业从业者的欢迎,他们倾向于选择在其管理下进行仲裁活动。

1. 仲裁员选任程序

实践中,特别是在国际商事仲裁实践中,当事人文化/法治背景差异巨大,往往难以就仲裁员的选任达成一致,从而产生仲裁程序上的拖延,使纠纷得不到及时的解决。西班牙仲裁院在这个问题上引入了一个特殊机制,以保证仲裁员的选任更加合理和便捷,效果颇佳。该模式的具体做法是:首先将一份仲裁员名单提交给仲裁各方当事人,让其分别选择哪些仲裁员是他们拒绝接受和哪些仲裁员是它们所希望指定的。[1] 这个名单的形成本身将考虑仲裁的具体事由/纠纷的性质和案件涉及的专业等因素。在各方完成选择后,仲裁员将根据各方偏好自动产生,仲裁庭也从而直接得以组成。该制度因其便捷/专业和透明而被认为是一项合理的制度创新。该模式被荷兰仲裁机构(the Netherlands Arbitration Institute)和世界知识产权组织(the World Intellectual Property Organization,WIPO)所借鉴,同时也被联合国所认可。

2. 紧急仲裁员制度

根据《西班牙仲裁院程序规则》第15条的规定,在仲裁庭尚未组成时,若任何一方当事人请求颁布紧急措施,仲裁院均有权指定一个紧急仲裁员来决定是否批准该请求。在此过程中,该紧急仲裁员要听取各方的主张和抗辩,然后在认真评估

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〔1〕 See Spanish Court of Arbitration, “Why Choose Us”, http://corteespanolaarbitraje.es/? page_id=4962&lang=en, July 20, 2018.

的基础上,根据仲裁规则作出决定。紧急仲裁员的权限完全适用仲裁庭组成后的仲裁员权限的规定;也就是说,紧急仲裁员拥有《西班牙仲裁院程序规则》第 14 条中所列明的全部职能。[1] 在仲裁庭正式组成后,紧急仲裁员的职能立即终止。此外,除非当事人之间有相反约定,紧急仲裁员无法担任在同一案件中正式的仲裁庭成员。

3. 上诉机制

关于仲裁裁决的效力,《西班牙仲裁法案》一般采用一裁终局制,仲裁裁决一旦作出即对双方产生拘束力。这使仲裁与有多个审级的司法活动不同。但需要说明的是,"一裁终局"是其一般规则,西班牙仲裁院在此基础上设立了特殊机制,给当事人提供一个自愿选择的机会,其标志就是设立一个上诉机制,供当事人自愿选择是否接受。西班牙仲裁院曾于 2010 年就建立上诉机制作过一项社会调查,调查对象为总部位于西班牙境内的本土和国际上市公司。调查结果显示,70% 的受访机构希望在商事仲裁中设立上诉机制。[2]

依据《西班牙仲裁院程序规则》第 39 条的规定,西班牙仲裁院设立了上诉机制。为使上诉程序能够切实可行,双方需要在仲裁条款或者单独的仲裁协议中直接表达上诉的意愿。倘若存在此类协议,那么当一方对第一审级的仲裁庭所作出的结果不服,提交了上诉申请后,就可以开启上诉程序。上诉审可以审查事实层面的问题,但要求该事实与仲裁裁决中的决定相关,或者该事实发生于仲裁裁决作出之后,或虽然事实发生在裁决作出之前,但却有充足的理由表明:上诉方只可能在裁决之后才会获取到这些与事实关联的信息和证据。[3]

(二)巴塞罗那仲裁院

巴塞罗那仲裁院(TAB)于 1989 年 2 月 15 日依照当时刚颁布的《西班牙仲裁法案》成立。在此之前,巴塞罗那的一些法律从业者曾就设立专业性仲裁机构的问题进行过多次探讨,并给出过初步方案。TAB 就是在此基础上,由多个法律从业者机构支持和辅助而设立的,这些机构包括加泰罗尼亚律师协会、巴塞罗那律师协会、巴塞罗那商会和加泰罗尼亚公证协会。建立 TAB 的初衷是为商事争议的解决提供更加专业化和便捷化的服务,同时提高整个法律行业的声誉。

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〔1〕 参见《西班牙仲裁院程序规则》第 14 条。

〔2〕 See "Second instance arbitration", http://corteespanolaarbitraje.es/? page_id = 4736&lang = en, July 20, 2018.

〔3〕 参见《西班牙仲裁院程序规则》第 39 条。

作为一个多行业、多主体参与建立的机构,TAB 具有多重价值取向和目标。除了保证法律适用的专业性以外,TAB 还注意规范职业伦理问题。此外,TAB 注重尊重仲裁当事人和仲裁过程中的多样性以及保护环境等社会目标。TAB 成立以来,一直致力于仲裁法的教育、宣传和研究;例如,在高等院校组织开设仲裁系列课程,举办座谈,创办和发行商事仲裁的特别杂志 *Butlletí*,并编纂《替代性司法年鉴》(*Anuario de Justicia Alternativa*)等。

《TAB 仲裁规则》的最新版是 2004 年修订后的版本,该版本反映了 2003 年《西班牙仲裁法案》修订的一系列变动。[1] 《TAB 仲裁规则》的设立宗旨是尽量尊重当事人的自主选择,并试图和解各方之间的冲突和矛盾。为此,在不减损仲裁法律基本原则的前提下,《TAB 仲裁规则》设立了一系列便捷而灵活的创新机制。比如,与西班牙仲裁院相似,从 2014 年 6 月起,TAB 也开始实施了紧急仲裁员制度,并为此制定了详细的《紧急仲裁员规则》。[2]

(三)民商事仲裁院

民商事仲裁院(CIMA) 是另一个有必要提及的西班牙重要的常设仲裁机构。CIMA 成立于 1989 年 7 月,其总部设在马德里。如其名称所示,CIMA 主要负责管理广泛的民商事纠纷的仲裁活动。此外,CIMA 也提供调解与咨询等服务,并为各种纠纷解决方式的结合运用提供了合适的场所。[3] CIMA 重视选择有各国仲裁和相关从业经验的仲裁员,以便提供多语种、多法律环境的纠纷解决服务。

CIMA 为其《CIMA 仲裁规则》提供了各种语言的官方版本,这些版本皆可以从其官网上找到相应文件。[4] 其《CIMA 仲裁规则》有如下的优势或特点:第一,《CIMA 仲裁规则》为涉外纠纷的解决特别提供了具体规则,使外国实体法可以被灵活和直接地用于仲裁过程当中;第二,《CIMA 仲裁规则》允许各方约定仲裁中的各种属于双方自由裁量权的程序性事项,并会充分执行各方的约定,包括在临时仲裁当中提供相应服务;第三,仲裁重视速度和效率,保证一般的仲裁裁决会在 6 个月内作

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〔1〕 See “Barcelona Arbitration Court (TAB) Regulations”, http://www.tab.es/images/documents/normativa/reglamento_Tribunal_Arbitral_Barcelona_eng.pdf, July 20, 2018.

〔2〕 See “Emergency Arbitrator Regulation”, http://www.tab.es/images/documents/normativa/reglamento_Arbitro_de_emergencia_eng.pdf, July 20, 2018.

〔3〕 See “the Court”, CIMA, http://arbitrajecima.com/en/sobre-nosotros/the-court/, July 20, 2018.

〔4〕 See “Reglamentos de Arbitraje”, CIMA, http://arbitrajecima.com/documentos/reglamentos-de-arbitraje/, July 20, 2018.

出;第四,相比其他仲裁机构,其仲裁费用较低,且费用计算受到严格控制。自 2011 年起,CIMA 开始适用关于紧急仲裁员的规定。

(四)马德里仲裁院

马德里仲裁院(CAM)是由马德里商业、工业和服务商(以下简称马德里商会)于 1989 年建立的常设性仲裁机构,它作为马德里商会的分支机构而存在。而马德里商会作为一个面向公众的法律服务机构,已经存续了 130 多年。为了保证仲裁机构的自主性和独立性,马德里商会制定了特殊的仲裁机构章程以保证其运行的独立性。根据其章程,CAM 由以下部门组成:仲裁院大会、仲裁院指定委员会、秘书和主席。

CAM 现行遵照的《CAM 仲裁规则》是 2015 年最新修订的版本。其中包含了 CAM 组织架构的设置以及活动的基本准则。[1]《CAM 仲裁规则》的特点之一是充分尊重当事各方的意思自治,允许各方通过约定就程序作出自己的设计。[2] 此外,《CAM 仲裁规则》包含了"快速通道"制度,允许简单的案件适用简化的程序,而对各程序的期限规定了更短的时间。

四、西班牙法院对仲裁的监督权以及仲裁裁决的承认与执行

尽管仲裁活动具有高度的自治性和自由裁量性,但司法系统对其的监督是必不可少的。西班牙法院对于仲裁享有监督的权限,体现为可以基于一些理由而审查仲裁活动的过程,并对不满足特定要求的裁决予以撤销。更为重要的是,仲裁裁决需要司法系统予以承认,并由法院予以执行。

(一)不服裁决的追诉权与法院的监督权

如果当事人对仲裁裁决不服,可以行使不服裁决的追诉权。西班牙仲裁法规定了行使追诉权的具体途径和方法以及行使追诉权的法定期限。依据《西班牙仲裁法案》第 31 条第 1 款的规定,[3] 只有在当事人提出申请并且能够证明特定情况被满足的时候,才能行使不服裁决的追诉权。这些情况包括如下 6 种[4]:(1)仲裁协议不存在或协议无效;(2)未向提出申请的当事人发出指定仲裁员的适当通知或

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〔1〕 See "Statute of the Court of Arbitration of Madrid", http://www.arbitramadrid.com/web/guest/estatutos, July 20, 2018.

〔2〕 See "Rules of Arbitration", at http://www.arbitramadrid.com/web/guest/reglamento1, July 20, 2018.

〔3〕 参见《西班牙仲裁法案》第 31 条第 1 款。同参见《示范法》第 34 条第 1 款。

〔4〕 参见《西班牙仲裁法案》第 31 条第 2 款。同参见《示范法》第 34 条第 2 款。

仲裁程序的适当通知,或者因他故而不能陈述案情;(3)仲裁庭就当事人未提交作为仲裁请求的事项作出了决定;(4)仲裁员的选定或仲裁程序的进行没有依照当事人之间的约定进行,除非该约定与《西班牙仲裁法案》中的任何条款相冲突,或者无此种约定的事实与本法不符;(5)仲裁员就不可仲裁的事项作出了仲裁约定;(6)该仲裁协议与公共政策相冲突。此外,《西班牙仲裁法案》还规定了行使追诉权的法定期限,以及追诉权的行使是否能够阻断仲裁裁决的执行等事项。

在上述6种情形中的第(2)(5)(6)项下,法院可以主动提起撤销仲裁裁决的程序。如果一方当事人所委托的律师本身的法定权利或利益与其所质疑的裁决结果紧密相关,也有权提出追诉仲裁裁决的请求。而在第(3)项和第(4)项中所述的情况下,法院所审查的裁决范围将仅限于被提出追诉申请所涉及事项,即未提交仲裁却被裁决的事项或不可仲裁却被裁决的事项。倘若裁决中有关这些事项的决定与整个裁决是可分的,则法院不应审查和监督这些事项以外的任何问题。

根据《西班牙仲裁法案》第41条第4款的规定,当事人行使该项追诉权的时限为得到裁决作出的通知后两个月内,或者得到决定澄清、补充、更正仲裁决议的通知的两个月内。

根据《西班牙仲裁法案》第45条的规定,当事人行使不服裁决的追诉权或申请法院行使监督权均不会对仲裁裁决的可执行性造成任何影响,[1]因此,行使追诉权不会阻却执行程序的进行。同时,第45条也允许被申请执行人向有管辖权的法院提出中止执行程序的申请,不过提出此种申请的当事人需向法院提供一定的担保,并且担保需要与裁决中所涉及的救济数额与延迟执行所造成的损失之和在数额上相同。根据《西班牙民事程序法案》第529条第3款第2段中所明确的要求,提供担保的方式有:现金、具有第一付款义务的银行担保或者任何法院所认为可以保证其总额能够即刻可用的任何形式的担保。[2]

值得注意的是,不服裁决的追诉权无法通过约定排除。也就是说,即便仲裁协议或仲裁条款中包含一方或各方承诺不对任何仲裁裁决行使追诉权,该约定也是无效的。

(二)仲裁裁决的承认与执行

从事跨国商事活动的当事人在适用仲裁方式解决纠纷时,往往会面临在仲裁

〔1〕 参见《西班牙仲裁法案》第45条。

〔2〕 参见《西班牙民事程序法案》第529条第3款第2段。

地之外的国家或地区申请承认和执行裁决的问题。如果裁决得不到充分有效的执行,则裁决将成为“空头支票”,无法让当事人得到充分救济。[1] 因此,有必要了解西班牙法律对外国裁决的态度,以便使仲裁活动真正发挥其作用。《西班牙仲裁法案》对承认和执行仲裁裁决的程序进行了规范,其中列举了被执行方反对执行的正当理由,并细化了可以阻止承认执行的各种情形和条件。

需要注意的是,《西班牙仲裁法案》对于国内和国际仲裁裁决的承认执行规定了不同的程序。根据《西班牙民事程序法案》第 517 条的规定,国内仲裁裁决由对案件具有管辖权的第一审级法院直接执行。[2]《西班牙民事程序法案》第 517 条以及随后的相关条款所规定的执行程序有两点颇具特色:第一,当事人在收到裁决书的 20 日以后才可以向法院提出执行申请;第二,如果裁决符合法定的形式要件,且申请人所请求的救济形式与裁决相一致,那么法院就必须作出下达执行令的决定。也就是说,法院只对裁决进行形式审查;如果符合形式要求,则不过问裁决的实质内容。

被执行方在收到法院所下达的执行决定后,将有 10 日时间表达反对意见。依据《西班牙民事程序法案》第 556 条和第 559 条的规定,对抗执行决定的理由包括:(1)被执行方已经支付了救济金额或已经执行了裁决;(2)执行的申请已经过了申请的有效期,即各方收到裁决的 5 年之内;(3)仲裁协议或公开的交易文件在形式上不符合要求;(4)申请执行的一方或被执行方缺乏相应的能力或没有充分的代理资格;(5)仲裁裁决根本无效,即裁决并不包含有效的决议部分;(6)仲裁裁决需要被公证,或者有公证但该公证缺乏权威性。[3] 根据《西班牙民事程序法案》第 556 条第 2 款的规定,被执行方提出反对意见将不会阻却执行程序的进行。[4]

外国仲裁,或称国际仲裁,是指在西班牙境外作出的具有国际因素的仲裁裁

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〔1〕 参见张建:《论国际投资仲裁裁决在中国的承认与执行》,载《南华大学学报》(社会科学版)2017 年第 2 期。

〔2〕 参见《西班牙民事程序法案》第 517 条。

〔3〕 See Ley N° 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law No. 1/2000 of January 7, 2000, on Civil Procedure] (modificada por la Ley Orgánica N° 16/2015, de 27 de octubre, Artículo 556. “Oposición a la ejecución de resoluciones procesales o arbitrales o de los acuerdos de mediación” and Artículo 559. “Sustanciación y resolución de la oposición por defectos procesales”, http://www. wipo. int/wipolex/en/text. jsp? file_id = 414639, July 20, 2018.

〔4〕 参见《西班牙民事程序法案》第 556 条第 2 项。原文为:“La oposición que se formule en los casos del apartado anterior no suspenderá el curso de la ejecución. ”

决。[1] 西班牙作为《纽约公约》的缔约国,对于外国裁决的承认与执行依照《纽约公约》进行。胜诉方可以向被执行方住所或居所或者财产所在地法院申请承认和执行。当依照《纽约公约》和29/2015号《国际法律合作法案》第54条[2]取得“双重许可(exequatur)”后,仲裁裁决将被依照属地管辖权拥有第一审级的执行。执行程序的法律依据为《西班牙民事程序法案》第517条。[3]

总体而言,西班牙法院在实践中倾向于尽量使一项仲裁裁决得以执行,虽然对于国内裁决和外国裁决适用不同的规则,但在执行的条件和程序上并无区别。因为《纽约公约》第5条将裁决被仲裁地法院撤销作为可以不予执行的理由,所以西班牙法院对于此类裁决原则上不予执行。但在个别案件的处理上,法院也会利用公约给予的空间而予以执行。比如,2007年7月11日在鲁维区第一地区法院作出的第3号决议即承认和执行了在仲裁地国家已经被撤销的裁决。[4] 该决定的作出是基于巴黎高等法院在“Compagnie de Saint Gobain vs. Fertilizer Corporation of India Ltd. 案”所述的裁决理由。[5]

一般执行仲裁裁决所需要的时间为9个月左右。根据《西班牙民事程序法案》第518条的规定,申请执行的期限为仲裁当事人收到裁决作出通知后的5年内。[6] 5年期限过后,当事人将丧失向法院申请执行仲裁裁决的资格。

(三)保全措施

在西班牙,保全措施可以由法院直接发布和执行。虽然保全措施是裁决作出之前的临时措施,旨在保证当事人的利益在仲裁过程中不被减损,但在当事人收到仲裁裁决作出的通知后,先前的保全措施还可以维持20日的效力。20日之后,如果当事人没有寻求仲裁裁决的执行,那么保全措施的效力将全部终止。当然,如果当事人在法律规定的期限内向法院提出了执行申请,保全措施在一定程度上可以为执行的成功提供保障。有此类功能的保全措施包括冻结资产或银行账户。

保全措施的实施还可以参照程序法案中关于仲裁庭组成和庭审阶段临时措施的相关规定。“保全措施”和“临时措施”两者具有类似的功能,即防御被申请人或

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〔1〕 参见《西班牙仲裁法案》第46条第1款。

〔2〕 See Article 54 of the International Legal Cooperation Act 29/2015.

〔3〕 参见《西班牙民事程序法案》第517条。

〔4〕 See First District Court, No. 3, of Rubí, of 11 July 2007.

〔5〕 See *Compagnie de Saint Gobain vs. Fertilizer Corporation of India Ltd.*

〔6〕 参见《西班牙民事程序法案》第518条。

被执行方的资产或财产减少等情况的产生而带来的损失及风险。但需要注意的是,保全措施的作用不仅是防御风险和减小损失,它还构成了仲裁裁决的执行的一个先行部分,这意味着它自身就有实现法律救济的功能。

五、对中国当事人参与西班牙仲裁的建议

(一)中国当事人参与西班牙仲裁的条约保障

中国与西班牙建交于1973年3月9日。其后,双边关系稳定发展,两国在政治、经济、文化等领域开展着有序的合作。无论是在政府层面,还是在民间层面,两国交往关系都日益紧密。政治、经济、文化各领域合作与交流的深化促进了两国间的缔约实践,双方交流的成果也不断以国际条约的形式予以确认。与商事活动和仲裁相关的条约包括:《中国和西班牙关于中、西两国建立外交关系的联合公报》(1973年3月9日)、中西签署贸易协定和民用航空运输协定(1978年6月19日)、两国签署关于避免双重征税和防止偷漏税的协定(1990年11月22日)、双方签署关于相互鼓励和保护投资协定(1992年2月6日)、两国签订关于民事、商事司法协助的条约(1992年5月2日)、《中华人民共和国和西班牙王国关于建立全面战略伙伴关系的联合公报》(2005年11月15日)、两国关于开展教育合作与交流执行计划(2015年至2019年)(2016年3月互换签署文件)、两国签署社保协定(2017年5月)以及《文化、青年和体育合作执行计划(2018—2021)》(2018年1月)。[1]

其中,值得提及的是1992年的《中华人民共和国和西班牙王国关于民事、商事司法协助的条约》,该条约第1条第1款即规定"缔约一方的国民在缔约另一方境内,享有与缔约另一方国民同等的司法保护,有权在与缔约另一方国民同等的条件下,在缔约另一方法院进行民事、商事诉讼。"这使我国的当事人在西班牙享有与西班牙当事人平等的请求司法监督仲裁活动的权利。该条约第2条规定,条约中所指代的"民事、商事方面的司法协助"包括承认与执行法院判决和仲裁机构的裁决。此外,该条约第17条明确规定,"缔约一方法院在本条约生效后作出的已经确定的民事、商事裁决,除因有关破产和清算程序问题造成的损失及因核能造成的损失之外,在缔约另一方境内应当予以承认与执行"。这使西班牙法院负有承认我国境内作出的仲裁裁决的国际法义务;同时我国法院也负有承认和执行在西班牙作出的仲裁裁决的义务。

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〔1〕 参见中华人民共和国外交部网站:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679810/sbgx_679814/,最后访问日期:2018年11月20日。

(二)关于订立仲裁条款和仲裁协议的建议

1. 仲裁格式条款的使用

首先需要澄清的是,由于西班牙的仲裁法律制度承认临时仲裁,当事人可以选择临时仲裁的方式解决争议,因此在仲裁协议适用西班牙法的情况下,并不一定要在仲裁协议中注明仲裁机构的名称。但如果当事人倾向于选择机构仲裁,为了能够在发生纠纷时有效地解决纠纷,还是有必要将仲裁机构以及所适用的规则等作出约定。这时,各大仲裁机构所提供的格式仲裁条款可以为我国当事人所借鉴和参考。

西班牙仲裁院直接提供了官方的中文仲裁条款,其表述如下:“所有就本合同或协议产生的异议,最终由西班牙仲裁院(Court)按照相关规定和章程做出裁决,西班牙仲裁院行使仲裁职能,并负责组织仲裁人或仲裁组。”而 TAB 的格式仲裁条款除了包含类似上述的西班牙仲裁院的表述外,还规定“即便仲裁庭的名称有变,也不妨碍将其提交至该机构。”[1] CIMA 的格式条款中包含着指定仲裁的实体适用法的模板。[2]

值得注意的是,TAB 还为涉及公司法问题的纠纷设定了特殊的格式仲裁条款。该条款为:“任何与公司有关的事项所引起的纠纷,无论纠纷数量有多少,无论是发生于公司与董事、清算人、股东之间的,还是在任意后三者之间的,都需要被提交至巴塞罗那仲裁庭(TAB)解决……这些纠纷的事由包括而不限于任何对公司决策的质疑;公司、其分支以及个人针对董事所发起的行为;以及任何关于召开董事会议或对公司启动破产以及清算程序的纠纷。”可见,该条款所适用的并非普通的合同关系,而是公司与股东、债权人等人士之间的出资和债务关系,抑或公司内部人员

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[1] 原文为“*The parties hereto shall submit any conflict or potentially litigious issue arising from this contract or any other legal action, including any based thereon, or as to the validity thereof, to the institutional arbitration of the Tribunal Arbitral de Barcelona (TAB) / Barcelona Arbitration Court, of the Associació Catalana per a l' Arbitratge (ACA) / Catalan Arbitration Association – by whatever name it may be known in the future – which shall be responsible for appointing the arbitrator or arbitrators and administering the arbitration proceedings in accordance with its Regulations in force at the start of the arbitration proceedings.*”

[2] 原文为“*… Any dispute arising from or relating to this contract, including any question regarding its existence, validity, interpretation, scope, performance or termination, shall be finally settled by arbitration [in law/equity], administered by the Civil and Commercial Arbitration Court (CIMA) in accordance with its Statutes and Arbitration Rules in force on the date of submission of the request for arbitration. The Arbitral Tribunal appointed for this purpose shall consist of […] Arbitrator/ Arbitrators and the language of arbitration shall be […]. The place of arbitration shall be […]. The applicable law shall be […]…*”

根据章程的公司治理关系。由于我国赴西班牙投资人可能会选择与当地的企业缔结合资或合作合同,或采取并购等方法来取得股东的身份,该格式条款对于我国从事此类投资的企业和个人具有一定的借鉴意义。〔1〕

2. 外国仲裁员的资格问题

在实践中,我方当事人可能会选择非西班牙籍的仲裁员,来进一步确保仲裁的中立性。在机构仲裁中,由于仲裁员的名字登记在册,可能不会因为仲裁员资格产生过多问题。但如果是临时仲裁,或向仲裁机构申请要求非注册仲裁员进行仲裁时,就需要注意外国仲裁员的资格问题。值得注意的是,西班牙的仲裁机构虽然均备有仲裁员名册,但允许当事人选择名册之外的人士担任仲裁庭成员审理案件。因为其奉行的原则是只要不与强行法相冲突,就要最大限度地尊重当事人的意愿。

根据《西班牙仲裁法案》第 13 条的规定,除非当事人之间有相反的约定,国籍不构成被禁止担任仲裁员的理由。区别于诉讼,西班牙法律没有外籍律师不能参与在西班牙进行的仲裁的规定。

3. 约定选择适用上诉制度的问题

如前文所述,西班牙仲裁院等仲裁机构允许当事人对仲裁裁决进行上诉,但西班牙仲裁法却默认仲裁是一裁终局。这里包含对当事人意思自治的尊重。依照西班牙法律和实践,对第一审级仲裁进行上诉的前提是各方当事人在仲裁协议中明确表达了允许上诉的意图。因此,如果我方当事人希望在得到裁决后可以上诉,应当在签订仲裁协议时就明确提出该条件。此外,希望能够用上诉来保证充分救济的当事人还应当注意其提交的仲裁机构是否提供仲裁上诉服务。因此如果意图上诉,需要对上诉机构作出选择,并且要十分关注上诉机构的机制与操作。

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〔1〕 原文为"...1. *All corporate issues and disputes, howsoever many there may be, arising between the company and its directors, liquidators or members or any of same with each other, shall be submitted to the institutional arbitration of the Tribunal Arbitral de Barcelona (TAB), under whatever name it may operate in the future, of the Asociación Catalana para el Arbitraje [Catalan Arbitration Association], entrusting to it the appointment of arbitrator(s) and the administration of the arbitration in accordance with its regulations. Such issues shall include, as herein listed without any limitation whatsoever, any challenges to corporate resolutions, corporate, derivative and individual actions against directors and disputes relating to calling meetings of corporate organs and the winding up and liquidation of the company.* 2. *The place of arbitration shall be the headquarters of the administering arbitration institution, unless otherwise agreed by the parties.* 3. *If the company is a party to the proceedings, it undertakes to make prompt provision of funds to meet initiation fees and administration by the arbitration institution and the fees and expenses of the arbitrators.* 4. *Amendment or repeal of this article shall require the same legal or statutory majorities required for the introduction of a statutory arbitration clause.*"

(三)仲裁程序进行中的相关建议

1. 如何提起管辖权异议

依照《西班牙仲裁法案》第 11 条的规定,如果仲裁一方当事人对仲裁管辖权存有异议,应当在开庭前提出。[1] 如果不对管辖权提出异议,那么就标志着法院丧失对涉案实体问题的审理权力,当事人也失去了寻求法院救济的机会,实体问题从而无法再通过诉讼程序解决。需要注意,前述的“上诉制度”是在仲裁范畴内的两级审理制度,本质上属于仲裁机构之间就后续服务的特别约定,与这里所讨论的法院管辖权问题无关。因此,需要慎重对待管辖权异议的问题。另外,在纠纷对方在有有效仲裁协议的情况下提起了司法程序时,我国当事人如果倾向于通过仲裁解决,则应当在司法程序中就法院的管辖权提出异议。如果我方也认为可以采用司法途径解决,则不必提出管辖权异议,司法程序将依法进行。在这种情况下,双方实际上是放弃了仲裁程序,默示地选择接受法院管辖。如果对方在日后再次提起仲裁,可以以已经放弃仲裁途径为由,就仲裁庭的管辖权提出异议。

如前文所述,《西班牙仲裁法案》第 11 条规定了提出异议的期限限制,无论是普通程序还是口头程序,异议当事人都需要在回应申请人的仲裁请求之日起的 10 日内提出异议。我方当事人应当注意该时间限制,以免因为疏忽而失去提出管辖权异议的机会。

2. 仲裁庭组成的异议问题

仲裁实践中,仲裁员的选定和仲裁庭的组成至关重要。中方当事人如果对仲裁员所披露的信息存在质疑,或者对仲裁员的中立性和独立性产生合理怀疑,均可以就仲裁员的选定和仲裁庭的组成提出异议。根据《西班牙仲裁法案》第 17 条第 2 款的规定,仲裁员无论是被选定还是被指定,在整个仲裁活动中,皆负有披露其与仲裁当事人或仲裁请求存在利益冲突的相关信息。我国参与仲裁的当事人,要时刻观察仲裁员在整个仲裁过程当中的任何可能出现的利益冲突。一旦出现对中立性和独立性可能产生合理怀疑的情况,当事人可以对该仲裁员进行质疑,而不必受是否已经组成仲裁庭、已经开始庭审程序的影响。

由于西班牙仲裁法律并没有关于衡量仲裁员中立性和独立性即判断利益关联程度具体标准的规则,因此该问题一般属于仲裁庭自由裁量权的范畴。为了最大限度地保护自己的利益,我国的当事人可以与对方当事人约定具体判别利益冲突

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〔1〕 参见《西班牙仲裁法案》第 11 条第 1 款。

的标准。为了使约定可以更加便于解释和被仲裁庭接受,建议我国当事人可以考虑采纳前文所述《关于仲裁员独立性和中立性的推荐做法》及《指导》等指导性文件中的标准,将其全部或部分纳入仲裁协议当中。

3. 临时措施的申请问题

鉴于《西班牙仲裁法案》第 23 条赋予了仲裁庭实施任何其认为就纠纷的争议事由而言必要或适当的临时措施的权力,我国当事人可以依据该条款来维护自己在仲裁阶段的利益,防御对方转移财产和证据,以最大限度地减损因此而可能带来的风险。[1] 临时措施的请求获得批准之后,即可依据《西班牙仲裁法案》第 11 条第 3 款的规定,及时请求法院执行该临时措施。[2] 由于临时措施的目的是防御在庭审过程中,对尚未经决断的主张中涉及的利益减损风险,或维持利益的占有或归属,因此这些临时措施的实施对象未必一定是仲裁的当事人,也有可能是一个与该请求有关联的第三方。可见,在申请一个临时措施的决定和请求其实施时,不仅要考虑当事方,还需考虑是否牵涉第三方的利益。

为了可以成功申请临时措施的签发和执行,我国当事人应针对临时措施的实施条件有所准备。根据本文的前述内容,首先,申请临时措施要掌握一定的"初步证据",以便让仲裁庭和法院在形式审查层面上能够认为损害或危险是存在的。其次,申请者需要证明"迟延会导致危险",如如果该措施被拒绝颁布,则争议财产可能会被转移,或股本会严重贬值等。

此外必须注意的是,《西班牙仲裁法案》第 11 条第 2 款和第 3 款明确了仲裁程序的进行并不会影响任何当事人在西班牙的司法体系中申请强制措施等程序性保障措施的权利,[3] 因此,即便我国当事人已经接受了仲裁庭的管辖,或者仲裁程序已经开始,也可以在必要时随时向法院提起临时措施的请求,以保障合法利益的实现。

4. 证据及证人

由于我方当事人对西班牙仲裁和司法体系中的质证程序以及证据证明力的认定规则并不熟悉,因此应当争取在证据的认定和使用上尽可能适用比较熟悉的规

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〔1〕《西班牙仲裁法案》第 23 条。

〔2〕 See Foster Wheeler Trading Company AG SA and Foster Wheeler Trading Company AG. v. National Company for Fishing. See also Marketing, Decision of the Court of First Instance of Madrid, number 69, dated June 28, 1999.

〔3〕《西班牙仲裁法案》第 11 条第 2 款、第 3 款。

则和程序。为此,我方当事人可以与对方当事人就证据问题进行特殊约定。如前文所述,西班牙仲裁法律允许当事人就各种属于自由裁量范畴的问题进行约定,而关于证据的认定和质证程序恰恰属于自由裁量的范围。此外,我方也可以向仲裁庭主张适用国际商事仲裁实践中常用的规则文本,譬如前文所提到的《IBA 证据规则》等指导性文件。

来自我国的当事人还应注意西班牙关于专家证人的法律制度。由于我国并不常用专家证人制度,所以其往往被商事活动从业者和律师忽略。根据《西班牙仲裁法案》第 32 条第 2 款的规定,当事人和仲裁庭在必要时皆可以邀请某一位在案件涉及领域的专家来就某个专业性问题提供意见,以帮助仲裁庭理解案件的事实情况。如果纠纷所涉及的领域较为专业,或不被仲裁员所熟知,我国当事人则可以依据该规则考虑邀请专业人士为庭审提供帮助。此外,需要注意到,比起当事人邀请的证人,仲裁庭指定的专家证人提供的证言一般被认为更具中立性,因而被采信的概率也更高。因此,我国当事人也可以建议仲裁庭选择相关领域的专家,以便增强其提供的信息的可信程度。

5. 终止仲裁程序的问题

虽然获得最终仲裁裁决是一项仲裁活动最常见的结果,但实践中不乏以其他方式终止仲裁程序的例子。经各方约定终止是在产生裁决前终止仲裁程序最常见的一种形式。约定终止的一般形式为和解,它并不需要各方就义务的履行和违反情况以及所造成的损害的数额等问题达成完全一致,也不需要在法律层面上认定应当适用的救济后果,它需要的仅仅是双方就仲裁请求中的事项达成一个解决方案。

为此,我国当事人可以灵活使用西班牙法律提倡的这种和解方法,以最大限度地化解矛盾,以免影响在西班牙境内持续的商业活动。但应当注意的是,和解合同中应当明确写明双方所约定的和解条件,并且约定若出现无法履行和解协议的情况,是否将再度付诸仲裁解决等事项。

(四)关于如何了解西班牙法律制度及法律环境的建议

1. 熟悉西班牙仲裁庭的辅助性渊源

即便西班牙是一个典型的大陆法系国家,成文法是其主要的法律渊源,但以往的司法判例也被作为辅助性渊源使用。辅助性渊源虽然不具有拘束力,但却可以成为佐证裁决的理由,加强裁决论证的力度。此外,学者和专家的权威论述也常被作为通论在仲裁裁决中引用,从而直接影响裁决的结果。在这方面,我方当事人与

西班牙方的当事人相比较绝不占优势,因为我们对这些辅助性渊源的了解远不如他们。因此,我们要加强对这些辅助性材料的研究。根据 IBA 的推荐,[1]以下材料经常被西班牙仲裁庭援引作为裁决理由的渊源:

1) Barona Vilar/ Silvia (Coor.), *Comentarios a la Ley de Arbitraje*: *Ley* 60/2003, *de* 23 *de diciembre*, *tras la reforma de la Ley* 11/2011, *de* 20 *de mayo de* 2011, Ed. Tirant Lo Blanch, Valencia, 2011.

2) Calvo Caravaca, A. L. (Dir.), Carrascosa González, J., *Derecho Internacional Privado Vol.* 1 *y II.*, Ed. Comares, Granada, 2017.

3) Cordón Moreno, F., *Arbitraje y jurisdicción*: *algunas cuestiones polémicas*, Ed. Civitas, Navarra, 2010.

4) Gonzalez – Bueno, C. (ed.), *The Spanish Arbitration Act. A Commentary*, Ed. Dykinson, S. L., Madrid, 2016.

5) González Soria/ Julio (Coor), *Comentarios a la nueva Ley de Arbitraje*: *Ley* 60/2003, *de* 23 *de diciembre*: *Actualizada conforme a las modificaciones introducidas por la Ley* 11/2011, *de* 20 *de mayo*, *de reforma de la Ley* 60/2003, Ed. Thomson – Aranzadi, Navarra, 2011.

6) Mallandrich Miret, N., *Le regulación del auxilio judicial en el arbitraje tral la reforma de la Ley de arbitraje operada por la Ley* 11/2011, *de* 20 *de marzo*, Ed. La Ley, Madrid, 2012.

7) Moreno, J. D. (Dir.), *La reforma de la ley de Arbitraje de* 2011, Ed. Wolters Kluwer, Madrid, 2011.

8) Pelayo Jiménez, R., *El concepto de orden público y la anulación de laudos arbitrajes*, Ed. La Ley, Madrid, 2015.

9) Prats Albentosa, L. (Coord.), *Comentarios a la Ley de arbitraje*, Ed. La Ley, Madrid, 2013.

10) Sospedra Navas, F. J., *Mediación y Arbitraje. Los sistemas alternativos de resolución de conflictos*, Ed. Civitas, Madrid, 2014.

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[1] See Carlos de los Santos: "Arbitration Guide: Spain", IBA Arbitration Committee (Updated January 2018), p. 26.

2. 参与仲裁会议等交流活动

西班牙仲裁界经常举办各种研讨会和论坛,对西班牙仲裁法律制度以及实践进行探讨和交流,是了解和熟悉西班牙仲裁法律制度的重要场所。IBA 推荐了以下常规举办的活动:

1)西班牙仲裁俱乐部国际大会——探讨国际仲裁重大问题和最新进展的会议,每年七月召开。

2)CEA - 40 大会——是由西班牙仲裁俱乐部下属的 40 个部门面向实践者分享和讨论仲裁实践经验的会议,每年不限次数,适时召开。

3)马德里模拟法庭——面向法学院学生的西班牙语模拟法庭比赛,每年一月至六月举办。

4)IE 法学院(IE Law School)的执行教育项目“Práctica Arbitral”——覆盖机构仲裁的各方面问题、涉及多个案例和仲裁程序模拟的学习项目。每年五月和六月在马德里进行。

上述活动为西班牙法律从业者自发宣传和普及自身领域知识和经验的重要场合,同时也是西班牙弘扬自己法律文化的途径。我国相关法律和商业活动从业者可以经常注意这些活动,从中丰富自己对西班牙仲裁法的认识,建立西班牙仲裁实践界的社交网络。

需要清晰认识到,由于法律制度、语言文化、社会生活、历史传统等方面的差异,目前我国学界与实践界对西班牙仲裁制度乃至商事法律制度的理解和研究还十分有限。在我国与西班牙政府以及民间层面的交往不断深化,在“一带一路”建设中不断加强合作的大背景下,我国商事活动从业者以及法律从业者应当开拓视野,丰富对西班牙的法律制度乃至社会生活的理解。为了防范出现争议带来的不利后果,我国企业应当在签订仲裁协议的过程中谨慎对待具体条款,联系自身以及西班牙法律制度的具体特征,争取对自身有利条款的签订。一旦必须在西班牙通过仲裁途径解决纠纷,企业不仅要研究西班牙仲裁法律制度,而且要探讨仲裁实践中的类似案例。积极咨询当地律师以及相关专业人士,建立与当地律师、仲裁员等行业协会的联系是必不可少并且有效的途径。

附录一：

2003 年西班牙仲裁法案(英文版)

LEY 60/2003 DE 23 DE DICIEMBRE DE ARBITRAJE

(Spanish Arbitration Act 2003)

Last amended: 6th October 2015

Preamble

(略)

TITLE Ⅰ General Provisions Article

Article 1 Scope of application

1. This Act shall apply to arbitration proceedings held within Spain, whether domestic or international, subject to the provisions of international treaties to which Spain is a party or in laws that contain special provisions concerning arbitration.

2. The rules contained in Article 8 Sections 3, 4 and 6, in Article 9 except for Section 2, in Articles 11 and 23 and in Titles Ⅷ and Ⅸ of this Act shall apply even when the place of arbitration is outside of Spain.

3. This Act shall also apply in a supplementary manner to arbitration provided for in other laws.

4. Employment arbitration is excluded from the scope of application of this Act.

Article 2 Subject matter of arbitration

1. Disputes about matters which are freely disposable pursuant to law may be subject to arbitration.

2. When arbitration is international and one of the parties is a State or body, organisation or company controlled by a State, that party may not invoke the prerogatives of its own law to elude the obligations resulting from the arbitration agreement.

Article 3 International arbitration

1. Arbitration is international when any of the following circumstances apply:

a) If at the time of conclusion of the arbitration agreement, the parties are domiciled in different States.

b) If the place of arbitration determined in or pursuant to the arbitration agreement, the place where a substantial part of the obligations of the legal relationship from which the dispute arises is to be performed, or the place most closely related to the latter is outside of the State in which the parties are domiciled.

c) If the legal relationship that the dispute arises from affects interests of international trade.

2. For the purposes of the previous Section, if any of the parties has more than one address, the applicable address shall be the one that has the closest relationship to the arbitration agreement; and if a party has no address, reference is to be made to his or her habitual place of residence.

Article 4 Rules of interpretation

When a provision of this Act:

a) Allows the parties the freedom to decide on a certain issue, such freedom includes the right of the parties to authorise a third party, including an arbitration institution, to take such decision, except in the case set forth in Article 34.

b) Refers to the arbitration agreement or to any other agreement between the parties, it shall be deemed to include the provisions of the arbitration rules to which the parties have submitted.

c) Refers to a claim, it also applies to a counterclaim, and when it refers to a response, it also applies to a response to such counterclaim, except in the case set forth in Article 31 paragraph a) and Article 38 Section 2 paragraph a).

Article 5 Notices, communications and calculation of time-limits

Unless otherwise agreed by the parties and, in any case, excluding communications in court proceedings, the following provisions shall apply:

a) Any notice or communication is deemed to have been received on the day on which it was delivered to the addressee personally or on which it was delivered to its

domicile, habitual residence, place of business or address. Similarly, any notice or communication made by telex, fax or by any other means of electronic, telematic or similar telecommunication that allows documents and written statements to be sent and received with a record kept of their sending and receipt, and have been designated by the interested party, shall be valid. If none of these locations can be found after making a reasonable inquiry, the notice shall be deemed to have been received on the day on which it was delivered or delivery was attempted, by registered letter or by any other means of which a record is kept, at the addressee's last known domicile, habitual residence, place of business or address.

b) The time-limits stipulated in this Act shall be counted from the day following the receipt of the notice or communication. If the last day of the term is a non-business day in the place of receipt of the notice or communication, it shall be postponed until the first business day thereafter. When a written statement must be submitted within a time-limit, the time-limit shall be deemed to have been met if the written statement is sent within the time-limit, even if receipt takes place afterwards. Time-limits set in days shall be counted as calendar days.

Article 6 Tacit waiver of appeal

If one party is aware of the infringement of a provision regulated in this Act from which the parties may derogate or of any requirement of the arbitration agreement, and does not object to it within the time-limit set to do so or, failing that, as soon as possible, that party shall be deemed to have waived the right to appeal set forth in this Act.

Article 7 Court intervention

No court shall intervene in matters governed by this Act, except in the cases in which this Act so provides.

Article 8 Competent courts for the functions of supporting and controlling arbitration

1. The Civil and Criminal Divisions of the Superior Court of Justice of the Autonomous Community where the arbitration is due to take place shall have jurisdiction to carry out judicial appointments and removal of arbitrators; if not yet determined, such ju-

risdiction will lie with those of the Autonomous Community of domicile or residence of any of the respondents; if none has domicile or habitual residence in Spain, such jurisdiction will lie with those of the Autonomous Community of domicile or habitual residence of the Plaintiff, and if he / she is not domiciled or resident in Spain, such jurisdiction will lie with that of his / her choice.

2. The Court of First Instance of the place of arbitration or the place where the assistance is to take place shall be competent for giving assistance regarding the taking of evidence.

3. The competent court for the judicial adoption of interim measures shall be the court of the place in which the award is to be enforced and, failing that, the court of the place where the measures must take effect, pursuant to the provisions of Article 724 of the Civil Procedure Act.

4. The competent court for compulsory enforcement of arbitration awards or rulings shall be the Court of First Instance of the place in which the award was handed down, in accordance with the provisions of paragraph 2 of Article 545 of Law 1 / 2000 of 7 January, on Civil Procedure.

5. Jurisdiction to hear motions to have an award set aside shall lie with the Civil and Criminal Divisions of the Superior Court of Justice of the Autonomous Community where it was handed down.

6. Jurisdiction to recognise foreign arbitration awards or decisions shall lie with the Civil and Criminal Divisions of the Superior Court of Justice of the Autonomous Community of domicile or residence of the person against whom recognition is sought or that of domicile or residence of the person to whom the effects of same refer, while the subsidiary issue of territorial jurisdiction is to be determined according to where the arbitration award is to be executed or where such award or resolution is due to take effect. The court of First Instance shall have jurisdiction to execute foreign arbitration awards or rulings in accordance with the same criteria.

TITLE Ⅱ Arbitration agreements and their effects

Article 9 Form and contents of arbitration agreements

1. An arbitration agreement, which may be in the form of an arbitration clause in a

contract or in the form of a separate agreement, must express the will of the parties to submit to arbitration all or some of the disputes that have arisen or may arise regarding a particular legal, contractual or noncontractual relationship.

2. If the arbitration agreement is contained in an adhesion contract, the validity of the clause and its interpretation shall be governed by what is set forth in the rules applicable to that kind of contracts.

3. Every arbitration agreement must be in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, fax or other means of telecommunication which provide a record of the agreement. This requirement shall be deemed fulfilled when the arbitration agreement is recorded and accessible for subsequent retrieval in electronic, optical or another kind of format.

4. An arbitration agreement recorded in a document to which the parties have referred in any of the manners stipulated in the previous Section shall be deemed part of the agreement between them.

5. An arbitration agreement shall be deemed to exist when its existence is affirmed by one party and not denied by the other in an exchange of claim and response statements.

6. When the arbitration is international, the arbitration agreement shall be valid and the dispute may be subject to arbitration if the requirements stipulated by the law chosen by the parties to govern the arbitration agreement, the law applicable to the substance of the dispute, or Spanish law, are fulfilled.

Article 10 Testamentary arbitration

Arbitration may be validly provided for in a testamentary disposition to resolve disputes between beneficiaries or legatees in matters relating to the distribution or administration of the estate.

Article 11 Arbitration agreement and substantive claim before court

1. An arbitration agreement requires the parties to meet the requirements thereof and prevents the courts from hearing disputes submitted to arbitration, provided that the interested party enters a motion of demurrer. The period for moving for a demurrer shall be the first ten days of the period allowed for entering a response.

2. A demurrer shall not prevent the initiation or continuation of arbitration proceedings.

3. Arbitration agreements shall not prevent any of the parties requesting a court to adopt interim measures nor prevent the court from ordering same prior to or during arbitration proceedings.

Article 11 bis. Corporate arbitration.

1. Companies may submit disputes arising within them to arbitration.

2. Insertion into a company's Articles of association of a clause providing for submission of disputes to arbitration shall require favourable vote representing at least two thirds of the share capital of the company.

3. A company's Articles of association may provide that any challenge to corporate resolutions by members or directors shall be subject to the decision of one or more arbitrators, designating an arbitration institution to administer the arbitration proceedings and appoint the arbitrator(s).

Article 11 ter. Annulment by arbitration award of corporate resolutions subject to registration.

1. Any arbitration award annulling a corporate resolution subject to registration shall itself be registered in the Companies Register. The Boletín Oficial del Registro Mercantil [Gazette] shall publish an extract.

2. In the event that the annulled resolution has already been registered, the arbitration award shall also provide for cancellation of such registration together with any subsequent provisions inconsistent with such cancellation.

TITLE Ⅲ The arbitrators

Article 12 Number of arbitrators

The parties are free to determine the number of arbitrators, provided it is an odd number. Should the parties fail to agree, a sole arbitrator shall be appointed.

Article 13 Legal standing to be an arbitrator

Individuals who may fully exercise their civil rights, provided they are not preven-

ted from doing so by the legislation to which they may be subject in the practice of their profession, may be arbitrators. No person shall be precluded from acting as an arbitrator, by reason of his/her nationality unless otherwise agreed by the parties.

Article 14 Administrative arbitration

1. The parties may entrust the administration of the arbitration and the appointment of arbitrators to: a. Public companies and entities which, according to their regulations, are empowered to undertake arbitration. b. Not-profit associations and entities which, according to their regulations, can undertake arbitration.

2. Arbitration institutions shall exercise their duties in accordance with their own regulations.

3. Arbitration institutions shall ensure compliance with conditions for the capacity of arbitrators, transparency in their appointment and also their independence.

Article 15 Appointment of arbitrators

1. Unless otherwise agreed by the parties, in arbitration proceedings which are not to be decided according to the principles of equity, and the award is to be made by a sole arbitrator, the person fulfilling that role must have a law degree. When the arbitration proceedings are to be decided by three or more arbitrators, at least one of them must have a law degree.

2. The parties may freely agree on the procedure for appointing the arbitrators, provided the principle of equality is not infringed. The following rules shall apply in the absence of agreement:

a) In an arbitration with a sole arbitrator, he/she shall be appointed by the competent court at the request of either of the parties.

b) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator, who will act as the president of the arbitration panel. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, the arbitrator shall be appointed by the competent court, upon request by either of the parties. The same shall apply when the appointed arbitrators cannot reach agreement on the third arbitrator within 30 days from the last acceptance. In the case of more than one claimant or respond-

ent, the various claimants shall appoint one arbitrator and the various respondents shall appoint another. If the claimants or respondents do not reach an agreement on the arbitrator that they may appoint, all of the arbitrators shall be appointed by the competent court upon request of either of the parties.

c) In an arbitration with more than three arbitrators, they shall all be appointed by the competent court upon request of either of the parties.

3. If it is not possible to appoint arbitrators through the procedure agreed by the parties, any of them may request the competent court to appoint the arbitrators or, if applicable, to adopt the measures required to do so.

4. Any request brought in relation to what is set forth in the foregoing Sections shall be conducted following the rules which apply to oral trials.

5. The court may only reject the petition made when it concludes, based on the documents provided, that there is no arbitration agreement.

6. If arbitrators are to be appointed by the court, the court shall provide a list of three names per each arbitrator that is to be appointed. When drawing up this list, the court shall take into account the requirements stipulated by the parties for being an arbitrator and shall take the measures required to guarantee their independence and impartiality. In the event of a sole arbitrator or a third arbitrator being appointed, the court shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties and, if applicable, the nationality of the arbitrators already appointed, in view of the prevailing circumstances. The arbitrators shall then be appointed by drawing lots.

7. No appeal shall lie to the competent court against final decisions concerning matters covered by this Article.

Article 16 Acceptance by the arbitrators

Unless otherwise agreed by the parties, each arbitrator must notify the party that appointed him/her of whether he/she accepts within the term of 15 days from the day following the communication of the appointment. If he/she does not notify his/her acceptance with this time-limit, he/she shall be deemed not to have accepted the appointment.

Article 17 Grounds for abstention and challenge

1. All arbitrators must be and remain independent and impartial during arbitration. In all cases, the arbitrator may not have any personal, professional or commercial relationship with the parties.

2. The person proposed as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality and independence. After his/her appointment, the arbitrator shall disclose to the parties without delay, any new circumstance which may arise. At any time during arbitration any of the parties may ask the arbitrators to clarify their relations with any of the other parties.

3. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence, or if he/she does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed thereby, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

4. Unless the parties agree otherwise, the arbitrator may not have acted as a mediator in the same dispute between them.

Article 18 Challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator.

2. Failing such agreement, a party that challenges an arbitrator must explain the grounds within fifteen days of becoming aware of his/her acceptance or of any circumstance that may give rise to justified doubts about his/her impartiality or independence. Unless the challenged arbitrator withdraws from his/her office or the other party agrees to the challenge, the arbitrators shall decide on the challenge.

3. If a challenge under any procedure agreed upon by the parties or under what is set forth in the previous Section is not successful, the challenging party may, as applicable, put forward the challenge when challenging the award.

Article 19 Failure or impossibility to Act

1. If an arbitrator becomes *de facto* or legally unable to perform his/her functions, or for other reasons fails to act without undue delay, his/her mandate shall terminate if he/she withdraws from office or if the parties agree to termination. If there is controver-

sy concerning the termination and the parties have not stipulated a procedure resolving such controversy, the following rules shall apply:

a) The termination claim shall be resolved following the rules which apply to oral trials. A request for appointment of arbitrators, in the terms set forth in Article 15, may be accumulated in the event of the termination being upheld. No appeal whatsoever shall lie against final decisions.

b) When there is more than one arbitrator, the other arbitrators shall decide the matter. If they are unable to reach a decision, the provisions contained in the previous paragraph shall apply.

2. If, pursuant to what is set forth in this Article or in Section 2 of the previous Article, an arbitrator withdraws from his/her office or a party agrees to the termination of the mandate of an arbitrator, this does not imply recognition of the validity of any issue raised under said provisions.

Article 20 Appointment of substitute arbitrator

1. Whatever the reason for having to appoint a new arbitrator, he/she shall be appointed in accordance with the regulations which applied to the appointment of the one who is replaced.

2. Once the substitute has been appointed, after a hearing with the parties, the arbitrators shall decide whether the proceedings already carried out should be repeated.

Article 21 Liability of arbitrators and arbitration institutions. Retainer

1. Acceptance obliges the arbitrators and, as applicable, the arbitration institution, to faithfully fulfil the task entrusted to them and, if they do not do so, they shall incur liability for the losses and damages that they may cause as a result of bad faith, recklessness or wilful misconduct. When the arbitration has been entrusted to an institution, the party harmed may bring action against it, regardless of the action that it may bring against the arbitrators. Arbitrators or arbitration institutions acting in their name shall be required to take out an insurance policy to cover civil liability or make an equivalent guarantee, for the amount established by regulation. Public entities or arbitration systems forming part of the public administrations shall remain exempt from the requirement to take out an insurance policy or make an equivalent guarantee.

2. Unless otherwise agreed, both the arbitrators and the arbitration institution may require the parties to pay the retainer they deem necessary for the arbitrators' fees and expenses and those that may arise during the administration of the arbitration. If the parties fail to pay the retainer, the arbitrators may suspend or terminate the arbitration proceedings. If any of the parties has not paid its retainer within the time-limit afforded to it, before resolving to conclude or suspend the proceedings, the arbitrators shall notify the other parties in case they wish to pay it within the time-limit which shall be established.

TITLE Ⅳ Jurisdiction of the arbitrators

Article 22 Competence of the arbitrators to rule on jurisdiction

1. The arbitrators shall be authorised to decide on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any others which would preclude them from ruling on the substance of the dispute if sustained. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail the invalidity of the arbitration agreement by itself alone.

2. The pleas referred to in the previous Section shall be raised not later than the submission of the response to the statement of claim. The fact of having appointed, or participated in the appointment of, an arbitrator shall not preclude a party from raising them. A plea that the arbitrators are exceeding the scope of their authority shall be raised as soon as the matter alleged to be beyond the scope of their authority is raised during the arbitration proceedings. The arbitrators may only accept pleas raised subsequently if the delay is justified.

3. The arbitrators may rule on a plea referred to in this Article either prior to or together with the other questions that they are to rule on concerning the substance of the case. The arbitrators' decision may only be challenged by bringing action to set the award aside. If the decision rejects the pleas and is made beforehand, the bringing of an action to set aside the award shall not suspend the arbitration proceedings.

Article 23 Legal authority of the arbitrators to order interim measures

1. Unless otherwise agreed by the parties, the arbitrators may, at the request of a party, order such interim measures as they may consider necessary in respect of the subject matter of the dispute. The arbitrators may require the party requesting such measures to provide appropriate security.

2. The rules concerning the setting aside and compulsory enforcement of awards shall apply to arbitrators' decisions concerning interim measures, whatever form they may take.

TITLE Ⅴ Conduct of Arbitration proceedings

Article 24 Principles of equality, hearing and contradiction

1. The parties shall be treated with equality and each party shall be given a sufficient opportunity to assert its rights.

2. The arbitrators, the parties and the arbitration institutions, as applicable, must keep any information they become aware of through the arbitration proceedings confidential.

Article 25 Determination of rules of procedure

1. Pursuant to what is set forth in the previous Article, the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings.

2. Failing such agreement, the arbitrators may, subject to the provisions of this Act, conduct the arbitration in such manner as they consider appropriate. The power conferred upon the arbitrators includes the power to determine the admissibility, relevance and usefulness of evidence, the manner of taking same, even *ex-officio*, and its assessment.

Article 26 Place of arbitration

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitrators, having regard to the circumstances of the case, including the convenience of the parties.

2. Notwithstanding the provisions of the previous Section, the arbitrators may, after consulting the parties and unless otherwise agreed thereby, meet at any place they

consider appropriate for the purpose of hearing witnesses, experts or the parties, or for inspection or recognition of objects, documents or people. The arbitrators may carry out consultation in any place they deem appropriate.

Article 27 Commencement of arbitration

Unless otherwise agreed by the parties, the arbitration proceedings shall be considered to commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

Article 28 *Idioma del arbitraje*

1. The parties may freely agree on the language or languages to be used in the arbitration. Failing such agreement, and when the circumstances do not allow the issue to be decided by default, arbitration proceedings shall be held in any of the official languages of the place the proceedings are heard. A party claiming not to understand the language used shall have right of audience, contradiction and response in the language he or she habitually uses, and the exercise of such right shall not hold up the proceedings. Unless otherwise provided for by agreement between the parties, the established language(s) shall be used in pleadings, hearings, awards and communications by the arbitrators, without prejudice to the provisions of the first paragraph hereof. In any case, witnesses, expert witnesses and third parties involved in the arbitration proceedings, both in oral and written parts, may use their own language(s). In oral parts anybody who knows the language used may act as an interpreter upon so swearing or averring.

2. Unless any of the parties opposes, the arbitrators may order that any document may be provided, or any other procedural action may be carried out in a language other than that of the arbitration without the need of a translation.

Article 29 Statement of claim and response

1. Within the period of time agreed by the parties or determined by the arbitrators and unless the parties have otherwise agreed as to the contents of the statement of claim and response, the claimant shall state the facts on which the claim is based, the nature and circumstances of the dispute and the relief sought, and the respondent may respond to that stated in the claim. The parties may submit with their statements all documents

they consider to be relevant or may add a reference to the documents or other evidence they will submit.

2. Unless otherwise agreed by the parties, either party may amend or supplement the statement of claim or response during the course of the arbitration proceedings, unless the arbitrators consider it inappropriate to allow such amendment having regard to the delay in making it.

Article 30 Form of the arbitration proceedings

1. Unless otherwise agreed by the parties, the arbitrators shall decide whether to hold oral hearings for the presentation of statements, evidence-taking and announcing conclusions, or whether the proceedings shall be conducted solely in writing. However, unless the parties have agreed that no hearings shall be held, the arbitrators shall hold them, at an appropriate stage of the proceedings, if any party so requests.

2. The parties shall be summoned to any hearing with sufficient advance notice and may take part in them directly or through their representatives.

3. A copy of all statements, documents or other instruments supplied to the arbitrators by one party shall be given to the other party. Any documents, expert reports or evidence on which the arbitrators may base their decision shall also be made available to the parties.

Article 31 Failure by the parties to appear

Unless otherwise agreed by the parties, if, without showing sufficient cause in the arbitrators' opinion:

a) The claimant does not file the statement of claim on time, the arbitrators shall terminate the proceedings unless, when the respondent is heard he/she states a wish to seek some form of relief.

b) The respondent fails to communicate a response on time, the arbitrators shall continue the proceedings without treating such failure as an agreement to or admission of the claimant's allegations.

c) Any party fails to appear at a hearing or to produce evidence, the arbitrators may continue the proceedings and issue the award on the grounds of the evidence which has been adduced.

Article 32 Expert witnesses appointed by arbitrators

1. Unless otherwise agreed by the parties, the arbitrators may appoint, *ex-officio* or at the request of a party, one or more expert witnesses to report on specific issues and may require either of the parties to give the expert witness any relevant information or to produce, or to provide access to, any relevant documents or objects for his/her inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitrators consider it necessary, any expert witness, after delivery of his/her report, must participate in a hearing where the arbitrators and the parties, by themselves or assisted by expert witnesses, may question him/her.

3. What is set forth in the foregoing Sections is deemed to be without prejudice to the parties' right to provide reports by freely appointed expert witnesses, unless otherwise agreed.

Article 33 Court assistance in taking evidence

1. The arbitrators or either of the parties with the approval of the arbitrators may request the competent court's assistance in taking evidence, according to the rules on taking evidence which may apply. Such assistance may consist of taking evidence in the competent court or the latter adopting the specific measures required so that the evidence may be taken by the arbitrators.

2. If so requested, the court shall take the evidence under its own direction exclusively. Otherwise, the court shall merely adopt the relevant measures. In both cases, the court shall deliver a statement of the proceedings to the applicant.

TITLE Ⅵ Making of award and termination of proceedings

Article 34 Rules applicable to substance of dispute

1. The arbitrators shall decide *ex aequo et bono* only if the parties have expressly authorised them to do so.

2. Notwithstanding what is set forth in the foregoing Section, when the arbitration is international, the arbitrators shall decide the dispute in accordance with the law chosen by the parties. Any designation of the law or legal system of a given State shall be

construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing any designation by the parties of the applicable law, the arbitrators shall apply the law they deem appropriate.

3. In all cases, the arbitrators shall decide in accordance with the terms of the contract and shall take into account the applicable usages.

Article 35 Decision-making by panel of arbitrators

1. When there is more than one arbitrator, any decision shall be made by a majority, unless otherwise stipulated by the parties. If there is no majority, the decision shall be taken by the presiding arbitrator.

2. Unless otherwise agreed by the parties or the arbitrators, questions regarding the organisation, processing and timing of proceedings may be decided by the presiding arbitrator alone.

Article 36 Award by agreement between the parties

1. If, during arbitration proceedings, the parties reach an agreement that puts an end to the dispute in whole or in part, the arbitrators shall terminate the proceedings with regards to the points agreed and, if requested by the parties and the arbitrators see no reason to object, they shall record the agreement in the form of an award on agreed terms.

2. The award shall be made in accordance with what is set forth in the following Article and shall have the same status and effect as any other award on the merits of the case.

Article 37 Term, form, contents and notice of award

1. Unless otherwise agreed by the parties, the arbitrators shall decide on the dispute in a single award or in as many partial awards as they deem necessary.

2. Unless otherwise agreed by the parties, the arbitrators must decide the dispute within the six months following the date of filing of the response referred to in Article 29 or the expiration of the term for presenting it. Unless otherwise agreed by the parties, the arbitrators may extend this term by a period no greater than two months by way of a reasoned decision. Unless otherwise agreed by the parties, the expiration of this pe-

riod without delivery of a final award shall not affect the arbitration agreement or the validity of the award, without prejudice to any liability that may be incurred by the arbitrators.

3. All awards shall be made in writing and signed by the arbitrators, who may put on record their agreement or dissent. When there is more than one arbitrator, the signatures of the majority of all members of the arbitration panel or just the one of the presiding arbitrator shall suffice, provided that the reason for any omitted signature is stated. For the purposes of the foregoing paragraph, the award shall be deemed to be recorded in writing when a record is kept of its contents and signatures and they are accessible for subsequent retrieval in electronic, optical or any other kind of format.

4. The award must always state the reasons upon which it is based, unless it is an award on agreed terms under the previous Article.

5. The award shall state its date and the place of arbitration as determined in accordance with Article 26 Section 1. The award shall be deemed to have been made at that place.

6. Subject to what may have been agreed by the parties, the arbitrators shall rule on the arbitration costs in the award, which shall include the arbitrators' fees and expenses and, as applicable, the fees and expenses of the parties' representatives, the cost of the service rendered by the arbitration administration institution and the other expenses resulting from the arbitration proceedings.

7. The arbitrators shall notify the parties of the award in the manner and within the term they have agreed or, failing that, by delivering a copy signed by the arbitrators in accordance with Section 3 to each party, within the same term as set forth in Section 2.

8. The award may be recorded by a notary public. Any of the parties, at their own expense, may request the arbitrators, before the notification, to have the award recorded by a notary public.

Article 38 Termination of proceedings

1. Notwithstanding what is set forth in the foregoing Article regarding notification of awards and, if applicable, recording of same by a notary public, and notwithstanding what is set forth in the following Article regarding correction, clarification and addition,

the arbitration proceedings and the arbitrators' mandate are terminated when the final award is made.

2. The arbitrators shall also issue an order for the termination of the arbitration proceedings when:

a) the claimant withdraws its claim, unless the respondent objects thereto and the arbitrators recognise a legitimate interest on its part in obtaining a final solution of the dispute.

b) the parties agree on the termination of the proceedings.

c) the arbitrators find that the continuation of the proceedings has become unnecessary or impossible.

3. Once the term that the parties have set for this purpose has elapsed or, failing that, two months after the termination of the proceedings, the arbitrators' obligation to keep the documents from the proceedings shall cease. Within this term, either of the parties may request the arbitrators to send them the documents submitted thereby. The arbitrators shall agree to the request provided it does not affect the confidentiality of the deliberation within the panel and provided the applicant bears the costs of delivering the documents, as applicable.

Article 39 Correction and clarification of award; additional awards and exceeding terms of reference or jurisdiction.

1. Within 10 days of notification of the award, unless another period of time has been agreed upon by the parties, either of the parties, with notice to the other party, may request the arbitrators:

a) To correct any errors in computation, any clerical or typographical errors or any errors of similar nature.

b) To give a clarification of a specific point or part of the award.

c) To make an additional award as to claims presented in the arbitration proceedings but omitted from the award.

d) To rectify the award to the extent that it has decided issues not subjected for decision or matters not subject to arbitration.

2. After hearing the other parties, the arbitrators shall make decisions regarding re-

quests to correct errors and make clarifications within a term of 10 days, and within a term of 20 days for rectification where the award has exceeded its terms of reference or jurisdiction.

3. Within 10 days of the date of the award, the arbitrators may, *ex-officio*, correct the errors referred to in Section 1 paragraph a).

4. The provisions of Article 37 shall apply to arbitration resolutions concerning correction, clarification, addition or exceeding terms of reference or jurisdiction of an award.

5. When the arbitration is international, the terms of 10 and 20 days set forth in the Sections above shall be one and two months respectively.

TITLE Ⅶ Setting aside and review of awards

Article 40 Action for setting aside awards

An action to have a final award set aside may be filed in accordance with the terms and conditions set forth in this title.

Article 41 Grounds

1. An arbitration award may be set aside only when the party making the application alleges and furnishes proof that:

a) There is no arbitration agreement or it is not valid.

b) It was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to assert its rights.

c) The arbitrators have decided on matters not submitted to them.

d) The appointment of the arbitrators or the arbitration procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with an imperative provision of this Act, or that, in the absence of such agreement, was not in accordance with this Act.

e) The arbitrators have decided on matters not capable of settlement by arbitration.

f) The award is in conflict with public policy.

2. The grounds contained in paragraphs b), e) and f) of the previous Section may be ruled upon by the court that hears the action to set aside the award, *ex-officio* or at

the request of the Attorney General office as regards the interests that said office is legally appointed to protect.

3. In the cases set forth in Section 1 paragraphs c) and e), the setting aside shall only affect the parts of the award concerning matters not submitted to the arbitrators to decide on or not capable of settlement by arbitration, provided they can be separated from the others.

4. The action to set aside the award must have been brought within two months following notification thereof, or, in the event that a correction, clarification or addition to the award has been requested, from the date the decision on this request has been notified, or from the expiry of the term set for such a decision.

Article 42 Procedure

1. Any action to set aside an award shall be regulated by the rules applicable to oral trials, without prejudice to the following special provisions:

a) The claim must be brought in accordance with the provisions of Article 399 of la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Civil Procedure Act], accompanied by supporting documents, the arbitration agreement and the award attached, and, when appropriate, must contain a proposal of the evidence that the claimant wishes to adduce.

b) The Clerk shall transmit the claim to the respondent, who may respond within a term of 20 days. The response, accompanied by supporting documents, must include a proposal of the evidence that the respondent wishes to adduce. This response and the accompanying documents shall be transmitted to the claimant, who may present additional documents or propose the evidence to be adduced.

c) Once the claim has been replied to or the appropriate period has expired, the Clerk shall call the parties for a hearing, if the parties have so requested in the claim and response. If a hearing has not been requested, or if the only evidence to be adduced is contained within the documents, and these have been submitted without challenge, or in the event that expert witness reports do not require ratification, the Court shall issue its decision without further ado.

2. No appeal shall lie against the decision issued.

Article 43 *Res judicata* and review of final awards

The final award shall be deemed *res judicata* and can only be challenged by way of an action to have it set aside or reviewed in accordance with the provisions of la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Civil Procedure Act] for final judgments.

TITLE Ⅷ Compulsory enforcement of the award

Article 44 Applicable rules

The compulsory enforcement of awards shall be governed by the provisions of la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Civil Procedure Act] and this title.

Article 45 Suspension, dismissal and resumption of enforcement in the case of action to set aside the award being brought

1. An award is enforceable even if an action to set it aside has been brought against it. However, in this case the enforcee may request the competent court to suspend enforcement, provided he/she offers security for an amount equal to the value of the award plus any loss and damages that may be incurred due to the delay in enforcement of the award. The security may be of any of the kinds set forth in Article 529, Section 3, paragraph two of la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Civil Procedure Act]. Once the request for suspension has been submitted, the court, after hearing the party wishing to have the award enforced, shall rule on the security. There shall be no recourse against this decision.

2. The suspension shall be lifted and the continuation of the enforcement shall be ordered when the court dismisses the action to set aside the award, notwithstanding the enforcer's right to request any compensation for loss and damages caused due to the delay in enforcement, through the channels set forth in Articles 712 et seq. of the Civil Procedure Act.

3. The enforcement shall be set aside, with the effects set forth in Articles 533 and 534 of the Civil Procedure Act, when the court upholds the action to set asidethe award.

If the setting aside only affects the matters referred to in Article 41, Section 3 and the other provisions of the award remain valid, it shall be deemed to be partially upheld for the purposes set forth in Article 553, Section 2 of the Civil Procedure Act.

TITLE Ⅸ Recognition of foreign awards

Article 46 Foreign nature of the award. Applicable rules

1. Foreign awards are those made outside of Spanish territory.

2. The recognition of foreign awards shall be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 10 June 1958, without prejudice of what is set forth in other international treaties more favourable to granting recognition, and shall be conducted according to the procedure set forth in the civil procedural system for judgments pronounced by foreign courts.

Sole additional provision. Consumer arbitration.

This Act shall also apply to the arbitration referred to in la Ley 26/1984, de 26 Julio, general de defensa de consumidores y usuarios [the General Consumer and User Protection Act 1984] which implementing regulations may stipulate that decisions be made *ex aequo et bono*, unless the parties expressly choose the option of legal arbitration.

Sole temporary provision. Provisional system.

1. In cases in which the respondent has been requested to submit the dispute to arbitration before this Act comes into force, or if arbitration proceedings have already begun, such arbitration shall be governed by La ley 36/1988, de 5 Diciembre, de Arbitraje [The Arbitration Act 1988]. However, the rules in this Act concerning arbitration agreements and their validity shall apply.

2. The rules of this Act concerning setting aside and review shall apply to awards made after this Act comes into force.

3. The procedures for compulsory enforcement of awards and recognition of foreign awards that are pending when this Act comes into force shall continue to be conducted by what is set forth in the Arbitration Act 36/1988, of 5 December.

Sole repeal provision. Repeal.

La ley 36/1988, de 5 Diciembre, de Arbitraje [The Arbitration Act 1988] is here-

by repealed.

Final provision one. Modification of Civil Procedure Act 1/2000, of 7 January.

1. Article 517, Section 2, paragraph 2 shall be worded in the following terms: "2. Arbitration awards or decisions."

2. A new paragraph is added to Article 550, Section 1, paragraph 1, which shall be worded as follows: "When the title is an award, the arbitration agreement and the supporting documents showing that the parties have been notified thereof shall also be attached."

3. Paragraph 4 is added to Article 559, Section 1 and shall be worded as follows: "4. If the title for enforcement is an arbitration award that was not recorded by a notary public, its inauthenticity."

Final provision two. Competence.

This Act is passed under the state's exclusive competence for commercial, procedural and civil law, as set forth in Article 149.1.6. and 8. of the Constitution.

Final provision three. Entry into force.

This Act shall come into force three months after it is published in the Boletín Oficial del Estado [Official Bulletin of the State].

Therefore, I hereby order all Spaniards, private individuals and authorities to observe and enforce this Act.

Madrid, 23 December 2003.

KING JUAN CARLOS.

The Prime Minister,

JOSÉ MARÍA AZNAR LÓPEZ.

附录二:

西班牙仲裁院程序规则(英文版)

REGLAMENTO DE PROCEDIMIENTO DE LA CORTE ESPAÑOLA DE ARBITRAJE

(Procedural Rules of the Spanish Court of Arbitration[1])

Ⅰ. GENERAL PROVISIONS

Article 1 On the Spanish Court of Arbitration and the scope of these Rules

1. The Spanish Court of Arbitration of the Superior Council of the Spanish Chambers of Commerce, Industry and Navigation-hereinafter the Court-shall administer the arbitrations that are submitted to them whether they be of a national or international nature, *de jure* and in equity, applying to and subject to the provisions of Arbitration Law 60/2003 of December 23, hereinafter Law 60/2003, and these Rules.

2. The arbitrations entrusted to the Court shall be administered in accordance with the current Rules on the date that said arbitration begins, unless the parties have expressly agreed to submit to the arbitration under the Rules in force on the date on which the arbitration agreement was signed.

3. The Court's decision regarding all matters relating to the arbitration shall be final and binding for the parties and the Arbitral Tribunal.

4. For all cases not expressly anticipated in the Rules, the Court and the Arbitral Tribunal shall proceed according to the nature of their provisions and of the resolutions deriving from the Court, always endeavouring to make the award liable to being legally enforced.

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〔1〕 全文可从以下网址获取:http://corteespanolaarbitraje.es/wp-content/uploads/2014/05/reglamento-corte-espanola-de-arbitraje-en-vigor-desde-el-15-03-2011.pdf,最后访问日期:2017年12月31日。

Article 2 Interpretation Criteria

1. Prior to the confirmation of the nomination of the arbitrators the Court is responsible for resolving, either *ex-officio* or upon the request of any of the parties, any question or query that may arise in relation to the interpretation, application and execution of these Rules.

2. Any reference in these Rules to the term "arbitrator" or "arbitrators" shall be understood as referring to the Arbitral Tribunal, in this case comprising several arbitrators.

3. Any reference expressed in singular form in these Rules shall be understood in the plural in cases in which there is more than one party.

4. Any reference in these Rules to the term "arbitration" shall be understood as a synonym for "procedure", "arbitral proceedings" and "arbitral procedure".

5. Any reference in these Rules to the term "case" shall be understood as referring to all "proceedings" or "arbitral proceedings" as well as all statements, documents, reports, resolutions, notifications and communications of any nature that appear included and bound to same.

6. Any reference in these Rules to the term "communication" shall be understood as all notification, appeals, warrants, official letters, summons, statements or information sent or received to or by any of the parties, or to or by the arbitrators, or to or by the Court, by the following means, including but not limited to post, telegram, fax, burofax, messaging service, email or any other means as long as it provides record of reception by the addressee.

7. Any reference in these Rules to the term "lawsuit" shall be understood as also referring to the term "counterclaim", in the terms laid down in Section c) of Article 4 of Law 60/2003.

8. Reference to the Arbitration Act shall be understood as referring to the legislation on arbitration being applied and that is in force when the request for arbitration is made.

Article 3 Submission to the Spanish Court of Arbitration

1. Submission to the Court shall be understood as having taken place when the par-

ties entrust to the former, to its Rules, its regulations or arbitration procedure, or directly to the Superior Council of the Spanish Chambers of Commerce, Industry and Navigation or any of its offices, all or any of the disputes that have arisen or that may arise with regard to a prior arbitration agreement between the parties, either by specific agreement between them, or upon the request of any of them, subsequently accepted by the other or others. Such an agreement should appear in writing, in a document signed by the parties, or in an exchange of letters, telegrams, faxes or other means of telecommunication that leave a record of the agreement. This requirement shall be considered as having been met when the arbitration agreement appears and is accessible for later consultation, in electronic or visual support or any other type.

It is understood that the parties entrust the arbitral administration to the Spanish Court of Arbitration when the arbitration agreement submits the resolution of their differences to“the Council”, to the “Spanish Council”, to the “Superior Council”, to the “Court of Council”, to “the Spanish Court”, to “the Spanish Court based in Madrid”, to “the Rules of the Court of Council”, to “the Rules of the Spanish Court”, to the “Rules of the Spanish Court based in Madrid”, to the “Spanish Arbitration Rules”, to the “arbitral rules of the Court of Council”, to the “Council’s arbitral rules”, to the “arbitral rules of the Spanish Court”, to the “arbitral rules of the Spanish Court based in Madrid”, or using any other similar expression.

2. Submission of the parties to the Court shall imply the competence of the latter for the purposes of admission, processing and, where appropriate, resolution of the arbitration as well as for the purposes of appointing the arbitrators, all of which shall be done under the terms laid down in these Rules.

3. Submission of the parties to the Court obliges them to comply with the conditions laid down for this purpose, the interlocutory resolutions, decisions and rulings or those of any other kind passed during the arbitration process as well as the award that finalises this, always adopting a legal attitude of good faith and avoiding any conduct or action tending to restrict or obstruct the arbitration process or the effectiveness of the decision that finalises said process.

4. The Court may request any document or information from the parties that it considers necessary for carrying out its duties.

Article 4 Material, types of arbitration and rules that apply to the substance of the dispute

1. Disputes over matters that are unrestricted according to law are liable for arbitration.

2. By submission to the Court, it is understood that the parties have decided that the arbitrators shall settle the disputes or disagreements they are made aware of according to the law. Nevertheless, the arbitrators shall decide in equity when the parties have expressly agreed to it.

3. The arbitrators shall settle the disputes or disagreements they are made aware of in accordance with the rules chosen by the parties, otherwise applying those that they deem appropriate. Notwithstanding, the arbitrators shall make their decision according to the provisions of the contract and considering the practices that apply to each case. Any mention of the legal system of a particular state refers to the substantive law of that state and not to its conflict of laws rules, unless otherwise stated.

Article 5 Seat and place of arbitration

1. The seat of the Spanish Court of Arbitration and its Secretariat, pursuant to Article 7.4 of these Rules, is situated in the Superior Council of the Spanish Chambers of Commerce, Industry and Navigation, in Madrid, Postcode 28042, C/. Ribera del Loira, 12.

2. It is up to the parties to freely determine the place of arbitration. In the absence of an agreement, it shall be held at the seat of the Court unless, on analysing the current circumstances and hearing both parties, the Court considers there to be another more appropriate place for this. The hearings and assemblies deriving from the proceedings shall be held in the place of arbitration, notwithstanding that the Arbitral Tribunal can hold assemblies for the purposes of deliberating or with any other aim that does not require the presence of the parties or their representatives, outside of the place of arbitration. The holding of hearings, taking of evidence or any other procedure that requires the attendance of the parties or their representatives can only be held outside of the place of arbitration by means of prior ruling of the Arbitral Tribunal in this regard, unless express consent is provided by the parties.

3. The award that brings the arbitral procedure to an end shall be considered as having been passed in the place of arbitration.

Article 6 Language of arbitration

1. The initial language of the arbitration shall be that used in the drawing up of the arbitration agreement, save an agreement between the parties to the contrary.

In the event that the agreement is written up in two or more languages, and unless it comes with instructions in more than one language, the parties (or the Court, in the absence of this), shall decide by mutual agreement which language shall be the initial language of the arbitration.

2. Once it has been set up, the Arbitral Tribunal shall decide on the language or languages of the arbitration by analysing the initial language of arbitration, listening to the parties and evaluating the current circumstances that it deems appropriate, unless the parties agree between themselves on the language or languages of arbitration.

3. The Arbitral Tribunal may order that any documents presented during the proceedings in their original language be accompanied by the language of arbitration unless the parties have agreed that the documents originally drawn up in the language referred to do not need to be translated into the language of the arbitration.

Article 7 Notifications and communications

1. In their first brief, each party should provide an address, telephone number, fax number and email address for the purposes of notification and communication. All notifications or communication that should be directed to that party during the arbitration proceedings shall be sent to the address they have provided, notwithstanding that over the course of the arbitration proceedings, said address may be modified. In this case, any change to said address should be immediately made known to the Court, the arbitrators and the other parties, taking effect as of that moment. If a party has not provided an address for notification and communication purposes, and if this is not clearly inferred from the documentation of the arbitration case, the notifications sent to that party shall be addressed to their last known home, primary residence, address or establishment. In any event, the party who begins the arbitration is responsible for providing the Court with the full identity, last known home, primary residence, address or establish-

ment of the defending party or parties of which they are aware, or of which they may become aware, until said party or parties present themselves at the arbitral procedure and provide an address for notification and communication purposes.

2. Communication may be carried out by means of confirmation of receipt, certified post, messaging service, fax, or email providing proof of issue and receipt. All notification or communication shall be considered as having been received on the day it is delivered in person to the addressee of same or to their home, primary residence, establishment or known address or on the day in which an attempt has been made to deliver it in the event that, after reasonable investigation, the address of any of the above-mentioned places has not been discovered. For the purposes of determining when the calculation of a period should begin when communicating via email, the notification should be considered as having been received on the day it was sent, depending on the seat of arbitration.

3. Notification or communication shall be valid once it permits the sending and receipt of statements and documents, providing proof that it has been sent and delivered. The use of email is the preferred method, and the Court can agree that it is the only form that may be used, subject to a hearing with the parties.

4. A copy of all communications, statements and documents that a party sends to the Arbitral Tribunal should be sent to the other party and to the Court. This also applies to communications and decisions made by the Arbitral Tribunal addressed to the all of the parties or to some of them.

Article 8 Calculating time frames

1. The time frames established in these Rules shall begin the day after which the notification or communication was made and the expiry date is included in this. The date of full reception in the Court Secretariat of all briefs or communication from the parties shall be what determines compliance with time frames for each case.

2. The time frames established in days refers to calendar days unless the Court or the arbitrators, having heard the parties, can establish the Spanish civil procedure calculation. If the last day of the established time frame is a public holiday or non-working day in the place where the notification or communication has been received, this shall

be considered as extended until the next working day.

3. Saturdays and holidays at the place of arbitration are considered non-working days with regard to the production of evidence, hearings or physical presentation of documents. The month of August will be considered non-operational to all effects, including the period for entering the award, unless otherwise agreed by the parties.

4. The Court, or the Arbitral Tribunal once it has been named, subject to a hearing with the parties, shall order the suspension of the established time frames in the event of force majeure, *ex-officio* or upon the request of any of the parties that suffer it, resuming the calculation when the cause of said suspension ceases to exist.

5. The time frames established in these Rules are susceptible to being modified, reduced, extended or suspended by the Court, bearing in mind the circumstances of the case, until the nomination of the arbitrators and by the arbitrators has been confirmed, from this moment onwards, and always subject to the maximum time frame for pronouncing the award. The time frames established in the summary and speedy trials cannot be extended save an unanimous and reasoned request from the parties, accepted by the Tribunal.

Article 9 Documentation for arbitral proceedings. Safe-keeping and custody of arbitration case

1. All statements and documents that are to form part of the arbitration case and/or that are presented by the parties at the Court Secretariat should be accompanied by as many copies in paper as there are in the original, plus one additional copy for each arbitrator. When dealing with email, it shall be sent to the parties, the arbitrators and the general Secretariat by that means.

2. Once the award has been announced or the proceedings have concluded, the safe-keeping and custody of the arbitration case shall be the responsibility of the General Secretariat of the Court, having been the responsibility until then, of the arbitrators. One year after the pronouncement of the award which brought the arbitration to an end, or any other resolution that, in compliance with the provisions of Article 33 of these Rules, has determined the conclusion of the proceedings, the obligation to safe-keep and hold custody over the documentation and arbitration case shall cease.

3. Any of the parties may request, at their own expense, the breakdown, return and handing over of the documents and reports provided during the proceedings, whilst the obligation to safe-keep and hold custody over the arbitration case, referred to above, remains in effect.

Article 10 Duty of confidentiality

1. Save express agreement between the parties to the contrary, the Court, the arbitrators and the parties are obliged to treat with confidentiality all information on the arbitration that they have become aware of through this, its deliberations, arbitral proceedings and, where applicable, the terms and conditions of the award. This obligation shall apply to the parties regarding information referring to the other parties to which they have had access during and as a result of the arbitration process. Notwithstanding, the arbitrators may adopt, *ex-officio* or upon request of the parties, the measures that they deem appropriate in order to maintain and guarantee the effectiveness of said duty of confidentiality and in particular, those aimed at protecting trade or industrial secrets.

2. In order that either by the Court or by any of the parties an award can be entered which terminates arbitration, it will be mandatory that both parties give their express consent within the timeframe established for the judgment of the award. The arbitrator will not be able to use the confidential information acquired during the arbitration process in order to gain personal advantage or on behalf of others or to otherwise affect adversely the interests of another person.

Article 11 Party representation

The parties may appear in the arbitral procedure duly represented and advised. To this end, it will be enough for the party to inform the Court in writing of the full identity, address, telephone number, fax and email address of their representatives, and if they so wish, that of their counsel/s, in the latter case indicating the position in which they shall act in the arbitration. The Court, or as the case may be the Arbitral Tribunal if the above is communication is made once said tribunal has been set up, may require from the party the reliable authorisation for the conferred representation or for the appointment of the counsel that has been carried out, limiting, where necessary and by means of a justified resolution, the excessive number of representatives or counsels of

each party.

Ⅱ. ARBITRAL TRIBUNAL

Article 12 Number of arbitrators and procedure for appointing them

1. The parties may agree on the number and identity of all the arbitrators and of the person undertaking the role of president, as long as these numbers are odd. During the period for replying to the request, the Court may provide the parties with a list of arbitrators specialised in the subject matter of the dispute, in case they may wish to appoint any of them. In the absence of an agreement over the number and identity of all the arbitrators, the Court shall decide on the appointment of one sole arbitrator, unless it deems that the nature, complexity and other circumstances of the dispute under arbitration require the nomination of an Arbitral Tribunal, in which case the latter shall comprise three members which shall be entirely appointed by the Court in the absence of an agreement during the period open for replying to the arbitration request, unless during this period, *ex-officio* or upon request of all of the parties, the Court considers it appropriate for each one of the parties to appoint an arbitrator, and for these to appoint the President by mutual agreement. If over the five days following their appointment the joint arbitrators have not appointed a President, this shall be done in the following way. If the arbitrators are appointed by the Court, the arbitrator appointment Committee shall draw up a list with several names for each arbitrator that should be nominated. Within the next 5 days following the delivery of the list, each one of the parties shall cross out the names that they object to, numbering the rest on the list by order of preference. The Court may limit the number or cross-outs that can be done. Failure to pronounce an arbitrator during this period shall mean that all arbitrators are considered as being equally acceptable for the party, without any preference. The Court shall elect the candidate or candidates whose names have not been crossed out and who are preferred by the parties until the number of arbitrators that should be named is complete. If for any reason the nomination cannot be done by means of this procedure, or there is a draw between them, the arbitrators shall be freely named by the Court, at its own discretion. On drawing up this list, the Court shall consider the requirements established by the parties for the arbitrator.

2. If there are a number of parties and they have agreed between themselves on the number and identity of the arbitrators, these shall be appointed. If no agreement has been made between them, this shall be done as set out in paragraph three of the First Section. If there is an agreement whereby each one of the legal positions appoints their own arbitrators and the latter appoint the President, those appointed in this way shall be named. If there is not an agreement as to who will be the President, this shall proceed in accordance with what is stated in the First Section, third paragraph. If there is an agreement on the appointment of their respective arbitrator, but they are not named in the period of 5 days, the Court shall proceed to appoint them in accordance with what is stated in paragraph three of the First Section of this article, pronouncing the parties who should have carried out the appointment but who did not reach an agreement or hadn't exercised this right in the designated time frame.

If the Court detects any kind of procedural fraud in the appointment of the arbitrators as a result of the number of parties, it shall proceed to name them freely at its discretion.

Article 13 Requirements that the arbitrators must meet. Nomination, challenge, dismissal and substitution of arbitrators

1. The Court shall appoint the arbitrators, responding to the characteristics and subject matter of the dispute submitted to arbitration, the nationality, place of arbitration and language of the parties. It shall also bear in mind the availability, prior performance before the Court and the aptitude to undertake the arbitration in accordance with the Rules. As it is an international arbitration, the convenience of naming a sole arbitrator or President of a nationality other than that of any of the parties shall be considered. The nationality of the parties includes that of the shareholders or the majority stakeholders.

In *de jure* arbitration, the Court may propose, with the consent of the parties, the inclusion of professionals or experts in the subject matter of the arbitration amongst the candidates for the nomination of the Arbitral Tribunal. The President of the Arbitral Tribunal shall be a practicing attorney.

2. Once the arbitrator has been proposed or appointed they shall be notified of this

so that, in a period of three days, they may accept this nomination and sign a written declaration of independence and impartiality stating that their personal and professional circumstances enable them to diligently take on the role of arbitrator, and in particular, the time frames laid down in these Rules. They shall also immediately notify the Court of any circumstance that could be relevant for the nomination-or which occurs after it and during the arbitration procedure-or that directly or indirectly could raise reasonable doubt concerning their impartiality, independence or fitness to act as an arbitrator.

On informing the Court of their acceptance, the arbitrator shall be named as “such-hand” in the event of there being a number of them, the Arbitral Tribunal shall be formed and the parties shall be notified. In the event that any of the appointees do not accept, the next one in the parties’ order of preference shall be automatically appointed.

3. The Court shall inform the parties of any circumstance of which they are aware relating to an arbitrator appointed by them, that could effect their fitness or seriously impede or hinder them from carrying out their duties in accordance with the Rules or within the established time frames.

The Court shall confirm the arbitrators appointed by the parties, unless, at their sole discretion, the parties or their representatives raise doubts about their fitness, availability, independence or impartiality in relation to the dispute.

If an arbitrator that is proposed by the parties does not obtain confirmation from the Court, the latter shall give the parties who proposed said arbitrator a period of 5 days in which to propose another one in their place. If the new arbitrator is also not confirmed, the Court shall proceed to appoint one, in accordance with the procedure laid down in the third paragraph of Article. 12.1 of these rules.

The parties may ask the arbitrators about their relationship with the other parties at any time during the arbitration procedure.

4. The parties may challenge the arbitrators once the nomination is confirmed, under circumstances that give rise to reasonable doubt about their impartiality, independence or fitness, by means of writ directed to the arbitrators specifying and justifying the facts underlying the challenge, which should be accompanied by evidence.

A party may only challenge an arbitrator after having participated in their designa-

tion and for reasons the former became aware of after the arbitrator was appointed.

Challenges must be lodged within the five days following communication to the parties of the confirmation of the appointment of the arbitrator or arbitrators or, otherwise, from the date on which the plaintiff was notified of the facts and circumstances on which his challenge is based, henceforth informing the remaining parties and the challenged arbitrator of these for possible allegations, in accordance with the common terms established by the Court.

The procedure and resolution of the challenged incident shall be the responsibility of the Court, expressly assigning the costs of the challenged incident to the appellant if their request is rejected.

If the challenged incident is upheld or the arbitrator or arbitrators challenged accept the challenge made against them, the incident shall conclude without further procedures and the next arbitrator in the parties' order of preference shall be automatically appointed.

If the replacement was appointed by either of the parties or by mutual agreement, the replacement shall be named in the same way and if this is not possible, it shall be done in accordance with Article. 12 First Section, Third paragraph. Challenges made against any of the arbitrators shall not suspend the arbitration procedure.

5. When an arbitrator is prevented either *de facto* or *de jure*, from carrying out their duties, if they renounce, if the parties agree on their dismissal, if they behave in such a way that is not compatible with the integrity required for carrying out the arbitral duties, or if for any other reason they do not carry out their duties within a reasonable time frame, the Court, after having heard the parties, shall proceed to replace said arbitrator in accordance with what is laid down in the above paragraph.

If an arbitrator deliberately contravenes the terms of the arbitral agreement (including these Regulations), or if he acts unfairly or inequitably in his relationship with the parties, or if he does not conduct the arbitration with due diligence, thereby avoiding unnecessary delays and expenses, or if he refuses to participate or is repeatedly absent from the deliberations of the Court of Arbitration, the Court may declare this arbitrator incapable of carrying out the function which he has been assigned and will proceed to substitute him.

Once the proceedings have finished, instead of replacing an arbitrator, the Court can decide, subject to a hearing with the parties and the other arbitrators in an ordinary time frame of 5 days whether or not the remaining arbitrators should continue with the nomination of a replacement.

Article 14 Authority of the arbitrators regarding their competence, as well as for making their decisions

1. The arbitrators are empowered to decide on their own competence, even regarding objections relating to the existence, validity or effectiveness of the arbitration agreement, or any others whose consideration prevents them from getting to the substance of the dispute under arbitration. Therefore, the arbitration agreement that forms part of a contract shall be considered as an agreement independent of the other clauses of said contract. The decision of the arbitrators declaring the contract null shall not alone entail the nullity of the arbitration agreement.

2. The objections referred to in the above secttion should be made no later than the time at which the defence is made and should be accompanied by evidence, without the fact that they have appointed or participated in the appointment of the arbitrators preventing them from presenting said objections. The arbitrators can only accept objections after this if the delay can be justified.

3. As a general rule, the objections regarding the competence of the arbitrators shall be resolved as a matter subject to and by means of award, subject to a hearing with all the parties, although they may also be resolved in the final award, once the proceedings have finished.

Article 15 Precautionary and provisional measures

1. The arbitrators may, unless an agreement is made between the parties, take precautionary or provisional measures that they deem necessary.

2. The arbitrators may subject the adoption of said measures to the prior constitution of sufficient security and warranty which shall be required from the applying party in the way, amount and time deemed appropriate. Said alternative security may also be required after the adoption of the precautionary measure.

3. The rules regarding annulment and enforcement of the Arbitration Act being fol-

lowed shall be applied to the arbitral decisions regarding precautionary or provisional measures, whatever form they are presented in.

4. When either party requires an urgent measure prior to the constitution of the tribunal, the Court may appoint an emergency arbitrator in order to decide on the application for urgent measures, having heard both of the parties and in accordance with that set down in the Regulations. His competences will be identical to those of the Arbitration Court, as established in Article 14 of the Regulations, and his functions will cease once the Court has been constituted. The Court of Arbitration may confirm, modify or annul the provisional order or award entered by the emergency arbitrator. The emergency arbitrator may not act as a member of the tribunal, unless otherwise agreed by the parties.

Ⅲ. ARBITRAL PROCEDURE

Article 16 Principles of the arbitral procedure

The arbitral procedure shall be subjected to the principles of immediacy, audience, promptness, contradiction and equality of the parties.

Article 17 Request for arbitration, acceptance and informing of this. Answering the request for arbitration and the possibility of counterclaiming

1. The arbitral procedure shall begin on written presentation before the Court of the request for arbitration, which shall be accompanied by a copy of the deposit of the acceptance fees collecting the following references:

a) Complete identity and/or company name, address, telephone number, fax, email and the remaining relevant data, of both the claimant or claimants making the request for arbitration, as well as the defendant or defendants and their representatives and counsels, permitting the Court to identify them, contact them and communicate with them;

b) Brief description of the dispute and causes of action of the arbitration, and the amount of these;

c) Identification of the act, document, contractual documents or legal transaction over which the dispute submitted to arbitration has arisen as well as that of the arbitra-

tion agreement or specific agreement that links the parties and that at the same time infers or derives submission to the Court-providing, where appropriate, a copy of same, unless said submission is requested in the request for arbitration itself, as a result of acceptance by the defendant or defendants; and

d) The proposal of the type of arbitration, the number and identity of all the arbitrators, language and place or arbitration, as well as the rules that apply to the substance of the dispute, where appropriate.

2. Once the request for arbitration has been presented, and before proceeding to accept it, the Court may, where appropriate, request that the appellant rectify any error or omission detected in same, providing a period of 5 days to do so. If, within said time frame the error or omission detected is rectified, the request for arbitration shall be considered as presented and validly accepted, bringing its implications back to the initial time at which is was presented. Otherwise, the request for arbitration shall not be accepted, and this fact shall be immediately communicated.

3. Once the request for arbitration is accepted, this shall be communicated to the defendant or defendants, who must present themselves before the Court and answer to the latter in writing in a period of 15 days detailing the following:

a) Complete identity and/or company name, address, telephone number, fax, email address and the remaining relevant data, allowing them and their representatives and counsels to be identified;

b) Brief declaration on the description of the dispute, causes of action of the request for arbitration and the amount involved in these;

c) Brief declaration of the act, contractual documents or legal transaction which, in the opinion of the defendant has caused the dispute submitted to arbitration and in short regarding their stance on the existence, validity and applicability of the arbitration agreement or specific agreement that links the parties, and which in turn results in submission to Court. In the event that the submission to the Court were requested by the claimant in the request for arbitration itself, with the pure and simple acceptance or rejection of same; and, where appropriate;

d) The proposal of the type of arbitration, the number and identity of all the arbitrators, language and place of arbitration, as well as the rules that apply to the substance

of the dispute submitted for arbitration.

4. Once the defendant or defendants have appeared in person and answered the request for arbitration, before proceeding to acceptance, the Court may also request, where appropriate, the rectification in the terms outlined in the above section. The claimant shall be immediately sent a copy of said response and where appropriate the documents attached to these.

Failure to respond to the request for arbitration within the timeframe established for this purpose, or failure to rectify the errors or omissions detected shall not prevent the arbitral procedure from continuing with its processes, nor the appointment and nomination of the arbitrators. Said failure to respond does not imply agreement concerning the arbitral candidates proposed by the claimant, appointing the arbitrators in accordance with Article. 12. First Section, Third Paragraph, not meaning that one of the candidates proposed by the claimant cannot be included on the list offered by the Court.

5. If the defendant, or the defendants, intends to counterclaim, it should be announced in the notice of counterclaim. In this case, the defendant or defendants collect the following references:

a) Brief description of the dispute, causes of action of the counterclaim, and the amount involved in these;

b) Identification of the act, contractual document or documents or legal transaction over which the counterclaim has arisen, providing, where appropriate, a copy of these;

c) Where appropriate, an indication of the rules that apply to the substance of the dispute which is the object of the counterclaim. Announcement of a counterclaim shall be communicated to the claimant in a term of seven days so that they may take a position regarding the dispute, courses of action, amount involved and rules that apply, as well as on their position regarding the applicability of the arbitral agreement to the counterclaim posed.

Article 18 Initial revision of the existence, validity and scope of the arbitral agreement

1. In the event that, on being notified of the request for arbitration, the defendant or defendants do not present themselves and respond before the Court within the time

frame conferred for this purpose, or if they oppose it, rejecting the submission of the matter to arbitration and/or the submission to the Court, or if they object to or question in any way the existence, validity and scope of the arbitral agreement, the Court shall adopt with good reason the resolution that is fitting, informing the parties of this.

2. If the Court decides to continue with the arbitration procedure, the final decision regarding the existence, validity and scope of the arbitral agreement and competence of the Court shall be the responsibility of the arbitrators.

3. If on the other hand, the Court decides not to continue with the arbitration procedure, the claimant or claimants may oppose the Court's decision within a period of five days in which case the arbitration procedure shall continue, whereby it shall be the responsibility of the arbitrators to revise the decision taken by the Court, and the final resolution on the existence, validity and scope of the arbitral agreement and competence of same. In this case, the claimant or claimants who oppose the Court's decision should pay the amount which, depending on the amount of causes of action stated in the brief outlining the request for arbitration, or pleading against it, correspond to 30% of the administrative costs of the Court and 30% of the arbitrators' fees. The stub proving payment should be provided along with the notice of intention to defend presented for this purpose. This plea shall not be processed if said payment cannot be proven.

The arbitrator or arbitrators shall resolve the matter in a period of five days from the date on which it is confirmed, informing the parties of its resolution. If they support the Court's decision, the party shall pay the costs of the incident, losing the amount paid to initiate it, and rejecting the administration of the arbitration. If, on the other hand they revise the Court's decision, they shall agree to continue the arbitration procedure, deducting from the party the amounts paid that correspond to administrative costs and arbitrators' fees.

4. The conditions included in the above sections shall also be applied to the counterclaim, considering the defendant or defendants as counterclaim defendants.

Article 19 Joinder and intervention of third parties originally not claimants or defendants

1. The Court, on the request of a party and informing the arbitrators and partiesin-

volved three days in advance for pleading purposes, may agree on the joinder of a new request for arbitration to an arbitration already underway, followed by the same parties, governed by the same procedure and pending resolution. In this case, the nature of the new claims, their connection with those formulated in the process already initiated and the stage at which the proceedings, amongst other things, must all be considered. For cases in which the Court decides to joinder the new request to a procedure pending with the Arbitral Tribunal already formed, it shall be assumed that the parties renounce their right to name an arbitrator with respect to the new request. In any event, the joinder shall be agreed upon when the award that may be given in one of the procedures could be detrimental to the other, or in those cases in which, among the objects of arbitration for which the joinder is requested there exists a connection that, in the event that they were to continue being treated separately, the awards could be passed with announcements or grounds that are contradictory, incompatible or mutually exclusive. The decision finally taken by the Court in view of the joinder considered shall not be subject to appeal.

2. Whilst the arbitration is pending resolution, the arbitrators, on the request of a party, and on informing the other parties in an ordinary period of three days, may decide upon the intervention of one or more third parties in the arbitration, provided they can prove to have a direct and legitimate interest in the result of same, and as long as said third party has expressed their conformance in writing.

The request and acceptance of the intervention of a third party in the arbitration shall be subject to payment, by said party, of the administrative costs to the Court and arbitrators' fees, as well as those of the experts that may intervene or that may have intervened during the arbitration procedure under the terms established in these Rules.

In any event, the request and admission of the intervention of a third party in the arbitration shall not mean the suspension of the processing of same, nor shall it imply a return to the proceedings already undertaken notwithstanding that, in any event, the third party whose intervention has been agreed upon, may make the necessary pleas for their defence, which they were unable to make before due to the fact that these were related to hearings before they were admitted. The other parties shall be informed of said pleas in an ordinary period of five days.

Article 20 Mission Statement

1. Once the amount of financial cover has been paid by the parties and the nomination of the arbitrators has been confirmed, the case shall be immediately submitted to them.

The arbitrators shall summon the parties to appear in court in a period of not more than ten days following the reception of the arbitral case, the aim of which shall be to write up the first minutes or Mission Statement that shall include, amongst other things, the following points:

a) Full identity, status and address of the arbitrators.

b) Full identity and/or corporate name and address of the parties, their representatives and/or counsels, as well as the maximum number of the latter and the name of each one of them.

c) Brief statement of the causes of action of the parties and determination of the terms and scope of the dispute under arbitration.

d) Language, place and type of arbitration: both *de jure* or in equity; national or international. When dealing with a *de jure* arbitration, the rules that apply to the substance of the dispute subject to same, are in accordance with the provision of Article 4.4 of these Rules, unless the parties come to another agreement.

e) Specification relating to the rules that apply to the procedure, calendar of proceedings, in this case authorising the arbitrators to modify this when the circumstances so require it, within the limits and restrictions laid down in Article 28 of these Rules, and unless it is expressly decided that it may not be extended, or if they are summary or speedy trials.

2. In any event, subject to the terms and conditions covered in these Rules, to the agreements made by the parties, and the terms of the statement referred to in the above section, the arbitrators may lead proceedings under the terms that they deem most appropriate at any given time.

3. The arbitral procedure shall develop and be driven ahead, *ex-officio* or upon the request of a party, by means of resolutions suggested by the arbitrators, in accordance with the rules chosen by the parties, and considering the stipulations of the statement, contract or legal transaction that links the parties and the practices that apply to the dis-

pute under arbitration. In lieu of the rules chosen by the parties, it shall be the arbitrators' responsibility to apply those which they consider to be most appropriate in view of the nature and object of the dispute under consideration as well as the pleas and causes of action inferred by them.

4. If a party, whatever their legal nature may be, becomes aware of a breach of any rule in these rules or of any requisite of the arbitral agreement, including those required by the specific rules that apply, and continues with the arbitration without reporting this as soon as possible, they shall be considered as having renounced the challenge.

Article 21 Claim and defence

1. The claimant or claimants shall file the statement of claim within a period of twenty days from the date of the first minutes referred to in Article 20.1 of these Rules.

The statement of claim which shall be accompanied by the documents and reports in which the party bases their entitlement and causes of action inferred, shall specify the claims that the party is making, establishing the amount of the dispute.

If the claim has not been presented in the period of time given for making it, the arbitrators shall pronounce the resolution, considering the arbitration as finished and assigning the costs to the claimant or claimants that did not lodge their claim, unless any of the other claiming parties have lodged their claim in the stated period, or unless the defendant or defendants, in their defence to the request for arbitration, have announced their intention to lodge a counterclaim, in which case the arbitration shall continue, informing them of this.

2. Once the statement of claim has been presented, and the defendant or defendants have been informed of this, the latter shall lodge their counterclaim, which shall also be done within a period of up to twenty days.

If the counterclaim has not been lodged in the period of time given for making it, the arbitrators shall pronounce the resolution, considering the notification as precluded and pursuing with the arbitration procedure, without this omission being considered as submission or acceptance of the facts or causes of action alleged by the claimant.

Article 22 Counterclaims and new claims

1. In the statement of defence, the defendant or defendants may lodge a counterclaim against the claimant, claimants or one of them in particular. The statement of counterclaim and the writing up of it shall be adjusted to the conditions laid down for the claim.

2. Once the statement of counterclaim has been presented, the claimant or claimants to which it is directed shall be notified of this, also within a period of 10 days, in which time they may oppose the counterclaim that has been made, if they so wish.

3. The lodging of new claims shall require authorisation from the arbitrators, considering the nature of such claims, the state of the process and other relevant circumstances.

Article 23 Evidence

1. Once the statement of defence has been presented or the period for doing so has passed, the evidence shall be presented and practiced in accordance with what is laid down in the mission statement in a period of 40 days, unless there exists full agreement as regards the events, or the parties unanimously and expressly reject the admission of evidence in the arbitration, asking the arbitrators to issue the award on the basis of the statements presented, and the documents and reports that may come with these.

2. The arbitrators may decide on the use of other evidence that they deem appropriate for correctly resolving the dispute under arbitration. They may also request that the parties provide the proceedings with any other relevant information, data, documentation, goods or proof in their possession or whose use directly or indirectly depends on them. If a party is in possession or has control over a means of proof, and they unjustifiably refuse to present it or allow access to it, the arbitrators may use such conduct to draw the conclusion that they consider fitting regarding the facts under investigation. The adducing of evidence shall be done on the basis of the principle whereby each party has the right to know, reasonably in advance, the evidence that the other party is basing their pleadings on.

3. The arbitrators shall freely assess all of the evidence used together and the outcome of this, in line with the rules of due circumspection.

Article 24 Hearings

1. The arbitrators may resolve the dispute on the sole basis of the documents and reports provided by the parties, unless any of them should request that a hearing be held.

2. The hearing may be held even if one of the parties does not appear after having been summoned with sufficient notice, without providing just cause.

3. The management of the hearings corresponds exclusively to the Arbitral Tribunal.

4. The hearings shall be held in closed session unless the parties agree to the contrary.

5. Prior to the hearing, the Court of Arbitration may furnish the parties with a list of the issues which must be contested with special attention.

Article 25 Testimony of witnesses

1. For the purposes of these Rules, all persons testifying on their knowledge of any question of fact shall be considered as a witness, regardless of whether or not they are a party in the arbitration.

2. The arbitrators may order that the witnesses provide written statements, notwithstanding that they may also order a questioning before the arbitrators and in the presence of the parties, orally or by any means of communication that make their presence unnecessary. The witness's oral statement must take place when one of the parties requests it, or if the arbitrators decide on it.

3. If a witness summonsed to appear at a hearing for questioning does not appear without providing just cause, the arbitrators may take this into account when assessing the evidence, and as the case may be, consider the written statement as having not been provided, depending on what they consider appropriate given the circumstances.

4. All parties ask the witness the questions that they deem appropriate, under the control of the arbitrators regarding their relevance and usefulness. The arbitrators may also question the witness at any time.

5. When witnesses make serious contradictions, the arbitrators, *ex-officio* or upon the request of a party, may decide that they meet face to face. The arbitrators may also

decide that, on the basis of the respective declarations, the parties meet face to face, that they meet face to face with one or some of the witnesses or that only the witnesses meet face to face. This taking of evidence must be requested or agreed upon at the end of the questioning.

Article 26 Expert evidence

1. Along with their statements of claim, defence, and as the case may be, counterclaims and pleas to these, the parties should provide the reports referring to the facts and circumstances included in these statements that they deem appropriate to better defend their interests, issued by experts freely appointed by them.

Notwithstanding the above, the arbitrators are empowered to name, *ex-officio* or upon the request of a party, one or several experts from the list provided by the Court so that they may issue a report on the specific questions relating to the object and causes of action of the dispute submitted to arbitration, defining the task and scope of the role.

2. If the experts are named by the arbitrators, the parties may also present other experts to make statements on the matters being debated. The arbitrators, *ex-officio* or upon the request of a party, may agree to hold a face to face meeting between the experts.

The Court of Arbitration may, at its own discretion, order that the specialists appointed by the parties who may be presenting or who may have presented technical reports on the same issues or on related issues, to meet and discuss such issues. In such a meeting, the experts appointed by the parties must try to reach an agreement on the issues to which their expert reports refer, and they will put in writing those points on which they agree, as well as others on which there exists disagreement, and the reasons thereof.

3. The precautions regarding independence, impartiality, suitability and availability included for the arbitrators in Article 13 of these Rules shall be applied to the experts named by the arbitrators. For these purposes, the appointed experts should sign a declaration showing their compliance with the model approved by the Court, prior to being named.

4. The parties may challenge the experts appointed by the arbitrators under circum-

stances that give rise to reasonable doubt about their impartiality, independence, fitness, or availability for carrying out the expert's report proposed.

The challenge should be made within five days following the appointment of the questioned expert or, failing that, from the date on which the appellant is made aware of the facts and circumstances on which their counterclaim is based, informing the other parties and the challenged expert of this for declaration purposes, in an ordinary period of three days. Once said period has passed, the arbitrators shall justifiably decide on the challenge, expressly charging the costs of the incident to the appellant if the request is finally rejected.

The challenge of any of the experts shall suspend the expert report procedure that has been entrusted until the incident is resolved.

5. The parties are obliged to provide the expert with all relevant information, data, documentation, goods or evidence that they possess that are directly related to the dispute under arbitration, and that the latter deems to be appropriate for the expertise entrusted, facilitating the task of the expert at all times.

6. The expert should finish their report within the time frame laid down in the Mission Statement, after hearing the parties, or failing that, in the period determined by the arbitrators.

Article 27 Conclusions of the parties and closing of the preliminary enquiry of the procedure

1. Once the evidence has been given, the arbitrators shall inform the parties in an ordinary period of ten days, so that they may present their conclusions in writing on the events comprising the dispute submitted to arbitration and the result of the evidence presented. Said procedure may be substituted or completed by a procedure of oral conclusions.

2. Once the conclusions have been made, the arbitrators shall declare the preliminary enquiry of the procedure as closed. After this date no statement, plea or evidence may be presented unless the arbitrators authorise this due to exceptional circumstances.

Ⅳ. TERMINATION OF THE ARBITRAL PROCEDURE AND ISSUING OF THE AWARD

Article 28 Time frame, method, content and notification of the award

1. The arbitrators shall decide on the dispute subjected to arbitration and on the causes of action of the parties in one single award or in as many partial awards as they deem necessary, that should be pronounced within the five months following the date on which the answer to the claim was presented or the counterclaim or expiry of said term. Said term of five months may be extended under special circumstances for an additional period of not greater than one month. Said extension can only be decided by the Court.

2. Unless the parties have agreed otherwise or it concerns an award by agreement between them, referred to in the next Article of these Rules, the award should always be justified by the arbitrators and be in writing and signed by them, who may express their differing opinion with good reason. When there is more than one arbitrator, the signature of the majority of the members of the Arbitral Tribunal is sufficient, or simply that of its President, as long as the reasons for the absence of one or more signatures are explained.

3. The date on which the award was pronounced and the place of arbitration shall be recorded.

4. The arbitrators shall expressly state the arbitration costs in the award, under the terms laid down in Article 38 of these Rules. If by virtue of the court costs, one party becomes indebted to another, the award shall expressly state the right to credit of the creditor party, for the amount that corresponds to them.

5. The parties shall be made known of the award by means of the Court Secretariat, using the method and time frame agreed upon or otherwise, by delivering to each of them a copy, signed by the arbitrators under the terms laid down in section 2 of this Article. The date for notifying the parties of the award need not be bound by the maximum time frame established for pronouncing same.

6. Before being notified, any of the parties may request through the Court Secretariat that the arbitrators register the award before a notary, taking on the costs that this

entails.

7. The award shall be issued in as many original copies necessary to correspond to the amount of people who intervened in the arbitration, as well as one extra original copy which shall remain attached to the case file and entrusted to the Court.

Article 29 Award by agreement between the parties

If, during the arbitration proceedings the parties reach an agreement that brings the dispute to a complete or partial end, the arbitrators shall consider the proceedings as finished with respect to the points agreed upon and if all the parties so request it, and the arbitrators do not see any reason to oppose it, this agreement shall be recorded as an award under the terms agreed upon for this purpose.

Article 30 Prior control of the award by the Spanish Court of Arbitration

1. Prior to drawing up the definitive version of the award and signing it, the arbitrator should submit a draft of this to the Court, who, respecting the principle of independence and freedom of decision of the arbitrators can suggest that strictly formal modifications be made to the draft that it considers necessary, within the next ten days, and in any case in the time frame established in the Article above for pronouncing the award. The Court may, where appropriate, bring to the attention of the arbitrators those aspects relating to the substance of the dispute submitted to arbitration, or those relating to the costs of the procedure that it deems appropriate, under the terms of these Rules. The arbitrators may not pronounce any award before sending the draft to the Court.

2. The prior control of the award by the Court shall under no circumstances imply that the Court assumes any responsibility for the content of the award that is announced.

Article 31 Correction, clarification and supplementary award

1. Within the five days following the notification of the award, unless the proceedings calendar states otherwise, any of the parties may make the following requests to the arbitrators:

a) The correction and rectification of any arithmetic error, typographical error, copy error or anything of the sort;

b) The clarification of a specific part of the award; or

c) The complement of the award with regard to claims deducted during the proceedings of the arbitration and not expressly resolved therein, or the correction of the partial override of the same.

2. The arbitrators shall inform the other parties of the request presented in a period of five days. Once said term has elapsed, the arbitrators shall respond to the request for the correction of errors, and clarifications within the following ten days, and as regards the request for a supplementary award, within a period of twenty days following said request.

3. Furthermore, within the ten days following the date of the award, the arbitrators may proceed, *ex-officio*, to correct the errors referred to in point a) of section 1 above.

4. The conditions relating to the method, content and notification of the award outlined in Article 28 of these Rules shall be applied to the arbitrators' resolutions regarding the correction, clarification and supplementation of the award.

Article 32 Enforceability of the award

1. The award is binding for all parties. The parties agree to fulfill it without fail.

2. The final award is *res judicata* and a request for its revision may only be made in accordance with the provisions of the Civil Procedure Act for final sentences.

Article 33 Termination of the proceedings

1. Without prejudice to the provisions of the above articles of these Rules on notification, and if applicable, the registration of the award before a notary as well as regarding its correction, clarification and supplementation, the arbitrators shall cease to carry out their duties once the final award has been pronounced.

2. The arbitrators shall likewise order the termination of the proceedings, ceasing to carry out their duties in the following cases:

a) Abandonment by the claimant requesting the arbitration, unless another party presenting themselves as claimant in the arbitration, or any of the defendants oppose this, and the arbitrators recognise it as a legitimate interest in obtaining a definitive solution to the dispute under arbitration;

b) Due to the lapsing of the term for filing the claim without it having been presented, in the terms laid down in the third paragraph of Article 21.1 of these Rules;

c) By mutual agreement between the parties; and

d) By agreement between the arbitrators in cases in which these ascertain that the processing of the arbitration is unnecessary or impossible.

Article 34 Exclusion of liability

No member of the Court, arbitrator or expert belonging to the Arbitral Tribunal shall be responsible before any party for any act or omission arising in an arbitration administered by the Court unless wilful misconduct can be proven.

Ⅴ. SUMMARY AND SPEEDY TRIAL

Article 35 Summary trial

The summary trial shall apply to all processes in which the total cost of the procedure (including the counterclaim) is less than 300 000 euros, as long as there are no concurring circumstances which, in the opinion of the Court expressed in the corresponding resolution make it advisable to use the ordinary procedure. This shall also apply to all other processes on agreement of the parties either in the arbitral clause itself or later. After the appointment of the Arbitral Tribunal, the Court may invite the parties to adopt the summary trial in matters whose simplicity make it recommendable.

The following shall be especially submitted to summary trial:

a) In the event that evidence other than documentary is proposed and this is agreed upon, one single hearing shall be held for the testimony and the ratification of experts, formulating oral conclusions in the same hearing or written ones in the following five days.

b) The arbitrators shall pronounce the award within the three months following the presentation of the plea to the claim or the plea to the counterclaim. Said period of time may not be extended. The mission statement or first procedural order should be pronounced within a time frame of ten days upon acceptance of the arbitrators, a period which may not be extended.

c) The arbitral procedure shall be processed with a single arbitrator, unless the arbitration agreement stipulates the election of an Arbitral Tribunal. When the parties have agreed on the nomination of three arbitrators before the arbitration begins, the Court

shall invite the parties to agree on the nomination of a single arbitrator.

Article 36 Speedy trial

The speedy trial shall apply to all processes which, due to their minimal cost or in view of the circumstances of time or simplicity, the Court decides upon, as long as there are no concurring circumstances that, in the opinion of the Court, expressed in the corresponding resolution, make it recommendable to use the other procedure.

Only the names of two candidates proposed for arbitrator may be rejected by each party.

Once an arbitrator has been named, the case shall be handed over to them. The parties and the arbitrator shall then be summonsed to a hearing being provided with a minimum of twenty days notice in such a way that within the six days following said notification, the party requesting the arbitration presents their statements and documents and, requesting the taking of other evidence, which they shall inform the appellant so that they respond within the same time frame. During the hearing, which may be extended at the discretion of the arbitrator, the evidence shall be taken by those wishing to assess the parties and the conclusions shall be formulated, with the proceedings now being ready for the award to be pronounced within the following ten days, a period which may not be extended.

Ⅵ. EXPENSES AND COSTS

Article 37 Arbitration expenses

1. The arbitration expenses shall include the acceptance fees; the administrative costs of Court; the arbitrators' fees and the experts' fees who, as the case may be, are appointed by the former during the arbitration procedure; all calculated according to what is laid down in the Economic Annex of these Rules as well as the expenses for renting the premises and equipment for the arbitration, which must be justified.

2. The party who requests the arbitration should provide proof of the deposit of the acceptance fees along with their initial request, in accordance with the amount laid down in Annex I of these Rules. The sum of these acceptance fees that shall include the record, preliminary study by the Court of the request for arbitration and the notification of

same to the defendant or defendants, shall not be under any circumstances refundable.

3. The party that requests the arbitration should also fix the amount of the dispute in their statement of request for arbitration understanding this to be the calculation of the real financial interest of same. If the amount of the dispute were undetermined, the sum of 50 000.00 euros would be taken as a reference for setting the administrative costs, arbitrators' fees and cost of the arbitral procedure, unless the Court agrees on a higher or lower figure considering concurrent circumstances.

The establishment of the amount of the arbitration, including that of an eventual appeal, will be the exclusive competence of the Court. Once the arbitration process is concluded, the Court will proceed to produce the final economic balance of the case, reimbursing the remainder, should there be any, or claiming the difference, if applicable. The Court may carry out partial settlement, in the proportion it deems adequate, of the administration rights, arbitration and experts' fees and, rental charges and equipment expenses for the arbitration, in lieu of the final settlement and as the different phases of the arbitration process move ahead.

4. In view of the statements of request and response to these, or if the time for doing so has elapsed, the Court, in accordance with sections 4 and 5 of this Article, shall fix the amount of funds to be paid by the parties for processing the procedure in order to meet the administrative costs of the Court and arbitrators fees, requiring payment of these, paying the resulting amount within a period of ten days. When the claimant infers causes of action of different amounts against two or more defendants, they shall take the amount of the dispute of the greater sum. Notwithstanding, during the processing of the arbitral procedure the Court, *ex-officio* or upon the request of the arbitrators may request that the parties pay additional funds.

The Court of Arbitration will only proceed with the examination of the arbitration once the General Secretary has confirmed that the funds claimed are held by the Court.

In the event of the plaintiff or the counterclaimant failing to pay the required provisions as quickly as possible and in full, the Court will regard this attitude as withdrawal of the main claim or of the counterclaim, as applicable.

No proceedings or presenting of evidence shall take place that have not already been previously paid for or for which payment has not been guaranteed by the parties

through the payment of the corresponding amount to cover this.

If, after having requested that the parties pay the fixed amounts, these amounts are not paid in full by any of the parties, and in the proportion assigned to each within the time frame given for this to be done, the Court shall once more request that the indebted party pay this sum within a period of five days. If, after this, the amount is not paid, the Court shall inform the other party or parties within the same time frame, and if they consider it appropriate, they shall pay the amount pending. If none of the parties pay the amount pending, the Court can, at its discretion, refuse to manage the arbitration or the specific proceeding that caused the request for the payment of the pending amounts. In the first scenario, once the amount corresponding to the administrative costs of the Court and, as the case may be, the arbitrators' fees has been deducted, the Court shall refund each party the sums that they have paid, bringing an end to the arbitration procedure.

Unless the parties have agreed otherwise, the payment of the amounts set by the Court shall be done so in equal proportions, being the responsibility of the Court to establish the assigning of payments carried out by each party for this concept. When the award is issued, the Court shall settle the amounts paid by them during the procedure, making the refunds that apply.

Article 38 Costs of arbitration

1. The arbitrators shall state the arbitration costs in the award. Any court costs should be justified, bearing in mind the criteria indicated in the following paragraph and the possible delays that the parties may have caused in the procedure.

Unless the parties agree otherwise, the arbitrators may justify the adding of costs based on the principle whereby the order to pay costs is a reflection of the success or failure of the respective causes of action of the parties, unless, on considering the specific circumstances of the case, the arbitrators deem it inappropriate to apply this general principle.

2. The award of the Court of Arbitration will settle the costs of the arbitration. Unless otherwise agreed by the parties, the Court of Arbitration will decide upon the proportion which each party will be obliged to pay of the whole or part of the aforemen-

tioned arbitration expenses. If the Court of Arbitration should decree payment of the full amount or a part of the costs of arbitration by a party different from the party which paid the Court, the latter party will have the right to claim against the convicted party, demanding payment of the corresponding amount.

3. The costs shall include the acceptance fees and administration of the CEA the arbitrators' fees and those of the experts if they have been appointed and have intervened during the arbitration procedure; as well as the reasonable expenses for defence, counsel or representation which the parties may have had to avail of, and other expenses deriving from the arbitral procedure, such as rent of the premises and equipment for the arbitration, which must be justified.

For the purposes of fixing and passing on the amount of expenses to be paid for the defence, counsel or representation of the parties, the arbitrators shall ask for a list of those incurred by each one of the parties and proof of these, once the procedure ends. The arbitrators shall have the authority to exclude those which they believe to be inadmissible, and to moderate or reduce the amount of those that they consider as being excessive.

Article 39 Arbitration appeal

In relation to the arbitration agreement undersigned in favour of the Spanish Court of Arbitration and in the context of the arbitration administered by this Court, in accordance with its Regulations and Statutes, if the parties provided each other, either through such agreement or through an agreement entered into at a later date, with the right to appeal against the award or awards which are issued before an appeals arbitration court, prior to the eventual commencement of the act of annulment, and notwithstanding the application of the Regulations of the Spanish Court of Arbitration, the motion of appeal will adhere to the following regulations:

1[a] Jurisdiction

The award or awards entered in the first instance may be appealed against within-five days. The appeal must be served to a tribunal composed of three arbitrators appointed by the Spanish Court of Arbitration in accordance with that set down in Article 12 of its Regulations.

2ª Scope

In the appeal, the reasons for the annulment of the award must be provided. When the grounds for the appeal are based on the infringement of norms or of legal safeguards in the first instance, the appellant must provide evidence that the infringement was duly reported, if there was appropriate procedural opportunity for it.

By virtue of the right of appeal, it may also be the object, in accordance with the basis in fact and in law of the claims made before the Court in the first instance, that the award be revoked and that, in its stead, a favourable award to the claimant may be entered, by means of further examination of the proceedings carried out before that Court and in accordance with the evidence which, in the cases expressly contemplated in this clause, is presented before the appeals tribunal.

3ª Notice and lodgement of the appeal, opposition to the appeal and contest of the award

The appeal will be notified to the Court within a period of five days, from the day following the notification of the award, by means of a document which identifies the award that is being appealed against, states the amount of the appeal and expressly declares the will to appeal. After that period, the Court will reject the appeal unconditionally.

The appellee or appellees will be given notice of the appeal for ten days, and they will have to answer on the amount of the appeal and, if applicable, on the possible untimeliness of the appeal.

Once the arbitrators have been appointed and the documentation is in their possession, they will request for ten days that the appellee presents the document of lodgement of the appeal, which must include the allegations on which the challenge is based.

If the appellee should not deliver the document of appeal within that period, the arbitrators will declare the appeal void, the award challenged will be considered definitive and they will charge the appellee with the costs incurred.

The appeal document will be served to the rest of the parties, for ten days, so that they can register undersigned writs of opposition to the appeal or, if applicable, challenge the award which is being appealed against. The opposition document will be

served to the main appellee, so that within ten days he can make allegations in his own interests.

4ª Presentation of documents and request for evidence

The writs of appeal, of opposition and, where applicable, of challenge, may only be accompanied by documents which have not been included in the first instance for reasons beyond the power of the claimant.

In the writs of appeal, of opposition and, where applicable, of challenge, and of opposition to the challenge, the following additional evidence may be demanded:

a) The evidence which may have been unduly refused in the first instance, provided that a complaint was then properly lodged.

b) The proposals admitted in the first instance which, for whatsoever reason not attributable to the proponent, may not have been considered.

c) The evidence that refers to relevant facts for the decision of the arbitration, which took place after the date in which the arbitrators declared procedural instruction closed, or before such date, whenever the party can prove that they have learned about them at a later date, in this case.

Notwithstanding the above, the arbitrators may request the new production of whatsoever statements and depositions provided in the first instance they deem necessary to review in order that their conviction is better informed.

In the admission of new documents and proposals of evidence, the arbitrators will be especially observant of bona fide legal procedures and the avoidance of undue delays.

5ª Admission of evidence, conclusions, hearing and close of proceedings

The arbitrators will decide on the admission of documents and of the evidence presented within five days from the day following reception of the document of appeal and, where applicable, of challenge. If evidence has to be examined, a date for the hearing will be set, within the following month.

Once the evidence has been examined, the arbitrators will inform the parties so that they may present their conclusions in writing. This procedure may be substituted or completed by means of a procedure based on oral conclusions.

If no evidence had been examined or if all of it were inadmissible, it may also be

agreed to hold a hearing upon request of any of the parties or if the arbitrators deem it necessary.

Once conclusions have been formulated or, where applicable, the hearing has taken place, the arbitrators will declare the examination of the appeal proceedings closed.

6ª Resolution of the appeal

The arbitrators will resolve the appeal in a single award or in as many partial awards as are deemed necessary, which must be entered within the two months following the date of closure of the examination of the proceedings.

If an alleged infringement of norms had been committed on entering the award in the first instance, the arbitrators, having revoked the award that has been appealed against, will resolve on the issue or issues which were the object of the appeal.

When the contents of the previous paragraph are not applicable and the infringement reported is of the kind that causes radical invalidity of the proceedings or part thereof, the arbitrators will so declare, and they will reinstate them to the status in which they were to be found when the infringement took place.

Proceedings will not be declared invalid if the infringement might be rectified through the appeals procedure; for this purpose, the arbitrators will grant a period of ten days, unless the contravention became apparent in the course of the hearing and it could be rectified then.

Once the amendment has been made and, where applicable, the parties have been heard and the admissible evidence has been examined, the arbitrators will resolve on the issue or issues which were the object of the appeal.

The award or awards which resolve the appeal must rule exclusively on the points and issues presented in the appeal, and where applicable, in the documents of opposition and challenge. The award or awards may not adversely affect the appellant, unless the injury results from the acceptance of the challenge of the resolution thereof, as presented by the former appellee.

7ª Costs

The arbitrators will state in the award the costs of the appeals procedure. They will also resolve on the penalty or lack thereof in terms of the costs of the first instance, if

they were challenged.

The arbitrators will apply Article 38 of the Regulations of the Spanish Court of Arbitration with regard to the costs of the appeal, once all the claims of the appeal are rejected. This regulation is also applicable for the resolution of the challenge related to the penalty or lack thereof in terms of the costs of the first instance.

In the case that the appeal is totally or partially admitted, none of the parties shall be penalised to bear the costs of the proceedings.

8[a] Expenses

The costs of the appeal procedure will be established and will be paid in accordance with that set down in Article 37 of the Regulations of the Spanish Court of Arbitration with the following specifications:

a) The appellant will determine the amount disputed in the document and state his intention to appeal, and this will be accompanied by proof of payment of the admission fee in accordance with the amount stipulated in Annex I of the Regulations.

b) The Court will determine the amount of the provision of funds which the parties will have to deposit in order to start proceedings once it has seen the document stating the intention to appeal and the writs from the appellee or appellee contesting the amount of the claim or claims under appeal.

TRANSITORY PROVISIONS

Sole transitory provision.

The arbitrations initiated before these Rules came into force shall continue to be governed by the previous Rules until they are fully concluded.

FINAL PROVISIONS

Sole final provision.

These Rules shall come into force on March 15th 2011, after which point the previous CEA Rules shall be void.

ECONOMIC ANNEX

ACCEPTANCE FEES

The party requesting the arbitration should pay the fee of 800 euros for opening the record and studying the case, which shall be non-refundable. If the amount of the arbitration exceeds 300 000 euros, these opening fees shall be 1000 euros.

The amount of the administrative costs of the Court shall be obtained applying the percentages included in the tables corresponding to Annex I of these Rules, to the sum set as the amount of the dispute submitted to arbitration.

The sum resulting from the administrative costs set in favour of the Court must be paid by each claimant or claimants, and by each one of the appearing defendants.

The amount of the arbitrators' fees shall be set by the Court and shall be obtained by applying the percentages included in the tables corresponding to Annex II of these Rules, to the sum set as the amount of the dispute submitted to arbitration. The Court shall set the fees included in this Annex, considering the time dedicated by the arbitrators, the capacity of the President of the Arbitral Tribunal, the complexity of the matter and any other circumstances relating in particular to the expected conclusion of the arbitral procedure through agreement by the parties or for any other reason. 10% shall be deducted from these fees as Court dues for the study and selection of the appointed arbitrators. If the arbitration exceeds the amount of 300 000 Euros for the decrease is 20%. The same percentage shall be deducted from the fees of the experts assigned by the arbitrators.

The amount resulting from the application of the scale in the mentioned table corresponds to those cases in which one sole arbitrator has intervened. In the event of there being a number of arbitrators, the resulting amount shall be multiplied by the number of these, paying the President of the Arbitral Tribunal fees 20% greater than those that correspond to the coarbitrators.

In the event of *De Jure* Arbitration, the scales established for the arbitrators fees and the administrative costs shall increase by 30%. The administrative costs of the Court and the fees due to the arbitrators shall include all of the proceedings that are carried out from the time at which the arbitration begun until it concludes through the a-

ward or any other resolution that, in accordance with the provisions of Article 33 of these Rules have brought about the termination of the proceedings, including, where appropriate, the clarification or resolution passed by the arbitrators for the purposes of completing the award.

When the arbitrator is named by mutual agreement a reduction of 10% shall be applied to their fees.

The application of the economic system of arbitration may be varied in response to the conventions established by the Spanish Court of Arbitration or social reasons or dissemination of the arbitration.

OTHER COURT SERVICES

Testimonies: 100 euros.

Court acting as Nominating Authority: 1500 euros per appointment.

Madrid, March 15th 2011

CHAPTER 04 >>

第四章

巴基斯坦仲裁制度研究

巴基斯坦是与中国山水相连的“好邻居”“好伙伴”“好朋友”“好兄弟”,是中国唯一的“全天候战略合作伙伴”,也是“一带一路”上重要的支点国家,建设中的中巴经济走廊更是“一带一路”倡议的重点和旗舰项目。2015 年 4 月,习近平主席对巴基斯坦进行国事访问期间,两国领导人一致同意以走廊建设为中心,以能源、交通基础设施、瓜达尔港、产业合作为重点,构建“1 +4”经济合作布局,[1]作为“一带一路”倡议重大和现行项目的中巴经济走廊建设由此进入全面推进阶段。当前,中巴经贸合作发展迅猛,中国已成为巴基斯坦第一大贸易伙伴、第一大进口来源国、第一大外商直接投资来源国和第二大出口目的地国,巴基斯坦也是中国在全球最重要的工程承包市场之一和南亚最大的投资目的地。当然,大家也应当关注在巴基斯坦进行贸易投资所存在的各种风险;这些风险包括政治风险、法律风险、恐怖活动导致的安全风险及债务风险等。为此,一方面,在巴基斯坦开展经贸活动时,应当对巴基斯坦的政治、法律、宗教、文化等环境进行全面了解和评估,将各类风险降到最低;另一方面,当争议发生时,应当积极采取有利的争端解决机制,高效快速地解决有关争议。鉴于在国际商事和投资争端领域,调解和仲裁是解决争议最常用的机制,

〔1〕 参见新华网: http://www. xinhuanet. com/world/2015 - 04/23/c _ 1115058270_2. htm, 最后访问日期:2018 年 11 月 15 日。

且得到了世界各国的广泛认可，本章将对巴基斯坦的调解和仲裁制度进行全面介绍和评析，并对中国当事人在解决涉巴争议时需注意的问题进行评估，以期对中国企业“走出去”提供参考。

一、巴基斯坦仲裁法律制度概况及演进

巴基斯坦的全称为巴基斯坦伊斯兰共和国，是多民族国家。伊斯兰教为其主要宗教，官方语言为乌尔都语和英语，是英联邦成员。[1] 巴基斯坦的法律制度既受到其宗教制度的影响，也受到来自英国普通法制度的深刻影响；这些影响也体现在其仲裁制度的确立和演进上。巴基斯坦的仲裁制度法律框架可以分为国内仲裁立法和其参加或批准的国际条约。

（一）国内仲裁立法

1. 1940 年《巴基斯坦仲裁法案》（Arbitration Act，1940）

1940 年《巴基斯坦仲裁法案》于 1940 年 7 月 1 日生效。该法案共有 7 章，49 条。在该法案制定时，巴基斯坦尚未独立，仍属于英属印度的一部分。1947 年 8 月巴基斯坦宣布独立，但该法案至今仍然有效。

1940 年《巴基斯坦仲裁法案》适用于在巴基斯坦境内进行的仲裁程序，以及对国内仲裁裁决的执行。在该法案下，当事人可以约定将已经发生或将来可能发生的争议提交仲裁解决；因此，对仲裁程序的推进双方当事人也享有较大的自由裁量权。但是，从整体来看，法院在仲裁程序中发挥着实质性作用，包括对仲裁员的指定及财产保全等。对于现在已经被大多数仲裁制度比较发达的国家所接受的一些原则，如仲裁庭自裁管辖权原则、仲裁庭作出临时措施决定的权力及仲裁程序的保密性等问题，该法案也没有相应的规定。因此，从这个角度来讲，该法案与国际仲裁制度的发展是不同步的。鉴于该法案仍然有效，本章在后面还将详细分析其主要条款。

2. 1937 年《巴基斯坦仲裁（议定书和公约）法案》[Arbitration（Protocol and Convention）Act，1937]

1937 年《巴基斯坦仲裁（议定书和公约）法案》（以下简称 1937 年法案）制定的目的是在巴基斯坦执行 1923 年《日内瓦仲裁条款议定书》（以下简称《日内瓦议定书》）和 1927 年《关于外国仲裁裁决执行的公约》（以下简称《日内瓦公约》）。为了使这两份法律文件在巴基斯坦得到执行，巴基斯坦专门制定国内法，同时对上述议

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〔1〕 参见中华人民共和国外交部网：https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/yz_676205/1206_676308/1206x0_676310/，最后访问日期：2018 年 11 月 20 日。

定书和公约的执行做了商事保留。1937 年法案共计 10 条,并将上述《日内瓦议定书》和《日内瓦公约》的内容作为附件置于法条之后。国际社会在 1958 年通过了《关于承认与执行外国仲裁裁决的公约》(以下简称《纽约公约》),巴基斯坦也批准了该公约,并且于 2011 年制定相应的国内法专门执行该公约。因此,1937 年法案可得到适用的范围大大缩小,但并没有完全失效。鉴于后文对该法案不再予以详细介绍,在此有必要对该法案的主要内容作出说明,以便对巴基斯坦关于承认与执行外国仲裁裁决立法演进有大致了解。

(1)关于外国裁决(foreign award)的界定[1]。该法案所指的外国裁决,是指针对根据巴基斯坦法律被认为是商事性质的争议所作出的裁决;裁决作出的时间应当为 1924 年 7 月 28 日之后。此外,该法案还规定外国裁决需满足下述条件:第一,仲裁条款必须满足《日内瓦议定书》中关于仲裁条款的界定,即仲裁协议是指受制于《日内瓦议定书》不同缔约国管辖的当事人之间签订的,将其已经发生或将来可能发生的与合同有关的商事争议或其他可通过仲裁解决的争议之全部或部分提交仲裁解决的协议。至于双方当事人是否受制于仲裁地国家的管辖则不予考虑。由此可见,1937 年法案并没有以仲裁地作为判断某一裁决是否为外国裁决的主要标准,而是采取当事人属人法的标准;这与后来签署的《纽约公约》是不同的。第二,裁决必须是在《日内瓦公约》缔约国领域内作出,即所谓的互惠保留。第三,裁决必须是终局的;如果裁决在裁决作出地国尚处于效力待确定状态,则该裁决不能被认为是最终的。对外国裁决的界定是很重要的,这关系哪些裁决能在巴基斯坦得到承认与执行。

(2)法院对仲裁条款的尊重[2]。该法案规定,即便存在 1940 年《巴基斯坦仲裁法案》和 1908 年《巴基斯坦民事诉讼程序法典》的有关规定,《日内瓦议定书》项下的仲裁条款应当得到法院的尊重,除非法院认为该仲裁条款是不可执行的,或者双方当事人对提交仲裁的事项在实际上不存在任何争议,否则正在进行的诉讼程序应当中止。

(3)外国裁决的效力[3]。该法案规定,外国裁决具有与在巴基斯坦仲裁所作出的裁决相同的效力。

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〔1〕 参见 1937 年《巴基斯坦仲裁(议定书和公约)法案》第 2 条。
〔2〕 参见 1937 年《巴基斯坦仲裁(议定书和公约)法案》第 3 条。
〔3〕 参见 1937 年《巴基斯坦仲裁(议定书和公约)法案》第 4 条。

(4)执行外国裁决的条件[1]。一方面,一个外国裁决要在巴基斯坦得到执行,必须满足下列条件:第一,裁决是根据有效的仲裁协议作出的;第二,仲裁庭的组成符合当事人的约定;第三,裁决符合仲裁程序准据法;第四,裁决在裁决作出地国是终局的;第五,根据巴基斯坦法律,裁决事项具有可仲裁性,对该裁决的执行不违反巴基斯坦的公共秩序与法律。另一方面,如果一个外国裁决具有下列情形之一,将得不到执行:第一,裁决在裁决作出地国被宣布无效;第二,被执行人在仲裁程序中未能得到适当的通知以陈述案件,或者因欠缺法律能力而未能适当地陈述案件;第三,裁决有漏裁或超裁的情形。(在出现漏裁时,法院可以延迟执行或者要求申请人提供担保从而执行裁决。)不过值得注意的是,该法案所列举的不予执行仲裁裁决的事由并非穷尽式列举;也就是说,如果被执行人举证证明存在上述事由之外的可能影响裁决执行的理由,法院如果认为恰当,就可以拒绝执行该裁决或者休庭,直到法院认为被执行人在合理充足的时间届满时取得该裁决无效的结果。

(5)例外情形[2]。该法案规定,如果仲裁协议所适用的准据法为巴基斯坦法律,对由此作出的仲裁裁决不适用本法案。

此外,该法案还就申请人请求巴基斯坦法院执行外国裁决的程序性事项作出较为详细的规定,包括如何在巴基斯坦法院登记备案及需要提交的证据材料等。

3. 2011 年《巴基斯坦关于承认与执行仲裁协议和外国仲裁裁决的法案》(An Act to Provide for the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Award)(以下简称 2011 年《巴基斯坦承认与执行法案》)

制定《巴基斯坦承认与执行法案》的目的是在巴基斯坦承认与执行《纽约公约》。该法案共有 10 条,《纽约公约》作为附件置于条文之后;其立法体例与前述 1937 年法案是一致的。与 1937 年法案相比,该法案规定得更简洁,对于不予执行外国仲裁裁决的事由直接援引 1958 年《纽约公约》的内容,而仅对一些程序性事项作出相对详细的规定。同时该法案还明确规定 1937 年法案原则上被废止,仅在个别情形下还可以适用 1937 年法案的有关规定。由于该法案是巴基斯坦执行《纽约公约》的现行国内法,本书将在后面对其有关内容予以详细论述。

4. 2011 年《巴基斯坦关于解决投资者与东道国之间投资争端的国际公约法案》(An Act to Implement the International Convention on the Settlement of Investment

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〔1〕 参见 1937 年《巴基斯坦仲裁(议定书和公约)法案》第 7 条。

〔2〕 参见 1937 年《巴基斯坦仲裁(议定书和公约)法案》第 9 条第 2 款。

Disputes between States and Nationals of other States)(以下简称2011年《巴基斯坦仲裁(国际投资争端)法案》)

制定《巴基斯坦仲裁(国际投资争端)法案》的目的是在巴基斯坦执行《关于解决国家与他国国民之间投资争议公约》(以下简称《华盛顿公约》)。与2011年《巴基斯坦承认与执行法案》一样,该法案共有10条,《华盛顿公约》作为附件置于条文之后。该法案主要是对解决投资争端国际中心(International Centre for Settlement of Investment Disputes, ICSID)作出的裁决在巴基斯坦执行的程序问题作出规定,同时明确排除上述1940年《巴基斯坦仲裁法案》对投资争端裁决的适用。同样,鉴于该法案为巴基斯坦现行有效的执行《华盛顿公约》的法律,下文将对其条文进行详细论述。

5.2017年《巴基斯坦替代性争端解决法案》(Alternative Dispute Resolution Act, 2017)

《巴基斯坦替代性争端解决法案》是巴基斯坦关于可替代性争端解决机制的最新立法,共27条和1个附件。制定该法案的目的是快速、低成本地解决争议,并且无须诉诸正式的诉讼程序。该法案所指的替代性争议解决机制是除诉讼之外的一切能够解决争议的手段,包括但不限于仲裁(arbitration)、调解(mediation)、调停(conciliation)及中立评估(neutral evaluation)。同样,鉴于该法案是巴基斯坦目前关于替代性争议解决机制的最新立法,下文会对该法案进行逐条分析。

(二)国际条约

1.《纽约公约》

巴基斯坦虽然是《纽约公约》的签字国,但直到2005年其才正式批准该公约。在此后大约6年的时间里,巴基斯坦都是通过总统令在巴基斯坦境内执行该公约;而总统令的有效期为120日,该期间届满后总统令即失效,除非再次作出总统令。这就使对公约的执行非常不稳定,如遇政府更迭,那么公约就可能无法在巴基斯坦得到执行。这种情况直到2011年议会通过立法(前述2011年《巴基斯坦承认与执行法案》)才得到根本解决。即便如此,《纽约公约》在巴基斯坦的执行依然存在若干问题,下文将通过案例予以论证。

2.《华盛顿公约》

巴基斯坦于1965年7月6日签署了《华盛顿公约》,并于1966年9月递交了批准书。但由于缺乏国内专门立法,该公约直到2011年才正式具有国内法效力,也就是前述的2011年《巴基斯坦仲裁(国际投资争端)法案》。巴基斯坦近年来不断吸

引外资,因此有关的投资争端也呈增长趋势。同样,下文将通过案例分析巴基斯坦对投资仲裁的态度以及执行情况。

3. 双边条约

根据联合国贸易和发展会议的官方统计,巴基斯坦已经与 60 个国家签署了双边投资条约,[1]这些条约的大部分都将仲裁作为争端解决的一种方式。中国与巴基斯坦于 1989 年签署了《中华人民共和国政府和巴基斯坦伊斯兰共和国政府互相鼓励和保护投资协定》。该协定第 10 条对东道国和投资者之间就征收补偿数额发生的争议解决方式作出规定。根据该条的规定,如果投资者对东道国提供的征收补偿数额有异议,可以向作出该征收措施决定的机关提出复议;如果在 1 年内该争议依然未得到解决,那么投资者可以向东道国有管辖权的法院提起诉讼,或者要求通过仲裁方式解决争议。需要注意的是,该协定仅就征收补偿数额争议规定了解决方式,相比巴基斯坦与其他有关国家签署的类似协议而言,范围较窄,显然不能适应当前中巴之间经贸往来的需要。尤其是随着中国在巴基斯坦投资的增多,该协定已无法满足争议解决的需求。于是两国于 2006 年签署了《中巴自由贸易协定》,对投资争议解决作了与时俱进的规定,后文将予以详述。

二、巴基斯坦现行仲裁法律制度介绍

(一)1940 年《巴基斯坦仲裁法案》

1. 主要内容

(1)定义条款。

为适用本法案之目的,《巴基斯坦仲裁法案》第 2 条对有关术语作了界定。仲裁协议,是指将现在或将来发生的争议提交仲裁的书面协议,无论该协议是否对仲裁员予以指定。至于何为书面,法案未作出进一步说明。

(2)不涉及诉讼程序时由当事人启动的仲裁。

《巴基斯坦仲裁法案》第 2 章规定了在一般情况下由当事人启动仲裁的程序,具体内容如下:

第一,如果双方当事人订有仲裁协议,则下列事项为该仲裁协议所暗含的条件:①仲裁员人数应当为 1 名,除非当事人另有明确约定。②如果当事人约定将争议提交偶数人数仲裁庭解决,那么这些仲裁员应当在他们各自被指定后 1 个月内指

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〔1〕 载 https://investmentpolicyhub. unctad. org/IIA/AdvancedSearchBITResults,最后访问日期:2019 年 2 月 14 日。

定 1 名公断人(umpire)。③仲裁员应当在提起仲裁之日起 4 个月内作出裁决,但法院可对该期限予以延长。当仲裁员无法在上述期限内达成一致意见时,公断人应当在 2 个月内作出裁决。当事人在仲裁员或公断人审理争议时,有权陈述案件,提交证据。④仲裁裁决对当事人具有终局效力。仲裁员或公断人可以对仲裁费用在当事人之间的分摊作出决定。

第二,该法案还对仲裁程序的其他事项作了补充规定:

①当事人可以在仲裁协议中约定由第三人对仲裁员进行指定。

②非经法院许可,被指定的仲裁员或公断人享有不可撤销的权力;当事人在协议中有明确相反意图的除外。

③一方当事人死亡的,仲裁协议及由该方当事人指定的仲裁员并不因此被撤销。在一方当事人破产时,仲裁协议也依然有效,并对破产当事人权利义务的承继人具有约束力。

④仲裁员的权力。除非当事人在仲裁协议中另有明确约定,否则仲裁庭享有以下权力:主持当事人或证人出庭宣誓;作出附条件裁决或其他形式的决定;就裁决书中因疏忽产生的打印错误进行更正;在必要的情况下,主持对当事人的质询。当然,仲裁员还有作出裁决的权力;裁决应当署名,并将此书面通知当事人,同时还应通知当事人就仲裁和裁决应承担的费用。

⑤法院的权力。法院有以下几项权力。

a. 指定仲裁员或公断人。特定情况包括:仲裁协议约定由当事人共同指定一名或多名仲裁员,但争议发生后当事人无法就仲裁员指定达成一致意见的;如果被指定的仲裁员疏于承担义务或拒绝履行义务,或者丧失履行能力,或者死亡的,同时仲裁协议并未表明由此造成的仲裁员缺失无须增补,且当事人或仲裁员未能增补该缺失的;当事人或仲裁员应当指定公断人而未能指定的。在上述特定情况下,任何一方当事人都可以根据情况向其他当事人或仲裁员发出书面通知,对指定或增补仲裁员表示意见。如果在上述通知发出后 15 日内当事人无法完成仲裁员的指定,经发出通知的一方当事人申请,并给予其他当事人陈述的机会,法院可以根据情况指定一名或多名仲裁员或公断人;被指定的仲裁员或公断人具有作出裁决的权力,且与当事人合议指定的仲裁员或公断人具有同等权力。

b. 将仲裁员或公断人除名。经当事人申请,法院可以将未能合理快速地推进仲裁并作出裁决的仲裁员或公断人除名;仲裁员或公断人本人或在仲裁程序中有不当行为的;根据本条被除名的仲裁员或公断人不得就其服务取得报酬。当仲裁

员被除名后,经当事人申请,法院可以增补仲裁员。如果仲裁员或公断人被法院除名,经一方当事人申请,法院要么指定一名仲裁员担任独任仲裁员,要么裁定仲裁协议对所提交的争议不再具有效力。

c. 修改或更正裁决的权力。发生以下情况时,法院可对仲裁裁决予以修改或更正:仲裁庭超裁且超裁事项能与裁决其他部分分开的;裁决书的形式不完善,或者包含明显的错误,且这种不完善或明显的错误能在不影响裁决的情况下被修改;裁决书包含因疏忽产生的打印错误。

d. 将裁决发回仲裁员或公断人重审的权力。发生以下情况时,法院可将裁决发回仲裁员或公断人重审:裁决漏裁,或者裁决超裁且超裁事项无法与其他裁决事项分开的;裁决内容不确定,无法执行的。裁决被发回重审的,仲裁员或公断人应当在法院规定的期限内作出决定,并提交法院;该期限可以被法院延长。如果仲裁员或公断人在上述期限内未能重审并将决定提交法院的,该裁决将无效。

e. 根据仲裁裁决作出裁定。如果法院认为没有理由将裁决发回重审,在申请撤销裁决的期限届满后,或者在当事人提出撤销裁决的申请被拒绝后,法院应当根据裁决作出裁定。除非裁定的内容超出仲裁裁决的内容或者与仲裁裁决存在其他不符,否则该裁定不得上诉。

f. 发布临时措施命令的权力。在提起仲裁程序之后,当一方当事人有意延迟或阻碍仲裁裁决的作出,或者阻碍仲裁裁决的快速执行,在取得宣誓书或其他保证的情况下,法院可以发布其认为必要的临时措施命令。但该临时措施的相对人如果提出证据证明临时措施命令有误,法院在听取各方当事人陈述后,可以进一步作出其认为必要和公正的命令。

g. 宣布仲裁协议不再有效的权力。如果仲裁协议因前述仲裁员或公断人拒绝重审变得无效,或者仲裁裁决被撤销的,法院可以作出命令宣布仲裁协议就针对已提交仲裁的争议部分不再有效。

(3)由法院启动的仲裁。

《巴基斯坦仲裁法案》第3章规定了由法院启动仲裁程序的情形。在当事人订有仲裁协议的情况下,如果协议所约定的争议事项已经发生但尚未启动诉讼程序的,当事人可以向有管辖权的法院提交仲裁协议以便启动仲裁程序,而无须根据法案第2章的规定启动仲裁程序。法院在收到申请后,应当向仲裁协议的所有当事人发出书面通知,要求其在规定的时间内陈述不应启动仲裁程序的理由。如果在规定的时间内当事人未能提出充分理由,法院则作出决定启动仲裁程序。关于仲裁

员的指定及其他程序性事项则根据法案的有关规定进行。

(4)诉讼程序中的仲裁。

《巴基斯坦仲裁法案》第4章规定了当事人在诉讼程序中启动仲裁的程序。在诉讼程序中,所有当事人可以约定将正在审理的争议提交仲裁解决;为此,当事人应当在法院判决作出前通过书面形式向法院提出申请。如果法院允许,则应当将有关争议提交仲裁员解决,并要求仲裁员在其认为合理的期限内作出裁决。对于已经提交仲裁员解决的争议,法院在不违背本法案的有关规定的情况下,将不再进行审理。对于仲裁员的指定方式,可以由当事人约定。如果只有部分当事人同意将他们之间的诉争事项提交仲裁,法院同意且该争议事项可以与其他诉争事项分离的,法院可以根据本章规定将争议提交仲裁;而对于剩余当事人之间的争议法院应当继续审理。仲裁员在这种情况下作出的裁决仅对提出申请的部分当事人具有约束力。

(5)一般条款。

《巴基斯坦仲裁法案》第5章对涉及仲裁的一般问题作出规定,主要包含以下内容:

第一,仲裁裁决应当附具理由。仲裁员或公断人应当在裁决书中对裁决理由予以充分说明,以便法院对裁决涉及的任何法律问题能够予以考虑。如果裁决理由不充分,法院应当将该裁决发回仲裁员或公断人予以补充说明,并要求其在规定的期间内再次提交法院;法院可以对该期限予以延长。如果仲裁员或公断人在规定的期限内不能再次提交裁决,那么该裁决无效。[1] 另外,除非当事人在仲裁协议中有明确的相反约定,仲裁员或公断人有权作出中间裁决;该法案的所有规定也适用于该中间裁决。

第二,裁决期限的延长。[2] 法院认为适当时,可以延长裁决期限,无论裁决期限是否已届满或是否已经作出。此外,当事人也可以一致同意延长裁决期限。

第三,裁决的撤销。法案规定,除非存在下列一种或多种理由,否则裁决不得被

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〔1〕 参见1940年《巴基斯坦仲裁法案》第26条。英文原文为:26 – A. Award to set out reasons: “(1) The arbitrators or umpire shall state in the award the reasons for the award in sufficient detail to enable the Court to consider any question of law arising out of the award. (2) Where the award does not state the reasons in sufficient detail, the Court shall remit the award to the arbitrators or umpire and fix the time within which the arbitrator or umpire shall submit the award together with the reasons in sufficient detail”。

〔2〕 参见1940年《巴基斯坦仲裁法案》第28条。

撤销:仲裁员或公断人存在不当行为;仲裁裁决是在法院裁定仲裁协议不再有效之后作出的,或者是在仲裁程序根据该法案第35条被宣布无效后作出的;仲裁裁决以不适当的方式作出或者因其他原因而无效。

第四,司法机关中止司法程序的权力。在存在仲裁协议而又启动司法程序的情况下,当事人可以在提出书面陈述或采取其他步骤之前向受理该司法程序的司法机关提出申请,请求其中止有关司法程序。如果司法机关认为不应根据仲裁协议进行仲裁的理由不充分,且申请人在司法程序开始时直至提出申请之时都愿意进行仲裁,那么该司法机关可以裁定中止司法程序。

(6)上诉。

《巴基斯坦仲裁法案》第6章规定,可以对根据本法案(不包括其他法案)所作的下列裁定提起上诉:宣布仲裁协议不再有效的裁定;对裁决进行修改或更正的裁定;当存在仲裁协议时中止或拒绝中止司法程序的裁定;撤销或拒绝撤销裁决的裁定。对上述裁定只能上诉一次,但不影响当事人向最高法院上诉的权利。对小额诉讼法庭(Small Cause Court)作出的裁定不得上诉。

(7)杂项规定。

该法案第7章对下列问题作出规定:第一,除非根据法案第21条之规定,否则小额诉讼法庭对任何仲裁程序或任何因仲裁而提起的申请不享有管辖权。第二,法院具有的程序性权力,包括采取临时措施及送达等权力。总体来说,法院在行使程序性权力时应当根据1908年《巴基斯坦民事诉讼法典》进行。

2. 简要评析

巴基斯坦在制定《巴基斯坦仲裁法案》时尚未从英属印度中独立出来,作为至今依然有效的法案,具有以下特点:

第一,法案条文较多,规定详细。该法案共有49条,另外加2个附件,对于仲裁程序涉及的一般问题都作出了规定,包括仲裁协议的形式和效力、仲裁程序在不同情况下的启动程序、仲裁员的指定和报酬、裁决的形式、仲裁中临时措施的发布、仲裁裁决的更正、法院对仲裁的司法监督等。应当说,该法案在通过时是比较完善和先进的,受到英国仲裁法的影响。

第二,该法案由于制定历史较久远,未能体现目前商事仲裁中的一些基本制度(如仲裁协议独立性原则、仲裁庭自裁管辖权原则、仲裁庭发布临时措施的权力、仲裁一裁终局原则等),这使仲裁作为替代性争端解决机制的独立性未能得到充分体现。

第三,法院在对仲裁提供司法协助的同时,更多地表现为对仲裁的监督与控制。包括对仲裁员的指定与除名、对仲裁裁决的审查及发回重审的决定、对仲裁协议效力的认定,以及对存在仲裁协议时是否中止司法程序的决定等,都体现了法院对仲裁程序的干预。事实上,该法案在第 2 章和第 3 章规定仲裁程序的启动时采用了“干预”(intervention)这种表述,也在一定程度上表明法院在整个仲裁程序中的地位。

第四,法案在一定程度上被 2017 年《巴基斯坦替代性争端解决法案》所取代,其适用空间将会越来越小。

(二)2011 年《巴基斯坦承认与执行法案》

1. 主要内容

(1)定义条款。

2011 年《巴基斯坦承认与执行法案》第 2 条对有关术语进行了界定。比较重要的有以下几个定义:第一,明确指出本法案所称的“公约”就是《纽约公约》,并以附件形式置于法案条文之后。第二,把“外国仲裁裁决”界定为在《纽约公约》缔约国境内作出的裁决,以及在巴基斯坦联邦政府官方公报上公布的另一国家境内作出的裁决。第三,本法案所指称的“法院”是指巴基斯坦高等法院(High Court)及巴基斯坦联邦政府在官方公报上公布的其他巴基斯坦境内高等法院。

(2)法院的管辖权。

2011 年《巴基斯坦承认与执行法案》第 3 条明确了巴基斯坦高等法院的管辖权:第一,高等法院对与本法案有关的或者因本法案而产生的争议具有排他的管辖权,即使其他法律另有规定。第二,根据《纽约公约》第 2 条提出的中止法律程序的申请可以向高等法院提出。第三,在行使管辖权时,高等法院应当遵守 1908 年《巴基斯坦民事诉讼程序法典》的有关规定,同时也享有该法典赋予民事法庭的一切权力。

(3)仲裁协议的可执行性。

2011 年《巴基斯坦承认与执行法案》明确规定了仲裁协议的可执行性,即在双方当事人签订有仲裁协议的情况下,如果一方当事人向巴基斯坦法院提起诉讼,另一方当事人在通知提起诉讼的一方当事人后,可以向受理该案的法院请求中止诉讼程序,将仲裁协议约定的争议事项提交仲裁解决。受理案件的法院在收到这样的请求后,应当指示双方当事人将争议提交仲裁解决;除非法院认为仲裁协议无效或者无法执行。

(4)外国仲裁裁决的执行。

2011 年《巴基斯坦承认与执行法案》明确规定,除非具有《纽约公约》第 5 条规定的事由,否则巴基斯坦高等法院不得拒绝承认与执行外国仲裁裁决。申请人在申请承认与执行外国仲裁裁决时,应当根据《纽约公约》第 4 条提供有关文件,巴基斯坦高等法院在收到该申请后,应当以执行其本国法院所作出判决或命令的方式承认与执行该外国仲裁裁决。对于巴基斯坦高等法院认为应当予以执行的外国仲裁裁决,其约束力对双方当事人来说是全面的,可以在巴基斯坦的任何法律程序中作为依据援引,也可以进行抵销债权债务等。

(5)《纽约公约》的优先性。

2011 年《巴基斯坦承认与执行法案》明确规定,在法案与《纽约公约》发生不一致时,应当以《纽约公约》优先。

(6)该法案与其他相关国内法的关系。

2011 年《巴基斯坦承认与执行法案》明确规定,除下述情形外,前述 1937 年法案被废止:第一,外国仲裁裁决于本法案生效之前作出;第二,根据本法案第 2 条关于外国仲裁裁决的界定,裁决不属于本法案所规定的外国仲裁裁决。

2. 简要评析

2011 年《巴基斯坦承认与执行法案》是巴基斯坦为了执行 1958 年《纽约公约》而专门制定的国内法。相对之前的总统令而言,法案具有明确性与稳定性,也使外国仲裁裁决在巴基斯坦的承认与执行具有一定的可预见性。此外,该法案还具有如下特点:第一,明确规定受理外国仲裁裁决承认与执行申请的法院是高等法院,这种审级的规定有利于维护外国仲裁裁决的权威性,表明巴基斯坦对国际商事仲裁友好和支持的态度。第二,拒绝承认与执行外国仲裁裁决的事由为《纽约公约》规定的事由,并且是穷尽式的。也就是说,巴基斯坦高等法院不得以《纽约公约》未规定的其他事由作为拒绝承认与执行外国仲裁裁决的理由;这与目前大部分国家的规定是一致的。第三,对外国仲裁裁决的认定具有一定的灵活性。虽然巴基斯坦在批准《纽约公约》时作出了互惠保留,但在该法案中并没有完全排除在非缔约国境内作出的仲裁裁决属于外国仲裁裁决从而适用《纽约公约》的可能性;但前提是巴基斯坦联邦政府在官方公报上公布有关非缔约国的名单。这事实上是对互惠保留的一种补充,即巴基斯坦并未采取完全的互惠保留。第四,该法案并非巴基斯坦的仲裁法,它的立法目的单一,对于仲裁程序涉及的很多问题都没有作出相应规定;因此其适用范围是非常有限的。

(三)2011 年《巴基斯坦仲裁(国际投资争端)法案》

1. 主要内容

(1)定义条款。

在 2011 年《巴基斯坦仲裁(国际投资争端)法案》中,“裁决”包括对某个仲裁裁决进行解释、予以撤销或宣布无效的决定,也包括根据《华盛顿公约》所作出的决定,还包括针对仲裁费用所作出的任何决定(该决定构成公约项下裁决的一部分)。“中心”是指根据《华盛顿公约》所建立的解决投资争端国际中心(ICSID)。

(2)登记程序。

若当事人拟在巴基斯坦请求承认与执行 ICSID 所作出的裁决,则应当履行相应的登记程序。请求应当向高等法院提出,并且执行的应当是给付特定金钱数额的裁决。ICSID 所作出的裁决对巴基斯坦政府具有约束力,但并不因此可以对巴基斯坦政府强制执行。如果巴基斯坦政府不是裁决的一方当事人,对其则无约束力。

(3)1940 年《巴基斯坦仲裁法案》对《华盛顿公约》项下的程序不予适用,也就是排除了 1940 年《巴基斯坦仲裁法案》的适用。

2. 简要评析

与前述 2011 年《巴基斯坦承认与执行法案》的立法目的一样,2011 年《巴基斯坦仲裁(国际投资争端)法案》的目的是在巴基斯坦承认与执行 ICSID 根据《华盛顿公约》所作出的裁决。该法案内容较为简单,主要就 ICSID 裁决在巴基斯坦的承认与执行程序作出了简要规定,同时对执行的内容也限定为给付特定数额的金钱债务。在巴基斯坦与其他国家签署的双边投资保护协定中,大多约定投资者可以将其与东道国之间发生的投资争端提交 ICSID 解决。不过,巴基斯坦法学理论界对 ICSID 解决投资争议存在不同意见,甚至有批判言论。比如,Tariq Hassan 博士就曾撰文对 ICSID 作出评论,认为 ICSID 位于美国华盛顿,这对发展中国家来说是地理位置上的劣势;ICSID 案件的律师大部分是欧美国家的,发展中国家往往无力负担昂贵的律师费;世界银行可能对投资者产生不公平的政治影响等。[1] 但这些观点遭到其他学者的驳斥。[2] 不过,也正是在这样的理论争鸣下,巴基斯坦通过了 2011 年《巴基斯坦仲裁(国际投资争端)法案》,向外国投资者表明其对 ICSID 争端

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[1] See Tariq Hassan, *International Arbitration in Pakistan – A Developing Country Perspective*, Journal of International Arbitration, (Kluwer Law International 2002, Volume 19 Issue 6) pp. 591 – 600.

[2] See Gordon Jaynes, International Arbitration in Pakistan, Journal of International Arbitration, (Kluwer Law International 2004, Volume 21 Issue 1) pp. 83 – 89.

解决机制的信任,同时也在大力培育国际仲裁专业人士。

(四)2017 年《巴基斯坦替代性争端解决法案》

1. 主要内容

(1)替代性争端解决方式。

替代性争端解决方式(Alternative Dispute Resolution,ADR)是指当事人通过法院诉讼程序之外的途径解决其争议,包括但不限于仲裁、调解、调停及中立评估。依据 2017 年《巴基斯坦替代性争端解决法案》的规定,仲裁,是指当事人将争议提交其共同指定的、通过法律规定指定的或者合同条款指定的中立人士(neutral person or persons)予以解决的程序;该中立人士作出的决定就是仲裁裁决。调解,是指调解员鼓励当事人通过沟通和谈判达成相互满意的协议,从而促使争端解决的程序。调停,是指中立人士通过提供可能的解决方案及和解条件鼓励当事人自愿解决他们之间的民商事争议的程序。该法案所说的中立人士包括仲裁员(arbitrator)、调解员(mediator)、调停人员(conciliator)、评估人员(evaluator)或者任何其他中立人士(impartial person)。

(2)可提交 ADR 解决的争议事项。

2017 年《巴基斯坦替代性争端解决法案》通过附件的形式规定了可提交 ADR 解决的 22 种民商事争议事项:(1)房屋租赁合同争议;(2)优先权案件(pre-emption cases);(3)土地及财产争议;(4)2002 年《巴基斯坦小额诉讼与轻微犯罪法院令》所规定的民事争议;(5)商事争议,包括但不限于因贸易和商事关系产生的任何索赔、权利或利益;(6)合同争议案件;(7)与职业过失有关的争议;(8)要求实际履行的请求(suits for specific performance);(9)公司与银行争议;(10)保险争议;(11)可转让票据争议(negotiable instruments);(12)人身伤害案件;(13)损害赔偿诉讼;(14)专利、商标以及著作权争议;(15)《巴基斯坦渠道法》(Canal and Drainage)项下的争议;(16)因动产或其价值赔偿产生的争议;(17)通过分割或其他方式区分共有不动产产生的争议;(18)因赎回抵押财产而产生的争议;(19)因让渡共有财产账户而产生的争议;(20)因限制浪费和排除妨害而产生的争议;(21)因财产中间收益而产生的争议;(22)本附件没有列举的但当事人根据本法可以约定通过 ADR 解决的任何其他事项。

(3)民事争议提交 ADR 解决程序。ADR 解决程序包含以下 6 个方面:

第一,ADR 程序的启动。

2017 年《巴基斯坦替代性争端解决法案》分别就可提交 ADR 解决的民事争议

与可和解的犯罪规定了不同的程序。对于可提交 ADR 解决的民事争议,法院在所有当事人都到庭的当天,将争议提交 ADR 解决。如果争议的任何一方当事人不同意通过 ADR 解决该争议,且法院根据案件事实和所处情形认为不可能通过 ADR 解决该争议,或者争议涉及复杂的法律或事实问题的,则争议不提交 ADR 解决。在将争议提交 ADR 解决之前,法院经当事人同意可以归纳争议焦点,以促使争议快速解决。ADR 程序进行中,应当事人共同要求,中立人士也可以归纳争议焦点。此外,法院在诉讼程序一方当事人的申请下,且征得所有当事人同意,可以在诉讼的任何阶段将附件所列的任何民事争议提交 ADR 解决。

第二,中立人士委员会的组成。

2017 年《巴基斯坦替代性争端解决法案》规定,巴基斯坦联邦政府与高等法院会商之后,从各区具有至少 7 年执业经验的律师、退休法官、退休公务员、乌理玛(ulema,回伊斯兰国家有名望的教法学家或神教学家)、法学家、技术专家(technocrats)、专家(experts)以及其他具有类似资格与经验的有名望和正直的人士中挑选人员组成中立人士委员会,并在官方公报上予以公布。上述中立人士的选取还应适当考虑女性的比例。联邦政府可以为上述人士提供必要的培训。该中立人士委员会的名单并非永久的,联邦政府在特定条件下可以增减或变更委员会的人员。但是,当中立人士开始行使 ADR 权力时,联邦政府不得将该人士替换,除非当事人一致同意。

第三,中立人士的指定。

2017 年《巴基斯坦替代性争端解决法案》规定,将争议事项提交 ADR 解决时,法院应当指定一名当事人均同意的中立人士或其他人员来解决争议,也可以将争议提交 ADR 中心(ADR Centre)解决。如果将争议提交 ADR 中心解决,法院也需要征得当事人的同意。ADR 中心由联邦政府在官方公报上予以公布。只有在当事人对中立人士或其他人员均达不成一致意见时,法院才可以根据自由裁量权指定一个中立人士解决争议。另外,法案还规定,如果争议一方或双方都是女性,那么中立人士应当最好是一名女性。

第四,ADR 程序。

2017 年《巴基斯坦替代性争端解决法案》规定,在将争议提交 ADR 解决后,法院应当命令当事人在其规定的时间前往中立人士处或 ADR 中心参与案件审理。当事人既可以亲自参与 ADR 程序,也可以通过适当授权的代表或律师参与。

中立人士或者 ADR 中心应当在 30 日内通过调解或调停方式解决争议。如果

中立人士请求延长期限,法院或 ADR 中心认为有充分理由的,可将该期限延长 15 日。通过仲裁方式解决争议的,仲裁员应当在 60 日内作出裁决。在仲裁员的请求下,法院认为有充分理由的,该期限可以延长 30 日。

对于 ADR 程序的推进,法院可以不时地作出其认为适当的指示,该指示对当事人和中立人士具有同样的约束力。

2017 年《巴基斯坦替代性争端解决法案》规定当事人有义务配合推进 ADR 程序,任何一方当事人不参加 ADR 程序,或者要求中止程序,或者对法院或中立人士规定的最后期限不予遵守,或者存在任何可能延误 ADR 程序的行为,中立人士都有权要求该当事人向另一方当事人支付费用。

第五,和解协议与仲裁裁决。

如果当事人通过调解或调停方式就争议解决达成协议,中立人士应当记录该协议,由其本人以及当事人或当事人适当授权的代表或律师见证并签署,然后提交法院;法院应当据此作出判决。如果双方当事人就部分争议达成协议,那么法院应当根据该部分协议作出判决;对未决事项通过司法途径解决。

如果争议是通过仲裁方式解决的,仲裁员应当作出书面裁决,并由其本人和当事人或当事人适当授权的代表或律师签署,然后提交法院,法院据此作出判决。

如果当事人在诉讼程序开始之前将争议提交 ADR 中心指定的中立人士解决,那么通过调解、调停达成的协议或通过仲裁作出的裁决应当由中立人士和当事人或者当事人适当授权的代表或律师见证、签署,并提交给 ADR 中心,然后由 ADR 中心提交至法院;法院据此作出判决。

法案还规定,当事人可以不诉诸 ADR 中心而自行通过 ADR 方式解决争议。如果达成和解协议(不包括仲裁裁决),当事人可以请求法院根据该和解协议作出判决。如果法院认为争议事项是当事人通过自愿方式解决的,且记录和解协议的文件已由当事人见证并签署,法院可以据此作出判决。

法院对根据和解协议及仲裁裁决作出的判决可以规定执行程序。若在本法案中未规定有关程序,则应当根据有关法律规定的程序予以执行。

第六,ADR 的失败。

如果中立人士不能促使当事人达成和解协议或无法作出仲裁裁决,那么中立人士应当将这种情况报告法院,法院应当从提交 ADR 时的诉讼程序开始继续审理案件。

如果当事人直接将争议提交 ADR 中心解决,或者在诉讼程序启动前将争议提

交 ADR 解决,那么在 ADR 失败的情况下,在向法院详细说明 ADR 失败情形之前,任何一方当事人都不得启动诉讼程序。

(4)杂项规定。

第一,费用分担。法案规定,ADR 程序产生的费用应由当事人根据其约定分担;未进行约定的,由法院判定。在 ADR 程序中,法院、中立人士或者 ADR 中心可以就某些诸如金融等专业问题聘请评估人员进行评估,该聘请的评估人员应当出具评估报告。评估人员的费用由法院判定在当事人之间分担。此外,2017 年《巴基斯坦替代性争端解决法案》还规定,如果一方当事人故意违反本法案规定,或者违背法院规则或命令的,法院可以判处该方当事人罚金(最高可达 10 万卢比)。

第二,禁止上诉。该法案明确规定,对于法院根据本法案所作裁定或任何命令,均不得提起上诉或复议。

第三,免于风险(savings)。法案规定,由中立人士主持的程序应当具有保密性;在取得有关当事人同意之前,任何法院不得将该程序作为证据采纳,也不得要求有关中立人士在与该争议有关的诉讼程序或 ADR 程序中作证;当然,该中立人士也不得在这些程序中担任任何一方当事人的代理人或律师。但是,如果当事人根据该法案第 1 章和第 2 章的规定通过 ADR 获得了仲裁裁决,或者达成和解协议并由法院作出判决,那么该仲裁裁决及和解协议可以在之后的与该争议标的有关的程序中作为证据使用。此外,法案还明确规定中立人士享有被诉的豁免权,即不得对中立人士在善意履行其争端解决职能过程中的任何作为或不作为提起法律诉讼。

第四,与其他相关法律的关系。法案规定,1873 年《巴基斯坦宣誓法案》(Oaths Act, 1873)、1908 年《巴基斯坦时效法案》(Limitation Act, 1908)、1940 年《巴基斯坦仲裁法案》有关规定的适用不得违背本法案。法案特别强调根据本法案所进行的仲裁,仲裁员必须由双方协商指定,即便 1940 年《巴基斯坦仲裁法案》存在不同规定。另外,在根据本法案提起的 ADR 程序中,1898 年《巴基斯坦刑事诉讼程序法典》(Code of Criminal Procedure, 1898)、1908 年《巴基斯坦民事诉讼程序法典》(Code of Civil Procedure, 1908)及 1984 年《伊斯兰证据法案》(*Qanun – e – Shahadat*, 1984)的有关规定不得适用。

2. 简要评析

作为巴基斯坦在可替代性争端解决领域的最新立法,2017 年《巴基斯坦替代性争端解决法案》具有以下特点:

第一,涵盖了目前所有的可替代性争端解决机制,包括仲裁、调解、调停及中立评估等机制,并且采取的是非穷尽式列举的立法方式,并不排除将来可能出现其他可替代性争端解决模式。

第二,为当事人提供了"一站式"争端解决平台。根据该法案,可替代性争端解决机制既可以在法院已经开始诉讼程序的情况下启动,也可以在司法程序开始之前由当事人自主启动。但无论哪种形式,都需以当事人同意为前提。这体现了启动ADR 程序的一个基本原则,即当事人意思自治原则。

第三,法院对 ADR 程序的监督与支持。2017 年法案所规定的 ADR 争端解决机制是在法院主导下的争端解决机制,它与一般的 ADR 模式不同。就一般的 ADR 模式而言,法院一般不会主动介入程序,只有在当事人请求的情况下才会有限介入:比如,当事人请求确认通过调解达成的协议的法律效力;或者请求撤销仲裁裁决,或者请求承认与执行仲裁裁决。但是,在该法案下,法院可以对 ADR 程序的推进作出其认为适当的指导,该指导对当事人以及中立人士均具有约束力。这可能引起对 ADR 程序独立性的质疑,尤其是通过仲裁解决争议的情况下。此外,在当事人通过 ADR 程序取得和解协议或仲裁裁决的情况下,有关中立人士(包括仲裁员)应当将所涉和解协议和仲裁裁决提交法院,以便法院据此作出判决。从这些特征来看,2017 年法案所确立的可替代性争端解决机制是在法院主导下的争端解决机制,它给予当事人一定的自治权,赋予中立人士一定的独立解决争议的权力,但通过 ADR 程序所取得的结果都需要得到法院的最终确认才具有法律约束力。因此,笔者认为这种可替代性争端解决机制与我们一般意义上所讲的调解和仲裁不一样;至于其在实践中效果如何,还将拭目以待。

第四,本法案在一定程度上废除了之前有关法案关于仲裁的法律规定。笔者认为,其目的是统一巴基斯坦在仲裁方面的立法规定。同时因为 1940 年《巴基斯坦仲裁法案》制定的历史较长,很多规定已经无法满足当代民商事争端解决的需求,并可能对巴基斯坦的国际民商事交往产生不利影响。

三、巴基斯坦国际投资与商事仲裁中心及其规则

(一)中心简介

巴基斯坦国际投资与商事仲裁中心(Center for International Investment and Commercial Arbitration,CIICA)于 2015 年 4 月成立,总部设在巴基斯坦第二大城市拉合尔,是巴基斯坦第一家提供仲裁、调解和其他争议解决服务的国际仲裁中心。中心的仲裁员名册中包括知名的国内仲裁员,以及来自美国、澳大利亚、中国、加拿

大和英国的优秀国外仲裁员。此外,该中心是一个经过登记的独立组织,其目标包括推动与国际仲裁有关的培训、研究及立法改革。

该中心设有独立的理事会(CIICA Council),理事会由律师、行业专家和商人组成。理事会不负责争议解决,其行使的只是行政管理的职能。由世界著名学者组成的全球顾问委员会(Global Board of Advisors)也会为国内、国际仲裁案件的解决提供建议和帮助。为了吸引更多的外国投资,该中心提供的争端解决方式也是多元化的,除仲裁和调解以外,还不断推进其他替代性争端解决方式的运用,从而为外国投资者营造良好的法律服务环境。

该中心于2016年颁布了《CIICA仲裁调解规则》,于同年4月5日开始施行。该规则是中心成立以来颁布的第一个仲裁调解规则,是在走访调研、召开专门研讨会的基础上制定的,且参考了世界各知名仲裁机构的相关规定。因此,该仲裁调解规则具有一定国际性,符合国际仲裁基本实践。下文将对中心的仲裁调解规则进行具体介绍。

(二)《CIICA仲裁规则》

《CIICA仲裁规则》共有36条,同时还有一个关于紧急仲裁员的附件。根据其内容可以划分将其为以下几个部分:

1.一般规定

《CIICA仲裁规则》的一般规定部分主要包括其适用范围和术语的解释、通知的送达及期间的计算,以及仲裁的申请与答辩等方面的内容。

(1)适用范围和术语解释。

与世界上大多数国际商事仲裁中心的规则一样,《CIICA仲裁规则》可以由当事人选择适用。其规定,如果当事人仅选择中心作为仲裁机构而未明确规定仲裁规则的,将视为同意适用中心的仲裁规则。但是,如果该仲裁规则的适用与仲裁准据法的强制性规定相抵触,则以强制性规定为准。该规则对涉及的术语作出了界定,例如,“裁决”,是指部分裁决、中间裁决或者终局裁决以及紧急仲裁员作出的裁决;“仲裁院”,是指巴基斯坦国际投资和商事仲裁中心仲裁院,包括仲裁院委员会;“仲裁院委员会”,是指由仲裁院主席任命的至少2名仲裁院成员组成的委员会(可包括主席在内);“主席”,是指仲裁院的主席;“秘书处”,是指巴基斯坦国际投资和商事仲裁中心的秘书处;“巴仲”,是指巴基斯坦国际投资和商事仲裁中心;“仲裁庭”,是指由独任仲裁员组成的仲裁庭或由全体仲裁员(被指定的仲裁员多于1名的情况)组成的仲裁庭。

(2)通知送达与期间计算。

规则规定的送达方式与目前国际商事仲裁的实践基本一致,既包括传统的个人送达、邮寄送达,也包括电子送达。有关通知或文书在发出当天就视为已经送达,期间则从视为已经送达的次日起开始计算。如果期间的最后一天在受送达地为非营业日,那么这个期间将顺延至非营业日后的第一个营业日。

当事人对于有关仲裁程序的任何通知、通信或建议,应当向秘书处提交一份副本。秘书处可以随时根据书面记录的理由延长或缩短该规则所规定的任何期限。

(3)申请仲裁。

根据《CIICA 仲裁规则》的规定,提起仲裁的申请人应向秘书处提交一份仲裁通知书,仲裁自秘书处收到仲裁通知书之日起开始。仲裁通知书的内容主要包括:要求将争议事项提交仲裁的意思表示;仲裁当事人及其代表的名称、地址、电话号码、传真号码和电子邮件地址;提交仲裁所援引的仲裁协议或仲裁条款,并附具该仲裁协议的副本;提交仲裁所援引的引起争议事项或者与争议事项有关的合同或其他文件及其副本;简述争议事项的性质和相关情形,列明仲裁请求的救济事项,并尽可能对索赔金额进行初步的量化;陈述当事人之间事先达成的有关仲裁程序应如何进行的约定或者仲裁申请人对仲裁程序应如何进行提出的建议;关于仲裁员人数的建议(如果仲裁协议中未明确仲裁员的人数);除非当事人另有约定,仲裁协议约定独任仲裁员的,申请人应当提出独任仲裁员的人选建议;仲裁协议约定三人仲裁庭的,申请人应当提名一位仲裁员。

(4)答辩。

《CIICA 仲裁规则》规定,被申请人在收到仲裁通知书之日起 14 日内,应当向秘书处递交答辩书。答辩书中应当载明下列内容:确认或者否认全部或部分仲裁请求;如果被申请人提出反请求,应当简述反请求争议事项的性质和相关情形,列明反请求的救济事项,并尽可能地对反请求事项的索赔金额进行初步的量化;对依本规则提交的仲裁通知书中的任何陈述提出意见,或者对该条所包含的事项提出意见;除非当事人另有约定,否则仲裁协议规定三名仲裁员的,被申请人应当提名一位仲裁员;仲裁协议规定独任仲裁员的,被申请人应当对申请人提出的独任仲裁员的人选发表意见或者提出新的人选建议。

被申请人应同时向秘书处发送答辩书副本,并支付反请求所需的申请费用。

2. 仲裁庭的组成

该部分主要包括仲裁员的人数及指定、仲裁员的资格、仲裁员的回避与更换等

内容。

(1)仲裁员人数及其指定。

《CIICA 仲裁规则》规定,除当事人另有约定或秘书处基于案件的性质认为争议需要指定三名仲裁员进行审理的,案件均应指定一名独任仲裁员进行审理。由此可见,一名仲裁员审理为原则,三人仲裁庭则是例外情形。

当事人可以约定由一名或多名当事人或者由第三方来指定仲裁员;对于一名或多名当事人,或者第三方提名的仲裁员,需要主席对提名加以确认。由此可见,在仲裁员指定方面的规定,该规则一方面充分尊重当事人的意思自治,另一方面也体现了 CIICA 中心的管理职能。

仲裁庭为独任仲裁员时,任何一方当事人可以向另一方当事人提议一名或者数名担任独任仲裁员的人选。当事人达成提名独任仲裁员的协议后,需要主席对提名加以确认。如果从秘书处收到仲裁通知起的 28 日内,当事人未能就独任仲裁员的人选达成一致意见,或者经任何一方当事人请求的,主席应当指定仲裁员。

仲裁庭为三名仲裁员时,各方当事人应当各自提名一名仲裁员。如果一方当事人在收到另一方当事人提名仲裁员的通知之日起 14 日内未能提名一名仲裁员,则主席代表该当事人指定一位仲裁员。在三人仲裁庭中,第三名或首席仲裁员通过以下方式指定:由双方当事人共同指定、由双方当事人共同指定的仲裁员指定或由主席指定。如果在当事人约定或秘书处确定的期限内,当事人未能就第三名仲裁员或首席仲裁员的指定达成一致意见,则第三名仲裁员或首席仲裁员应当由主席指定,且主席任命仲裁员的决定应当是终局的。

关于多方当事人仲裁庭的组成有以下规定。仲裁案件中有两个以上当事人,且需要指定三名仲裁员的,申请人一方和被申请人一方应当分别共同提名一位仲裁员。如果从秘书处收到仲裁通知之日起 28 日内,或者在当事人约定或秘书处指定的期限内,未能就上述的共同提名达成一致,则三名仲裁员全部由主席任命,并指定其中一位仲裁员担任首席仲裁员。仲裁案件中有两个以上当事人,且需要指定一名独任仲裁员的,各个当事人必须在秘书处收到仲裁通知之日起 28 日内,或在当事人约定或秘书处指定的期限内就独任仲裁员的提名达成一致。如果当事人之间未能就提名达成一致意见,则主席应当指定该案的独任仲裁员。

(2)仲裁员资格。

《CIICA 仲裁规则》在仲裁员资格方面的规定与目前国际商事仲裁的实践基本一致,要求仲裁员在进行仲裁时应当是独立和公正的,不代表任何一方当事人。主

席依该规则指定仲裁员时，应对当事人就仲裁员资质要求的约定以及仲裁员独立公正等重要因素给予适当考虑。

此外，规则在仲裁员资格的规定中包含了仲裁员的披露义务。其规定，仲裁员在获得主席的任命之前，对于任何可能导致对仲裁员公正性或独立性产生合理怀疑的情形，应在合理可行的范围内尽快向当事各方和秘书处披露。在仲裁员获得任命之后，仲裁进行过程中，对于任何可能导致对仲裁员公正性或独立性产生合理怀疑的情形，仲裁员应立即向各方当事人、其他仲裁员和秘书处进行披露。规则中对于仲裁员披露义务中的规定与中心仲裁员的行为守则中的规定是一致的。

当事人或者当事人的代表人不得单方面与仲裁员或者由当事人提名的仲裁员候选人就案件的相关事项交换意见，但下列交流除外：就案件争议的基本性质和即将发起的仲裁程序进行交流；与仲裁候选人讨论其资格、是否有时间办案、与当事人有关的独立性问题；在当事人或者当事人提名的仲裁员要参与选择第三位仲裁员时，与仲裁员候选人讨论其是否适合作为第三位仲裁员。但是，当事人或者其代表人均不得单方面与首席仲裁员候选人就案件的相关事项交换意见。

（3）仲裁员的回避。

《CIICA 仲裁规则》规定，如果存在对仲裁员公正性或者独立性产生合理怀疑的情形，或者仲裁员未具备当事人约定的资质要求，当事人可以申请仲裁员回避。对于当事人自己提名的仲裁员，只有回避事由是在该仲裁员被指定之后该当事人才得知的情形，该当事人才能申请自己提名的仲裁员回避。

若一方当事人申请仲裁员回避，其应当在收到关于该仲裁员被指定的通知之日起 14 日内，或者在其得知仲裁员存在回避情形之日起 14 日内，向秘书处提交申请回避的通知书。秘书处可以暂停仲裁程序，直至回避申请得到解决。

在收到申请回避的通知之日起 7 日内，另一方当事人不同意该仲裁员回避的，并且申请回避的仲裁员也没有主动退出仲裁庭的，则 CIICA 中心仲裁理事会（Arbitration Council）应当决定是否支持回避申请。如果仲裁理事会决定支持回避的申请，则应当根据具体情况任命替代的仲裁员。如果仲裁理事会驳回了对仲裁员提出的回避申请，则该仲裁员应当继续参与仲裁。仲裁理事会对于回避申请作出的决定是终局的，不得上诉。

（4）仲裁员的更换。

在仲裁程序进行过程中，遇到有仲裁员死亡、辞职或被免职的情形的，应当按照适用于该仲裁员的提名和指定程序，重新任命一名替代的仲裁员。对于仲裁员

拒绝或者未履行职责,或者仲裁员发生法律或事实上不能履行职责的情形,或者没有依据《CIICA 仲裁规则》的规定履行其职责的,应当适用该规则有关仲裁员回避和更换的规定。对于仲裁员拒绝或者未履行职责,或者发生法律或事实上不能履行其职责的情形,或者没有依据该规则的规定履行其职责的情形,主席在征询当事人的意见后,可以免除该仲裁员的职务。

如果独任仲裁员或首席仲裁员被替换,除非当事人另有约定,否则之前进行过的审理程序均应当重新进行。如果更换的是其他仲裁员,则仲裁庭征询当事人意见后,可以自行决定是否重新审理。如果之前仲裁庭已作出中间裁决或部分裁决,该裁决继续有效,对仅与该裁决有关的审理不得重新进行。

3. 仲裁程序

仲裁程序部分主要是对仲裁程序中涉及的各个环节和相关问题的规定。

(1)仲裁地和仲裁语言。

《CIICA 仲裁规则》规定,当事人可以约定仲裁地;当事人未约定的,仲裁地应当是巴基斯坦拉合尔,除非仲裁庭在考虑案件所有相关因素和情况后认为另一地点更为合适。仲裁庭有权按照其认为适当的方式,在其认为便利或适当的地点组织庭审和举行会议。

对于仲裁语言,除非当事人另有约定,仲裁庭应当确定仲裁程序使用的语言。当事人所提交的文件使用了仲裁语言以外的其他语言的,仲裁庭或者秘书处可以要求该方当事人提供翻译文本;翻译文本形式由仲裁庭或者秘书处确定。

(2)仲裁庭管辖权。

《CIICA 仲裁规则》确立了仲裁庭自裁管辖权原则与仲裁条款独立性原则。仲裁庭组成之前,如果一方当事人对仲裁协议的存在或有效性有异议,或者对中心管理仲裁的资格有异议,秘书处应当决定是否须将这种异议提交仲裁院。若秘书处将异议提交至仲裁院,仲裁院应当确定仲裁协议是否表面有效。仲裁院认为仲裁协议无效的,仲裁程序应当终止。秘书处或仲裁院作出的决定并不影响仲裁庭就自身的管辖权作出裁决。仲裁庭有权决定自己的管辖权,包括对仲裁协议的存在、终止、有效性的异议作出决定。仲裁庭认定合同无效的决定并不导致仲裁协议的无效,因为仲裁协议被视为一个独立的合同,其效力独立于基础合同。

当事人认为仲裁庭不具有管辖权的,应当在答辩书或者反请求答辩书中提出。当事人认为仲裁庭超出管辖权的,应当在仲裁庭就所称的越权事项表明管辖权意图后及时提出。在以上两种管辖权异议的情形中,如果当事人迟延提出异议,仲裁

庭认为延迟的理由正当,仍可接受异议。当事人已经提名或者参与提名仲裁员的事实不构成妨碍其提出管辖权异议的理由。对没有提出异议的当事人,视为其放弃对程序提出异议的权利。对于管辖权异议,仲裁庭可以将其作为先决问题作出裁决,也可以在争议实体裁决中作出。如果仲裁庭认为其有管辖权,则应当就此作出部分裁决。

(3)仲裁程序的进行。

《CIICA 仲裁规则》赋予了仲裁庭对程序的高度控制权。该规则规定,仲裁庭应按照当事人约定的程序进行仲裁,以确保公平和快速地解决争端。如果当事人未就程序方面的问题达成一致意见,则仲裁庭有权自行决定仲裁程序。仲裁庭对所有证据的关联性、形式要求及可采纳性应具有决定权。仲裁庭有权决定审理程序的先后顺序,排除无关的证言或其他证据,并指令当事人就事关案件解决的全部或部分事项进行重点陈述。

除非当事人已根据该规则提交了仲裁申请书,否则申请人应当在仲裁庭规定的期限内向被申请人和仲裁庭提交仲裁申请书,仲裁申请书应当列明以下内容:支持仲裁请求的事实;与仲裁请求有关的法律依据或法律论证;主张的救济和所有可量化的索赔金额。

被申请人应当在仲裁庭规定的期限内向申请人和仲裁庭提交答辩书,答辩书应包括其所依据的事实和法律争议。被申请人在答辩书中还可以提起反请求。被申请人提出反请求的,申请人应当在 14 日内向被申请人发送反请求答辩书,列明以下内容:对反请求中所列事实与法律论证的承认或者否认;对反请求予以否认的依据;反请求答辩所依据的其他事实和法律论证。当事人可以在仲裁庭允许的情况下修改仲裁请求、反请求,或者更换其他陈述。但如果修改会造成不必要的延误,或者对另一方当事人带来不利影响,或者修改后的仲裁请求或反请求超出仲裁协议的范围,仲裁庭可以拒绝许可。仲裁庭应当决定当事人是否需要进一步提交材料,并且应规定提交的截止日期。申请人未在规定期限内提交申请书的,仲裁庭有权作出终止仲裁程序的命令或发出其他适当的指示。被申请人未提交答辩书,或者当事人在任何时候未能按照仲裁庭规定的方式提交材料的,仲裁庭有权继续进行仲裁。

对于仲裁的审理方式,《CIICA 仲裁规则》规定,除当事人约定仲裁只能书面审理外,仲裁应当开庭审理。开庭时,仲裁庭应当对当事人争议的实体问题(包括仲裁庭管辖权问题)所提出的证据或口头陈述进行审理。除非当事人另有约定,所有

会议和开庭均不公开进行,任何记录、笔录或使用的文件均应保密。

(4)仲裁庭的其他权力。

仲裁庭在仲裁程序中,除享有上述明确规定的权力之外,在不与仲裁准据法中的强制性规定相冲突的情况下,仲裁庭还应具有以下权力:作出更正合同的命令,但范围仅限于仲裁庭认定该错误系合同全部当事人的疏忽造成的,且需满足合同准据法就该更正所规定的条件;经一方当事人申请,仲裁庭有权允许一名或数名第三人加入仲裁,只要申请人为仲裁协议当事人,且第三方书面同意加入仲裁,仲裁庭有权随后针对全部当事人作出一份最终裁决或数份单独裁决;延长、缩短本规则规定的期限;进行其认为必要的询问;命令当事人将其财产或物品处于可检验的状态;命令对全部或部分属于争议标的财产或物品进行保管、储存、售卖或处置;命令当事人提交其占有或控制的相关的/有实质关联性的文件副本,以接受仲裁庭和其他当事人的检验;对未支付的仲裁费用作出裁决等。

4. 裁决

《CIICA 仲裁规则》对裁决的种类、裁决的更正和补充及费用和保证金等事项作了明确规定。

(1)中间裁决和紧急裁决。

《CIICA 仲裁规则》规定,除了最终裁决外,仲裁庭还可以根据当事人的请求,作出禁令或其认为适当的其他临时救济。仲裁庭有权命令申请中间裁决的当事人提供与所申请救济有关的适当担保。仲裁庭组成之前,当事人可以依据该规则附件一规定的程序申请紧急仲裁。在仲裁庭组成之前或仲裁庭组成之后的例外情况下,当事人可以向司法机关申请临时救济。在寻求这种临时救济之前,当事人无须得到仲裁庭的允许。

(2)最终裁决。

仲裁庭在与各方当事人协商后,如果认为各方当事人没有进一步陈述,则应当宣布审理程序终结。仲裁庭应当在宣布审理终结之日起 30 日内,向秘书处提交裁决书草案。该裁决书草案被推定为一项合理的裁决。如果裁决书草案在格式上存在问题,秘书处应当尽快提出修改建议。裁决书草案的格式未经秘书处批准的,仲裁庭不得作出任何裁决。仲裁庭由一名以上仲裁员组成的,应当按照多数意见作出裁决;未形成多数意见的,应当由首席仲裁员单独作出裁决。

当事人达成和解,且当事人提出请求的,仲裁庭可以记录和解协议,并作出合意裁决。当事人不要作出合意裁决的,应当向秘书处确认已达成和解。

(3)裁决书的更正和补充裁决。

对于裁决书中存在的计算错误、笔误、打印错误或类似性质的错误,当事人在收到裁决书之日起30日内经书面通知秘书处和其他当事人,可以要求仲裁庭予以更正。其他当事人可以在收到通知之日起15日内,就该请求提出意见。如果仲裁庭认为该请求合理,应当在收到请求之日起30日内作出更正。

当事人在收到裁决书之日起30日内,经书面通知秘书处和其他当事人,可以请求仲裁庭就仲裁程序中提出但没有得到裁决的请求作出补充裁决。其他当事人可以在收到该通知之日起15日内就该请求发表意见。如果仲裁庭认为该请求合理,应当在收到请求之日起45日内作出补充裁决。

当事人在收到裁决书之日起30日内,经书面通知秘书处和其他当事人,可以请求仲裁庭作出裁决解释。其他当事人可以在收到该通知之日起15日内就该请求发表意见。如果仲裁庭认为该请求合理,应当在收到请求书之日起45日内作出书面解释;该解释应当构成裁决的一部分。

(4)准据法。

有关当事人争议实体问题的法律适用《CIICA仲裁规则》规定,仲裁庭应当适用当事人选择的法律,如果当事人未能选择法律,仲裁庭可以适用其认为适当的法律作为准据法。只有在当事人明确授权的情况下,仲裁庭才可以作为友好公断人或依公允善良的原则作出裁决。对于所有仲裁案件,仲裁庭应当依据合同条款作出裁决;对可能适用的商业惯例也应当予以考虑。

(5)费用和保证金。

《CIICA仲裁规则》规定,仲裁庭报酬和中心费用应当依据仲裁程序开始时适用的费用表予以确定。当事人可以在仲裁庭组成之前约定确定仲裁庭报酬的其他方法。秘书处应当确定仲裁费用的预付款。申请人和被申请人各付50%的预付款,但秘书处另做指示的除外。秘书处可以分别确定仲裁请求和反请求的预付款。如果已逾付款期限,当事人仍未能确定仲裁请求或反请求的索赔金额,秘书处应当暂估仲裁费用。该暂估的仲裁费用可以结合争议的性质、案件情况进行估算。待争议金额进一步确定后,对暂估费用可以进行相应的调整。

秘书处可以不定期地指示当事人进一步支付与仲裁程序有关的已经发生的和即将发生的费用。一方当事人未付款的,秘书处征询仲裁庭和当事人意见后,可以指示仲裁庭中止审理,并规定付款期限。当事人在付款期限届满时仍未支付的,应当视为撤回相关的仲裁请求或反请求;但这不影响该当事人就相同的请求或反请

求另行提出申请。

当事人对仲裁费用承担连带责任,如果一方当事人未支付关于请求或反请求仲裁费用的预付款或保证金中的应付份额,另一方当事人可以支付全部预付款或保证金。当事人全部或部分未支付预付款或保证金的,仲裁庭或秘书处可以完全地或部分地中止各自的工作。当事人提出裁决申请的,仲裁庭也可以根据《CIICA仲裁规则》的规定作出仲裁费用裁决。如果当事人自行和解或者未经审理即结案的,仲裁费用最终应当由秘书处决定。

仲裁庭应当在裁决书中列明仲裁费用的总额,确定各方当事人应当承担的仲裁费用的分摊份额,但当事人另有约定的除外。秘书处应当根据费用表及仲裁程序结束时的进展阶段来确定仲裁庭的报酬。在例外情况下,秘书处可以允许仲裁庭在费用表的基础上增加收费。仲裁庭的合理实际开支和其他津贴应当由秘书处决定并相应地予以报销。在裁决书中,仲裁庭有权命令一方当事人承担另一方当事人全部或部分的律师费或其他费用。

5. 其他事项的规定

(1)免责。

《CIICA 仲裁规则》规定中心(包括主席、仲裁院成员、董事、高级职员、一般雇员和任何仲裁员)无须就适用该规则进行仲裁中的任何过失、作为或不作为向任何人承担责任。当事人不得试图把主席、仲裁院成员、董事、高级职员、一般雇员或仲裁员作为与适用该规则进行仲裁的相关法律程序中的证人。

(2)保密。

除非当事人另有约定,当事人和仲裁庭必须始终对有关仲裁程序和仲裁裁决的全部事项予以保密。事先未征得全体当事人书面同意的,当事人或仲裁员不得向第三方披露任何保密事项或信息。但下列情形除外:向有管辖权的法院申请执行裁决或对裁决提出异议;根据有管辖权的法院发布的命令或传票;行使或执行一项法定的权利或请求;为遵守准据法中对披露方有约束力的披露规定;遵守任何主管部门或其他主管机构的特定要求或指令;依照仲裁庭根据一方当事人提出的申请作出的命令保密。《CIICA 仲裁规则》所称事项,包括当事人的书面陈述、证据材料、仲裁程序中的其他材料,其他当事人在仲裁程序中提交的全部文件,以及在仲裁程序中作出的仲裁裁决书,但不包括任何属于公共领域的事项。如果当事人违反本条规定,仲裁庭有权采取适当的措施,包括发布惩罚性措施或费用的命令或裁决。

6. 紧急仲裁员制度

在国际仲裁实践中，在仲裁庭组成之前，当事人经常会申请临时救济，如财产保全、临时禁令、证据保全等。《CIICA 仲裁规则》的附件一规定了紧急仲裁员制度，共 11 条；当事人可以据此申请紧急临时救济。

该附件一规定，当事人需要紧急救济的，在提交“仲裁通知书”的同时或者之后、仲裁庭组成之前，可以申请紧急临时救济。当事人应当将申请救济的性质以及以紧急情况和请求本项救济的理由书面通知秘书处和其他所有当事人，通知书中也应当列明当事人有权享有这种救济的理由。该通知中应当包含一份声明，证明申请人已经告知其他所有当事人或已采取善意的方式告知其他当事人。申请中还应当包括支付了秘书处就此类程序设定的费用的证明。

主席决定接受申请的，应当在秘书处收到当事人的申请及其缴费之日起 1 个工作日内指定紧急仲裁员。紧急仲裁员在接受指定前，应当向秘书处披露可能对其中立性或独立性产生合理怀疑的任何情况。当事人请求紧急仲裁员回避的，必须在秘书处向各方当事人发出关于紧急仲裁员指定的通知以及披露回避的情况/理由之日起 1 个工作日内提出。除非当事人另有约定，紧急仲裁员不得在将来进行的与该争议有关的任何仲裁程序再担任仲裁员。

紧急仲裁员应当在收到指定通知之日起 3 个工作日内，作出有关审理紧急裁决申请的工作时间表。该工作表应当为所有当事人提供公平、合理陈述意见的机会，并可以规定采用电话会议或书面陈述的方式进行该程序，以替代亲自出庭的方式。紧急仲裁员具有《CIICA 仲裁规则》赋予仲裁庭的各项权力，包括自裁管辖权的权力。紧急仲裁员有权作出其认为合适且必要的任何中期裁决。紧急仲裁员应当写明其裁决的理由。紧急仲裁员有正当理由时，可以修改或废止中期裁决。

仲裁庭组成后，紧急仲裁员不得再行使任何权力。对于紧急仲裁员作出的紧急救济的中期裁决，仲裁庭可以再做考虑、作出修改或予以废止，紧急仲裁员提出的理由对仲裁庭没有约束力。

紧急救济的中期裁决可以要求申请此种救济的当事人提供适当的担保作为救济的条件。

依据《CIICA 仲裁规则》附件一作出的裁决对当事人应当是有拘束力的。当事人约定依照《CIICA 仲裁规则》进行仲裁，即承诺无迟延地遵守紧急仲裁庭作出的命令或裁决。根据附件一申请救济产生的费用，由紧急仲裁员提出初步的分摊比例，但这些费用最终的分摊比例应当由仲裁庭决定。紧急仲裁员对于适用本规则

的决定应当是终局的,不可上诉。

7. 仲裁示范条款

与很多仲裁机构一样,为了便于当事人拟定有效的仲裁协议或仲裁条款,CIICA提供了标准的仲裁示范条款和先调解后仲裁的仲裁示范条款供当事人参考。

对标准的仲裁示范条款,CIICA 提供了两种形式供当事人参考:

(1)对于争议发生后的仲裁示范条款。如果争议已经发生,但当事人之间没有约定进行仲裁,或者当事人希望修改争议解决条款来规定通过巴基斯坦国际投资和商事仲裁中心进行仲裁,则建议采用以下条款:“当事人兹同意,双方之间就_____(简要介绍据以产生争议、纠纷、分歧或者诉求的合同)之间产生争议、纠纷、分歧或诉求应当提交巴基斯坦国际投资和商事仲裁中心,根据届时有效的《CIICA仲裁规则》进行仲裁并使纠纷得到最终解决,上述规则被视为本仲裁条款的一部分。仲裁员的数量应为(一名/三名)。仲裁地或仲裁法定地点应为(城市和/或国家)。仲裁程序使用的语言应为(　)。支配合同的法律(是/应该是)(　)的实体法。”

(2)对于争议发生前的仲裁示范条款,合同的当事人对于将来产生的争议希望根据《CIICA 仲裁规则》进行仲裁的,则建议采用以下条款:“由本合同引起的或与本合同有关的争议、纠纷、分歧或诉求,包括有关合同成立、效力、解释、履行、违约或终止的问题应当提交巴基斯坦国际投资和商事仲裁中心,根据届时有效的《CIICA仲裁规则》进行仲裁并使纠纷得到最终解决,上述规则被视为本仲裁条款的一部分。仲裁员的数量应为(一名/三名)。仲裁地或仲裁法定地点应为(城市和/或国家)。仲裁程序使用的语言应为(　)。支配合同的法律应该是(　)的实体法。”

(3)先调解后仲裁示范条款。“对于由本合同引起的或与本合同有关的争议,当事人应当首先根据中心调解规则将争议进行调解。如果纠纷在申请调解后 90 日内或在当事人书面约定的其他期限内尚未得到解决的,或者中心认为合适的,应当将此类纠纷依据《CIICA 仲裁规则》提交仲裁并最终解决;上述规则视为本条款的一部分。”

(三)《CIICA 快速仲裁规则》

随着国际仲裁的不断发展,同时考虑到普通仲裁程序往往费时较长、费用较高且当事人不满的现实状况,很多仲裁机构都设置快速仲裁程序,对一定金额以下的争议快速高效地解决。快速程序仲裁庭一般为一名仲裁员,仲裁裁决期限较短,仲裁费用相应较低。CIICA 也对快速仲裁程序作出相应规定,该规则条文共有 16 条,

其主要目的就是通过适用最简单的仲裁程序(在任命仲裁员后的90日内),对当事人之间争议总额不超过500,000美元的争议作出终局且具有法律约束力的裁决。

1. 快速程序开始

快速仲裁程序自CIICA收到根据快速仲裁规则任命仲裁员的申请之日起开始。申请书中应当包括当事人的详细信息,有关争议的简要介绍和需要解决的问题,以及寻求救济的内容。如果当事人之间没有根据快速规则将争议提交仲裁的协议,申请书应当由争议各方当事人签字。申请书的副本和所有附件应同时由申请人送达被申请人。

申请书中应附有以下内容:(1)有关合同文件副本;如果是单方申请,还应包括当事人之间同意根据快速仲裁规则将争议提交仲裁的协议副本。(2)申请人的申请书副本和每位申请人2500美元的费用;可以通过支票或银行转账在申请当日或之前支付。

仲裁开始后7日内,被申请人应当:缴纳2500美元费用,并向中心和申请人提交答辩意见和反请求申请书。如果被申请人提起反请求,且申请人的请求和/或被申请人反请求的价值超过500,000美元的,中心将根据《CIICA仲裁规则》对争议作出决定。上述规定表明,如果当事人之间的争议金额超过500,000美元的,快速仲裁程序将不适用,而转为普通仲裁程序。

2. 任命仲裁员

CIICA将在仲裁程序开始后10日内从仲裁员名单中任命仲裁员,然后将仲裁员的详细信息告知当事人。仲裁员将在被任命后的7日内发布一个时间表。所有的程序事项均由仲裁员自行决定。

3. 裁决

仲裁员应按快速程序在90日内作出书面且理由充分的裁决。该裁决将由仲裁员签字并注明日期;裁决是终局的,具有法律约束力。仲裁员将同时向CIICA发送其裁决副本以及收费清单。收到清单后,CIICA将支付仲裁员费用。所有通信都将以书面方式进行,而且任何一方当事人发送给仲裁员或仲裁员发送给任何一方当事人的信件都必须同时递送给另一方当事人。

4. 免责

CIICA及其高级职员、代理人、雇员均不对根据《CIICA快速仲裁规则》任命或提名仲裁员,或者根据该规则管理仲裁案件中的作为或不作为负责,除非该作为或不作为被证明是恶意的。CIICA及其高级职员、代理人、雇员均不对根据前述规则

提名或指定的仲裁员在履行或声称履行其仲裁员职责时的作为或不作为负责。

综上所述,根据《CIICA 快速仲裁规则》的规定,快速仲裁程序与普通的仲裁程序主要存在以下不同:第一,仲裁庭的组成不同。快速程序仲裁庭由独任仲裁员组成,不存在三人仲裁庭。第二,就快速仲裁程序而言,只收取固定仲裁费用,即向每位当事人收取 2500 美元仲裁费用。第三,适用快速仲裁程序审理案件的期限也不同于普通仲裁程序,仲裁员需要在 90 日内对案件作出裁决。第四,适用快速仲裁程序的前提是请求和反请求的争议总额不得超过 500,000 美元。

5. 快速仲裁示范条款

CIICA 提供了快速仲裁的示范条款:“由本合同引起的或与本合同有关的争议、纠纷、分歧或诉求,包括有关合同成立、效力、解释、履行、违约或终止的问题应当提交巴基斯坦国际投资和商事仲裁中心,根据届时有效的《CIICA 快速仲裁规则》进行仲裁并使纠纷得到终局且具有约束力的解决。”

(四)《CIICA 调解规则》

《CIICA 调解规则》共有 11 条,与《CIICA 仲裁规则》同时颁布。调解充分尊重当事人的意思自治,当事人在争议发生之前或争议发生之后均可约定将争议提交调解。

1. 开始调解

如果当事人之间存在事先达成的调解协议,希望进行调解的一方或多方当事人应向中心秘书处提交书面的调解申请。若调解申请书不是由先前协议的所有各方当事人共同作出的,请求调解的当事人应在申请调解时将调解申请书的副本发送给其他当事人。

如果不存在事先协议,一方或多方当事人希望根据本规则进行调解的,应当向秘书处提交调解申请书。若调解申请书不是由争议各方当事人共同提出的,那么申请调解的一方当事人应在将调解申请书发送给秘书处的同时,将其副本发送给另一方或多方当事人,且另一方或多方当事人应当在收到调解申请书后 14 日内书面通知秘书处他们是否同意将纠纷提交调解。

如果另一方或多方当事人拒绝调解,或者未能在 14 日内同意进行调解,则不得进行调解;秘书处应以书面形式通知当事人。在不存在事先协议的情况下,调解的开始日期应根据达成调解协议的日期确定。中心应在调解程序开始后尽快指定一名调解员,并适当考虑当事人书面约定的调解员的提名、方法或选择标准。

2. 调解员的任命

在中心任命调解员之前,调解员应向秘书处提交一份书面简历,并且应签署一份声明以表明除其在声明中披露的情况外,其不存在可能会引起任何关于自身公正性或独立性的合理怀疑的情况。调解员简历和声明的副本应当提供给各方当事人。

如果调解员根据规定进行了披露,当事人对其公正性或独立性产生合理怀疑,当事人可以反对调解员的任命;在这种情况下 CIICA 应当指定另一名调解员。

3. 进行调解

调解员可以根据案件的情形和当事人的合理请求,以其认为正当且合适的方式进行调解,可以通过口头或书面的方式与各方当事人一起或单独沟通。各方当事人在得知调解员召集的会议后应将出席会议的人员的数量和身份通知其他当事人和调解员。当事人应当以书面形式授权其代表,该代表有权代表当事人解决争议。在调解过程中,一方当事人提交的陈述或与调解员的沟通,未经其明确同意不得转达给其他当事人。除非当事人另有约定,调解的语言由调解员决定。

4. 调解结果

调解程序的终结分为以下几种情况:当事人签署和解协议;当事人通知调解员,他们无法达成和解且希望终止调解;调解员根据其评估/判断建议当事人调解程序不能解决争议;调解程序无法在先前协议规定的期限内完成,且各方当事人尚未同意延长期限。

5. 费用

调解的费用应包括调解员的报酬和开支以及 CIICA 的机构管理费。调解一旦开始,CIICA 将要求当事人在可能的情况下尽快提交调解员报酬和开支以及 CIICA 机构管理费的保证金。保证金应当由当事人以平等份额或其书面同意的其他比例支付。如果一方当事人未能支付其保证金的份额,则其他当事人可以支付该方当事人的份额以便调解程序继续进行。

6. 其他规定

(1)司法或仲裁程序的提起。

除非当事人另有约定,调解并不影响当事人就该争议提起或继续仲裁程序或司法程序的权利。

(2)保密。

所有调解会议都是私下进行的,而且只能由调解员、当事人和根据《CIICA 调解

规则》确定的人员参加。整个调解过程和其中所有的通信包括谈判、口头和书面陈述以及所提交的文件均应严格保密。除非法律要求或当事人同意,否则调解员或当事人均不得向任何人披露有关调解或和解条款或调解结果的任何信息。当事人对在调解过程中提交的所有文件或其他信息享有特权:非经法律要求,这些材料不得在任何诉讼或仲裁程序中作为证据出现或被采纳。除当事人同意的情况外,调解程序不得有正式记录或文字记录。当事人或者调解员在调解过程中表达的任何承认、建议或意见,不得在任何仲裁或司法程序中被提及或作为证据。

(3)责任限制。

CIICA(包括其职员和雇员)、秘书处和任何调解员不应对其根据《CIICA 仲裁规则》进行调解的有关作为或不作为对任何一方当事人承担责任,但以下情况除外:如果当事人证明该作为或不作为是上述主体的故意行为,或该条款的任何部分是被有关准据法所禁止的。CIICA(包括其职员和雇员)、秘书处或调解员不承担就与调解有关的任何事项向个人或实体发表任何声明的法律义务,任何一方当事人也不得在因调解而引起的任何法律诉讼或其他程序中将上述人员作为证人。

综上所述,调解与仲裁相比,具有很多相似性,如调解员的指定、调解员的独立性和披露义务、调解过程不公开、调解员与调解当事人的保密义务。但两者同时也具有以下不同之处:第一,调解员的权限与仲裁员不同;调解员没有解决争议的权力,其只能通过《CIICA 调解规则》允许的方式努力促成双方解决争议。第二,除非当事人同意,原则上调解过程无须制作笔录。第三,调解的期限远远短于仲裁期限。

7. 调解示范条款

CIICA 对于调解也提供了如下调解示范条款:“对于由本合同引起的或与本合同有关的争议,包括有关合同成立、效力、解释、履行、违约或终止的问题,当事人应当根据《CIICA 调解规则》通过调解解决纠纷;上述调解规则视为本条款的一部分。”

(五)其他替代性争端解决方法

除了仲裁和调解之外,巴基斯坦国际投资和商事仲裁中心还提供以下几种经济高效的避免和解决争端服务:

1. 早期中立评估(Early Neutral Evaluation)

早期中立评估,是指具有专业知识和技能的中立人士根据各方当事人的立场,就案件的实质问题和法庭审理案件可能出现的结果提出意见。这种评估是通过保密会议进行的。但是,评估对当事人没有约束力,其目的是双方当事人进一步进行建设性谈判提供基础。

2. 专家决断(Expert Determination)

专家决断,是指当事人同意将争议或分歧提交一名或多名专家进行决断;除非当事人另有约定,否则该专家决断对当事人具有约束力。专家决断并不要求正式庭审中的一些程序或做法,如不需要准备庭审程序,也不需要对所涉文件进行详细调查并对证人进行交叉质证等。虽然专家决断是一种可替代性争端解决机制,主要用于解决当事人之间发生的争端,但若当事人之间尚未发生争端,而仅是对某个问题存在不同看法,也可以诉诸专家决断取得意见(如就某个私人商业行为进行评估)。

3. 裁定(Adjudication)

裁定这种替代性争议解决方式会涉及一个独立第三方,该第三方通常是该行业的专家;其在考虑双方的主张后作出决定,且不受任何程序规则如仲裁规则的约束。为了及时解决纠纷,裁定通常在一段期限内有约束力。根据当事人的请求,裁定者裁定的具体问题可以在之后进行仲裁,以获得最终和具有约束力的解决结果。但与传统的仲裁相比,这种方式对当事人来说更经济,且比仲裁更及时地解决纠纷。

4. 争端委员会(Dispute Board)

争端委员会是一个由一名至三名成员组成的常设机构,通常在当事人签署或执行中长期合同之际设立,其目的是帮助当事人在履行合同过程中避免争议的发生,或者在发生争议后解决争议。就避免争议发生而言,争端委员会的角色主要是鼓励当事人自己解决问题,创造良好氛围以便当事人继续沟通,并提供咨询。争端委员会的一个主要优势在于,当事人之间一旦发生不同意见,可立即要求争端委员会成员帮助当事人解决该分歧,从而避免使分歧演变为难以解决的争议。将冲突在萌芽阶段解决或防患于未然对当事人来说具有明显的好处:大幅降低法律费用,减少生产时间的损失,维护当事人之间的友好关系。

(六)小结

综上所述,巴基斯坦国际投资和商事仲裁中心(CIICA)的仲裁规则内容较为全面,规定较为详细,与目前世界上主要仲裁机构的规则较一致。随着中巴经济走廊全方位、多领域的合作,中国与巴基斯坦之间的全天候战略合作伙伴关系很有可能会进一步密切和强化。CIICA 争端解决方式的多元化和规则的完善也必然会为中国投资者提供有利的争议解决环境。

与中国国际经济贸易仲裁委员会(以下简称贸仲委)的仲裁规则比较,CIICA

的仲裁规则主要存在以下不同之处。第一,就仲裁规则的适用范围而言,《CIICA 仲裁规则》在适用范围中并未明确是否适用于国内案件的仲裁,而贸仲委的仲裁规则明确规定了受案范围为国际和国内案件。第二,关于第三方加入仲裁的规定不同。实践中,由于债权债务关系的复杂性,某些债权债务关系存在多方当事人,而仲裁协议可能是其中两方当事人订立的;由于仲裁协议的相对性,该仲裁协议只能约束签署的当事人。对第三方加入仲裁进行具体规定,有利于更快速地解决争议。贸仲委的仲裁规则中没有第三人加入仲裁的规定,仅涉及追加当事人问题,即在仲裁程序中,一方当事人依据表面上约束被追加当事人的案涉仲裁协议可以向仲裁委员会申请追加当事人。从上述规定中可以看出,追加当事人仅仅是对仲裁协议的当事方而言的,而对非仲裁协议当事方的第三人是否能加入,贸仲委的仲裁规则没有作出明确规定。而《CIICA 仲裁规则》中关于仲裁庭的其他权力部分则有相关规定,即经一方当事人申请,仲裁庭有权允许一名或数名第三人加入仲裁,只要申请人为仲裁协议当事人,且第三方书面同意加入仲裁。但是,CIICA 也只是将第三人加入仲裁作为仲裁庭其他权力的一种类型作出概括式规定,而对于当事人如何申请、第三人如何加入等具体问题没有作出规定。第三,有关快速程序,《CIICA 仲裁规则》中也作出规定;这有利于快速、高效地解决当事人之间的争议。贸仲委的仲裁规则中虽然没有规定快速程序,但存在与之相类似的简易程序。与快速程序相比,虽然贸仲委的简易程序也有金额限制,但如果争议金额超出了金额限制,当事人协商一致同意适用的,简易程序仍能适用。而《CIICA 仲裁规则》规定,一旦争议金额超出了限制,快速仲裁程序将不予适用。另外,如果当事人另有约定,贸仲委的简易程序可以适用三人仲裁庭;而在 CIICA 的快速仲裁程序中则不存在三人仲裁庭,只由一名仲裁员组成仲裁庭。可见,CIICA 的快速程序规则和贸仲委的简易程序并不完全一致;相较而言,贸仲委的简易程序在更大程度上尊重了当事人的意思自治,更具有灵活性。

四、中国当事人如何参与巴基斯坦的仲裁

中国当事人在巴基斯坦可能面临两种类型的仲裁,一种是基于投资条约进行的仲裁,另一种是基于巴基斯坦国内法以及中巴当事人之间签订的经贸合同所进行的仲裁。由于导致争议发生的法律基础不同,仲裁程序也不一样,本部分将分别论述以上两种类型的仲裁。

(一)基于投资条约进行的仲裁

如前文所述,中国和巴基斯坦于 1989 年 12 月 12 日签署了《中华人民共和国政

府和巴基斯坦伊斯兰共和国政府互相鼓励和投资保护协定》,并于 1990 年 9 月 30 日生效。该协定第 10 条对投资者与东道国之间就投资财产被征收的补偿款额有异议时的争端解决方式作出如下规定:“如果投资者对被征收的投资财产的补偿款额有异议,可向采取征收措施的缔约一方的主管当局提出申诉。在申诉提出后一年内仍未解决时,应投资者的请求,由采取征收措施的缔约一方有管辖权的法院或国际仲裁庭对补偿款额予以审查。”由此可见,该协定将仲裁作为解决投资者与东道国之间因征收而产生的争议的手段之一。至于如何启动国际仲裁,该协定并未作出详细规定。需要注意的是,该协定仅规定了因征收补偿款额产生的异议的争端解决机制,而对于投资争端的其他问题,如投资者的界定、征收的认定等关键问题并没有进行规定,这种规定显然是不全面的。鉴于中巴两国经贸合作关系的快速发展,两国于 2006 年签订了内容更为全面的《中巴自由贸易协定》,其对投资争端的解决进行了较为详细的规定[1]。与之前的投资保护协定相比,《中巴自由贸易协定》对投资者与东道国之间的投资争议解决进行了更为全面的规定:第一,争议类型不限于因征收补偿款数额所引发的争议,而是包括因投资而产生的一切法律争议。第二,对争议解决规定了“冷却期”,也就是说,争议发生后投资者与东道国应当通过友好协商的方式解决争议,如果在 6 个月内仍不能解决争议,才可以进入下一个争议解决程序。第三,赋予了投资者选择争议解决方式的权利,即在争议发生后 6 个月内双方不能友好协商解决争议的,投资者有权选择在东道国法院提起诉讼,或者提交 ICSID 通过仲裁方式解决争议(东道国可以要求投资者在提交 ICSID 仲裁之前诉诸东道国的行政复议程序)。投资者作出选择后,这种争议解决方式的选择是终局的。此外,《中巴自由贸易协定》还就投资争端仲裁的法律适用作出规定,即争议的准据法为东道国法律,包括其冲突规范以及应当予以适用的国际法。仲裁裁决是终局的,对当事人均有约束力,双方应当善意履行裁决。

由此可见,《中巴自由贸易协定》对投资者争议解决方式的选择赋予了较大的自主权,体现了对投资者利益的保护;这点对中方投资者来说是较为有利的。鉴于 ICSID 在投资仲裁领域所取得的成就,笔者建议投资者选择 ICSID 解决争议。另外,对于 6 个月的友好协商期,投资者需要引起高度重视。因为有些仲裁庭会认为该 6 个月的期限是确立其管辖权的前提,也就是说如果没有经过这 6 个月的友好协商期,仲裁庭对争议就不具有管辖权。在实践中,投资者应当通过书面形式通知东

〔1〕 参见《中巴自由贸易协定》第 54 条。

道国某项投资争议已经发生,并要求进行友好协商以便解决争议。这样的书面材料一定要妥善保存。在6个月的期限届满后,如果投资者认为根据协商解决争议已无可能,那么就可以通知ICSID提起仲裁,并附上相应的书面证据。

(二)非基于投资条约进行的仲裁

对于非基于投资条约进行的仲裁,当事人之间往往有仲裁协议或条款,约定将他们之间的争议提交仲裁解决。对于中国当事人来说,如果谈判力量足够强大,可以约定在巴基斯坦境外,包括中国进行仲裁;而如果选择在巴基斯坦解决争议,可以采取以下两种方式提起或参与仲裁。

1. 直接约定在巴基斯坦国际投资与商事仲裁中心仲裁

如前文所述,巴基斯坦国际投资与仲裁中心(以下简称巴仲)是巴基斯坦第一家提供仲裁、调解和其他争端解决服务的国际仲裁中心。巴仲的仲裁员名册中包括优秀的国内仲裁员以及来自美国、澳大利亚、中国、加拿大、中国香港和英国的杰出的国外仲裁员。该仲裁机构是巴基斯坦仲裁国际化的代表,但由于成立时间不长、受案数量不多,在国际社会尚未确立威望和地位。不过,如果中国当事人必须选择在巴基斯坦进行仲裁,也就是仲裁地在巴基斯坦,那么可以约定在该仲裁机构提起仲裁,具体程序大致如下所述。

(1)拟定适格的仲裁条款。

巴仲针对不同情况为当事人提供了争端解决示范条款,包括争议已经发生但当事人之前未能达成仲裁协议,以及争议尚未发生时应当怎样签订仲裁条款的两种仲裁示范条款。总体来看,仲裁条款或协议应当包含如下信息:将争议提交巴仲仲裁,适用巴仲仲裁规则,仲裁地点、仲裁员人数、仲裁语言以及基础合同准据法等事项。另外,针对争议标的较小的情形,为了使当事人快速、低费用地解决争议,巴仲还规定了快速仲裁程序。同时,考虑到调解在争端解决中的优势(如费用低廉、尽量维护当事人之间的合作关系),巴仲也提供了将调解和仲裁融为一体的争端解决条款,即“因本合同产生的或与本合同有关的一切争议,应当首先提交巴基斯坦国际投资与仲裁中心根据其调解规则通过调解解决。如果在提起调解请求后90日内该争议无法根据调解规则解决,或者当事人在该期限内达成书面意见,或者巴仲认为适当,则应当将该争议提交巴仲根据其仲裁规则予以仲裁。仲裁裁决是终局的,仲裁规则应被视为纳入该仲裁条款”。这种模式的争端解决条款现在已经被很多仲裁机构采纳。中方当事人在考虑争端解决方式时,应当结合交易的具体情况和对方当事人的履约能力,选择最有利的方式对已经发生的争端或将来可能发生

的争端予以解决。

此外,巴仲还提供了除调解和仲裁之外的其他争端解决机制,包括早期中间人评估(Early Neutral Evaluation)、专家决断(Expert Determination)、裁定(Adjudication)、争端委员会(Dispute Board)。中方当事人可以根据争议情况对这些可替代性争端解决机制作出选择。

(2)提起仲裁请求或作出答辩。

在提起仲裁时需要注意仲裁通知书应当包括的内容,避免因信息不全面而影响仲裁程序的推进。仲裁通知书主要包括:要求将争议事项提交仲裁的意思表示、仲裁当事人及其代表的基本信息、提交仲裁所援引的仲裁协议或仲裁条款等内容。在实践中,最好与中心秘书处进行充分沟通。如果中方当事人是被申请人,那么在答辩时是否对仲裁协议效力提出异议也是需要认真考虑的问题。过分迟延地对管辖权提出异议可能会导致该项权利的丧失,因此需要对时间节点予以恰当掌握。

(3)选定仲裁员。

众所周知,仲裁员的好坏决定仲裁裁决的好坏,因此,中方当事人在选定仲裁员时应当予以高度重视。对仲裁员的经验、专业领域、教育背景,甚至宗教信仰都需要全面考察。尽管巴仲提供仲裁员名册供当事人选择,但中方当事人对有关仲裁员可能并不熟悉,那么这时听取专业律师的建议和由仲裁院主席予以指定,都是不错的选择。总之,切忌盲目选择。如果是三人或多人仲裁庭,对首席仲裁员的指定需要更加谨慎,可以要求对候选人进行面试等方式进行考察。

(4)庭审准备。

从历史上来看,巴基斯坦曾经属于英属印度的一部分,因此其法律制度,包括仲裁程序等都受到英国法律的影响,本质上属于普通法系。中方当事人在准备仲裁庭审材料时一定要充分,将事实问题与法律问题予以明确区分,做到事实清楚,论证有力。在案情需要的情况下,最好聘请当地律师或者熟悉普通法抗辩技巧的律师出庭。即使中方当事人是被申请人,也不能怠于行使权利,应当将有利的证据按顺序装订妥当,切勿抱着“走程序”的心态参与仲裁。

(5)仲裁流程示意图。

巴仲仲裁流程具体如图 4 – 1 所示。

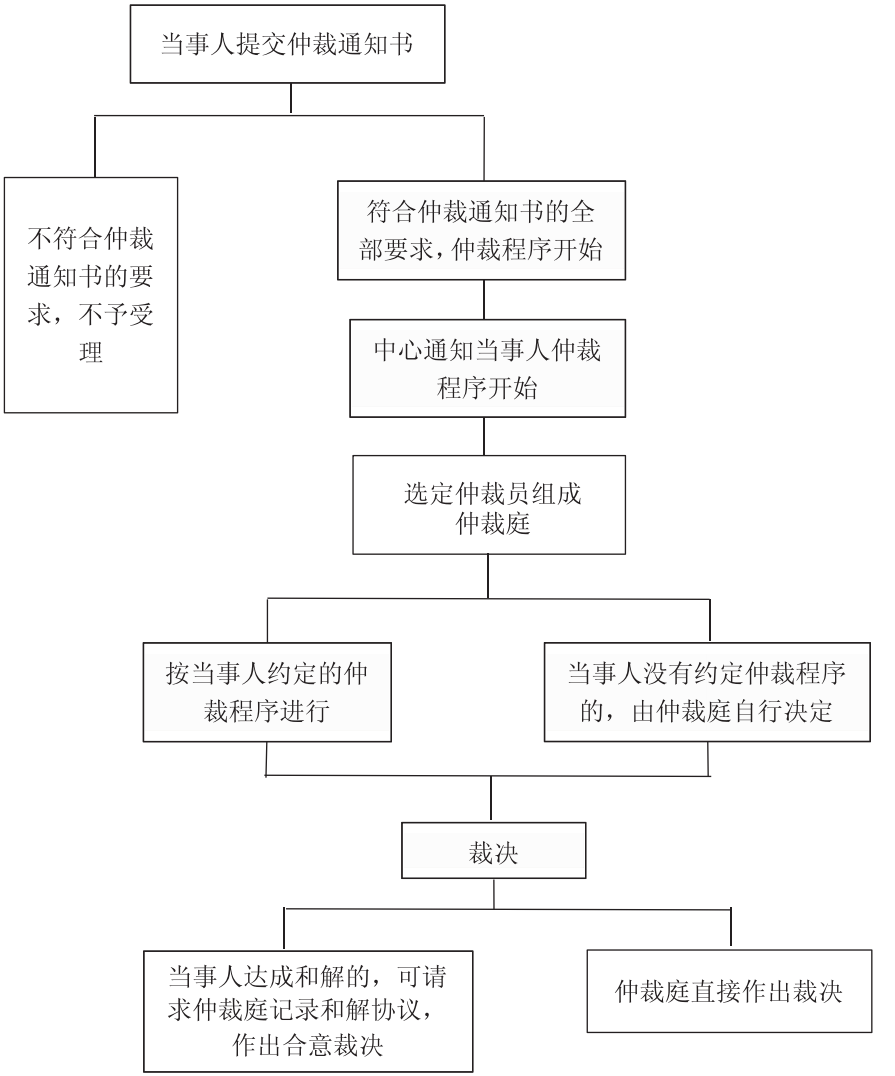


图 4－1　巴仲仲裁流程

2. 在诉讼程序进行中约定仲裁

如前文所述,2017 年《巴基斯坦可替代性争端解决法案》旨在为当事人提供集诉讼、调解、调停以及仲裁为一体的“一站式”争端解决服务。根据该法案,即便双方当事人已经进入诉讼程序,但只要当事人同意,仍然可以将争议提交调解或仲裁

等可替代性争端解决机制解决。为此,中国当事人需注意以下程序或事项:

(1)确认所涉争议是否为可通过 ADR 解决的争议。2017 年《巴基斯坦可替代性争端解决法案》通过附件的方式列举了 22 种可以通过 ADR 解决的争议,中方当事人应当对所涉争议进行分析,并且评估哪种争端解决方式最有利于己方。在进行评估时,对争议的事实、法律的适用、不同方式解决争议所需的时间和人员成本以及判决/裁决的执行等事项都应给予全面考虑和评估,从而决定是继续通过诉讼还是通过调解或仲裁方式解决争议。

(2)在确定通过仲裁方式解决争议后,应积极参与仲裁员的指定。根据 2017 年《巴基斯坦可替代性争端解决法案》的规定,原则上由当事人共同指定仲裁员,法院只有在例外情况下才代为指定仲裁员。因此,中方当事人应当认真从仲裁员名册中选定仲裁员,对拟指定仲裁员的教育背景、专业领域、仲裁经验以及行为操守等方面予以全面考察。由于巴基斯坦的居民大多有宗教信仰,因此在选定仲裁员时,应适当考虑仲裁员的宗教信仰对案件审理的影响,不要因为仲裁庭成员之间信仰的不同而引发不必要的问题。另外,对于女性仲裁员的选定,亦可以根据案情适当考虑。

(3)注意配合仲裁程序。2017 年《巴基斯坦可替代性争端解决法案》规定,当事人有义务对 ADR 程序予以配合,否则可能面临罚款等处罚。中方当事人应当注意开庭时间、地点及有关费用的缴纳期限等。对于仲裁员存在不公正或不独立的情形也应当及时提出,请求该仲裁员回避。实践中,有些中方当事人在国内进行仲裁时对仲裁庭签发的程序令重视程度不够,甚至不以为意,在规定的时间内不提交证据材料或答辩意见。一定要避免这种行为,否则可能丧失提交有关材料的机会。另外,如果要请求仲裁员回避,不能错过提出回避请求的时间节点,以避免该权利的丧失。

(4)注意庭审技巧。由于巴基斯坦法律制度在本质上属于普通法系,仲裁庭在庭审时(包括在仲裁程序中)往往会采取抗辩式审理方式,中方当事人对此应当予以高度重视。可以聘请普通法系的律师或巴基斯坦本地律师担任代理人。事实上,国内一些知名仲裁机构(如贸仲委)也开始重视对普通法背景下庭审策略与技巧的培训,专门邀请英国知名律师就“国际仲裁中的证人交叉盘问:普通法项下仲裁庭

审策略、技巧和建议”举办专题讲座。[1]中国当事人应当对有关庭审程序进行了解。

(5)对有关文件的适当签署。对于在仲裁程序中达成和解协议的,可以要求仲裁庭根据和解协议制作裁决书,并适当签署有关和解协议上。

五、中国当事人参与涉巴基斯坦仲裁需注意的问题

如前文所述,中国当事人可以通过不同途径进入仲裁程序,但在有关涉巴争议发生之前,中方当事人对下列问题就应当引起高度重视。

(一)巴基斯坦法院对国际仲裁的管辖权

如前文所述,中方当事人在与巴方当事人签订仲裁条款时可以将仲裁地约定在巴基斯坦境外。在“Messrs Eckhardt & Co, Marine GmbH v. Muhammad Hanif 案”[2]中,巴基斯坦当事人与一家在德国注册的公司 Eckhardt 通过其在巴基斯坦的代理签订了一份机动车购买合同。双方当事人约定将争议提交一名或三名仲裁员在伦敦仲裁,该仲裁为非机构仲裁/临时仲裁。后因德国 Eckhardt 公司未能在约定的时间交付机动车,双方同意将交货日期延长。巴基斯坦当事人在巴基斯坦信德省高等法院提起诉讼,认为德国公司故意迟延交货。诉讼期间,德国 Eckhardt 公司向法院提出请求,要求中止诉讼,理由是合同里约定有仲裁条款。对此,巴基斯坦当事人辩称,与该案有关的所有证据都在巴基斯坦卡拉奇,因此在卡拉奇进行诉讼是方便的;高等法院据此驳回了德国公司的请求。巴基斯坦最高法院支持了该高等法院的决定,并将非方便仲裁作为其中一个理由。巴基斯坦最高法院在判决中写道:“考虑到案件的所有情况(德国当事人声称迟延交货的原因是卡拉奇港口拥堵和罢工导致的),所有的书面证据和口头证言都来自卡拉奇,要将这些证据递交到伦敦是非常不方便的,并且非常昂贵”。巴基斯坦最高法院判决根据的是 1940 年《巴基斯坦仲裁法案》第 34 条,该条款赋予法院是否中止诉讼程序的自由裁量权。

在“Messrs Travel Automation (PVT.) LTD. v. Abacus International (PVT.) LTD. 案”[3]中,合同约定争议在新加坡根据新加坡国际仲裁中心规则仲裁,即仲裁地在新加坡。巴基斯坦当事人 Travel Automation 请求巴基斯坦高等法院中止在

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〔1〕 载 http://www.cietac.org.cn/index.php?m=Article&a=show&id=15473,最后访问日期:2018 年 8 月 8 日。

〔2〕 See *Messrs Eckhardt & Co, Marine GmbH v. Muhammad Hanif*, PLD 1993 Supreme Court 42.

〔3〕 See *Messrs Travel Automation (PVT.) LTD. v. Abacus International (PVT.) LTD.*, 2006 CLD Karachi 497.

新加坡进行的仲裁程序，理由是在新加坡仲裁不方便，因为合同是在巴基斯坦履行的，所有证据也都位于巴基斯坦。但高等法院驳回了该申请，理由如下："2005 年总统令〔1〕第 4 条第 2 款之规定剥夺了法院中止仲裁程序的自由裁量权，即使存在不方便仲裁的理由，法院只有在仲裁协议本身无效或者无法执行的情况下才能终止仲裁程序。"该规定显然与 1940 年《巴基斯坦仲裁法案》第 34 条之规定是不同的，并且优先于 1940 年《巴基斯坦仲裁法案》适用。这表明巴基斯坦司法对国际商事仲裁态度的变化。中方当事人在进行仲裁时应对巴基斯坦国内涉及仲裁的司法实践予以必要的关注，特别是对《纽约公约》的理解和适用情况更应密切关注。

（二）准据法与仲裁裁决国籍的关系

《纽约公约》在确定仲裁裁决国籍时主要采用了领地标准，即根据仲裁地来确定裁决的国籍，缔约国并据此判断是否适用公约对裁决予以承认和执行。巴基斯坦在批准《纽约公约》时做了互惠保留与商事保留。实践中，巴基斯坦在判定某个裁决的国籍时往往考虑合同的准据法所属国。如在"Hitachi Limited v. Rupali Polyester 案"〔2〕中，一家巴基斯坦公司与一家日本和德国合资公司（以下简称日德公司）签订涤纶生产线转让合同，合同约定的准据法是巴基斯坦法律。有关争议提交仲裁解决，仲裁地需根据案件被申请人情况予以确定：如果被申请人是巴基斯坦公司，仲裁地为卡拉奇；如果为日德公司，仲裁地则为伦敦。后来巴基斯坦公司声称日德公司提供的生产线存在缺陷，不符合合同约定，于是提起仲裁。随后，巴基斯坦公司在巴基斯坦法院提出一系列申请，其中一项是请求法院宣布仲裁条款不再有效。该案最终由巴基斯坦最高法院作出判决。摆在法院面前的一个法律问题是，既然合同准据法是巴基斯坦法律，那么巴基斯坦的仲裁法是否能够适用于在英国伦敦进行的仲裁程序；另一个法律问题是，既然仲裁地在伦敦，那么该裁决对巴基斯坦来说就是一个外国仲裁裁决，巴基斯坦是否应当根据《纽约公约》来审查是否承认与执行该裁决。巴基斯坦最高法院在其裁决中写道："仲裁裁决的国籍不应当完全根据仲裁地予以确定。一个在外国作出的裁决也可能被视为国内裁决。"该案的判决与《纽约公约》在判定仲裁裁决国籍时的基本原则（裁决的国籍主要根据仲裁地予以确定）是不同的。尽管该案发生在巴基斯坦批准《纽约公约》之前，但该案似乎

〔1〕 该总统令专门为执行《纽约公约》而颁布，但有效期只有 120 日，后来被 2011 年《巴基斯坦承认与执行法案》通过立法的形式所取代。

〔2〕 *See Hitachi Limited v. Rupali Polyester*，1998 SCMR 1618.

对巴基斯坦批准《纽约公约》之后的司法实践也具有影响。在“Taisei Corporation v. A. M. Construction Company 案”[1]中,Taisei 是一家日本公司,负责卑路支斯坦省一段国家高速公路的改造工程,它于 2007 年与 A. M. Construction Company 签订了分包合同。分包合同约定争议在新加坡根据 ICC 仲裁规则予以仲裁,合同准据法为巴基斯坦法律。争议发生后,仲裁庭作出了不利于 A. M. Construction Company 的裁决,A. M Construction Company 在巴基斯坦民事法院对裁决提出挑战,理由是仲裁员存在不当行为,且仲裁违反巴基斯坦的公共秩序。Taisei 提出了管辖权异议,认为该案应当由高等法院专属管辖,不应由民事法院管辖,因为该裁决是外国仲裁裁决。民事法院驳回了 Taisei 的主张。后来,当事人上诉至高等法院。高等法院支持了民事法院的裁决,理由是合同的准据法是巴基斯坦法律,因此该案的裁决是巴基斯坦国内裁决,而非外国裁决,不适用《纽约公约》的规定。

从上述案例可以看出,中国当事人在签订合同时不仅要考虑仲裁地,还应当注意合同准据法的约定,如果无法达成协议,也应当在合同中约定仲裁裁决的国籍应根据《纽约公约》所依据的仲裁地予以认定。

(三)争议事项的可仲裁性与仲裁条款独立性原则

争议事项的可仲裁性问题在仲裁程序的不同阶段可能受到不同国家法律的管辖。在确认仲裁协议效力时,可能受到仲裁协议准据法的规制;在申请撤销仲裁裁决时,受到仲裁地法律的规制;在承认与执行仲裁裁决阶段,又要受到被请求承认与执行该裁决的法院所属国法律的规制。中方当事人对该问题同样需要予以高度关注。

在“Hub Power Company Limited (HUBCO) v. Pakistan WAPDA 案”[2]中,WAPAD 与 HUBCO 之间签订了电力购买合同,合同约定的准据法是英国法,在 ICC 仲裁。合同经历几次修订,在合宪性审查中被质疑违反公共秩序。巴基斯坦法院下令禁止 HUBCO 将收益转出巴基斯坦。为此,HUBCO 提起仲裁。WAPAD 则在巴基斯坦法院提出申请,请求永久禁止 HUBCO 诉诸仲裁程序。该案经过几次审查和上诉来到巴基斯坦最高法院。就公共秩序而言,巴基斯坦最高法院需要解决的问题是在涉嫌存在恶意、欺诈以及非法的情况下,争议是否可以通过仲裁解决,即是否具有可仲裁性。巴基斯坦最高法院作出裁决,认为对腐败的指称为进一步展开

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[1] *See Taisei Corporation v. A. M. Construction Company*, 2012 PLD Lahore 455.

[2] *See Hub Power Company Limited (HUBCO) v. Pakistan WAPDA*, 2000 PLD Supreme Court 841.

司法调查提供了表面证据,根据巴基斯坦关于公共秩序的立法,这种可能招致刑事调查的争议事项不得通过仲裁解决。巴基斯坦最高法院认为,既然本案争议的焦点是合同是否成立及是否有效,那么该问题就不可能构成仲裁条款下拟解决的争议。该案的判决应当引起中国当事人高度重视,在签订仲裁条款时,要对争议事项的可仲裁性进行研究,避免签订无效的仲裁条款。不过从近年的司法实践中来看,巴基斯坦法院对仲裁条款独立性原则基本是认可和支持的。即便对基础合同的修改导致一个新合同的产生,原基础合同中的仲裁条款依然有效。[1]

(四)关于公共秩序的界定

公共秩序保留制度是一项古老的制度,它在不同法律领域发挥着不同的功能。在国际仲裁领域,它既可能导致仲裁协议无效,也可能导致仲裁裁决无法得到承认与执行;《纽约公约》也明确将其作为可以拒绝承认与执行外国仲裁裁决的法定事由。但是,对于何为公共秩序,至今尚未形成为各国认可的统一定义,各国都是根据自己的情况予以界定,甚至在同一国家的不同历史时期,对公共秩序的认定标准也存在不同。在国际仲裁领域,对公共秩序认定的宽严表明了各国对仲裁的态度。

就巴基斯坦而言,自从其正式通过立法执行《纽约公约》以来,在审查是否承认与执行外国仲裁裁决时一般都根据公约规定的事项进行有限的司法审查,明确法院既不是仲裁案件的上诉法庭,也不应对仲裁中的证据再次进行评估。[2] 但是在对公共秩序的解释方面,还应当引起外国当事人的重视。在"Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others 案"[3]中,Tethyan Copper Company(TCC)是一家智利与加拿大的合资公司,它与卑路支斯坦省政府签署了一份开发煤矿的协议[4]。后来由于 TCC 被拒绝给予开矿许可证而导致争议发生。TCC 根据它与卑路支斯坦省政府签订的合同以及巴基斯坦与澳大利亚签署的双边投资协定分别在 ICC 和

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〔1〕 *Pakistan Steel Mills (Pvt.) Limited v. Sesa Goa Limited*, decided on 19 November 2013, para. 8. Munib Akhtar J, High Court of Sindh.

〔2〕 *Crescent Steel and Allied Products Limited v. Sui Northern Gas Pipeline Limited* 2013 *MLD* 1499 *at* 1506*E and Sadat Business Group Limited v. Federation of Pakistan* 2013 *CLD* 1451 *at* 1461 *and* 1465 *B&C*.

〔3〕 *Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others*,2013 PLD Supreme Court 641.

〔4〕 该案涉及的主体非常复杂,在此协议签订之前就存在若干主体以及他们之间签署的各种协议。TCC 虽然由智利和加拿大公司持股,但之前却由一家澳大利亚公司设立,因此后文涉及巴基斯坦与澳大利亚之间签署的双边投资协定。

ICSID 提起仲裁,声称卑路支斯坦省政府禁止对其颁发开矿许可证是非法的。在本案中,由于前期存在多方主体间复杂的交易架构,且涉及政府官员的参与,因此有关主体在巴基斯坦最高法院提起合宪审查,认为卑路支斯坦省政府出租铜矿和金矿的决定是非法的。在巴基斯坦最高法院庭审期间,其指令卑路支斯坦省政府要求 ICC 和 ICSID 不得进一步推进仲裁程序,因为巴基斯坦最高法院对该案涉及的协议效力具有决定权。为此,巴基斯坦最高法院援引了《纽约公约》第 11 条第 3 款和 2003 年《联合国反腐败公约》第 34 条以证明其对争议具有管辖权。此外,巴基斯坦最高法院还认为,在其对有关争议事项正在审理的过程中,TCC 提起仲裁的行为是藐视法庭的行为,违反了有关国际法。最后,巴基斯坦最高法院以 3 票一致通过判决,判定有关协议无效,且协议中的仲裁条款也不具有可执行性。在“Alleged Corruption in Rental Plants 案”[1]中,Karkey 是一家土耳其公司,它与巴基斯坦政府签订了能源租赁协议,协议约定将争议提交伦敦国际仲裁院仲裁,仲裁地为伦敦。合同签订后一年,Karkey 中止提供租赁服务,声称巴基斯坦政府未能履行合同义务,包括未能履行主权支付担保义务。但同时,巴基斯坦最高法院则根据《巴基斯坦宪法》第 184 条第 3 款审查该合同签订的程序是否合法与透明。经过审理,巴基斯坦最高法院宣布合同无效,并命令 Karkey 将巴基斯坦政府已经支付的预付款予以退还,同时命令扣押 Karkey 用于发电的设备。

从上述案件可以看出,只要合同的签订涉嫌欺诈、腐败或程序不透明,巴基斯坦法院就可能会援引公共秩序宣布有关合同无效,并禁止当事人启动或推进仲裁程序。中方当事人在与巴方签订合同时,对这方面一定要高度重视。

除了上述事项外,中方当事人在参与涉巴仲裁活动时,还应注意善用仲裁中的临时救济措施,以及在订有仲裁协议或仲裁条款时请求巴基斯坦法院中止诉讼程序。一般来说,巴基斯坦法院对这样的请求都会予以支持。[2]

总之,中方当事人在从事涉巴经贸活动时,应当对巴基斯坦的政治、法律、宗教及文化制度予以全面了解。具体而言,在签订合同之前,应当进行尽职调查,掌握可能存在的潜在风险,作出理性的投资决定;在合同订立过程中,应当谨慎拟定争议解决条款,使其具有可操作性;当争议发生后,尽可能友好协商解决争议,善用除仲

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〔1〕 *Alleged Corruption in Rental Plants*,2012 SCMR 773.

〔2〕 Jan Paulsson and Lise Bosman eds, *Note General Editor Pakistan* (2017), ICCA International Handbook on commercial Arbitration, 1984, Supplement No. 93, March (2015) pp. i – ii.

裁与诉讼外的多元争议解决机制，若仍无法解决争议，则可诉诸仲裁或诉讼。在进行仲裁时，聘请适格的律师至关重要，律师除了为当事人提供法律支撑外，还可以协助当事人选定仲裁员，把握仲裁程序，从而从实体和程序两方面保障当事人的合法权益。

附录一:

关于解决投资者与东道国之间投资争端的国际公约法案(英文版)

An Act to Implement the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Extraordinary Published by Authority
Islamabad, Saturday, April 30, 2011

PART I

Acts, Ordinances, President's Orders and Regulations

SENATE SECRETARIAT

Islamabad, April 30, 2011

No. F. 9 (34)/2010 Legis.

The following Act of Majlis-e-Shoora (Parliament) received the assent of the President on 28th April, 2011, is hereby published for general information:

Act No. IX of 2011

An act to implement the International Convention on the Settlement of Investment Disputes between States and Nationals of other States

Whereas Pakistan has signed and ratified the International Convention on the Settlement of Investment Disputes between States and Nationals of other States;

And whereas it is expedient to enact the law for that purpose,

It is hereby enacted as follows:

1. Short title, extent and commencement.

This Act may be called the Arbitration (International Investment Disputes) Act,

2011.

It extends to the whole of Pakistan.

It shall come into force at once.

2. Definitions.

In this Act, unless there is any thing repugnant in the subject or context,

(a)"award" includes any decision interpreting, reversing or annulling an award, being a decision pursuant to the Convention, and any decision, as to costs, which under the Convention is to form part of the award;

(b)"Centre" means the International Center for Settlement of investment Disputes established by the Convention;

(c)"Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States incorporated in the Schedule;

(d)"Government" means the Federal Government; and

(e)"Schedule" means the Schedule to this Act.

3. Registration of awards.

An award shall be deemed to have been rendered pursuant to the Convention on the date on which certified copies of the award were dispatched to the parties.

Any person seeking recognition or enforcement of an award rendered pursuant to the Convention shall be entitled to have the award registered in the High Court subject to proof of any matters that may be prescribed and to the other provisions of this Act.

In addition to the pecuniary obligations imposed by the award, the award shall be registered for the reasonable costs of and incidental to registration.

If at the date of the application for registration the pecuniary obligations imposed by the award have been partly satisfied, the award shall be registered only in respect of the balance, and accordingly if those obligations have been wholly satisfied, the award shall not be registered.

4. Effect of registration.

Subject to the provisions of this Act, an award registered under section 3 shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for

the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, and, so far as it relates to such pecuniary obligations:

(a) proceedings may be taken on the award;

(b) the sum for which the award is registered shall carry interest if the award so stipulates; and

(c) the High Court shall have the same control over the execution of the award, as if the award had been a judgment of the High Court.

5. Binding on the Government.

Sections 3 and 4 shall bind the Government but not so as to make an award enforceable against the Government in a manner in which a judgment would not be enforceable against the Government:

Provided that sections 3 and 4 shall not be binding on the Government in the case of awards to which it is not a party.

6. Government contribution to expenses under the Convention.

Any sums required to meet any obligations of the Government arising out of Article 17 of the Convention (which obliges the Contracting States to meet any deficit of the Centre) shall be charged on Government and paid through the Budget.

7. Exclusion of Arbitration Act.

The provisions of the Arbitration Act, 1940 (X of 1940), shall not apply to proceedings pursuant to the Convention.

8. Certain provisions of Convention to have force of law.

(1) Notwithstanding anything to the contrary in any law, the provisions of Articles 18, 19, 20, 21(a) and 22 of the Convention as it applies to Articles 21(a), 23(1) and 24 shall have the force of law.

(2) Nothing in Article 24(1) of the Convention shall be construed as

(a) entitling the Centre to import into Pakistan goods free of any customs duty without restriction on their subsequent sale therein;

(b) conferring on the Centre any exemption from taxes or duties which form part of

the price of goods sold; or

(c) conferring on the Centre any exemption from taxes or duties rendered.

(3) For the purposes of Articles 20 and Article 21(a) of the Convention as given the force of law by this section, a statement to the effect that the Centre has waived an immunity in the circumstances specified in the statement, being a statement certified by the Secretary-General of the Centre, or by the person acting as Secretary-General, shall be conclusive evidence of such waiver.

9. Power to make rules.

The Federal Government may make rules.

(a) to prescribe the procedure for applying for registration of an award under this Act, and to require the applicant to give prior notice of his intention to register to other parties;

(b) to prescribe matters to be proved on the application and the manner of proof, and in particular to require the applicant to furnish a copy of the award certified pursuant to the Convention;

(c) to provide for the service of notice of registration of the award by the applicant on other parties;

(d) to provide for the stay of execution whether provisionally or otherwise of any award registered under this Act in accordance with the provisions of the Convention; and

(e) on any other matter which may be necessary to carry out the purposes of this Act.

10. Federal Government to amend Schedule.

The Federal Government may, by notification in the official Gazette, amend the Schedule in conformity with any amendments to the provisions of the Convention set out therein which may hereafter be duly made and adopted.

SCHEDULE

[See sections 2(c) and 2(e)]

Convention on the Settlement of Investment Disputes between States and Nationals of Other States

PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER Ⅰ
International Centre for Settlement of Investment Disputes

SECTION 1
ESTABLISHMENT AND ORGANIZATION

ARTICLE 1

(**1**) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(**2**) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

ARTICLE 2

The seat of the Centre shall be at the principal office for the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

ARTICLE 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

SECTION 2
THE ADMINISTRATIVE COUNCIL

ARTICLE 4

The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

In the absence of a contrary designation, each governor and alternate governor of

the Bank appointed by a Contracting State shall be *ex-officio* its representative and its alternate respectively.

ARTICLE 5

The President of the Bank shall be *ex-officio* Chairman of the Administrative Council (hereinafter called the Chairman), but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

ARTICLE 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:

(a) adopt the administrative and financial regulations of the Centre;

(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;

(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);

(d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;

(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;

(f) adopt the annual budget of revenues and expenditures of the Centre;

(g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of the Convention.

ARTICLE 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

ARTICLE 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

SECTION 3
THE SECRETARIAT

ARTICLE 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

ARTICLE 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incom-

patible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

ARTICLE 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

SECTION 4
THE PANELS

ARTICLE 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

ARTICLE 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

ARTICLE 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance,

who may be relied upon to exercise independent judgement. Competence in the field of law shall be of particular importance in the case of persons on the Panel or Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

ARTICLE 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

ARTICLE 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notifiedto the Secretary-General and shall take effect from the date on which the notification is received.

SECTION 5
FINANCING THE CENTRE

ARTICLE 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

SECTION 6
STATUS, IMMUNITIES AND PRIVILEGES

ARTICLE 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity:

to contract;

to acquire and dispose of movable and immovable property;

to institute legal proceedings.

ARTICLE 19

To enable the Centre to fulfill its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

ARTICLE 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

ARTICLE 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat:

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

ARTICLE 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided,

however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

ARTICLE 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting Statetreatment not less favorable than that accorded to other international organizations.

ARTICLE 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER Ⅱ
JURISDICTION OF THE CENTRE

ARTICLE 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent sub-division or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit

to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent sub-division or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

ARTICLE 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

ARTICLE 27

(1) No Contracting State shall give diplomatic protection, or bring an international

claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER Ⅲ
CONCILIATION

SECTION 1
REQUEST FOR CONCILIATION

ARTICLE 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2
CONSTITUTION OF THE CONCILIATION COMMISSION

ARTICLE 29

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(2)

(a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

ARTICLE 30

If the Commission shall not have been constituted within ninety days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

ARTICLE 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3
CONCILIATION PROCEEDINGS

ARTICLE 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

ARTICLE 33

Any conciliation proceeding shall be conducted in accordance with the provisions of

this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

ARTICLE 34

(1) It shall be the duty of the Commission to clarity the issues in dispute between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

ARTICLE 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the commission.

CHAPTER Ⅳ
ARBITRATION

SECTION 1
REQUEST FOR ARBITRATION

ARTICLE 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2
CONSTITUTION OF THE TRIBUNAL

ARTICLE 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2)

(a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appoint-

ed by agreement of the parties.

ARTICLE 38

If the Tribunal shall not have been constituted within ninety days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

ARTICLE 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

ARTICLE 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3
POWERS AND FUNCTIONS OF THE TRIBUNAL

ARTICLE 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

ARTICLE 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

ARTICLE 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings;

(a) call upon the parties to produce documents or other evidence; and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

ARTICLE 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

ARTICLE 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present hiscase at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

ARTICLE 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

ARTICLE 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

SECTION 4
THE AWARD

ARTICLE 48

(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

ARTICLE 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical

or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

SECTION 5
INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

ARTICLE 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

ARTICLE 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within ninety days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

ARTICLE 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within one hundred days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within twenty days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41 – 45, 48, 49, 53 and 54, and of Chapters Ⅵ and Ⅶ shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

SECTION 6
RECOGNITION AND ENFORCEMENT OF THE AWARD

ARTICLE 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

ARTICLE 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

ARTICLE 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

CHAPTER Ⅴ
REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

ARTICLE 56

(1) After a Commission or a Tribunal has been constituted and proceedings have begun its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter Ⅲ or Section 2 of Chapter Ⅳ.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

ARTICLE 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter Ⅳ.

ARTICLE 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter Ⅲ or Section 2 of Chapter Ⅳ.

CHAPTER Ⅵ
COST OF PROCEEDINGS

ARTICLE 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

ARTICLE 60

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

ARTICLE 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Center shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Center shall be paid. Such decision shall form part of the award.

CHAPTER Ⅶ
PLACE OF PROCEEDINGS

ARTICLE 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

ARTICLE 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER Ⅷ
DISPUTES BETWEEN CONTRACTING STATES

ARTICLE 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

CHAPTER Ⅸ
AMENDMENT

ARTICLE 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than ninety days prior to the meeting of the Administrative Council at which such amendment is

to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

ARTICLE 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force thirty days after dispatch by the depository of the Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent sub-divisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X
FINAL PROVISIONS

ARTICLE 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

ARTICLE 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall either into force thirty days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval thirty days after the date of such deposit.

ARTICLE 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

ARTICLE 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depository of this Convention either at the time of ratification, acceptance or approval or subsequently.

ARTICLE 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

ARTICLE 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State of any of its constituent sub-divisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

ARTICLE 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

ARTICLE 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

ARTICLE 75

The depositary shall notify all signatory States of the following:

(a) signatures in accordance with Article 67;

(b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;

(c) the date on which this Convention enters into force in accordance with Article 68;

(d) exclusions from territorial application pursuant to Article 70;

(e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and

(f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfill the functions with which it is charged under this Convention.

RAJA MUHAMMAD AMIN,

Secretary

附录二：

1940 年巴基斯坦仲裁法案(英文版)

The Arbitration Act, 1940

Act No. X of 1940

(11th March, 1940)

An Act to consolidate and amend the law relating to Arbitration.

Whereas it is expedient to consolidate and amend the law relating to arbitration in Pakistan;

It is hereby enacted as follows:

CHAPTER Ⅰ
INTRODUCTORY

1. Short title, extent and commencement:

This Act may be called the Arbitration Act, 1940.

It extends to the whole of Pakistan.

It shall come into force on the 1st day of July, 1940.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,

(a)"arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

(b)"award" means an arbitration award;

(c)"Court" means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;

(d)“legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in representative character, the person on whom the estate devolves on the death of the party so acting;

(e)“reference” means reference to arbitration.

CHAPTER Ⅱ
ARBITRATION WITHOUT INTERVENTION OF A COURT

3. Provisions implied in arbitration agreement.

An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

4. Agreement that arbitrators be appointed by third party.

The parties to an arbitration agreement may agree that any reference there under shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

5. Authority of appointed arbitrator or umpire irrevocable except by leave of Court.

The authority of an appointed arbitrator or umpire shall not a revocable except with the leave of the Court unless a contrary intention is expressed in the arbitration agreement.

6. Arbitration agreement not to be discharged by death of party thereto.

(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

7. Provisions in case of insolvency.

(1) Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

8. Power of Court to appoint arbitrator or umpire.

(1) In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a

written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

9. Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.

Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement:

(a) if either of the appointed arbitrators, neglects or refuses to act, or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

Provided that the Court may set aside any appointment as sole arbitrators made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation: The fact that an arbitrator or umpire, after request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

10. Provisions as to appointment of three or more arbitrators.

(1) Where an arbitration agreement provides that a reference shall be to three arbi-

trators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

11. Power of Court to remove arbitrators or umpire in certain circumstances.

(1) The Court may, on the application of any party to reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconduct himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

12. Power of Court where arbitrator is removed or his authority revoked.

(1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

13. Powers of arbitrator.

The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to

(a) administer oath to the parties and witnesses appearing;

(b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;

(c) make the award conditional or in the alternative;

(d) correct in an award any clerical mistake or error arising from any accidental slip or omission;

(e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

14. Award to be signed and filed.

(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

15. Power of Court to modify award.

The Court may by order modify or correct an award

(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) Where the award is imperfect in form, or contains any obvious error which can be amended without effecting such decision; or

(c) Where the award contains clerical mistake or an error arising from an accidental slip or omission.

16. Power to remit award.

(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

17. Judgment in terms of award.

Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having

been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

18. Power of Court to pass interim orders.

(1) Notwithstanding anything contained in section 17, at anytime after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

19. Power to supersede arbitration where award becomes void or is set aside.

Where an award has become void under sub section (3) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

CHAPTER Ⅲ
ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING

20. Application to file in Court arbitration agreement.

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter Ⅱ, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

CHAPTER Ⅳ
ARBITRATION IN SUITS

21. Parties to suit may apply for order or reference.

Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order or reference.

22. Appointment of arbitrator.

The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

23. Order of reference.

(1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(2) Where a matter is referred to arbitration, the Court shall not, save in the man-

nerand to the extent provided in this Act, deal with such matter in the suit.

24. Reference to arbitration by some of the parties.

Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suits shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

25. Provisions applicable to arbitrations under this Chapter.

The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter: Provided that the Court may, in any of the circumstances mentioned in Section 8, 10, 11 and 12, instead of filing up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

CHAPTER Ⅴ
GENERAL

26. Application of Chapter.

Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations.

26 – A. Award to set out reasons:

(1) The arbitrators or umpire shall state in the award the reasons for the award in sufficient detail to enable the Court to consider any question of law arising out of the a-

ward.

(2) Where the award does not state the reasons in sufficient detail, the Court shall remit the award to the arbitrators or umpire and fix the time within which the arbitrator or umpire shall submit the award together with the reasons in sufficient detail:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (2) shall become void on the failure of the arbitrators or umpire to submit it in accordance with the direction of the Court.

27. Power of arbitrators to make an interim award.

(1) Unless a different intention appears in the arbitration agreement, the arbitrator-sor umpire may, if they think fit, make an interim award.

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

28. Power to Court only to enlarge time for making award.

(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provisions in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

29. Interest on awards.

Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjusted by the award and confirmed by the decree.

30. Grounds for setting aside award.

An award shall not be set aside except on one or more of the following grounds, namely:

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superse-

ding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.

31. Jurisdiction.

(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act hasbeen made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent application arising out of that reference and the arbitration proceeding shall be made in that court in no other Court.

32. Bar to suit contesting arbitration agreement or award.

Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Arbitration agreement or award to be contested by application.

Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also and it may pass such orders for the discovery and particulars as it may do in a suit.

34. Power to stay legal proceedings where there is an arbitration agreement.

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority, may make an order staying the proceedings.

35. Effect of legal proceedings on arbitration.

(1) No reference nor award shall be rendered invalid by reasons only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

36. Power of Court, to order that a provision making an award a condition precedent to an action shall not apply to a particular difference.

Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect

as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

37. Limitations.

(1) All the provisions of the Limitation Act, 1908 (IX of 1908), shall apply to arbitrators as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Limitation Act, 1908 (IX of 1908), an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1908 (IX of 1908), for the commencement of the proceedings (including arbitration) with respect to the difference referred.

38. Disputes as to arbitrator's remuneration or costs.

(1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

CHAPTER Ⅵ
APPEALS

39. Appeasable orders.

(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order:

An order

(*i*) superseding an arbitration;

(*ii*) on an award stated in the form of a special case;

(*iii*) modifying or correcting an award;

(*iv*) filing or refusing to file an arbitration agreement;

(*v*) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(*vi*) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

CHAPTER Ⅶ
MISCELLANEOUS

40. Small Cause Court not to have jurisdictions over arbitration save arbitrations in suit before it.

A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising there out save on application made under section 21.

41. Procedure and powers of Court.

Subject to the provisions of this Act and of rules made there under.

(a) the provisions of the Code of Civil Procedure, 1908 (V of 1908), shall apply to all proceedings before the Court, to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

42. Service of notice by party or arbitrator.

Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either

(a) by delivering it to the person on whom it is to be served, or

(b) by sending it by the post in a letter addressed to that person at his usual or last

known place of abode or business in Pakistan and registered under Chapter Ⅵ of the Post Officer Act, 1898 (VI of 1898).

43. Power of Court to issue processes for appearance before arbitrator.

(1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitration or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

44. Power of High Court to make rules.

The High Court may make rules consistent with this Act as to:

(a) the filing of awards and all proceedings consequent thereon or incidental thereto;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;

(c) the staying of any suit or proceeding in contravention of an arbitration agreement;

(d) the forms to be used for the purposes of this Act;

(e) generally, all proceedings in Court under this Act.

45. Government to be bound.

The provisions of this Act shall be binding on the Government.

46. Application of Act to statutory arbitrations.

The provisions of this Act, except sub-section (1) of section 6 and section 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsis-

tent with that other enactment or with any rules made thereunder.

47. Act to apply to all arbitrations.

Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

48. Saving for pending references.

The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal affected by this Act, continue to apply.

49. (***Repeals and amendments.***) ***Rep. by the Repealing and Amending Act*, 1945** (***VI of* 1945**), ***s.* 2 *and First Schedule.***

THE FIRST SCHEDULE

(See Section 3)

IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.

2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in

lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

6. The parties to the reference and all persons claiming under them shall subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators, or umpire may require.

7. The award shall be final and binding on the parties and persons claiming under them respectively.

8. The cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

THE SECOND SCHEDULE
(See Section 41)
POWER OF COURT

1. The preservation, interim custody or sale of any goods which are subject matter of the reference.

2. Securing the amount in difference in the reference.

The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon or into any land or building in the possession or any party to the reference, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

3. Interim injunctions or the appointment of a receiver.

4. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

附录三：

1937 年巴基斯坦仲裁(议定书和公约)法案(英文版)

The Arbitration (*Protocol and Convention*) *Act*, 1937
THE THIRD AND FOURTH SCHEDULES
(ENACTMENTS REPEALED. ENACTMENTS AMENDED.)
***Rep. by the Repealing and Amending Act*,**
1945 (*VI of* 1945), *S.* 2 *and First Schedule*

144 ACT NO. VI OF 1937

(4th March, 1937)

An Act to make certain further provisions respecting the law of arbitration in Pakistan.

Whereas India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in Pakistan;

And whereas it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in Pakistan, to make certain further provisions respecting the law of arbitration; it is hereby enacted as follows:

1. Short title extent and operation.

(1) This Act may be called the Arbitration (Protocol and Convention) Act, 1937.

(2) It extends to the whole of Pakistan.

(3) The provisions of this Act, except this section, shall have effect only from such date as the Federal Government may, by notification in the official Gazette, ap-

point in this behalf, and the Federal Government may appoint different dates for the coming into effect of different provisions of the Act.

2. Interpretation.

(1) In this Act “foreign award” means an award on the differences relating to matters considered as commercial under the law in force in Pakistan, made after the 28th day of July, 1924,

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Federal Government, being satisfied that reciprocal provisions have been made, may, by notification in the official Gazette, declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Federal Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

(2) For the removal of doubt it is hereby declared that any notification issued under this section by the late Government of India before the fifteenth day of August, 1947, and in force on that day for the purpose of enforcement of foreign awards in British India, declaring any Power to be a party to the said Convention or any territory to be the territory to which the Convention applies, shall be deemed to be a notification issued by the Federal Government for the purpose of enforcement of foreign awards in Pakistan.

3. Stay of proceedings in respect of matters to be referred to arbitration.

Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908 (Ⅴ of 1908), if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other

party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings ; and the Court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make and order staying the proceedings.

4. Effect of foreign awards.

(1) A foreign award shall, subject to the provisions of this Act, be enforceable in Pakistan as if it were an award made on a matter referred to arbitration in Pakistan.

(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence set off or otherwise in any legal proceedings in Pakistan, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

5. Filling of foreign award in Court.

(1) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

6. Enforcement of foreign award.

(1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance

with the award.

7. Conditions for enforcement of foreign awards.

(1) In order that a foreign award may be enforceable under this Act it must have

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;

(c) been made in conformity with the law governing the arbitration procedure;

(d) become final in the country in which it was made;

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of Pakistan, and the enforcement thereof must not be contrary to the public policy or the law, of Pakistan.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

(c) the award does not deal with all the questions referred or contains decisions on matter beyond the scope of the agreement for arbitration;

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient

to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

8. Evidence.

(1) The party seeking to enforce a foreign award must produce

(a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (a), (b) and (c) of sub-section (1) of section 7 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in Pakistan.

9. Saving.

Nothing in this Act shall

(a) prejudice any rights which any person would have had of enforcing in Pakistan any award or of availing himself in Pakistan of any award if this Act had not been passed, or

(b) apply to any award made on an arbitration agreement governed by the law of Pakistan.

10. Rule-making powers of the High Court.

The High Court may make rules consistent with this Act as to

(a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

(b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in Court under this Act.

THE FIRST SCHEDULE
PROTOCOL ON ARBITRATION CLAUSES

The undersigned, being duly authorized, declare that they accept: on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States 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, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under mentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE SECOND SCHEDULE CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS

ARTICLE 1

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called “a submission to arbitration”) covered by the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or *pourvoi en* cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

ARTICLE 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

ARTICLE 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

ARTICLE 4

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

ARTICLE 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

ARTICLE 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923.

ARTICLE 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

ARTICLE 8

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

ARTICLE 9

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General

of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

ARTICLE 10

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned. The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on 24th September, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

ARTICLE 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

附录四:

2017 年巴基斯坦替代性争端解决法案(英文版)

Alternative Dispute Resolution Act, 2017

Extraordinary Published by Authority
(190) Islamabad, Thursday, June 1, 2017

PART I

Acts, Ordinances. President's Orders and Regulations

NATIONAL ASSEMBLY SECRETARIAT

Islamabad, the 30th May 2017

No. F. 22(39)/2016 Legis.

The following Acts of *Majlis-e-Shoora* (Parliament) received the assent of the President on the 30th May, 2017 is hereby published for general information:

Act No. XX of 2017

to provide for alternative dispute resolution

Whereas the State is required to ensure inexpensive and expeditious justice;

And whereas an alternative dispute resolution system can facilitate settlement of disputes expeditiously without resort to formal litigation:

It is hereby enacted as follows:

1. Short title, extent and commencement.

(1) This Act may be called the Alternative Dispute Resolution Act, 2017.

(2) It shall extend to the Islamabad Capital Territory.

(3) It shall come into force at once.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,

(a)"Alternative Dispute Resolution"(ADR) means a process in which parties resort to resolving a dispute other than by adjudication by Courts and includes, but is not limited to arbitration, mediation, conciliation and neutral evaluation;

(b)"ADR Centre" means the ADR Centre notified by the Government for the purposes of this Act;

(c)"arbitration" means a process by which parties submit a dispute to the decision of a Neutral person or persons appointed by mutual consent or under a statutory or contractual provision;

(d)"award" means an arbitration award;

(e)"conciliation" means a process in which a Neutral person encourages the parties to resolve their civil or commercial disputes voluntarily including by advising on possible solutions and terms of settlement;

(f)"Court" means any court, tribunal or quasi-judicial for having original jurisdiction;

(g)"Government" means the Federal Government;

(h)"High Court" means the High Court concerned;

(i)"mediation" means a process in which a mediator facilitates dispute resolution by encouraging communication and negotiation between the parties, in order for them to arrive at a mutually satisfactory agreement;

(j)"Neutral" includes an arbitrator, conciliator, evaluator and mediator or any other impartial person who is included in the panel;

(k)"panel" means the panel of Neutrals notified under section 4;

(l)"prescribed" means prescribed by rules made under this Act;

(m)"rules" means the rules made under this Act;

(n)"Schedule" means a Schedule annexed to this Act; and

(o)"settlement" means the agreement reached between the parties as a result of successful ADR, other than an award.

CHAPTER Ⅰ
CIVIL MATTERS

3. Reference to ADR.

(1) The Court, on the first date after appearance of all parties, shall refer every civil matter mentioned in the Schedule for ADR except where

(a) any of the parties to the dispute do not agree for ADR;

(b) the Court, having regard to the facts and circumstances of the case, is satisfied that there is no possibility of resolution of the dispute through ADR; or

(c) an intricate question of law or fact is involved.

(2) Before referral to ADR, the Court may frame issues with the consent of the parties for facilitating the settlement of the dispute.

Provided that the Neutral may frame additional issues if so required during the course of ADR proceedings, with the consent of the parties.

(3) The Court, on application of any party to the dispute before it, with the consent of all parties, may refer any civil matter mentioned in the Schedule to ADR at any stage of the proceedings.

(4) This section shall not apply where *ex-parte* proceedings are subsisting against the defendant or the respondent.

Provided that even if such proceedings are set aside, the case shall not be referred to ADR unless the Court, keeping in view the stage of the proceedings the case or any agreement of the parties, decides otherwise.

4. Panel of Neutrals.

(1) The Government, after consultation with the High Court, shall notify in the official Gazette a panel of Neutrals for each district from amongst lawyers with at least seven years practising experience, retired Judges, retired civil servants, ulema, jurists, technocrats and experts and such other persons of repute and integrity having such qualifications and experience as may be prescribed;

Provided that due representation shall be given to women, having prescribed qualifications and experience, in the panel of Neutrals.

(2) The Government may arrange such training courses for Neutrals as may be prescribed.

(3) The Government may, in the like manner as provided in sub-section (1), amend the panel by adding or modifying any entry therein or omitting any entry therefrom.

(4) The Government may not remove a Neutral once he is seized of the matter referred to him unless both parties agree on his replacement.

5. Appointment of Neutrals.

While referring the matter for ADR, the Court shall appoint a Neutral or any other person agreed upon by the parties or refer the matter to an ADR Centre;

Provided that where the parties neither agree on a Neutral nor any other person, the Court shall appoint a Neutral in its discretion;

Provided further that where one or both of the parties to the dispute are women, the Neutral shall preferably be a woman.

6. Referral to ADR Centre.

The Court may, with the consent of the parties, refer the matter to an ADR Centre;

Provided that if the case is referred to an ADR Centre and one or both of the parties to the dispute are women, the case shall preferably be dealt with by a team including a woman.

7. Appearance of parties.

Upon referring the matter for ADR, the Court shall direct the parties to appear before the Neutral or ADR Centre, as the case may be, on the date and time fixed by the Court.

8. Reference to ADR before legal proceedings.

(1) If the parties agree on ADR before initiating the proceedings in the Court, they may make an application to the Court or an ADR Centre for resolution of their dispute through ADR.

(2) On receipt of an application under sub-section (1), the Court or ADR Centre,

as the case may be, shall refer the matter to a Neutral or such other person as may be agreed upon by the parties.

(3) The provisions of this Act shall *mutatis mutandis* apply to the proceedings under this section.

9. ADR proceedings.

(1) The parties to the dispute shall take part in the ADR proceedings in person or through duly authorized representatives or attorneys.

(2) A Neutral appointed by the Court or an ADR Centre to whom the matter is referred for mediation, conciliation or other mode of ADR shall dispose of the matter within a period of thirty days;

Provided that the Court or the ADR Centre, as the case may be, may for sufficient cause extend this period for further fifteen days on a request made by the Neutral.

(3) If the matter is referred to an arbitrator, he shall complete the process within sixty days;

Provided that the Court may for sufficient cause extend this period for further thirty days on a request made by the arbitrator.

(4) The Court may, from time to time, give such directions as it deems fit regarding the conduct of the ADR and the same shall be binding on the parties and the Neutral.

(5) Any party who fails to attend or who requests an adjournment in any ADR proceedings or fails to comply with a deadline stipulated either by the Court or by the Neutral or does any other act which has the effect of delaying the ADR proceedings, shall be liable to pay costs to the other party as may be determined by the Neutral.

10. Settlement and award.

(1) If as a result of the mediation or conciliation a settlement is reached between the parties, the Neutral shall record such settlement, duly witnessed and signed by him and by the parties or their duly authorized representatives or attorneys and submit it to the Court which shall pronounce judgment and pass decree in terms of the settlement.

(2) If the settlement relates only to part of the dispute, the Court shall pass order in terms of such settlement, while adjudicating upon the remaining part.

(3) The arbitrator on determination of the dispute shall render a written award, duly signed by him and by the parties or their duly authorized representatives or attorneys and submit it to the Court which shall pronounce judgment and pass decree in terms of the award.

(4) If the Neutral was appointed by an ADR Centre before initiation of legal proceedings, he shall submit the settlement or award, duly witnessed and signed by him and by the parties or their duly authorized representatives or attorneys, to the said Centre which shall submit the same to the Court and the Court shall pronounce judgment and pass decree in terms of the settlement or award.

(5) If the parties have themselves resorted to ADR and a settlement is reached between them, they may make application to the Court to make the same Rule of the Court. The Court, if satisfied that the matter has been voluntarily settled and the document recording the settlement has been duly witnessed and signed by the parties, shall pronounce judgment and pass decree in terms of the settlement.

11. Failure of ADR.

If the efforts of the Neutral fail to bring about a settlement between the parties or does not result in an award, the Neutral shall submit a report to the Court which shall proceed with the case from the stage it was referred for the ADR.

12. Failure of ADR Centre etc.

Where the parties have directly approached an ADR Centre or before initiating the proceedings in the Court and the ADR Centre has failed to bring about a settlement or result in an award, no legal proceedings shall be initiated thereafter by either party without intimating the Court about the failure of the ADR.

13. Execution of an order or a decree.

Where an order or a decree is passed by a Court following ADR, it shall be executed in the manner as prescribed and if no such manner is prescribed under this Act, it shall be executable in accordance with the procedure provided for in the relevant law.

CHAPTER Ⅱ
COMPOUNDABLE OFFENCES

14. ADR in compoundable offences.

(1) Where the Court takes cognizance of a compoundable offence specified in section 345 of the Code of Criminal Procedure, 1898 (Act V of 1898) or under any other law for the time being in force, the Court may appoint a Neutral or such other persons as may be agreed upon by the parties to facilitate compounding of the offence;

Provided that the Court shall not refer a case for compounding of an offence without consent of the parties.

(2) The Neutral appointed under sub-section (1) shall try to facilitate compounding of the offence within thirty days.

(3) If the offence is compounded, the Neutral shall submit a report in this respect in the Court duly witnessed and signed by him and by the persons authorized to compound the offence under any law for time being in force and the Court shall pass order and the accused shall be discharged.

(4) If the efforts of the Neutral for compounding the offence fail, the Court shall proceed with the trial from the stage it was referred to the Neutral.

(5) If the parties have themselves resorted to ADR and the offence is compounded in terms of section 345 of the Code of Criminal Procedure, 1898 (Act V of 1898) or any other law for the time being in force, they may make application to the Court in terms thereof. If the Court is satisfied that the parties have voluntarily compounded the offence and the document recording their agreement has been duly witnessed and signed by them, the Court shall pass order accordingly and the accused shall be discharged.

(6) Section 345 of the Code of Criminal Procedure, 1898 (Act V of 1898) or any other law under which the offence is compoundable shall *mutatis mutandis* apply to the proceedings under this Chapter.

CHAPTER Ⅲ
MISCELLANEOUS

15. Costs and fees of ADR.

The costs and fees of ADR process shall be borne by the parties in such proportion as may be mutually agreed upon by them, failing which it shall be determined by the Court.

16. Utilization of services of an evaluator.

The Court or the Neutral or ADR Centre may utilize the services of an evaluator to determine any matter of financial or any other nature in respect of any proceedings before it or him. The evaluator shall render such assistance as may be required by the Court or the Neutral or ADR Centre. After completion of the evaluation process, the evaluator shall submit a report to the Court or the Neutral or ADR Centre, as the case may be. The parties shall pay costs of the evaluation and fee of the evaluator as may be determined by the Court.

17. Penal costs.

Any person who willfully violates any provision of this Act, rules or any order of the Court with which he is required to comply shall be liable to penal costs which may extend to one hundred thousand rupees, in addition to any other costs or penalty to which he may be liable under the relevant law.

18. Appeal and revision barred.

No appeal or revision shall lie from the decree or any order of the Court under this-Act.

19. Savings.

(1) Save as provided in this Act, the proceedings before the Neutral shall be privileged and shall not be admissible in evidence before any Court without consent of the parties and the Neutral shall not be required to appear as a witness or otherwise in any arbitral or judicial proceedings with respect to a dispute that is or was the subject-matter

of an ADR;

Provided that the final settlement, award or agreement between the parties, as the case may be, under Chapter Ⅰ or Chapter Ⅱ shall be admissible in evidence in any subsequent proceedings between them relating to the same subject-matter, wholly or partly.

(2) The Neutral shall not act as a representative or attorney of any party to the ADR, in any subsequent proceedings with respect to a dispute that is or was the subject-matter of an ADR.

(3) No legal proceedings shall lie against a Neutral or any other person or official associated in the ADR process for any act done or omitted to be done in good faith in the course of the performance of his functions, in reference to such ADR.

20. Application, etc., of certain laws.

(1) Subject to the provisions of this Act, the following laws and the rules made thereunder shall *mutatis mutandis* apply to proceedings under this Act;

(a) the Oaths Act, 1873 (X of 1873);

(b) the Limitation Act 1908 (IX of 1908); and

(c) the Arbitration Act, 1940 (X of 1940);

Provided that notwithstanding anything contained in the arbitration Act, 1940 (X of 1940), in case of an arbitration under this Act, the arbitrator shall be appointed by mutual agreement of the parties.

(2) Save as provided in this Act, the Code of Criminal Procedure, 1898 (Act V of 1898), the Code of Civil Procedure, 1908 (Act V of 1908) and the *Qanun-e- Shahadat*, 1984 (P. O. No. 10 of 1984) shall not apply to the ADR proceedings under this Act.

(3) Provisions of this Act shall apply to a matter pending in the Court immediately before the commencement of this Act, unless the parties agree otherwise.

(4) Subject to the provisions of this Act and the rules made thereunder, Rules of Chamber of Commerce and other relevant bodies, where applicable, shall *mutatis mutandis* apply to proceedings under this Act.

21. Overriding effect.

Subject to section 20, the provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

22. Transitory provision.

Until a panel is notified, the Court shall nominate a person agreed upon by the parties to carry out ADR under this Act who shall be deemed to be a Neutral.

23. Cases pending in appeal or revision.

The provisions of this Act shall, with the consent of the parties *mutatis mutandis* apply to matters pending in appeal or revision.

24. Code of Conduct.

The Government shall notify Code of Conduct for Neutral (arbitrator, conciliator, evaluator and mediator) in consultation with Chief Justice of Islamabad High Court.

25. Power to make rules.

(1) The Government, may, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) The rules made under sub-section (1) shall have effect notwithstanding anything to the contrary contained in any rules made under any other law for the time being in force.

26. Removal of difficulty.

If any difficulty arises in giving effect to any provision of this Act, the Government may make such order not inconsistent with the provisions of this Act as may be necessary to remove the difficulty.

27. Repeal.

Subject to the provisions of sub-section (3) of section 20, section 89A of the Code of Civil Procedure, 1908 (Act V of 1908), to the extent of area or areas to which this Act is extended, shall stand repealed.

SCHEDULE

[See section 3(1)]

1. A dispute between a landlord and tenant.

2. Preemption cases.

3. Land and property disputes.

4. Civil matters under the Small Claims and Minor Offences Courts Ordinance, 2002.

5. Commercial dispute including but not limited to any claim, right or interest arising out of trade and commerce.

6. Contractual cases.

7. Disputes relating to professional negligence.

8. Suits for specific performance.

9. Companies and banking matters.

10. Insurance.

11. Negotiable instruments.

12. Personal injury.

13. Compensation and damages suits.

14. Patent, Trade mark and copyright.

15. Disputes under the Canal and Drainage Law.

16. Dispute for recovery of movable property or value thereof.

17. Dispute for separate possession of joint immovable property through partition or otherwise.

18. Dispute for redemption of mortgaged property.

19. Dispute for rendition of accounts of joint property.

20. Dispute to restrain waste and remove nuisance.

21. Mesne profits of property.

22. Any other matter under the law not falling in the Schedule but agreed to by the parties for settlement under this Act.

JAWAD RAFIQUE MALIK

Secretary

附录五：

巴基斯坦承认与执行法案(英文版)

An Act to Provide for the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards

Extraordinary Published by Authority
Islamabad, Tuesday, 19th July , 2011

PART I
Acts, Ordinances. President's Orders and Regulations
SENATE SECRETARIAT

Islamabad, the 19th July 2011

No. F. 9(3)/2011 – Legis.

The following Act of *Majlis-e-Shoora* (Parliament) received the assent of the President on 15th July, 2011, is hereby published for general information:

Act No. XVII of 2011

An Act to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards.

Whereas, Pakistan is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;

Whereas, it is expedient to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to the said Convention and for matters connected therewith;

It is hereby enacted as follows:

1. Short title, extent, application and commencement.

(1) This Act may be called the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011.

(2) It extends to the whole of Pakistan.

(3) It shall apply to arbitration agreements made before, on or after the date of commencement of this Act.

(4) It shall not apply to foreign arbitral awards made before the fourteenth day of July, 2005.

(5) It shall come into force at once.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,

(a) “Article” means an Article of Convention;

(b) “Contracting State” means a State which is a Party to the Convention;

(c) “Convention” means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958, set forth in the Schedule to this Act;

(d) “Court” means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette; and

(e) “foreign arbitral award” means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official Gazette.

3. Jurisdiction of Court.

(1) Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.

(2) An application to stay legal proceedings pursuant to the provisions of Article Ⅱ ofthe Convention may be filed in the Court, in which the legal proceedings are pending.

(3) In the exercise of its jurisdiction, the Court shall

(a) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and

(b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908).

4. Enforcement of arbitration agreements.

(1) A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.

(2) On an application under sub-section (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is *null* and *void*, in operative or incapable of being performed.

5. Furnishing of documents.

The party applying for recognition and enforcement of foreign arbitral award under this Act shall, at the time of the application, furnish documents to the Court in accordance with Article Ⅳ of the Convention.

6. Enforcement of foreign arbitral award.

(1) Unless the Court pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognize and enforce the award in the same manner as a judgment or order of a court in Pakistan.

(2) A foreign arbitral award which is enforceable under this Act, shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.

7. Unenforceable foreign arbitral awards.

The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article Ⅴ of the Convention.

8. Inconsistency.

In the event of any inconsistency between this Act and the Convention, the Convention shall prevail to the extent of the inconsistency.

9. Powers to make Rules.

The Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.

10. Repeal and saving.

(1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as 'the Act') is hereby repealed.

(2) Notwithstanding the repeal of the Act, it shall continue *to* have effect in relation to foreign arbitral awards made,

(a) before the date of commencement of this Act; and

(b) within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Act.

SCHEDULE

[*See* Section 2 (a)]

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Done at New York on 10th June, 1958

Entry into force: 7th June, 1959

ARTICLE Ⅰ

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory or a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension

under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE Ⅱ

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

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is *null* and *void*, inoperative or incapable of being performed.

ARTICLE Ⅲ

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral award to which this Convention applies than arc imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE Ⅳ

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in Article Ⅱ or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE Ⅴ

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

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

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

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

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority if the country in which, or under the law of which,

that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

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

ARTICLE Ⅵ

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE Ⅶ

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE Ⅷ

1. This Convention shall be open until 31st December, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which

is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE Ⅸ

1. This Convention shall be open for accession to all States referred to in Article Ⅷ.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE Ⅹ

1. Any State may, at the time of signature, ratification or accession declare that this Convention shall extent to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each state concerned shall consider the possibility of taking the necessary steps in order to extent the application of this Convention to such territories, subject, where necessary for Constitutional reasons, to the consent of the Governments of such territories.

ARTICLE Ⅺ

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall

to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force onthe ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

(1) Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

(2) Any State which has made a declaration or notification under Article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

(3) This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the denunciation take effect.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in Article VIII of the following:

(a) signatures and ratifications in accordance with Article VIII;

(b) accessions in accordance with Article IX;

(c) declarations and notifications under Articles I, X and XI;

(d) the date upon which this Convention enters into force in accordance with Article XII; and

(e) denunciations and notifications in accordance with Article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of the Convention to the States contemplated in Article VIII.

RAJA MUHAMMAD AMIN

Secretary

附录六：

CIICA 仲裁规则(英文版)

CIICA Arbitration Rules

Center for International Investment and Commercial Arbitration (CIICA)

CIICA is Pakistan's first international arbitration center that offers arbitration, mediation and a wide range of other dispute avoidance and resolution services. CIICA's panel of arbitrators includes leading local and foreign arbitrators from the U. S., Australia, China, Canada, Hong Kong and the U. K.

CIICA is a registered, independent organization that is also involved in capacity building in the area of international arbitration in particular and alternative dispute resolution in general. CIICA's objectives also include training, research and legislative reform in connection with international arbitration.

1. Scope of Application and Interpretation

1.1 If parties have agreed to refer their dispute to CIICA for arbitration, they shall be deemed to have agreed that the arbitration shall be conducted and administered in accordance with these Rules. If any of these Rules is in conflict with a mandatory provision of the applicable law, that provision shall prevail.

1.2 These Rules shall come into force on April 5, 2016. These Rules shall apply, unless the parties have agreed otherwise, to any arbitration which is commenced on or after that date.

Unless they indicate otherwise, the parties will be deemed to have selected the CIICA Rules in force at the time of initiation of arbitration, even if an earlier version of the rules was in effect at the time of the agreement to arbitrate.

1.3 In these Rules,

· "Award" means a partial, interim or final award and an award of an Emergency Arbitrator;

· "Arbitration Council" means the CIICA Arbitration Council and includes a

Committee of the Arbitration Council;

· “Committee of the Arbitration Council” means a committee consisting of at least two members of the Arbitration Council appointed by the Chairman of the Arbitration Council, which may include the Chairman;

· “Chairman” means the Chairman of the Arbitration Council;

· “Secretariat” means the Secretariat of CIICA;

· “CIICA” means the Center for International Investment and Commercial Arbitration;

· “Tribunal” includes a sole arbitrator or all the arbitrators if more than one is appointed;

· Any pronoun shall be understood to be gender-neutral; and

· Any singular noun shall be understood to refer to the plural where applicable.

2. Notice, Calculation of Periods of Time

2.1 For the purposes of these Rules, all notices, communications or proposals shall be in writing. Any such written communication may be delivered or sent by registered postal, courier service, fax or email or delivered by any other means that provides a record/proof of its delivery. It is deemed to have been received if it is delivered:

a. to the addressee personally; or

b. to his habitual residence, place of business or designated address; or

c. to any address agreed on by the parties; or

d. in accordance with the standard practice, if any, of the parties in prior communications/dealings, or

e. if none of these addresses are available, at the addressee's last-known residence or place of business.

2.2 The notice, communication, or proposal is deemed to have been received on the day it is delivered to the addressee.

2.3 Any period of time under these Rules, shall begin to run on the day following the day on which the notice, communication or proposal is received. If the last day of such period is not a business day at the place of receipt pursuant to Rule 2.1, the period shall be extended until the first business day that follows. Non-business days including

official holidays during the running of the period of time are included in calculating the period.

2.4 The parties shall file with the Secretariat a copy of any notice, communication or proposal related to the arbitral proceedings.

2.5 The Secretariat may at any time, subject to reasons recorded in writing, extend or shorten any time limits prescribed under these Rules.

3. Notice of Arbitration

3.1 In order to commence an arbitration, the "Claimant" shall file with the Secretariat a Notice of Arbitration which shall include, but may not be limited to:

a. a request that the dispute be referred to arbitration;

b. the names, address(es), telephone number(s), facsimile number(s) and email address(es), of the parties to the arbitration and their representatives, if any;

c. a reference to the arbitration clause/agreement that is invoked and its copy;

d. a reference to the contract or other instrument out of or in relation to which the dispute arises and its copy;

e. a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, if possible, an initial quantification of the claim amount;

f. a statement of any matters which the parties have previously agreed regarding the conduct of the arbitration or with respect to which the Claimant would like to make a proposal;

g. a proposal for the number of arbitrator(s) in case it is not specified in the arbitration agreement;

h. unless the parties have agreed otherwise, a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator, or the nomination of an arbitrator if the arbitration agreement provides for three arbitrators;

i. any comments regarding the applicable rules of law;

j. any comments regarding the language of the arbitration; and

k. payment of the applicable filing fee.

3.2 The Notice of Arbitration may also include the "Statement of Claim" referred to in Rule 16.1.

3.3 The date of receipt of the complete Notice of Arbitration by the Secretariat shall be deemed the date of commencement of the arbitration. The Notice of Arbitration is deemed to be complete after all the requirements of Rule 3.1 are fulfilled or when the Secretariat determines that there has been substantial compliance with such requirements. CIICA shall notify the parties on the commencement of arbitration.

3.4 The Claimant shall at the same time send a copy of the Notice of Arbitration to the “Respondent”, and notify the Secretariat that it has done so, specifying the mode and date of service and providing evidence thereof.

4. Response to the Notice of Arbitration

4.1 The Respondent shall send to the Secretariat (for transmission to Claimant) a Response within fourteen days of receipt of the Notice of Arbitration that contains the following:

a. a confirmation or denial of all or part of the claim(s);

b. a brief statement describing the nature and circumstances of any counterclaim, specifying the relief claimed and, if possible, an initial quantification of the counterclaim amount;

c. any comment in response to any statements in the Notice of Arbitration under Rules 3.1 (f), (g), (h), (i) and (j) or any comment in connection with matters covered in such Rules; and

d. the nomination of an arbitrator if the arbitration agreement provides for three arbitrators or, if the arbitration agreement provides for a sole arbitrator, agreement with Claimant's proposal for a sole arbitrator or a counter-proposal unless parties have agreed on a different procedure.

4.2 The Response may also include the Statement of Defence and a Statement of Counterclaim, as referred to in Rules 16.2 and 16.3.

4.3 The Respondent shall at the same time send a copy of the Response to the Secretariat, together with the payment of the requisite filing fee for any counterclaim, and shall notify the Secretariat of the mode and date of service.

5. Number and Appointment of Arbitrators

5.1 A sole arbitrator shall be appointed unless the parties have agreed otherwise or

unless it appears to the Secretariat, based on relevant factors including the nature of the case that the dispute warrants the appointment of three arbitrators.

5.2 Parties may agree that an arbitrator is to be appointed by one or more of the parties, or by any third person including the arbitrators already appointed.

5.3 The Chairman shall confirm appointment of the arbitrators nominated by the parties, or by any third person including the arbitrators already appointed.

5.4 The Secretariat shall set the terms of appointment of each arbitrator in accordance with these Rules or in accordance with the agreement of the parties.

6. Sole Arbitrator

6.1 If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons. Rule 5.3 shall apply once the parties have reached an agreement on the nomination of a sole arbitrator.

6.2 The Chairman shall appoint the arbitrator if, within twenty-eight days after receipt by the Secretariat of the Notice of Arbitration, the parties have not agreed on the nomination of a sole arbitrator, or if at any time either party so requests.

7. Three Arbitrators

7.1 In case three arbitrators are to be appointed, each party shall nominate one arbitrator.

7.2 If a party fails to make a nomination within 14 days after receipt of a party's nomination of an arbitrator, the Chairman shall appoint the arbitrator on its behalf.

7.3 In case of a three-member tribunal, the third/presiding arbitrator may be appointed by (a) the parties jointly; or (b) the party-appointed arbitrators jointly; or (c) Chairman.

7.4 The Chairman shall appoint the third/presiding arbitrator if the parties do not agree on a nomination within the time limit set by the parties or by the Secretariat.

7.5 The Chairman shall appoint an arbitrator as soon as practicable. The Chairman's decision to appoint an arbitrator shall be final and cannot be challenged/appealed.

8. Multi-party Appointment of Arbitrator(s)

8.1 If there are more than two parties and three arbitrators are to be appointed, the Claimant(s) shall jointly nominate one arbitrator and the Respondent(s) shall jointly nominate one arbitrator. In case both the joint nominations are not made within twenty-eight days of receipt by the Secretariat of the Notice of Arbitration or within the period agreed by the parties or set by the Secretariat, the Chairman shall appoint all three arbitrators and designate one of them to act as the presiding arbitrator.

8.2 If there are more than two parties and one arbitrator is to be appointed, all parties must agree on an arbitrator within twenty-eight days of receipt by the Secretariat of the Notice of Arbitration or within the period agreed by the parties or set by the Secretariat. In case all parties do not agree on a nomination, the Chairman shall appoint the arbitrator.

9. Qualifications of Arbitrators

9.1 Any arbitrator, whether or not nominated by the parties, conducting an arbitration under these Rules shall be independent and impartial, and not act as an advocate for any party.

9.2 In making an appointment under these Rules, the Chairman shall give due consideration to any qualifications required of the arbitrator by the agreement of the parties and to considerations important for the appointment of an independent and impartial arbitrator.

9.3 The Chairman shall also take into consideration the arbitrator's availability for conducting the arbitral proceedings in a prompt and efficient manner.

9.4 An arbitrator shall disclose to the parties and to the Secretariat any circumstance that may give rise to justifiable doubts regarding his impartiality or independence as soon as reasonably practicable and in any event before his appointment by the Chairman.

9.5 An arbitrator shall immediately disclose to the parties, the other arbitrators and the Secretariat any circumstance of a similar nature that may arise after his appointment at any stage during the arbitration.

9.6 If the parties have agreed on any arbitrator qualifications, the arbitrator shall be

deemed to meet such qualifications unless a party states otherwise within fourteen days after receipt by that party of the notification of the nomination of the arbitrator. In the event of such a challenge, the procedure for challenge and replacement of an arbitrator in Rules 10 to 13 shall apply.

9.7 No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator or with any candidate for appointment as party-nominated arbitrator, except communications related to the following:

a. the general nature of the controversy and of the anticipated proceedings;

b. the candidate's qualifications, availability or independence in relation to the parties; and

c. the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

No party or its representative shall have any *ex parte* communication with any candidate for presiding arbitrator.

10. Challenge of Arbitrators

10.1 Any arbitrator may be challenged if any circumstances give rise to justifiable doubts regarding the arbitrator's impartiality or independence or if the arbitrator does not possess the requisite qualification on which the parties have agreed.

10.2 A party may challenge the arbitrator nominated by it on the basis of any information/facts that it became aware of after the arbitrator's appointment.

11. Notice of Challenge

11.1 Subject to Rule 9.6, a party that intends to challenge an arbitrator shall send a notice of challenge within fourteen days after the receipt of the notice of appointment of that arbitrator or within fourteen days after the party becomes aware of any information/circumstances mentioned in Rule 10.1 or 10.2.

11.2 The notice of challenge shall be filed with the Secretariat and sent simultaneously to the other party, the arbitrator who is being challenged and the other members of the Tribunal. The notice of challenge shall be in writing and shall state the grounds for the challenge. The Secretariat may suspend the arbitration proceedings until the challenge is decided.

11.3 If an arbitrator is challenged by one party, the other party may choose not to contest it. The challenged arbitrator may also withdraw from his office without contesting it. In both cases, it would not constitute acceptance of the validity of the grounds for the challenge.

11.4 In instances referred to in Rule 11.3, the procedure provided in Rules 5, 6, 7 or 8, as the case may be, shall be used for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator, a party had failed to exercise his right to nominate. The time-limits provided in those Rules shall start to run from the date of receipt of the other party's agreement with the challenge or the challenged arbitrator's withdrawal.

12. Decision on Challenge

12.1 If, within seven days of receipt of the notice of challenge, the other party does not confirm its agreement with the challenge and the arbitrator who is being challenged does not withdraw voluntarily, the Arbitration Council shall decide the challenge.

12.2 If the Arbitration Council decides that the challenge is valid, a substitute arbitrator shall be appointed in accordance with the procedure provided in Rules 5,6, 7 or 8, as the case may be, even if during the process of appointing the challenged arbitrator, a party had failed to exercise his right to nominate. The time-limits provided in those Rules shall start to run from the date of the Secretariat's notification to the parties of the decision by the Arbitration Council.

12.3 If the Arbitration Council dismisses the challenge, the arbitrator shall continue with the arbitration.

12.4 The Arbitration Council may fix the costs related to proceedings for determining the challenge and specify whether one or more parties will bear the costs and the proportion in which such costs should be borne.

12.5 The Arbitration Council's decision made under this Rule shall be final and cannot be challenged /appealed.

13. Replacement of an Arbitrator

13.1 In the event of the death, resignation or removal of an arbitrator during the

course of the arbitral proceedings, a substitute arbitrator shall be appointed in accordance with the same procedure that was adopted for nomination and appointment of the arbitrator being replaced.

13.2 If an arbitrator refuses or fails to act or in the event of a *de jure* or *de facto* impossibility of him performing his functions or that he is not fulfilling his functions in accordance with the Rules the procedure for challenge and replacement of an arbitrator provided in Rules 10 to 12 and 13.1 shall apply.

13.3 The Chairman after consulting with the parties, may remove an arbitrator who refuses or fails to act, or in case of a *de jure* or *de facto* impossibility of him performing his functions, or if he is not fulfilling his functions in accordance with the Rules.

14. Repetition of Hearings in the Event of Replacement of an Arbitrator

Upon replacement of a sole or presiding arbitrator any hearings held previously shall be repeated unless otherwise agreed by the parties. If any other arbitrator is replaced, such prior hearings may be repeated if the Tribunal decides to do so after consulting with the parties. If the Tribunal has issued an interim or partial award, any hearings related solely to that award shall not be repeated, and the award shall remain in effect.

15. Conduct of the Proceedings

15.1 The Tribunal shall conduct the arbitration in accordance with the procedure agreed to by the parties to ensure the fair and expeditious determination of the dispute. To the extent the parties have not agreed on procedural aspects of the proceeding, the Tribunal is empowered to determine in its discretion the procedures to be followed for the arbitral proceedings.

15.2 The Tribunal shall determine the relevance, form and admissibility of allevidence.

15.3 As soon as practicable after the appointment of all arbitrators, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the most appropriate and efficient procedures to be adopted for the arbitration.

15.4 The Tribunal may direct the order of proceedings, exclude any testimony not considered relevant or other evidence and direct the parties to focus their submissions on

issues the decision of which could dispose of all or part of the case.

15.5 Parties may authorize the presiding arbitrator to make procedural rulings on behalf of the tribunal.

15.6 All statements, documents or other information submitted to the Tribunal and the Secretariat by one party shall simultaneously be communicated to the other party.

16. Submissions by the Parties

16.1 Unless already submitted pursuant to Rule 3.2, the Claimant shall, within a period of time to be determined by the Tribunal, send to the Respondent and the Tribunal a Statement of Claim setting out the following:

a. a statement of facts that support the claim;

b. the legal grounds or arguments in connection with the claim; and

c. the relief claimed and the amount of all quantifiable claims.

16.2 Unless already submitted pursuant to Rule 4.2, the Respondent shall, within a period of time to be determined by the Tribunal, send to the Claimant a Statement of Defence that includes the facts and contentions of law on which it relies. The Statement of Defence shall also state any counterclaim, which shall comply with the requirements of Rule 16.1.

16.3 If the Respondent makes a counterclaim the Claimant shall, within fourteen days, send to the Respondent a Statement of Defense to the Counterclaim stating:

a. the facts and legal arguments in the Statement of Counterclaim it admits or denies;

b. the grounds on which it denies the claims;

c. other facts and legal arguments on which it relies.

16.4 A party may amend its claim, counterclaim or other submissions subject to the permission of the Tribunal. The Tribunal may deny permission if it would cause unnecessary delay or prejudice the other party or if the amended claim or counterclaim would fall outside the scope of the arbitration agreement.

16.5 The Tribunal shall decide whether or not any further submissions are required-from the parties. The Tribunal shall set the deadlines for communicating such submissions.

16.6 All submissions referred to in this Rule shall be accompanied by copies of all supporting documents that have not been submitted earlier by the party.

16.7 If the Claimant fails to submit its Statement of Claim within the specified time period, the Tribunal may issue an order for termination of the arbitral proceedings or give such other directions it deems appropriate.

16.8 If the Respondent fails to submit a Statement of Defence within the specified time period, or if at any point any party fails to make any submissions in the manner directed by the Tribunal, the Tribunal may proceed with the arbitration.

17. Seat of Arbitration

17.1 The parties may agree on the seat of arbitration. If there is no such agreement, the seat of arbitration shall be Lahore, Pakistan, unless the Tribunal determines that another seat is more appropriate after considering all relevant factors and circumstances of the case.

17.2 The Tribunal may hold hearings and meetings in a manner it considers appropriate and at any location it considers convenient or appropriate.

18. Language of Arbitration

18.1 The Tribunal shall determine the language to be used in the proceedings unless parties have agreed on a language.

18.2 If a document is written in a language other than the language of the arbitration, the Tribunal, or the Secretariat if the Tribunal has not been constituted, may order that party to submit a translation in a form to be determined by the Tribunal or the Secretariat.

19. Party Representatives

A party may be represented by lawyers/legal practitioners or any other representatives.

20. Hearings

20.1 Unless the parties have agreed on documents-only arbitration, the Tribunal shall, if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including

any submissions related to jurisdiction of the Tribunal.

20.2 The Tribunal shall set the date, time and place of any meeting or hearing and shall give the parties sufficient notice.

20.3 If any party fails to attend a hearing without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration and may make the award based on the submissions and evidence before it.

20.4 All meetings and hearings shall be in private, and any recordings, transcripts, or documents used shall remain confidential except to the extent parties expressly agree otherwise.

21. Witnesses

21.1 Before any hearing, the Tribunal may direct a party to give notice of the identity of witnesses, including expert witnesses, whom it intends to produce, the subject matter of their testimony and its relevance to the issues.

21.2 The Tribunal may allow, refuse or limit the appearance of witnesses.

21.3 Any witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in a manner determined by the Tribunal.

21.4 The Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. Subject to Rule 21.2, any party may request that such a witness should attend for oral examination. If the witness fails to attend, the Tribunal may accord such weight to the written testimony as it deems appropriate and may even disregard or exclude it completely.

21.5 A party or its representatives may interview any of its witnesses or potential witnesses prior to his appearance at any hearing.

21.6 A witness's testimony will be struck from the record if he or she is not made available for cross-examination.

22. Tribunal-Appointed Experts

22.1 Unless the parties have agreed otherwise, the Tribunal:

a. may appoint an expert, after consulting with the parties, to report on specific issues; and

b. may require a party to provide such expert any relevant information/documents, or provide access to any relevant documents, goods or property for the expert's inspection.

22.2 An expert so appointed shall submit a report in writing to the Tribunal. Upon receipt of the report, the Tribunal shall forward a copy of the report to the parties and invite the parties to submit their written comments on the report.

22.3 Unless the parties have agreed otherwise, if the Tribunal considers it necessary, the expert shall, after delivery of his written report, participate in a hearing at which the parties shall have the opportunity to question him on the report.

23. Additional Powers of the Tribunal

In addition to the powers specified in these Rules, and assuming there is no conflict with the applicable mandatory law, the Tribunal shall have the power to:

a. order the correction of any contract, but only to the extent required to rectify any mistake which it determines to have been made by all the parties to that contract. This is subject to the condition that the proper law of the contract allows such correction;

b. upon a party's application, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and subsequently make one final award or separate awards in respect of all parties;

c. except as provided in Rules 27.2 and 28.5, extend or shorten any time limits provided by these Rules;

d. conduct any enquiries that the Tribunal deems necessary;

e. order the parties to allow access to any property or item for inspection;

f. order the preservation, storage, sale or disposal of any property or item which is fully or partly the subject-matter of the dispute;

g. order any party to submit copies of any relevant/material documents in their possession or control for inspection by the Tribunal and the other parties;

h. render an award for unpaid arbitration costs;

i. direct any party to give evidence by affidavit or in any other form;

j. direct any party to ensure that arbitral award including any interim or partial a-

ward is not rendered ineffective by the dissipation of party's assets;

k. order any party to provide security for legal or other costs in any manner the Tribunal deems fit;

l. order any party to provide security for all or part of any amount in connection with the dispute in the arbitration;

m. proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal's orders or directions or any partial award and to impose such sanctions deemed appropriate by the Tribunal;

n. decide any issue not expressly or impliedly raised in the submissions filed under Rule 17 provided all parties are given adequate opportunity to make their submissions, oral or written;

o. determine the law applicable to the arbitral proceedings; and

p. determine any claim of legal or other privilege.

24. Jurisdiction of the Tribunal

24.1 If a party objects to the existence or validity of the arbitration agreement or to the competence of CIICA to administer an arbitration before the Tribunal is appointed, the Secretariat shall determine if reference of such an objection is to be made to the Council. If the Secretariat refers it to the Arbitration Council, the Arbitration Council shall determine if the arbitration agreement is *prima facie* valid. If the Arbitration Council determines otherwise, the proceedings shall be terminated. Any decision by the Secretariat or the Arbitration Council is without prejudice to the power of the Tribunal to rule on its own jurisdiction.

24.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections regarding the existence, termination or validity of the arbitration agreement. A decision by the Tribunal that the contract is null and void shall not invalidate the arbitration agreement as it shall be considered a separate/independent agreement.

24.3 A plea that the Tribunal does not have jurisdiction shall be raised in the Statement of Defence or in a Statement of Defence to a Counterclaim. A plea that the Tribunal is exceeding the scope of its jurisdiction shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its

jurisdiction. In either case the Tribunal may admit a late plea under this Rule if it considers the delay justified. A party is not barred from raising this plea by the fact that he has nominated, or participated in the nomination of, an arbitrator. A party that does not raise an objection is deemed to have waived its right to raise procedural objections also.

24.4 The Tribunal may rule on a plea regarding its jurisdiction either as a preliminary question or in an award on the merits. In case the Tribunal rules in favor of jurisdiction, it will issue a partial award to that effect.

24.5 For purposes of a set-off, a party may rely on a claim or defence to the extent permitted by the applicable law.

25. Interim and Emergency Award

25.1 At the request of a party, the Tribunal may issue an award granting an injunction or any other interim relief it deems appropriate. The party requesting the interim award may be required by the Tribunal to provide appropriate security in connection with the relief sought.

25.2 Prior to the constitution of the Tribunal, a party may apply for an emergency award pursuant to the procedures set forth in Schedule 1.

25.3 A party may apply to a judicial authority for interim relief prior to the constitution of the Tribunal, or in exceptional circumstances after constitution of the Tribunal. A party is not required to take the tribunal's permission before seeking such interim relief.

26. Applicable Law, Amiable Compositeur

26.1 The Tribunal shall apply the law chosen by the parties to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law which it deems appropriate.

26.2 The Tribunal shall decide as amiable compositeur or *ex aequoet* bono only if it has been expressly authorised by the parties to do so.

26.3 In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any applicable trade usages.

27. The Award

27.1 The Tribunal shall declare the proceedings closed once if it is satisfied, after consulting with the parties, that the parties have no further submission to make. The Tribunal may reopen the proceedings, on its own motion or upon application of a party, before any award is made.

27.2 The Tribunal shall submit the draft award to the Secretariat within thirty days from the date on which the Tribunal declares the proceedings closed. The presumption is that the draft award is a reasoned award. The Secretariat may, as soon as practicable, suggest modifications, if any, to the form of the award. No award shall be made by the Tribunal until its form has been approved by the Secretariat.

27.3 The Tribunal may make separate awards on different issues at different times.

27.4 If any arbitrator does not participate in the making of the award despite being given a reasonable opportunity to do so, the remaining arbitrators shall proceed in his or her absence.

27.5 In case of more than one arbitrator, the Tribunal shall decide by a majority. If there is no majority decision, the presiding arbitrator alone shall make the award for the Tribunal.

27.6 The award shall be delivered to the Secretariat, which shall forward certified copies to the parties upon the full settlement of the costs of arbitration.

27.7 The Tribunal may award simple or compound interest on any sum which is the subject of the arbitration at such rates as the parties may have agreed. In the absence of such an agreement, the Tribunal may award it at such rates and for such time period that it deems appropriate.

27.8 In case of a settlement, the Tribunal may render a consent award recording the settlement on the request of a party. If the parties do not require a consent award, the parties shall confirm to the Secretariat that a settlement has been reached. The Tribunal shall be discharged and the arbitration concluded upon payment of any outstanding costs of arbitration including CIICA's fee and arbitrators' fees.

27.9 Subject to Rule 28 and Schedule 1, by agreeing to arbitration under these Rules, the parties undertake to enforce the award without delay, and they also irrevocably waive their rights subject to any exceptions under applicable law to any form of ap-

peal, review or recourse to any competent court or other judicial authority. The parties further agree that an award shall be final and binding on the parties from the date it is made.

27.10 CIICA may publish any award subject to mutual consent of the parties and to any specific conditions mutually agreed upon by the parties.

28. Correction of Awards and Additional Awards

28.1 A party may, within thirty days of receipt of an award, request the Tribunal, by written notice to the Secretariat and to any other party, to correct in the award any error in computation, any clerical or typographical error or any error of a similar nature. Any other party may provide its comments on such request within fifteen days of its receipt. If the Tribunal considers the request to be justified, it shall make the correction within thirty days of receipt of the request. Any correction, made in the original award or in a separate memorandum, shall be considered part of the award.

28.2 The Tribunal may, on its own initiative, correct any error of the type referred to in Rule 28.1 within thirty days of the date of the award.

28.3 A party may, within thirty days of receipt of an award, request the Tribunal, by written notice to the Secretariat and to any other party, to make an additional award in connection with the claims presented in the arbitral proceedings but not dealt with in the award. Any other party may provide its comments on such request within fifteen days of its receipt. If the Tribunal considers the request to be justified, it shall make the additional award within forty-five days of receipt of the request.

28.4 A party may, within thirty days of receipt of an award, request the Tribunal, by written notice to the Secretariat and to any other party, to give an interpretation of the award. Any other party may provide its comments on such request within fifteen days of its receipt. If the Tribunal considers the request to be justified, it shall give the interpretation in writing within forty-five days of receipt of the request. The interpretation shall form part of the award.

28.5 The Secretariat may extend the time limits in this Rule.

28.6 In case of a correction of an award and any additional award, Rule 27 shall apply in the same manner with the appropriate changes.

29. Fees and Deposits

29.1 The Tribunal's fees and CIICA's fees shall be ascertained in accordance with the Schedule of Fees in force at the time of commencement of the arbitration. Parties may agree on a different method for determining the Tribunal's fees prior to the constitution of the Tribunal.

29.2 The Secretariat shall determine the advance payment on costs of the arbitration. Unless the Secretariat directs otherwise, 50% of such advances shall be payable by the Claimant and the remaining 50% of such advances shall be payable by the Respondent. The Secretariat may fix separate advance payments on costs for claims and counterclaims.

29.3 If the amount of the claim or the counterclaim is not quantifiable at the time payment is due, the Secretariat shall make a provisional estimate of the costs of the arbitration. This estimate may be based on the nature of the controversy and the circumstances of the case. This may be revised in light of any information that subsequently becomes available.

29.4 The Secretariat may from time to time direct parties to make further payments in connection with the arbitration costs that have either been incurred or to be incurred.

29.5 If a party fails to make the payments the Secretariat may, after consultation with the Tribunal and the parties, direct the Tribunal to suspend work and set a deadline on the expiry of which the claims or counterclaims shall be considered as withdrawn without prejudice to the party resubmitting the same claims or counterclaims in another proceeding that is not before the same tribunal.

29.6 Parties are jointly and severally liable for the costs of the arbitration. Any party may pay the whole of the advances or deposits on costs of the arbitration in respect of the claim or the counterclaim if the other party fail to pay its share. The Tribunal or the Secretariat may suspend its work, in whole or in part, if the advances or deposits remain either wholly or in part unpaid. The Tribunal may also issue an award for unpaid costs pursuant to Rule 23(h) on the application of a party.

29.7 If the arbitration is settled or disposed of without a hearing, the costs of arbitration shall be finally determined by the Secretariat. The Secretariat shall consider all the circumstances of the case, including the stage of proceedings at which the arbitration

is settled or disposed of. If the costs of arbitration determined are less than the deposits made, there shall be a refund in such proportions as the parties may agree, or failing an agreement, in the same proportions as the deposits were made.

29.8 All advance payments shall be made to and held by CIICA. Any interest which may accrue on such deposits shall be retained by CIICA.

30. Costs of the Arbitration

30.1 The Tribunal shall specify the total amount of the arbitration costs in the award. The Tribunal shall also specify the apportionment of the arbitration costs of the arbitration among the parties if the parties have not agreed otherwise.

30.2 The term "costs of the arbitration" includes:

a. the Tribunal's fees and expenses;

b. CIICA's administrative fees and expenses; and

c. the costs of expert advice/opinion and of any other assistance required by the Tribunal.

31. Tribunal's Fees and Expenses

31.1 The fees of the Tribunal shall be fixed by the Secretariat in accordance with the Schedule of Fees and the stage of the proceedings at which the arbitration ended. The Secretariat may allow an additional fee above the amount prescribed in the Schedule of Fees if there are any exceptional circumstances.

31.2 The Tribunal's reasonable disbursements, out-of-pocket expenses necessarily incurred and other allowances shall be determined by the Secretariat and reimbursed accordingly.

32. Party's Legal and Other Costs

In its award, the Tribunal shall have the authority to order that all or a part of the legal or other costs of a party be paid by another party.

33. Exclusion of Liability

33.1 CIICA, including the Chairman, members of its Arbitration Council, directors, officers, employees or any arbitrator, shall not be liable to any person for any negligence, act or omission in connection with any arbitration proceedings conducted

pursuant to these Rules.

33.2 CIICA, including the Chairman, members of its Arbitration Council, directors, officers, employees or any arbitrator, shall not be under any obligation to make any oral or written statement in connection with any arbitration proceedings conducted pursuant to these Rules. No party shall seek to make the Chairman, any member of the Arbitration Council, director, officer, employee or arbitrator act as a witness in any legal proceedings related to any arbitration governed by these Rules.

34. Confidentiality

34.1 At all times, the parties and the Tribunal shall treat all matters in connection with the proceedings and the award as confidential unless parties agree otherwise.

34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose any confidential matter/information to a third party except:

a. for purposes of an application to a competent court to enforce or challenge the award;

b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;

c. for purposes of pursuing or enforcing a legal right or claim;

d. in compliance with the provisions of the applicable laws which are binding on the party making the disclosure;

e. in compliance with a specific requirement or request/directions of any regulatory body or other authority; or

f. pursuant to the Tribunal's order on application by a party with proper notice to the other parties.

34.3 The matters referred to in this Rule, include the pleadings, evidence and other materials in the arbitration proceedings and all other documents submitted by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.

34.4 In case a party breaches this Rule's provisions, the Tribunal has the power to take appropriate measures, including issuing an order or award for sanctions or costs.

35. Decisions of the Chairman, the Arbitration Council and the Secretariat

35.1 Subject to Rule 24.1, the decisions of the Chairman the Arbitration Council and the Secretariat regarding all matters involved in the arbitration shall be conclusive and binding upon the parties and the Tribunal. The Chairman of the Arbitration Council and the Secretariat are not obligated to provide reasons for such decisions.

35.2 Subject to Rule 24.1, the parties shall be deemed to have waived any right of appeal or review in connection with any decisions of the Chairman the Arbitration Council and the Secretariat to any court or other judicial authority.

36. General Provisions

36.1 A party that is aware of non-compliance with any provision or requirement under these Rules and proceeds with the arbitration without promptly stating its objection shall be deemed to have waived its right to object.

36.2 In all matters not expressly provided for in these Rules, the Chairman, the Arbitration Council, the Secretariat and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair and expeditious completion of the arbitration.

36.3 CIICA may from time to time issue Practice Notes to supplement, regulate and implement these Rules to facilitate the administration of arbitrations governed by these Rules.

36.4 CIICA has the authority to amend, modify these Rules but the changes will not apply to arbitration proceedings that have already commenced unless specifically agreed to by the parties.

SCHEDULE 1

Emergency Arbitrator

1. A party in need of emergency relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, make an application for emergency interim award. The party shall notify the Secretariat and all other parties in writing of the nature of the relief sought and the reasons why such relief is re-

quired on an emergency basis. The application shall also state the grounds on which the party is entitled to such relief. Such notice should include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties. The application shall also be accompanied by payment of any fees set by the Secretariat for such proceedings.

2. In case the Chairman determines that the application should be accepted, he shall appoint an Emergency Arbitrator within one business day of receipt of such application by the Secretariat and payment of any required fee.

3. The Emergency Arbitrator so appointed shall, before accepting appointment, disclose to the Secretariat any circumstance that may raise justifiable doubts regarding his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the Secretariat's notification to the parties of the Emergency Arbitrator's appointment and the circumstances/grounds for the challenge disclosed.

4. Unless the parties agree otherwise, an Emergency Arbitrator may not act as an arbitrator in any future arbitration related to the dispute.

5. The Emergency Arbitrator shall, as soon as possible but in any event no later than three business days of appointment, establish a schedule for consideration of the application for an emergency award. The schedule shall provide a fair and reasonable opportunity to all parties to be heard. In the alternative, the schedule may provide for proceedings by telephone conference or on written submissions. The Emergency Arbitrator shall have the powers vested in the Tribunal under these Rules, including the authority to rule on his own jurisdiction, and shall resolve any disputes in connection with the application of this Schedule 1.

6. The Emergency Arbitrator shall have the power to award any interim relief that he deems proper and necessary. The Emergency Arbitrator shall give reasons for his award in writing. The Emergency Arbitrator may modify or vacate the interim award by providing valid grounds/reasons.

7. Once the Tribunal is constituted, the Emergency Arbitrator shall have no further power to act. The Tribunal may reconsider, modify or vacate the interim award of emergency relief issued by the Emergency Arbitrator and is not bound by the reasons giv-

en by the Emergency Arbitrator. Any award issued by the Emergency Arbitrator shall, in any event, cease to be binding:

· if the Tribunal is not constituted within ninety days of such order or award; or

· when the Tribunal makes a final award; or

· if the claim is withdrawn.

8. Any interim award of emergency relief may be subject to the condition that the party seeking such relief provide appropriate security.

9. An award rendered under Schedule 1 shall be binding on the parties. Parties' agreement on arbitration under these Rules constitutes an undertaking to comply with such an order or award without delay.

10. The costs associated with any application pursuant to this Schedule 1 shall initially be apportioned by the Emergency Arbitrator. The final determination of apportionment of these costs shall be made by the Tribunal.

11. These Rules shall apply, as deemed appropriate by the Emergency Arbitrator, to proceedings under Schedule 1, in view of the urgency of such proceedings. The Emergency Arbitrator's decision regarding application of these Rules shall be final and not subject to appeal.

CIICA Expedited Arbitration Rules

OBJECT

The object of Expedited Arbitration is to provide the parties with a final and legally binding decision on their dispute in less than ninety days from the appointment of the Arbitrator, by adopting the simplest procedure appropriate to the dispute.

The Expedited procedure has been developed to provide simple, cost-effective and timely resolution of disputes by a sole arbitrator, for a fixed fee, provided that the total amount of the claim and any counterclaim does not exceed USD 500 000.

These Rules apply to arbitrations under the CIICA Expedited Arbitration Rules.

1.1 The arbitration commences on the date the Center for International Investment and Commercial Arbitration (CIICA) receives a request for the appointment of an Arbitrator (the Application) under the Expedited Arbitration Rules.

1.2 The Application should contain details of the parties, a brief summary of the dispute and the issues to be determined, and an outline of the relief sought. In the absence of a contractual agreement between the parties to refer disputes to arbitration under the expedited rules, the Application should be signed by each party to the dispute.

2.1 The Application should be accompanied by the following:

a) copies of relevant contractual documents, including, in the case of a unilateral Application, a copy of the contractual agreement between the parties to refer their dispute to arbitration under the Expedited Arbitration Rules;

b) a copy of the Applicant's Statement of Claim (subject to paragraph 9 below); and

c) a fee of USD 2500 [or its equivalent in Pak rupees (PKR)] per Applicant, which is payable by cheque or bank transfer on or before the date of the Application.

2.2 A copy of the Application, and all accompanying documents, should be sent by the Applicant to the Respondent, simultaneously.

CIICA retains the right to refuse to register an Application if any of the requirements in paragraphs 1 and 2 are not complied with.

3. Within seven days of the commencement of the arbitration, the Respondent should send:

a) a fee of USD 2500 [or its equivalent in Pak rupees (PKR)] per Respondent, payable by cheque or bank transfer; and

b) to CIICA and to the Applicant, a Statement of Defence (and Counterclaim, if applicable) (subject to paragraph 9 below).

4. If a counterclaim is advanced by the Respondent, but the Respondent fails to pay the fee required under paragraph 3, and/or under paragraph 10 (if applicable), the Respondent's counterclaim may be treated by the Arbitrator and by CIICA as withdrawn.

5. Failure by the Respondent to pay any or all of the fee required under paragraph 3, and/or paragraph 10 (if applicable) may result in CIICA directing the Applicant to pay the remainder of the fee due. Any payment made by the Applicant on behalf of the Respondent will be treated as a debt which the Applicant is entitled to recover immediately from the defaulting Respondent.

6. If a counterclaim is advanced, with the Respondent's payment of the fee under paragraph 3, and the value of the Applicant's claim and the Respondent's counterclaim

together exceeds USD 500 000, CIICA will refer the dispute for determination under the CIICA Arbitration Rules.

7. CIICA will appoint an Arbitrator from its panel within ten days of commencement of the arbitration, and the Arbitrator's details will then be notified to the parties.

8. The Arbitrator will issue a timetable for the arbitration within seven days of being appointed. All procedural matters are at the discretion of the Arbitrator. Any timetable issued by the Arbitrator should meet the objective of the Expedited Procedure, and meet the ninety day deadline prescribed in paragraph 12 for the issue of an award.

9. The statements of case (e.g. the Claim, Defence, and Response) must each be signed and dated by a duly authorised representative of the party concerned. All witness statements must be signed and dated by the witness.

Unless otherwise directed by the Arbitrator: (i) each side's statements of case and witness statements shall, collectively, be no more than 5000 words.

10. Each party may be directed by CIICA to make an additional payment following the issue of the procedural timetable if either of following applies:

a) Half-day Hearing or Meeting:

If the parties require a half-day hearing or meeting with the Arbitrator, an additional fee per party will be payable. The amount shall be decided by CIICA after consulting with the Arbitrator. This additional fee does not include the cost of a venue for the hearing or meeting, the Arbitrator's expenses for the hearing or meeting, or any other expenses associated with the hearing or meeting.

b) Site Visit:

If a half-day site visit is required, in order for the Arbitrator to better appreciate the matters in dispute, an additional fee per party will be payable. The amount shall be decided by CIICA after consulting with the Arbitrator. This additional fee does not include the Arbitrator's expenses, or any other expenses, associated with the site visit.

11. The Arbitrator shall decide if one side can recover from the other any costs of the arbitration, which includes the fixed fee and reasonable legal fees.

12. Within ninety days of the Arbitrator's appointment, the Arbitrator will issue to the parties a written reasoned award. The award will be signed and dated by the Arbitrator, and will be final and legally binding. The Arbitrator will, simultaneously, send to

CIICA a copy of his award, together with an invoice of his charges. Upon receipt of this invoice, CIICA will pay the Arbitrator's fee.

13. If the parties settle their dispute after commencing the arbitration, they must inform CIICA and the Arbitrator, if appointed, immediately. In the event of settlement after the Arbitrator has been appointed, CIICA will pay the Arbitrator's fee upon receipt of the Arbitrator's invoice.

14. Unless otherwise agreed by the parties, the UNCITRAL Arbitration Rules shall apply to the arbitration.

15. All communications will be in writing and any correspondence which a party sends to the Arbitrator, or the Arbitrator sends to a party, must be copied to the other party at the same time.

16. Neither CIICA nor any of its officers, agents, or employees will be liable for anything done or omitted to be done in the appointment or nomination of an Arbitrator under these Rules or in respect of the arbitration administered under these Rules unless the act or omission was shown to be in bad faith. Neither CIICA nor its officers, agents, or employees shall be liable for anything done or omitted to be done by an Arbitrator nominated or appointed by CIICA under these Rules in the discharge or purported discharge of his functions as an Arbitrator.

Code of Ethics for an Arbitrator

1. Appointment

1.1 A prospective arbitrator shall accept an appointment only if:

· he is fully satisfied that he is able to discharge his duties independently and without any bias;

· he has adequate knowledge of the language of the arbitration; and

· he is able to give to the arbitration the time and attention that the parties are reasonably entitled to expect.

1.2 If the prospective arbitrator is aware of any potential time constraints in the next 6 – 12 months on his ability to discharge his duties if he is appointed as an arbitrator, he shall, without breaching any existing confidentiality obligations, disclose details

of such time constraints to CIICA's Secretariat. CIICA reserves the right to refuse to appoint the prospective arbitrator if it is of the view that the prospective arbitrator will not be able to discharge his duties due to such potential time constraints.

1.3 The prospective arbitrator confirms that he understands that while fixing the quantum of fees payable to the arbitrator, CIICA's Secretariat will take into account any failure by the prospective arbitrator to discharge his duties to ensure the fair, expeditious, economical and final determination of the dispute.

2. Disclosure

2.1 A prospective arbitrator shall disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. This duty shall continue throughout the arbitral proceedings with regard to any new facts and circumstances.

2.2 A prospective arbitrator shall disclose to the Secretariat and any party who contacts him for a possible appointment:

· any past or present close personal/professional/business relationship, whether direct or indirect, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration;

· the extent of any prior knowledge he may have of the dispute.

3. Bias

3.1 Any close personal relationship or current direct or indirect professional/business relationship between an arbitrator and a party, or any representative of a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. Past professional/business relationships will only give rise to justifiable doubts if they are of such nature as to be likely to affect a prospective arbitrator's judgment. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed.

4. Communications

4.1 Before accepting an appointment, an arbitrator can only inquire about the general nature of the dispute, the names of the parties and the expected time period required

for the arbitration.

4.2 Subject to the applicable arbitration rules, no arbitrator shall confer with any of the parties or their counsel until after the Secretariat gives notice of the formation of the Tribunal to the parties.

4.3 During the course of the arbitral proceedings, an arbitrator shall avoid any unilateral communications regarding the case with any party or its representatives.

5. Fees

5.1 In accepting an appointment, an arbitrator agrees to the fees fixed by CIICA, and he shall make no separate arrangements with any of the parties or their counsel for any additional fees or expenses, except with the express agreement of the Secretariat.

6. Confidentiality

6.1 An arbitrator is in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the course of the proceedings to gain personal advantage or advantage for others, or to adversely affect the interest of another.

6.2 This Code of Ethics cannot constitute grounds for the setting aside of any award.

Schedule of Fees (Arbitration)

Case Filing/Registration Fee: USD 250.

Administration Fee as Showed in Figure 1.

Figure 1 Administration Fee

Amount in Dispute (USD)	Administration Fee (USD)
0 – 50 000	500
50 000 – 100 000	500 + 3% of excess over 50 000
100 000 – 500 000	1000 + 2.5% of excess over 100 000
500 000 – 1000 000	5000 + 2% of excess over 500 000
1000 000 – 2000 000	7500 + 1.5% of excess over 1000 000
2000 000 – 5000 000	10 000 + 0.75% of excess over 2000 000
5000 000 – 10 000 000	25 000 + 0.50% of excess over 5000 000
10 000 000 and above	35 000 + 0.25% of excess over 10 000 000

Arbitrator's Fees

The arbitrator's fees will be calculated with reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular circumstances of the case, including its complexity and the experience and qualifications of the arbitrator. The arbitrator shall agree in writing on the fee rates prior to his/her appointment by the CIICA Arbitration Council. The rates will be communicated to the parties by the Secretariat at the time of the arbitrator's appointment. The fee rates may be reviewed if the duration or a change in the circumstances of the arbitration requires.

CIICA Mediation Rules

Preamble

In case parties have agreed on mediation of existing or future disputes under the rules of CIICA, the parties shall be deemed to have agreed that the mediation shall be conducted in accordance with these rules (the "Rules") or such amended/revised rules as CIICA may have adopted hereafter to take effect before the commencement of the mediation. The Schedule of Costs, current or updated (the "Schedule") in effect at the time the mediation is commenced is also included in the Rules.

Article 1 Commencing Mediation-prior existing agreement to mediate

1.1 If there is a prior agreement to mediate under the Rules (a "Prior Agreement"), any party or parties wishing to commence a mediation shall send to CIICA's Secretariat ("the Secretariat") a written request for mediation (the "Request for Mediation"), which shall state:

a. the nature of the dispute;

b. the value of the claim;

c. the parties' names and contact information including addresses, telephone numbers and e-mail addresses;

d. the parties' legal representatives names and contact information including addresses, telephone numbers and e-mail addresses; and

e. the name and any other relevant information about the proposed mediator (if

any) by the party/parties requesting mediation.

1.2 In case the Request for Mediation is not made jointly by all parties to the Prior Agreement, the party requesting mediation shall send a copy of the Request for Mediation to the other party/parties at the time the request for mediation is made.

1.3 The registration fee shall be paid at the time the Request for Mediation is submitted to complete the registration process.

1.4 In case of a Prior Agreement, the mediation's commencement date shall be the date on which the Secretariat receives the Request for Mediation and the registration fee.

1.5 CIICA shall appoint a mediator as soon as practicable after the commencement of the mediation, taking into consideration any nomination, or method or selection criteria agreed in writing by the parties, and subject to Article 8 of the Rules.

Article 2 Commencing Mediation-no prior agreement

2.1 If there is no Prior Agreement, any party or parties wishing to commence a mediation under the Rules shall send a Request for Mediation to the Secretariat. The Request for Mediation shall include the following:

a. Description of the nature of the dispute and value of the claim;

b. the names, addresses, telephone, facsimile, numbers and e-mail addresses of the parties to the mediation;

c. the names, addresses, telephone and facsimile numbers and e-mail addresses of their legal representatives; and

d. the names, addresses, telephone and facsimile numbers and e-mail addresses of the mediator proposed (if any) by the party or parties requesting mediation.

2.2 The Request for Mediation shall be registered once the registration fee prescribed in the Schedule is paid.

2.3 If the Request for Mediation is not made jointly by all parties to the dispute:

a) the party comencing the mediation shall send a copy of the Request for Mediation to the other party or parties at the same time it is sent to the Secretariat; and

b) the other party or parties shall, within fourteen days of receipt of the Request for Mediation, inform the Secretariat in writing whether or not they agree to mediation

of the dispute.

2.4 If the other party or parties either declines mediation, or fails to agree to mediation within the fourteen days referred to in Article 2.3 (b), there shall be no mediation under the Rules and the Secretariat shall accordingly advise the parties in writing.

2.5 If there is no Prior Agreement, the date of commencement of the mediation shall, subject to payment of the registration fee, be the date on which the agreement to mediate is reached in accordance with Article 2.3 (b).

2.6 CIICA shall appoint a mediator as soon as practicable after the commencement of the mediation taking into due consideration any nomination, or method or selection criteria agreed in writing by the parties, and subject to Article 8 of the Rules.

Article 3 Appointment of Mediator

3.1 Before the mediator's appointment by CIICA, the mediator shall furnish the Secretariat with a written CV/résumé and he or she shall sign a declaration to the effect that there are no reasons/circumstances in his or her knowledge that are likely to raise any justifiable doubts regarding his or her impartiality or independence, other than any reasons/circumstances disclosed by him or her in the declaration. A copy of the mediator's CV/résumé and declaration shall be provided to the parties.

3.2 If the mediator has made a disclosure, pursuant to Article 3.1, or if a party independently knows of reasons/circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, a party can object to his or her appointment, in which case CIICA shall appoint another mediator.

Article 4 Statements by the Parties

4.1 The parties may agree on the specific form and method of submitting their respective cases to the mediator, provided that, unless they have agreed otherwise, each party shall submit to the mediator, no later than seven days before the first scheduled mediation session:

a. a written statement summarising its case;

b. the background to the dispute;

c. the issues to be resolved; and

d. copies of document referred to or relied upon in the written statement.

4.2 Each party shall submit a copy of the written statement and supporting documents to the other party or parties at the same time these are submitted to the mediator.

Article 5 Conduct of the Mediation

5.1 The mediator may conduct the mediation in a manner he or she deems proper and appropriate in view of the circumstances of the case and any reasonable requests/preferences of the parties.

5.2 The mediator may communicate with the parties orally or in writing, together, or individually/separately. The mediator may convene a meeting or meetings at a venue chosen by the mediator after consultation with the parties.

5.3 Nothing submitted or communicated to the mediator either orally or in writing in private during the course of the mediation shall be repeated/forwarded to the other party or parties, without the express consent of the party making the submission or communication to the mediator.

5.4 Each party, after being informed of any meeting being convened by the mediator, shall notify the other party and the mediator of the number and identity of those persons who will attend the meeting.

5.5 Each party shall authorise, in writing, a representative of that party who is authorised to settle the dispute on behalf of that party.

5.6 The mediator shall, unless otherwise agreed by the parties, decide the language(s) in which the mediation will be conducted.

Article 6 Conclusion of the Mediation

The mediation proceedings will conclude when, either:

(a) a settlement agreement is signed by the parties; or

(b) the parties inform the mediator that in their view, a settlement cannot be reached and that they wish to terminate the mediation; or

(c) the mediator advises the parties that based on his or her assessment/judgement, the mediation process will not resolve the dispute(s); or

(d) the mediation process could not be completed within the time period provided in a Prior Agreement and the parties have not agreed to extend that time limit.

Article 7 Settlement Agreement

7.1 If settlement is reached, the parties shall draw up and sign a settlement agreement, setting out such terms. The parties may seek assistance of the mediator for this purpose.

7.2 Signing of the settlement agreement by the parties will make it binding on the parties.

Article 8 Costs

8.1 The costs of the mediation shall include the Mediator's Fees and Expenses, Time Reserved but not Used (if any), and CIICA's Administrative Charges as mentioned in the Schedule (the "Costs").

8.2 Once the mediation is commenced, CIICA will request the parties to submit, as soon as practicable, a deposit to be held on account of the Mediator's Fees and Expenses and the Administration Charges (the "Deposit"). The Deposit shall be paid by the parties in equal shares or in such other proportions as they agree in writing.

8.3 In case a party fails to pay its share of the Deposit, the other party or one of the other parties may pay the party's share to allow the mediation to proceed.

8.4 The Deposit has been paid in full before the mediator is appointed.

8.5 If the mediation was commenced pursuant to Article 1.4 or Article 2.5 of the Rules but a mediator is not appointed and the mediation does not proceed, CIICA's Administration Charges shall be invoiced for immediate payment by the parties in equal shares, or in such other proportions as the parties have agreed in writing.

8.6 If the mediation does not proceed because a mediator is not appointed, by operation of Article 2.4 of the Rules, CIICA's Administration Charges shall be invoiced for immediate payment by the party or parties that requested mediation.

8.7 If a mediator is appointed, and the mediation does proceed:

a. At the conclusion of the mediation, CIICA shall determine the Costs;

b. If the Deposit exceeds the Costs, the excess will be reimbursed to the parties in the proportions in which they have contributed to the Costs, or in such other proportions as the parties have agreed in writing; and

c. If the Costs exceed the Deposit, the difference/shortfall will be invoiced for im-

mediate payment by the parties in such proportions as the parties may have agreed in writing, or if there is no, such agreement, in such proportions as CIICA determines.

8.8 Any other costs incurred by the parties, including legal fees, experts' fees or any other expenses will not be considered part of the Costs for purposes of the Rules.

Article 9 Judicial or Arbitral Proceedings

Unless they have agreed otherwise, parties may initiate or continue any arbitration or judicial proceedings notwithstanding the mediation, in connection with the dispute that is the subject of the mediation.

Article 10 Confidentiality and Privacy

10.1 All mediation sessions shall be private, and shall be attended only by the mediator, the parties and those individuals identified pursuant to Article 5.4.

10.2 The entire mediation process and all communications made in it including negotiations, oral and written statements and documents submitted shall be strictly confidential and covered by "without prejudice" or negotiation privilege.

10.3 Unless required by law or mutually agreed upon by the parties, neither the mediator nor the parties may disclose to any person any information regarding the mediation or any settlement terms, or the outcome of the mediation.

10.4 All documents or other information submitted by parties during the mediation will be privileged and will not, unless required by law, be admissible in evidence or otherwise discoverable in any litigation or arbitration.

10.5 The mediation proceedings shall not have a formal record or transcript unless agreed to by the parties.

10.6 Any admissions, proposals or views expressed by the parties or by the mediator during the course of the mediation shall not be referred to or relied on as evidence in any arbitral or judicial proceedings.

Article 11 Limitation of Liability

11.1 CIICA (including its officers and employees), the Secretariat and any mediator shall not be liable to any party howsoever for any act or omission in connection with any mediation conducted under the Rules, except (i) where the party proves that the act

or omission constitutes deliberate wrongdoing committed by the body or person alleged to be liable to that party and (ii) the extent to which any part of this provision is prohibited by any applicable law.

11.2 CIICA (including its officers and employees), the Secretariat or the Mediator shall not be under any legal obligation to make any statement to any person or entity about any matter related to the mediation, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the mediation.

Other ADR Services

In addition to arbitration and mediation, CIICA offers the following cost effective dispute avoidance and resolution services:

EARLY NEUTRAL EVALUATION

In early neutral evaluation, a neutral person with specialist knowledge and skills considers each party's position in a confidential session and renders an opinion on the merits of the issue(s) in the case and the likely outcome should the case be heard in court. The evaluation is not binding on the parties and is designed to serve as a basis for further constructive negotiations between the parties.

EXPERT DETERMINATION

Expert determination involves submission of a dispute or difference between parties to one or more experts who make a determination that is binding, unless the parties agree otherwise.

There is no requirement to prepare pleadings, conduct detailed investigation of documents, cross-examine witnesses or conduct trial-type hearings.

The parties' contract may provide for expert determination to resolve any disputes that arise, or the parties may decide to use expert determination to resolve an existing dispute in preference to the system provided by their contract. Although Expert Determination is an Alternative Dispute Resolution process, it can also be used when there is no dispute, but a difference which needs to be resolved for example the valuation of a private business.

ADJUDICATION

Adjudication offers immediate, binding and affordable relief with the opportunity of later revisiting contested issues in arbitration. It involves an independent third party, usually an expert in the subject matter, who makes a decision after considering the claims of both parties. Adjudicators are not bound by any procedural rules such as the rules of arbitration.

Adjudication is generally binding for an interim period of time in order to resolve a dispute promptly. At the request of a party, the specific issues decided by the Adjudicator may be arbitrated at a later time for a definitive and binding solution.

DISPUTE BOARD

A Dispute Board is a standing body composed of one or three members usually set up upon the signature or commencement of performance of a mid-term or long-term contract, to aid the parties in avoiding or resolving disputes that arise during the implementation of the contract. The dispute avoidance role of the standing board involves encouraging the parties to solve their own problems, creating an atmosphere where the parties continue to communicate and avail themselves of the advisory role of the Dispute Board.

One of the primary advantages of using a dispute board is that its members may be called upon as soon as a difference arises and help the parties resolve it before it turns into an intractable dispute. Resolving conflicts at an early stage, or even before they arise, is an obvious benefit that can substantially minimize costs such as legal fees, and reduces loss of productive time and goodwill between the parties.

CHAPTER 05 >>

第五章

土耳其仲裁制度研究

一、土耳其仲裁制度历史沿革

土耳其是一个横跨欧亚两洲的国家,国土约 78 万平方千米,接壤八个国家,90% 以上人口信奉伊斯兰教。土耳其不仅有着重要的战略位置,还拥有多样的文化遗产。其有庞大的矿藏储量,石油天然气以及在黑海沿岸发现的新石油和天然气田,使土耳其在该地区的市场中拥有举足轻重的地位。土耳其的经济充满活力,由传统农业和现代工商业部门组成,近几年经历了快速的增长。1971 年 8 月 4 日,中国和土耳其建交。20 世纪 80 年代以来,两国高层互访增多,双边关系发展较快。2018 年,中土双边贸易额 215.5 亿美元,同比微降 1.6%,其中我国出口 177.9 亿美元,同比下降 1.8%;进口 37.6 亿美元,同比下降 0.6%。两国经贸合作稳步开展,交通、电力、能源、金融是双方合作的重点。[1]

由于土耳其所处地理位置和早期对西方先进法律体系的吸收,土耳其法律体系和系统受西方法律体系影响。从 9 世纪中叶开始,土耳其人进入阿拉伯伊斯兰世界并且开始定居,逐步接受了伊斯兰法律。13 世纪末,土耳其人建立了奥斯曼帝国。在 19

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〔1〕 参见中华人民共和国外交部网:https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/yz_676205/1206_676956/sbgx_676960/,最后访问日期:2019 年 1 月 28 日。

世纪以前,伊斯兰法在土耳其的日常生活中占绝对重要的地位。[1] 到19世纪,欧洲列强在奥斯曼帝国的领土上建立了各自势力范围,亚洲和非洲的领土已被瓜分完毕。在欧洲殖民化浪潮的推动下,大工业兴起,世界市场开始形成。在这种背景下,西方法律对伊斯兰国家的法律,特别是对伊斯兰法的发展产生了重大的影响。随着欧洲殖民制度的建立和巩固,西方的法律制度强烈冲击了传统伊斯兰法律传统。在内外交困的境况下,穆罕穆德三世(1808~1839)跨出了勇敢的一步,为国家法律结构改革和更新而努力。从18世纪末开始,奥斯曼帝国被迫进行了一些重要改革,就是这个时候西方的影响也渐渐进入土耳其。1839年以后,土耳其的法律对西方更加开放。至此,土耳其法律系统也成为西方法律体系的一个组成部分。在法律改革方面,奥斯曼帝国主要仿效法国的法律颁布了商法、刑法、海商法,并于1876年颁布了其帝国历史上的第一部宪法。土耳其建国后,废除了已实行长达1200余年的哈里发制度,确立政教分离的政策,先后颁布了《土耳其民法》《土耳其民事诉讼法》《土耳其刑法》《土耳其海商法》等法律。[2]

土耳其学者认为,仲裁代表的诉讼外纠纷解决文化扎根于土耳其法律传统之中,但实际上现代意义上的“仲裁”一词最早见于土耳其1856年的国内立法中。真正的仲裁制度的建立则是土耳其共和国建国之后的事。1927年,土耳其共和国颁行的首部《土耳其民事诉讼法典》专门规定了仲裁制度编。[3] 长期以来,土耳其仲裁法制进展缓慢,法院也时常干预仲裁,如不承认管辖权自裁原则,而且允许将涉及案件实体争议的案件上诉至法院,导致土耳其并未形成良性、健康的仲裁文化。近十年来,情况发生转变。随着经济增长和涉外经济交往的密切发展,以及大量配套改革措施的推行实施,尤其是2011年《土耳其民事诉讼法》的重修完善和更新了土耳其国内仲裁法制,使土耳其逐渐转变成一个仲裁友好的司法管辖区。不仅在国际商事纠纷中,仲裁成为解决争议的首选项;在国内商事纠纷中,仲裁也不再是

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〔1〕 伊斯兰法律的根源由4部分组成,分别为:古兰经(Kur'an)、撒那经(Sünnet)、赞美神的词(icma)、个人意见和观点(içtihat)。伊斯兰的法律分行政法和特别法两种,行政法不但对宗教事务的模式和规范、宗教等级、税务征收进行了规定,还把刑事方面的规定也都划归在行政法的范畴之内。它规定了复仇、伤害以及对通奸刑事和棒打的刑罚,对盗窃、抢劫、信仰的变更、造反和反叛的刑罚;并且规定了司法机构、审判方法和诉讼程序。在这部分中对通奸和信仰变更的处罚都有非常详细的和严厉的规定。特别法中却规定了自由人、奴隶、家庭、遗产、伊斯兰宗教基金、债务和分配以及伊斯兰法律中的所有权等。

〔2〕 参见徐青:《土耳其法律体系》,载 http://article.chinalawinfo.com:81/article_print.asp?articleid=28113,最后访问日期:2019年1月28日。

〔3〕 《土耳其民事诉讼法典》,1927年7月18日第1086号法令。参见《土耳其政府公报》1927年7月2日第622~624号。

“替代”纠纷解决方式,而是逐渐成为当事人解决争议的首选项。土耳其国内法院审理商事案件常常需要 2 ~ 10 年,低效和拖沓的诉讼程序使仲裁在土耳其广受青睐。仲裁本身的专业性、中立性、保密性和经济性,都使仲裁成为土耳其主流的商事争议解决方式。

二、土耳其仲裁制度概述

(一)土耳其商事仲裁制度

1.“双轨制”仲裁法

土耳其施行国内仲裁和国际仲裁的“双轨制”立法,即国内仲裁案件适用 2011 年修订的《土耳其民事诉讼法》,[1]涉外案件适用 2002 年制定的《土耳其国际仲裁法》。[2] 两部法律都以联合国《示范法》为基础,但是二者适用范围和内容有所不同。《土耳其国际仲裁法》旨在模仿瑞士“双轨制”仲裁制度,采纳的主要是《瑞士国际私法典》第 12 章有关国际仲裁的规定。但是,《土耳其国际仲裁法》对《示范法》条文翻译和理解存在一些偏差,而且未能反映 2006 年《示范法》修订变化,导致《土耳其国际仲裁法》的规定不如后来修订的《土耳其民事诉讼法》的规定先进。为此,土耳其学者开始讨论并轨的可能性,但并未形成主导意见,在立法中也未有体现。

目前“双轨制”的立法框架下,区分两部法律适用范围的核心是区分国内案件和涉外案件。根据《土耳其国际仲裁法》第 2 条的规定,区分国内、涉外案件,要考虑仲裁地和涉外(国际)因素两个标准。涉外案件包括如下几种情况。首先,当事人各自的住所、永久居所或营业地位于不同国家的,视为具有国际性质的案件。其次,一方当事人的住所、永久居所或营业地位于仲裁地之外,或者位于合同主要义务履行地国之外,或者位于与案件争议有最密切联系的国家之外的,也视为国际案件。再次,公司股东一方根据土耳其鼓励外商投资的法规向土耳其投资涉及的争议,以及为履行向土耳其投资而缔结的相关借贷、担保争议,视为国际案件。最后,主合同或者仲裁条款项下争议导致资本或货物跨国流动的争议,也属于国际案件。

两部仲裁法都采用了《示范法》的结构和内容,[3]两部法律内容大体一致,在

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〔1〕《土耳其民事诉讼法典》(修订),是土耳其 2011 年 1 月 12 日第 6100 号法令。参见土耳其政府公报 2011 年 2 月 4 日第 27836 号。该法于 2011 年 10 月 1 日起生效。

〔2〕《土耳其国际仲裁法》,是土耳其 2001 年 7 月 21 日第 4686 号法案。参见《土耳其政府公报》2001 年 7 月 5 日第 24453 号。

〔3〕《土耳其国际仲裁法》和修订的《土耳其民事诉讼法》的案文前言都明确表示,以《示范法》为蓝本进行修法。

具体细节方面有略微差异。除国际、国内案件的固有差异之外[1],两部仲裁法在具体程序设计方面也有不同,主要体现在如下方面:

(1)《土耳其国际仲裁法》规定,当事人在仲裁程序期间可以向法院申请临时禁令等临时措施,当事人申请的临时措施被法院批准,不构成违反仲裁协议。《土耳其民事诉讼法》则规定,当事人不得向法院申请临时措施,而应当向仲裁庭提出申请,除非个案中存在紧急情况。《土耳其国际仲裁法》还规定,仲裁庭无权作出对第三方有约束力的临时措施,而《土耳其民事诉讼法》未规定这一限制。根据《土耳其民事诉讼法》第414条的规定,仲裁庭可以修改或撤销法院作出的临时措施,而《土耳其国际仲裁法》则没有赋予仲裁庭这项权力。

(2)《土耳其民事诉讼法》第416条对审理案件的独任仲裁员的资质作出了规定,即该仲裁员必须具备5年的法律或者专业执业经验。《土耳其国际仲裁法》并未作出此项限制。

(3)《土耳其民事诉讼法》第421条规定,重新指定仲裁员不中断仲裁审理期限,而《土耳其国际仲裁法》第7条则规定重新指定仲裁员中断仲裁审理期限。

(4)《土耳其国际仲裁法》第10条规定,仲裁庭必须明确审理范围(Terms of Reference),而《土耳其民事诉讼法》并未做此规定。

(5)《土耳其国际仲裁法》还规定,不在土耳其境内的当事人可以约定放弃申请撤销仲裁裁决的权利,而《土耳其民事诉讼法》未做此规定。此外,《土耳其国际仲裁法》规定申请撤销仲裁裁决,产生中断执行仲裁裁决的效果,而《土耳其民事诉讼法》并未做此限制。

除《土耳其民事诉讼法》和《土耳其国际仲裁法》规定的“双轨制”仲裁基本制度之外,相关规范还散见于《有关土耳其政府采购和公共服务争议提交仲裁适用法律原则的若干规定》(以下简称《土耳其政府采购法》)[2]和《土耳其国际私法》。[3]《土耳其政府采购法》明确授权,外国投资者可以将政府采购有关争议提交仲裁解决,程序适用《土耳其国际仲裁法》有关仲裁程序的规定。值得注意的是,

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〔1〕 例如,仲裁协议的准据法、申请人预缴仲裁费以及外国律师是否可以出庭。

〔2〕 即土耳其2000年1月21日第4501号法令(Law Regarding Principles to be Adhered to upon Resorting to Arbitration in Disputes Arising from Concession Stipulations and Agreements Regarding Public Services)。参见土耳其政府公报2000年1月22日第23941期。

〔3〕 即土耳其2007年11月27日第5718号法令。参见土耳其政府公报2007年12月12日第26728期。

该法还显著扩大了涉外性的认定标准。《土耳其国际私法》规定了土耳其法院处理涉外案件时,有关准据法、管辖权以及外国仲裁裁决和判决的承认与执行。由于土耳其是《纽约公约》缔约国,《土耳其国际私法》的规定仅适用于《纽约公约》成员国以外的国家或地区作出的仲裁裁决。

2. 国际公约

土耳其加入仲裁方面的国际公约包括《纽约公约》《关于国际商事仲裁的欧洲公约》《ICSID 公约》《欧洲能源宪章》《伊斯兰合作组织成员国之间促进、保护和保障投资公约》,以及大量双边投资协定和司法协助条约。

1989 年 3 月 3 日,土耳其批准了《华盛顿公约》。该公约的主要功能是,通过设立投资争端解决机制,促进私人国际投资的发展。就土耳其而言,该公约对吸引外资和对外投资都提供关键保障。该公约规定,管辖权建立在所谓"双重合意"的基础上,即不仅东道国必须是《华盛顿公约》的缔约国,而且东道国还必须通过协议、双边投资协定或本国法,明确同意涉案争议提交投资争端解决中心解决。

1991 年 5 月 21 日起,《关于国际商事仲裁的欧洲公约》对土耳其生效。该公约的主要功能是对《纽约公约》未规定的事项如仲裁庭的管辖权、仲裁程序作出规定,协调和统一欧洲范围内的国际商事仲裁法。土耳其适用该公约的情况非常少。

1992 年 9 月 25 日起,《纽约公约》对土耳其生效。与我国相同,土耳其对公约作出两项保留,即互惠保留和商事保留。根据互惠保留,土耳其只承认和执行纽约公约缔约国领域内作出的仲裁裁决。商事争议以外的仲裁裁决只能根据《土耳其国际私法》的规定寻求承认执行。

2001 年 4 月 5 日起,《欧洲能源宪章》对土耳其生效。该公约的主要目的是,通过建立国际能源投资有关的争议解决机制,促进能源开发、销售和环境保护的国际合作。自 1998 年起,该宪章项下争议可以提交 ICSID 解决。

土耳其还是伊斯兰合作组织成员以及《伊斯兰合作组织成员国之间促进、保护和保障投资公约》的缔约国。该公约第 16 条第 2 款规定了有关东道国和投资者之间的争端解决的仲裁程序,但是截至目前该程序从未启动过。

此外,土耳其与包括我国[1]在内的 74 个国家订立了双边投资协定。土耳其

〔1〕 我国与土耳其于 1990 年 11 月 13 日在北京签订《中华人民共和国和土耳其共和国关于相互促进和保护投资协定》。

还与包括我国[1]在内的多个国家订立了双边司法互助协定。在我国与土耳其签订的双边司法互助条约中,有民事判决和仲裁裁决承认与执行的条文。相关协定明确规定,如果缔约另一方国内作出的仲裁裁决,属于协定规定的可仲裁纠纷,并且仲裁协议根据被请求方国家法律是有效的,缔约方应当承认和执行该仲裁裁决。[2] 中国和土耳其都是《纽约公约》缔约国,而《纽约公约》较之中土双边协定的规定更宽松。尤其是前述协定第 26 条第 3 项要求,被请求法院适用被请求一方法律判断仲裁协议的效力,严于《纽约公约》第 5 条第 1 款甲项的规定,即适用当事人选择的仲裁协议准据法或仲裁地法律,判断仲裁协议的效力。根据《纽约公约》第 7 条第 1 款的规定,当事人可以援引《纽约公约》中较双边协定更有利的规定。因此,当事人可以选择适用更宽松的《纽约公约》条文,而不是协定条文。

(二)土耳其投资仲裁制度

截至 2014 年 6 月,涉及土耳其的投资仲裁案件共有 27 起。其中,以土耳其为被申请人的案件共计 9 起,土耳其当事人为申请人的案件共计 18 起。土耳其作为被申请人的案件中,除 1 起适用临时仲裁外,其余 8 起皆由投资争端解决国际中心管理。案件中 6 起涉及能源行业,2 起涉及电信行业,1 起涉及建设工程。除涉及能源行业的 3 件争议系依据《欧洲能源宪章》管辖之外,其余案件皆依据双边投资协定中的投资争端解决条款提起。土耳其作为被申请人的案件中值得关注的案件有 3 起,即“Tulip Real Estate 案”“Libananco 案”“PSEG 案”。

在“Tulip Real Estate 案”中,荷兰房地产开发公司 Tulip Real Estate 通过合作经营的方式取得一项伊斯坦布尔附近大规模商业设施的开发权。土耳其方合作者 Emlak 是政府出资的房地产开发基金。2006 年项目开启后,进展并不顺利。2010 年 Emlak 基于工程超期以及融资困难的原因,单方解除了合同。随后,荷兰公司援引荷兰土耳其双边投资协定,向投资争端解决国际中心提起仲裁,主张 Emlak 属于国家机构,并且援引双边投资协定中的“保护伞条款”,主张适用土耳其投资保护

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〔1〕 我国与土耳其于 1992 年 9 月 28 日在北京签订《中华人民共和国和土耳其共和国关于民事、商事和刑事司法协助的协定》。

〔2〕 《中华人民共和国和土耳其共和国关于民事、商事和刑事司法协助的协定》第 26 条(仲裁机构裁决的承认与执行)规定“除符合本章第三节的其他规定外,符合下列条件的仲裁裁决应予承认与执行:(一)按照被请求的缔约一方的法律,该项仲裁裁决属于对契约性或非契约性商事争议作出的仲裁裁决;(二)仲裁裁决是基于当事人关于将某一特定案件或今后由某一特定法律关系所产生的案件提交仲裁机构管辖的书面仲裁协议作出的,且该项仲裁裁决是上述仲裁机构在仲裁协议中所规定的权限范围内作出的。(三)根据被请求的缔约一方的法律,提交仲裁机构管辖的协议是有效的”。

法。仲裁庭并未对“保护伞条款”是否适用作出裁决,而是直接驳回荷兰公司的申请,原因是“Emlak 无论是不是国家机构,在本案中都有权解除合同”。

“Libananco 案”是 ICSID 受理的争议金额最大的投资仲裁案件。案件涉及 Uzan 家族。家族成员在被判决欺诈、敲诈等罪名之后,土耳其政府扣押了该家族的许多产业。该家族向 ICSID 提起共 6 起仲裁申请。除在 1 个申请中,土耳其政府与申请人和解之外,在其余 5 个申请中土耳其政府全部胜诉。主要原因是申请人不能证明其是被政府扣押财产公司的股东,因而不符合投资者的定义。

在“PSEG 案”中,由于土耳其在能源领域对外开放政策的不稳定,导致投资者向 ICSID 申请仲裁,并获得赔偿。1994 ~ 2001 年,土耳其颁行了一系列法律,鼓励外商投资能源领域。PESG 在投资之前进行了大量的可行性研究,随后与土耳其政府开始谈判兴建发电站。尽管当事人之间并未真正订立投资协议,但 PESG 在投资未果之后提起仲裁。仲裁庭最终认定土耳其政府违反了土耳其—美国投资协定中的公平、公正条款。土耳其政府前后不一的立法和行政行为,给投资者带来过山车般的“惊险体验”,应当向投资者赔偿损失。

土耳其当事人作为申请人的投资仲裁案件多涉及中亚国家,案件集中在建设工程和通信领域。典型案件如“Bozbey 诉土库曼斯坦案”、“K ılı ç 诉土库曼斯坦案”和“ATA 案”。在“Bozbey 案”中,土耳其商人拒绝为新当选的总统自付费兴建直升机场,因而遭到不公正的刑事指控。该商人被土耳其大使馆营救之后,提起投资仲裁和人权诉讼。在 K ılı ç 案中,仲裁庭根据《土耳其和土库曼斯坦双边投资协定》中的管辖权条款,否认仲裁庭的管辖权。涉案双边投资协定中,明确规定了“如果当事人向缔约一方国内法院起诉,一年内未能获得终局判决时”,可以向 ICSID 申请仲裁,或者适用《联合国贸法会仲裁规则》提起临时仲裁,或者向 ICC 申请仲裁。该案中,当事人选择直接向 ICSID 申请仲裁,仲裁庭认定无权管辖该案。“ATA 案”涉及撤销仲裁裁决构成非法征收的问题。ATA 是一家土耳其工程公司,与约旦国有公司 APC 订立合同,在死海上修建一座大坝。大坝竣工后,没多久就坍塌了。APC 在约旦国内提起商事仲裁,请求赔偿。ATA 否认赔偿责任,并提出反请求。仲裁庭不认可 APC 的诉讼请求,支持了 ATA 的反请求。随后这家约旦国有公司向约旦法院提起撤销仲裁裁决的诉讼,并获得两审法院的支持。ATA 随后依据《土耳其和约旦双边投资协定》提起投资仲裁。仲裁庭最终裁决,违法撤销仲裁裁决剥夺了投资协定中规定的“对合法并且具有经济意义的给付的请求权”,构成征收行为。

(三)土耳其替代性纠纷解决制度

1. 商事调解制度

商事调解制度是近年来新兴的商事争议解决制度,受到当事人的青睐。[1] 土耳其的商事调解制度规定在2013年6月22日生效的《土耳其调解法》之中。该法包括9章,分别规定了立法目的、宗旨和定义(第1章),调解的基本原则(第2章),调解员的权利和义务(第3章),调解活动(第4章),调解员注册(第5章),调解员和调解机构培训(第6章),调解机构的设立和职责(第7章),刑事责任(第8章)和杂项(第9章)。通过制定《土耳其调解法》的具体的程序事项和程序原则,推广商事调解制度。

该法详尽地规定了商事调解所涉及的事项。根据该法第1条的规定,凡当事人可以处分的事项或者民事关系,无论是否具有涉外因素,都可以通过调解程序解决。第2条界定了调解的概念,即中立、独立且受过专门训练的调解员,利用调解技术组织当事人谈判,在确保当事人有效沟通并相互理解的条件下,由当事人自主提出争议解决方案的过程。

《土耳其调解法》将当事人意思自治和保密作为基本原则。当事人意思自治是土耳其调解法的基石。当事人可以决定是否启动调解程序,如何进行调解程序,是否终止调解程序,以及如何达成和解协议。保密原则是调解法的基本保障。该法第33条甚至规定,任何人违反保密义务,造成另一方当事人损失的,最高可判处有期徒刑6个月。保密义务的主体包括双方当事人、调解员以及任何参与调解程序的第三人。保密的事项包括:一方当事人邀请调解或主张调解的事实、当事人在调解过程中提出的任何观点和看法、当事人作出的任何主张、建议或认可的事实以及任何调解过程中起草的书面文件。根据保密原则,调解过程中当事人提交的任何文件或陈述,不可以在任何后来发生的诉讼或仲裁程序中使用,无论后续程序是否涉及本案纠纷。法院、仲裁庭或者行政机关在其他程序中,不得要求当事人披露与以上信息有关的证据。如果当事人提交上述信息相关证据,法院及其他机构应当否认其证据效力,除非法律另有规定。

《土耳其调解法》第6条至第12条规定了调解员的权利和义务。调解员的权利主要包括:使用认证调解员的头衔及行使相应特权、请求支付调解费或预付费的

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〔1〕 土耳其目前已有约50件调解成功的案件。参见www. adb. adalet. gov. tr/Sayfalar/istatistikler,最后访问日期:2019年1月28日。

权利、偿付调解过程中产生费用的权利以及分别或同时会见一方或双方当事人的权利。调解员的义务则包括:亲自履行调解义务、独立中立的义务、平等对待当事人双方的义务、按照当事人期待的方式主持调解的义务。

根据《土耳其调解法》第 13 条的规定,当事人可以在进入诉讼或者仲裁程序前,或者进入仲裁程序后的任意时间点,进入调解程序。在诉讼或仲裁程序启动前,当事人达成合意后可以通过与调解员订立调解合同,启动调解程序。如果一方当事人向另一方作出调解的要约,另一方当事人在 30 日内没有回应的,视为拒绝要约。双方当事人同意调解之后,应当选任调解员。调解员被选任之后,签订调解协议,调解程序启动。调解员应当召集当事人举行第一次会议。在诉讼或仲裁程序中,当事人接受法院的调解意愿,或者当事人约定调解的,启动调解程序。调解程序启动后,中断诉讼时效。当事人可以约定调解程序,但不得违反法律的强制性规定。当事人可以选择机构调解,适用机构的调解规则;也可以选择临时调解,由当事人或调解员专门约定特定案件适用的调解程序。如果当事人没有约定调解程序,则由调解员根据案件具体情况决定程序事项。如果当事人达成调解协议,或者一方当事人决定退出调解程序,或者调解员认为不应继续调解,调解程序终结。调解程序终结后,应当制作书面文件,记载和解协议是否达成;未能达成和解协议的,需要记载不能达成和解的事由。该文件由调解员和当事人签名后,送调解指导局备案。

如果当事人通过调解达成书面和解协议,可以向法院请求签注和解协议。和解协议经法院签注之后,具有与判决、裁决同样的执行力。当事人及其代理律师享有缔结民法上和解协议的权利,因此当事人也可以选择不适用《土耳其调解法》规定的调解程序。如果当事人没有选择认证调解员,也没有适用《土耳其调解法》规定的调解程序,那么其和解协议不可以被法院签注,也不会取得强制执行的效力。

为保障《土耳其调解法》的实施,该法专门新设了调解指导局(作为法律事务委员会的内设部门)和调解委员会(作为司法部的内设部门)。前者的主要职能是,管理调解员注册事宜、调解结果文书登记以及为国内调解事务提供有效的帮助和支持,包括统计调解案件数据、主持调解员培训及管理调解员培训机构、出版调解相关文献、支持调解科学研究、宣传推广调解以及国际合作等。后者的主要职能则是,制定调解服务和调解职业的基本规则、制定调解员培训的基本制度、监督调解员活动、调解员除名、吊销调解培训机构执照以及制定调解收费标准。

2. 律师调解制度

律师谈判调解制度,是土耳其具有特色的法律制度。根据《土耳其律师法》[1]第35A条的规定,律师参与的和解协议,具有与判决和裁决同样的法律效力。一方当事人不履行该和解协议的,另一方当事人可以请求强制执行。当事人之间自行达成的调解协议,仅具有债权合同的性质,没有可执行的法律效力。当事人也可以去公证机关,由公证员按照当事人的约定制作文书,经登记后也可以获得强制执行的效力,但这仅限于当事人能够自主达成一致意见的情况。

在庭审程序开始前,当事人双方的代理律师可以进行协商,或邀请双方当事人进行谈判。在谈判过程中,律师的角色是向当事人提供各自关系和地位的法律意见,提出解决纠纷的意见,鼓励当事人和解。律师调解程序启动后,律师不再是一方当事人的代理人,而成为独立主体,协助双方达成和解协议。这样的制度设计有悖于律师代理当事人的义务,因此在实践中并未取得预期的效果。

如果谈判顺利达成和解协议,应当制作和解协议。和解协议不应附条件,协议内容应当明确和解争议的标的、和解地点以及双方当事人各自的权利和义务。和解协议书必须由双方当事人及律师签字。该和解协议无须法院签注,直接取得与生效判决和裁决同样的法律效力。律师调解也适用与商事调解同样的保密制度。

3. 专家裁决机制

专家裁决机制是当事人双方委托第三方,就争议涉及的事实问题作出决定的专家裁决制度,也是土耳其国内常见的替代性纠纷解决机制。土耳其并没有专门规定专家裁决机制的法律。该制度施行的基础是《土耳其民事诉讼法》第193条规定的证据制度。根据该条的规定,当事人可以书面约定争议事实通过法定证据形式以外的证据证明。因此,专家裁决在土耳其被视为当事人约定证据形式的程序合同(usuli bir sözleşme)。当专家就争议事实问题作出裁决后,当事人不得提交其他任何证据,[2]除非通过表面证据可以证实:(1)专家报告明显违反公平正义,或明显背离事实;(2)报告的形式或内容不合法;(3)专家指定违反当事人约定的程序;(4)专家裁决超出当事人委托的范围;(5)裁决违反平等对待当事人原则。

长期以来,土耳其学界都主张专家裁决报告的撤销,尤其是基于“明显违背事

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〔1〕 该法是土耳其1969年3月19日第1136号法令。参见土耳其政府公报1969年4月7日第13168期。

〔2〕 参见土耳其上诉法院第11裁判庭1974年2月8日判决,案卷编号:1974/110,判决编号:1974/386。

实”的撤销，应当严格适用初步证据（*prima facie*）审查，严格遵循专家报告的效力。然而，司法实践却表明，法院对专家裁决制度的支持非常有限。当事人一方申请撤销专家报告时，法院自行另外指定专家，就同一事项进行审查。如果法院指定的专家结论与当事人约定的专家报告不一致，法院采纳自己指定的专家的结论。土耳其法院的做法更像是传统大陆法系对待鉴定人的态度，而忽略了专家裁定机制本身的意义。如果当事人的意愿和承诺得不到尊重，该制度就不足以称为替代性纠纷解决机制，也解决不了任何纠纷。

三、土耳其仲裁机构概述

土耳其仲裁机构大多附属于商会设立，因而在商会体系内的不同层级存在许多仲裁机构，但这些机构受理的案件数量以及影响力都不大。为增强土耳其仲裁机构的竞争力，集中仲裁机构案件受理，尤其是为了直接促进伊斯坦布尔金融中心的建设，专门成立的伊斯坦布尔仲裁中心（Istanbul Arbitration Centre，ISTAC）成为土耳其最大的仲裁机构。

（一）伊斯坦布尔仲裁中心

1. 机构设置

ISTAC 是土耳其专门立法设立的仲裁机构，[1] 成立于 2015 年。该机构完全采用私法治理结构，是按照国际仲裁机构的同行标准建立的独立、中立、居中的仲裁机构。该机构旨在为国内仲裁和国际仲裁提供高效、优质、实惠的纠纷解决服务。与土耳其传统仲裁机构不同的是，该机构并不仅限于对商会会员提供仲裁服务。受益于土耳其特殊的地理位置以及融贯欧亚的文化传统，该机构尝试将自己打造成欧洲、亚洲以及中东的区域仲裁中心。

该仲裁机构由大会（General Assembly）、董事会（Board of Directors）和秘书处（Office of the Secretary General）组成。董事会的职能包括起草仲裁、调解以及机构治理的相关规则，由大会审查批准。董事会在具体程序中承担组庭服务职能，辅助当事人高效地解决纠纷。秘书处则负责提供仲裁规则规定的服务，以及负责与当事人、代理人及仲裁员进行沟通。

现行《ISTAC 仲裁规则》和《ISTAC 调解规则》是 2015 年颁行的版本。较之土耳其国内其他机构的仲裁规则，该中心的仲裁规则引入了许多国际通行的最新的

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〔1〕 相关内容记载于 2014 年 11 月 29 日有关伊斯坦布尔仲裁中心的 6570 号法令。参见土耳其政府公报 2015 年 1 月 1 日刊。

制度,如快速仲裁程序(Fast Track Arbitration)、紧急仲裁员(Emergency Arbitrator)以及为临时仲裁(*ad hoc* Arbitration)提供指定服务。从规则内容上看,现行规则主要仿照 ICC 仲裁院仲裁规则。之所以仿照 ICC 仲裁院的规则,是因为 ICC 仲裁院是土耳其当事人经常选择的仲裁机构。无论是实务界还是学术界,都非常熟悉国际商会仲裁院仲裁规则。

2. 仲裁规则

《ISTAC 仲裁规则》的核心特征有两种:一是提高仲裁程序的效率;二是降低仲裁费用。提高仲裁程序效率不仅是土耳其国内当事人选择仲裁的主要动机,而且也是 ISTAC 提供国际仲裁服务的核心吸引力。该机构的仲裁规则不仅提供了精简的仲裁案件管理制度,而且还专门规定了快速仲裁程序、紧急仲裁员程序,并配套以高效的仲裁秘书团队。根据国际用户的评价,该机构仲裁收费低廉,在欧、亚、中东地区具有很强的竞争力。

该机构规则中规定的快速仲裁程序,适用于争议标的额(包括请求和反请求)低于 30 万土耳其里拉(约 42 万元人民币)的案件。除非当事人另有约定,快速程序无须申请,自动适用。如果争议标的额高于这个数字时,当事人也可以专门约定适用快速程序。在快速程序中,指定仲裁员的时限从 30 日减半为 15 日。仲裁庭确定审理范围书和审理计划的时间从 30 日减为 7 日。除非独任仲裁员认为必须开庭审理,否则一概书面审理。从组庭到裁决作出的时间,从 6 个月减为 3 个月。最后一次开庭到裁决作出的时限为 1 个月。

《ISTAC 仲裁规则》还规定了紧急仲裁员程序。在仲裁庭组庭之前,当事人可以向仲裁机构申请指定紧急仲裁员,除非当事人另有约定。申请紧急仲裁员时,申请人并不需要提交仲裁申请或仲裁请求书,但必须在申请紧急仲裁员的 15 日内,向机构提交仲裁申请。收到当事人紧急仲裁员的申请后,机构董事会主席在 2 日内,决定紧急仲裁员的人选。紧急仲裁员接受委任后,必须在 2 日内确定审理计划。紧急仲裁员必须在收到书面文件 7 日内,作出紧急裁决。紧急裁决一旦作出,立即生效。申请人向机构申请指定紧急仲裁员,并不妨碍当事人向法院寻求中间保全措施。如果法院批准保全措施,不会导致申请人违反仲裁协议,也不会视作申请人撤回紧急仲裁员的申请。

3. 仲裁收费

仲裁案件中,该机构收取的费用包括受理费每件 300 土耳其里拉(相当于约 420 元人民币)。案件管理费按争议标的收取(见表 5 – 1)。仲裁员收费则分为独

任仲裁员和多人仲裁庭,分别计费(见表5-2)。该机构收费规则,明显借鉴了ICC仲裁院的收费规则。此外,该机构收费表中未包含仲裁员报酬的税金。仲裁员报酬的税金为3%~5%。

表5-1　管理费收费规则

标的金额	管理费
30万里拉以下	1.5%
30万~100万里拉	4500里拉+1%〔1〕
100万~500万里拉	11 500里拉+0.5%
500万~1000万里拉	31 500里拉+0.3%
1000万~5000万里拉	46 500里拉+0.1%
5000万~1亿里拉	86 500里拉+0.08%
1亿里拉以上	130万里拉

表5-2　仲裁员报酬收费规则

标的金额	独任仲裁员报酬	仲裁庭报酬
30万里拉以下	5%	7%
30万~100万里拉	15 000里拉+4%	21 000里拉+6%
100万~500万里拉	43 000里拉+3%	63 000里拉+5%
500万~1000万里拉	163 000里拉+1%	263 000里拉+2%
1000万~5000万里拉	213 000里拉+0.5%	363 000里拉+1%
5000万~1亿里拉	413 000里拉+0.1%	763 000里拉+0.5%
1亿~3.5亿里拉	463 000里拉+0.2%	1 013 000里拉+0.1%
3.5亿里拉以上	513 000里拉+0.01%	1 263 000里拉+0.025%

以5亿元人民币争议标的额案件计算,ISTAC收费共计约140万元人民币,低于中国国际贸易仲裁委员会的320万元和北京仲裁委员会的204万元。

(二)商会仲裁院

除伊斯坦布尔仲裁中心之外,土耳其各级商会还内设大量仲裁机构。其中,比

〔1〕 争议标的额的1%。

较有影响力的仲裁机构包括土耳其商品交易和商会联合会仲裁院(Türkiye Odalar ve Borsalar Birli ğ i)以及伊斯坦布尔商会仲裁院(Istanbul Ticaret Odasl)。前者位于安卡拉,为土耳其全国商会会员提供仲裁纠纷解决服务。后者位于伊斯坦布尔,同样只为商会会员作为当事人一方的争议提供纠纷解决服务。该机构服务的商会包括,伊斯坦布尔商会、工业协会、商品交易协会和海商协会。非会员当事人申请仲裁的,由仲裁院主席裁量决定是否受理。土耳其各地商会仲裁院受理的案件数量并不多。较早的调查报告显示,2005~2010 年,土耳其商品交易和商会联合会仲裁院受理的案件总共为 6 起,伊斯坦布尔商会仲裁院共受理 57 起。

四、土耳其仲裁程序的基本框架

(一)仲裁协议

根据《土耳其国际仲裁法》第 4 条的规定,国际仲裁的当事人可以选择仲裁协议适用的法律,但当事人没有选择的,应根据土耳其法认定仲裁协议的效力。因此,土耳其国内法关于仲裁协议效力的规定显得尤其重要。《土耳其民事诉讼法》第 412 条和《土耳其国际仲裁法》第 4 条,对仲裁协议采用同样的定义,即当事人将特定法律关系已经发生的争议或者将来可能发生的部分或全部争议,无论是否因合同而产生的争议,提交仲裁的约定。其中关键要素为:(1)必须是可仲裁的特定争议;(2)仲裁协议是当事人之间的约定;(3)仲裁的可以是尚未发生的争议,但必须涉及特定的法律关系;(4)可以将争议的部分或者全部提交仲裁解决。司法实践及通说皆认为仲裁协议是程序合同。[1]

1. 可仲裁性

《土耳其民事诉讼法》第 408 条和《土耳其国际仲裁法》第 1 条第 4 款都规定了“可仲裁性”,即“与不动产物权相关的争议以及当事人无处分权的争议不能仲裁”。《土耳其民法典》[2]第 704 条界定了“不动产相关争议”,即土地、土地登记簿记载的其他独立、连续的权利、登记的建筑物区分所有权。认可可能导致前述不动产权属发生变更的争议,都不得提交仲裁。有关不动产的债券或者属人权,如不动产租

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〔1〕 参见土耳其上诉法院 2003 年 3 月 19 日判决,案卷编号:2003/15-142,判决编号:2003/182,检索判决登录 www. kazanci. com,最后访问日期:2019 年 1 月 28 日。

〔2〕 《土耳其民法典》是 2001 年 11 月 22 日第 4721 号法令。参见《土耳其政府公报》2001 年 12 月 8 日第 24607 号。

赁合同,具有可仲裁性,可以提交仲裁。[1]“无处分权的争议”通常包括:(1)行政法、刑法有关争议;(2)家事法、破产法、劳动法、消费者保护法以及公司法中部分不可仲裁事项。撤销股份有限公司股东大会决议以及撤销有限责任公司股东决议,依据土耳其法不能提交仲裁解决。[2] 解雇公司经理的争议,也不能提交仲裁。劳动合同和消费者合同争议不能提交仲裁,目的在于保护劳动者和消费者。如果仲裁庭就不可仲裁的争议作出裁决,那么在当事人提出撤销裁决申请之后,法院依职权审查案件是否具有可仲裁性。如果争议不具有可仲裁性,法院应当撤销裁决。在仲裁程序进行过程中,当事人不能申请法院审查仲裁性。只有在裁决作出后,法院才可以审查争议可仲裁性。[3]

2. 仲裁协议的内容

土耳其法并未规定仲裁协议的必要内容。根据学界通说及惯常实践,仲裁协议应当包含两项基本内容,即特定争议和明确的提交仲裁的意思。[4] 如果当事人约定争议可以仲裁或者诉讼,或者当事人约定仲裁未果时可以提起诉讼,那么土耳其法院会认为当事人缺乏明确、清晰的提交仲裁解决纠纷的意思,否定仲裁协议的效力。在仲裁协议的实体方面,还必须符合一般合同的约定。如一方当事人利用经济地位强迫另一方当事人缔结仲裁协议,则协议无效。[5]

3. 仲裁协议的形式

《土耳其民事诉讼法》第 412 条和《土耳其国际仲裁法》第 4 条都确认,仲裁协议可以是主合同中的仲裁条款,也可以是单独的仲裁合同。如果仲裁协议作为主合同中的条文出现,那么仲裁协议具有独立于主合同的法律地位,主合同的效力不影响仲裁协议的效力。仲裁协议不因主合同无效而无效,主合同也不因仲裁协议

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〔1〕 事件中也有法院认为不动产租赁合同不可以仲裁,但原因是违反消费者保护法,而不是物权的不可仲裁性。

〔2〕 参见土耳其上诉法院第 11 裁判庭 2012 年 12 月 5 日判决,案卷编号:2012/13485,判决编号:2012/19915。

〔3〕 参见土耳其上诉法院第 15 裁判庭 2007 年 7 月 27 日判决,案卷编号:2007/2145,判决编号:2007/4389。

〔4〕 参见土耳其上诉法院第 9 裁判庭 2013 年 2 月 25 日判决,案卷编号:2013/1773,判决编号:2013/6664。

〔5〕 参见土耳其上诉法院第 13 裁判庭 1990 年 4 月 25 日判决,案卷编号:1990/8778,判决编号:1991/4492。

无效而无效。[1]《土耳其民事诉讼法》第412条明确规定主合同无效或者不成立不影响仲裁协议的效力。土耳其上诉法院裁判的若干案件,都体现了这一基本原则。例如,保加利亚某公司和土耳其某公司订立了买卖合同。签订合同的保加利亚公司股东并无签订合同的代理权,但合同义务已经由该公司实际履行。履行发生争议后,该公司要求根据合同中的仲裁协议提交仲裁。土耳其上诉法院裁定,案件主合同与仲裁协议是两个不同的合同,实际履行补全了主合同合意,但主合同的实际履行,并未补全仲裁协议的合意。由于仲裁协议的签订人缺乏适当的代理权,而且没有得到追认,因此仲裁协议无效。[2]

仲裁协议必须具备书面形式。根据《土耳其民事诉讼法》第412条的定义,书面形式包括当事人共同签名的文档,或者当事人之间交换签名的信件、传真或者其他通信形式。由于该条对书面形式的定义是开放的,因此符合《土耳其电子签名法》[3]或者《土耳其债法典》[4]规定的书面形式,也属于符合要求的仲裁协议的书面形式。此外,当事人援引包含仲裁协议的文件,并将该文件作为合同一部分时,该仲裁协议视为并入主合同。如果当事人没有订立仲裁协议,但一方申请仲裁;另一方没有在答辩书中提出异议,也属于有效的书面形式。如果仲裁裁决作出后,一方当事人主张没有仲裁协议而撤销仲裁裁决的,法院不予认可。

(二)仲裁庭组成

1. 仲裁员的选定和指定

《土耳其民事诉讼法》第415条和《土耳其国际仲裁法》第7A条都规定,当事人可以自由约定仲裁员的数量,但必须是奇数。作此规定的目的是避免出现决策僵局。如果当事人约定了偶数名仲裁员组成仲裁庭,视为当事人约定无效,应适用法定组庭人数的规定。

上述两部法律都没有关于仲裁员资格的规定,因此任何具有民事行为能力的人,都可以被选定为仲裁员。仲裁员必须是自然人,因为只有自然人才可以审理案

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〔1〕 参见土耳其上诉法院大裁判庭2000年10月11日判决,案卷编号:2000/19-1122,判决编号:2000/1256。

〔2〕 参见土耳其上诉法院大裁判庭判决1995年7月18日判决,判决编号:1994/571,判决编号:1995/391。

〔3〕《土耳其电子签名法》是2004年1月15日第5070号法令。参见《土耳其政府公报》2004年1月23日第25355号。

〔4〕《土耳其债法典》是2011年1月11日第6098号法令。参见《土耳其政府公报》2011年2月4日第27836号。

件。土耳其学界也有学说认为,当事人可以约定法人作为仲裁员。如果当事人选定法人作为仲裁员,则应由法人的代表机构担任仲裁员。《土耳其宪法》第 140 条规定,法官和检察官不能从事法律规定以外的私人或者公共职业。[1] 如果当事人约定在任的法官或者检察官为仲裁员,该选任无效。此外,《土耳其民事诉讼法》规定,当仲裁庭成员多于一名时,必须包含一名具有法律职业资格并且执业 5 年以上的仲裁员。《土耳其国际仲裁法》并未规定此类限制,因此国际仲裁中无论是独任仲裁员,还是多人仲裁庭,都可以由任何背景的人担任仲裁员。法律也没有限制仲裁员的国籍,当事人可以选择任何国籍的人担任仲裁员。

土耳其两部仲裁法都规定了三种选任仲裁员的方式。首先,当事人可以直接在仲裁协议中明确约定仲裁员的人选。其次,当事人可以约定仲裁员的选任程序。最后,当事人可以委托指定机构指定仲裁员。在仲裁协议中直接约定仲裁员,具有避免仲裁员回避程序和节省指定程序时间的优势。直接指定仲裁员也有许多风险,如被指定的仲裁员不愿意接受指定或者接受指定后退出审理,会导致仲裁协议的不能执行。《土耳其国际仲裁法》第 7G 条规定,如果仲裁协议约定的仲裁员组成仲裁庭,而全部或者部分仲裁员退出审理,以至于不能作出多数决定时,应当终止仲裁程序。土耳其上诉法院曾在一起类似案件中作出判决,要求仲裁协议中约定的仲裁员因故退出审理或不能继续审理时,应当终止仲裁程序。当事人不可以依据仲裁协议重新仲裁,只能通过诉讼解决争议。[2] 因此,当事人如果在仲裁协议中直接约定仲裁员人选,应当同时约定候选仲裁员的身份或者选任方式,否则可能会产生仲裁协议不能执行的风险。应当注意的是,如果当事人不是在仲裁协议中,而是在补充仲裁协议中约定了仲裁员的人选,那么当选定的仲裁员退出审理后,仲裁协议的效力不受影响,当事人可以另行约定其他仲裁员人选。同样的裁判规则,后来又再次被上诉法院确认。“仲裁协议是程序合同,而争议合同为实体合同,二者不可混为一谈。仲裁协议的效力独立于主合同,主合同的效力也独立于仲裁协议。本案中,订立合同的代理人享有订立主合同的代理权,却欠缺订立仲裁协议的代理

〔1〕 参见土耳其上诉法院第 15 裁判庭 1986 年 5 月 29 日判决,案卷编号:1986/1969,判决编号:1986/2192。

〔2〕 参见土耳其上诉法院大裁判庭判决,案卷编号:1950/6027,判决编号:1951/5455。

权,因此仲裁协议无效。”〔1〕

当事人约定仲裁员选任程序,应当符合平等对待当事人的原则。如果约定当事人一方可以单独决定独任仲裁员的人选,或者决定多人仲裁庭的多数仲裁员,该约定因违反了平等对待双方当事人的原则而无效。在土耳其上诉法院审理的一起案件中,当事人约定:“任何因履行或不履行本合同而产生的有关损失认定的争议,按照仲裁程序解决。仲裁地为安卡拉。仲裁员由买方选任。”法院认定单方决定仲裁员的约定无效,应按照法定程序指定仲裁员。仲裁员指定的法定程序见于《土耳其民事诉讼法》第415条、第416条及《土耳其国际仲裁法》第7条。如果当事人约定独任仲裁庭,但不能对仲裁员的人选达成合意,经当事人一方申请,初审法院指定仲裁员。国内案件中,初审法院是指仲裁地初审法院(asliye hukuk mahkemesi)。〔2〕如果当事人没有约定仲裁地,则由被申请人经常居所或主营业地初审法院管辖。涉外案件中,如果被申请人在土耳其境内没有经常居所或主营业地,由伊斯坦布尔的初审法院(istanbul Asliye Hukuk Mahkemesi)指定仲裁员。约定适用多人仲裁庭的,当事人各自指定一名仲裁员,由当事人指定的仲裁员指定共同第三名仲裁员,该名仲裁员作为首席仲裁员。如果一方当事人不指定仲裁员或者当事人指定的仲裁员不能选定第三名仲裁员,则应当适用法定指定程序,由初审法院指定。〔3〕法院指定仲裁员时,应当先听取当事人的意见后作出决定。应当考量的因素包括,当事人的意愿、仲裁员的独立性以及仲裁员的专业是否与案件争议匹配。涉外案件中,如果当事人国籍不同,法院应指定第三国国籍的仲裁员。法院指定仲裁员的决定,是终局的,不可上诉。土耳其两部仲裁法都没有规定多方仲裁程序的组庭程序。如果当事人没有约定,则类推适用指定仲裁员的普通程序。

当事人还可以约定指定机构,由指定机构指定仲裁员。指定机构可以是国际仲裁机构(如ICC仲裁院、伦敦国际仲裁中心),也可以是国内仲裁机构(如ISTAC),还可以是自然人。如果指定机构拒绝指定,则由法院承担指定职能。指定机构(Appointing Authority)应当符合仲裁员资质的规定,即自然人应当具有完全行

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〔1〕 See 13th Civil Division of the Court of Appeal, Date: 22 April 1993, File No.: 1993/2051, Decision No.: 1993/3488 (unpublished). Also see, 11th Civil Division of the Court of Appeal, Date: 26 May 1999, File No.: 1998/9679, Decision No.: 1999/4500 - Maritime Law Journal 4/1 - 2, 182.

〔2〕《土耳其关于地区法院和初审法院的建立、职责和权利的法律》,2004年9月26日第5235号法令。参见土耳其政府公报2004年10月7日第25606号。

〔3〕 参见土耳其上诉法院大审判庭2003年3月19日判决,案卷编号:2003/15 - 142,判决编号:2003/182。

为能力、指定机构应当具有独立中立的地位以及指定机构不可以是不能担任仲裁员的人(如在职法官和检察官)。根据土耳其上诉法院的实践,当事人可以约定法院或者法院院长作为指定机构。“如果当事人不能就指定机构达成一致意见,由安卡拉商事法院指定仲裁员”〔1〕或者“本合同引起的任何纠纷提交仲裁解决。当事人各自指定一名仲裁员,第三名仲裁员由伊兹密尔商事法院指定”,〔2〕都被认为是有效约定。如果当事人约定由具体的法官承担指定职能,则违反了法官不能担任仲裁员的法律规定。

2. 仲裁员的回避

《土耳其国际仲裁法》第7C条规定了仲裁员的回避事由,共包括三类:(1)仲裁员不具备当事人约定资质;(2)出现当事人约定的回避事由;(3)仲裁员不具有独立性和中立性。第一种情况下,如果当事人约定仲裁员应当具有法律背景而不具有法律背景,则具备仲裁员回避的法定理由。第二种情况,是指当事人可以约定回避事由,约定事由发生时,当事人可以申请仲裁员回避。例如,当事人可以约定,曾经担任过当事人之间争议仲裁员的,不能再次担任相同当事人之间争议的仲裁员。如果仲裁员再次担任相同当事人之间仲裁员的,可以申请其回避。第三种情况则是常见的,也是最重要的回避事由,即仲裁员必须具备独立性和中立性。

仲裁员的独立性和中立性,构成仲裁裁决有效的基本前提,也是仲裁程序之所以能够替代诉讼的核心。例如,指定一方当事人董事会成员作为仲裁员,明显违反仲裁员的独立性和中立性原则,也违反了任何人不能担任自己法官的自然正义原则。〔3〕如果仲裁员的独立性和中立性不能得到保障,当事人可以申请法院撤销仲裁裁决。作为仲裁员独立性和中立性的制度保障,土耳其两部仲裁法都规定了仲裁员的披露义务。《土耳其民事诉讼法》规定,仲裁员的回避适用与法官回避同样的规则。〔4〕仲裁员在接受指定前,以及仲裁程序进行的任何阶段,都有义务向当事人和其他仲裁员披露有关其独立性和中立性的信息。例如,《土耳其国际仲裁法》第7条规定,任何自然人被当事人接触,具有被指定为仲裁员的可能时,应当披露任

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〔1〕 参见土耳其上诉法院第15裁判庭1991年6月11日判决,案卷编号1991/3329,判决标号:1991/3693。

〔2〕 参见土耳其上诉法院第15裁判庭1994年9月13日判决。案卷编号:1991/3637,判决编号:1994/4868。

〔3〕 参见土耳其上诉法院第13裁判庭1974年9月26日判决,案卷编号:1974/2385,判决编号:1974/2161。

〔4〕《土耳其民事诉讼法》第521条规定“仲裁员的回避事由与法官回避事由相同”。

何可能导致怀疑其独立性和中立性的情况。仲裁员被指定后,在仲裁程序的任何阶段,都应当向当事人披露前述信息,接受指定前已经披露的信息除外。在土耳其加入《纽约公约》之前,曾经有过判例认为 ICC 仲裁院要求秘书核阅裁决书的实践,违反仲裁员独立和中立原则。[1] 土耳其法院的判决引发强烈的批评,因为秘书核阅裁决书确实有干涉仲裁庭独立性的风险,但除非这种风险在个案中非常明显,否则不能以此作为撤销仲裁或不予执行裁决的理由。但此后,土耳其法院已经改变了看法。后来的判例表明,机构核阅裁决书并不必然导致仲裁庭丧失独立性。[2]

仲裁员回避程序,首先适用当事人约定的程序。当事人没有约定的,适用法定回避程序。根据《土耳其国际仲裁法》第 7D 条的规定,申请仲裁员回避的当事人必须在仲裁庭组成或知悉仲裁员回避事由的 30 日内,向仲裁庭书面提出回避申请。申请书应当包含申请回避的事实和理由。如果仲裁庭决定仲裁员回避,则该仲裁员停止行使仲裁员职权。如果仲裁庭决定仲裁员不回避,申请回避的当事人可以向法院申请撤销仲裁庭不予回避的决定,并决定仲裁员回避。土耳其仲裁法并未规定,法院受案后仲裁庭可否继续审理案件。根据学界主流观点,仲裁庭应当继续审理,否则当事人可能滥用权利拖延仲裁程序。当事人知悉回避事由,在仲裁裁决作出后才申请撤销仲裁裁决的,视为当事人放弃申请回避的权利。如果当事人申请全部仲裁员回避,回避决定应当由初审法院作出。

如果仲裁庭或者法院决定仲裁员回避,那么当事人应当根据回避仲裁员的指定程序,重新指定仲裁员。土耳其司法实践甚至确认,一方当事人怠于指定仲裁员,由法院补充指定的仲裁员回避之后,怠于指定仲裁员的当事人,仍旧无权指定仲裁员,而由法院指定仲裁员。关于重新指定的仲裁员应当继续审理还是重新审理案件,土耳其两部仲裁法都没有给出明确规定。由于更换仲裁员并不中断仲裁期限的计算,当事人通常会另行约定延长仲裁期限。[3] 根据《土耳其国际仲裁法》第 7E 条的规定,仲裁员无合理原因不履行义务导致更换仲裁员的,被更换的仲裁员应当赔偿给当事人造成的损失。

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〔1〕 参见土耳其上诉法院第 15 裁判庭 1976 年 3 月 10 日判决,案卷编号:1976/1617,判决编号:1976/1052。

〔2〕 参见土耳其上诉法院第 15 裁判庭 1991 年 6 月 10 日判决,案卷编号:1991/2383,判决编号:1991/3667。

〔3〕 参见土耳其上诉法院第 15 裁判庭 2010 年 12 月 13 日判决,案卷编号:2010/4287,判决编号:2010/6858。

（三）仲裁程序

1. 仲裁规则

土耳其仲裁法采纳了《示范法》的规定，以当事人意思自治为基本原则。当事人可以直接约定仲裁程序规则，也可以间接约定既有的仲裁规则，还可以约定适用外国仲裁法作为程序规则。如果当事人没有约定，则适用仲裁地仲裁法为仲裁程序规则。

当事人关于仲裁程序规则的约定，不适用有关仲裁协议内容、效力和形式的规则。约定仲裁规则的合意的成立和效力，适用仲裁地法（*lex arbitri*）。约定仲裁规则的合意可以是明示的，也可以是默示的。通常认为，当事人遵循仲裁庭仲裁令，并不意味着当事人同意仲裁庭对仲裁规则的选择。当事人选择实体准据法，或者选择仲裁协议准据法，并不必然选择该国仲裁法作为仲裁程序规则。由于选定仲裁规则的合意与仲裁协议是独立的，因此选定仲裁规则的合意可以不具备书面形式。当事人口头选择仲裁规则，也是有效的合意形式。实践中，当事人还是倾向于通过书面形式约定仲裁规则。

当事人直接约定各项程序规则的情况并不多见。当事人往往会间接约定特定仲裁机构的规则，仅对某些特别重要的事项（如仲裁语言、仲裁地、通知送达的方式）作出直接、明确的约定。此外，《土耳其国际仲裁法》第 8A 条还明确规定，当事人可以约定外国仲裁法作为仲裁程序规则。当事人选择外国仲裁法作为程序规则时，选择的外国法变成当事人的约定，因此适用外国法不能违反仲裁地仲裁法的强制性规定。实践中最常见的做法是，当事人约定适用特定仲裁机构的仲裁规则。《土耳其国际仲裁法》第 8A 条明确规定，当事人可以约定国际通行的或者特定仲裁机构的仲裁规则。当事人选定特定仲裁规则，意味着仲裁规则的全部规定适用于仲裁程序。如果当事人约定 ICC 仲裁规则，那么其有关仲裁程序内部操作以及仲裁费的规定，都将适用于本案仲裁程序。

当事人没有约定仲裁规则，或者约定的仲裁规则未能详尽地规定仲裁程序中涉及的具体程序问题时，由仲裁庭根据仲裁地法决定。如果仲裁地是土耳其，根据《土耳其国际仲裁法》第 8A 条的规定，仲裁庭应当以该法规定的程序为准。该法未规定的事项，由仲裁庭根据案件具体情况，决定具体程序适用的规则。仲裁庭可以在程序开始后，或者程序进行的必要时间决定程序事项，但应当注意平衡灵活性和可预见性。对于程序至关重要的事项（如语言、仲裁地等），应当在程序开始之后立即作出。仲裁庭在决定程序事项之前，应当与当事人进行沟通，并征求当事人的意

见。如果仲裁庭和当事人之间不能达成一致,由仲裁庭决定。仲裁庭采纳当事人一方的意见,不会必然导致违反平等对待当事人的基本原则。该原则要求当事人有平等的表达意见的机会,并不意味着意见具有同等的效果。在国际仲裁中,仲裁庭可以选择适用国际通行规则,或者选择适用特定国家的国内规则,也可以采取拼凑或者分割的方法,叠加适用不同规则。

无论是当事人约定的仲裁规则,还是仲裁庭决定的仲裁规则,都不得违反仲裁法的强制性规定。土耳其两部仲裁法都以强制性规定作为当事人意思自治和仲裁庭裁量权的限制,但法律并未明确何为强制性规定。土耳其学界认为,仲裁法的强制性规定包括两项,即平等对待双方当事人(Equal Treatment)和保障当事人申辩权(Right to be Heard)。平等对待双方当事人,并不是在形式上给予当事人双方同样的权利,而是要给当事人同样公正的机会。当事人一方申请延长提交证据的期限,并不意味着另一方当事人也要延长相同的期限。申辩权包含三层含义:(1)当事人应当获得及时、充分的通知,并有充分的时间准备案件;(2)当事人必须有机会陈述和解释自己的立场;(3)当事人的解释和阐述必须被裁判者充分地考量。仲裁庭对程序事项作出的决定如果违反强制性规定,可能导致裁决被撤销。

2. 仲裁地和仲裁语言

仲裁地在国际仲裁中具有极其重要的地位,因为仲裁地不仅决定仲裁程序的准据法,还决定支持和监督仲裁的法院管辖权。仲裁地是国际私法惯常使用的连接点法,即通过将仲裁程序场所化,建立仲裁程序和特定仲裁法之间的联系。[1]《土耳其国际仲裁法》也对仲裁地作出明确的界定,并写明仲裁地是开庭地或者仲裁庭审理案件的任何物理上的地点。此外,《土耳其国际仲裁法》第 1 条规定,当事人可以选择仲裁地以外的法律作为仲裁程序准据法;但土耳其上诉法院的裁决表明,仲裁地才是决定仲裁程序准据法的首要标准。[2] 根据《土耳其国际仲裁法》第 9 条的规定,当事人可以自由约定仲裁地。当事人没有约定的,由仲裁庭根据案件具体情况裁量决定。实践中,很少会出现当事人没有约定仲裁地的情况。示范仲裁

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〔1〕 参见上诉法院大裁判庭 2012 年 2 月 8 日判决,案卷编号:2011/13 - 568,判决编号:2012/47。

〔2〕 土耳其司法实践通常采用仲裁程法作为确定仲裁地法的主要标准。例如,上诉法院大审判庭 1951 年 11 月 7 日判决(案卷编号:1951/126,判决编号:1951/109):“根据外国仲裁法作出的仲裁裁决视为外国仲裁裁决。”土耳其学界也持同样看法,如 Erol Ertekin & izzet Karata , Uygulamada ihtiyarî Tahkim ve Yabancl Hakem Kararlarlnln Tenfizi Tanlnmasl (承认和执行外国仲裁裁决的理论和实践) (Ankara: Yetkin Publishing, 1997), 430 - 461。自 1976 年起,上诉法院第 15 裁判庭开始采用地域标准。(1976 年 3 月 10 日,案卷编号:1975/1617,判决编号:1976/1052。)

条款中,都会约定仲裁地。仲裁地约定不明的,不仅导致仲裁程序的不确定性,还会降低仲裁程序的效率。仲裁庭在裁量决定仲裁地时,通常会考虑仲裁地仲裁法对仲裁的支持程度、仲裁地所在国是不是《纽约公约》缔约国、适用仲裁地法律是否影响程序效率等因素。仲裁地的交通、开庭设施以及综合服务水平,通常也是需要考虑的因素。

《土耳其国际仲裁法》第 10 条规定,仲裁地在土耳其的,仲裁程序的语言可以是土耳其语或者土耳其承认的外国的官方语言。如果当事人选择了土耳其不承认的国家的官方语言,约定无效。仲裁语言指的是仲裁程序进行过程中使用的有效的意思表示的语言,如申请书、答辩书、证据、开庭的语言,裁决书语言等。当事人应当使用仲裁语言完成程序行为。当事人使用非仲裁语言的,可能导致意思表示或程序行为无效。当事人可以约定任意语言,但需要考虑仲裁程序中使用外语的成本。例如,开庭翻译的费用,或者《土耳其民事诉讼法》第 223 条规定的,法院支持或监督仲裁的情况下,非土耳其语的证据必须经过公证翻译的要求。约定特定语言,还会造成选任仲裁员的困难。当事人也可以约定仲裁使用两种以上语言,如书面证据可以提交英语、中文或土耳其语,而开庭语言使用土耳其语。允许不同国家当事人使用各自的语言,可以降低仲裁程序的成本,便利当事人仲裁。如果当事人没有约定仲裁语言,则仲裁语言由仲裁庭裁量决定。仲裁庭在决定程序语言时,应当考虑双方当事人的国籍、证据材料的语言以及双方当事人惯常交易的语言。

根据《土耳其律师法》的规定,任何人可以在民事诉讼或仲裁中,以自己的名义出庭,或者委托他人代理自己出庭。在国内案件中,委托代理人必须是获得律师资格的自然人。根据《土耳其律师法》第 3 条的规定,只有土耳其公民才可以成为土耳其的注册律师。根据《土耳其国际仲裁法》第 8B 条,涉外仲裁案件的代理人可以是外国律师或法人。代理人是外国律师或者学者以及任何当事人委托的人,无论其是否取得任何国家的律师资格。如果法院介入仲裁程序,那么外国律师或其他外国人则无权参加相应司法程序。

3. 仲裁程序的进行

当事人申请启动仲裁程序,应当提交书面仲裁申请。根据《土耳其国际仲裁法》第 10A 条,仲裁申请应包含争议的性质、发生争议的原因以及请求的救济。请求所依据的事实和法律上的理由,并不需要包含在仲裁申请书之中。

仲裁程序的启动日期,不仅导致实体法上诉讼时效的中止,还涉及当事人申请保全措施后提起仲裁的时限。根据《土耳其国际仲裁法》第 10B 条的规定,以下任

一时间点均可以视作仲裁程序开始:(1)需要指定机构指定仲裁员的,当事人向法院或者有指定权的机构或个人提出指定仲裁员的申请之日;(2)当事人自己指定仲裁员的,由申请人选定仲裁员,并通知被申请人;(3)仲裁协议指明仲裁员人选的,被申请人收到申请人仲裁通知之日。

仲裁庭组成之后,双方当事人交换仲裁请求书(Statement of Claim)和答辩书(Statement of Answer)。《土耳其国际仲裁法》第10D条规定,申请人应当在当事人约定的时间内,或者仲裁庭指定的时间内,提交仲裁请求书。仲裁请求书与仲裁申请书(Request for Arbitration)不同。仲裁申请书是在仲裁组庭前申请人提交仲裁解决纠纷的意思表示,而仲裁请求书是仲裁庭组成之后,请求仲裁庭作出裁判的依据和意见。根据第10D条的规定,仲裁请求书应当包含当事人双方及其代理人的名字、头衔、住址、仲裁协议、争议标的的描述、仲裁请求所依据的事实、仲裁标的以及请求赔偿的数额。被申请人应当在当事人约定的时间内,或者仲裁庭决定的时间内,提交答辩书。答辩书中应当包含对仲裁请求实体方面和仲裁程序方面的答复,如管辖权异议。根据《土耳其国际仲裁法》第7H条的规定,管辖权异议必须在答辩期内作出,除非有正当理由允许被申请人迟延提交。如果当事人要提出反请求,或者提出抵销请求,也同样应当在答辩期内提出。当事人提交的仲裁请求书和答辩书的份数,应当为仲裁员人数加额外一份。如果有仲裁秘书参加,应当再多提交一份。与国际商事仲裁实践有差异的是,土耳其仲裁法并不要求当事人必须在交换书面意见阶段提交证据。如果当事人没有另行约定,或者仲裁庭没有另行决定,当事人提交仲裁请求书或答辩书时,可以不提交证据。

按照《土耳其民事诉讼法》的规定,当事人书面意见交换完毕之后,不允许再提交新的仲裁请求或变更答辩意见,尤其是不得嗣后变更诉讼标的和诉讼请求。作为例外,当事人可以嗣后变更或增加法律理由或减少诉讼请求的额度。在仲裁程序中,法律没有对此作出严格的限制。理论上,当事人有合理理由支撑的话,可以在仲裁程序的任何阶段提交新的仲裁请求,除非当事人另有约定。如果当事人提出或变更仲裁请求过于迟延,由仲裁庭裁量是否允许。仲裁庭应当权衡当事人申辩权和程序经济原则,综合考量。根据《土耳其国际仲裁法》第10D条的规定,如果提交或者变更仲裁请求过于迟延,或者对另一方当事人造成不公平的负担,仲裁庭可以拒绝当事人提交或者变更仲裁请求。如果仲裁庭事先已经明确提交或变更仲裁请求的时限,当事人超期提交的,仲裁庭有权拒绝接受。

当事人不提交仲裁请求书或答辩书的,《土耳其国际仲裁法》第11条根据不同

情况规定了不同的后果:(1)申请人无合理理由不提交仲裁请求书的,仲裁庭应当中止审理;(2)申请人按时提交仲裁请求书,但仲裁请求书不符合要求,而又不在合理期限内补充的,仲裁庭应当中止审理;(3)被申请人不提交仲裁答辩书的,仲裁庭可以继续审理,并根据已有的证据作出裁决。

《土耳其国际仲裁法》第 10E 条明确规定,在当事人提交仲裁请求书和仲裁答辩书之后,仲裁庭应当制作审理范围书(Terms of Reference)。实践中,仲裁庭作出审理范围书之前,会召集当事人举行会议,听取当事人的意见。仲裁庭也可先自行起草审理范围书,征求当事人双方的意见,或者邀请当事人双方提交仲裁请求和答辩摘要。审理范围书应当由仲裁庭全体和当事人全体签字。当事人签字之后,任何人未经协商不得变更审理范围书的内容。当事人拒绝签字的,并不导致审理范围书无效,因为仲裁庭有决定程序事项的全部权力。即便当事人都不签字,也不影响审理范围书的效力。实践中,仲裁庭往往会在审理范围书上记载当事人拒绝签字的事由,然后再请求当事人签字。审理范围书的内容通常包括:当事人以及仲裁庭成员的姓名、头衔和住址、仲裁申请和答辩摘要、申请人的救济请求、争议案件的简要说明、仲裁地、仲裁期限的起始、仲裁规则以及仲裁庭是否可以友好仲裁(*ex aequo et bono*)。制作审理范围书是仲裁庭的义务,但仲裁庭疏于制作审理范围书的,尽管违反了程序规则,却不会必然导致裁决被撤销。只有疏于制作审理范围书,导致案件实体审理的,才可能导致裁决被撤销。应当注意的是,审前会议与审理范围会议有所不同。审前会议往往涉及仲裁程序步骤和事项的安排,不涉及案件的实体问题。审前会议只涉及程序问题,目的是使程序进展更加顺利和高效。仲裁庭可以随时变更庭前会议中作出的决定,而不受当事人意思的限制。

《土耳其国际仲裁法》第 11A 条并未要求必须开庭审理,而是仅授权仲裁庭可以开庭质证和质询专家证人,但实践中很少出现未经开庭就作出裁决的情形。开庭审理可以确保当事人充分表达意见和辩驳对方的看法,保障当事人的申辩权,由当事人在开放、透明的环境中共同影响裁决走向,并且提高裁判质量。因此,开庭审理的权利被视为当事人申辩权的核心。如果当事人一方要求开庭审理的,仲裁庭必须开庭审理。即便当事人意图通过开庭拖延裁决作出的时间,仲裁庭也不能拒绝当事人的开庭请求。仲裁庭决定开庭的,通常会事先征询当事人可行的时间点,再作出决定。仲裁庭决定开庭时间后,应当通知当事人,并给当事人留足合理的准备时间。仲裁庭通知开庭,而一方当事人无正当理由不按时出庭的,仲裁庭可以继续审理。为保障当事人的申辩权,如果存在正当理由,仲裁庭可以决定延期。如果

当事人不申请开庭,仲裁庭也决定不开庭的,仲裁庭可以在书面审理的基础上作出裁决。

4. 证据和实体问题准据法

土耳其两部仲裁法对证据问题的规定都很简洁,把决定证据问题的权限交给仲裁庭裁量。当事人应当按照举证责任规则,提交对自己有利的证据。如果不能举证,将承担对其不利的后果。《土耳其民事诉讼法》并未规定证据开示程序,因此不能要求对方当事人提交对自己有利的证据。对于一方当事人已经提交的证据;另一方可以援引支持自己的主张。如果证据由第三方控制,仲裁庭可以向法院申请调查取证。如果证人拒绝出庭作证,仲裁庭也可以申请法院协助,强制证人出庭作证。如果证人经常居所位于土耳其之外,则可以通过司法协助的方式进行调查取证。《土耳其民事诉讼法》采纳了传统的大陆法系关于专家证人(鉴定)的规定,即当事人无权指定鉴定专家,只有法院才能指定。《土耳其国际仲裁法》却采纳了《示范法》的规定,允许当事人聘请自己的鉴定专家,鉴定专家应当出庭接受质证和询问。《土耳其国际仲裁法》第 12 条还规定,当事人应该向鉴定人提供必要的信息。必要情况下,仲裁庭可以作出程序令,要求当事人向鉴定人提供必要信息。

案件实体问题通常适用当事人选择的法律。[1]《土耳其国际仲裁法》第 12 条规定,仲裁庭应当根据合同约定和合同准据法决定案件的实体问题。当事人可以明示选择准据法,也可以默示选择。当事人在合同中未明确指出所选法律是实体准据法或程序准据法的,推定为选择实体准据法。当事人可选法的范围不受限制,可以选择适用国际习惯,也可以选择适用商人习惯法(*lex mercatoria*)。如果当事人没有约定准据法,根据《土耳其国际仲裁法》第 12 条的规定,由仲裁庭根据最密切联系原则确定准据法。当事人也可以明确约定适用公平原则裁判案件,此时仲裁庭可以不严格依法裁判。[2] 无论是否依法裁判,仲裁庭都必须遵守公共秩序,并不得违反强制性规定。

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〔1〕“被告辩称仲裁庭超越仲裁协议赋予的权力,适用英国法裁决案件实体问题。本院则认为,当事人虽然有权选择准据法,但合同中使用的瑞士法律术语并不足以成为选法的依据。当事人没有选定准据法的,本案仲裁庭在征求法律专家之后,决定适用英国法。仲裁庭并未超越仲裁权限。”参见上诉法院第 19 裁判庭 2000 年 11 月 9 日判决,案卷编号:2000/7171,判决编号:2000/7602。

〔2〕当事人的约定必须是明示的。参见上诉法院大裁判庭判决 1994 年 1 月 28 日判决,案件编号:1993/4,判决编号:1994/1。

5. 仲裁程序的终止

通常而言,仲裁裁决作出即导致仲裁程序终止。此外,根据《土耳其国际仲裁法》第13B条的规定,下列情形的出现也会导致仲裁程序的终止。这些情形包括:申请人撤诉、当事人协议终止程序、仲裁程序不能继续进行、仲裁期限无法延长、仲裁庭无法作出一致裁决、当事人一方丧失当事人能力以及不支付仲裁费。

仲裁审理完毕,仲裁庭应当作出裁决。裁决作出后,仲裁程序终止。仲裁庭可以对裁决进行补正、补充和解释,但仲裁庭的管辖权随着程序的终止而终止。仲裁裁决应当按照仲裁庭的多数意见作出。独任仲裁庭不会发生意见不一的情况。多人仲裁庭中如果不能达成一致意见,如三名仲裁员各自看法不同的,除非当事人协议授权以首席仲裁员的意见为准,否则仲裁程序因无法作出裁决而终止。如果当事人约定,裁决必须由一致意见作出,若仲裁庭不能达成一致意见,仲裁程序终止。土耳其仲裁法并未规定,仲裁庭合议是否必须全部仲裁员到场。如果要求仲裁员必须全部到场才能合议表决,那么事实上将赋予仲裁员恶意拖延程序的机会。土耳其学界通说认为,多数仲裁员到场就可以合意表决,不影响裁决的作出,也最大限度地保障了案件审理权。[1] 此外,如果当事人达成和解协议的,也会导致程序的终止。当事人之间可以直接订立和解协议,也可以要求仲裁庭按照和解协议的内容制作裁决书。仲裁庭应当对和解协议的内容进行审查,如果发现违反法律强制性规定或者公共秩序的内容,可以拒绝按照和解协议制作裁决书。

申请人放弃或者撤回仲裁申请,也会导致仲裁程序的终止。放弃与撤回是两种完全不同的制度。放弃,是指当事人放弃以争议标的为基础的任何请求。仲裁程序结束后,申请人不能再次提起任何程序。撤回,则是指申请人撤回仲裁申请,保留今后重新仲裁的权利。由于撤销仲裁申请也涉及被申请人的程序权利,因此申请人撤回仲裁申请应征得被申请人的同意。被申请人拒绝撤回仲裁申请的,由仲裁庭审查被申请人是否对继续审理案件享有合法利益。根据审查结果,仲裁庭决定是否准许撤回仲裁申请。

仲裁庭认为仲裁程序因事实或法律原因无法继续进行时,也可以决定终止仲裁程序。事实原因可能是战乱导致一方当事人无法参加审理;法律原因可能是,当事人约定必须作出一致裁决,而仲裁庭无法作出一致裁决,或者争议标的物灭失,

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〔1〕 这样做同时也是为了防止仲裁员恶意拖延时间。参见上诉法院第11审判庭1975年10月2日判决,案卷编号:1975/2842,判决编号:1975/5417。

或者债务人已经主动履行债务等。《土耳其国际仲裁法》第10B条要求仲裁裁决必须在仲裁期限内作出。如果仲裁庭在仲裁期限内不能作出裁决,又不能申请延期的,仲裁程序终止。仲裁程序中,如果当事人一方丧失当事人能力(民事权利能力),仲裁庭应当通知利害关系人,由其决定是否继续进行仲裁。如果利害关系人不继续仲裁或者仲裁庭6个月内未能通知利害关系人的,仲裁程序终止。

最后,当事人是仲裁程序的主人,因此可以合意终止仲裁程序。当事人合意终止仲裁程序的,可以不向仲裁庭说明理由。如果仲裁庭认为当事人有关仲裁费的约定不当,可以作出费用裁决。本案仲裁程序终止后,当事人可以申请再次仲裁。

6. 仲裁裁决

仲裁裁决必须在仲裁期限内作出。仲裁期限制度是土耳其仲裁法的一大特色。无论是《示范法》还是各国仲裁法都没有规定如此严格的仲裁时限制度。土耳其两部仲裁法都把超期裁决视为撤销仲裁裁决的理由。仲裁时限是指,对仲裁庭作出仲裁裁决时间的限制。当事人可以直接约定仲裁程序的时限,或者间接地通过约定仲裁规则约定仲裁时限,但约定的时限必须是确定的。不确定的时限被认为违反公共利益,而不被土耳其法院承认。当事人没有约定仲裁时限,则适用1年的法定仲裁时限。这意味着,仲裁庭应当在第一次开庭前会议之后的1年内作出裁决。如果是独任仲裁庭,则应当在独任仲裁员接受委任后1年之内作出裁决。如果案件过于复杂,当事人可以约定延长仲裁时限。[1] 当事人不能达成一致意见的,可以申请法院批准延长。如果法院不批准并且当事人不能达成延期合意,那么仲裁期限届满之后程序终结。与此同时,仲裁协议失效,当事人不得根据同一仲裁协议再次申请仲裁,只能向法院起诉。

《土耳其国际仲裁法》第14A条规定了仲裁裁决必须记载的内容:(1)仲裁裁决必须包括当事人、代理人的姓名、头衔和住址。记载当事人的身份信息,是为了确保裁决约束当事人,也是为了便利执行。(2)裁决必须包含作出裁决的依据以及说明理由。裁决附理由,是裁判权行使的基本原则,构成当事人申辩权的基本依据。《土耳其宪法》第141条就规定,司法判决必须说明理由。仲裁程序中,当事人可以约定裁决可以不说明理由。(3)裁决必须包含赔偿的明确数额。缺乏赔偿数额或者利息起算的方式,不利于执行仲裁裁决。(4)仲裁裁决必须记载仲裁地和裁决日

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〔1〕 当事人约定仲裁期限必须明确,否则约定无效。参见上诉法院第15裁判庭1997年4月16日,案卷编号:1997/1447,判决编号:1997/2163。

期。仲裁地对仲裁程序准据法和仲裁法院管辖权有决定性意义,因此仲裁裁决必须对此予以记载。无论开庭地或者实际裁决作出地是否位于仲裁地,都必须清楚记载仲裁地。裁决作出日期关涉到仲裁期限是否得到遵守,因此也必须记载清楚。(5)仲裁裁决必须记载仲裁员的身份信息以及仲裁员的不同意见。仲裁裁决必须包含每一位仲裁员的姓名、头衔和住址。持不同意见的仲裁员,可以在裁决书上记载不同意见后签名。如果持不同意见的仲裁员拒绝签名或者辞职的,多数仲裁员应当在裁决书中记载说明实际情况后签名。仲裁裁决并不因未能全体签字而无效。裁决书中只包括持有不同观点的仲裁员的意见,而不包括他对其他仲裁员意见的沟通过程,否则会违反仲裁保密原则。不同意见只包含对法律适用的不同意见,而不包含对证据认定的不同意见,当然也不能包含对败诉方当事人的建议。(6)仲裁裁决必须告知当事人有向法院申请撤销仲裁裁决的权利。违反前述裁决必要记载事项,并不必然导致仲裁裁决被撤销。若违反有关仲裁员签名的规定,可能导致仲裁裁决被撤销。没有记载仲裁地的,应当嗣后补正,而不直接构成撤销仲裁裁决的理由。

仲裁裁决作出后,应当送达当事人。仲裁庭可以直接将仲裁裁决送达给当事人,也可以通过法院将仲裁裁决送达给当事人。仲裁庭作出仲裁裁决,可以按照当事人的请求,将裁决送到法院备案。备案不影响仲裁裁决的效力。仲裁裁决的通知应当是书面形式,送达方式不局限于《土耳其民事诉讼法》规定的送达途径,可以通过快递或者邮政送达。仲裁裁决送达当事人的经常居所、住所或者主营业地址,视为完成送达。如果上述地址不能确定的,仲裁裁决送至当事人的上一个已知地址的,视为完成送达。

裁决送达后,当事人可以在30日内向仲裁庭申请补正、解释或者补充裁决。仲裁案件可能涉及非常复杂的技术或者事实问题,因此技术性书写或者计算错误的补正难以避免。仲裁庭也能依职权,在裁决作出30日内,对案件事实问题进行实质性修改。这些问题可能涉及当事人名称输入错误或者支付币种错误。此外,任意一方当事人还可以要求仲裁庭对裁决内容作出解释说明,以避免在仲裁裁决理解或执行过程中,难以确定裁决内容,或者消除裁决中相互冲突的表述。裁决书应当包含对当事人提出的所有请求的决定。如果裁决书漏裁,当事人可以在裁决送达30日内,申请仲裁庭作出补充裁决;仲裁庭应当在60日内,作出补充裁决。当事人没有提出的仲裁请求,即便该请求属于仲裁协议的范围,也不属于补充裁决的范围。无论是申请补正,还是解释或者补充裁决,都应当同时通知仲裁庭和对方当事人。

对方当事人可以发表自己的意见,否则可能侵犯该方当事人的申辩权。仲裁庭对裁决的补正、解释以及补充裁决视为原裁决的一部分。申请撤销仲裁裁决的时限,从补正或者补充裁决作出之日起算。

7. 仲裁费用

仲裁裁决中应当包含有关仲裁费用的裁决。[1] 仲裁费用指的是,为确保仲裁程序进行所支出的全部费用。《土耳其国际仲裁法》第16B条列明了仲裁费用的范围:(1)仲裁员报酬;(2)仲裁庭的差旅费;(3)向专家或者其他第三方支付的费用;(4)仲裁庭批准的证人的差旅费;(5)胜诉方的律师费,按照律师服务最低费率计算;(6)涉及诉讼程序的诉讼费用,如申请法院取证或保全、协助指定仲裁员等;(7)通知和送达的费用。根据《土耳其国际仲裁法》第16D条的规定,仲裁费用由败诉一方当事人承担。当事人部分胜诉、部分败诉的,按照比例承担仲裁费用。[2]

仲裁员提供服务通常是有偿的。当事人可以与仲裁员约定仲裁员的报酬,约定仲裁员报酬的合同被称为仲裁员合同。仲裁员合同独立于仲裁协议,不适用有关仲裁协议的规定。土耳其法将仲裁员合同视为普通的代理合同。《土耳其国际仲裁法》明确规定仲裁员有获得报酬的权利。当事人对仲裁员报酬负有连带债务。仲裁员报酬可以是当事人约定的任何数额。如果当事人约定适用特定机构仲裁规则,通常也认为当事人同意按照该规则关于仲裁员报酬的附表确定仲裁员报酬。如果当事人没有约定仲裁员的报酬,也没有约定仲裁规则,则按照土耳其司法部公布的费率表计算。土耳其仲裁法不认为仲裁员有单方决定报酬的权利。

(四)撤销仲裁裁决

1. 撤销裁决的事由

撤销仲裁裁决是土耳其仲裁法规定的唯一的救济方式,不存在不予执行制度,也没有上诉以及法律上诉审。[3] 法院不实体审查仲裁裁决,也是土耳其仲裁法的基本原则。法院无权审查仲裁庭是否正确适用法律。存在《土耳其国际仲裁法》第15条列举的撤裁事由的,法院才可以撤销仲裁裁决。撤销仲裁的事由与《纽约公

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〔1〕 参见土耳其上诉法院第15裁判庭1992年11月9日判决,案卷编号:4476,判决编号:5204。

〔2〕 参见土耳其上诉法院第19裁判庭2011年3月22日判决,案卷编号:2010/10631判决编号:2011/3674。

〔3〕 土耳其上诉法院第11裁判庭认为,撤销仲裁裁决是《土耳其国际仲裁法》规定的对仲裁裁决的唯一救济途径。法律没有规定仲裁上诉制度,因此驳回当事人的上诉申请。参见土耳其上诉法院第11裁判庭2006年2月2日判决,案卷编号:3953,判决编号:1858。

约》相似,但有所不同。撤销仲裁裁决的事由也分为两类,即由当事人申请的撤销事由和由法院依职权审查的撤裁事由。当事人申请撤销的事由包括仲裁协议无效、指定仲裁员违反当事人的协议、裁决超出仲裁期限、仲裁庭自裁管辖权错误、权限外裁决及权限内事项未裁决、违反仲裁规则影响案件实体公正和违反平等原则。具体情况如下:

(1)仲裁协议无效。有效仲裁协议是仲裁程序的基础,也是排除司法管辖的原因。《土耳其宪法》第 37 条规定,当事人不可非自愿(强迫)接受任何法院的管辖,法律规定法院有管辖权的除外。如果当事人未能缔结有效的仲裁协议,仲裁庭无权开启程序,也无权审理案件和作出裁决。[1] 当事人欠缺缔约能力以及仲裁协议违反准据法中的有效要件,都会导致仲裁协议无效。判断当事人是否具有缔约能力,应适用《土耳其国际私法》第 9 条的规定指引的准据法,即适用自然人的国籍国法或者法人的管理机构所在地法。仲裁协议的效力同样由其准据法决定。根据《土耳其国际仲裁法》第 4 条的规定,仲裁协议适用当事人选择的法律。当事人没有选择的,适用土耳其法。

(2)指定仲裁员违反约定或法定程序。根据《土耳其国际仲裁法》第 4 条,当事人可以约定指定仲裁员的程序。如果没有约定,适用仲裁地仲裁法的指定程序。违反约定或者法定程序的,构成撤销仲裁裁决的理由。

(3)裁决超出仲裁期限。仲裁期限是非常具有土耳其特色的仲裁制度。《土耳其国际仲裁法》第 10B 条规定,除非当事人另有约定,仲裁庭应当在一年的仲裁期限内作出仲裁裁决。未在仲裁期限内作出裁决的,构成撤销裁决的理由。

(4)仲裁庭管辖权瑕疵。《土耳其国际仲裁法》第 7H 条采纳了管辖权自裁原则。如果仲裁庭错误地决定自己有管辖权或者无管辖权,[2] 当事人可以申请法院撤销裁决。应当注意的是,当事人在仲裁庭作出管辖权决定后,应当立即提出管辖权异议。当事人未能及时提出管辖权异议,视为接受仲裁庭的决定,丧失在裁决作出后提出管辖权异议的权利。

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〔1〕 土耳其上诉法院判决:“由法院解决纠纷是常态,除非当事人清楚明白地表达仲裁的意图,添加仲裁条款或者订立仲裁协议,才可以仲裁解决纠纷。”参见上诉法院第 13 裁判庭 2006 年 4 月 12 日案卷编号:521,判决编号:5446。

〔2〕 仲裁庭认定自己无管辖权的裁决,也可以被撤销。参见上诉法院第 11 裁判庭 2009 年 6 月 16 日判决,案卷编号:2007/13799,判决编号:2009/8820。

(5)越权裁决和不裁决。仲裁庭应当在当事人授权的范围内裁判。[1] 如果仲裁庭对未授权的事项进行裁决,越权裁决会导致裁决被部分撤销,即撤销越权裁决部分。如果越权裁决不可分割,如不适用当事人选择的法律裁决,也有可能导致裁决整体被撤销。例如,被申请人未提出反请求时,对反请求进行裁决,或者对不包含仲裁协议的合同作出裁决,或者对当事人明确排除的事项(如利息)作出裁决,都有可能导致越权裁决被撤销。不裁决指的是,仲裁庭没有对当事人提出的仲裁请求作出裁决。对于未裁决事项,当事人可以重新提出仲裁,或者要求补充裁决,也可以要求撤销仲裁裁决。

(6)程序违反仲裁规则。因违反仲裁规则而撤销仲裁裁决,需要满足两个条件,即违反仲裁裁决的事实和违反仲裁规则对实体审理产生不利影响。最常见的程序违规是通知送达违规。通知送达对于当事人行使申辩权至关重要。当事人未收到送达的通知,而导致未能申辩,构成撤销仲裁裁决的理由。如果通知送达采用的语言不是当事人约定的仲裁语言,而且受送达当事人确实不掌握该门语言,致使不能答辩的,构成违反程序规则撤销仲裁裁决的理由。同理,如果当事人请求证人质证,而未对证人进行质证,侵犯当事人申辩权的,构成撤销仲裁裁决的理由。当事人在获悉程序违反仲裁规则后,应当及时提出抗辩。当事人没有及时提出抗辩,而又据此请求撤销仲裁裁决的,不予准许。

(7)不平等对待双方当事人。《土耳其国际仲裁法》第8B条规定平等对待当事人,被视为是正当程序原则(Due Process)的表述,不仅包括列举的平等原则,还包括申辩原则。因此,该原则多作为程序违法撤销仲裁裁决的兜底规定。

除当事人申请撤销仲裁裁决的事由之外,还有法院依职权审查的撤销仲裁裁决的事由。法院依职权审查的事由包括可仲裁性审查和公共秩序:

(1)不可仲裁性。根据土耳其法,争议不可仲裁的,构成撤销仲裁裁决的法定理由。要注意的是,不可仲裁性指的是土耳其法,即法院地法认为不可仲裁的事项。如果争议根据仲裁协议准据法(如根据当事人选择的法律)争议不具有可仲裁性,并不是法定撤销仲裁裁决的理由。如果当事人未能及时向仲裁庭提出异议,视为当事人接受仲裁庭的管辖。土耳其法律中明确规定了不动产物权不可仲裁,以及当事人不可处分的事项不可仲裁。在土耳其的司法实践中,如果案件与土耳其没

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〔1〕 土耳其上诉法院认定仲裁庭无权越权裁判。参见上诉法院第15裁判庭2011年5月11日判决,案卷编号:2010/7197,判决编号:2011/2857。

有实际关联,即便根据土耳其法争议不可仲裁,法院也可能不会撤销仲裁裁决。

(2)公共秩序保留。土耳其仲裁法认为,《土耳其国际仲裁法》第15A条规定的公共秩序是国际公共秩序,而不是国内公共秩序。违反国内公共秩序,并不必然违反国际公共秩序。土耳其法并未明确界定公共秩序。根据学界通说,法官应当在个案中逐案审查是否违反公共秩序。在土耳其通信管理机构与移动电话运营商的政府采购案件中,土耳其上诉法院将公共秩序界定为,"保护社会根本利益、构建社会、政治、经济、道德和法律根本结构的全部法律规则……履行债务需要支付票据的行为将违反土耳其税法,导致违反土耳其法律规定的基本原则"。[1] 除实体公共秩序之外,还有程序法上的公共秩序。例如,仲裁裁决中包含相互矛盾的陈述。典型的例子是,一方面认定合同无效;另一方面又要求债务人履行债务,这就违反程序法的公共秩序。当事人一方利用仲裁裁决进行欺诈、仲裁庭违反独立原则以及仲裁裁决违反既判力原则的,都构成违反程序法上的公共秩序。

2. 撤销裁决的程序

当事人可以事先约定放弃申请撤销仲裁裁决的权利,但必须符合两个基本条件。首先,只有住所不在土耳其境内的当事人,才能约定放弃申请撤销仲裁裁决。其次,当事人约定放弃申请撤销仲裁裁决,必须采用书面形式。根据《土耳其国际仲裁法》第15A条的规定,可以采用全部或者部分放弃提出申请撤销仲裁裁决的事由。全部放弃,是指当事人放弃提出可申请撤销仲裁的全部事由,法院依职权审查的公共秩序保留和可仲裁性除外。部分放弃,是指当事人放弃可申请撤销仲裁裁决的部分事由。无论当事人约定全部放弃还是部分放弃,当事人都不可约定单方当事人放弃,而另一方当事人保留申请撤销仲裁裁决的权利。约定单方放弃申请撤销仲裁的权利,违反平等对待当事人的基本原则。

根据《土耳其国际仲裁法》第15A条的规定,当事人申请撤销仲裁裁决的,必须在仲裁裁决作出30日之内提出。撤销期限自仲裁裁决送达当事人之日起算。送达仲裁裁决应当遵循《土耳其送达法》的有关规定。[2] 法院通常不开庭审理撤销仲裁裁决之诉。撤销仲裁裁决之诉适用普通诉讼程序,适用《土耳其民事诉讼法》第317~322条的规定。当事人提起申请撤销仲裁之诉的,仲裁裁决可执行力中止。

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〔1〕 参见土耳其上诉法院第13裁判庭2012年4月17日判决,案卷编号:2012/8426,判决编号:2012/10349。

〔2〕 1959年2月11日《土耳其送达法》,载《土耳其政府公报》1959年2月19日第10139号。

之所以中止仲裁裁决的执行,是为了防止执行未终局的裁决给被执行人造成不可逆转的损害。法院可以发给债权人裁决凭证,证明裁决在撤销之前是有效的,待撤销仲裁裁决之诉审理完毕,不撤销仲裁裁决的,可以申请强制执行仲裁裁决。

法院审查仲裁裁决的结果可能是驳回申请、部分支持或者全部支持撤销申请。仲裁庭越权仲裁的,通常会导致部分撤销仲裁裁决。[1] 仲裁裁决撤销之后,当事人通常可以再次提起仲裁。出于某些原因撤销仲裁裁决的,当事人不能申请再次仲裁,只能提起诉讼。这些原因包括:缔约时当事人无行为能力、违反可仲裁性或者其他导致仲裁协议无效的情况以及土耳其法上特有的超期仲裁。

五、外国仲裁裁决在土耳其的承认与执行

一方当事人不自动履行生效仲裁裁决确定的义务的,另一方当事人可以申请法院强制执行。在土耳其国内仲裁中,当事人可以向有执行权的机构申请执行。在国际仲裁中,则需要区分不同的情况,适用不同的执行依据,申请土耳其法院强制执行。申请执行外国仲裁裁决的依据主要是《纽约公约》,公约范围以外的外国仲裁裁决按照《土耳其国际私法》承认与执行。

(一)根据《纽约公约》的承认与执行

1. 可承认执行的仲裁裁决

《纽约公约》于 1992 年 10 月 1 日起对土耳其生效。根据《纽约公约》第 1 条的规定,公约适用于缔约国以外的国家作出的仲裁裁决,无论该国是否属于《纽约公约》的缔约国。但是该条第 3 款又明确指出,缔约国可以声明保留,仅承认和执行缔约国领土内作出的仲裁裁决。土耳其在批准公约时便作出互惠保留,仅承认和执行缔约国内作出的仲裁裁决。《纽约公约》第 3 条规定的“外国”仲裁裁决包括两类,即仲裁地在外国以及仲裁不视为本国裁决的情况。仲裁地在外国的情况下,无论当事人是否全部为土耳其当事人,或者交易是否与土耳其有密切联系,都不影响仲裁裁决国籍的判断。国际仲裁中,如果当事人约定仲裁地在土耳其,则适用《土耳其国际仲裁法》,据此作出的裁决为土耳其裁决。如果当事人约定仲裁地在土耳其,又清楚表明不适用《土耳其国际仲裁法》,而选择适用其他国家仲裁法的,视为非土耳其裁决。《纽约公约》第 3 条还规定,缔约国可以提出商事保留,即只承认执行本国认为属于商事案件的仲裁裁决。土耳其批准条约时,声明商事保留,因此只

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〔1〕 参见部分撤销仲裁裁决,如土耳其上诉法院第 15 裁判庭 2007 年 11 月 15 日判决,案卷编号:2007/3708,判决编号:2007/7216。

承认和执行外国商事仲裁裁决。

2. 承认和执行仲裁裁决的程序

《纽约公约》第3条规定,承认和执行外国仲裁裁决的程序,适用被请求承认执行国的国内程序法。也就是说,除该公约规定的证明责任之外,在土耳其承认和执行外国仲裁裁决涉及的管辖权、申请人提供的担保、法院费用、程序形式以及承认执行裁定的救济,都适用《土耳其国际私法》及《土耳其民事诉讼法》的规定。根据《土耳其国际私法》第60条的规定,受理承认和执行外国仲裁裁决的法院为初审(基层)商事法院。就地域管辖而言,首先可以是当事人选择的法院。当事人没有选择的,被执行人住所地法院有管辖权。被执行人在土耳其没有住所的,由其居所地法院管辖。被执行人在土耳其没有住所和居所的,由财产所在地法院管辖。前述法院都位于土耳其之外的,土耳其法院没有管辖权。申请承认执行仲裁裁决之诉属于具有涉外因素的民事诉讼,因此外国公民或者在土耳其境内没有住所的土耳其公民,申请或加入承认和执行外国仲裁裁决程序的,应当根据《土耳其国际私法》第48条的规定,支付执行担保。[1]

有权申请承认和执行外国仲裁裁决的当事人,不必然是仲裁案件实体争议的债权人,但必须是对仲裁裁决有合理利益的人。例如,在有关票据的争议中,第三人在裁决作出后取得票据权益的,仲裁裁决当事人不再对票据具有权益。如果裁决的胜诉债权人请求承认执行外国仲裁裁决的,法院不予支持。[2]

根据《纽约公约》第4条的规定,当事人申请承认执行外国仲裁裁决时,应当同时提交仲裁裁决正式原件或正式副本、仲裁协议的原件或正式副本、仲裁协议和仲裁裁决的翻译件。根据《土耳其民事诉讼法》第121条的规定,除提交给法院之外,申请人应当按照被申请人的数量提交副本。其第191条规定,如果当事人未能提交必要的材料,法院应当宽限一周时间,要求申请人补交材料。根据《土耳其国际私法》第55条的规定,承认外国仲裁裁决的程序适用普通程序。根据该法第61条的

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〔1〕 根据《土耳其收费法》第3条(1964年6月2日第492号法令,参见政府公报1964年6月17日第11756期),申请承认执行仲裁裁决应当缴纳法院费用。根据该法第1条第1款增补条款(判决和确认收费),与仲裁程序有关的收费额为15%。因此,承认和执行外国仲裁裁决应当从执行标的中扣除15%的费用。相应判决参见土耳其上诉法院第11裁判庭,2010年11月7日,案卷编号:2009/3799,判决编号:2010/2911;土耳其上诉法院第11裁判庭,2010年11月4日,案卷编号2009/1307,判决编号2010/11271。

〔2〕 参见伊斯坦布尔安娜多路区基层商事法院2013年5月23日判决,案卷编号:2013/387,判决编号:2013/155。

规定,对于承认或者不承认外国仲裁裁决的裁定,可以提起上诉,适用民事诉讼法的一般规定。裁定被上诉后,停止执行仲裁裁决。

《纽约公约》第5条禁止对外国仲裁裁决进行实质审查,并且规定了有限的不予承认执行外国仲裁裁决的理由。除该条列明的情形外,《土耳其国际私法》第55条还扩展规定了不违反《纽约公约》的两项拒绝承认的理由,即仲裁裁决已经履行以及客观情况表明仲裁裁决无法履行。土耳其学界认为,该条扩展规定的条文属于公约规定的程序适用法院地法的范围。其中,对于导致仲裁裁决无法执行的“客观情况”应当限制解释,即执行仲裁裁决可能会违反执行地票据法或者不动产法等情形。

当事人可以仅申请承认外国仲裁裁决,或者同时申请承认和执行外国仲裁裁决。仲裁裁决承认后,可以防止同案在土耳其被二次审理。如要申请执行外国仲裁裁决,必须在先前或者执行的同时提起承认外国仲裁裁决的请求。承认和执行外国仲裁裁决,都适用《纽约公约》第5条规定的条件。

3. 拒绝承认执行仲裁裁决的理由

(1)欠缺有效仲裁协议,构成不予承认执行的理由。《纽约公约》第2条规定了仲裁协议的有效要件,因此应按照公约规定审查仲裁协议的有效要件。[1] 公约要求仲裁协议应当具备书面形式。书面形式包括当事人签字的文件或者交换的信件或电报。公约还要求当事人必须具备缔约能力。公约本身并未包含当事人缔约能力的规定,而是指引适用准据法。根据《土耳其国际私法》第9条的规定,自然人适用国籍国法,法人适用主要办事机构所在地法。法人主要办事机构位于土耳其,适用土耳其法律判断订立仲裁协议的人是否有代理该机构的权利。例如,股份有限公司的董事两人以上可以代表公司订立仲裁协议。[2] 此外,仲裁协议还必须满足仲裁协议准据法规定的条件。《纽约公约》第5条规定当事人可以选择仲裁协议的准据法,未选择的适用仲裁地法。如果准据法是土耳其法,仲裁协议的实体效力适用土耳其债法的规定。土耳其上诉法院在判决中指明:“仲裁条款及仲裁协议都属

〔1〕 参见土耳其上诉法院第19裁判庭2000年2月24日判决,案卷编号:1999/7119,判决编号:2000/1342,检索判决登录网站 www. kazanci. com。

〔2〕 参见土耳其上诉法院第11裁判庭1999年5月26日判决,案卷编号:9679。

于《土耳其债法典》所称的合同。该法关于合同成立的规定，同样适用于仲裁协议。〔1〕本案中，该法第19、20条有关合同自由的限制，也同样适用于仲裁协议。”〔2〕当事人还可以通过并入格式条款的方式订立仲裁协议。〔3〕根据《土耳其国际仲裁法》第4条的规定，〔4〕如果当事人援引的文件中包含仲裁协议，而且当事人明确表示该仲裁协议并入合同的，对本合同当事人有约束力。如果当事人没有明确约定仲裁协议也并入合同，土耳其法院曾有过不支持的先例。〔5〕

土耳其的司法实践中，提单中的仲裁条款和保险合同中的仲裁条款是经常会遇到效力认定的问题。提单是票据的一种，用来证明运输合同的订立、货物已交付承运人或已经装船，并且授权承运人向提单持有者交付货物。由于提单是承运人单方签发的票据，提单中包含的仲裁条款不构成双方当事人的合意。根据土耳其法院的实践，承运人可以在提单中记载仲裁条款，但该条款本身不构成仲裁协议。〔6〕提单交付后，托运人可以勾掉提单上的仲裁条款，否则提单上的仲裁条款构

〔1〕“根据债法典，西红柿生产商和西红柿酱制造商之间的买卖合同中的仲裁条款无效。”“仲裁协议违反善良风俗的，约定无效。一方当事人利用经济上的强势地位，制定有利于该方的仲裁条款，或者约定一方当事人可以指定多名仲裁员。”“根据债法典第20条第3款，该仲裁协议无效。”参见土耳其上诉法院第13裁判庭1991年4月25日判决，案卷编号1990/8778，判决编号1991/4492；参见上诉法院期刊1991年第8期；上诉法院第15裁判庭1981年6月7日判决，案卷编号1981/2726，判决编号1981/3508；参见上诉法院裁判期刊1081年第7期第1449～1450页；上诉法院第15裁判庭2009年4月13日判决，案卷编号：2009/1438，判决编号：2009/2153；参见上诉法院裁判期刊第2009年第9期第1734页；上诉法院第19裁判庭2004年3月11日判决，案卷编号：2003/2654，判决编号：2004/2603。

〔2〕参见土耳其上诉法院第13裁判庭1991年4月25日判决，案卷编号：1990/8778，判决编号：1991/4492，载上诉法院裁判期刊1991年第8期；上诉法院第15裁判庭1981年6月7日判决，案件编号：1981/2726，判决编号：1981/3508，参见上诉法院判决期刊1981年第7期第1449～1450页；上诉法院第15裁判庭2019年4月13日判决，案卷编号：2009/1438，判决编号：2009/2153，上诉法院判决期刊2009年第9期；上诉法院第19裁判庭2004年3月11日判决，案卷编号：2003/2654，判决编号：2004/2603。

〔3〕正面记载日期所涉及的运输合同的全部条款、条件、权利以及包括仲裁条款在内的其他规定，并入本提单。参见土耳其上诉法院第11裁判庭2008年6月1日判决，案卷编号：2007/1590，判决编号：2008/8780。

〔4〕即便在《土耳其国际仲裁法》颁行之前，土耳其上诉法院第19裁判庭已经承认了国际油、油籽和油脂协会格式条款中的仲裁协议。参见土耳其上诉法院第19裁判庭1997年5月判决，案卷编号：1996/9619，判决编号：1997/4669。

〔5〕此时当事人之间合同条款保持不变。参见土耳其上诉法院第11裁判庭2005年6月13日判决，案卷编号：2004/9458，判决编号：2005/6114。

〔6〕参见土耳其上诉法院第11裁判庭2009年6月13日判决，案卷编号：2008/7774，判决编号：2009/12516。

成有效的仲裁协议。[1] 提单被转让给第三人之后,仍适用同样的规则认定仲裁协议的效力。如果第三人不同意仲裁条款,可以将该条款勾掉,否则提单上的仲裁条款构成有效的仲裁协议。土耳其上诉法院还认定,提单中声明合同条款并入运输合同,则提单中的仲裁协议成为主合同的一部分。保险合同中的仲裁条款涉及的问题则是,保险人代位被保险人之后,是否可以代位主张被保险人和赔偿义务人之间的仲裁条款。土耳其法院的裁决实践表明,保险人赔偿后可以代位主张仲裁协议。例如,海上货物运输案件中,托运人和承运人的运输合同中包含仲裁条款。保险风险发生后,保险人向被保险人即托运人履行了保险责任。随后保险人援引被保险人与承运人之间的仲裁协议提起仲裁。在初审和二审法院都拒绝认可仲裁协议效力后,土耳其上诉法院认为代位原则适用于仲裁协议,因此保险人可以援引被保险人的仲裁协议,向第三人提起仲裁。[2]

《土耳其债法典》第 504 条明确规定,授予代理人的普通授权不包括“诉诸仲裁”。因此,订立仲裁协议往往需要被代理人的特别授权。尽管土耳其学界有观点认为,“诉诸仲裁”指的是不能启动仲裁程序,而不是不能订立仲裁协议,但土耳其的司法实践却一再确认,订立仲裁协议必须获得专门授权。[3]

(2)侵犯被申请人申辩权,构成不予承认和执行外国仲裁裁决的理由。《纽约公约》第 5 条规定的主要是被申请人未获通知以及其他导致被申请人不能陈述案件的事实。“其他不能陈述案件的情况”主要指的是仲裁庭违反被申请人程序权利的后果。如果被申请人因为不可抗力或者法律限制不能取得某些证据,不构成撤销仲裁裁决的理由。

(3)仲裁庭越权裁决,构成不予承认执行外国仲裁裁决的理由。仲裁庭裁决的赔偿额度高于申请人的请求,或者仲裁庭未遵守当事人约定的准据法,都构成越权裁决。

(4)仲裁庭的组成违反当事人的约定或者仲裁地法的,构成撤裁理由。仲裁庭的组成是仲裁程序的核心程序,违反约定或者法定规则的,会使仲裁正当程序落

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〔1〕 参见土耳其上诉法院第 11 裁判庭 1998 年 3 月 13 日判决,案卷编号:1997/9447,判决编号:1998/1703。

〔2〕 参见土耳其上诉法院大审判庭 1995 年 2 月 1 日判决,案卷编号:1994/11 - 765,判决编号:1995/39。

〔3〕 参见土耳其上诉法院大裁判庭 2000 年 10 月 11 日判决,案卷编号:2000/19 - 1122,判决编号:2000/1256。

空。如果仲裁庭的组成违反当事人直接约定的方式、间接约定的仲裁规则，或者违反仲裁地法律强制规定的，构成《纽约公约》第 5 条规定的撤销仲裁裁决的事由。

（5）不具有可仲裁性。根据被请求承认执行国法，不具有可仲裁性的外国裁决不可以在土耳其得到承认执行。法院依职权审查，争议事项根据土耳其国内法是否具有可仲裁性。根据土耳其法，只要是当事人有权处分，受当事人意思自治支配的民商事关系都具有可仲裁性。《土耳其民事诉讼法》第 408 条规定了类似内容，即涉及不动产物权和当事人不能意思自治的事项，不具有可仲裁性。这些争议主要涉及弱者保护，如消费者合同、劳动合同。《土耳其调解法》涉及的争议适用与仲裁同样的标准，因此可调解的纠纷也具有可仲裁性。

（6）违反公共政策。“公共政策”指的是在社会、经济、和政治领域具有重大意义事项，但缺乏明确的认定规则。土耳其学者总结出两类有可能违反土耳其公共秩序的裁决：第一类是违反法律基本原则和基本道德原则的裁决；第二类是违反程序法基本原则的裁决。前一类包括赌博、贿赂、进出口不许交易的货物、履行合同导致发生腐败的交易、人口买卖、贩毒。后一类包括仲裁庭违反独立、公正原则和仲裁裁决违反土耳其法院的生效判决。仲裁庭独立性是程序正义的基本保障。如果仲裁庭接受任何组织机构和个人的指令，或者接受当事人的贿赂，那么仲裁庭就无法作出中立、公正的裁决。公共秩序保留的适用，必须列明违反事由和理由；概括认定外国裁决违反公共秩序，是对公共秩序保留的滥用。

（二）根据《土耳其国际私法》的承认与执行

由于《纽约公约》缔约国基本涵盖了世界上绝大多数和最主要的贸易国，因此适用《土耳其国际私法》承认与执行外国仲裁裁决的情况非常少见。《纽约公约》第 7 条规定，当事人可以要求适用更有利的国内法规定；但《土耳其国际私法》并未包含比《纽约公约》更优惠的规定。只有公约缔约国以外的国家作出的涉外仲裁裁决，才可能适用《土耳其国际私法》承认与执行。《土耳其国际私法》第 62 条包含与《纽约公约》同样内容的规定，前文关于《纽约公约》的解释也同样适用于根据该法第 62 条的承认与执行。

六、对中国当事人在土耳其参加仲裁的建议

（一）是否选择土耳其作为仲裁地

是否在国际仲裁中选择特定国家作为仲裁地，主要考虑三个因素。第一，仲裁地仲裁程序法规定是否符合国际商事仲裁实践。第二，仲裁地法院是否支持仲裁。第三，该国作出的仲裁裁决是否能够在外国得到便利的承认与执行。程序中的其

他问题,如仲裁员的选择、仲裁语言、仲裁规则的选择,需要当事人合意约定。

从仲裁地仲裁程序法的规定来看,《土耳其国际仲裁法》以联合国贸法会《示范法》为基础。虽然《土耳其国际仲裁法》立法时对《示范法》有细微误解,但随着《土耳其民事诉讼法》的修订,这些误解被修正弥补。新《土耳其民事诉讼法》的仲裁编也吸收了《示范法》2006 年修订的成果。土耳其被联合国贸法会认定为《示范法》国家,[1]因此土耳其法律与《示范法》之间不存在太多差异。《示范法》充分支持当事人意思自治,因此被认为反映了国际商事仲裁的实践。土耳其仲裁制度由于建立在《示范法》的基础上,因此可以被视为是符合国际商事实践的。对于经常参加国际仲裁的中方当事人而言,应当不会对土耳其仲裁制度感到陌生。但是对于经常参加我国国内仲裁的当事人而言,需要注意国际仲裁与我国仲裁制度的差异。

从仲裁地法院支持仲裁的角度来讲,土耳其法院也非常支持仲裁,可以被视为仲裁友好型法院。土耳其法院充分尊重仲裁庭自裁原则,支持仲裁庭作出的保全等临时措施,甚至允许仲裁庭修改法院作出的临时措施,在临时仲裁中法院作为指定机构支持临时仲裁协议的实施,采用《纽约公约》一致的、基于有限事由的非实质审查,并且在国内仲裁中没有不予执行制度。涉外仲裁中,甚至可以允许当事人约定适用仲裁地之外的程序法,允许外国当事人之间的纠纷事先约定放弃撤销仲裁裁决的权利,允许外国人担任仲裁员,允许外国人和外国律师代理涉外商事仲裁案件。《土耳其调解法》也为仲调结合提供了非常有益的制度框架。实践中,尤其是《土耳其国际仲裁法》施行之后,土耳其法院也严格地遵循支持仲裁和仲裁友好的司法政策。

从仲裁地仲裁裁决的域外承认和执行来看,土耳其也适合作为仲裁地。土耳其是《纽约公约》缔约国,参加《纽约公约》时,作出商事保留和互惠保留。这两项保留对承认和执行外国仲裁裁决,并无实质影响。不符合商事保留的争议通常面临的“可仲裁性”审查的问题。由于《纽约公约》成员国众多,因此互惠保留也不会影响土耳其作出的仲裁裁决的域外承认与执行。

由此可见,土耳其作为《示范法》国家和《纽约公约》缔约国,并且施行“双轨制”仲裁立法,为国际商事仲裁提供了良好的制度框架。中国和土耳其当事人之间,如果不能约定中国作为仲裁地,选择国际领先的第三国仲裁地,或者可以考虑

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〔1〕 参见 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html,最后访问日期:2019 年 1 月 28 日。

约定土耳其作为仲裁地。

（二）选择什么样的土耳其仲裁机构

土耳其仲裁机构众多，但水平差异较大。土耳其的仲裁机构多附属于不同层级的商会，专为商会成员服务。中国和土耳其贸易中，土方建议的格式条款中可能会包含选择某商会仲裁院的情况。通常而言，安卡拉、伊斯坦布尔和伊兹密尔商会仲裁院的水平较高。尽管如此，并不推荐选择商会仲裁院管理仲裁案件。

2015 年成立的 ISTAC 是土耳其专门立法设立的仲裁机构。该机构不附属于任何商会，旨在为国内仲裁和国际仲裁提供高效、优质、实惠的纠纷解决服务。该中心仲裁规则主要仿照 ICC 仲裁院仲裁规则。之所以仿照国际商会仲裁院的规则，是因为国际商会仲裁院是土耳其当事人经常选择的仲裁机构。该中心的仲裁规则引入了许多国际通行的最新的制度，如快速仲裁程序、紧急仲裁员以及为临时仲裁提供指定服务。该机构主打的服务是高效和高性价比。该机构的仲裁规则不仅提供了精简的仲裁案件管理制度，而且还专门规定了快速仲裁程序、紧急仲裁员程序，并配套以高效的仲裁秘书团队。根据国际用户的评价，该机构仲裁收费低廉。

与中国仲裁机构相比，ISTAC 在“高效”方面不具优势。根据该中心规则，通常仲裁庭应当在组庭后 6 个月内作出仲裁裁决，这与中国仲裁机构的实践并无差异。该中心所说的“高性价比”，也并不必然。如果案件标的过小，或者标的过大，该中心的收费都比中国主流涉外仲裁机构收费要高。不过，该机构在中东、中亚、东欧和北非享有较高的声誉。中国企业与这些国家和地区的当事人订立合同，也可以考虑选择 ISTAC 管理案件。

（三）在土耳其仲裁的注意事项

在土耳其仲裁，尤其需要注意仲裁期限制度。仲裁裁决必须在仲裁期限内作出。仲裁期限制度是土耳其仲裁法的一大特色。《中华人民共和国仲裁法》《示范法》以及多数国家的仲裁法都没有规定如此严格的仲裁时限制度。而土耳其两部仲裁法都把超期裁决，视为撤销仲裁裁决的理由。超期裁决被撤销后，仲裁协议变得无效，当事人只能向法院起诉。仲裁庭必须在法定的仲裁期限内作出裁决。当事人没有约定仲裁时限，则适用 1 年的法定仲裁时限。仲裁庭应当在第一次开庭前会议之后的 1 年内作出裁决。如果是独任仲裁庭，则应当在独任仲裁员接受委任的 1 年之内作出裁决。如果案件过于复杂，当事人可以约定延长仲裁时限。当事人不能达成一致意见的，可以申请法院批准延长。如果法院不批准并且当事人不能达成延期合意，那么仲裁期限届满之后程序中止。与此同时，仲裁协议失效，当事人不得

根据同一仲裁协议再次申请仲裁,只能向法院起诉。

(四)在土耳其承认和执行仲裁裁决

土耳其是《纽约公约》缔约国,我国作出的仲裁裁决可以在土耳其承认与执行。土耳其还与我国订立了双边司法互助协定,即《中华人民共和国和土耳其共和国关于民事、商事和刑事司法协助的协定》。该协定包括民事判决和仲裁裁决的承认与执行的条文。该协定第 26 条明确规定,如果缔约国另一方国内作出的仲裁裁决,属于协定规定的可仲裁纠纷,并且仲裁协议根据被请求方国家法律是有效的,缔约方应当承认和执行该仲裁裁决。由于中国、土耳其都是《纽约公约》缔约国,而《纽约公约》较之中土双边协定的规定宽松,尤其是该协定第 26 条第 3 项要求“被请求法院适用被请求一方法律判断仲裁协议的效力”,严于该公约第 5 条第 1 款甲项规定的“适用当事人选择的仲裁协议准据法或仲裁地法律”。根据《纽约公约》第 7 条第 1 款的规定,当事人可以援引公约中较双边协定更有利的规定,因此当事人可以选择适用更宽松的《纽约公约》条文,而不是协定条文。

(五)中土之间的司法协助

由于中国和土耳其缔结了前述双边司法互助协定,除承认和执行仲裁裁决以外,中土之间还可以在判决承认执行、认证免除、文书证明、调查取证、送达司法文书方面,实现广泛的司法协助。双边司法协助协定,免除了互惠要求以及缔约国国内法的适用。根据该协定第 21 ~ 25 条的规定,符合条件的我国判决可以在土耳其得到承认与执行。在仲裁过程中,中国法院作出的有关仲裁协议效力的裁定,可以申请在土耳其承认与执行。我国已经承认和执行过土耳其判决。2013 年 1 月 28 日,土耳其伊斯坦布尔第六商业一审法院通过外交途径向我国最高人民法院提出请求,请求承认与执行该院作出的生效判决。根据我国最高人民法院的要求,山东高级人民法院依据《中华人民共和国民事诉讼法》《中华人民共和国和土耳其共和国关于民事、商事和刑事司法协助的协定》的规定,将案件交由济宁中级人民法院审理。济宁中级人民法院依照中国法律及两国司法协助协定,对案件是否属于司法协助范围、是否符合请求途径要求以及是否存在不予承认与执行情形等方面进行了审查,在审查程序、审查标准、文书制作方面均进行了有益探索,并最终作出承认与执行土耳其伊斯坦布尔第六商业一审法院生效判决的民事裁定书。该裁定已发生法律效力。土耳其承认与执行中国判决的先例,尚未可知。

仲裁程序进行过程中,如果需要送达、取证的,也可以适用双边协定中的相应规定。就取证而言,首先,该协定第 8 条规定缔约一方司法机关制作或证明的文书,

只要经过签署和正式盖章，即可在缔约另一方司法机关使用，无须认证，免去了公证认证的烦琐程序。第 9 条规定，缔约一方官方机关签署的证书在缔约另一方境内具有同等的证明效力。据此，有关法人资格、法定代表的文件可以翻译后在中国直接使用。其次，根据该协定第 11 条的规定，缔约一方可以通过派驻缔约另一方的外交或领事机构，在缔约另一方境内向其本国国民送达文书和调查取证，但不得违反缔约另一方法律，亦不得采取任何强制措施。这简化了中国使领馆向对方机关请求协助的过程，减少了沟通环节。根据协定条文，司法协助请求书及其附件应用提出请求的缔约一方的官方文字书写，并附有经证明的被请求的缔约一方的官方文字或英文的译文。上述文件均应一式两份。此外，在诉讼费和担保方面，中国和土耳其当事人享受国民待遇。收费和担保的规定，同样适用于仲裁有关的司法程序。

附录一:

土耳其国际仲裁法(英文版)

Turkish International Arbitration Law

(Law No. 4686 of 21 June 2001)

Chapter 1 General Provisions

Article 1 Purpose and scope

The purpose of this Law is to set forth the procedures and principles concerning international (commercial) arbitration.

This Law shall be applicable where a dispute has a foreign element and the place of arbitration is determined to be in Turkey or where the Law is chosen as the governing law (of arbitration) by arbitrating parties or their sole arbitrator or arbitral tribunal.

Articles 5 and 6 of this Law are applicable even if the place of arbitration is determined to be a place not in Turkey.

This Law shall not be applicable to disputes related to real rights concerning immovables located in Turkey and to disputes that are not within the parties' disposal.

This Law shall also be applicable to the resolution, through international arbitration, of disputes concerning concession contracts which are related to public services and which contain a foreign element in accordance with Law No. 4501 of 21st January, 2000 concerning Principles That Shall Be Complied with When There Is Access to Arbitration for Disputes Arising from Concession Contracts.

The provisions of international conventions to which Turkey is a party are reserved.

Article 2 Foreign element

The existence of any of the following circumstances demonstrates that the dispute has a foreign element and, under such circumstances, arbitration is considered as international:

1. where the parties to the arbitration agreement have their domiciles or habitual

residences or places of business in different States;

2. where one of the following is situated outside the State in which the parties have their domiciles or habitual residences or places of business;

a. the place of arbitration, which is determined in, or pursuant to, the arbitration agreement; (or)

b. a place where a substantial part of the obligations arising from the underlying contract is performed or a place where the dispute has the closest connection;

3. where a shareholder of the company which is a party to the underlying contract that constitutes the basis for the arbitration agreement has brought foreign capital (into Turkey) in accordance with the laws concerning the encouragement of foreign capital or where a loan and/or guarantee agreement needs to be signed, with the purpose of obtaining foreign capital, for the execution of the underlying contract;

4. where, in accordance with the underlying contract or with the underlying legal relationship, the movement of capital or of goods shall be made from one country to another.

The provisions of Law No. 4501 of 21st January, 2000 are reserved.

Article 3 Court with Competence and Jurisdiction, and the Extent of Court Intervention

A reference to a court in this Law shall be the reference to the civil court of first instance (asliye hukuk mahkemesi) of the respondent's domicile, habitual residence or place of business; where none of these is in Turkey, to the stanbul Civil Court of First Instance (istanbul Asliye Hukuk Mahkemesi).

In matters concerning international arbitration, no court shall intervene except where so provided in this Law.

Chapter 2 Arbitration Agreement

Article 4 Definition and Form

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be

in the form of an arbitration clause in a contract or in the form of a separate agreement.

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

The validity of the arbitration agreement is subject to the law agreed by the parties, failing such agreement to Turkish Law.

No objection could be made against the arbitration agreement by arguing that the underlying contract is invalid or that the arbitration agreement is related to a dispute, which has not yet arisen.

Article 5 Objection as to arbitration before the court and agreement to arbitrate

If an action is brought before the court in a matter, which is the subject of an arbitration agreement, the respondent may make an objection as to the arbitration. The acceptance (or denial by the court) of that objection and disputes concerning the validity of the arbitration agreement are subject to the provisions of the Code of Civil Procedure concerning initial objections. If such objection is accepted, then the court shall dismiss the action on procedural grounds.

If the parties agree to arbitrate during the court proceedings, the case file shall be sent to the arbitral tribunal by the court.

Article 6 Interim measures of protection and interim attachments

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection or an interim attachment and for a court to grant such measure or attachment.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order an interim measure of protection or an interim attachment during arbitral proceedings. The arbitral tribunal may require any party to provide appropriate security

in connection with such measure or attachment. The arbitral tribunal shall not grant interim measures or interim attachments (a) that are required to be enforced through execution offices or to be executed through other official authorities or (b) that bind third parties.

If a party does not comply with the interim measure or attachment, the other party may request the assistance of the competent court for taking an interim measure of protection or an interim attachment. The competent court, if necessary, may hear [the case in question] through a substitute court.

The parties' right to make a request (for interim measures of protection or interim attachments to a court) in accordance with the Code of Civil Procedure and the Code of Execution is reserved.

Any decision of a court, with respect to interim measures of protection or interim attachments, that is given upon a request of a party prior to commencement of arbitration or during arbitral proceedings, shall automatically cease to have effect where the decision of the arbitral tribunal becomes enforceable or where the arbitral tribunal denies (to hear) the case in its decision.

Chapter 3 Appointment, Challenge, and Responsibility of Arbitral tribunal, Termination of its Duties and its Competence

Article 7 Appointment, challenge, and responsibility of arbitral tribunal, termination of its duties and its competence

A) The parties are free to determine the number of arbitrators. However, the number shall be odd.

If the number of arbitrators is not determined by the parties, three arbitrators shall be appointed.

B) Unless otherwise agreed by the parties, the following principles shall be applicable to the appointment of the arbitrators:

1. Only real persons can be appointed as arbitrators.

2. In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the civil court of first instance.

3. In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the civil court of first instance. The third arbitrator appointed shall be the chairman of the arbitral tribunal.

4. In an arbitration with more than three arbitrators, the arbitrators who will appoint the last arbitrator shall be appointed by the parties in equal numbers in accordance with the procedure set forth in the above paragraph.

Where under an appointment procedure agreed upon by the parties,

1. a party fails to act as required under such procedure;

2. the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; (or)

3. a third party, including an institution, that is empowered to appoint arbitrators fails to perform any function entrusted to it under such procedure the appointment of the arbitral tribunal shall be made, upon a party request, by the civil court of first instance.

The civil court of first instance's decision given, if necessary, upon hearing the parties, shall be final. The court, in appointing an arbitrator, shall give due regard to: (1) any qualifications of the arbitrator that is contained in the agreement of the parties, (2) securing the appointment of an independent and impartial arbitrator, and (3) the principles as to: (i) in the case of appointment of the sole arbitrator (or the third arbitrator), the advisability of appointing an arbitrator of a nationality other than those of the parties, and (ii) in case of appointment of a panel of three arbitrators, the advisability of making sure that two of the arbitrators do not have the same nationality as any of the parties. In case of appointment of more than three arbitrators, the above principles shall also be applicable.

C) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances

to the parties unless they have already been informed of them by him.

An arbitrator may be challenged if: (1) he does not possess the qualifications that were agreed to by the parties, (2) if there exists a reason for challenge in accordance with the arbitration procedure agreed by the parties, or (3) if the existing circumstances give rise to justifiable doubts as to his impartiality or independence.

D) The parties are free to agree on a procedure for challenging an arbitrator.

A party who intends to challenge an arbitrator shall, within thirty days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance that may give rise to a challenge, send a written statement of the reasons for the challenge to the arbitral tribunal.

A party who challenged one or more arbitrators before the arbitral tribunal shall provide its request and reasoning (for that purpose). A party who becomes aware that the challenge is not successful may, within thirty days after having received notice of the decision rejecting the challenge, apply to the civil court of first instance for lifting such decision and removal of the arbitrator or the arbitrators.

A challenge to the (sole) arbitrator appointed, or all members of the arbitral tribunal, or a challenge to the number of arbitrators that may remove the decision-making majority of the tribunal, shall only be made to the civil court of first instance. The court's decision under this paragraph is final.

The arbitration will come to an end, if the court accepts the challenge to the (sole) arbitrator appointed, all members of the arbitral tribunal, or the part of the arbitral tribunal that may remove the decision-making majority. However, unless the arbitral tribunal is designated by name in the arbitration agreement, a new tribunal shall be appointed.

E) Unless otherwise agreed by the parties, an arbitrator who accepts his office shall be responsible to indemnify any damages that are related to the failure of the arbitrator to perform his duties without a justifiable reason.

F) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, if he withdraws from his office, or if the parties agree on the termination, his mandate shall be terminated.

If a controversy remains concerning any ground with respect to the arbitrator's withdrawal from the office, any party may request the civil court of first instance to de-

cide on the termination of the arbitrator's mandate. The decision (of the court) shall be final.

The arbitrator's withdrawal from his office or the acceptance of the other party of the termination of the arbitrator's mandate does not imply acceptance of the validity of any ground concerning the challenge.

G) Where the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

The replacement of one or more arbitrators will not suspend the term of arbitration.

If, in the arbitration agreement, the arbitral tribunal is designated by name, upon the termination for any reason of the mandate of the whole arbitral tribunal or part of it that would remove the decision-making majority, the arbitration shall be terminated.

H) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration agreement, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.

A plea that the arbitral tribunal is exceeding the scope of its authority shall not be valid if it is not raised without undue delay.

The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

The arbitral tribunal shall rule on an objection as to its jurisdiction as a preliminary question. If the arbitral tribunal considers itself competent then it shall proceed with arbitration and shall render its decision.

Chapter 4 Arbitration Procedure

Article 8 Determination of the rules of procedure, equal treatment of parties and their representation

A) Subject to the mandatory provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. They may, in the determination of such procedure, make a reference to any law or international or institutional arbitration rules. If there is no such agreement between the parties, the arbitral tribunal shall conduct the proceedings in accordance with the provisions of this Law.

B) The parties shall have the same rights and powers. Each party shall be given a (full) opportunity to assert his petitions and defences.

The parties may also be represented in the arbitration proceedings by foreign real or legal persons. This provision shall not be applicable to requests to a court concerning arbitration.

Article 9 Place of arbitration

The parties or an arbitration institution chosen by the parties are free to determine the place of arbitration. Failing such agreement or determination, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The arbitral tribunal may meet upon notification in advance to the parties at any place where the circumstances of the arbitration so require.

Article 10 Commencement, term and language of arbitration, statement of claim and defence, terms of reference

A) Unless otherwise agreed by the parties, an arbitration commences on the date on which a request for the appointment of arbitrators is made to the civil court of first instance or to a person or institution which, according to the parties' agreement, appoints arbitrators or, in case both of the parties are responsible for the appointment of the arbitrators in accordance with the arbitration agreement, on the date on which, following the appointment of his arbitrator, the claimant's notification to the respondent of appointment of the respondent's arbitrator or, in case the arbitration agreement contains

the name of the sole arbitrator or the names of the members of the arbitral tribunal, on the date of receipt of the request for arbitration.

In a case where a party has obtained an interim measure of protection or an interim attachment from a court, the party shall commence arbitration within thirty days from the date of the measure or attachment. Otherwise, the interim measure or the interim attachment shall automatically be lifted.

B) Unless otherwise agreed by the parties, an award shall be rendered within one year, in the case of a sole arbitrator, from the date of his appointment or, in the case where there is an arbitral tribunal, from the date when the minutes of the tribunal's first meeting are kept.

The term of arbitration may be extended, upon agreement of the parties, or, in case of failure, upon a party request, by the civil court of first instance Upon denial of the request, arbitration shall come to an end at the date of the expiry of the term of arbitration.

The court's decision shall be final.

C) The language of the arbitration shall be Turkish or any other language, which is the formal language of a state that is recognized by the Republic of Turkey. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages. The agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages used in the arbitration proceedings.

D) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall submit to the arbitral tribunal its statement of claim containing the parties' names, titles, addresses and its representatives, the arbitration agreement, the underlying contract or legal relationship, the circumstances upon which the claim is based, the subject matter of the dispute, the amount in dispute and its request. The respondent too shall submit within the same period to the arbitral tribunal its statement of defence. The parties may submit with their statements all documents they consider to be

relevant and may add a reference to the documents or other evidence they will submit.

Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or to whether or not it creates an unjust difficulty for the other party or to other circumstances. The claim or defence shall not be amended or supplemented so as to extend beyond the scope of the arbitration agreement.

E) Unless otherwise agreed by the parties, the arbitral tribunal, following the submissions as to the claim and defence shall draw up its terms of reference.

The terms of reference may contain such particulars as the parties' names and titles, their addresses for notification during the arbitration, a summary of their claims or defences, their requests, explanations on the dispute in question, the names, surnames, titles, and addresses of the arbitrators, the place of arbitration, the term of arbitration, the commencement of the term, explanations as to the procedural law or rules applicable to the dispute, and whether or not the arbitrators are competent to act as amiable compositeur.

The terms of reference shall be signed by the arbitral tribunal and the parties.

Article 11 Hearing and proceedings in writing, losing capacity to be a party, default of a party to participate in arbitral proceedings

A) The arbitral tribunal shall decide whether to hold oral hearings for presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of the case file. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold hearings at an appropriate stage of proceedings, if so requested by a party.

The arbitral tribunal shall give sufficient advance notice to the parties concerning the date of any site-inspection, examination by an expert, or of any hearing and any meeting of the arbitral tribunal for the purposes of examining other evidence, and of the consequences of the failure to attend any inspection, examination, hearing or meeting.

All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.

B) Where a party to arbitration loses his capacity to be a party to arbitration, the arbitral tribunal suspends the arbitral proceedings and notifies for the purposes of continuation of the proceedings, the relevant parties of the suspension. In such case, the term of arbitration shall not run. The arbitral proceedings shall come to an end if, within six months, no notification is made (within the meaning of the above paragraph) or a party who is being served the notification does not notify the other party or the arbitral tribunal of his intention to continue with the proceedings.

C) In case of a party's default in participating in the arbitration proceedings, the following provisions shall be applicable:

1. If the claimant fails to timely communicate his statement of claim, the arbitral tribunal shall terminate the proceedings.

2. If the statement of claim is not in accordance with the first sub-paragraph of Article 10(D) and the incompleteness is not remedied within the period to be determined by the arbitral tribunal, the tribunal shall terminate the proceedings.

3. If the respondent fails to communicate his statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure, in itself, as an admission of the claimant's allegations.

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

Article 12 Expert appointment by arbitral tribunal, taking evidence, rules applicable to substance of dispute and settlement

A) The arbitral tribunal may

1. appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

2. require a party to give the expert any relevant information or to produce or to provide access to, any relevant information or documents;

3. rule on inspection of goods or other property.

Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him

and to present expert witnesses in order to testify on the points at issue.

B) The parties shall provide their evidence within the term that is determined by the arbitrators. The arbitral tribunal may request from the competent court of first instance assistance in taking evidence. In such case, the provisions of the Code of Civil Procedure shall be applicable.

C) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. The applicable trade usages under the law shall be taken into account in construing the provisions of the underlying contract and for filling gaps. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules or its rules of procedure.

Failing any designation by the parties of the applicable substantive law, the arbitral tribunal shall apply the substantive law of a State, which has the closest connection with the dispute.

The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorized it to do so.

D) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. The arbitral tribunal shall, if requested by the parties and accepted by itself, record the settlement in the form of an arbitral award on agreed terms.

Article 13 Decision making by panel of arbitrators, termination of proceedings

A) Any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members.

However, certain issues concerning procedure may be decided by a presiding arbitrator, if so authorized by the parties or the members of the arbitral tribunal.

B) The arbitral proceedings are terminated by the issuance of the final award or by the realization of any of the following circumstances:

1. If the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settle-

ment of the dispute;

2. If the parties agree on the termination of the proceedings;

3. If the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible;

4. If a request concerning the extension of the term of arbitration in accordance with the second sub-paragraph of Article 10(B) is denied;

5. If, in cases where the parties agree that the arbitral tribunal renders its decision with unanimity, the tribunal could not reach unanimity;

6. If the arbitration proceedings could not be continued in accordance with the second sub-paragraph of Article 11(B);

7. If an advance in accordance with the second sub-paragraph of Article 16(C) is not deposited.

The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings, subject to the provisions of Article 14(B).

Article 14 Form, content, correction and interpretation of award, additional award, written notification

A) An arbitral award shall contain

1. the names, surnames, titles and addresses of the parties, their representatives and lawyers;

2. the reasons upon which the award is based, with their legal basis, and, in case there is a request for compensation, the amount of compensation;

3. the place of arbitration and the date of the award;

4. the name, signature and a dissenting opinion, if any, of the arbitral tribunal;

5. an indication that an action for setting aside the award could be brought.

Unless otherwise agreed by the parties, the arbitral tribunal may render (interim and) partial awards.

The arbitral award shall be notified to the parties by the sole arbitrator or the chairman of the arbitral tribunal.

The parties may request that the arbitral award shall be sent to the civil court of first instance provided that the relevant costs and charges are paid. Upon such request,

the sole arbitrator or the chairman of the arbitral tribunal shall submit the award and the case file to the court and they shall be kept at the office of the clerk.

B) Within thirty days of receipt of the award, a party, with notice to the other party, may request the arbitral tribunal:

1. to correct in the award any material errors in computation, any clerical or typographical errors or any errors of similar nature;

2. to give an interpretation of a specific point or part or whole of the award.

If the arbitral tribunal considers that, following the receipt of the other party's opinion, the request is justified, it shall make the correction of the material error or give the interpretation within thirty days of receipt of the request.

The arbitral tribunal may correct any material error on its own initiative within thirty days from the date of the award.

A party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

The decision concerning the correction, interpretation and the additional award is notified to the parties and shall form part of the award.

C) Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his domicile, habitual residence, place of business or mailing address.

If none of the above can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known domicile, habitual residence, place of business or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.

The communication is deemed to have been received on the day it is so delivered.

The provisions of this Article do not apply to communications in court proceedings.

Chapter 5 Recourse Against Arbitral Awards

Article 15 Application for setting aside and arbitral award becoming enforceable

A) Recourse to a court against an arbitral award may be made only by an application for setting aside the award. Such recourse shall be made before the civil court of first instance. The application for recourse shall be given priority and shall be handled expeditiously.

An arbitral award may be set aside:

1. where the party making the application furnishes proof that:

a) 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 thereon, under Turkish law;

b) the composition of arbitral tribunal is not in accordance with the parties' agreement, or, (failing such agreement) with this Law;

c) the arbitral award is not rendered within the term of arbitration;

d) the arbitral tribunal unlawfully found itself competent or incompetent;

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

f) the arbitral proceedings are not in compliance with the parties' agreement (as to the procedure), or, failing such agreement, with this Law provided that such non-compliance affected the substance of the award;

g) the parties are not treated with equality; or

2. where the court finds that:

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

b) the award is in conflict with the public policy.

In cases where an application for the setting aside of the award is made on the ground that the award contains matters beyond the scope of submission to arbitration, if the decisions on matters submitted to arbitration can be separated from those not so sub-

mitted only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

The application for setting aside an award may be made within thirty days from the date of notification of an award or a decision on correction or interpretation or an additional award. This application shall automatically suspend the execution of the arbitral award.

The parties may, in part or in full, renounce the right to initiate an action for setting aside the award. A party whose domicile or habitual residence is not in Turkey may renounce that right completely in an express clause in the arbitration agreement or in writing, following the signature of the arbitration agreement. Alternatively, in the same manner, the parties may renounce the above right for one or more of the reasons as set forth above for setting aside the award [see Article 15 (A)2.1, above].

The application for setting aside shall, unless the competent court requires otherwise, be decided upon examination of the case file.

The judgment on the application for setting aside the award may be appealed in accordance with the provisions of the Code of Civil Procedure, however, no request can be made for reconsideration of the judgment rendered at the appeal level. Any examination at the appeal level shall be limited to the grounds available for setting aside the award. The examination shall be given priority and shall be handled expeditiously.

In cases where: (1) the application for setting aside the award is accepted and no appeal is launched against the judgment concerning the acceptance, or (2) under the circumstances envisaged under sub-paragraphs 1(b), (d), (e), (f), (g) and sub-paragraph 2(b) above, the parties, unless prior agreement exists, may appoint new arbitrators and re-determine a new term of arbitration. The parties may appoint their former arbitrators.

B) Upon the finalization of the judgment concerning the denial of the application for setting aside, the civil court of first instance shall give a certificate concerning the enforceability of the award to the party who made a request for it. No court charges are applicable to the issuance of this certificate. At the stage of the award's enforcement, the Code on Charges shall however be applicable.

In cases where the term provided for the application for setting aside has elapsed or

where the parties have renounced the right to initiate an action for setting aside, sub-paragraphs (A)2(a) and (b) above shall be automatically taken into consideration by the civil court of first instance for granting the certificate concerning the enforceability of the award. In such case, unless the court decides otherwise, the examination shall be made on the file.

Chapter 6 Costs of Arbitration

Article 16 Fees of arbitrators, costs of proceedings, deposit of advance, payment of costs

A) Unless otherwise agreed by the parties, the fees of the arbitrators shall be fixed between the arbitral tribunal and the parties, by taking into consideration the amount in dispute, the nature of the dispute and the term of arbitral proceedings.

The parties may determine those fees by making a reference to the established international rules or institutional arbitration rules.

If the parties and the arbitral tribunal cannot agree on the determination of the fees or if the arbitration agreement does not contain any provision concerning the determination of the fees or if no reference has been made by the parties in this respect to the established international rules or institutional arbitration rules, the fees of the arbitral tribunal shall be determined in accordance with the schedule of fees determined annually by the Ministry of Justice after the consultation with the relevant professional organizations, which are public establishments in nature.

Unless otherwise agreed by the parties, the fees of the chairman shall be calculated as ten percent more than the fee to be paid to each arbitrator.

No additional fees are payable for the correction or interpretation of the award or issuing an additional award.

B) The arbitral tribunal shall state the costs of arbitration in its arbitral award. The term “costs” refers to:

1. the fees of the arbitrators;

2. the arbitrators’ travel and other expenses;

3. the fees paid to the experts, and to the other persons whose assistance is sought and who are, collectively, appointed by the arbitral tribunal, and the costs for the site

inspection;

4. the witnesses' travel and other expenses to the extent approved by the arbitral tribunal;

5. if he is represented by an attorney at law, the successful party's attorney fees, which are calculated by taking into account the minimum fee schedule, subject to the arbitral tribunal's approval;

6. the charges to be made for the applications in accordance with this Law, to the courts;

7. the notification expenses with respect to the arbitral proceedings.

C) The arbitral tribunal may request that the claimant deposit an advance for the arbitration costs.

If the advance is not paid within the period determined in an arbitral decision, the arbitral tribunal may suspend the proceedings. If the advance is paid within thirty days from the notification to the parties of the suspension, the arbitral proceedings shall be continued; otherwise, the arbitration shall come to an end.

After the award is rendered, the arbitral tribunal shall provide to the parties a certificate stating where and how much of the advances deposited were spent and shall return any remaining balance of the advance to the party who paid it.

D) Unless otherwise agreed by the parties, the costs of proceedings shall be borne by the unsuccessful party. If both parties' claims are partially upheld in the arbitral award, the costs of arbitration shall be apportioned among the parties by taking into account the degree of justification of their claims.

The award of the arbitral tribunal that terminates the arbitral proceedings or that settles the case shall also contain the costs of arbitration.

Chapter 7 Final Provisions

Article 17 Repealed and inapplicable provisions

With respect to the matters regarding this Law, unless otherwise stated, the provisions of the Code of Civil Procedure shall not be applicable.

Article 5 of Law No. 4501 of 21st January, 2000 concerning Principles That Shall Be Complied with When There Is Access to Arbitration for Disputes Arising from Con-

cession Contracts is repealed.

Temporary Article 1

If the parties and the arbitral tribunal cannot agree on the fees of the arbitrators or the arbitration agreement does not contain any provision regarding the determination of the fees or the parties made no reference in respect of the fees to either internationally established rules or institutional arbitration rules, until the Ministry of Justice determines a fee schedule, the arbitrators' fees shall be assessed by the civil court of first instance by taking into account the nature of the dispute and the term of arbitration.

Article 18 Entry in force

This Law enters into force on the date of its publication.

Article 19 Implementation

The provisions of this Law shall be implemented by the Council of Ministers.

附录二：

土耳其国际私法典(节录)(英文版)

Turkish Private International Law(Excerpt)

(Law No. 5718 of 27 November 2007)

Part Ⅰ　Private International Law

Chapter Ⅰ General Provisions

Article 1 Scope

(1) The applicable law to private law transactions and relations with a foreign element, the international jurisdiction of Turkish courts and the recognition and enforcement of foreign judgments are regulated by this Act.

(2) The provisions of international conventions that had been ratified by the Turkish Republic shall be preserved.

...

Part Ⅱ　International Procedure Law

Chapter Ⅰ International Jurisdiction of Turkish Courts

Article 40 International jurisdiction

(1) The domestic rules of venue to initiate a lawsuit shall determine the international jurisdiction of Turkish courts.

...

Article 41 The cases relating to the personal status of Turkish citizens

(1) If the cases relating to the personal status of Turkish citizens are not or cannot be initiated before a foreign court, they shall be initiated before a Turkish court that has jurisdiction in accordance with rules of venue; if such court does not exist, then before

the Turkish court in the place where the relevant Turkish citizen is resident; or if he is not resident in Turkey, before the Turkish court where he/she had its latest domicile in Turkey; or if he never had a domicile in Turkey, before any of the Ankara, istanbul or izmir courts.

Article 42 Certain cases relating to the personal status of foreigners

(1) Decisions related to cases regarding custody, trusteeship, guardianship, disappearance, declaration of presumed death of a foreign person shall be rendered by the Turkish court where such person is resident; if he is not resident in Turkey, where his belongings are located therein.

...

Article 43 Cases relating to inheritance

(1) Cases relating to inheritance shall be adjudicated in a Turkish court where the deceased has its latest domicile; if the deceased's latest domicile is not in Turkey, then in the court where the properties within the deceased's estate are located.

...

Article 44 Cases relating to individual employment contracts and individual employment relations

(1) The Turkish court at the habitual place of work of the employee shall have jurisdiction over the disputes arising out of individual employment contracts or individual employment relations. In the event that the employee is initiating a law suit against his employer, the Turkish courts at the domicile of the employer, and/or the domicile or habitual residence of the employee shall also have jurisdiction.

...

Article 45 Cases relating to consumer contracts

(1) For cases arising from consumer contracts defined in Article 26, the Turkish courts at the domicile or habitual residence of the consumer and the domicile, place of business or habitual residence of the counterparty, depending on the choice of the consumer, shall have jurisdiction.

(2) The competent court in respect of the cases initiated against the consumer rela-

ting to consumer contracts executed in accordance with the sub-section 1 above shall be the Turkish court at the habitual residence of the consumer.

Article 46 Cases relating to insurance agreements

(1) For disputes arising from an insurance agreement, the Turkish court at the place where the insurer's main business place or where its branch office or agency that executed the insurance agreement is located shall have jurisdiction. However, if a case is to be initiated against the policy holder, insured or the insurance beneficiary, then the Turkish courts at their domicile or habitual residence shall have jurisdiction.

...

Article 47 Jurisdiction agreement and its limits

(1) Where there is no rule of exclusive venue, the parties may agree that the dispute between them bearing a foreign element and arising out of pecuniary relations shall be adjudicated by a foreign court. Such an agreement conferring jurisdiction shall be valid if proved in an agreement in writing. A case in respect of such agreement could only be adjudicated by a Turkish court if the foreign court decides that it has no jurisdiction over the case or no objection is made to the jurisdiction of the Turkish court when the case is brought before it.

(2) The jurisdiction conferred by Articles 44, 45 and 46 cannot be waived by an agreement of the parties.

Article 48 Security

(1) Foreign legal and real persons who initiate a law suit in Turkey, intervene with a case before a Turkish court or initiate an execution proceedings (in Turkey) shall provide security determined by the court for costs for the law suit or execution and for compensation of damages that may be incurred by the counterparty.

(2) The court shall exempt, on the basis of reciprocity, the person who initiated a law suit, intervened with a suit or launched an execution proceeding from (providing) security.

Article 49 Circumstances where a foreign State cannot benefit from State immunity

(1) A foreign State shall not benefit from State immunity relating to disputes arising out of private law relations.

(2) The notifications shall be served to the diplomatic agents of the foreign State relating to the above disputes.

Chapter Ⅱ The Enforcement and Recognition of Foreign Judgments and Arbitral Awards

Article 50 Enforcement decision

(1) The enforcement of a foreign judgment, concerning civil law (as opposed to penal law) disputes, which are final and binding according to the law of the State in which the judgment was rendered, is subject to an enforcement decision given by a competent Turkish court.

(2) An enforcement decision may also be sought in respect of individual rights granted in penal judgments of foreign courts.

Article 51 Jurisdiction

(1) The civil court of first instance (asliye hukuk mahkemesi) shall be the competent court for the enforcement decision.

(2) The enforcement decision may be requested from the Turkish court at the domicile of the person against whom enforcement is sought; if he does not have a domicile in Turkey, from the Turkish court at his residence; if he does not have a domicile or residence in Turkey, from any of the courts in Ankara, istanbul or izmir.

Article 52 Enforcement request

(1) Any person who has a legal interest in the enforcement of a foreign judgment could request its enforcement. The enforcement request shall be made by a (written) petition. Copies of the petition in the number of the opposing parties shall be provided along with the petition. The petition shall contain the following:

(a) The names, surnames and addresses of the parties who request the enforcement, and against whom enforcement is sought, as well as their legal representatives

and attorneys, if any.

(b) The indication of the State whose court rendered the judgment subject to enforcement, of the court, and of the date as well as the number of the judgment and its summary.

(c) If enforcement is sought only for a part of the judgment, the statement of that part.

...

Article 53 Documents to be attached to the petition

(1) The following documents shall be attached to the petition for enforcement:

(a) The original copy of the foreign judgment duly authenticated by the authorities of the State in which the judgment was rendered, or a copy of the judgment authenticated by the court itself that rendered the judgment and its authenticated translation.

(b) A notification or a document, authenticated by the authorities of the State in which the judgment was rendered, certifying that the judgment is final and binding, and its authenticated translation.

Article 54 Requirements for enforcement

(1) The competent court shall render its decision on enforcement in consideration of the following requirements:

(a) There shall be an agreement based on reciprocity between the Republic of Turkey and the State in which the judgment was given; or a statutory provision or *de facto* application in that State which makes the enforcement of Turkish judgments likely.

(b) The judgment shall be rendered concerning a matter that is not within the exclusive jurisdiction of the Turkish courts or shall be rendered, provided that the defendant raises an objection, by a court of a State that has no real connection with the subject matter of the dispute or the disputing parties.

(c) The judgment shall not be manifestly contrary to public policy.

(d) The party against whom enforcement is sought shall have been duly summoned to the court or duly represented before the court according to the law of the State in which the judgment was given; or the judgment shall not have been given in his absence contrary to this law, provided that this party submits a relevant objection before the

Turkish court.

. . .

Article 55 Notification and objection

(1) The petition concerning the enforcement request and the date of the hearing shall be notified to the party against whom enforcement is sought. The recognition and enforcement of decisions regarding issues that are not considered disputes (nizaslz kaza kararlarl) shall be subject to the same provision. The provision concerning notification shall not be applied for uncontested decisions given *ex parte*. The enforcement request shall be decided in accordance with the provisions of simple trial procedure.

(2) The party against whom enforcement is sought could only raise an objection by claiming that the enforcement requirements provided by the provisions of this Part have not been fulfilled, that the foreign judgment had already been enforced, or that an impediment had arisen to prevent its enforcement.

Article 56 Decision

(1) The court shall decide the total or partial enforcement of the judgment or may deny its enforcement. The decision shall be noted under the foreign judgment and shall be signed and stamped by the judge.

. . .

Article 57 Execution and appeal

(1) Foreign judgments for which leave for enforcement has been granted shall be executed as if they are judgments rendered by Turkish courts.

(2) The decision providing for enforcement or denial of enforcement shall be subject to appeal pursuant to general provisions. The appeal shall suspend the execution of the judgment.

Article 58 Recognition

(1) The recognition of a foreign judgment as definitive evidence or a final and binding judgment is subject to a decision of a Turkish court revealing that the foreign judgment bears the conditions necessary for enforcement. Article 54(1)(a) shall not apply to recognition.

(2) The recognition of uncontested decisions shall be subject to the above provision.

(3) The above procedure shall be applied in order to perform an administrative action in Turkey based on a foreign judgment.

Article 59 Effect of final and binding judgment and of definitive evidence

(1) The effect of final and binding judgment and definitive evidence of a foreign judgement shall be assumed as of the date the judgment became final and binding in the State in which it was rendered.

Article 60 Enforcement of foreign arbitral awards

(1) Final and executable, or binding foreign arbitral awards shall be enforceable.

(2) The enforcement of foreign arbitral awards shall be requested, by a petition, from the court of first instance (asliye hukuk mahkemesi) agreed upon by the parties in writing. In the event that there is no such agreement between the parties, the court located at the domicile of the party against whom enforcement is sought, if he does not have a domicile in Turkey, at his residence, or if he does not have a residence, at a place where the property that could be subject to execution is located, shall have jurisdiction.

Article 61 Petition and review procedure

(1) The party who requests the enforcement of a foreign arbitral award shall attach to the petition the following documents with copies in the number of the opposing parties:

(a) The original or duly authenticated copy of the arbitration agreement or clause.

(b) The original or duly authenticated copy of the final and enforceable, or binding arbitral award.

(c) The duly authenticated translations of the documents listed in (a) and (b) above.

(2) Articles 55, 56 and 57 shall be applied by way of analogy in the enforcement of arbitral awards by the courts.

Article 62 Grounds of refusal

(1) The enforcement of a foreign arbitral award shall be refused:

(a) Where no arbitration agreement has ever been entered into or the underlying contracts do not contain any arbitral clause.

(b) Where the arbitral award is against general ethics or public policy.

(c) Where the issue which is the subject of the foreign award is not arbitrable according to Turkish law.

(d) Where a party has not been duly represented before the arbitral tribunal and did not afterwards accept the acts and actions in arbitration in clear terms.

(e) Where the respondent has not been duly informed of the appointment of arbitrators or has failed to present or defend its case.

(f) Where the arbitration agreement or clause is considered invalid in accordance with the law agreed upon by the parties, or in its absence, with the law where the award was rendered.

(g) Where the appointment of arbitrators or the arbitral procedure applied infringes the parties' agreement, or in the absence of such agreement, the law of the place of arbitration.

(h) Where the arbitral award is related to an issue not covered by the arbitration agreement or clause or beyond the border of the coverage of such agreement or clause. In this latter case, only the part that goes beyond the limit of the arbitration agreement or clause shall not be enforced.

(i) Where the arbitral award has not become final, enforceable or binding in accordance with the law applicable to the award, or in its absence, the law of the place of arbitration, or with the applicable procedure the award is subject to.

(2) The party against whom enforcement is sought shall bear the burden of proof of the facts provided by sub-paragraphs (a), (d), (e), (f), (g) and (h) above.

Article 63 The recognition of a foreign arbitral award

(1) The recognition of a foreign arbitral award shall be subject to the provisions concerning its enforcement.

...

Part Ⅲ　Final Provisions

Article 64 Repealed provisions

(1) The International Private and Procedural Law dated 20 May 1982 and numbered 2675;

(2) Article 866(2) of the Turkish Commercial Code dated 29 June 1956 and numbered 6762;

(3) Article 88 of the Intellectual and Art Objects Act dated 5 December 1951 and numbered 5846 are hereby abolished.

Article 65 Entry into force

(1) This Act shall enter into force upon its publication.

...

Article 66 Execution

(1) The Council of Ministers shall execute the provisions of this Act.

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CHAPTER 06 >>

第六章

越南仲裁制度研究

越南社会主义共和国，简称越南，位于亚洲中南半岛东部，地形狭长，北与我国广西、云南接壤，西与老挝、柬埔寨交界，东面和南面紧临南海，是与我国山水相连的邻邦。[1]

自1976年越南统一后，特别是从1986年改革开放后，越南以经济发展为中心，对经济政治制度进行了一系列改革，并取得了长足发展，成为东南亚国家联盟（Association of Southeast Asian Nation，ASEAN，即东盟）中的后起之秀。越南边境贸易发达，在全球化背景下加快融入国际经济体系步伐。2006年11月，越南加入WTO，此后，其主要贸易对象为中国、日本、美国、韩国和其他东盟国家。近年来，越南依托东盟、亚洲太平洋经济合作组织（Asia－Pacific Economic Cooperation，APEC）等区域性合作机制，积极开展对外贸易。中国—东盟自贸区的建立促进了中越经贸合作稳步发展。2016年，中越双边贸易总额达到982.3亿美元，同比增长2.5%。2017年前五个月，中越双边贸易额达到418.9亿美元，同比增长16.3%，越南已经超越马来西亚，成为中国在东盟的第一大贸易伙伴。[2]

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〔1〕 参见中华人民共和国外交部网：https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/yz_676205/1206_677292/1206x0_677294/，最后访问日期：2018年11月20日。

〔2〕 参见《对外投资合作国别（地区）指南——越南篇》（2017年版），载http://vn.mofcom.gov.cn/article/ddfg/tzzhch/201801/20180102700733.shtml，最后访问日期：2018年6月2日。

在投资方面,越南的主要投资来源国为日本、新加坡、中国、韩国和美国。越南给予外资企业国民待遇,大力清理国内法律法规,与国际接轨。为加大外资投资力度,越南第五次修订《越南投资法》,于2015年7月1日起正式实施。2016年11月22日,越南国会通过了《关于〈投资法〉附条件投资经营行业4号目录的修订草案》,决定自2017年1月1日起正式取消20项业务的投资经营限制条件,进一步开放国内市场。[1]

随着越南改革开放事业的全面蓬勃发展,其国际民商事交流频繁,国际投资日渐增多。国际商事、投资争议不断增加,类型也日趋多样。市场经济的发展迫切要求越南进行司法改革。为了使司法制度能够在纠纷解决中扮演积极角色,越南共产党中央政治局于2005年5月制定了《2005年至2020年司法改革策略决议》,对民事司法改革提出了新的要求,该指导性文件提出"鼓励采取替代性纠纷解决方式解决纠纷,如协商、和解、调解或仲裁等,通过确认其法律效力的方式,积极促进这些纠纷解决机制的广泛适用,实现ADR的社会化发展,开展社会组织承担一些司法解纷任务的试点"。无论是在商事领域还是在投资领域,越南积极鼓励使用仲裁方式解决纠纷。2010年,越南修改了其2003年颁布的仲裁条例,出台2010年《越南商事仲裁法》,对仲裁进行了更为详细全面的规定,以支持越南的仲裁发展。

一、越南仲裁制度的历史沿革

越南仲裁的制度立法共经历了三个重要阶段,相应颁布了三项法律规则,分别是1990年《越南经济仲裁法》、2003年《越南商事仲裁条例》以及现行有效的2010年《越南商事仲裁法》。这三项仲裁法律规则见证了越南的仲裁从无到有、逐步完善的演进过程。

(一)1990年《越南经济仲裁法》

越南的仲裁法律制度始于1990年颁布的《越南经济仲裁法》。1986年12月,越南共产党全国代表大会决定进行改革开放,展开广泛的"经济革新",实行"特殊模式"的市场经济。在改革开放的背景下,1990年《越南经济仲裁法》出台。该法共有6章39条,规定了经济仲裁机关的性质、经济仲裁组织、各级经济仲裁机关的任务和权限、解决经济合同纠纷与处理违反经济合同法行为的程序、法律责任等主要内容。

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〔1〕 参见《对外投资合作国别(地区)指南——越南篇》(2017年版),载http://vn.mofcom.gov.cn/article/ddfg/tzzhch/201801/20180102700733.shtml,最后访问日期:2018年6月2日。

该法第1条规定,“经济仲裁机关是国家对经济合同制度进行管理的机关,经济仲裁机关根据法律规定,解决经济合同纠纷、处理违反经济合同法的行为”。经济仲裁机关不仅要解决经济合同纠纷,还要对经济合同制度行使管理职能,主要是对违反经济合同法的行为加以处理,是兼具解决纠纷与管理职能的机关。有关经济仲裁机关进行的仲裁按照国家的行政区划分为三级,分别是国家经济仲裁,省、直辖市与相当级别的经济仲裁,以及县、郡与相当级别的经济仲裁,各级仲裁中经济仲裁机关的权限不同,分别解决不同标的额的案件。其中,国家级经济机关根据当事各方要求,解决款额在5亿越盾以上的经济合同纠纷,或者解决纠纷款额在2亿越盾以上,纠纷各方不在同一省、中央直辖市和相当级别,且各方未向其他级别经济仲裁机关申请解决纠纷的经济合同纠纷;其余两个级别的经济仲裁机关受理案件均不受纠纷标的额的限制。[1] 但是,关于当事人一方或各方为外国组织或个人的案件,国家级经济仲裁机关受理时不受纠纷标的额限制;而对于省、直辖市与相当级别的经济仲裁机关,只有河内市、胡志明市、海防或广南岘港省的经济仲裁机关才可受理此类案件;县、郡与相当级别的经济仲裁机关则无权受理此类案件。[2] 1990年《越南经济仲裁法》为各级经济仲裁机关规定了严格复杂的级别管辖规则;对于涉及外方当事人的案件,仅可进行国家级别的仲裁或者由少数几个省或直辖市的仲裁机关进行仲裁,且当事人仅能在非常有限的范围内对仲裁机关进行选择。

1990年《越南经济仲裁法》赋予仲裁员极大的权限,他们可以一并解决合同纠纷并处理违法行为,其地位和职能相当于行政官。在解决经济合同纠纷、处理违反经济合同法的行为时,仲裁员只依法办事,对自己作出的决定负法律责任。任何机关、组织或个人对仲裁员对经济合同纠纷的解释、对违反经济合同法的处理均不得进行干涉。[3] 在解决纠纷和处理违法行为过程中,仲裁员有权直接发布采取临时措施的命令,各经济单位、机关、组织、个人对仲裁员在权限范围内的要求,必须认真执行。[4] 若处理的是违反经济合同法的行为,仲裁员有权对全部或部分无效的经济合同作出裁决,并宣布各方不得执行或终止执行该合同,并对全部无效的经济合

〔1〕 参见1990年《越南经济仲裁法》第13条、第16条、第19条。
〔2〕 参见1990年《越南经济仲裁法》第16条。
〔3〕 参见1990年《越南经济仲裁法》第3条。
〔4〕 参见1990年《越南经济仲裁法》第21条。

同签订人和故意执行全部无效合同者施以行政罚款。[1] 另外，仅在必要时，由经济仲裁机关主席[2]决定成立由三名仲裁员组成的仲裁委员会，[3]解决经济合同纠纷、处理违反经济合同法的行为；仲裁委员会根据多数意见作出裁决。[4] 因此，在1990年《越南经济仲裁法》之下，当事人无权对仲裁员进行选择，也不能自由约定仲裁庭的组成，一般情况下由一名仲裁员处理案件。若仲裁员为谋取私利或出于其他个人动机，作出给当事人造成财产损失的决定，则视其程度的轻重，给予纪律处分、追究刑事责任。[5]

1990年《越南经济仲裁法》未涉及有关仲裁的司法监督和仲裁与司法衔接的问题。上级经济仲裁机关有权根据上诉或根据监督程序，重新审查下级经济仲裁机关的裁决，并有权根据具体情况作出维持原裁决、修改裁决或者撤销并重新解决纠纷的裁决。经济仲裁主席有权决定暂缓执行该裁决。[6] 经济仲裁机关作出的裁决或申诉审理裁决[7]具有执行力，有关经济单位、机关、组织，根据自身的职能，有责任执行经济仲裁裁决；[8]若各方不自觉执行经济仲裁裁决，由部长会议[9]发布进行强制执行经济仲裁的决定。[10] 可见，对于仲裁案件的受理、处理、监督和执行，均由经济仲裁机关一并进行，司法机关全程均不参与。只有在可能涉及刑事犯罪时，经济仲裁机关需要将材料转交同级人民检察院并建议追究刑事责任，[11]这是该法唯一一处有关仲裁与司法合作的规定。

通过以上分析可知，1990年《越南经济仲裁法》是一部具有浓厚行政色彩的法

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〔1〕 参见1990年《越南经济仲裁法》第26条。

〔2〕 经济仲裁机关主席属于行政职务。经济仲裁机关设主席一名，领导经济仲裁机关，并在必要时担任仲裁员。参见1990年《越南经济仲裁法》第10条。

〔3〕 仲裁委员会是由经济仲裁机关主席根据案件复杂程度自行决定组成的临时性裁判组织，与现代意义上的仲裁庭职能类似。1990年《越南经济仲裁法》并未引入“仲裁庭”的概念，因此，此处使用“仲裁委员会”一词表述。

〔4〕 参见1990年《越南经济仲裁法》第21条。

〔5〕 参见1990年《越南经济仲裁法》第36条。

〔6〕 参见1990年《越南经济仲裁法》第32条。

〔7〕 申诉审理裁决，是指由上级经济仲裁机关根据上诉或监督程序，重新审查下级经济仲裁机关而作出的裁决。

〔8〕 参见1990年《越南经济仲裁法》第6条。

〔9〕 部长会议是越南的国家机关之一，直接领导国家经济仲裁，负责制定有关经济仲裁法的实施细则等工作。

〔10〕 参见1990年《越南经济仲裁法》第34条。

〔11〕 参见1990年《越南经济仲裁法》第27条。

律。该法意义上的经济仲裁机关属于行政机关,仲裁员享有行政官的权力并承担相应责任,仲裁机制的设计与行政机制大体一致,兼具解决纠纷与管理功能。当事人在仲裁管辖权、仲裁员任命、仲裁程序的选择等方面不享有或非常有限地享有意思自治权,司法机关对仲裁没有参与度。由此可见,1990 年《越南经济仲裁法》虽然填补了越南仲裁立法的缺位,标志着仲裁法律制度的确立,但却与现代意义上的仲裁法相去甚远,基本没有体现出仲裁的“民间性”与“自治性”。其规定的仲裁制度主要是通过解决经济合同纠纷对经济性事务进行管理,因此该法并不是一部真正意义上的仲裁法,仅是当时越南不完善的市场经济体制下经济管理的产物。

(二)2003 年《越南商事仲裁条例》[1]

随着越南改革开放的不断深化,除了其国内经济不断发展外,国际贸易与国际投资也逐渐增多,越南政府为了解决投资者之间以及国内外企业间经济纠纷,适应新的发展要求,于 2003 年 2 月 24 日,由越南国务常务委员会审议通过了《越南商事仲裁条例》。该条例于 2003 年 7 月 1 日起正式生效,其开篇明确规定该条例是“为了帮助解决商事活动中出现的纠纷,保证自主经营权,保护当事人的合法权益,发展社会主义市场经济”而制定的。2003 年《越南商事仲裁条例》的颁布使仲裁正式成为国家承认的解决商事活动纠纷的方式;其与 1990 年《越南经济仲裁法》的性质大不相同,具备了现代仲裁立法框架。该条例共有 8 章 63 条,规定了仲裁协议、仲裁员、仲裁中心、仲裁程序和仲裁裁决的撤销、对仲裁裁决的承认和执行等主要内容,尊重当事人的意思自治,完全改变了 1990 年《越南经济仲裁法》所确立的仲裁法律框架。

在管辖范围上,2003 年《越南商事仲裁条例》明确规定仲裁只用于解决由商事活动引发的纠纷;[2]“商事活动”指经营个体、组织进行的单一或多个商事行为,包括商品买卖、服务提供、分配、商贸代理、寄售、租赁、租买、建设、咨询、技术、执照、投资、财政、银行、保险、勘探、开采、空运、海运、铁路、公路运输品、旅客及法律规定的其他商业行为。[3] 该条例将仲裁的适用限于商事纠纷范围,并对“商事活动”进行了明确的预设和列举,这一规定对仲裁的管辖范围进行了限制,相对于其他国家的仲裁法而言比较保守。

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〔1〕 该法的英文名称是“Ordinance on Commercial Arbitration (2003), No. 12/2002/QH11”。

〔2〕 2003 年《越南商事仲裁条例》第 1 条。

〔3〕 2003 年《越南商事仲裁条例》第 2 条、第 3 条。

该条例取消了1990年《越南经济仲裁法》规定的经济仲裁机关,并规定在符合有关政府管理条例的情况下,可在人口聚居地成立仲裁中心,并明确仲裁中心是具有法人地位的非政府组织,[1]赋予仲裁中心民间性。当事人有权选任仲裁员组成仲裁庭。关于仲裁员的资格,2003年《越南商事仲裁条例》的规定详细而严格。根据其第12条的规定,仲裁员必须是越南的公民。因此,只有具备法定资格的越南公民才能被选任为仲裁员,外籍人员在该条例之下不具备仲裁员资格。该条规定限制外籍人员作为仲裁员参与在越南进行的仲裁,限制当事人在仲裁员选任方面的意思自治。

此外,为了保障和纠正当事人的意思自治,2003年《越南商事仲裁条例》将司法支持与监督纳入进来,提升了司法对仲裁的参与度;这主要体现在指定仲裁员、发布临时措施、撤销仲裁裁决、对仲裁裁决的承认与执行等方面。

可以说,2003年《越南商事仲裁条例》是越南第一部现代意义上的仲裁法,具备了仲裁制度的精神内核。尽管其在一些仲裁理念和制度设计上仍不够国际化和现代化,但标志着越南仲裁制度由行政性向商事性的转变。该条例的颁布和实施使从事商事活动的各组织和自然人第一次真正享受到自由选择纠纷解决方式的权利,为越南仲裁制度的不断完善和发展奠定了基础。

(三)2010年《越南商事仲裁法》

2006年越南加入WTO之后,其国内市场得到进一步开放。虽然2003年《越南商事仲裁条例》基本建立了其商事仲裁制度,但这一立法对当事人的意思自治进行了诸多限制,很多规定与国际惯例不一致。尤其是在涉及外方当事人的纠纷中,实践结果并不理想,大量纠纷难以通过仲裁解决。为了缓解司法压力、高效解决商事纠纷,2010年6月17日,越南国会第十二次会议通过了8项法律,其中包括2010年《越南商事仲裁法》。2010年《越南商事仲裁法》在2003年《越南商事仲裁条例》的基础上进行了大量改进和完善,进一步扩大当事人的意思自治权,赋予仲裁庭较大的权限,减少司法机关对仲裁的干预;同时,其增加了仲裁制度的国际性,不断强化仲裁的商事纠纷解决功能。

2010年《越南商事仲裁法》扩大了仲裁适用的范围,不再将纠纷限定于商事主体之间,取消了对商事活动的列举式规定,尤其是将法律规定的其他可仲裁解决的纠纷纳入可仲裁范围,为其他能够适用仲裁解决的契约性或非契约性争议预留了

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〔1〕 2003年《越南商事仲裁条例》第14条、第16条。

空间。比如,依照《越南投资法》的规定,投资争议可以适用仲裁解决。[1] 与 2003 年《越南商事仲裁条例》不同,2010 年《越南商事仲裁法》以仲裁是否根据外国法律或外国仲裁程序规则进行为标准区分国内仲裁和国外仲裁。[2] 同时,外籍仲裁员能够参与仲裁,只要其具备该法规定的仲裁员资格即可。[3] 另外,该法允许外国仲裁组织和机构通过设立分支机构和代表办事处的方式在越南运营。[4] 这些规定都增加了越南仲裁的国际性。

在有关仲裁协议的规定上,2010 年《越南商事仲裁法》取消了 2003 年《越南商事仲裁条例》中“若仲裁协议没有约定仲裁机构或约定仲裁机构不明,则仲裁协议无效”的规定,这体现了对临时仲裁的承认。即使仲裁协议有对仲裁机构约定不明确的瑕疵,也不会导致仲裁协议的绝对无效。因此,在约定仲裁机构不明的情况下,当事人可以进行临时仲裁。若当事人倾向于机构仲裁,则应首先由当事人对特定仲裁机构进行合意;当合意无法达成时,应由有管辖权的法院根据一方当事人的申请来决定特定的仲裁机构。[5]

扩大仲裁庭权限的一个表现是,2010 年《越南商事仲裁法》赋予仲裁庭发布临时措施的权力。[6] 这一规定有利于维护当事人的合法权益,减少当事人的损失,有利于仲裁程序的顺利开展。此外,该法增加了法院在调查取证方面对仲裁的支持,以便于当事人及时固定和收集证据,解决纠纷。

2010 年《越南商事仲裁法》确立了一系列仲裁的新规则,进一步扩大和尊重当事人的意思自治,显示了国家对仲裁大力支持和鼓励的立法态度,是越南商事仲裁迈向国际化的重要一步。虽然其对一些问题的规定有待进一步明确,但已经体现出极大的进步性和向国际商事仲裁发展积极靠拢的趋势,对越南商事仲裁发展具有重要意义。

二、越南仲裁法律制度与实践综述

越南通过修改仲裁立法改变了仲裁的整体格局。仅从用语的变化来看,越南继 1990 年《越南经济仲裁法》之后所颁布的两部仲裁法都直接冠名为“商事仲裁

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〔1〕 Hogan Lovells, Arbitration in Vietnam, 2013.
〔2〕 Law on Commercial Arbitration (2010), Art 3.11.
〔3〕 Law on Commercial Arbitration (2010), Art 20.
〔4〕 Law on Commercial Arbitration (2010), Art 74.
〔5〕 Law on Commercial Arbitration (2010), Art 43(5).
〔6〕 Law on Commercial Arbitration (2010), Art 48.

法”。这清晰表达了该立法的定位,明确其调整的是商事仲裁法律关系,规定的是商事仲裁中的最低程序标准。仲裁作为一种纠纷解决方式被确立,而不是一种辅助式的行政管理手段。

2010 年至今,为了促进仲裁的发展,除颁布 2010 年《越南商事仲裁法》外,越南国务委员会(The national Assembly of Socialist Republic of Vietnam)等国家机关还陆续颁布了 2011 年《越南政府关于适用〈商事仲裁法〉若干问题的规定》〔1〕以及 2014 年《越南最高人民法院关于适用〈商事仲裁法〉若干问题的规定》〔2〕(以下简称《2014 年决议》)。除此之外,与商事仲裁相关的法律规定还有 2015 年《越南民事诉讼法》、〔3〕2008 年《越南民事判决执行法》〔4〕及 2014 年《〈民事判决执行法〉若干条款的修正和补充规定》。〔5〕以上法律共同构成了现有越南仲裁制度的法律框架。其中,2010 年《越南商事仲裁法》主要对仲裁的基本程序事项进行规定;2015 年《越南民事诉讼法》第 7 章对外国仲裁裁决的承认和执行加以规定;而具体的仲裁裁决执行程序则集中规定在 2014 年《越南民事判决执行法》中。下文主要结合以上法律,对越南现行仲裁法律制度进行总体介绍。

2010 年《越南商事仲裁法》共 13 章 82 条,自 2011 年 1 月 1 日起正式生效。该法在一定程度上对《示范法》包括其 2006 年的修正案进行了吸纳,并结合本国实际情况进行了变更,在保留本国特色的同时又具有一定国际性。具体体现在:(1)2010 年《越南商事仲裁法》的范围比《示范法》的范围更广,因为其涵盖了本国地方法院对仲裁活动所享有的权限、国外仲裁机构在越南境内的分支机构的组建及运营,以及仲裁裁决的执行等《示范法》并未规定的内容;(2)2010 年《越南商事仲裁法》将“商事活动”定义为“一切营利性活动”,这不仅包括货物买卖和服务贸易,还包括投资活动以及商业促销活动,力求该定义与国际惯例中的“商事活动”含义相对应,因而对《示范法》规定的可仲裁性进行了扩充;(3)2010 年《越南商事仲

〔1〕 The Government Detailing and guiding A Number of Articles of the Law on Commercial Arbitration, Decree No. 63/2011 ND – CP.

〔2〕 Resolution 01/2014/NQ – HDTP of the Council of Judges of the Supreme People's Court Providing Guidance on Certain Provisions of the Law on Commercial Arbitration.

〔3〕 Civil Procedure Code No. 92/2015/QH13.

〔4〕 Law on Enforcement of Civil Judgments No. 26/2008/QH12.

〔5〕 Law No. 64/2014/QH13 Amending and Supplementing a Number of Articles of the Law on Enforcement of Civil Judgments.

裁法》规定了仲裁解决纠纷的基本原则,[1]对仲裁的国家行政管理,[2]当事人缺席[3]和仲裁费用[4]这些《示范法》中并未涉及的内容;(4)根据2010年《越南商事仲裁法》的规定,临时仲裁需要在越南国内法院进行登记,以增强其在本地的可执行性;(5)2010年《越南商事仲裁法》对仲裁员资格进行了严格规定,保障纠纷得到妥善解决;(6)根据2010年《越南商事仲裁法》的规定,当事人可以要求仲裁庭协助他们达成友好的争议解决方案;[5](7)2010年《越南商事仲裁法》中没有对批准或拒绝当事人的临时措施申请规定明确的条件;(8)《示范法》将违反本国公共政策规定为撤销仲裁裁决的事由之一,而2010年《越南商事仲裁法》使用了“越南法律的基本原则”这一类似的描述,同时,在越南法院拒绝承认与执行仲裁裁决的法定事由中也使用了这一描述。

目前,越南的仲裁法律制度对国内仲裁和涉外仲裁实行“双轨制”。根据2010年《越南商事仲裁法》第14条的规定,对于没有涉外因素的纠纷应适用越南的法律,对具有涉外因素的纠纷则适用当事人选择的法律或仲裁庭认为合适的法律。另外,2010年《越南商事仲裁法》还使用了“外国仲裁”(foreign arbitration)一词,其与“涉外仲裁”实为两个不同概念。2010年《越南商事仲裁法》未明确涉外仲裁的定义,但一般认为,涉外仲裁的实质是其解决的争议具有涉外因素,即在商事关系或者在其他法律关系中发生的含有涉外因素的争议。2015年《越南民事诉讼法》第633条为涉外因素下了定义,即至少一方当事人是外国机构、组织或者个人;或者当事各方均为越南的公民或组织,但是当事人之间法律关系的建立、变更、实现和终止发生在越南境外;或者当事各方均为越南的公民或组织,但此类民事关系的主体在越南境外。2010年《越南商事仲裁法》在定义外国仲裁时采用了准据法标准,即外国仲裁是指根据外国法律或外国仲裁程序规则进行的机构仲裁或临时仲裁。[6]并非所有解决涉外纠纷的仲裁都是外国仲裁。在具有涉外纠纷的当事人选择适用越南法律作为仲裁程序的情况下,解决该纠纷的仲裁虽具有涉外性但仍属于国内仲裁。而在涉外纠纷的当事人选择适用越南法律以外的法律作为仲裁程序时,解

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〔1〕 Law on Commercial Arbitration (2010), Art. 4.
〔2〕 Law on Commercial Arbitration (2010), Art. 15.
〔3〕 Law on Commercial Arbitration (2010), Art. 56.
〔4〕 Law on Commercial Arbitration (2010), Art. 34.
〔5〕 Law on Commercial Arbitration (2010), Art. 38.
〔6〕 Law on Commercial Arbitration (2010), Art. 3.11.

决该纠纷的仲裁才符合2010年《越南商事仲裁法》对外国仲裁的定义。

(一)越南商事仲裁制度的基本内容

1. 可仲裁性

标的的可仲裁性,即仲裁的范围,涉及确定何种类型的争议可以通过仲裁解决,何种类型的争议应被排除在可仲裁范围外而专属于法院管辖范围的问题。只有具有可仲裁性的争议才能进入仲裁程序。

根据2010年《越南商事仲裁法》第2条的规定,除双方均为商事活动当事人之间的纠纷能够通过仲裁解决外,至少一方当事人从事商事活动而引起的纠纷也可以通过仲裁解决。2010年《越南商事仲裁法》还另外设置了"法律规定的其他可以通过仲裁解决的纠纷"作为兜底条款。也就是说,除一般商事纠纷外,对于一方为从事商事活动的当事人,而另一方为非从事商事活动的当事人来说,他们之间的纠纷也可以通过仲裁进行解决,如说消费者与经营者之间的纠纷。从条文来看,2010年《越南商事仲裁法》强调能够仲裁解决的纠纷必须产生于商事活动;而2005年《越南商法典》[1]将"商事"解释为以营利为目的的活动。

2010年《越南商事仲裁法》没有明确规定不可仲裁的事项,但从商事仲裁的普遍经验及越南的相关法律规定来看,不可仲裁的事项包括:由行政行为引起的纠纷和纯粹的具有民事性质的纠纷、刑事性质的纠纷、劳动和婚姻家庭纠纷;另外,还包括在越南境内涉及不动产权利的民事案件。对于在越南设有总机构或分支机构的承运人,由其签订的承运合同而引起的纠纷也不可仲裁,因为此类纠纷专属于越南法院管辖。[2]

在双方当事人签有仲裁协议的情况下,若一方向法院提起诉讼,根据《2014年决议》的规定,法院必须对仲裁协议的有效性进行初步审查。审查要考虑的因素被限制为仲裁协议是否存在和仲裁协议是否能被履行两个方面。设置这种有限审查范围的原因可能是由于民事诉讼案件的具体程序要求法院必须在5日内考虑是否要受理案件。[3] 决议的起草者可能考虑到,在如此短的时间内,法院只能审查是否存在仲裁协议以及仲裁协议是否明显不能履行。在认定存在可履行的仲裁协议后,法院必须拒绝受理该案件;如果该案件已经受理,则要停止该案的程序。[4] 此

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〔1〕 Commercial Law, No. 36/2005/QH11.

〔2〕 Civil Procedure Code No. 92/2015/QH13, Art 470(1).

〔3〕 Civil Procedure Code, Art 191.

〔4〕 Resolution 01/2014, Art 2(2).

外,2010 年《越南商事仲裁法》和《2014 年决议》都没有提及在前述情况下,另一方当事人向法院申请停止该诉讼程序的时限。应当认为,无论当事人是否提起此种申请,法院都应当在得知存在可履行的仲裁协议后拒绝行使管辖权。如果法院在存在可履行仲裁协议的情况下仍继续诉讼程序,则当事人可以在庭审准备期内或在庭审时提出对法院管辖权的异议。[1] 这种管辖权异议可以构成上诉或对法院裁定重审的基础。

2. 仲裁协议

合法有效的仲裁协议对当事人具有约束力,能够排除法院对争议的管辖权,是仲裁庭和仲裁员取得管辖权的依据。

(1)仲裁协议的形式。

2010 年《越南商事仲裁法》没有区分约定将已产生的争议提交仲裁的协议和争议发生前合同中预设的仲裁条款。值得注意的是,如果经营者在向消费者[2]提供商品或服务的格式合同中加入仲裁条款,消费者仍有权选择仲裁或者提交法院解决纠纷,即该仲裁条款只有在消费者同意适用的情况下才产生效力。而在消费者进行选择之前,该预设性仲裁条款不具有法律效力,经营者无权进行单方约定。这一规定加强了对消费者的权益保护,弥补了消费者面对消费格式合同或条款时谈判协商能力的欠缺。

有效的仲裁协议必须满足形式要求。2010 年《越南商事仲裁法》规定,仲裁协议必须具有“书面性”,[3] 电文、传真、电传、电子邮件或法律规定的其他形式、电子合同的法律效力不能因为其以数据电文作为载体这一唯一理由而被否认。[4]因此,以电子方式所创建、传送、接收和存储的信息可以根据电子交易法认定为具有书面形式。此外,有效的仲裁协议也包括:当事方之间的书面沟通;由律师、公证机构或主管机构在双方共同请求下为其拟定的书面协议;在交易过程中当事人对合同、源文件、公司章程或包含仲裁协议的其他类似文件的引用。这种援引本身存在限制,即合同所涉及的争议事项应与该文件中有关可适用仲裁解决争议的情形具有一致性,否则援引无效。此外,双方交换申请书和答辩书的过程中,一方提出具有

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〔1〕 Civil Procedure Code, Art 199(1).

〔2〕 根据《越南消费者权益保护法》第 59/2010 号/QH12,“消费者”,是指购买或使用日常生活所需的消费品或服务的个人、家庭或组织。

〔3〕 Law on Commercial Arbitration (2010), Art 16(2).

〔4〕 Law on E – Transaction No. 31/2005/QH11, Art 34.

仲裁协议而另一方不予否认的，构成有效的仲裁协议。根据上述规定，口头方式达成的或未被记录的仲裁协议不具有书面形式。不满足书面形式要件的仲裁协议可以通过当事人的后续行为来补救，如签署新的仲裁条款，或者明示或默示地同意将争议提交仲裁等。

在仲裁协议的形式要求方面，2010 年《越南商事仲裁法》的规定较为详细，内容上与《示范法》对“书面”的定义一致，〔1〕涵盖了多种情况下仲裁协议的认定方式，增加了当事人依靠仲裁协议将纠纷提交仲裁的可能。

（2）仲裁协议的独立性。

仲裁协议的独立性是普遍接受的原则。“Fiona Trust 案”〔2〕是适用仲裁独立性原则的经典案例。该案中，一方当事人声称有八份合同由贿赂获得，因此这些合同无效，其中的仲裁协议也无效。英国上议院支持了上诉法院的判决，认为应适用仲裁协议的独立性原则，行贿的指控仅指向主合同，不能使仲裁协议无效；此外，因为没有任何证据表明应将关于合同有效性的争议排除在仲裁协议的管辖范围之外，应由仲裁员来决定主合同存在受贿情况时的仲裁协议效力问题，而不是法院。

目前，越南确立了仲裁协议的独立性原则，并明确了应由仲裁庭认定仲裁协议的效力。2010 年《越南商事仲裁法》规定，仲裁协议具有独立性，即主合同的效力不影响仲裁协议的有效性。具体来说，仲裁协议完全独立于合同，任何对主合同的修改、延期或解除，或者主合同的无效或不可执行，均不导致仲裁协议的无效。〔3〕仲裁协议应视为“特殊的协议”，并且只能因与仲裁协议直接相关的事由而可撤销或无效。当然，也存在导致主合同无效的理由与导致仲裁协议无效的理由相同的情况，如当事人不具有行为能力等。

（3）仲裁协议的当事人。

2010 年《越南商事仲裁法》规定，缺乏法律规定的权限或者缺乏民法规定的民事行为能力的人签订的仲裁协议无效。〔4〕

在一方当事人破产的情况下，除非当事人之间另有约定，否则仲裁协议对任何

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〔1〕 UNCITRAL Model Law on International Commercial Arbitration Art. 7(2).

〔2〕 Fiona Trust Holding Corporation v. Privalvo [2007] UKHL 40 on appeal from, and up holding, the Court of Appeal's decision at [2007] EWCA Civ 20.

〔3〕 Law on Commercial Arbitration (2010), Art 19.

〔4〕 Law on Commercial Arbitration (2010), Art 18.

继承了破产当事人权利和义务的主体仍然有效。[1]

争议各方可包括以索赔人或被调查者的身份参与仲裁程序的越南或其他外国的个人、团体或组织。[2] 在一些国家,国家各部委和国家机构参与仲裁并不需要特别的许可。但是,这些部委和机构可能在参与特定的项目时需要适当的许可,以使其有权限签订包括仲裁协议在内的合同。在越南,只有“商事活动”引发的争议才是可仲裁的。

2010 年《越南商事仲裁法》没有规定多方当事人仲裁,[3] 只有一个条款对仲裁涉及有多个被申请人时如何任命仲裁员的情况进行了规定,即所有被申请人都必须在一定时间内就仲裁员的任命达成协议,否则仲裁中心的主席或有管辖权的法院的法官将有权任命仲裁员。[4] 由仲裁中心解决争议的,适用其有关任命仲裁员的仲裁规则。在其他情况下,如在临时仲裁中,可由争议双方合意授权的,或无此合意而由一方请求有资格的法院指定仲裁员。

此外,2010 年《越南商事仲裁法》没有关于第三方参与仲裁的具体条款。由于仲裁庭的管辖权是由当事人的相互合意而获得的,任何人不得被强制参与仲裁。事实上,在越南,并没有关于除申请人和被申请人以外的第三方参与仲裁的判例法或权威立法。

3. 仲裁庭

(1)仲裁员。

仲裁员是仲裁程序的关键,其所组成的仲裁庭主导仲裁活动的进行,对当事人的程序权利和实体权利都具有决定性影响。

由于 2010 年《越南商事仲裁法》没有明确仲裁员名单选任制度,在临时仲裁中,双方当事人可以自由选择仲裁员。在机构仲裁中,当事人则需要依照其选择的仲裁规则的具体规定选择仲裁员。2010 年《越南商事仲裁法》第 27 条第 5 款规定,越南境内设立的仲裁中心应当设有仲裁员名单,以供当事人选择。

2010 年《越南商事仲裁法》规定了比较具体的仲裁员法定资格标准。其第 20

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〔1〕 Law on Commercial Arbitration (2010), Art 5(3); Law on Bankruptcy No. 21/2004/QH11, Art 10.

〔2〕 Law on Commercial Arbitration (2010), Art 3(3).

〔3〕 多方当事人仲裁是仲裁实务中的常见现象,指申请人及/或被申请人方具有多个当事人的仲裁。参见林一飞:《国际商事仲裁法律与实务》,中信出版社 2005 年版,第 130 页。

〔4〕 Law on Commercial Arbitration (2010), Art 40(2), Art 41(2).

条规定,仲裁员必须具有《越南民事诉讼法》规定的完全民事行为能力,同时需要具有相应大学文化程度并至少担任领域相关工作至少5年。另外,虽未能满足上述两个法定条件,但具有更高素质和实践经验丰富的专家也可以被当事人选择作为仲裁员。实践中,一般由选任该专家作为仲裁员的当事人对其资格进行说明和举证。2010年《越南商事仲裁法》没有对仲裁员的国籍进行限制,允许满足上述法定条件的外国人担任在越南境内进行的机构仲裁活动或临时仲裁活动中的仲裁员。但值得注意的是,外国人在越南担任临时仲裁的仲裁员时,需要到其居住地的司法部门进行登记;这实际上又对外国仲裁员参与仲裁形成了一种限制。

与《示范法》完全将仲裁员的选任交由当事人意思自治相比,2010年《越南商事仲裁法》规定了比较严格的仲裁员选任标准。但就越南国内仲裁发展的现状来看,尤其是在越南那些商事仲裁没有被广泛适用的地区,相对严格的仲裁员法定选任标准有助于保证争议解决的高效性,因为依照这一标准选任的仲裁员通常具有比较丰富的仲裁实践经验和熟练的商业逻辑,能够更好地保证仲裁程序的快速顺利进行,并进行公正裁判。

2010年《越南商事仲裁法》禁止在职法官、检察官、在调查机构工作的调查人员、在国家执行机构工作的执行人员和公务人员担任仲裁员,以确保仲裁员的独立性。另外,受到刑事指控或刑事记录尚未被删除者也被排除在仲裁员选任范围之外。

无论是被哪方当事人所指定,仲裁员在仲裁过程中必须保持独立和公正,以确保争议的解决的公正、迅速和及时。[1] 越南的有关法律没有对仲裁员的公正性和独立性进行区分,但越南国际仲裁中心提供了适用于其仲裁员的职业道德规范,其中明确规定了仲裁员的披露义务、公正性义务和独立性义务。[2] 因此,仲裁员有义务在接到选任或指定时向仲裁中心或仲裁庭以及当事人披露任何可能影响其客观公正性的情况。[3] 此义务是持续性义务,仲裁员在仲裁的任何阶段都要遵守。若出现了可能影响仲裁员客观公正性的事由,或者因不可抗力或其他原因导致仲裁员无法继续参加纠纷解决,当事人有权更换仲裁员。依情况不同,更换仲裁员的权力属于仲裁庭剩余成员或仲裁中心主席或法院。若仲裁庭已经成立,由仲裁庭剩

〔1〕 Law on Commercial Arbitration (2010), Art 21.

〔2〕 Code of Ethics of an Arbitrator of Vietnam International Arbitration Centre.

〔3〕 Law on Commercial Arbitration (2010), Art 42.2.

余成员决定仲裁员的更换;剩余成员无法决定的,机构仲裁由仲裁中心主席决定,临时仲裁由有权的法院决定。在机构仲裁中,若仲裁庭尚未成立,由仲裁中心主席决定仲裁员的更换。2010 年《越南商事仲裁法》未提及更换仲裁员的决定是否必须说明理由或以书面形式作出。实践中,仲裁机构的规则,以越南国际仲裁中心(Vietnam International Arbitration Centre,VIAC)2017 年的仲裁规则为例,不要求必须说明理由,但暗示该决定应以书面形式作出决定。[1] 仲裁庭、仲裁中心主席或法院所作出的更换仲裁员的决定为终局,不可上诉。

此外,越南法律不承认任何法官或仲裁员的豁免权。仲裁员对当事人承担责任主要是根据合同法或侵权责任法的一般性原则,如 2010 年《越南商事仲裁法》第 49 条第 5 款就规定了这种民事责任制度:因仲裁员发布不当临时措施而遭受损失的当事人或第三人有权依《越南民事诉讼法》向法院提起民事损害赔偿诉讼。法官的责任规定在其他若干法律条款中,如 2015 年《越南民法典》第 598 条。

(2)仲裁庭的组成。

仲裁庭可根据当事人的约定,由一名或多名仲裁员组成;当事人没有对人数进行约定时,仲裁庭由三名仲裁员组成。[2] 2010 年《越南商事仲裁法》未严格要求组成仲裁庭的仲裁员人数必须为奇数,当事人可对仲裁员人数自由约定;若约定的仲裁庭仲裁员人数为偶数,因而多数裁决不能作出裁决时,仲裁裁决应当按照首席仲裁员的意见作出。[3]

2010 年《越南商事仲裁法》分别规定了在无当事人其他约定或仲裁中心规则其他规定时,各个仲裁中心组成仲裁庭应当遵循的程序,以及临时仲裁应当遵循的仲裁庭组成规则。[4]

(3)仲裁庭的权力。

2010 年《越南商事仲裁法》允许当事人对仲裁解决纠纷的场所进行约定;若当事人未约定,则由仲裁庭综合考虑有利于仲裁员之间协商、证人陈述、寻求专家建议和财产评估等因素,决定该场所,且不限于越南境内。[5]

仲裁庭应当在审理争议事项前,认定仲裁协议是否有效,仲裁协议是否可以履

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〔1〕 2017 Rules of Arbitration of VIAC, Art 17(2).

〔2〕 Law on Commercial Arbitration (2010), Art 39.

〔3〕 Law on Commercial Arbitration (2010), Art 60.

〔4〕 Law on Commercial Arbitration (2010), Art 40, Art 41.

〔5〕 Law on Commercial Arbitration (2010), Art 11.

行,以及仲裁庭是否有管辖权。[1] 仲裁庭有认定案件事实的权力,除与双方当事人会见或讨论以明确纠纷事实外,仲裁庭可依职权或当事人的请求,在当事人在场或已通知当事人的情况下,向第三人查明案件事实。[2] 仲裁庭有充分的自由确定当事人提交的证据的可采性、关联性、重要性和重要性。一般来说,当事人既有权利也有责任向仲裁庭提供证据。仲裁庭有收集证据的权力,根据当事人的请求,仲裁庭有权要求证人提供与解决纠纷有关的信息数据,有权对争议财产的价值进行评估,有权寻求专家建议;后两种方式也可由仲裁庭依职权进行。[3] 对于出具建议的专家,2010 年《越南商事仲裁法》并未规定其资格。与法院取证不同,仲裁庭不必遵循《越南民事诉讼法》规定的证据规则。

根据当事人的申请,若仲裁庭认为有必要,可以要求证人出庭。在大陆法系国家,没有依据表明仲裁庭有权强制证人当庭宣誓作证,越南也不例外。在证人经合法传唤无法定理由而不出庭,且证人缺席对纠纷解决形成障碍时,仲裁庭有权向法院发送传唤证人出席仲裁的书面申请,[4] 证人不得拒绝法院批准的传唤,也就是说仲裁庭传唤证人出庭作证的命令可得到法院的协助和强制执行。另外,2010 年《越南商事仲裁法》未规定证人的听证程序和交叉质询,因此除非当事人另有约定,一般应由仲裁庭酌情进行证人质证程序。

2010 年《越南商事仲裁法》规定了仲裁庭发布临时措施的权力。该权力必须以当事人请求为前提,任何情况下仲裁庭都不得自动采取临时措施。仲裁庭需对临时措施的发布承担责任,有权要求临时措施申请人提供财政担保,其数额应相当于错误临时措施可能导致的损失价值。[5] 仲裁庭有权在一方当事人的请求下,在纠纷解决过程中的任何时候,改变、增加或解除临时措施。[6] 仲裁庭采取临时措施的决定应视为仲裁庭在争议解决过程中的程序性决定,而不应视为裁决本身。临时措施应当根据有关民事判决执行的法律执行。[7]

4. 仲裁程序

2010 年《越南商事仲裁法》规定了有关仲裁程序的一些强制性要求,但是,当事

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〔1〕 Law on Commercial Arbitration (2010), Art 43.
〔2〕 Law on Commercial Arbitration (2010), Art 45, Art 50(3).
〔3〕 Law on Commercial Arbitration (2010), Art 46.
〔4〕 Law on Commercial Arbitration (2010), Art 47.
〔5〕 Law on Commercial Arbitration (2010), Art 49.
〔6〕 Law on Commercial Arbitration (2010), Art 51.
〔7〕 Law on Commercial Arbitration (2010), Art 50(5).

人可以自由决定其他仲裁程序。对于法律和当事人约定的仲裁规则中的非强制性要求,仲裁庭应当灵活处理,保障仲裁程序最大限度依据当事人的协议进行。只要该协议不违反任何禁令,也不违背社会道德,仲裁员必须尊重当事人的协议。[1] 当法律未对某一特定程序事项进行规定且没有提及关于确定适当程序的任何准则时,若当事人也未约定,则一般情况下,仲裁庭有权决定该事项。在任何情况下,仲裁庭都有责任促进当事人行使权利和履行义务,并处理当事人的异议。[2]

(1)仲裁程序的启动。

申请人应将申请书及附随资料提交仲裁机构或在临时仲裁中送达被申请人。若无特别约定,被申请人应在收到申请书及附随资料之日起 30 日内提交或送达答辩书。若被申请人主张纠纷不在仲裁管辖权之内,或者主张不存在仲裁协议、仲裁协议无效或不能履行,应在答辩书中明确提出。[3] 被申请人有就争议提起反请求的权利,反请求应与答辩书一同提交。[4] 仲裁庭作出裁决之前,当事人有权撤回其申请书或反请求。当事人有权更改或增加其申请书、反请求或答辩书,但仲裁庭认为这会造成仲裁裁决困难或拖延,或者超出仲裁协议范围时,有权拒绝该请求。[5] 被申请人不提交答辩状的,不影响仲裁程序继续进行。

在当事人选择机构仲裁时,除非另有约定,仲裁程序的启动时间为收到申请人的申请书之时。在临时仲裁中,启动时间为收到被申请人答辩书之时。[6]

《2014 年决议》规定,在多方当事人达成共同合意,或者仲裁规则有明确规定的情况下,可以对“多个法律关系”进行合并仲裁。[7] “多个法律关系”一词虽然没有法律上的具体定义,但可以理解为足以涵盖同一方和多方当事人之间的多重交易。这一规定简化了由多重合同引发的同类纠纷所适用的仲裁程序,提高了纠纷解决的效率。

(2)仲裁程序的进行。

2010 年《越南商事仲裁法》规定,除非当事人另有约定,仲裁应当秘密进行。[8]

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〔1〕 Law on Commercial Arbitration (2010), Art 4(1).
〔2〕 Law on Commercial Arbitration (2010), Art 4(3).
〔3〕 Law on Commercial Arbitration (2010), Art 30, Art 35.
〔4〕 Law on Commercial Arbitration (2010), Art 36.
〔5〕 Law on Commercial Arbitration (2010), Art 37.
〔6〕 Law on Commercial Arbitration (2010), Art 31.
〔7〕 Resolution 01/2014, Art 7(4).
〔8〕 Law on Commercial Arbitration (2010), Art 4(4).

这意味着,要保证仲裁的程序和争议本身的保密性。和英国法律相同,越南法律没有区分隐私和保密性。除非仲裁庭需要根据越南法律向主管国家机关提供有关信息,否则仲裁庭有义务对当事人提交的材料和其所披露的信息以及案件的内容保密。但是,越南法律是否规定当事人有同等义务尚不清楚。有关仲裁裁决在执行程序中的保密性问题也尚未解决。目前,除了规定保护国家秘密的法律之外,越南没有其他可适用的隐私权保护立法。

申请人未经仲裁庭同意,或经合法传唤而无法定理由未出席的,视为撤回申请。若此时存在反请求,且被申请人要求继续审理的,仲裁庭应继续审理。仲裁庭也可依照当事人的要求进行书面审理。[1] 若存在法定理由,当事人可书面申请仲裁庭延期开庭,说明理由并提交证据;该申请应至少在开庭前 7 个工作日前送达仲裁庭。[2]

(3)仲裁程序的终止。

2010 年《越南商事仲裁法》规定在下列情况下仲裁程序终止:申请人或被申请人死亡、终止运营、破产、解散、合并、分立,且没有人或机构继承其权利义务;申请人撤回申请或申请依法被视为撤回,被申请人要求继续解决纠纷的除外;当事人合意终止仲裁程序;法院裁定纠纷不在仲裁庭管辖权之内,或者没有仲裁协议或仲裁协议无效或无法履行。终止仲裁程序的决定应由仲裁庭作出,或者在仲裁庭未成立时由仲裁中心主席作出。除了撤回申请和法院裁定无效仲裁协议的情况外,仲裁程序终止后,若无新事实新情况,当事人无权将同一纠纷再次提交仲裁。[3]

5. 仲裁裁决

仲裁裁决应按照多数意见作出;若无法达成多数意见,则按照首席仲裁员的意见作出。[4] 2010 年《越南商事仲裁法》未对反对意见进行规定,但从多数表决原则来看,不同意见或反对意见的存在并不影响仲裁裁决的事实认定。此外,若有仲裁员未签署仲裁裁决,仲裁裁决仍然有效,但必须由首席仲裁员记录该事实并说明理由。仲裁裁决应当庭作出或不迟于庭审结束后 30 日内作出。[5] 由于 2010 年《越南仲裁法》没有对此类延期作出任何弹性规定,因此即使当事人同意也不得延长此

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〔1〕 Law on Commercial Arbitration (2010), Art 56.

〔2〕 Law on Commercial Arbitration (2010), Art 57.

〔3〕 Law on Commercial Arbitration (2010), Art 59.

〔4〕 Law on Commercial Arbitration (2010), Art 60.

〔5〕 Law on Commercial Arbitration (2010), Art 61.

期限,仲裁庭逾期作出仲裁裁决,将违反2010年《越南商事仲裁法》。

当事人有权自收到仲裁裁决作出之日起30日内,申请仲裁庭更正裁决中明显的拼写或计算错误,且有权申请仲裁庭对裁决中特定内容或条款作出解释。仲裁庭也可自行在仲裁裁决作出之日起30日内依职权进行更正。若当事人发现有仲裁裁决未记录的已裁决事项,可申请仲裁庭补充仲裁。除仲裁庭自行更正仲裁裁决外,上述30日的期限可由当事人另行约定。仲裁庭更正和解释裁决的法定期限为自收到申请之日起30日内,补充裁决的法定期限为自收到申请之日起45日内。必要时,仲裁庭可将这些期限延长。另外,任何对仲裁裁决的更正、解释与补充都必须通知当事人。[1] 可见,当事人只能在法定期限内向仲裁庭申请对仲裁裁决的更正、解释和补正,法院并不参与这一过程。

仲裁裁决为终局,对各方当事人具有约束力。除当事人自愿执行仲裁裁决外,强制执行仲裁裁决的具体内容并没有直接规定在2010年《越南商事仲裁法》中,而是要依照法律有关执行民事判决的规定执行。[2]

2010年《越南商事仲裁法》规定了撤销仲裁裁决的法定情形:无仲裁协议或仲裁协议无效;仲裁庭的组成不符合当事人约定或本法规定;纠纷不属于仲裁管辖范围,仲裁裁决中包含仲裁管辖外内容的部分应被撤销;仲裁依据的证据系伪造,或者存在仲裁员收受贿赂或有其他影响仲裁客观性公正性的情形;仲裁裁决与越南法律基本原则相冲突。除最后一项由法院自行收集和查验证据外,其余均由提出撤销裁决之诉的起诉人进行举证。[3] 提起撤销仲裁裁决之诉的法定期限为收到仲裁裁决之日起30日内。[4]

6. 仲裁的司法协助与监督

2010年《越南商事仲裁法》的出台标志着司法对仲裁制度的大力支持。对仲裁的司法监督大幅度减少,有关规定也多是关于司法对仲裁活动的协助。根据《2014年决议》的规定,任何依照2010年《越南商事仲裁法》被定义为“外国仲裁”的仲裁,在越南境内进行时仍受到越南法院的支持与监督。除撤销仲裁裁决要依照当事人选择适用的外国法律或程序规则外,这种法院的协助与监督权的范围基本与越南国内仲裁一致。

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〔1〕 Law on Commercial Arbitration (2010), Art 63.

〔2〕 Law on Commercial Arbitration (2010), Art 67.

〔3〕 Law on Commercial Arbitration (2010), Art 68.

〔4〕 Law on Commercial Arbitration (2010), Art 69(1).

值得注意的是,2010 年《越南商事仲裁法》允许当事人对协助和监督仲裁进行的管辖法院进行约定,但将可约定的法院限定为中央和省级的人民法院。若当事人没有约定有管辖权的法院,则依据地域管辖原则确认有权的法院。[1] 因此,只要当事人对管辖法院进行了约定,则无论是对仲裁的协助还是对仲裁的监督,均由该法院来实施。这一规定将当事人意思自治进一步扩大到司法协助与监督领域,简化了仲裁的司法协助和监督程序,具有突破性。

(1)司法协助。

2010 年《越南商事仲裁法》承认临时仲裁的效力,并为临时仲裁提供大量司法协助。临时仲裁中选任仲裁员时,若期限届满仍无法选定仲裁员,且当事人无其他约定时,有权法院可依当事人申请指定仲裁员、首席仲裁员或独任仲裁员。[2] 更换仲裁员时,若临时仲裁庭的剩余成员无法作出决定,或者多个仲裁员或独任仲裁员需要被更换,由有管辖权的法院决定仲裁员的更换。[3]

有管辖权的法院可以对仲裁庭发布临时措施加以协助。除 2010 年《越南商事仲裁法》规定的临时措施外,2015 年《越南民事诉讼法》第 114 条还规定了专属于法院发布的临时措施。但是,《2014 年决议》第 12 条第 2 款明确规定,在仲裁程序中,有权法院只可以发布与仲裁庭有权发布的相同类型的临时措施,除非当事人另有约定。若当事人已向法院申请采取临时措施,又向仲裁庭申请的,仲裁庭应当拒绝;若当事人向仲裁庭申请采取临时措施后又向法院申请的,法院应当拒绝。法院只能在仲裁程序开始之后,即当事人提交了仲裁申请书后,采取临时措施。在当事人提交申请书之后、仲裁庭组成之前,由法院在当事人利益被侵犯或有被侵犯的直接危险时采取临时措施。仲裁程序开始前的情况不在 2010 年《越南商事仲裁法》规定之列。

此外,有管辖权的法院还对仲裁中的证据收集、证人传唤进行协助。

(2)司法监督。

在宏观层面上,越南司法部应就国家对仲裁的行政管理负责。[4] 具体到仲裁程序中,2010 年《越南商事仲裁法》赋予当事人对仲裁庭作出的有关是否存在仲裁协议、仲裁协议是否无效、仲裁协议是否无法履行以及仲裁庭是否有管辖权的决定

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〔1〕 Law on Commercial Arbitration (2010), Art 7.

〔2〕 Law on Commercial Arbitration (2010), Art 41.

〔3〕 Law on Commercial Arbitration (2010), Art 42(4).

〔4〕 Law on Commercial Arbitration (2010), Art 15(3).

的申诉权。有管辖权的法院应当对当事人有关上述事项的申诉进行审查,法院对申诉的审理不影响仲裁的继续进行。[1]

临时仲裁作出的仲裁裁决在向有权的民事执行机构申请组织执行之前,应由裁决作出地的法院进行登记,以确保仲裁裁决的真实性。

对仲裁裁决的撤销集中体现了司法对仲裁的监督。撤销仲裁裁决之诉由法院审理、检察院监督。有权法院受理当事人申请撤销仲裁裁决的诉讼后,应通知有关仲裁机构、临时仲裁的仲裁员、当事人及同级检察院。法院应在开庭前7个工作日前将文件转交检察院审查。诉讼由三名法官组成合议庭审理,同级检察院应出席听审。法院应在作出判决之日起5个工作日内,将判决送达当事人、仲裁中心或临时仲裁的仲裁员,以及同级检察院。法院的判决为终局且具有执行力。[2]

对仲裁裁决的承认执行是司法监督的另一主要体现,其中也涉及检察院的监督,相关内容将在下文进行分析。

除以上司法监督内容之外,仲裁的其他过程中,司法机关均不对仲裁活动进行干预,也不对仲裁庭作出的任何决定进行司法审查。

(二)越南商事仲裁制度的特征

通过以上分析可知,越南商事仲裁制度具有以下三个特征。

第一,越南商事仲裁制度体现出明显的国际化特征。2010年《越南国际商事仲裁法》总体的仲裁程序设计吸纳了《示范法》及其2006年修正案的有关内容,并结合本国实际进行了修改完善。在仲裁裁决的承认与执行方面,吸纳《纽约公约》这一仲裁领域重要国际公约的内容。越南通过推进仲裁法改革工作,转变了传统仲裁立法思路,接纳国际社会先进立法经验,逐步建立起与国际社会接轨的现代仲裁法体系。

第二,越南的商事仲裁制度保留了开放性和灵活度。越南现行仲裁法体系充分体现现代仲裁的自治性特点,尊重当事人意思自治,赋予当事人在诸多事项上的自由选择权,尤其是允许当事人自由选择协助和监督仲裁的有权法院这一规定,将当事人的意思自治进一步扩大至仲裁司法干预的层面上。越南就仲裁涉及的多方面事项采取了较为灵活的立法方式,确保对当事人纠纷解决意愿最大限度的尊重。如当事人可以自由选择依法仲裁或友好仲裁,也可以自由选择临时仲裁

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〔1〕 Law on Commercial Arbitration (2010), Art 44.

〔2〕 Law on Commercial Arbitration (2010), Art 71.

或机构仲裁。

第三,越南商事仲裁制度体现了服务性导向。2010 年《越南商事仲裁法》以及 2011 年《越南政府关于适用〈商事仲裁法〉若干问题的规定》细化了仲裁中心的设立标准和运营要求,进一步规范国内仲裁市场,并在机构设置、人员培训、部门协调方面给予仲裁诸多支持,这有助于提升国内仲裁服务整体水平。同时,2010 年《越南商事仲裁法》允许外国仲裁机构在本国境内设立分支机构或代表处进行运营,明确了国内市场的对外开放程度,促进本国在国际商事仲裁方面的发展。

(三)越南的投资仲裁制度

2014 年《越南投资法》第 14 条"关于投资活动中的纠纷"第 4 款规定:"国外投资商与国家职能部门之间发生的、与在越南领土上的投资活动相关的纠纷,可通过越南仲裁或法院解决。国家职能管理部门与外国投资商之间签订的合同或越南作为成员的国际条约中另有规定的场合除外。"

越南并非《解决国家与其他国家国民之间投资争端公约》(以下简称《ICSID 公约》)成员国,但这并不意味着在越南境内产生的投资争端不能提交 ICSID 仲裁解决。

以我国为例,《中华人民共和国政府和越南社会主义共和国政府关于鼓励和相互保护投资协定》(以下简称《协定》)于 1993 年 9 月 1 日正式生效,其中的第 8 条规定:缔约国一方的投资者与缔约国另一方之间就在缔约国另一方领土内的投资产生的争议应尽量由当事方友好协商解决;如果争议在 6 个月内未能协商解决,当事任何一方有权将争议提交受投资的缔约国一方有管辖权的法院。据此,中国投资者就在越南直接投资产生的纠纷如不能通过协商解决,则只能将纠纷提交越南法院处理。

但同时,《协定》规定,涉及征收补偿款的争议,在协商 6 个月内仍未能解决的,可将争议提交仲裁庭。该仲裁庭应按下列方式逐案设立:争议双方应各任命一名仲裁员,该两名仲裁员推选一名与缔约国双方均有外交关系的第三国国民为首席仲裁员。如在规定的期限内,仲裁庭尚未组成,争议任何一方可提请依照《ICSID 公约》下设立的 ICSID 的秘书长作出必要的委任。仲裁庭的裁决以多数票作出;裁决是终局的,对争议双方具有约束力;缔约国双方根据各自的法律应对强制执行上述仲裁裁决承担义务。仲裁庭应根据接受投资缔约国一方的法律(包括其冲突法规则)、《协定》的规定以及缔约国双方均接受的普遍承认的国际法原则作出裁决。争议各方应承担其委派的仲裁员和出席仲裁程序的费用;首席仲裁员的费用和仲裁

庭的其余费用应由争议双方平均负担。

我国是ICSID成员国,但越南并非ICSID成员国。从表面看来,我国当事人与越南当事人之间关于私人海外投资争端提交ICSID中心进行仲裁,并不符合《ICSID公约》关于适格的争端当事人的规定。《ICSID公约》第25条规定:“……中心的管辖权适用于缔约国(或缔约国指派到中心的该国的任何下属单位或机构)与另一缔约国国民之间因直接投资而产生并经双方书面同意提交给中心的任何法律争议……”但是,《中华人民共和国政府与东南亚国家联盟成员国政府全面经济合作框架协议投资协议》第14条对缔约方与投资者间争端解决作出详细规定:“……如果按第三款规定提出磋商和书面请求后6个月内,争端仍未解决,除非争端所涉方另行同意,则应当根据投资者的选择,将争端:……(三)如果争端所涉及的缔约方和非缔约方所涉缔约方其中之一为国际投资争端解决中心公约的成员国,则可根据国际投资争端解决中心附加便利规则提交仲裁;或(四)根据《联合国国际贸易法委员会规则》提交仲裁;或(五)由争端所涉方同意的任何其他仲裁规则进行仲裁。”也就是说,在进行了充分磋商和谈判、仍不能解决投资争端的情况下,除非另有约定,就争端解决方式进行选择的权利由投资者单方享有,如果选择以仲裁解决投资争端,则可以在一方缔约方为《ICSID公约》成员国的条件下根据《ICSID附加便利规则》提交仲裁,或者根据《联合国国际贸易法委员会规则》或争端所涉方同意的其他仲裁规则进行仲裁。

可见,越南整体上鼓励通过仲裁的方式解决投资争端,投资者既能够与越南政府通过合意的方式选择其他仲裁机构,也可以根据越南与其他国家签订的双边投资协定等援引ICSID仲裁解决投资争端,但是这一援引的前提必须是另一缔约国为《ICSID公约》的成员国,并且能够被援引的规则只能是《ICSID附加便利规则》。

(四)越南商事调解法律制度

调解是越南社会常用的纠纷解决方式,在越南有相当长的发展历史。然而在立法层面,调解在越南是一个新课题,因为长久以来,越南并没有制定有效的统一的调解法,有关调解的法律规定散见于不同法律或法律性文件中。

目前,越南大力推进司法改革,要求鼓励采取ADR方式来解决纠纷,而调解和仲裁是其中最主要和有效的两种方式。越南司法部曾在2015年起草了《越南贸易调解法令》,旨在为建立和发展可独立解决贸易纠纷的贸易调解服务提供法理基础。当时通过调解解决贸易纠纷的方式已在越南的多部规范性经济法律文件和越南签订的国际条约中有所体现,但只是提出了总体原则,并没有关于调解员、专业

调解机构、调解程序和调解手续等内容的具体规定和说明。实践中,一些组织和企业总是先使用调解方式,解决不成才会申请仲裁或者到法院起诉;但由于没有法律支撑,该做法仍缺乏可操作性和普遍性。随着越南国际贸易的不断增多,地区和国际专业调解服务业务逐渐建立并在越南稳定发展。专业的贸易调解活动始于2007年VIAC公布其《VIAC调解规则》,但遗憾的是该规则仅解决了5起贸易纠纷,并未充分发挥作用,大量的贸易纠纷仍无法得到有效解决。在这种形势下,为形成贸易纠纷解决机制的多样化,减轻法院诉讼压力,营造良好、稳定的投资经营环境,推动融入国际进程,越南政府决定制定《越南贸易调解法令》。该法令的草案共有7章38条,包括关于贸易调解员、贸易调解服务机构、程序、贸易调解手续、外国驻越南贸易调解机构的活动等具体规定。越南鼓励当事方使用调解机制解决贸易纠纷。

有了一定调解立法的经验,为进一步扩大调解的适用范围,越南始终鼓励争议各方通过调解解决商事纠纷和法律规定的其他纠纷,还鼓励调动一切现有资源进行商事调解活动和调解专业培训,以提高调解员和商事调解机构的业务水平。

1. 商事调解

从目前越南的国内立法来看,越南政府于2017年2月24日发布了《越南商事调解法令》(Government's Decree No. 22/2017/ND - CP),这是现行有效的有关商事调解的最新法律文件。该法令于2017年4月15日正式生效,是有关商事调解的第一个政府法令。该法令受到《联合国国际贸易法委员会国际商事调解示范法》(以下简称《调解示范法》)的启发,但也结合越南国情进行了一些修改。从起草过程来看,这一法令不仅引起了来自越南的专家和实践者的注意,也受到了国际社会的关注。

《越南商事调解法令》共有6章44条,规定了商事调解纠纷解决机制的适用范围、原则、规则和程序,规定调解员、调解机构、外国调解机构在越南境内的代表办事处和国家对商事调解活动的监督管理等内容。当事人自行进行的调解,或者由法令规定的调解员、调解机构或外国调解机构在越南境内的代表办事处以外的其他机构、组织和个人进行的调解,可以依照当事人的约定依照越南法律进行,但不受法令规定的限制。

由于统一的调解立法长期空缺,该法令很大限度上受到了2010年《越南商事仲裁法》的影响。下面就《越南商事调解法令》的主要规定进行简要分析。

(1)商事调解的适用范围与原则。

该法令与2010年《越南商事仲裁法》在适用范围上具有一致性。该法令规定,

调解仅适用于商事性质的纠纷、至少一方当事人从事商事活动的纠纷或其他法律明确规定的能够适用商事调解的纠纷。[1] 根据越南法律,“商事活动”,是指为了产生利润而进行的活动,包括货物的买卖、提供服务、投资和商业促销。目前,只有在这种范围内的纠纷才能通过商事调解来解决。虽然该法令的适用范围比《调解示范法》中预见的范围要窄,但它可以涵盖几乎所有目前常见的商事纠纷。此外,随着《越南商法典》和其他实体法的修改,预计该法令的适用范围会在不久的将来扩大,很可能明确地通过调解来进一步解决商事领域的各种纠纷。

要通过调解解决商事争议,争议各方必须协商一致,在争议发生前或者争议解决前的任何时候,均可以通过调解解决争议。争议各方参与调解应完全自愿,在权利义务方面完全平等。除非当事人另有约定或者法律另有规定,否则与调解案件有关的信息应当保密。此外,调解协议的内容不得违反禁止性规定、社会公德、强制义务,不得损害第三方合法权益。

(2)调解员资格、外国调解员的执业和外国调解机构在越南的代表办事处。

《越南商事调解法令》对调解员提出了相当严格的要求。具体而言,除了一般的道德标准外,调解员必须具有大学或更高的学历和至少两年的相关领域工作经验。此外,调解员需要具备调解技能以及法律理解能力、商业知识和商业实践。[2] 同时,任何正在被刑事起诉或正在服刑或服刑期满但犯罪记录仍未被清除的人,或者被施加行政措施而强制劳教或强制戒毒的人,不得作为商事调解员。[3] 这些要求类似于2010年《越南商事仲裁法》规定的仲裁员资格要求,但其对调解员并没有职业上的限制。尽管有这些严格的标准,相关规定却缺乏相应的调解员资格认证制度。《越南商事调解法令》的出台有利于促进机构调解和临时调解的发展。相应地,调解员可以选择列名于调解机构的调解员名单中,也可以作为临时调解员自由执业,或二者兼具。[4]

该法令虽然对调解员的国籍没有明确限制,但其设置了一个壁垒,就是要求临时调解员向他们居住地的司法部门进行登记。在该规定之下,外籍调解员在越南自由执业的机会受到了很大限制。原则上,在越南境内无居所的外籍调解员不能在越南自由执业。在越南进行临时调解时,当事人或者请求越南的调解机构从其

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〔1〕 Decree on Commercial Arbitration (2017), Art 2.

〔2〕 Decree on Commercial Arbitration (2017), Art 7.1.

〔3〕 Decree on Commercial Arbitration (2017), Art 7.4.

〔4〕 Decree on Commercial Arbitration (2017), Art 7.2.

调解员名单中选派调解员，或者自行从司法部公布的调解员名单中进行选择，而不能任意选择名单外的调解员，否则可能面临所选调解员不具备在越南的执业资格，而被法院认为和解协议达成具有程序瑕疵，进而影响和解协议的承认执行的后果。因此，当事人在临时调解中选择合适的调解员可能比较困难，因为根据该法令规定所能选择的调解员十分有限，而这些调解员有可能不像专业的国际调解员那样熟练和经验丰富。但受到2010年《越南商事仲裁法》的影响，以及越南加入WTO时的承诺，该法令鼓励外国调解机构在越南开设分支机构或代表机构。此外，国际调解机构的分支机构可以设立自己的调解员名单，只要调解员符合法令规定的一般资格。这一规定将有助于越南对国际调解机构开放市场，在一定程度上也能够缓和临时仲裁员执业登记制带来的风险。

根据《越南商事调解法令》，调解员享有下列权利：接受或拒绝进行商事调解活动；拒绝提供与争议有关的任何信息，除非当事人书面同意或依据法律的要求；就调解活动依法获得报酬；法令或其他法律规定的权利。相应地，调解员具有下列义务：遵守法律和调解员的道德规范和行为守则；以独立、公正、客观和诚实的方式工作；尊重争议方达成的协议，不得违反法律和社会公德；无当事人特别约定或者法律规定时，对涉及纠纷的信息严格保密；在调解开始前，通知当事人有关调解员的职权、报酬和调解费用等信息；除非当事人另有约定，调解员不得作为任何一方当事人的代理人或法律顾问，也不可在同一纠纷的仲裁程序中担任仲裁员；法令和有关法律规定的其他义务。同时，该法令再次强调禁止调解员在未经当事人同意或依照法律规定的情况下对外披露调解事项或当事人信息，禁止调解员收受贿赂。与仲裁相比，调解的自治性更强，司法机关对其监督相对较少，但这些特点相应地决定了调解需要更强的保密性，因此，调解员必须严格遵守相关规定，以便在调解不成，当事人再进行仲裁或诉讼时，防止因案件信息的提前披露而使仲裁员或法官产生先入为主的印象，影响公正性。

（3）调解的规则和程序。

调解程序启动的前提是当事人之间签订了单独的调解协议或合同中有调解条款；与仲裁协议一样，调解协议必须具有书面性。[1] 调解所适用的程序、调解员的选任、调解地点、调解的时限等事项均由当事人合意决定。[2]

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〔1〕 Decree on Commercial Arbitration (2017), Art 11.

〔2〕 Decree on Commercial Arbitration (2017), Art 13.

当事人既可以选择调解机构的调解规则,也可就调解适用的规则和程序进行合意;当无法达成这种合意时,由调解员根据纠纷的具体情况和当事人的意愿,以其认为适当的程序进行调解。[1]

调解成功后,当事人应当签订书面和解协议,该和解协议对当事人有约束力。若调解不成,当事人可以选择继续进行调解、进行仲裁或向法院起诉以解决纠纷。[2]

(4)和解协议的承认与执行。

和解协议的执行力是决定调解成功与否最重要的因素。因此,为了保障和解协议的可执行性,经调解达成的和解协议应首先由法院予以承认。《越南商事调解法令》规定了承认调解和解协议的机制,即应根据2015年《越南民事诉讼法》第33章(第416条至第419条)规定的程序,由一方或双方当事人请求将该协议转化为法院的民事判决,再由相应国家机关执行该判决。[3] 但是,这种承认机制只适用于根据法令的规定进行调解而达成的和解协议。因此,由例如新加坡调解中心(SIMC)、有效争议解决中心(CEDR)等外国调解中心调解达成的和解协议尚不适用这些规定,除非该和解协议是由外国调解中心在越南合法设立的代表机构进行调解而达成的。

(5)调解与仲裁的关系。

2010年《越南商事仲裁法》第9条、第38条和第58条都是关于仲裁中的协商与调解的规定。其中,第9条规定的是仲裁过程中的协商和调解。也就是说,若当事人申请了仲裁,即使是在仲裁程序启动之后,当事人仍保留自行达成解决纠纷的协议这一权利;在纠纷有调解的可能性时,当事人可以随时自行调解以期纠纷的解决。该法第38条规定的是仲裁过程中的协商,强调的是当事人有权利在仲裁程序启动之后,就终结纠纷解决程序达成协议,并据此请求仲裁中心主席作出停止仲裁程序的决定,即当事人在达成和解后,继续仲裁对纠纷解决已无现实必要,当事人有权终止仲裁程序,降低纠纷解决成本。该法第58条规定了仲裁过程中的调解,即应当事人请求,仲裁庭可启动调解程序以协助双方当事人解决争议。当双方当事人达成协议时,仲裁庭应当制作调解协议,并由当事人和仲裁员签字。仲裁委员会

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〔1〕 Decree on Commercial Arbitration (2017), Art 14.

〔2〕 Decree on Commercial Arbitration (2017), Art 15.

〔3〕 Decree on Commercial Arbitration (2017), Art 16.

作出确认调解成功的决定。这一决定是终局的、有执行力的，与仲裁裁决的效力相同，对各方当事人具有约束力。

可见，2010 年《越南商事仲裁法》规定的仲裁过程中的调解分为两种：第一种是双方当事人通过自行协商达成解决纠纷的协议；第二种是由仲裁庭根据当事人的请求对纠纷进行调解，使双方达成和解协议。对于第一种调解，其与正在进行的仲裁是两个平行的程序，当事人对仲裁的选择不当然意味着对各方自行调解达成和解权利的放弃，调解程序的开始也不会中止仲裁程序，两个程序可以同时进行，进行过程中互不影响，只是在当事人自行达成和解协议后，可以请求仲裁庭终止仲裁程序，避免不必要的支出。这体现出商事纠纷解决方式的多层性，不仅能够提高纠纷顺利解决的概率和效率，也节省了纠纷解决的成本。第二种调解是由仲裁庭进行的调解，仲裁庭的这种调解必须依据双方当事人请求进行；该法未规定仲裁庭可以主动对纠纷进行调解。在这种情况下，仲裁庭调解达成的和解协议将以决定的形式被确认，与仲裁裁决具有同等法律效力，对各方当事人具有约束力。

可见，调解既可以与仲裁分别进行，也可以嵌入仲裁程序之中。具体的适用方式由当事人根据实际情况来自行选择。

2. 投资调解

除了建立国内商事调解法律框架外，从国际法层面来看，越南也是最早加入新一代自由贸易协定的东盟国家之一，通过调解促进和细化投资争端的解决。越南与欧盟于 2015 年 12 月签订了《欧盟—越南自由贸易协定》（EVFTA），这一协定与《欧盟—新加坡自由贸易协定》类似但更进步，被认为是欧盟与发展中国家缔结的最全面、最具生命力的自由贸易协定，对于国家和投资者之间、国家和国家之间的调解发展起到了积极作用。

在 EVFTA 之下，任何一方在解决投资者与国家争端的过程中，都可以邀请另一方按照其规定的程序进行调解。EVFTA 中关于调解的具体规定体现了欧洲和越南立法者对通过调解解决投资争端的特别关注。显然，这一协定表明，越南正在逐渐适应这种利于投资纠纷解决的新趋势，而这一趋势也将对越南商事调解的整体发展产生积极的影响和进一步的促进作用。

从越南调解制度的现状来看，商事纠纷领域和投资纠纷领域的调解都得到了越南立法者的高度关注。在国内和国际层面，越南都试图制定一个相对健全的法律框架，作为调解制度未来发展的基石。尽管还存在很多缺陷，但新的立法将使越南的调解更加接近国际惯例的标准；这将有助于调解成为解决商事争议的有效方

法。越南的调解已经迈出了走向标准化、国际化的关键一步。另外,从《越南商事调解法令》的具体内容上看,这一新调解立法实际上会为仲裁提供更多支持而不是与仲裁形成竞争或对抗关系,因为调解与仲裁都属于诉讼之外的纠纷解决方式。以立法确立的调解法律制度将促进多层次纠纷解决机制的建立,这也符合越南政府大力推进 ADR 的司法改革政策。因此,可以预期,新的调解法律框架带来的便利以及越南法院和政府的支持将会使越南的调解制度在不久的将来蓬勃发展。

三、越南主要仲裁机构

目前,越南共有 19 个仲裁中心。为越南被当事人约定选择最多的仲裁机构是 VIAC。VIAC下设于越南工商部,依据越南社会主义共和国总理发布的 1993 年 4 月 28 日 No. 204/TTg 决定,合并了 1963 年成立的对外贸易仲裁委员会和 1964 年成立的海事仲裁委员会,于 1993 年正式成立。与前述两个机构的性质不同,VIAC 是独立的非营利性机构,旨在促进纠纷解决方式和纠纷解决替代方式的发展。[1] VIAC是越南境内声誉卓越的仲裁机构,在其国内外商界信赖度很高。1996 年 2 月 16 日,越南总理又签发了一项编号为 No. 114/TTg 的决定,主题为“进一步扩大越南国际仲裁中心受理争议纠纷的管辖权”。[2] 如果纠纷双方当事人同意将争议提交 VIAC 解决,应当允许 VIAC 扩大纠纷解决管辖权。目前,VIAC 共有 155 名信誉良好的仲裁员(其中包括 30 名非越南籍仲裁员)。[3]

VIAC 对商事活动中出现的纠纷拥有管辖权。作为一个仲裁管理机构,VIAC 致力于业务开展的公正性和透明性。同时,VIAC 希望建立一个客观、公平、可靠的纠纷解决机制,并确保其有效性和便利性,为当事人提供更优质的服务。截至 2016 年,VIAC 新增案例 155 件,达到了成立以来的最高峰(见图 6 - 1)。[4] 此外,经由 VIAC 处理的涉外仲裁案件呈逐年上升趋势,尤其是 2012 年至 2016 年,VIAC 每年

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〔1〕 载 http://eng. viac. vn/about - us/gioi - thieu - chung - a164. html,最后访问日期:2018 年 5 月 8 日。

〔2〕 载 http://www. asianlii. org/vn/legis/laws/oetcoviacisd865/,最后访问日期:2018 年 6 月 10 日。

〔3〕 载 http://eng. viac. vn/vietnamese - arbitrators - p2. html - trang - 13,最后访问日期:2019 年 6 月 24 日。

〔4〕 See “Vietnam International Arbitration Centre Report on Summarizing Activities in 2016”,http://eng. viac. vn/statistics/vietnam - international - arbitration - centre - report - on - summarizing - activities - in - 2016 - a445. html,July 28,2018.

处理的涉外仲裁案件数量甚至超过了越南国内仲裁案件(见图 6 – 2)。[1] 这些变化显示出 VIAC 在越南作为最主要仲裁机构的地位。近年来,VIAC 开展了更多涉外业务,积累了大量处理涉外仲裁案件的实践经验。由于其所处理案件主要涉及东南亚国家,因而在东盟纠纷方面别具优势。

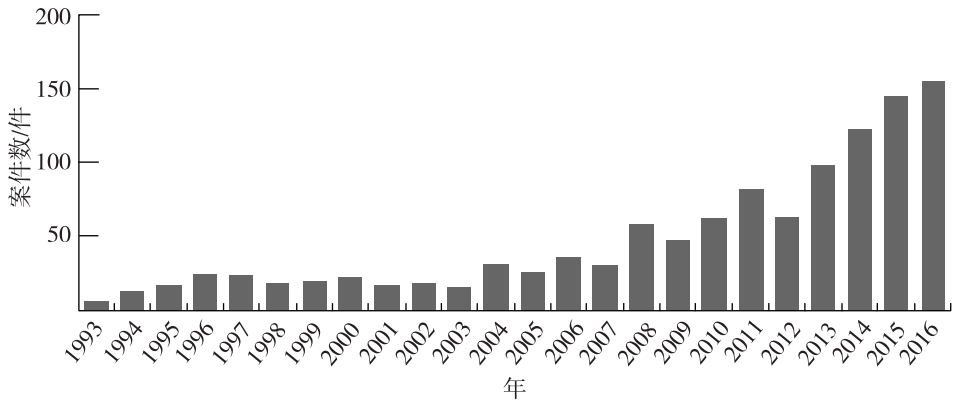


图 6 – 1　1993 ~ 2016 年 VIAC 案件数

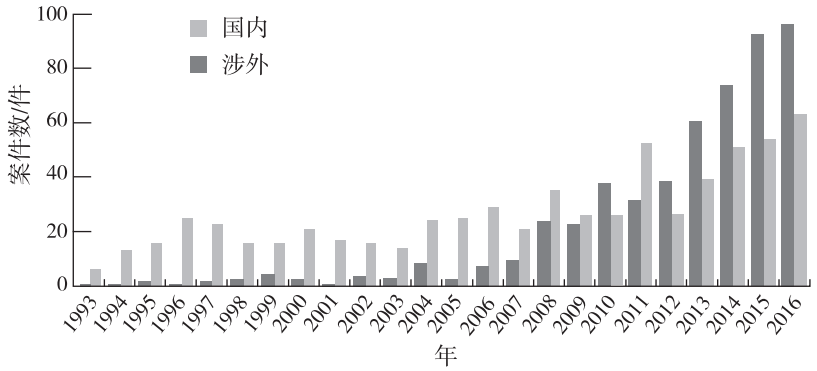


图 6 – 2　1993 ~ 2016 年 VIAC 国内和涉外案件数

〔1〕 See "Vietnam International Arbitration Centre Report on Summarizing Activities in 2016", http://eng. viac. vn/statistics/vietnam – international – arbitration – centre – report – on – summarizing – activities – in – 2016 – a445. html, July 28, 2018.

(一)VIAC 的仲裁规则

VIAC 现行有效的仲裁规则有两个,均制定于 2010 年《越南商事仲裁法》颁布之后:一是《2012 年 VIAC 仲裁规则》(以下简称《2012 年规则》),二是《2017 年 VIAC仲裁规则》(以下简称《2017 年规则》)。当事人可以根据自身需求和纠纷的具体情况对 VIAC 两个版本的仲裁规则进行自由选择。其中,《2017 年规则》自 2017 年 3 月 1 日起实施,共 38 条。根据该规则,除非当事人另有约定,否则该规则只适用于 2017 年 3 月 1 日以后启动的仲裁程序。仲裁规则是仲裁法的延伸,应当在不违反仲裁法强制性程序要求的前提下赋予当事人程序上最大限度的意思自治。

《2012 年规则》在具体内容的设计上几乎与 2010 年《越南商事仲裁法》如出一辙,仅在几个方面进行了调整,弹性和灵活度非常有限。为促进仲裁业务长期发展,VIAC 结合越南仲裁制度的新变化对其仲裁规则进行了修改。《2017 年规则》进一步扩大了当事人意思自治的权利,同时在多个方面力图与 2010 年《越南商事仲裁法》的规定保持一致性,以便于当事人开展仲裁活动。

具体而言,《2017 年规则》与《2012 年规则》相比,在以下几个方面有所不同。

1. 仲裁程序开始的时间

《2017 年规则》第 5 条将仲裁程序开始的时间修改为允许当事人对仲裁程序开始的时间进行约定。《2012 年规则》规定仲裁程序开始的时间是自 VIAC 收到仲裁申请人的仲裁申请之日起,这一规定与 2010 年《越南商事仲裁法》相同。但 2010 年《越南商事仲裁法》允许当事人对这一事项有其他约定,因此,《2017 年规则》在符合 2010 年《越南商事仲裁法》规定的前提下将这一事项的决定权交由当事人,VIAC 不再为仲裁程序的开始规定特定的起算时间,从而扩大了当事人的意思自治权。

2. 多重合同仲裁(multiple contracts arbitration)和多个仲裁的合并(consolidation of arbitrations)

《2017 年规则》新增了第 6 条,规定有关多重合同仲裁程序的启动,即多个合同有涉及同一约定的仲裁事由,无论其是否全部处于同一仲裁条款项下,均可以适用同一仲裁程序一并仲裁。同时,新增了第 15 条,规定对两个或更多待决仲裁进行合并的程序启动,即当事人可申请合并多个仲裁程序,合并与否由 VIAC 考虑实际情况后决定;除非当事人有相反约定,否则多个仲裁应当合并到最先开始的仲裁程序中。这一改变所反映的是《2014 年决议》有关合并多个法律关系的规定,VIAC 据此修订了仲裁规则以纳入合并程序。因此,就多个合同而产生的争议而言,申请人可

以在一个仲裁中提出一个单独的仲裁请求，无论该请求是基于一个还是多个仲裁协议。

《2014 年决议》于 2014 年颁布实施，但直到 2017 年 VIAC 才将合并仲裁写入了仲裁规则中，具有一定的滞后性。虽然从规则的具体规定来看，已经具备了相应的内容，但在实践中，VIAC 作为仲裁机构在合并仲裁的具体操作上发挥的作用如何，仍要接受时间的检验。这一情况可能为选择《2017 年规则》的当事人带来一定风险，如仲裁员可能在合并仲裁程序方面业务不熟练，因而造成不必要的时间拖延。但是，合并仲裁程序的启动必须经过当事人的同意；同时，当事人可以选择对 VIAC 仲裁规则比较熟悉，同时又具备丰富国际商事仲裁经验的仲裁员组成仲裁庭，从源头上降低风险。

3. 仲裁庭的管辖权

与《2012 年规则》相比，《2017 年规则》在对仲裁庭的管辖权规定中强调，仲裁庭可以对其管辖权事项作出一个单独的决定，或者在仲裁裁决中对管辖权问题一并作出决定。若仲裁庭选择在仲裁裁决中一并决定管辖权问题，就会将法院介入仲裁管辖权审查的时间延迟到仲裁庭作出仲裁裁决之后。这种模式有利于加速仲裁程序的进行，同时降低法院介入仲裁的概率。但是，一旦仲裁庭对管辖权问题的决定出现错误，将会导致整个仲裁裁决的效力无法得到法院确认，造成当事人为无效仲裁所投入时间与金钱的浪费。在《2017 年规则》之下，采用何种方式对管辖权问题进行决定由仲裁庭根据案件实际情况决定，这体现出仲裁庭权限自裁管辖的扩张；具体会产生何种效果视不同的案件而定，当事人是否会面临较大的风险也取决于仲裁员自身的专业素质和经验。

4. 快速仲裁程序

VIAC 在其《2017 年规则》中新引入了第 37 条快速仲裁程序。近年来，越南的发展和需求提高了对纠纷解决方式的效率要求。2015 年《越南民事诉讼法》规定了快速诉讼程序以提高诉讼的效率；相应地，VIAC 也积极顺应这一趋势，紧跟国际商事仲裁的发展潮流，为不断提高仲裁解决纠纷的效率作出努力。

与新加坡国际仲裁中心的仲裁规则和 ICC 的仲裁规则设计不同，VIAC《2017 年规则》既没有以仲裁标的额作为适用快速程序的标准，也没有将适用快速程序的决定权交由中心的主席。仲裁快速程序的适用必须以双方当事人的共同合意为唯一前提，VIAC 或仲裁庭无权自动适用。这在很大程度上减少了当事人对仲裁快速程序公正性的质疑。在适用快速程序的情况下，除非当事人另有约定，否则仲裁庭

应由独任仲裁员组成。同时,VIAC 或者仲裁庭为快速解决纠纷的目的,可以缩短规则中规定的任何期限。此外,快速程序的审理方式更为灵活:除非双方当事人都明确反对,否则仲裁庭可以依据现有的文件、证据和其他材料,在没有当事人在场的情况下对案件进行书面审理,或者是通过电话会议或视频会议或任何其他仲裁庭认为适当的手段对案件进行审理。在 2010 年《越南商事仲裁法》的规定之下,仲裁庭进行书面审理必须征得当事人同意。但在 VIAC《2017 年规则》之下,由于快速程序的适用已经由当事人同意,而书面审理又包含在快速程序中,因而审理方式的简化不必再次经当事人同意。除不可约定排除或限制 VIAC 或仲裁庭缩短有关期限的权限外,当事人可以根据需求约定排除适用快速程序的其他规定。

5. 其他变化

《2017 年规则》在其第 9 条第 4 款中规定,被申请人未在规定时间内提交答辩状,不影响仲裁程序的继续进行。《2012 年规则》并未提及此种情况,但是 2010 年《越南商事仲裁法》同样规定了被申请人不提交答辩状,仲裁程序继续进行。

《2017 年规则》第 22 条第 4 款特别强调了仲裁庭可以适用其认为有助于纠纷解决的商事贸易惯例作为纠纷解决的准据法,赋予贸易惯例适用法的地位。这反映了 2010 年《越南商事仲裁法》对仲裁准据法的规定。以上的修改明确了 VIAC 的仲裁规则与仲裁立法保持一致的态度。

此外,《2017 年规则》在一般规定中增加了两款内容:(1)第 38 条第 2 款规定,除非当事人另有约定,否则仲裁应当秘密进行;若任何一方当事人违反了保密性原则,仲裁庭有权采取适当的措施。该规定将保密性确立为依据《2017 年规则》进行仲裁的一项原则,彰显了仲裁的优点也尊重了现实。(2)第 38 条第 7 款规定,VIAC 秘书处应当依照仲裁规则和 VIAC 的管理制度行使其职权,以便为当事人提供更多便捷服务。

通过以上分析可见,VIAC 的《2017 年规则》删改了《2012 年规则》中灵活度不足的规定。在符合本国仲裁立法的基础上,VIAC《2017 年规则》借鉴其他国际商事仲裁机构的创新做法,充分尊重当事人意思自治,保障仲裁庭的独立性,旨在提高 VIAC 整体业务水平和服务水平,提升机构的国际影响力,以吸引更多当事人。

(二)越南调解中心的调解规则

VIAC 曾在 2007 年发布过《VIAC 调解规则》,该规则适用于当事人申请 VIAC 就其之间的商事纠纷进行调解的情况,但由于当时并无有关调解的立法加以支持,和解协议往往缺乏执行力,调解并未发挥理想的纠纷解决效果。

2018 年 5 月 29 日，VIAC 在河内正式成立其下设部门越南调解中心（Vietnam Mediation Center，VMC）并发布《VMC 调解规则》，该调解规则于 2018 年 7 月 1 日起正式生效。

2018 年的《VMC 调解规则》共有 15 条，在遵守《越南商事调解法令》的规定的基础上，对调解的申请和适用程序等内容进行了细化。具体而言，有以下内容。

1. 调解程序的启动

根据《VMC 调解规则》的规定，当事人申请调解以合意达成调解协议为基础，在 VMC 收到当事人的调解请求书和调解费用后，调解程序正式开始。[1] 若两个日期不一致，应以后一个日期为准。VMC 应在收到当事人调解请求书和调解费用的 5 个工作日内向另一方当事人发送调解的通知和调解请求书副本；在接到上述通知 10 日内，另一方当事人应当向中心提交回复。[2] 另一方当事人明确拒绝调解，或者没有在接到通知后进行回复的，调解程序终结。[3] 调解与仲裁所具有的约束力不同：在仲裁程序中，被申请人不提交答辩状不影响仲裁程序的继续进行；但同样的情况出现在调解中时，非请求调解方当事人不对调解请求进行回复的行为构成了对调解的默示拒绝，会直接使调解程序终结。

在当事人之间没有就争议调解进行事前约定时，VMC 可以从中协助当事人达成调解协议。有调解意愿的当事人可以直接向 VMC 提交包含了请求另一方当事人进行调解的申请。VMC 应在 5 个工作日内将这一请求传达给另一方当事人，由另一方当事人在收到该请求后 10 日内对接受调解与否进行回复。若另一方当事人接受调解的请求，就表示当事人之间的调解协议已达成，依照《VMC 调解规则》的第 3 条开启调解程序；若拒绝调解的请求，则调解程序将无法开展。

2. 调解员的选任

调解员由当事人共同合意选择后通知 VMC。若当事人选择的调解员不在 VMC 的调解员名单之列，则必须由当事人来证明该调解员符合调解员的法定资格。若当事人未达成上述共同合意或者没有约定选任方式时，由 VMC 的主任指定一名调解员。VMC 主任指定调解员要综合考虑当事人对调解员的要求，其他因素如调解员的国籍、语言、专业能力和经验等。由主任指定的调解员虽然不限于 VMC 的

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〔1〕 VMC Mediation Rules, Art 3(4).

〔2〕 VMC Mediation Rules, Art 3(3).

〔3〕 VMC Mediation Rules, Art 3(4).

调解员名单,但也绝非任意的指定,被指定的调解员必须要符合《越南商事调解法令》规定的资格及相关登记要求。据此,被指定的调解员即使不在 VMC 列名,也往往列名于其他调解中心或司法部的调解员名单中。

调解员在接受任命之前,必须向 VMC 书面披露可能引发对其独立性、公正性、客观性怀疑的因素,以及其他任何可能不满足当事人对调解员要求的情况。VMC 应将披露的情况告知当事人,由当事人决定是否同意该任命;当事人不同意的,VMC 应依照前述程序任命另一调解员。这项披露要求未在《越南商事调解法令》中有所体现。

调解员应当始终保持独立、中立,客观真诚地帮助当事人解决纠纷,并在整个调解过程中承担对以上事项的持续性披露义务。调解员应当充分考虑案件情况、当事人意愿以及快速解决纠纷的要求,以自己认为适当的方式进行调解。在调解的任何阶段,调解员可以提出解决纠纷的建议;调解员对该建议不必说明理由也不能强制当事人采纳。此外,除非得到各方当事人的同意,否则调解员不能在围绕同一争议进行的仲裁或诉讼中,担任任何一方的法定代理人或咨询人,或者担任法官、仲裁员。

3. 调解的进行

VMC 为当事人提供调解所需的场所,组织材料交换传递,并对调解提供一般性行政支持和相应的翻译服务。调解员可以组织双方共同会谈,也可单独会见各方当事人。会谈可以通过电话会议、视频会议或其他更为灵活多样、便捷的方式进行。

4. 调解的保密性

除非当事人对此有保密性要求,双方当事人与调解员之间有关调解过程中需要发布的各项通知、各项与调解事项和纠纷有关的文件或材料传递都需要通过 VMC 进行。

除非当事人有相反约定,否则调解的进行必须完全保密。第三方参与调解受到严格限制,任何第三方对调解的参与都必须提前通知调解员和各方当事人,并得到他们的同意。与调解有关的各项信息,只能在各方当事人有共同的书面同意时才可对外披露。

除非当事人书面同意,否则调解双方的当事人、调解员以及参与调解的第三方都必须对调解过程中收集或产生的各类信息严格保密。调解协议的内容必须保密,除非为了执行和适用的需要而进行的适当披露。调解员与一方当事人进行单独会谈时所交换的信息必须严格保密,除非提前得到该方当事人有关该信息披露

的同意。整个调解过程中,除了调解员为了调解的进行和纠纷解决的需要而做的必要记录外,不得对调解进行录像、录音或以其他方式对调解进行记录。

调解过程中收集获得的任何信息,不可在后续诉讼或仲裁或其他任何程序中作为证据使用。调解员不可在后续纠纷解决程序中作为证人。这一保密规定不仅针对同一项纠纷,也包括基于同一事实而产生的其他纠纷。

可见,《VMC 调解规则》对调解的保密性进行了详细严格的规定,对调解的当事人、调解员以及参与调解程序的第三方都提出了比 2010 年《越南商事调解法令》更严格的要求。

5. 调解程序的终结

调解程序将在以下情况下终结:(1)当事人成功达成了有关纠纷解决的和解协议;(2)调解员在与双方当事人进行询问和沟通后,宣布调解没有继续进行的可能;(3)一方或双方当事人向调解员发出终结调解程序的书面通知;(4)一方当事人拒绝另一方当事人的调解请求,或者在 VMC 要求的期限内未寄送有关调解的回复;(5)当事人未在 VMC 规定的期限内缴纳调解所需的费用,且未采取其他有效措施。

调解成功后,必须由调解员和双方当事人共同在和解书上签字。和解书要包含调解基于的主要事实、各方当事人的基本信息、争点、纠纷解决方案以及当事人依法约定的其他内容。和解协议对当事人具有约束力,依据越南民事诉讼法的规定来执行。

四、仲裁裁决在越南的承认与执行

仲裁裁决自签发之日起是终局的,对当事人产生约束力,具有可执行性。仲裁裁决的执行是当事人权利得以实现的重要保障,是法院对仲裁制度给予支持的集中表现,是仲裁法律制度的重要组成部分,是仲裁法律制度得以存续和发展的最终保证。在越南境内进行的仲裁裁决的承认与执行由其国内法和其参与的国际条约进行规制。根据越南的仲裁法律制度,在债务人不能自愿履行仲裁裁决的情况下,无论是其国内的仲裁裁决还是外国的仲裁裁决,要得到执行,都必须要首先获得法律上的承认,然后才能进入执行程序。

(一)国内仲裁裁决

有关越南国内仲裁裁决的执行,根据 2010 年《越南商事仲裁法》规定,申请人应向有权的民事执行机构申请执行裁决。[1] 在分析具体的有关仲裁裁决承认与执

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〔1〕 Law on Commercial Arbitration (2010), Art 66.

行的规定前,有必要对越南有权进行强制执行的机构和组织进行简要介绍。

《越南民事判决执行法》第 2 章提供了民事判决执行机构和执行组织,根据其第 13 条的规定,民事判决执行机构的组织制度为:(1)民事判决执行管理机构是司法部民事审判执行管理机构和国防部民事审判执行管理机构;(2)民事判决执行机构是省、中央经营城市(以下统称省级民事审判执行机构)的民事判决执行机构;农村、市区、城镇或省级城市的民事判决执行机构;军事区或同等级别的审判执行机构(以下统称军事区级审判执行机构)。政府应当明确民事判决执行管理机构的任务和权限、民事判决执行机构的名称和具体组织结构。其他规定涵盖了具体的民事判决执行机构和执行组织的权力和义务。

《越南民事判决执行法》下的强制执行程序较为复杂。在实践中,裁决的债权人必须向国家执行机构提交单独的申请令,才能强制执行该裁决。

越南的仲裁法律制度鼓励当事人自愿履行仲裁裁决。[1] 在履行仲裁裁决的期限届满时,裁决的债务人未自愿履行仲裁裁决也未申请撤销仲裁裁决的,裁决的债权人有权要求国家执行机构强制执行该裁决。[2] 关于履行仲裁裁决的期限,应将其理解为当事人自愿履行仲裁裁决的期限,2010 年《越南商事仲裁法》并没有对此期限作出统一规定,而是将其作为仲裁裁决书必须包含的内容,[3] 由仲裁庭根据案件情况对此期限进行决定。同时,对于申请有权执行机构执行仲裁裁决的期限,2010 年《越南商事仲裁法》也未进行规定;只要是在仲裁庭决定的自愿履行仲裁裁决的期限届满后,裁决的债权人就获得了申请有权的执行机构对仲裁裁决进行执行的权利。

对于临时仲裁,2010 年《越南商事仲裁法》规定,临时仲裁的仲裁裁决必须在一方当事人或所有当事人的要求下,在向有权的民事执行机构申请执行裁决之前,在仲裁庭作出仲裁裁决地的法院进行登记,该登记必须在仲裁裁决作出之日起 1 年内完成。登记与否虽不影响仲裁裁决的内容和效力,但在不登记的情况下,债权人无权申请该仲裁裁决的执行。[4] 对于仲裁机构作出的仲裁裁决,并无法定登记的要求。

在具体的执行方式上,执行机构有权采取命令银行或任何账户持有人在仲裁

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〔1〕 Law on Commercial Arbitration (2010), Art 65.

〔2〕 Law on Commercial Arbitration (2010), Art 66.

〔3〕 Law on Commercial Arbitration (2010), Art 61(1).

〔4〕 Law on Commercial Arbitration (2010), Art 62, Art 66(2).

裁决执行中提供执行债务人的银行账户等方式进行。[1] 如果当事人有理由认为执行机构所作出的决定或采取的行为是违法的，或者侵犯了他们的法定权利及合法权益，他们有权对民事判决执行机构、执行人员的决定或行为进行申诉。[2]

（二）外国仲裁裁决

长久以来，越南的法律体系中一直没有有关承认和执行外国仲裁裁决的规定。1995 年，越南正式批准加入《纽约公约》并提出了三项保留：（1）该外国仲裁裁决必须是在公约缔约国领土内作出的，而非公约缔约国领土内作出的外国仲裁裁决仅在互惠的基础上适用公约关于承认与执行外国仲裁裁决的规定；（2）越南法院或有权机构对公约的任何解释必须符合越南的宪法和法律；（3）公约仅适用于由商事法律关系而产生的争议。[3] 由商事法律关系而产生的争议，无论是契约性质还是非契约性质，都被视为具有越南法下的“商事”属性。越南现存的法律及规章没有对“商事法律关系”作出一个明确的定义。不过，“商事法律关系”的概念源于《越南商法典》。《越南商法典》第 45 条列举了 14 种具有“商事法律关系”的行为：货物的购买与销售；交易商的代理；涉及商业经纪的行为；货物购销中的运送；货物购销中的代理；商业中的转包合同；货物的拍卖；货物的竞标；为运送货物提供服务；为货物检查提供服务；商品推销；商业广告；货物的展览/引进；商业交易、展览。从第 3 项保留的语言本身来看，一项外国仲裁裁决要在越南得到承认和执行，其必须要涉及上述 14 种行为之一。否则只要法院对此严格把控，不涉及上述行为的外国仲裁裁决可能很难得到执行。当然，这并不排除在越南司法部支持下非“商事法律关系”的外国仲裁裁决在越南得到承认和执行的可能性。

在加入《纽约公约》后，越南在短时间内颁布了第一个执行外国仲裁裁决的法律文件，即 1995 年 9 月 14 日由越南常务委员会通过的《承认和执行外国仲裁裁决条例》[4]，该条例后来被 2004 年《越南民事诉讼法》第 6 部分的规定所取代。但是，2004 年《越南民事诉讼法》关于仲裁的法律规定存在待完善之处，如提交执行申请的时间不确定、举证责任不明确、外国仲裁员只能发布有限的临时措施。这些缺陷

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〔1〕 Law on Enforcement of Civil Judgments, Art 67, Art 76.

〔2〕 Law on Enforcement of Civil Judgments, Art 140(1).

〔3〕 Decision No. 453/QD/CTN dated 28 July 1995 of the State President on the Accession of the Socialist Republic of Vietnam to the New York Convention.

〔4〕 Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, No. 42 – L/CTN.

为外国仲裁裁决在越南的承认和执行带来了困难。根据越南最高人民法院一项数据统计,2005～2014 年,共有 52 项请求承认和执行外国仲裁裁决的申请提交至越南法院,其中几乎有一半(52 项中有 24 项)裁定驳回。[1]

经过修订,目前相关内容规定在 2015 年《越南民事诉讼法》第 7 部分中,相关规定已大大完善。

关于“外国仲裁裁决”的定义,越南立法经历了一个改进的过程。根据 2004 年《越南民事诉讼法》的规定,外国仲裁裁决是由双方当事人制定的外国仲裁员在越南境内或境外作出的仲裁裁决。[2] 可见,在仲裁裁决的国籍认定方面,越南最初并没有采用《纽约公约》对外国仲裁裁决的定义,既没有采用地域标准,也没有采用仲裁准据法标准,而是以仲裁员的国籍作为区分标准。这种定义既未体现外国仲裁裁决的本质特点,还可能与其他国家的规定产生冲突,在实践中会为越南执行外国仲裁裁决带来困难。2010 年《越南商事仲裁法》第 3 条第 11 款规定,“外国仲裁”,是指根据外国法律或外国仲裁程序规则进行的机构仲裁或当事人选定成立的临时仲裁,无论该仲裁是在越南境内还是境外进行的。后来为了统一立法,2004 年《越南民事诉讼法》的修订工作开始。最终,2015 年《越南民事诉讼法》第 424 条第 3 款规定,该法第 1 条规定的“外国仲裁”,依照 2010 年《越南商事仲裁法》的规定确定。

根据 2015 年《越南民事诉讼法》的规定,在仲裁裁决生效之日起的 3 年内,裁决的债权人、利益关系人或他们的法定代理人有权根据越南签署的国际条约的规定向越南司法部或者根据该法确定的有管辖权法院提出执行仲裁裁决的申请。[3] 因此,原则上,除非在越南签署的国际条约中有法律互助条款明确规定要将执行申请现行提交至越南司法部,否则在没有此类规定的情况下,申请执行人只需直接向有管辖权的法院提交申请即可。而在此之前,2004 年《越南民事诉讼法》要求任何情况下,申请执行人都必须先向越南司法部提交申请材料,而越南司法部本身无权承认或执行一项外国仲裁裁决,其只进行行政工作,即审查申请材料的完整性。在越南司法部对申请材料的形式进行审核后,移交给有管辖权的法院,法院在受理之后才能继续开展后续的工作,正式进入对仲裁裁决的审查程序。同时,越南司法部可以就裁决是否应得到承认给出自己的观点以供法院参考,但并不能强制法院采

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〔1〕 Conference “20 Years of the New York Convention in Vietnam”, (June 21, 2018) http://moj.gov.vn/ct/tintuc/Pages/hoat-dong-cua-Bo-Tu-Phap.aspx? ItemID=6638.

〔2〕 The Civil Proceeding Code 2004, Art 342.2.

〔3〕 The Civil Proceeding Code 2015, Art 451(1).

用其观点,其观点也不会对最终决定产生影响。[1] 2015 年《越南民事诉讼法》赋予了申请执行人直接向有管辖权的法院提交执行申请的权利,改变了过去冗杂烦复的程序,大大提高了外国仲裁裁决承认与执行的效率,减轻了申请执行人的负担。此外,由于 2004 年《越南民事诉讼法》没有规定申请执行的期限,法院认定一般民事案件的申请执行期限为 1 年,[2]2015 年《越南民事诉讼法》明确了提交执行申请的期限为仲裁裁决生效之日起 3 年;这反映了立法机关为确保外国仲裁裁决得到承认和执行,而赋予其比一般民事案件更长执行申请时限的意图。

申请执行人需要提交的承认和执行外国仲裁裁决的文件包括:(1)申请书(必须列明裁决债权人与裁决债务人的姓名、住址等信息,以及裁决债权人的请求);(2)仲裁裁决以及仲裁协议的核证副本;(3)外文形式的执行申请必须附有经合法公正的越南文译本。[3]

比较有特色的是,2010 年《越南商事仲裁法》明确规定,检察机关有权对商事仲裁进行监督,如在撤销仲裁裁决时。[4] 检察院的监督权在对外国仲裁裁决的承认与执行上也有所体现。2015 年《越南民事诉讼法》规定,在就外国仲裁裁决承认与执行而进行的听证会上,与管辖法院同级的检察院检察官应当出席听证;若检察官缺席,不影响听证进行。[5] 另外,省人民检察院和越南最高人民检察院有权对省人民法院一审作出的关于承认与执行外国仲裁裁决的决定进行抗诉,[6] 而二审法院对上诉作出的决定,仍可由检察院依法进行抗诉。[7] 但是,越南的相关法律并没有规定检察院提起抗诉的法定理由,这使当事人面临着检察院滥用抗诉权损害其合法权益的风险。

原则上,越南法院在考虑外国仲裁裁决承认和执行时,不允许重新审理外国仲裁庭解决对案件是非曲直的裁判,而只应核查和核实外国仲裁裁决及附呈的文件是否违反越南法律和《纽约公约》的相关规定。然而,在实践中,一些地方法官有根

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〔1〕 The Civil Proceeding Code 2004, Art 364.1, Art 366.1, Art 367.1.

〔2〕 Cargill v. Dong Quanfg, Decision No. 01/2014/QDST – KDTM of the People's Court of Long An Province (2014); Decision No. 08/2015/QDST – KDTM of the Appellate Court of the Supreme People's Court in Ho Chi Minh City (2015) (upholding Cargill v. Dong Quanfe).

〔3〕 The Civil Proceeding Code 2015, Art 452, Art 453.

〔4〕 Law on Commercial Arbitration 2010, Art 71.

〔5〕 The Civil Proceeding Code 2015, Art 458(2).

〔6〕 The Civil Proceeding Code 2015, Art 461(2).

〔7〕 The Civil Proceeding Code 2015, Art 462(6).

据越南法律对案件的是非曲直进行评估的倾向,至少在合同当事人的法律能力和合同的效力以及仲裁协议方面都是如此。此外,对越南法律基本原则的考虑也是地方法官审查外国仲裁裁决实体内容的常用理由。这些都造成实践中,在越南获得承认与执行的外国仲裁裁决较少。

在有关仲裁协议的效力认定方面,以下案例曾产生争议:在“Steelco Pacific Trading v. Petrovietnam 案”〔1〕中,涉案外国仲裁裁决在我国香港特别行政区以临时仲裁的方式作出。仲裁案件的申请人是一家香港公司(以下简称 S),其与越南国有企业越南石油(以下简称 Petrovietnam)的分支机构即被申请人(以下简称 P)之间签订了一份货物销售合同。合同由 S 的董事与 P 的部门经理签订。其中,第 12 条规定了仲裁条款,双方约定适用联合国贸法会仲裁规则,并由香港国际仲裁中心指定一名仲裁员独任审理,仲裁地为我国香港特别行政区。双方未约定仲裁协议的准据法;后仲裁员决定应适用我国香港特别行政区的法律。后 P 违约,S 依照仲裁条款申请仲裁后得到支持己方请求的仲裁裁决。根据越南律师的建议,P 不具有越南法律规定的法人资格。因此,S 将 Pretrovietnam 作为被执行人,要求执行该仲裁裁决。一审法院、二审法院均拒绝承认和执行该仲裁裁决,理由是:(1)P 仅为 Petrovietnam 的一个不具有法人资格的分支机构,且 P 的部门经理在与 S 签订合同时未获得 Petrovietnam 法定代理人的授权。因此,P 缺乏与 S 订立合同的行为能力,S 与 P 签订的货物销售合同无效。(2)Petrovietnam 未收到进行仲裁的通知。从以上两个理由来看,越南法院在认定 P 无行为能力导致主合同无效的同时,又认为 Petrovietnam 没有收到任何仲裁通知;后一理由似乎认定了一个可与主合同分离的有效仲裁协议的存在,法院似乎接受了仲裁条款的分离性原则。但经深入分析后就会发现:首先,2004 年《越南民事诉讼法》和《纽约公约》仅涉及当事人在订立仲裁协议时的行为能力,因而应当将法院的观点理解为主合同与仲裁条款均因 P 无行为能力而无效;但法院并未对此进行说明。其次,就仲裁协议的有效性而言,虽然法院认为 S 与 P 之间不存在有效的仲裁协议,但他们也认为 Petrovietnam 没有收到仲裁通知,而第二个理由成立的基础是 S 与 Petrovietnam 之间存在有效的仲裁协议。要得出这个结论,法院在推理时必须将仲裁协议的签订者由 P 替换为 Petrovi-

〔1〕 Steelco Pacific Trading Co. Ltd. v. Petrovietnam Manpower Development and Services Joint Stock Co, Decision of People's Court of Vietnam in Hanoi (May 27, 2011), Decision Decision of the Appellate Court of the Supreme People's Court of Vietnam in Hanoi (Nov. 16, 2011).

etnam,但仲裁的分离性并不适用于这种情况。最后,法院在推理时引用了2003年《越南商事仲裁条例》的规定而未明确理由,忽略了香港法律被明确作为仲裁适用的程序法的这一前提事实。当然,这也与2004年《越南民事诉讼法》未作出相关规定有关。

以违反"越南法律的基本原则"作为拒绝理由也是外国仲裁裁决在越南得到承认和执行的一个障碍。上述支持我国香港特区S公司的仲裁裁决也被法院认定违反了"越南法律的基本原则"而被拒绝承认和执行。该规则意在反映《纽约公约》第2条(b)项,即对违反国家的公共政策的仲裁裁决不予承认或执行。然而,"越南法律的基本原则"并没有明确的定义。在2014年之前,对这一实践没有进一步的立法指导,法院具有完全的自由裁量权。因此,该术语已被许多越南法院解释和适用,是越南法院在拒绝承认或执行外国仲裁裁决时最常引用的理由之一。越南法院在引用该条款时往往进行扩大解释,即使是与监管规定具有轻微的不一致,也可以被认定是违反了越南法律的基本原则,导致外国仲裁裁决被拒绝承认或执行。例如,在"Energo – Novus v. Vinatex案"[1]中,越南最高人民法院拒绝承认该外国仲裁裁决,理由是俄罗斯仲裁庭拒绝承认越南方当事人提交的公证文件,因而违反了越南的政府法令。除此之外,越南法院还考虑到外国当事人根据越南部长级通告的要求登记外国承包人建造许可证的失败,违反越南法律的基本原则。又如,在"Tyco v. Leighton案"[2]中,由于新加坡当事人并未在越南进行外国承包商建造许可证的登记,因而被认定违反了越南曾发布的一个部长级别通告的要求,法院便拒绝了这一仲裁裁决的承认和执行。法院认为这一未登记的行为构成了对越南法律的基本原则和国家利益的违反,但实际上越南所发布的这项通告仅仅具有行政性质。

越南法院对"越南法律的基本原则"的宽泛定义导致对仲裁案件实体争议的重新审查。事实上,在进行审查时,越南法院不仅会引用基本立法的规定(包括国会法案和法令),有时甚至会引用二级立法[3]的规定。是否承认和执行外国仲裁裁决大多是基于对仲裁案件实体争议的重新审查,以查明其是否符合民法典、商法典

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〔1〕 Energo – Novus Co (Russia) v. Vietnam Textile Corporation (Vinatext), Case No. 58, Decision of the Appellate Court of the Supreme People's Court of Vietnam in Hanoi (May 16, 2000).

〔2〕 Tyco Services Singapore Pte Ltd v. Leighton Contractors (VN) Ltd., Decision No. 02/PTDS, Decision of the Appellate Court of the Supreme People's Court of Vietnam in Ho Chi Minh City (Jan. 21, 2003).

〔3〕 这也被称为授权立法,是指政府部门在被授予立法权后进行的立法。这些立法主要用来对现有的国会法案添加信息或进行修改。

的规定,有时甚至是越南法院适用的程序规则。例如,在“Toepfer v. Sao Mai 案”〔1〕中,法院认为,外方当事人未能采取适当行动以减轻自身损失的行为违反了 2004 年《越南民事诉讼法》的规定,〔2〕因此构成了对“越南法律的基本原则”的违反。

为进一步指导和明确对越南法律基本原则的解释,越南最高人民法院于 2014 年发布了一项决议,〔3〕要求法院对裁决执行采取更严格的方法。该决议将“越南法律的基本原则”定义为“那些对越南法律的制定和实施方面具有突出影响的基本原则”,并增加了认定违反这些原则的标准,即仲裁庭作出仲裁裁决的程序违反了越南法律规定,且这种违反构成了对政府利益的损害或对第三方当事人的合法权益的损害。〔4〕这一决议意在纠正越南法院对“越南法律的基本原则”的不当解释。然而,尽管基本原则的定义已经变得更加清晰,但仍有大量的外国仲裁裁决被拒绝承认或执行。例如,在“Tisco v. Agc 案”〔5〕中,河内人民法院拒绝承认和执行该外国仲裁裁决,其理由仅仅是仲裁庭作出的仲裁裁决“不充分”。此案中,法院没有作出进一步的解释也没有进行其他类似案件的引用。可见,虽然有越南最高人民法院的决议作为指导,但该决议和相关法律并未要求法院在拒绝承认或执行外国仲裁裁决时必须说明理由,故法院在具体处理案件时受到的约束非常有限,仍享有自由裁量权。

意识到以上这些问题,越南正在努力加强法院在处理外国仲裁裁决承认和执行申请的一致性和效率。近年来,越南法院实践逐渐呈现出积极的趋势,越来越多外国仲裁裁决承认和执行申请得到了批准。例如,在“Realogy Group LLC v. Minh Viet Investment JSC 案”〔6〕中,虽然涉案裁决在执行申请被法院受理近两年后才获得承认和执行,但这在越南仍然处于可接受的时限范围内。原则上,该裁决将与越南法院作出的任何其他判决具有相同的法律效力。

五、中国当事人参与越南仲裁的实践情况

越南是中国在东盟的主要贸易伙伴之一,两国具有深厚和悠久的经贸交往历

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〔1〕 Toepfer v. Sao Mai, Decision of the Appellate Court of Supreme People's Court in Vietnam in Hanoi (2011).

〔2〕 Civil Procedure Code 2004, supra note 5, Art. 362.

〔3〕 Resolution No. 01/2014/NQ – HDTP Guiding the Implementation of Certain Provisions of Law On Commercial Arbitration.

〔4〕 Resolution No. 01/2014/NQ – HDTP Guiding the Implementation of Certain Provisions of Law On Commercial Arbitration, Art 14(2)(dd).

〔5〕 Decision No. 06/2014/QD – PQTT, Decision of the People's Court of Hanoi (Aug. 29, 2014).

〔6〕 Decision of the People's Court of Hanoi (Dec. 2015).

史。在共建“一带一路”倡议的过程中,中国支持有能力、有条件的企业依照商事原则和国际惯例开展贸易投资合作,中越两国迎来新的发展机遇。除传统的加工制造业、基础生产行业、房地产项目外,两国正在就医疗合作、科技合作、旅游合作等方面进行积极磋商。中国对越南的商事贸易和投资将持续增长,越来越多的中国企业将参与到与越南有关的经贸活动中来。

同时,中国在与包括越南在内的“一带一路”沿线国家之间进行投资贸易所面临的风险亦不可忽略。由于两国边贸政策不统一,缺乏相关管理规范,贸易投资人员素质参差不齐,中国当事人对越南当地法律法规了解不够,贸易投资纠纷随之增加。若这些纠纷不能得到及时解决,将会对我国企业的境外经营造成不良影响,制约中国企业顺利开展境外投资,成为中国企业从事对外贸易的阻碍。

如何防范风险、解决纠纷是中国企业关注的热点。为妥善解决经贸纠纷,中国与包括越南在内的东盟各成员国于 2002 年 11 月 4 日在柬埔寨首都金边共同签署了《中华人民共和国政府与东南亚国家联盟全面经济合作框架协议的争端解决机制协议》。中国—东盟自贸区争端解决机制(以下简称 CAFTA 争端解决机制)正式建立。但依照该协议的内容,私人主体不能启动 CAFTA 争端解决机制。[1] 因此,对于在越南从事经贸活动的中国企业而言,仍需要通过国际诉讼、国际商事仲裁或国际商事调解等途径解决纠纷。因此,中国企业在进行与越南相关的商事活动时,尤其需要充分了解可利用的争议解决方式,选择适宜的纠纷解决途径维护自身合法权益。

在寻求纠纷解决的过程中,中国企业应该结合具体纠纷特点对各个纠纷解决途径的效率、所需成本、执行力等因素进行综合权衡,以选择适宜的争端解决方式。现以中国企业在越南寻求商事纠纷解决为视角,主要就越南的诉讼、仲裁和调解这三种最主要的纠纷解决方式进行比较分析。

(一)诉讼

诉讼是最为传统的纠纷解决方式,其最大的优势在于判决执行层面的便利。若中方当事人选择以诉讼方式处理纠纷,在越南法院得到的判决可以直接通过其判决执行机构得到执行,而不必像仲裁裁决或和解协议那样需要首先得到承认,程序上相对比较便利。但是,中方当事人选择在越南法院进行诉讼的风险也比较多,

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〔1〕 参见《中华人民共和国政府与东南亚国家联盟全面经济合作框架协议的争端解决机制协议》第 4 条。

体现在以下方面:

第一,地域管辖的限制。根据越南的民事诉讼法,越南法院的管辖权严格依照地域原则。当事人进行诉讼、取证、申请临时救济因此受到限制,为纠纷解决带来诸多不便。

第二,法庭语言带来的障碍。越南的官方语言为越南语,在司法实践中,具有涉外因素的诉讼活动常常以越南语或英语进行。因此,中方当事人在越南进行诉讼往往需要依赖语言翻译,这无疑增加了当事人的负担和参与案件审理的难度。

第三,诉讼审理周期长。与其他纠纷解决方式相比,在越南进行诉讼往往需要花费数年的时间,当事人还可能要进入上诉或再审程序,解决纠纷的效率比较低。

第四,商业秘密泄露风险。根据2015年《越南民事诉讼法》第15条和《越南宪法》第103条的规定,民事案件的所有诉讼程序均向公众开放,对涉及商业秘密和个人隐私的案件不公开审理,但必须公开宣判。一旦有关信息不被划入商业秘密之列,当事人的有关信息可能在庭审中被披露,从而蒙受损失。

虽然中方当事人在越南通过诉讼方式解决商事纠纷具有一定可行性,但多会遭遇诸多阻碍,诉讼并非最佳选择。

(二)仲裁

在国际上,仲裁是目前商事纠纷解决领域备受欢迎的纠纷解决方式。基于意思自治原则设计构造的国际商事仲裁制度,从多方面审视观之,仲裁均是中方当事人的最佳选择。具体说来,对于中方当事人而言,选择仲裁方式处理纠纷有以下优势:

第一,灵活性高。基于前述对越南仲裁法律制度的分析,可以发现仲裁的灵活性贯穿仲裁程序始终。当事人可以自由选择仲裁类型,如机构仲裁或临时仲裁、依法仲裁或友好仲裁。双方可在法律规定限度内对仲裁的诸多事项进行约定,最大限度创造解决纠纷的便利条件。

第二,专业性强。仲裁领域相对专业,2010年《越南商事仲裁法》要求仲裁员必须在专业领域从事相关工作满一定年限。因此,有资格的仲裁员往往具备较好的案件相关领域专业知识或技能,在处理相关纠纷方面更为专业化,这对于纠纷处理结果的公正合理有一定保障作用。

第三,效率高。仲裁一裁终局,除因法定理由被撤销外或不予执行外,当事人不得上诉。仲裁审理期限也明显短于诉讼程序,且允许当事人对一些事项约定更短的期限。

第四,保密性强。越南相关仲裁立法和仲裁中心的仲裁规则都规定了保密义务,要求所有当事人、仲裁员及其他仲裁参与者对与仲裁有关的信息保密,因而可以有效避免企业在解决纠纷过程中因为信息披露导致的其他损害,也有利于维护中国企业的形象。

由此可见,中国企业处理涉越商事纠纷时,选择商事仲裁有较大的优势,有助于当事人在瞬息万变的商业社会及时解决纠纷,减少间接损失,保障交易关系的稳定。但同时也需要注意,参与越南的仲裁同样可能存在一定的文化差异带来的障碍,中方当事人应当在纠纷解决中聘请越南籍律师或咨询其他了解越南仲裁制度的专业人士,以降低风险。

(三)调解

与仲裁相比,调解在提高纠纷解决效率、符合当事人心理预期及降低纠纷解决成本方面有更为突出的优势。但是,就越南的商事调解而言,其虽然具有悠久的历史,但长期以来并未形成一部专门规制调解的法律,直到 2017 年《越南商事调解法令》的出台,其具体内容前文已详细介绍。

中方当事人可以选择越南境内的调解机构进行调解,也可以选择临时调解。目前,VIAC 下设 VMC,并制定了《VMC 调解规则》,为当事人提供服务,包括:专业调解服务;咨询服务,帮助其合理利用包括调解在内的替代争端解决方式解决相关争议;调解员任命与管理等。另外,早在 VMC 成立之前,越南境内已经出现了一些专业领域内的调解机构,为当事人提供多元的纠纷解决途径。

总体而言,相比较仲裁、诉讼而言,调解最具有灵活性。当事人在调解的诸多程序事项方面有更多的自由选择权,可以在法律允许的框架内尽可能达成最佳纠纷解决方案。但是,对于越南来说,以法律规制调解还是一个新兴事物,尤其是在和解协议的执行方面,其实践结果如何有待时间的检验,因此就目前情况来看,当事人选择调解还是面临很多不确定性带来的风险。

三种纠纷解决方式各有优势和不足。相对而言,仲裁的灵活性、高效性、专业性和保密性方面均占据优势,且从实践情况来看,越南具有一定的国际仲裁经验。此外,就越南目前司法改革政策来看,其正大力推进解决纠纷的 ADR 方式,因此对仲裁持有非常友好宽松的态度,这一点从其司法机关对仲裁活动的支持和非常有限的干预上就可看出。越南是 1958 年《纽约公约》的缔约国,其现行的仲裁法律制度吸纳了《示范法》在内的众多国际社会立法经验。其国内仲裁机构 VIAC 近年来发展迅速,国际声誉不断提高,为吸引国际商事仲裁案件做了充分的准备。因此,考虑

到解决纠纷的便利程度和实际效果,仲裁是中方当事人解决涉越商事纠纷的首选方式。

六、中国当事人参与越南仲裁的注意事项

对于中国企业而言,当务之急是在了解越南仲裁法律制度的基础上,结合自身发展的需要,积极利用相关法律制度,为防范或化解纠纷做好法律层面的准备。总体而言,2010 年《越南商事仲裁法》以当事人意思自治为首要原则,甚至将其运用到了司法机关对仲裁的干预中。为降低当事人利用仲裁解决纠纷所面临的风险,需要结合 2010 年《越南商事仲裁法》的具体内容加以分析。

(一)强制性条款的适用

2010 年《越南商事仲裁法》尊重当事人的意思自治,在诸多仲裁程序性事项上允许当事人可以自由决定。但是,对 2010 年《越南商事仲裁法》的强制性规定必须严格适用,当事人不得做任何修改。强制性规定具体而言主要有:可仲裁性;适用于仲裁解决纠纷的基本原则;法院对仲裁活动的权限;国家执行机构的权限;当事人得到通知的权利;对仲裁有关事项提起异议的权利放弃;仲裁协议、申请书、答辩书、临时救济申请书和撤销仲裁裁决申请书的法定形式要求;消费者保护问题;仲裁协议被认定无效的标准;仲裁协议的可分离性;仲裁员的权利和义务;仲裁庭认定事实、收集证据和召集证人的权力;可由仲裁庭和有权法院采取的临时措施及适用于仲裁庭命令、修改、补充或终止临时措施的程序;作出仲裁裁决的原则;仲裁裁决的内容、形式和效力;根据《越南民事判决执行法》执行仲裁裁决;撤销仲裁裁决的法定理由;请求撤销仲裁裁决的权利。

当事人应当注意,若就以上事项作出与 2010 年《越南商事仲裁法》规定不同的约定,约定无效,可能会导致整个仲裁协议被认定无效,因而不能据此开启仲裁程序。

(二)仲裁协议的订立

仲裁协议是当事人将争议提交仲裁、开启仲裁程序的基础。同国际普遍做法一致,2010 年《越南商事仲裁法》规定仲裁协议的类型可以采用合同中的仲裁条款形式或单独的仲裁协议两种形式。

有效仲裁协议包括形式有效和实质有效。形式方面要满足 2010 年《越南商事仲裁法》规定的书面性要求。实质方面要具有可仲裁性,即约定的争议事项不得违反越南法律的基本原则,同时争议的标的能够通过仲裁解决。原则上各类型的商事争议均可提交仲裁解决,但若商事争议涉及特殊事项,则当事人可能面临仲裁协

议不具有可仲裁性的风险。因此,当事人需要多方位全面了解越南现行法律和政策,尤其应注意争议标的是否在相应的越南单行法中被视为无可仲裁性,同时在订立合同时充分考虑越南有关公共政策和基本法律原则的限制。

在2010年《越南商事仲裁法》之下,中方当事人所参与的仲裁均属于具有涉外因素,因此仲裁庭应当首先适用当事人选择的法律。越南承认仲裁协议的可分离性,因此,主合同所适用的准据法不绝对适用于仲裁协议;在当事人未选择时,将由仲裁庭选择其认为适当的准据法,因而有可能适用越南法律,这可能使不熟悉越南法律的当事人处于不利地位。因此,为了降低风险,建议当事人提前约定仲裁协议适用的准据法,以便仲裁庭准确高效地确认仲裁协议的效力,提高仲裁的可预测性。

2010年《越南商事仲裁法》承认临时仲裁的合法性,但对临时仲裁施加了很多限制,如当事人选择外籍仲裁员的权利受限,经临时仲裁作出的仲裁裁决必须在执行前进行登记等,这些可能阻碍纠纷的妥善解决。此外,临时仲裁的很多程序事项需要法院的协助才能进行,可能降低仲裁效率。而目前越南境内有近20家仲裁机构,VIAC最具有代表性,其仲裁规则比较符合国际经验,仲裁员的国际性、专业性均属前列。因此,建议中方当事人在越南进行仲裁时,尽量选择机构仲裁;如确实无法约定中国或其他国际知名仲裁机构,仲裁机构的选择可以优先考虑VIAC。

此外,在存在有效的、可履行的仲裁协议的情形下,若对方当事人仍将应仲裁解决的争议提交法院,中方当事人应当尽快向法院说明仲裁协议存在且能被履行的这一情况,以便法院进行审查。原则上,在诉讼程序开始后的任何阶段,只要法院得知了存在可履行的仲裁协议,就应当拒绝行使管辖权,终止诉讼程序。由于2010年《越南商事仲裁法》和《2014年决议》均未规定这种情形下当事人申请法院终止诉讼程序的时限,建议中方当事人遇到此种情况时尽快向法院提起终止诉讼程序申请,要主动采取一切可能的行动,使争议重归仲裁管辖。

(三)仲裁程序

第一,仲裁员的选任事项。2010年《越南商事仲裁法》第39条至第42条明确规定了选任仲裁员的相关事宜。除了更换仲裁员由仲裁庭剩余成员、仲裁中心主席或法院来决定外,仲裁员的人数、选任仲裁员组成仲裁庭的程序均以当事人的约定优先。当事人未约定时,仲裁庭由三名仲裁员组成,选任程序则分别依照机构仲裁和临时仲裁的不同程序进行。因此,当事人可以约定组成偶数仲裁庭,但为仲裁的公正性和便利以及成本的考虑,建议当事人选择三人仲裁庭。同时,为便于及时

高效解决纠纷,建议当事人在仲裁协议中明确约定仲裁员的人数和指定仲裁员的程序,否则可能因需要中心主席或法院指定仲裁员而造成仲裁的拖延,影响纠纷解决的效率。此外,若当事人发现有影响仲裁员公正性、独立性的情况发生,为不影响仲裁程序,应尽快向仲裁庭或有权法院申请更换仲裁员。

当事人选任的仲裁员一般不得低于2010年《越南商事仲裁法》第20条第1款(a)(b)项规定的资格标准,同时不得出现该条第2款规定的情形。在特别情况下,具有高度专业资格和相当时间经验的专家也可以被选任为仲裁员,而不受第1款(b)项的限制,但选任该专家作为仲裁员的当事人必须对其具备仲裁员资格提供证据。

第二,仲裁请求与反请求的提出。2010年《越南商事仲裁法》第33条规定,除非特别法另有规定,申请仲裁解决纠纷的时效为法定权利和利益被侵犯之日起两年。当事人要特别注意提起仲裁的时效限制。

当事人提交的申请书必须要包含2010年《越南商事仲裁法》第30条规定的内容,附随材料需一并提交,由被申请人逐一答辩。只要仲裁庭认为提出时间适宜,当事人可以修改或补充其申请书或答辩状内容。因此,对于中方当事人而言,若作为申请人,一定要明确仲裁请求,不要超过双方当事人仲裁协议的约定,从根源上避免仲裁庭超裁。若作为被申请人,应注意针对申请人的请求答辩,有关纠纷不在仲裁管辖权之内,或不存在仲裁协议、仲裁协议无效或无法履行的主张,应当注意在答辩书中明确提出。在国际商事纠纷中,双方当事人往往都对纠纷负有一定责任。反请求是被申请人保障自身权益的重要手段之一,因此,必要时,被申请人可提起反请求,并与答辩书同时提交。

第三,审理方式的选择。2010年《越南商事仲裁法》第8章规定了开庭审理的相关事宜,因此,原则上案件应进行庭审。仲裁庭可以在当事人的要求下,在不要求当事人出席的情况下,就书面材料进行审理。

2010年《越南商事仲裁法》未明确庭审为原则,也未禁止当事人约定排除庭审。应当认识到,开庭审理对当事人具有重要意义,尤其是开庭审理中的口头辩论,能够使当事人对仲裁有全局性把握,围绕争议事项发表自己的观点,反驳对方,使仲裁庭尽可能采信己方的观点,这是仲裁庭根据书面材料审理案件所不具有的。开庭审理有利于推进仲裁庭对案件事实进行客观认定,对证据进行全面审核,同时能够一定程度上监督仲裁庭权力的行使,保证案件处理的公正性等,若不开庭,就等于失去了这些程序性利益。因此,即使是案件不开庭审理已被明确不会对当事人

实体权利造成明显影响,或者不开庭将大大简化程序,也不建议当事人排除对案件的开庭审理。

第四,证据及质证事宜。2010 年《越南商事仲裁法》虽规定了仲裁庭收集证据、传唤证人的权力,却未规定具体的质证程序。因此,为更好地认定案件事实,各方当事人可以就质证程序进行协商,也可向仲裁庭提出意见。

2010 年《越南商事仲裁法》规定了听取专家意见是仲裁庭的权力,若有必要,当事人也可以申请仲裁庭听取专家的建议。2010 年《越南商事仲裁法》未明确规定出具建议的专家是否必须出庭。若专家参加庭审,则当事各方可以向其提问,充分利用庭审维护自身权益,因此,如有必要,当事人可对这一事项进行约定。

有权法院可以协助仲裁庭命令证人出庭作证。当事人要在仲裁中积极运用证人制度,在证人出席有困难时,及时请求仲裁庭传唤证人。

第五,临时措施事项。2010 年《越南商事仲裁法》第 7 章对临时措施进行了明确规定。仲裁庭和法院均有权采取临时措施,这一权力的行使必须以当事人的请求为前提,不得主动采取。仲裁庭所能采取的临时措施有 6 种:保持争议财产现状;预防不利于仲裁的行为;扣押争议财产;要求保持、储存、出售或处分一方或所有当事方的财产;要求当事人临时支付金钱;禁止转移争议财产的财产权。法院为仲裁程序便利而采取的临时措施,如无特别约定,也仅限于此 6 种。因此,若当事人需要法院采取该法规定的 6 种类型之外的临时措施,需要提前达成合意。

在仲裁过程中,当事人既可向仲裁庭请求采取临时措施,也可向法院请求采取临时措施,由先接受申请的一方行使这一权限。应当注意的是,只有在仲裁程序开始之后,当事人才有权申请采取临时措施。在仲裁庭组成之前,若当事人的法定权利被侵犯或面临被侵犯的直接危险,由有权的法院依当事人请求采取临时措施。因此,若事态紧急,当事人应尽快提起仲裁请求,启动仲裁程序,并及时向有权法院提交采取临时措施的申请。

虽然 2010 年《越南商事仲裁法》没有规定在仲裁庭组成之后,采取临时措施的权利专属于仲裁庭,但应当注意的是,有权法院采取仲裁法规定的 6 种临时措施实际上是出于对仲裁庭的协助。而事实上,在仲裁程序开始后当事人直接向仲裁庭申请采取临时措施也更为便利和及时,尤其在当事人未约定对仲裁活动有管辖权的法院时,不必舍近求远。

第六,仲裁中的调解事宜。与英美法系国家立法模式相同,越南将仲裁与调解设计为两个不相干扰的平行程序。一般而言,调解作为独立的程序,不受仲裁干涉,

以当事人自愿达成的调解协议来启动;目前相关内容由2017年《越南商事调解法令》来规制。若当事人已经就可能进行的仲裁合意选择确定了仲裁员,但尚未正式进入仲裁程序,那么该仲裁员不能同时在平行于仲裁程序的调解程序中作为调解员,因为调解不能妨碍和排除之后仲裁程序的进行,也不得影响后续纠纷解决方式的公正性与独立性。调解不成时,当事人能够进一步寻求仲裁救济。[1] 但2010年《越南商事仲裁法》也设计了调解嵌套在仲裁程序中的模式,即当事人可请求仲裁庭对案件进行调解。

当事人可以灵活运用调解与仲裁来高效解决纠纷。建议当事人优先选择在仲裁程序开始前进行调解,因为其相对于仲裁更便捷高效,保密性也更强。在进入仲裁程序后,如有可能,建议当事人请求仲裁庭对案件进行调解,而不是在仲裁程序之外另行开启调解程序,因为仲裁员对案件情况已经相对熟悉;这样不仅避免了过多纠纷解决成本的消耗,还有利于纠纷的高效和友好解决。

(四)仲裁裁决作出后

对于中方当事人而言,仲裁庭裁决作出后,还不能等同于维权目的的实现。必须重视对裁决作出后相关程序的参与和风险应对。

1. 仲裁裁决的更正和解释、补充裁决

当事人提出改正、解释或者补充仲裁裁决的请求具有重要意义,这赋予了仲裁庭改正错误的机会,也为当事人提供了更多权利救济的可能。仲裁庭对裁决某一部分的具体解释,将有助于理解仲裁庭在法律适用方面的思路,这可能使裁决更具说服力,可能促使被申请人自动执行仲裁裁决。

仲裁庭遗漏了仲裁请求的事项时,若遗漏的事项属于仲裁庭对案件的实体管辖范围,则当事人在程序上不能通过申请撤销裁决的方式进行补救,且直接以撤销仲裁裁决方式来补救也无必要。在这种情况下,当事人可以直接请求仲裁庭补充裁决,若仲裁庭能够及时弥补瑕疵,不仅可以免去当事人诉诸法院的烦琐,也能避免权利难以救济的风险。

需要注意的是以上请求权的行使期限:若无特别约定,当事人的请求应在收到裁决之日起30日内提起;虽无须事先征得其他当事人同意,但要就提起申请的实施通知其他当事人。

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〔1〕 有关调解的其他具体内容参见前文。

2. 仲裁裁决的撤销

关于仲裁裁决的撤销，2010 年《越南商事仲裁法》的规定与《示范法》基本相同，根据《越南商事仲裁法》第 68 条的规定，撤销仲裁裁决的法定事由共 7 种两类：第一类由申请方当事人负责举证，共有 6 种情形；第二类由有权法院自行审查。当事人的撤销仲裁裁决申请必须在收到仲裁裁决之日起 30 日内提起。

3. 仲裁裁决的承认与执行

越南商事仲裁制度对仲裁裁决的承认与执行依照《越南民事判决执行法》的有关规定进行，对外国仲裁裁决则依照吸纳了《纽约公约》的 2015 年《越南民事诉讼法》第 6 部分的规定进行。当事人申请承认和执行仲裁裁决，一定要注意申请的时限以及起算时间：对国内仲裁裁决，只要当事人约定的自动履行仲裁裁决期限届满，裁决的债权人就可以申请对该裁决的执行；对外国仲裁裁决，裁决债权人需要在仲裁裁决生效之日起 3 年内申请。另外，申请承认与外国仲裁裁决的当事人，应当按照 2015 年《越南民事诉讼法》的规定提交有关材料。由于越南尚未对法院作出是否承认和执行外国仲裁裁决的决定设定明确的期限，建议作为裁决债权人的中方当事人尽快在裁决生效后申请承认和执行，以缩短这一时间。

从实践来看，越南对外国仲裁裁决的承认和执行具有不确定性，且决定时间较长，因此，在被申请人一方可执行的财产所在地位于越南境内的纠纷中，中方当事人可以考虑通过约定越南法律作为仲裁准据法的方式使仲裁裁决归入越南国内仲裁裁决的范围，以此规避外国仲裁裁决承认与执行程序可能带来的风险。

由于语言文化、历史传统、法律体系等差异的影响，国内对于越南相关仲裁法律制度的了解和研究仍然有限。在两国加强经贸合作、共同建设“一带一路”的大背景下，中国企业应当充分利用已有资源，不断增强自身的法律意识，融入当地。中国企业在通过仲裁防范或解决涉越商事纠纷的过程时，必须正视和重视仲裁条款的作用；在签订合同的过程中充分考虑可能出现的纠纷或风险，向法律专业人士咨询，制定有利于纠纷解决的仲裁条款。中国企业应当主动了解越南的仲裁法律制度，一旦发生纠纷，应积极参与相关程序，努力寻求纠纷的合理解决。除此之外，由于国际商事仲裁专业化程度较高，涉及的领域和内容非常广泛，相关企业和法务工作者也要重视与仲裁领域专家学者的交流，建立与专业律师、仲裁员的联系，以便发生纠纷时能够及时找到解决纠纷的最佳人选。此外，还要依托国家平台，充分利用信息资源，提高企业自身抵御风险和化解风险的能力。

附录:

2010 年越南商事仲裁法(英文版)

Vietnamese Law on Commercial Arbitration
No. 54/2010/QH12

National Assembly of the Socialist Republic of Vietnam Legislature XII, 7th Session (June 17, 2010)

Pursuant to the 1992 Constitution of the Socialist Republic of Vietnam as amended by Resolution 51 – 2001 – QH10;

The National Assembly hereby promulgates the Law on Commercial Arbitration.

Chapter Ⅰ General Provisions

Article 1 Governing scope

This Law regulates commercial arbitration competence, arbitration forms, arbitration institutions and arbitrators; order and procedures for arbitration; rights, obligations and responsibilities of parties to arbitration proceedings; competence of courts over arbitration activities; organization and operation of foreign arbitration in Vietnam; and enforcement of arbitral awards.

Article 2 Competence of arbitration to resolve disputes:

1. Disputes between parties arising from commercial activities.

2. Disputes arising between parties at least one of whom is engaged in commercial activities.

3. Other disputes between parties which the law stipulates shall (or may) (1) be resolved by arbitration.

Article 3 Interpretation of terms

In this Law, the following terms shall be construed as follows:

1. Commercial arbitration means a dispute resolution method agreed by the parties and conducted in accordance with the provisions of this Law.

2. Arbitration agreement means an agreement between the parties to use arbitration to resolve a dispute which may arise or which has arisen.

3. Parties in dispute mean Vietnamese or foreign individuals, bodies or organizations which participate in arbitration proceedings in the capacity of claimants or respondents.

4. Dispute with a foreign element means a dispute arising in commercial relations involving, or in some other legal relationships involving a foreign element as prescribed in the Civil Code.

5. Arbitrator means a person selected by the parties or appointed by an arbitration centre or by a court to resolve a dispute in accordance with the provisions of this Law.

6. Institutional arbitration means the form of dispute resolution at an arbitration centre in accordance with the provisions of this Law and the procedural rules of such arbitration centre.

7. *Ad hoc* arbitration means the form of dispute resolution in accordance with the provisions of this Law and the order and procedures as agreed by the parties.

8. Dispute resolution location means the location where the arbitration tribunal conducts the dispute resolution as agreed by the parties, or as decided by the arbitration tribunal if the parties do not have such an agreement. If the dispute resolution location is within the territory of Vietnam then the award must be deemed to have been rendered in Vietnam irrespective of the location at which the arbitration tribunal conducted sessions in order to issue such award.

9. Arbitral decision means a decision of the arbitration tribunal during the dispute resolution process.

10. Arbitral award means the decision of the arbitration tribunal resolving the entire dispute and terminating the arbitration proceedings.

11. Foreign arbitration means arbitration established in accordance with foreign arbitration law which the parties agree to select to conduct dispute resolution, either inside or outside the territory of Vietnam.

12. Foreign arbitral award means an award rendered by foreign arbitration either inside or outside the territory of Vietnam in order to resolve a dispute as agreed by the parties.

Article 4 Principles for dispute resolution by arbitration

1. Arbitrators must respect the agreement of the parties if it does not breach prohibitions and is not contrary to social morals.

2. Arbitrators must be independent, objective and impartial, and must comply with provisions of law.

3. Parties in dispute shall have equal rights and obligations. Arbitration tribunals shall be responsible to facilitate the parties to exercise their rights and to discharge their obligations.

4. Dispute resolution by arbitration shall be conducted in private, unless otherwise agreed by the parties.

5. An arbitral award shall be final.

Article 5 Conditions for dispute resolution by arbitration

1. A dispute shall be resolved by arbitration if the parties have an arbitration agreement. An arbitration agreement may be made either prior to or after a dispute arises.

2. If one of the parties to an arbitration agreement is an individual who dies or who loses capacity for acts, then the arbitration agreement shall remain effective against the heir or legal representative (respectively) of such former individual, unless otherwise agreed by the parties.

3. If one of the parties to an arbitration agreement is an organization which must terminate its operation, becomes bankrupt, dissolves, consolidates, merges, demerges, separates or converts its organizational form, then the arbitration agreement shall remaineffective against the organization which succeeds to the rights and obligations of such former organization, unless otherwise agreed by the parties.

Article 6 Court refusal to accept jurisdiction if there is an arbitration agreement

Where the parties in dispute already have an arbitration agreement but one party institutes court proceedings, the court must refuse to accept jurisdiction unless the arbitration agreement is void or incapable of being performed.

Article 7 Determining which court has competence over arbitration activities

1. If the parties already have an agreement to choose a specific court, then such court as chosen by the parties shall be the competent court.

2. If the parties do not have an agreement to choose a court, then the competent court shall be determined as follows:

(a) For appointment of an arbitrator to establish an *ad hoc* arbitration tribunal, the competent court shall be the court in the place where the respondent resides if the respondent is an individual, or where the respondent has its head office if the respondent is an organization. If there are a number of respondents, then the competent court shall be the court in the place where one of such respondents resides or has its head office.

If the respondent resides or has its head office overseas, then the competent court shall be the court in the place where the claimant resides or has its head office.

(b) For the replacement of an arbitrator in an ad hoc arbitration tribunal, the competent court shall be the court in the place where the arbitration tribunal resolves the dispute.

(c) For an appeal against the decision of an arbitration tribunal that the arbitration agreement was void or incapable of being performed or about the jurisdiction of the arbitration tribunal, the competent court shall be the court in the place where the arbitration tribunal issued (such) decision.

(d) For an application to a court to collect evidence, the competent court shall be the court in the place where such evidence requiring collection exists.

(dd) For an application to a court to grant interim relief, (2) the competent court shall be the court in the place where the relief needs to be applied.

(e) For summoning witnesses, the competent court shall be the court in the place where the witnesses reside.

(f) For an application to set aside an arbitral award or to register an *ad hoc* arbitral award, the competent court shall be the court in the place where the arbitration tribunal rendered such award.

3. Courts with competence over the arbitration activities prescribed in clauses 1 and 2 of this article shall be people's courts of provinces and cities under central authority.

Article 8 Determining which enforcement agency has competence to enforce arbitral awards and interim relief decisions of arbitration tribunals

1. The civil enforcement agency with competence to enforce an arbitral award shall be the civil enforcement agency in the province or city under central authority where the arbitration tribunal rendered the award.

2. The civil enforcement agency with competence to enforce an interim relief decision of an arbitration tribunal shall be the civil enforcement agency in the province or city under central authority where the relief needs to be applied.

Article 9 Negotiation and conciliation during arbitration proceedings

Parties shall have the freedom, during the process of arbitration proceedings, to negotiate and reach agreement with each other to resolve their dispute, or to request the arbitration tribunal to mediate in order for the parties to reach agreement and resolve their dispute.

Article 10 Language

1. For disputes without a foreign element, the language to be used in arbitration proceedings shall be Vietnamese, except in a dispute to which at least one party is an enterprise with foreign invested capital. If a party in dispute cannot use Vietnamese, then it may use an interpreter (to translate) into Vietnamese.

2. For disputes with a foreign element, disputes to which at least one party is an enterprise with foreign invested capital, the language to be used in arbitration proceedings shall be as agreed by the parties. If the parties do not have such an agreement, then the language to be used in the arbitration proceedings shall be as decided by the arbitration tribunal.

Article 11 Location for dispute resolution by arbitration

1. Parties shall have the right to reach agreement on the dispute resolution location; if the parties do not have such an agreement, then the location shall be as decided by the arbitration tribunal. The dispute resolution location may be inside or outside the territory of Vietnam.

2. Unless otherwise agreed by the parties, the arbitration tribunal may conduct ses-

sions at a location which it deems appropriate for mutual consultation between the arbitrators, for taking statements from witnesses, for seeking advice from experts, or for conducting evaluations of goods, assets or other materials.

Article 12 Service of notices and order for service of notices

The method and order for service of notices in arbitration proceedings shall be regulated as follows, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre:

1. Explanatory statements, communications and other materials as served by any one party must be sent to the arbitration centre or arbitration tribunal in sufficient copies so that each member of the arbitration tribunal has one copy, the other party has one copy, and one copy is archived at the arbitration centre.

2. Notices and materials served by an arbitration centre and/or arbitration tribunal on the parties must be sent to the addresses of the parties or to their representatives at the correct addresses as notified by such parties.

3. An arbitration centre and/or arbitration tribunal may serve notices and materials by hand delivery, registered letter, ordinary mail, fax, telex, telegram, email or any other method which acknowledges such service.

4. Notices and materials sent by an arbitration centre and/or arbitration tribunal shall be deemed received on the date on which the parties or their representatives received them or they are deemed received, if such notices and materials were sent in conformity with the provisions in clause 2 of this article.

5. The time-limit for receipt of a notice or material shall be calculated from the day following the day on which such notice or material is deemed received. If the following day is a public or other holiday as prescribed in regulations of the country or territory where such notice or material was served, then this time-limit shall be calculated from the first business day (after such holiday). If the last day of this time-limit falls on a public or other holiday as prescribed in regulations of the country or territory where such notice or material is served, then the deadline shall be the close of the next business day (after such holiday).

Article 13 Loss of right to object

If a party discovers a breach of the provisions of this Law or of the arbitration agreement but continues to conduct the arbitration proceedings and does not object to such breach within the time-limit stipulated in this Law, (such party) shall lose the right to object at the arbitration or before the court.

Article 14 Applicable law in dispute resolution

1. For disputes without a foreign element, the arbitration tribunal shall apply the law of Vietnam in order to resolve the dispute.

2. For disputes with a foreign element, the arbitration tribunal shall apply the law chosen by the parties; if the parties do not have an agreement on applicable law, then the arbitration tribunal shall make a decision to apply the law which it considers the most appropriate.

3. If the law of Vietnam (or) the law chosen by the parties does not contain specific provisions relevant to the matters in dispute, then the arbitration tribunal may apply international customs in order to resolve the dispute if such application or the consequences of such application are not contrary to the fundamental principles of the law of Vietnam.

Article 15 State administration of arbitration

1. State administration of arbitration shall comprise the following items:

(a) Promulgation of legal instruments on arbitration and their implementing guidelines;

(b) Issuance and revocation of establishment licences and certificates of registration of operation of arbitration centres, and of branches and representative offices of foreign arbitration institutions in Vietnam;

(c) Announcement of lists of arbitrators of arbitration institutions operating in Vietnam;

(d) Dissemination and education on the law on arbitration; international cooperation in the arbitration sector; and guidance on training and fostering arbitrators;

(dd) Checks and inspections, and dealing with breaches of the law on arbitration;

(e) Resolution of complaints and denunciations about the arbitration activities pre-

scribed in sub-clauses (b), (c), (d) and (dd) of this clause.

2. The Government shall exercise uniform State administration of arbitration.

3. The Ministry of Justice shall be responsible before the Government for exercising State administration of arbitration.

4. Departments of Justice of provinces and cities under central authority shall assist the Ministry of Justice to carry out a number of tasks in accordance with Government regulations and the provisions of this Law.

Chapter Ⅱ Arbitration Agreements

Article 16 Form of arbitration agreements

1. An arbitration agreement may be in the form of an arbitration clause in a contract or it may be in the form of a separate agreement.

2. An arbitration agreement must be in writing. The following forms of agreement shall also be deemed to constitute a written arbitration agreement:

(a) An agreement established via an exchange between the parties by telegram, fax, telex, email or other form prescribed by law.

(b) An agreement established via the exchange of written information between the parties.

(c) An agreement prepared in writing by a lawyer, notary or competent organization at the request of the parties.

(d) Reference by the parties during the course of a transaction to a document such as a contract, source document, company charter or other similar documents which contain an arbitration agreement.

(dd) Exchange of a statement of claim and defence which express the existence of an agreement proposed by one party and not denied by the other party.

Article 17 Right of consumers to select dispute resolution method

For disputes between a goods and/or service provider (on the one hand) and consumers (on the other hand), even if such provider has drafted and inserted an arbitration clause in its standard conditions on supply of such goods and services, a consumer shall still have the right to select arbitration or a court to resolve the dispute. A goods

and/or service provider shall only have the right to institute arbitration proceedings if the consumer so consents.

Article 18 Void arbitration agreements:

1. The dispute arises in a sector outside the competence of arbitration prescribed in Article 2 of this Law.

2. The person who entered into the arbitration agreement lacked authority as stipulated by law.

3. The person who entered into the arbitration agreement lacked civil legal capacity pursuant to the Civil Code.

4. The form of the arbitration agreement does not comply with Article 16 of this Law.

5. One of the parties was deceived, threatened or coerced during the process of formulation of the arbitration agreement and requests a declaration that the arbitration agreement is void.

6. The arbitration agreement breaches a prohibition prescribed by law.

Article 19 Independence of arbitration agreements

An arbitration agreement shall exist totally independently of the contract. Any modification, extension or rescission of the contract, or invalidity or unenforceability of the contract shall not result in the invalidity of the arbitration agreement.

Chapter Ⅲ Arbitrators

Article 20 Qualifications of arbitrators

1. A person with all the following qualifications may act as an arbitrator:

(a) Having full civil legal capacity as prescribed in the Civil Code;

(b) Having a university qualification and at least five years' work experience in the discipline which he or she studied;

(c) In special cases an expert with highly specialized qualifications and considerable practical experience may still be selected to act as an arbitrator notwithstanding he/she fails to satisfy the requirements prescribed in sub-clause (b) above.

2. A person with all the qualifications prescribed in clause 1 of this Article but who falls into one of the following categories shall not be permitted to act as an arbitrator:

(a) A person who is currently a judge, prosecutor, investigator, enforcement officer, or official of a people's court, of a people's procuracy, of an investigative agency or of a judgment enforcement agency.

(b) A person under a criminal charge or prosecution or who is serving a criminal sentence or who has fully served the sentence but whose criminal record has not yet been cleared.

3. An arbitration centre may stipulate higher qualifications than those prescribed in clause 1 of this Article as applicable to arbitrators in its institution.

Article 21 Rights and obligations of arbitrators:

1. To accept or refuse to resolve a dispute.

2. To remain independent during dispute resolution.

3. To refuse to provide information about a dispute.

4. To receive remuneration.

5. To maintain confidentiality of the contents of the dispute which he or she resolves, unless information must be provided to a competent State authority in accordance with law.

6. To ensure that resolution of a dispute is impartial, speedy and prompt.

7. To comply with professional ethics rules.

Article 22 Arbitrators' Association

The Arbitrators' Association shall be a socio-professional organization of arbitrators and arbitration centres throughout the entire country. Establishment and operation of the Arbitrators' Association shall be implemented in accordance with the law on professional associations.

Chapter Ⅳ　Arbitration Centres

Article 23 Functions of arbitration centre

An arbitration centre shall have the function of organizing and coordinating activi-

ties of dispute resolution by institutional arbitration, and of assisting arbitrators by providing administrative and office facilities and other assistance during the process of the arbitration proceedings.

Article 24 Conditions and procedures for establishment of arbitration centre

1. An arbitration centre may be established if there is a request for establishment from at least five founding members who are Vietnamese citizens and fully qualified to act as arbitrators in accordance with Article 20 of this Law, and if the Minister of Justice issues an establishment licence.

2. An application file for establishment of an arbitration centre shall comprise:

(a) Request for establishment;

(b) Draft charter of the arbitration centre on the standard form issued by the Ministry of Justice;

(c) List of founding members and accompanying documents proving that such members satisfy all the conditions prescribed in Article 20 of this Law.

3. The Minister of Justice shall, within thirty days from the date of receipt of a complete and valid application file, issue an establishment licence for the arbitration centre and approve its charter; in a case of refusal, a written reply specifying the reasons must be provided.

Article 25 Registration of operation of arbitration centre

An arbitration centre must, within thirty days from the date of receipt of its establishment licence, register its operation with the Department of Justice in the province or city under central authority where it has its head office. If upon the expiry of this time-limit the arbitration centre has failed to carry out registration, then its licence shall no longer be valid.

The Department of Justice shall issue a certificate of registration of operation for the arbitration centre no later than fifteen days from the date of receipt of the request for registration.

Article 26 Announcement of establishment of arbitration centre

1. An arbitration centre must, within thirty days from the date of issuance of its

certificate of registration of operation, publish an announcement in three consecutive issues of a central daily newspaper or daily newspaper in the locality where it registered its operation, with the following main particulars:

(a) Name and address of head office of the arbitration centre;

(b) Operational activities of the arbitration centre;

(c) Serial number of the certificate of registration of operation, issuing body and date of issuance of such certificate;

(d) Date of commencement of operation of the arbitration centre.

2. An arbitration centre must display at its head office a notice of the particulars stipulated in clause 1 of this Article and a list of arbitrators of the arbitration centre.

Article 27 Legal entity status and structure of arbitration centre

1. An arbitration centre shall have legal entity status, and its own seal and bank account.

2. An arbitration centre shall be a non-profit institution.

3. An arbitration centre shall be permitted to establish branches and representative offices both within Vietnam and overseas.

4. An arbitration centre shall have an executive committee and a secretariat. The structure and apparatus of the arbitration centre shall be as prescribed in its charter.

The executive committee of an arbitration centre shall comprise the chairman and one or more vice chairmen, and it may also include a general secretary appointed by the chairman. The chairman of the arbitration centre shall be an arbitrator.

5. An arbitration centre shall have a list of arbitrators.

Article 28 Rights and obligations of arbitration centre

1. To formulate the charter and procedural rules of the arbitration centre, which shall be consistent with the provisions of this Law.

2. To prescribe the qualifications required for arbitrators and the rules on selection and removal of the name of an arbitrator from the list of arbitrators of such centre.

3. To send the list of arbitrators of the arbitration centre and any changes to such list to the Ministry of Justice for announcement.

4. To appoint arbitrators to establish an arbitration tribunal in the cases prescribed in

this Law.

5. To provide arbitration and mediation services and other commercial dispute resolution methods prescribed by law.

6. To supply administrative and office facilities and other services for dispute resolution.

7. To collect arbitration fees and other lawful fees relevant to arbitration activities.

8. To pay remuneration and other expenses to arbitrators.

9. To hold courses for arbitrators to reinforce their knowledge and skills in dispute resolution.

10. To report annually on the operation of the arbitration centre to the Department of Justice in the locality where the arbitration centre has registered its operation.

11. To archive files and to provide copies of arbitral decisions at the request of the parties in dispute or of a competent State authority.

Article 29 Termination of operation of arbitration centre

1. The operation of an arbitration centre shall terminate in the following circumstances:

(a) In the circumstances prescribed in the charter of the arbitration centre;

(b) Upon revocation of the establishment licence or certificate of registration of operation of the arbitration centre.

2. The Government shall provide detailed regulations on the circumstances in which an establishment licence or certificate of registration of operation of an arbitration centre shall be revoked, and on the order and procedures for termination of operation of an arbitration centre.

Chapter Ⅴ Instituting (Arbitration) Proceedings

Article 30 Statement of claim and accompanying materials

1. In the case of dispute resolution at an arbitration centre, the claimant (shall) prepare a statement of claim and send it to the arbitration centre. In the case of dispute resolution by *ad hoc* arbitration, the claimant shall prepare a statement of claim and send it to the respondent.

2. A statement of claim shall contain the following particulars:

(a) Date on which the statement of claim is made;

(b) Names and addresses of the parties, and names and addresses of witnesses, if any;

(c) Summary of the matters in dispute;

(d) Grounds and evidence, if any, of the claim;

(dd) Specific relief sought by the claimant (8) and value of the dispute;

(e) Name and address of the person whom the claimant selects as arbitrator or request for an arbitrator to be appointed.

3. The arbitration agreement and originals or copies of relevant materials must accompany the statement of claim.

Article 31 Time of commencement of arbitration proceedings

1. In the case of dispute resolution at an arbitration centre and unless otherwise agreed by the parties, the time of commencement of the arbitration proceedings shall be upon receipt by the arbitration centre of the statement of claim from the claimant.

2. In the case of dispute resolution by *ad hoc* arbitration and unless otherwise agreed by the parties, the time of commencement of the arbitration proceedings shall be upon receipt by the respondent of the statement of claim of the claimant.

Article 32 Notification of statement of claim

Unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre, the arbitration centre must, within ten days from the date of receipt of the statement of claim with accompanying materials and a receipt of the provisional advance of arbitration fees, send the respondent a copy of the statement of claim of the claimant together with the materials prescribed in Article 30.3 of this Law.

Article 33 Limitation period for initiating proceedings for dispute resolution by arbitration

The limitation period for initiating proceedings for dispute resolution by arbitration shall be two years from the date of infringement of legal rights and interests, unless otherwise stipulated by specialized law.

Article 34 Arbitration fees

1. Arbitration fees are the fees collected for the provision of services for dispute resolution by arbitration. Arbitration fees shall comprise:

(a) Remuneration and travelling and other expenses of arbitrators;

(b) Fees for expert consultancy and other assistance requested by the arbitration tribunal;

(c) Administrative fees;

(d) Fees for the arbitration centre's appointment of an arbitrator for an *ad hoc* arbitrator at the request of the parties in dispute;

(dd) Fees for use of other necessary services provided by the arbitration centre.

2. The arbitration centre shall fix the arbitration fees. In the case of dispute resolution by *ad hoc* arbitration, the arbitration tribunal shall fix the arbitration fees.

3. The party which loses the case must pay the arbitration fees, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre, or unless the arbitration tribunal makes some other allocation of fees.

Article 35 Defence and submission of the defence

1. A defence shall contain the following particulars:

(a) Date on which the defence is made;

(b) Name and address of the respondent;

(c) Grounds and evidence, if any, in support of the defence;

(d) Name and address of the person whom the respondent selects as arbitrator or request for an arbitrator to be appointed.

2. In the case of dispute resolution at an arbitration centre, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre, the respondent must send the defence to the arbitration centre within thirty days from the date of receipt of the statement of claim and accompanying materials. If one or all parties so request, the arbitration centre may extend this time-limit depending on the particular circumstances of the case.

3. In the case of dispute resolution by ad hoc arbitration, unless otherwise agreed by the parties, within thirty days from the date of receipt of the statement of claim and

accompanying materials of the claimant, the respondent must send the defence to the claimant and the arbitrator(s) and the name and address of the person whom the respondent selects as arbitrator.

4. If the respondent alleges that the dispute is outside the jurisdiction of arbitration, or alleges that there is no arbitration agreement or that the arbitration agreement is void or incapable of being performed, the respondent must specify such allegations in the defence.

5. If the respondent fails to submit the defence as prescribed in clauses 2 and 3 of this Article, the dispute resolution process shall still proceed.

Article 36 Counterclaim by respondent

1. A respondent shall have the right to file a counterclaim against the claimant on issues relevant to the dispute.

2. The counterclaim of the respondent must be sent to the arbitration centre. In the case of dispute resolution by *ad hoc* arbitration, the counterclaim must be sent to the arbitration tribunal and the claimant. Counterclaims must be submitted at the same time as the defence.

3. The claimant must send a defence (to counterclaim) to the arbitration centre within thirty days from the date of receipt of the counterclaim. In the case of dispute resolution by *ad hoc* arbitration, the claimant must send the defence to counterclaim to the arbitration tribunal and to the respondent.

4. The arbitration tribunal which resolves the statement of claim of the claimant shall also resolve the counterclaim in accordance with the provisions in this Law on order and procedures for resolving a statement of claim of a claimant.

Article 37 Withdrawal of statement of claim or counterclaim; amendment or addition to statement of claim, counterclaim or defences

1. Parties shall have the right to withdraw their statement of claim and/or counterclaim before the arbitration tribunal issues the arbitral award.

2. Parties may amend or add to their statement of claim, counterclaim or defences throughout the process of the arbitration proceedings. The arbitration tribunal shall have the right to disallow such amendments or additions if it considers they are an abuse

aimed at causing difficulties or delaying the issuance of an arbitral award, or if they exceed the scope of the arbitration agreement applicable to the dispute.

Article 38 Negotiation during arbitration proceedings

Parties shall still have the right, as from the time of commencement of arbitration proceedings, to voluntarily negotiate and reach agreement on termination of the dispute resolution.

If the parties reach their own agreement on termination of the dispute resolution, they shall have the right to request (that) the chairman of the arbitration centre issue a decision staying the dispute resolution.

Chapter Ⅵ Arbitration Tribunal

Article 39 Composition of arbitration tribunal

1. An arbitration tribunal may consist of one or more arbitrators, depending on the agreement of the parties.

2. If the parties do not have an agreement on the number of arbitrators, an arbitration tribunal shall consist of three arbitrators.

Article 40 Establishment of arbitration tribunal at arbitration centre

Establishment of an arbitration tribunal shall be regulated as follows, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre:

1. The respondent shall, within thirty (30) days from the date of receipt of the statement of claim and request to select an arbitrator as sent to the respondent by the arbitration centre, select an arbitrator for the respondent and notify the arbitration centre of same or request (that) the chairman of the arbitration centre appoint an arbitrator. If the respondent has failed to select an arbitrator or to request that the chairman of the arbitration centre appoint an arbitrator, then within a further seven days after expiry of the time-limit provided in this clause, the chairman of the arbitration centre shall appoint an arbitrator for the respondent.

2. If a dispute involves multiple respondents, then the respondents shall agree on

selection of an arbitrator or agree on requesting appointment of an arbitrator for such respondents within thirty days from the date of receipt of the statement of claim sent by the arbitration centre. If the respondents have failed to select an arbitrator, then within a further seven days after expiry of the time-limit provided in this clause, the chairman of the arbitration centre shall appoint an arbitrator for the respondents.

3. The arbitrators shall, within fifteen days from the date of their selection by the parties or appointment by the chairman of the arbitration centre, elect another (third) arbitrator to act as chairman of the arbitration tribunal. If such election has not taken place upon the expiry of this time-limit, then within a further seven days after expiry of the time-limit provided in this clause, the chairman of the arbitration centre shall appoint the chairman of the arbitration tribunal.

4. Where the parties agree to have the dispute resolved by a sole arbitrator but fail to select an arbitrator within thirty days from the date on which the respondent receives the statement of claim, then at the request of one or all parties, the chairman of the arbitration centre shall appoint a sole arbitrator within fifteen days from the date of receipt of such request.

Article 41 Establishment of *ad hoc* arbitration tribunal

Establishment of an *ad hoc* arbitration tribunal shall be regulated as follows, unless otherwise agreed by the parties:

1. The respondent must select an arbitrator for the respondent and notify the claimant of such selection within thirty days from the date on which the respondent receives the statement of claim of the claimant. If upon expiry of this time-limit the respondent has failed to notify the claimant of the name of the selected arbitrator and the parties do not have some other agreement on appointment of an arbitrator, then the claimant shall have the right to request the competent court to appoint an arbitrator for the respondent.

2. If a dispute involves multiple respondents, then the respondents shall reach agreement on selection of an arbitrator within thirty days from the date of receipt of the statement of claim and accompanying materials from the claimant. If upon expiry of this time-limit the respondents have failed to select an arbitrator and the parties do not have some other agreement on appointment of an arbitrator, then one or all parties shall have

the right to request the competent court to appoint an arbitrator for the respondents.

3. The arbitrators shall, within fifteen days from the date of their selection by the parties or appointment by the court, elect another (third) arbitrator to act as chairman of the arbitration tribunal. If the arbitrators are unable to elect a chairman and unless otherwise agreed by the parties, the parties shall have the right to request the competent court to appoint the chairman of the arbitration tribunal.

4. Where the parties agree to dispute resolution by a sole arbitrator but are unable to agree on selection of an arbitrator within thirty days from the date on which the respondent received the statement of claim, and if the parties do not have an agreement to request an arbitration centre to appoint an arbitrator, then the competent court shall appoint a sole arbitrator at the request of one or all parties.

5. The chief judge of a competent court must, within seven days from the date of receipt of a request from the parties prescribed in clauses 1, 2, 3 or 4 of this Article, assign a judge to appoint an arbitrator and notify the parties thereof.

Article 42 Replacement of arbitrators

1. An arbitrator must refuse to resolve a dispute, and the parties shall have the right to request replacement of an arbitrator resolving the dispute in the following circumstances:

(a) The arbitrator is a relative or representative of a party;

(b) The arbitrator has an interest related to the dispute;

(c) There are clear grounds demonstrating that the arbitrator is not impartial or objective;

(d) The arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution, unless the parties provide written consent.

2. An arbitrator must, as from the time of his or her selection or appointment, provide written notice to the arbitration centre or arbitration tribunal and to the parties of any circumstances which may affect his or her objectiveness and impartiality.

3. In the case of dispute resolution at an arbitration centre, if an arbitration tribunal has not yet been established, then the chairman of the arbitration centre shall make the

decision on replacement of the arbitrator. If an arbitration tribunal has already been established, then the remaining members of such tribunal shall make the decision on replacement of the arbitrator. If such remaining members of the arbitration tribunal are unable to make a decision or if the arbitrators or the sole arbitrator refuses to resolve the dispute, then the chairman of the arbitration centre shall make the decision on replacement of the arbitrator.

4. In the case of dispute resolution by an *ad hoc* arbitration tribunal, the remaining members of the arbitration tribunal shall make the decision on replacement of the arbitrator. If such remaining members are unable to reach a decision or if the arbitrators or the sole arbitrator refuses to resolve the dispute, then within fifteen days from the date of receipt of a request from one or more arbitrators as mentioned above, or from one or all parties to the dispute, the chief judge of the competent court shall assign a judge to make the decision on replacement of the arbitrator.

5. The decision of the chairman of the arbitration centre or of the court in the circumstances prescribed in clauses 3 and 4 respectively of this Article shall be the final decision.

6. If for any reason of force majeure or other objective reason an arbitrator is unable to continue his or her participation in the dispute resolution or if such arbitrator is replaced, then selection or appointment of a substitute arbitrator shall be implemented in accordance with the order and procedures stipulated in this Law.

7. The newly established arbitration tribunal may, after consulting the parties, review issues already dealt with in previous dispute resolution sessions held by the former arbitration tribunal.

Article 43 Consideration whether an arbitration is void or incapable of being performed and whether the arbitration tribunal has jurisdiction

1. The arbitration tribunal must, prior to dealing with the merits of a dispute, consider whether the arbitration agreement is valid, whether the arbitration agreement is capable of being performed, and whether the tribunal has jurisdiction. If the case is within the jurisdiction of the arbitration tribunal to resolve, then the tribunal shall proceed to resolve the dispute in accordance with this Law. If the dispute is not within the jurisdic-

tion of the tribunal, or if the arbitration agreement is void, or if it is clearly established that the arbitration agreement is incapable of being performed, then the arbitration tribunal shall decide to stay the proceedings and immediately notify the parties thereof.

2. If it is discovered during the dispute resolution process that the arbitration tribunal has exceeded its jurisdiction, the parties may lodge a complaint with the arbitration tribunal. The arbitration tribunal shall then be responsible to hear such issue and make a decision on it.

3. If the parties have agreed for dispute resolution at one specific arbitration centre, but such centre has already terminated its operation without any other institution succeeding it, then the parties may reach an agreement to select some other arbitration centre; if the parties are unable to reach such an agreement, they shall have the right to institute court proceedings for resolution of the dispute.

4. If the parties already have a specific agreement on selection of an arbitrator for an *ad hoc* arbitration, but at the time when the dispute arises the arbitrator is unable to conduct resolution of the dispute for any reason of force majeure or for any other objective reasons, then parties may reach agreement on selection of another arbitrator in replacement; if the parties are unable to reach such an agreement, they shall have the right to institute court proceedings to resolve the dispute.

5. If the parties already have an arbitration agreement but do not clearly indicate the arbitration form or a specific arbitration institution, then if a dispute arises the parties must reach agreement on the arbitration form or a specific arbitration institution to resolve the dispute. If the parties are unable to reach such an agreement, then selection of the arbitration form and the arbitration institution to resolve the dispute shall be implemented in accordance with the request of the claimant.

Article 44 Petition and resolution of petition against decision of arbitration tribunal concerning whether the arbitration agreement exists, the arbitration agreement is void, the arbitration agreement is incapable of being performed and whether the arbitration tribunal has jurisdiction

1. If the parties disagree with any decision of the arbitration tribunal prescribed in Article 43 of this Law, they shall have the right, within five business days from the date

of receipt of such decision, to petition the competent court to review such decision of the arbitration tribunal. The petitioner must simultaneously notify the arbitration tribunal of such petition.

2. A petition shall contain the following main particulars:

(a) Date on which the petition is made;

(b) Name and address of the petitioner;

(c) Relief sought.

3. Copies of the statement of claim, arbitration agreement and decision of the arbitration tribunal must accompany the petition. Accompanying documents in a foreign language must be translated into Vietnamese and translations must be validly certified.

4. The chief judge of the competent court shall, within five business days from receipt of the petition, assign a judge to hear and resolve the petition. Such judge must hear the matter and make a decision on it within ten business days from the date of being assigned. The decision of the court shall be final.

5. The arbitration tribunal may continue to conduct the dispute resolution while the court is dealing with the petition.

6. If the court decides that the dispute does not fall within the jurisdiction of the arbitration tribunal, or that there is no arbitration agreement or that the arbitration agreement is void or incapable of being performed, then the arbitration tribunal shall issue a decision staying the dispute resolution. Unless the parties have some other agreement, the parties shall have the right to institute court proceedings to resolve their dispute. The limitation period for initiating court proceedings shall be determined in accordance with law. Calculation of the limitation period shall exclude the time from when the claimant initiated arbitration proceedings up until the date of issuance of the court decision accepting jurisdiction over the dispute resolution.

Article 45 Jurisdiction of the arbitration tribunal to verify the facts

An arbitration tribunal shall have the right, during the dispute resolution process, to meet or hold discussions with one party in the presence of the other party, by appropriate methods, in order to clarify issues relevant to the dispute. The arbitration tribunal may on its own initiative or at the request of one or all parties, conduct fact-finding with

a third person in the presence of the parties or after having notified the parties.

Article 46 Jurisdiction of the arbitration tribunal to collect evidence

1. The parties shall have the right and responsibility to provide evidence to the arbitration tribunal to prove facts relevant to the issues in dispute.

2. The arbitration tribunal shall have the right, at the request of one or all parties, to request witnesses to provide information and materials relevant to the dispute resolution.

3. The arbitration tribunal shall have the right, on its own initiative or at the request of one or both parties, to seek an assessment or valuation of the assets in dispute in order to provide grounds for resolving the dispute. The party requesting an assessment or valuation shall advance the costs thereof, or the arbitration tribunal shall allocate such costs.

4. The arbitration tribunal shall have the right, on its own initiative or at the request of one or both parties, to seek expert advice. Expert fees shall be provisionally paid in advance by the party requesting such advice, or shall be paid in accordance with the allocation made by the arbitration tribunal.

5. If the arbitration tribunal or one or both parties have already taken necessary measures to collect evidence by themselves but without success, then a petition may be made to the competent court to require other bodies, organizations or individuals to provide legible, audible or visual materials or to provide other objects relevant to the dispute. Such petition must specify the matters in dispute currently being resolved by arbitration, the evidence which needs to be collected, the reasons why the evidence has not been collected, and the name and address of the body, organization or individual currently managing and/or holding the evidence which needs to be collected.

6. The chief judge of the competent court shall, within seven business days from the date of receipt of a request for collection of evidence, assign a judge to hear and resolve such request. Such judge shall, within five business days from the date of being assigned, send a written notice to the body, organization or individual currently managing and/or holding the evidence requiring it to provide the evidence to the court, and the judge shall also send such notice to the same level procuracy in order for the latter to

implement its functions and duties in accordance with law.

The body, organization or individual currently managing and/or holding the evidence shall be responsible to promptly and completely provide such evidence pursuant to the request of the court within fifteen days from the date of receipt of the request.

The court must, within five business days from the date of receipt of the evidence from the body, organization or individual supplying it, notify the arbitration tribunal and the applicant so that the evidence may be handed over.

If after expiry of the stipulated time-limit the body, organisation or individual (concerned) fails to provide the evidence pursuant to the request (of the court), the court shall immediately notify the arbitration tribunal and the applicant, and also provide written notice to the competent agency or organization to deal with such failure in accordance with law.

Article 47 Jurisdiction of arbitration tribunal to summon witnesses

1. The arbitration tribunal shall have the right at the request of one or both parties and if the tribunal considers it necessary, to require a witness to attend a dispute resolution session. Witness fees shall be paid by the party requesting that the witness be summoned, or shall be as allocated by the arbitration tribunal.

2. If a witness who has been validly summoned by the arbitration tribunal fails to attend the session without a legitimate reason, and the absence of such witness constitutes an obstacle to resolution of the dispute, then the arbitration tribunal may send a written request to the competent court to issue a decision summoning such witness to attend a session of the arbitration tribunal. Such request must specify the matters currently being resolved by arbitration; the full name and address of the witness; the reason why the witness needs to be summoned; and the time and location where the witness is required to attend.

3. The chief judge of the competent court shall, within seven business days from the date of receipt of a written request from the arbitration tribunal to summon a witness, assign a judge to hear and resolve such request. The judge must, within five business days from the date of being assigned, issue a decision summoning the witness.

The decision summoning the witness must specify the name of the arbitration tribu-

nal which requested that the witness be summoned; the contents of the dispute; the full name and address of the witness; and the time and location where the witness must attend at the request of the arbitration tribunal.

The court must immediately send the decision to the arbitration tribunal, to the witness, and also to the same level procuracy in order for the latter to implement its functions and duties in accordance with law.

A witness shall be obliged to strictly implement the decision of the court. Witness fees shall be paid as stipulated in clause 1 of this Article.

Chapter Ⅶ Interim Relief

Article 48 Right to request application of interim relief

1. Parties in dispute shall have the right to request the arbitration tribunal or a court to order an interim relief in accordance with the provisions of this Law and other relevant laws, unless such parties have some other agreement.

2. A request to a court to order an interim relief shall not be deemed to be a denial of the arbitration agreement or a waiver of the right to dispute resolution by arbitration.

Article 49 Jurisdiction of arbitration tribunal to order interim relief

1. The arbitration tribunal may, at the request of one of the parties, order one or more forms of interim relief applicable to the parties in dispute.

2. Interim relief shall comprise:

(a) Prohibition of any change in the status quo of the assets in dispute;

(b) Prohibition of acts by, or ordering one or more specific acts to be taken by a party in dispute, aimed at preventing conduct adverse to the process of the arbitration proceedings;

(c) Attachment of the assets in dispute;

(d) Requirement of preservation, storage, sale or disposal of any of the assets of one or all parties in dispute;

(dd) Requirement of interim payment of money as between the parties;

(e) Prohibition of transfer of asset rights of the assets in dispute.

3. If during the dispute resolution process one of the parties had already applied to a

court to order one or more of the forms of interim relief prescribed in clause 2 of this Article and then applies to the arbitration tribunal to order interim relief, the arbitration tribunal must refuse such application.

4. The arbitration tribunal shall have the right, prior to ordering interim relief, to require the applicant for the interim relief to provide financial security.

5. If an arbitration tribunal orders a different form of interim relief or interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant or to the party against whom the interim relief was applied or to a third party, then the party incurring loss shall have the right to institute court proceedings for compensation in accordance with the law on civil proceedings.

Article 50 Procedures for arbitration tribunal to order interim relief

1. An applicant for an interim relief must file an application with the arbitration tribunal.

2. An application for an interim relief must contain the following main particulars:

(a) Date on which the application is made;

(b) Name and address of the applicant for the interim relief;

(c) Name and address of the party against whom the interim relief is sought to be applied;

(d) Summary of the items in dispute;

(dd) Reason for requiring the interim relief;

(e) Specific items of interim relief sought.

The applicant for an interim relief must attach to such application evidence provided to the arbitration tribunal to prove the necessity for such interim relief.

3. The applicant for interim relief must, pursuant to a decision of the arbitration tribunal, lodge a sum of money, precious metals, precious stones or valuable papers as fixed by the arbitration tribunal corresponding to the amount of loss that may arise due to unjustified interim relief being ordered, in order to protect the interests of the party against whom the interim relief is sought to be applied. Such sum of money, precious metals, precious stones or valuable papers shall be deposited in an escrow account nominated by the arbitration tribunal.

4. Within three business days from the date of receipt of an application, immediately after the applicant has provided the security prescribed in clause 3 of this Article, the arbitration tribunal shall hear the matter and issue a decision ordering (or not ordering) interim relief. If the arbitration tribunal does not agree to the application, it shall provide a written notice to the applicant specifying its reasons.

5. Enforcement of a decision by an arbitration tribunal ordering interim relief shall be implemented in accordance with the law on enforcement of civil judgments.

Article 51 Jurisdiction of and procedures for arbitration tribunal to change, supplement or remove interim relief

1. The arbitration tribunal shall have the right, at the request of one of the parties, to change, supplement or remove interim relief at any time during the dispute resolution process.

2. Procedures for changing or supplementing interim relief shall be implemented in accordance with Article 50 of this Law.

3. The arbitration tribunal shall remove interim relief already ordered in the following circumstances:

(a) The applicant for the interim relief requests the removal;

(b) The party subject to enforcement of the decision ordering the interim relief has already lodged assets or some other person has provided security for discharge of the obligation owing to the applicant;

(c) The obligation of the obligor has terminated pursuant to law.

4. Procedures for removing interim relief shall be implemented as follows:

(a) The applicant must file a petition for removal of the interim relief with the arbitration tribunal.

(b) The arbitration tribunal shall hear the application and issue a decision removing the interim relief and shall also issue a decision that the security prescribed in Article 50.3 of this Law be returned to the applicant unless the applicant who applied to the arbitration tribunal to order the interim relief is liable to pay compensation for an unjustified application causing loss to the party against whom the interim relief was applied or to a third party.

The decision removing the interim relief must immediately be sent to the parties in dispute and also to the civil judgment enforcement agency.

Article 52 Responsibility of applicant for interim relief

An applicant for interim relief shall be liable for such application. An applicant for unjustified interim relief which causes loss to the other party or to a third party must pay compensation (for such loss).

Article 53 Jurisdiction of and order and procedures for court to order, change or remove interim relief

1. If after a party has lodged its statement of claim, such party's legal rights and interests have been infringed or there is a direct danger of such infringement, such party shall have the right to file an application with the competent court to order one or more forms of interim relief.

2. The chief judge of the competent court shall, within three business days from the date of receipt of the application for interim relief, assign a judge to hear and resolve the application. The judge assigned must, within three business days from the date of being assigned, hear the application and issue a decision ordering or not ordering interim relief. The judge must issue a decision ordering the interim relief immediately after the applicant implements security measures. If the judge does not grant the application, the judge must provide written notice to the applicant, specifying the reasons.

3. A party shall have the right to apply to a court to change, supplement or remove interim relief. Assignment of a judge to hear and resolve any such application to change, supplement or remove interim relief shall be implemented in accordance with the provisions in clause 2 of this Article.

4. The order and procedures for a court to order, change or remove interim relief and for checking compliance with law during the application of interim relief shall be implemented in accordance with the provisions of the Civil Procedure Code.

5. If during the dispute resolution process one of the parties which already applied to the arbitration tribunal for one or more forms of interim relief applies to the court for interim relief, the court must refuse such application and return it to the applicant, unless the (former) application for the interim relief was beyond the jurisdiction of the ar-

bitration tribunal.

Chapter Ⅷ Dispute Resolution Sessions

Article 54 Preparation for dispute resolution sessions

1. The arbitration tribunal shall make decisions on the time and location for holding dispute resolution sessions, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre.

2. Summonses to attend a session shall be forwarded to the parties at least thirty days prior to the date of commencement of a session, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre.

Article 55 Composition of and procedures for dispute resolution sessions

1. Dispute resolution sessions shall be conducted in private, unless otherwise agreed by the parties.

2. Parties may personally attend dispute resolution sessions or may authorize their representatives to attend; and parties shall have the right to invite witnesses and a person to protect their legal rights and interests.

3. The arbitration tribunal may permit other people to attend dispute resolution sessions, if the parties so consent.

4. The order and procedures for holding dispute resolution sessions shall be as stipulated in the arbitration procedural rules of the arbitration centre; or shall be as agreed by the parties in the case of an *ad hoc* arbitration.

Article 56 Absence of parties

1. A claimant who was validly summoned to attend a dispute resolution session but fails to attend without a legitimate reason or who leaves a session without the consent of the arbitration tribunal, shall be deemed to have withdrawn its statement of claim. In such case the arbitration tribunal shall continue the dispute resolution if the respondent so requests or if there is a counterclaim.

2. If a respondent was validly summoned to attend a dispute resolution session but fails to attend without a legitimate reason or leaves a session without the consent of the

arbitration tribunal, the arbitration tribunal shall continue the dispute resolution based on currently available materials and evidence.

3. The arbitration tribunal may, at the request of the parties, rely on the file to conduct a dispute resolution session without requiring the presence of the parties.

Article 57 Adjournment of dispute resolution session

One or both parties may, if there is a legitimate reason, request the arbitration tribunal to adjourn a dispute resolution session. A request for adjournment of a dispute resolution session must be in writing, specifying the reason and providing evidence, and must be sent to the arbitration tribunal at least seven business days prior to the (due) date of commencement of the session. If the arbitration tribunal does not receive the request within this time-limit, the applicant for such adjournment must pay all costs arising, if any. The arbitration tribunal shall consider and issue a decision consenting or not consenting to the request for the adjournment, and shall promptly notify the parties.

The period of any adjournment shall be as decided by the arbitration tribunal.

Article 58 Mediation and recognition of successful mediation

The arbitration tribunal (may), at the request of the parties, conduct a mediation in order for the parties to reach an agreement on resolution of their dispute. If the mediation is successful, the arbitration tribunal shall prepare minutes of successful mediation to be signed by the parties and certified by the arbitrator/s. The arbitration tribunal shall issue a decision recognizing the agreement of the parties. Such decision shall be final and shall have the same validity as an arbitral award.

Article 59 Stay of dispute resolution

1. Resolution of a dispute shall be stayed in the following circumstances:

(a) The claimant or respondent being an individual dies, without anyone inheriting his or her rights and obligations;

(b) The claimant or respondent being an agency or organization has terminated its operation, become bankrupt, dissolved, consolidated, merged, demerged, separated or converted its organizational form without any agency or organization succeeding to the former's rights and obligations;

(c) The claimant withdraws its statement of claim or the claim is deemed to be withdrawn pursuant to Article 56.1 of this Law, except where the respondent requires the dispute resolution to be continued;

(d) The parties reach agreement on termination of the dispute resolution;

(dd) The court issues a decision that the dispute is not within the jurisdiction of the arbitration tribunal, or that there is no arbitration agreement or that such agreement is void or incapable of being performed in accordance with Article 44.6 of this Law.

2. The arbitration tribunal shall issue a decision staying the dispute resolution. If an arbitration tribunal has not yet been established, then the chairman of the arbitration centre shall issue such decision.

3. After there is a decision staying dispute resolution, the parties shall not have the right to institute arbitration proceedings for re-resolution of such dispute if such proceedings are not different from the former dispute in terms of the claimant, respondent and legal relationship giving rise to the dispute, except for the cases prescribed in sub-clauses (c) and (dd) of clause 1 of this Article.

Chapter Ⅸ Arbitral Awards

Article 60 Principles for issuance of award

1. An arbitration tribunal shall issue an arbitral award on the basis of its majority vote.

2. If voting does not result in a majority decision, then the arbitral award shall be made in accordance with the opinion of the chairman of the arbitration tribunal.

Article 61 Contents, form and validity of arbitral award

1. An arbitral award must be in writing and contain the following main particulars:

(a) Date and location of issuance of the award;

(b) Names and addresses of the claimant and of the respondent;

(c) Full names and addresses of the arbitrator/s;

(d) Summary of the statement of claim and matters in dispute;

(dd) Reasons for issuance of the award, unless the parties agree it is unnecessary to specify reasons for the award;

(e) Result of the dispute resolution;

(f) Time-limit for enforcement of the award;

(g) Allocation of arbitration fees and other relevant fees;

(h) Signatures of the arbitrator/s.

2. If an arbitrator does not sign the arbitral award, the chairman of the arbitration tribunal must record such fact in the arbitral award and specify the reasons for it. In such a case, the arbitral award shall still be effective.

3. The arbitral award shall immediately be issued in the session or no later than thirty days from the end of the final session.

4. The arbitral award must be sent to the parties immediately after the date of its issuance. The parties shall have the right to request the arbitration centre or arbitration tribunal to issue copies of the arbitral award.

5. An arbitral award shall be final and shall be of full force and effect as from the date of its issuance.

Article 62 Registration of *ad hoc* arbitral award

1. An *ad hoc* arbitral award may, at the request of one or all parties to the dispute, be registered at the court in the locality where the arbitration tribunal issued such award, prior to any request being made to the competent civil judgment enforcement agency to organize enforcement of the award. Registration or non-registration of an arbitral award shall not affect the contents and validity of such award.

2. Within a time-limit of one year from the date of issuance of an arbitral award, the applicant for registration of an *ad hoc* arbitral award must send a petition requesting registration of the arbitral award to the competent court as prescribed in clause 1 of this Article, together with originals or validly certified copies of the following materials:

(a) Arbitral award issued by the *ad hoc* arbitration tribunal;

(b) Minutes, if any, of the session of the *ad hoc* arbitration tribunal resolving the dispute;

(c) Original or validly certified copy of the arbitration agreement.

The applicant must be responsible for the authenticity of the materials lodged with the court.

3. The chief judge of the court must, within five business days from the date of receipt of a petition requesting registration of an arbitral award, assign a judge to deal with such petition. The judge assigned must, within ten days from the date of being assigned, check the authenticity of the materials accompanying the petition and conduct registration. The judge shall refuse to conduct registration if he or she is satisfied that there is in fact no arbitral award, and in such case shall return the petition and accompanying materials and must immediately notify the petitioner and specify the reasons (for the refusal to conduct registration). The applicant for registration of the arbitral award shall have the right, within three business days from the date of receipt of such notice from the court, to lodge a complaint with the chief judge of the court regarding refusal to register the arbitral award. The chief judge of the court shall, within three business days from the date of receipt of such complaint, hear the complaint and issue a decision resolving it. The decision of the chief judge resolving the complaint shall be final.

4. Registration of an arbitral award shall contain the following particulars:

(a) Time and location of conducting registration;

(b) Name of the court conducting registration;

(c) Name and address of the applicant for registration;

(d) The award which was registered;

(dd) Signature of the authorized person and seal of the court.

Article 63 Rectification and explanation of arbitral award; supplementary awards

1. A party may, within thirty days from the date of receipt of an arbitral award unless the parties have some other agreement about this time-limit, request the arbitration tribunal to rectify obvious errors in spelling or figures caused by a mistake or incorrect computation in the arbitral award, and must immediately notify the other party (of such request). If the arbitration tribunal considers such request legitimate, it shall make the rectification within thirty days from the date of receipt of the request.

2. A party may, within thirty days from the date of receipt of an arbitral award unless the parties have some other agreement about this time-limit, request the arbitration tribunal to explain specific points or items in the award, and must immediately notify

the other party of such request. If the arbitration tribunal considers such request legitimate, it shall provide an explanation within thirty days from the date of receipt of the request. The explanation provided shall form a part of the award.

3. The arbitration tribunal may on its own initiative, within thirty days from the date of issuance of the arbitral award, rectify any of the errors prescribed in clause 1 of this Article and immediately notify the parties.

4. If the parties do not have some other agreement, then within thirty days from the date of receipt of an award, a party may request the arbitration tribunal to issue a supplementary award with matters raised during the process of the proceedings but not yet recorded in the award, and must immediately notify the other party of such request. If the arbitration tribunal considers such request legitimate, it shall issue a supplementary award within forty-five days from the date of receipt of the request.

5. In necessary cases, the arbitration tribunal may extend (the time-limits) for rectification, explanation or issuance of a supplementary award prescribed in clauses 1, 2 and 4 of this Article.

Article 64 Archiving files

1. An arbitration centre shall be responsible to archive files on disputes over which it has accepted jurisdiction. Files on disputes resolved by *ad hoc* arbitration shall be archived by the parties or by the arbitrators.

2. Arbitration files shall be archived for a period of five years as from the date of issuance of the arbitral award or decision staying dispute resolution by arbitration.

Chapter X　Enforcement of Arbitral Awards

Article 65 Voluntary carrying out of arbitral award

The State encourages the parties to voluntarily carry out arbitral awards.

Article 66 Right to apply for enforcement of arbitral award

1. If on expiry of the time-limit for carrying out an arbitral award the award debtor has not voluntarily carried out the award and has not requested that the award be set aside pursuant to Article 69 of this Law, the arbitral award creditor shall have the right to

request the competent civil judgment enforcement agency to enforce such award.

2. In the case of an *ad hoc* arbitral award, the award creditor shall have the right to apply to the competent civil judgment enforcement agency requesting enforcement of the arbitral award after such award has been registered in accordance with Article 62 of this Law.

Article 67 Enforcement of arbitral award

Arbitral awards shall be enforced in accordance with the law on enforcement of civil judgments.

Chapter XI Setting Aside Arbitral Awards

Article 68 Grounds for setting aside arbitral award

1. The court shall hear (an application for) setting aside an arbitral award on receipt of a petition from one of the parties.

2. An arbitral award which falls within any one of the following cases shall be set aside:

(a) There was no arbitration agreement or the arbitration agreement is void;

(b) The composition of the arbitration tribunal was (or) the arbitration proceedings were inconsistent with the agreement of the parties or contrary to the provisions of this Law;

(c) The dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside;

(d) The evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; (or) an arbitrator received money, assets or some other material benefit from one of the parties in dispute which affected the objectivity and impartiality of the arbitral award;

(dd) The arbitral award is contrary to the fundamental principles of the law of Vietnam.

3. When the court hears a petition to set aside an arbitral award, burden of proof shall be regulated as follows:

(a) Any petitioner (relying on the grounds) prescribed in sub-clauses (a), (b), (c) or (d) of clause 2 of this Article shall have the burden of proving that the arbitration tribunal issued the arbitral award in one of such prescribed cases;

(b) In the case of a petition to set aside an arbitral award (relying on the grounds) prescribed in sub-clause (dd) of clause 2 of this Article, the court shall have the responsibility to itself collect and verify evidence in order to decide to set aside or not set aside the arbitral award.

Article 69 Right to petition for arbitral award to be set aside

1. A party with sufficient evidence proving that the arbitration tribunal issued the arbitral award in any of the cases prescribed in Article 68.2 (of) this Law shall have the right, within thirty days from the date of receipt of such award, to lodge a petition with the competent court to set aside the arbitral award. A petition requesting an arbitral award be set aside must be accompanied by materials and evidence proving that such petition has (sufficient) grounds and is lawful.

2. If a petition is lodged out of time due to an event of force majeure, then the duration of such event shall not be included when calculating the time-limit for requesting (that) the arbitral award be set aside.

Article 70 Petition requesting arbitral award be set aside

1. A petition requesting (that) an arbitral award be set aside must contain the following main particulars:

(a) Date on which the petition is made;

(b) Name and address of the petitioner;

(c) Relief sought and grounds for setting aside the arbitral award.

2. The following documents must accompany the petition:

(a) Original or validly certified copy of the arbitral award;

(b) Original or validly certified copy of the arbitration agreement.

Documents accompanying a petition in a foreign language must be translated into Vietnamese and the translations must be validly certified.

Article 71 Hearing by court of petition requesting arbitral award be set aside

1. The competent court shall, after it accepts jurisdiction of a petition requesting an arbitral award be set aside, immediately notify the arbitration centre or the arbitrators in an *ad hoc* arbitration, the parties in dispute, and the same level procuracy.

2. The chief judge shall, within seven business days from the date on which jurisdiction is accepted, assign a council of three judges including one judge to act as chairman of the council as assigned by the chief judge, to hear the petition.

The council of judges must commence a session to hear the petition to set aside the arbitral award within thirty days from the date of being assigned. The court must, seven business days prior to the date of opening the session, transfer the file to the same level procuracy for it to review and participate in the session hearing the petition. Upon the expiry of such time-limit, the procuracy must return the file to the court in order for the court to open the session hearing the petition.

3. The session shall be conducted in the presence of the parties in dispute and their lawyers (if any) and a prosecutor of the same level procuracy. If either of the parties requests the council of judges to hear the petition in his or her absence, or if after being validly summoned a party is absent without a legitimate reason or leaves the session without the consent of the council of judges, then the council of judges shall continue hearing the petition to set aside the arbitral award.

4. When hearing the petition, the council of judges shall rely on the provisions in Article 68 of this Law and the materials accompanying the petition in order to reach its decision; and shall not review the merits of the dispute which the arbitration tribunal already resolved. The council of judges shall, after considering the petition and accompanying materials, after hearing witnesses, if any, who have been summoned and after hearing the procurator provide the opinion of the procuracy, discuss and reach a majority decision.

5. The council of judges hearing the petition shall have the right to issue a decision setting aside or not setting aside the arbitral award. If the petitioner withdraws the petition, or if after being validly summoned the petitioner fails to attend the session without a legitimate reason or leaves the session without the consent of the council of judges, then the council of judges shall issue a decision staying the application.

6. The court shall, within five business days from the date of issuing its decision, send the decision to the parties, to the arbitration centre or to the arbitrator/s of an *ad hoc* arbitration, and to the same level procuracy.

7. The council of judges may, at the request of a party and if the council considers it appropriate, adjourn a petition to set aside an arbitral award for a period not to exceed sixty days in order to facilitate the arbitration tribunal in rectifying what in the opinion of the arbitration tribunal were errors in the arbitration proceedings, thereby removing the grounds for setting aside the arbitral award. The arbitration tribunal must notify the court when it has rectified errors in the arbitration proceedings. If the arbitration tribunal does not rectify errors in the proceedings, then the council of judges shall continue to hear the petition to set aside the award.

8. In a case where the council of judges issues a decision to set aside the arbitral award, the parties may reach a fresh agreement to bring their dispute before arbitration or any one party shall have the right to institute court proceedings. If the council of judges does not set aside the arbitral award, such award shall be enforceable.

9. In all cases, the time taken for dispute resolution by arbitration and the time taken to conduct court procedures to set aside an arbitral award shall not be included when calculating the limitation period for instituting proceedings.

10. The decision of the court shall be final and shall be valid for enforcement.

Article 72 Court fees regarding arbitration

Fees for requests to a court to appoint an arbitrator, to order interim relief, to set aside arbitral awards, to register arbitral awards and any other fees shall be implemented in accordance with the law on legal and court fees.

Chapter XII　Organization and Operation of Foreign Arbitration in Vietnam

Article 73 Conditions for foreign arbitration institutions to operate in Vietnam

Foreign arbitration institutions which have been legally established and are currently legally operating in foreign countries, and which respect the constitution and law of the Socialist Republic of Vietnam, shall be permitted to operate in Vietnam in accordance

with this Law.

Article 74 Operational forms of foreign arbitration institutions in Vietnam

Foreign arbitration institutions shall operate in Vietnam in the following forms:

1. Branch of the foreign arbitration institution (hereinafter referred to as branch).

2. Representative office of the foreign arbitration institution (hereinafter referred to as representative office).

Article 75 Branches

1. Branch is a dependent unit of a foreign arbitration institution, established and conducting arbitration activities in Vietnam pursuant to this Law.

2. The foreign arbitration institution and its branch shall be liable before the law of Vietnam for the operation of the branch.

3. The foreign arbitration institution shall elect one arbitrator to act as head of the branch. The head of the branch shall be the authorized representative of the foreign arbitration institution in Vietnam.

Article 76 Rights and obligations of branch of foreign arbitration institution in Vietnam

1. To rent an office, and to hire or purchase facilities and materials necessary for the activities of the branch.

2. To recruit Vietnamese and foreign employees to work at the branch in accordance with the law of Vietnam.

3. To open Vietnamese dong and foreign currency accounts at a bank authorized to operate in Vietnam in order to service the activities of the branch.

4. To remit income of the branch overseas in accordance with the law of Vietnam.

5. To have a seal bearing the name of the branch in accordance with the law of Vietnam.

6. To appoint arbitrators to establish arbitration tribunals pursuant to authority delegated by the foreign arbitration institution.

7. To provide arbitration, mediation services and other commercial dispute resolution methods in accordance with law.

8. To supply administrative services, office and other services for dispute resolution by foreign arbitration tribunals.

9. To collect arbitration fees and other lawful fees.

10. To pay remuneration to arbitrators.

11. To provide training to raise the dispute resolution knowledge and skills of arbitrators.

12. To archive files, and to provide copies of arbitral decisions on request by the parties in dispute or by competent State authorities of Vietnam.

13. To operate strictly in the sectors recorded in the establishment licence (and) certificate of registration of operation.

14. To comply with the relevant law of Vietnam on operation of the branch.

15. To provide annual reports on the operation of the branch to the Department of Justice in the locality where the branch is registered for operation.

Article 77 Representative offices

1. Representative office is a dependent unit of a foreign arbitration institution, established, and seeking and promoting opportunities for arbitration activities in Vietnam in accordance with this Law.

2. The foreign arbitration institution shall be liable before the law of Vietnam for the operation of its representative office.

Article 78 Rights and obligations of representative office of foreign arbitration institution in Vietnam

1. To seek and promote opportunities for arbitration activities for its institution in Vietnam.

2. To rent an office, and to hire or purchase facilities and materials necessary for the activities of the representative office.

3. To recruit Vietnamese and foreign employees to work at the representative office in accordance with the law of Vietnam.

4. To open foreign currency and Vietnamese dong accounts at a bank authorized to operate in Vietnam, and only to use such accounts for the operation of the representative office.

5. To have a seal bearing the name of the representative office in accordance with the law of Vietnam.

6. To operate for the correct objectives and within the scope and for the duration stipulated in the licence for establishment of the representative office.

7. Not to conduct arbitration activities in Vietnam.

8. To only conduct promotions and advertising for arbitration activities in accordance with the law (of) Vietnam.

9. To comply with the relevant law of Vietnam on operation of the representative office.

10. To provide annual reports on the operation of the representative office to the Department of Justice in the locality where the representative office is registered for operation.

Article 79 Operation of branches and representative offices of foreign arbitration institutions in Vietnam

The establishment, operation, and termination of operation of branches and representative offices of foreign arbitration institutions in Vietnam shall be implemented in accordance with the law of Vietnam and international treaties of which Vietnam is a member. The Government shall provide detailed regulations on the procedures for establishment, operation, and termination of operation of branches and representative offices of foreign arbitration institutions in Vietnam.

Chapter XIII Implementing Provisions

Article 80 Application of this Law to arbitration centres established prior to effective date of this Law

Arbitration centres which were established prior to the effective date of this Law shall not be required to conduct procedures for re-establishment. Arbitration centres must, within twelve months from the effective date of this Law, amend and supplement their charters and arbitration procedural rules for compliance with this Law. If upon the expiry of such time-limit any arbitration centre has failed to amend and supplement its charter and arbitration procedural rules, the establishment licence of such arbitration

centre shall be revoked and it must terminate its operation.

Article 81 Effectiveness

1. This Law shall be of full force and effect as from 1st January, 2011.

2. The Ordinance on Commercial Arbitration 03/2003/PL-UBTVQH11 shall no longer be effective as from the effective date of this Law.

3. Arbitration agreements entered into prior to the effective date of this Law shall be implemented in accordance with the provisions of law effective as at the date when the arbitration agreement was entered into.

Article 82 Detailed regulations and guidelines on implementation

The Government, the People's Supreme Court and the People's Supreme Procuracy shall, within the scope of their respective duties and powers, provide detailed regulations and guidelines for implementation of Articles and clauses assigned in this Law; and shall provide guidelines for implementation of other items in this Law necessary to meet State management requirements.

This Law was passed by Legislature XII of the National Assembly of the Socialist Republic of Vietnam in its 7th session on 17th June, 2010.

Chairman of the National Assembly NGUYEN PHU TRONG