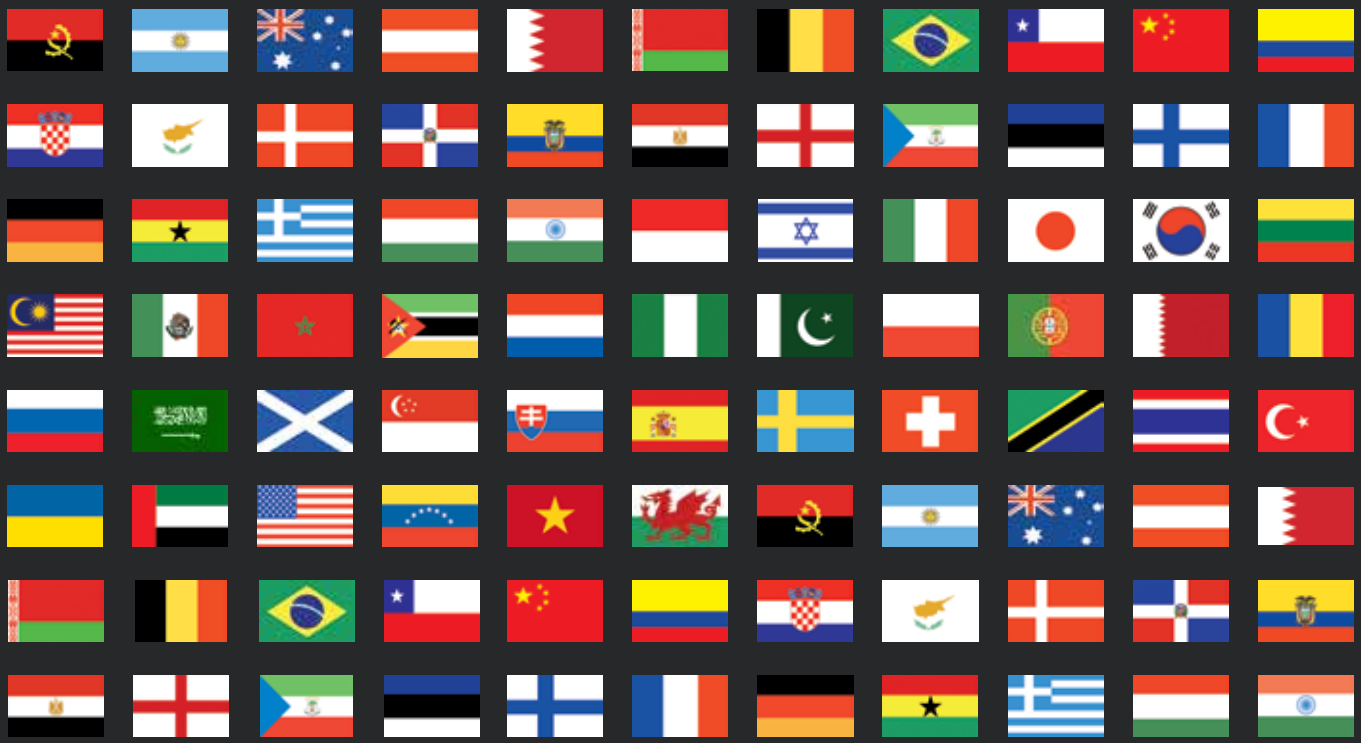
Arbitration

In 60 jurisdictions worldwide

Contributing editors
Gerhard Wegen and Stephan Wilske



2015

GETTING THE DEAL THROUGH

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Arbitration 2015

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CONTENTS

Introduction 7
Gerhard Wegen and Stephan Wilske
Gleiss Lutz

CEA 14
Pablo Poza and Ana Blanco
Spanish Court of Arbitration

CEAC 17
Eckart Brödermann and Christine Heeg
Chinese European Arbitration Centre
Thomas Weimann
Chinese European Legal Association

CIETAC 22
Shengchang Wang, Ning Fei and Fang Zhao
Hui Zhong Law Firm

The DIFC-LCIA Arbitration Centre 25
Gordon Blanke and Soraya Corm-Bakhos
Baker & McKenzie Habib Al Mulla

DIS 28
Renate Dendorfer-Ditges
Heussen Rechtsanwaltsgesellschaft mbH

HKIAC 32
Paulo Fohlin
Odebjer Fohlin

ICC 35
José Rosell and María Beatriz Burghetto
Hughes Hubbard & Reed LLP

The Polish Chamber of Commerce 40
Justyna Szpara and Maciej Łaszczuk
Łaszczuk & Partners

SCC 43
Dan Engström and Cornel Marian
Stockholm Arbitration & Litigation Center (SALC) Advokatbyrå KB

The Swiss Chambers' Arbitration Institution 46
Philippe Bärtsch and Christopher Boog
Schellenberg Wittmer Ltd

Angola 50
Agostinho Pereira de Miranda, Cláudia Leonardo and Jayr Fernandes
Miranda Correia Amendoeira & Associados

Argentina 56
Luis Alberto Erize, Hernán Martín Oriolo and Mariano Hernán Beica
Abeledo Gottheil Abogados SRL

Australia 63
Tony Johnson and Henry Winter
Johnson Winter & Slattery

Austria 70
Klaus Oblin
Oblin Melichar

Bahrain 76
Adam Vause
Norton Rose Fulbright (Middle East) LLP

Belarus 83
Alexey Anischenko and Kirill Laptev
SORAINEN

Belgium 89
Johan Billiet
Billiet & Co
Cecile Oosterveen
Association for International Arbitration

Brazil 98
Hermes Marcelo Huck, Rogério Carmona Bianco and Fábio Peixinho Gomes Corrêa
Lilla, Huck, Otranto, Camargo Advogados

Chile 104
Cristián Gandarillas and Gabriel del Río
Aninat Schwencke y Cía

China 110
Shengchang Wang, Ning Fei and Fang Zhao
Hui Zhong Law Firm

Colombia 120
Alberto Zuleta-Londoño, Juan Camilo Fandiño-Bravo and Juan Camilo Jiménez-Valencia
Cárdenas & Cárdenas Abogados

Croatia 126
Zoran Vukić, Iva Sunko and Ana Pehar
Vukić & Partners, Ltd

Cyprus 133
Andreas Erotocritou and Alexis Erotocritou
AG Erotocritou LLC

Denmark 137
Peter Lind Nielsen and Morten Grundahl
Bird & Bird Advokatpartnerselskab

Dominican Republic 145
Fabiola Medina Garnes
Medina Garrigó Attorneys at Law

Ecuador 152
Rodrigo Jijón Letort, Juan Manuel Marchán and Juan Francisco González
Pérez Bustamante & Ponce

Egypt 159
Tarek F Riad
Kosheri, Rashed & Riad Law Firm

England & Wales 164
Adrian Jones, Gordon McAllister and Edward Norman
Crowell & Moring LLP

Equatorial Guinea 174
Agostinho Pereira de Miranda and Cláudia Leonardo
Miranda Correia Amendoeira & Associados

Estonia 179
Carri Ginter and Maria Pihlak
SORAINEN

Finland 186
Tom Vapaavuori and Juha Ojala
Bird & Bird Attorneys Ltd

France 193
Thomas Bevilacqua and Ivan Urzhumov
Foley Hoag LLP

Germany 202
Stephan Wilske and Claudia Krapfl
Gleiss Lutz

Ghana 209
Kimathi Kuenyehia and Sarpong Odame
Kimathi & Partners, Corporate Attorneys

Greece 216
Antonios D Tsavdaridis
IK Rokas & Partners Law Firm

Hungary 222
Chrysta Bán
Bán, S Szabó & Partners

India 231
Shreyas Jayasimha, Mysore Prasanna, Rajashree Rastogi and Spandana Ashwath
Aarna Law

Indonesia 242
Anangga W Roosdiono
Roosdiono & Partners

Israel 248
Eric S Sherby and Tali Rosen
Sherby & Co, Advs

Italy 256
Cecilia Carrara
Legance – Avvocati Associati

Japan 261
Shinji Kusakabe
Anderson Mōri & Tomotsune

Korea 270
BC Yoon, Richard Menard and Liz Kyo-Hwa Chung
Kim & Chang

Lithuania 278
Ramūnas Audzevičius and Rimantas Daujotas
Motieka & Audzevičius

Malaysia 285
Foo Joon Liang
Gan Partnership

Mexico 294
Sergio Rodríguez Labastida and Mariana Beltrán
Rodríguez Labastida Abogados

Morocco 301
Azzedine Kettani
Kettani Law Firm

Mozambique 309
Agostinho Pereira de Miranda, Filipa Russo de Sá and Catarina Carvalho Cunha
Miranda Correia Amendoeira & Associados

Netherlands 315
Daniella Strik
Linklaters LLP

Nigeria 321
Dorothy Udeme Ufot
Dorothy Ufot & Co

Pakistan 329
Sajid Zahid and Mustafa Ahmed
Orr, Dignam & Co

Poland 335
Justyna Szpara and Andrzej Maciejewski
Łaszczuk & Partners

Portugal 342
Agostinho Pereira de Miranda and Sofia Martins
Miranda Correia Amendoeira & Associados

Qatar 349
Jalal El Ahdab and Myriam Eid
Ginestié Magellan Paley-Vincent in association with Ahdab Law Firm

Romania 356
Cristiana-Irinel Stoica, Andrea Micu and Daniel Aragea
Stoica & Asociații

Russia 364
Ilya Nikiforov, Alexey Karchiomov and Svetlana Popova
Egorov, Puginsky, Afanasiev and Partners

Saudi Arabia 373
Jalal El Ahdab and Myriam Eid
Ginestié Magellan Paley-Vincent in association with Ahdab Law Firm

Scotland 382
Brandon Malone
Brandon Malone & Company

Singapore 391
Edmund Jerome Kronenburg and Tan Kok Peng
Braddell Brothers LLP

Slovakia 401
Roman Prekop, Monika Simorova and Peter Petho
Barger Prekop sro

Spain 409
Alberto Echarri
Echarri & Brindle, Abogados

CONTENTS

Sweden 417
Simon Arvmyren
Sandart & Partners

Switzerland 423
Xavier Favre-Bulle, Harold Frey and Daniel Durante
Lenz & Staehelin

Tanzania 430
Wilbert Kapinga, Ofotsu A Tetteh-Kujorjie and Kamanga Kapinga
Mkono & Co Advocates

Thailand 436
Kornkieat Chunhakasikarn and John King
Tilleke & Gibbins

Turkey 443
Ismail G Esin and Dogan Gultutan
Esin Attorney Partnership

Ukraine 450
Oleg Alyoshin and Yuriy Dobosh
Vasil Kisil & Partners

United Arab Emirates 459
Gordon Blanke and Soraya Corm-Bakhos
Baker & McKenzie Habib Al Mulla

United States 468
Jack Thomas, Arlen Pyenson and Amal Bouhabib
Crowell & Moring LLP

Venezuela 475
Fernando Peláez-Pier and José Gregorio Torrealba
Hoet Pelaez Castillo & Duque

Vietnam 482
Nguyen Manh Dzung, Le Quang Hung and Nguyen Ngoc Minh
Dzungsrt & Associates LLC

Ghana

Kimathi Kuenyehia and Sarpong Odame
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Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Ghana is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Ghana became a member of the New York Convention on 9 April, 1968. No declarations or notifications were made under articles I, X and XI of the New York Convention. Ghana is also a party to the International Convention on the Settlement of Investment Disputes, which came into force on 14 October 1966. In addition, Ghana is a party to the United Nations Commission on International Trade Law (UNCITRAL).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Yes; Ghana has entered into 26 bilateral investment treaties with other countries, most of which contain dispute resolution provisions.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Alternative Dispute Resolution Act, 2010 (Act 798) (the 'Arbitration Act' or 'arbitration law') regulates domestic arbitral proceedings. The arbitration law does not regulate foreign arbitral proceedings. However, it provides the framework for the enforcement of foreign arbitral awards. Arbitration proceedings are considered foreign when they are undertaken outside the jurisdiction under a system of law other than the laws of Ghana. The party seeking to enforce a foreign award is required to satisfy the following conditions:

- the award was rendered by a competent authority under the laws of the country where the award was made;
- a reciprocal agreement exists between Ghana and the country in which the award was made;
- the award was made under the international convention specified in the first schedule to the Arbitration Act or under any other international convention on arbitration ratified by Parliament;
- the party has produced the original award or a certified copy thereof, and the agreement pursuant to which the award was made or a duly authenticated copy; and
- there is no appeal pending against the award in any court under the law applicable to the arbitration.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration. However, there are some differences between the Arbitration Act and the UNCITRAL Model Law. Some of the major differences are as follows:

- in terms of subject matter, the UNCITRAL Model Law essentially relates to commercial disputes between contracting parties at the international level. The Arbitration Act, on the other hand, provides an avenue for the resolution of a wide variety of disputes in addition to commercial disputes;
- the Arbitration Act provides for customary arbitration, which is unique to the Ghanaian situation. Customary arbitration is where parties with a prior agreement to be bound by the decision of the arbitrators submit their disputes to arbitrators (who may be chiefs, heads of family or heads of clan) for the purpose of having the dispute decided informally, but on its merits; and
- the court and the Alternative Dispute Resolution Centre is a key part in the Arbitration Act, as opposed to the position of the conciliator in the UNCITRAL Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Parties have the freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. In the absence of such an agreement, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate. In either case, the arbitral tribunal has the obligation to abide by the principle of equal treatment of the parties in the proceedings, and ensure that each party is given an opportunity to present its case.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The Arbitration Act mandates the arbitrator to decide the dispute in accordance with the law chosen by the parties. The arbitrator is also required to have regard to such other considerations as are agreed by the parties or determined by the arbitrator. Where the issue relates to a contract, the arbitrator is expected to take cognisance of the usages of the trade to which the contract relates. If the parties are unable to reach an agreement on the applicable substantive law, the arbitrator is required to determine the dispute by reference to the conflict of law rules that the arbitrator deems applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Ghana Arbitration Centre is the most prominent arbitral institution in Ghana. The Centre's address is as follows:

The Ghana Arbitration Centre
No. C122A/3 Farrar Avenue, Asylum Down
PO Box GP 18615, Accra
Tel. +233 302 240820 / 240924
Fax: +233 302 223227
gac@ghana.com
www.ghanaarbitration.org

In addition, the Arbitration Act has made provision for the establishment of the Alternative Dispute Resolution Centre. It is envisaged that the Centre will have a permanent existence with the object of facilitating the practice of alternative dispute resolution in Ghana. The law provides a great deal of flexibility in terms of the choice of law, place of arbitration, selection of arbitrators and the language of proceedings. In each of these areas, the parties are given the priority to make a choice. The arbitral tribunal is vested with the power to decide on any of the matters when the parties are unable to reach a consensus on the issue in question. With respect to the fees for arbitrators, there must first be an agreement between the parties and the arbitrator as to the amount payable. In calculating the amount payable, regard must also be given to the value of the subject matter, the complexity of the case and the agreed hourly fee rate.

The National Labour Commission, as established by the Labour Act, 2003 (Act 651) is another important arbitral institution in Ghana. The National Labour Commission's mandate is to facilitate and settle industrial disputes through negotiation, mediation and arbitration. Currently, the National Labour Commission is usually the first point of call in the resolution of industrial disputes in Ghana.

The Ghana Investment Promotion Centre Act, 2013 (Act 865) and the Minerals and Mining Act, 2006 (Act 703) state the dispute settlement procedures parties can resort to and provide for arbitration when disputes cannot be settled by any other means. These laws further provide that parties may refer the dispute to arbitration in accordance with UNCITRAL rules or within the framework of a bilateral agreement between Ghana and the investor's country.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The general rule is that only matters that can be subjected to compromise and settlement are to be referred to arbitration. Although the Arbitration Act does not make any express provision for disputes in the areas of intellectual property, antitrust, competition law, securities transactions and intra-company disputes, such disputes may be settled through arbitration. Section 1 of the Arbitration Act, however, expressly states that matters involving the national or public interest, the environment, the enforcement and interpretation of the Constitution, or other matters that by law cannot be settled by an alternative dispute resolution method (including criminal action and abuse of human rights), are not arbitrable.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Arbitration Act provides that an arbitration agreement must be in writing. In order to satisfy the requirement of writing, the law stipulates that the arbitration agreement may be in the form of an exchange of letters, telex, fax, e-mail or other means of communication providing a record of the agreement. An arbitration agreement is valid if it is contained 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 the other, or when reference is made in a contract to any document containing an arbitration clause.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement may not be enforceable if waived by the parties or if the parties decide to submit the matter to the jurisdiction of the courts, or if declared null and void by the arbitral tribunal.

An arbitration agreement is not rendered unenforceable by reason of the death of a party to the agreement or insolvency. The obligations of a party to an arbitration agreement may be transferred to other successors on the death of such a party. In addition, a party to an arbitration agreement who is not notified of an arbitral proceeding may apply to the High Court to set aside the arbitration agreement. A party is entitled to have the arbitration agreement set aside where he or she satisfies the High Court, upon application, that the law applicable to the arbitration is not valid.

Arbitration clauses or agreements that are part of a contract are generally deemed to be independent of the other terms of the contract. Thus, the invalidity or unenforceability of the underlying contract does not necessarily affect the arbitration agreement or clause. However, a judgment of a court declaring an underlying contract void may render the arbitration clause or agreement unenforceable.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In principle, arbitration agreements cannot be extended to third parties who are not signatories to the arbitration agreement. The Arbitration Act does not make any express provision for the imposition of liability arising from an arbitration agreement on account of assignment, agency or insolvency. However, the assignment of the underlying contract may be presumed to include the acceptance of any arbitration agreements contained in or incorporated into the underlying contract. Similarly, a principal may be bound by an arbitration agreement entered into by an agent. Under the Arbitration Act, the occurrence of death does not discharge a party to an arbitration agreement from liability. The implication is that a successor-in-title will be required to discharge the liabilities arising from the arbitration agreement entered into by the deceased. This may also be presumed for situations of insolvency.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act does not contain any provisions with respect to third-party participation in arbitration. However, third parties may participate where the arbitration agreement in a main contract entered into by the parties extends to ancillary contracts that one of the parties to the main contract executes with a different party, or where the parties agree to the joinder of a third party.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Under the principle of separate legal personality, companies in the same group will not be bound by an arbitration agreement entered into by a parent company or subsidiary company, or another company in the same group, unless the corporate veil is lifted.

The Arbitration Act provides that parties who submit a matter for arbitration must have an agreement between them. This implies that the arbitrator, or the tribunal as the case may be, shall not have the mandate to extend any arbitral proceedings to another party that was not a party to the agreement.

The law does not grant any exemption to companies in this regard, and hence the 'group of companies' doctrine may not be applicable in Ghana, unless the corporate veil is lifted.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There is no express provision relating to multiparty arbitration agreements under the Arbitration Act. Thus, the requirements for a valid bilateral agreement would in principle be the same as those set out for the validity of a multiparty arbitration agreement. Additionally, whenever an issue regarding the composition of the arbitral tribunal arises, the appointing

authority shall decide on it based on the principles of equal treatment and due process of law.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The general principle is that an arbitrator is required to have the relevant experience and competence. However, parties are given the power to appoint any persons to act as arbitrators, regardless of their experience or nationality. Even though the Ghana Arbitration Centre or Alternative Dispute Centre and the National Labour Commission are mandated to keep a list of qualified mediators and arbitrators, there is nothing in the law that suggests that parties to an arbitration dispute cannot appoint arbitrators outside that list.

In order to guarantee a fair award, the factors outlined below, among others, are to be taken into account in the appointment of an arbitrator:

- the relationship of the arbitrator to a party or counsel of a party to the arbitration;
- nationality of the parties; and
- personal, proprietary, fiduciary or financial interest of the arbitrator.

The arbitration law provides in relevant parts that, in appointing an arbitrator, the parties, the person or the appointing institution shall have regard to the 'nationalities of the parties and other relevant considerations'. Once the parties agree on the arbitrators, the courts are likely to recognise those arbitrators irrespective of a requirement for nationality, religion or gender.

An arbitrator whose appointment contravenes any of these requirements will be disqualified from acting as such. It is also worth noting that the law does not impose any express restrictions on the appointment of judges (active or retired) as arbitrators. The parties to an arbitration agreement are at liberty to request for the register of arbitrators maintained by the Alternative Dispute Resolution Centre.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The Arbitration Act permits parties to agree on the procedure for appointing an arbitrator. In the event that the parties are unable to agree on the appointment procedure, the default rules for the appointment of arbitrators are triggered. With respect to a sole arbitrator, the default rule is that the appointment shall be made by the appointing authority upon a request by a party to the other party within a period of 14 days. Where the arbitral tribunal is made up of three arbitrators and the parties are unable to agree on a third arbitrator, either party can request that the appointment of the third arbitrator be made by an appointing authority.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The Arbitration Act provides that a person appointed as an arbitrator shall make a full disclosure of material facts involving any proprietary or financial stake that may give reasonable cause to doubt his or her independence and impartiality.

The appointment of an arbitrator may be challenged if it emerges that the arbitrator does not possess the qualifications agreed upon by the parties or circumstances exist that give rise to justifiable doubt as to the arbitrator's independence or impartiality. According to the Arbitration Act, a party may not challenge an arbitrator he or she has appointed, or whose appointment he or she participated in, except for reasons that the party becomes aware of after the appointment.

With respect to the procedure for challenging the appointment of an arbitrator, the law gives parties the right to make that determination. Where the parties are unable to agree on a procedure, the party mounting the challenge is required to submit a written statement to the arbitral tribunal or the arbitrator, within 15 days of becoming aware of the composition of the tribunal or the grounds justifying the challenge of a sole arbitrator. The party challenging the appointment of the arbitrator can also apply to the High Court for the revocation of the arbitrator's authority on notice to the other party. The arbitrator's authority will also be revoked on his or her death. The High Court may remove an arbitrator where there is sufficient reason to doubt the impartiality of the arbitrator. If the arbitrator is physically or mentally incapable, or there is justifiable doubt as to the arbitrator's capability to conduct proceedings, he or she may also be removed by the High Court. Additionally, if the arbitrator has refused or failed to conduct the arbitral proceedings properly, or to use reasonable despatch in conducting the proceedings or making an award that can cause substantial injustice to a party, the High Court may remove that arbitrator. If the arbitrator's authority is revoked, the law permits the parties to decide on how the vacancy will be filled.

If the parties fail to reach agreement on the replacement arbitrator, an appointing authority shall, on application by a party, appoint another arbitrator in accordance with the law. Where an arbitrator has been successfully challenged, or that arbitrator's mandate is terminated due to an agreement between the parties, or a situation has made it impossible for the arbitrator to act, or the arbitrator has resigned, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

There is nothing in the law that prohibits an arbitral tribunal or arbitrator from seeking guidance from the IBA or any other body, should it deem this necessary.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Arbitrators, whether appointed by the parties or by the appointing institution, or otherwise, are required to be independent, and to act fairly and impartially. Arbitrators are not agents or representatives of the parties in the dispute. Thus, in order to guarantee a fair award, the law imposes a strict obligation on an arbitrator to disclose all material facts that will impinge on the delivery of his or her award.

The parties are also required to bear the expenses and remuneration of the arbitrator or the tribunal. Where the High Court removes an arbitrator on an application by a party, it may make any orders that it considers appropriate for payment of fees and expenses of the arbitrator, or the payment by the arbitrator of any fees or expenses already paid to the arbitration.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The arbitration law provides immunity to arbitrators in the performance of their functions and explicitly regulates their liability. An arbitrator will be liable for the consequences of deliberate wrongdoing arising from the performance of his or her duties. Section 23(1) of the arbitration law states that 'an arbitrator is not liable for any act or omission in the discharge of the arbitrator's functions as an arbitrator unless the arbitrator is shown to have acted in bad faith'.

It must also be noted that section 23(1) also applies to an employee or an agent of the arbitrator.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The Arbitration Act gives priority to an arbitrator or a tribunal to determine matters bordering on jurisdiction. Consequently, a party who intends to raise any jurisdictional question is first required to do so before the arbitrator or the tribunal immediately after the matter alleged to be beyond

the jurisdiction of the arbitrator or the tribunal is raised. The arbitrator or the tribunal is required to make a determination on the jurisdictional challenge mounted by a party to an agreement. If a party is not satisfied with the determination of the jurisdictional question, he or she is entitled to apply to the High Court within seven days after the ruling indicating his or her reasons for such application.

The intervention of the High Court is not meant to supplant the powers of the arbitrator or the tribunal. This is because the application to the High Court does not automatically lead to a stay of proceedings, unless it is otherwise agreed to by the parties.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Once constituted, the arbitral tribunal is competent to rule on its own jurisdiction. A party making a jurisdictional challenge before the arbitral tribunal must raise the motion before taking the first step in the proceedings to contest the case on its merits. Parties are not precluded from raising an objection to the jurisdiction of the arbitral tribunal or arbitrator because they have appointed or participated in the appointment of an arbitrator. A motion that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority arises during the arbitral proceedings. The arbitral tribunal may address the issue of jurisdiction in a preliminary award before ruling on the merits of the case. The award rendered may only be challenged through an annulment action at the High Court or to the appointing authority. The initiation of an annulment action does not suspend the ongoing arbitral proceedings. The arbitrator may entertain an objection made later than the prescribed time if the arbitrator considers that there is sufficient justification to do so.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The Arbitration Act provides that where the parties are unable to agree on the place of arbitration, it shall be determined by the arbitrator or the arbitral tribunal, taking into consideration the circumstances of the case and the convenience of the parties. The law also confers power on the arbitral tribunal to determine the language to be used for the arbitral proceedings if the parties are unable to agree on this issue. The arbitrator may direct that any documentary evidence should be accompanied with a translation into a language agreed on by the parties.

23 Commencement of arbitration

How are arbitral proceedings initiated?

An arbitration proceeding is initiated when a party to a dispute in respect of which there is an arbitration agreement refers the dispute to an arbitrator or an institution for arbitration, or to the Alternative Dispute Resolution Centre. The party initiating the arbitral proceedings is required to notify the other party of the commencement of the proceeding. A party to an agreement who is not notified of an arbitration proceeding arising under that agreement may apply to the High Court to set aside any arbitral award. Apart from resorting to a sole arbitrator or a tribunal, the parties to an arbitration agreement have the option of settling their dispute under the auspices of the Alternative Dispute Resolution Centre. The rules for the conduct of the arbitral proceedings by the Centre are set out in the third schedule of the Arbitration Act. According to the rules of the Centre, notice to a party is satisfied by telephone, fax, e-mail or other mode of electronic communication. Where the claim or counterclaim by a party to the dispute does not exceed US$100,000 or its equivalent in local currency, the Centre shall, upon the submission of the dispute, appoint a sole arbitrator from the register of arbitrators.

24 Hearing

Is a hearing required and what rules apply?

Subject to the agreement of the parties, the arbitrator may dispense with the requirement for a hearing. In lieu of a hearing, the arbitrator may request the parties to make their respective cases through the submission of documents and other materials. However, if the parties desire to be heard, there are a number of procedures that must be satisfied. The parties are required to give the arbitrator the particulars of any witnesses who will be called. The arbitration law further requires that the hearing shall be held in private, unless the parties agree to the contrary. At the commencement of the hearing, the parties are required to provide opening statements that will set down the issues to be determined. Similar rules of procedure apply were the parties elect to use the Expedited Arbitration Proceedings Rules of the Alternative Dispute Resolution Centre. In that regard, the Centre will play a facilitative role with respect to the proceedings. The Centre will be required to serve notice of the hearing date on the parties. Depending on the nature of the issue in contention, the hearing may be concluded in a day.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The taking of evidence is generally governed by the statutory rules relating to the admissibility of evidence. The arbitration law imposes an obligation on the arbitrator to ensure that evidence is taken in the presence of parties, unless a party has expressly waived that right or has refused to attend without good cause. A party is entitled to present his or her evidence by affidavit after the arbitrator has considered any objections by the opposing party. The opposing party is also entitled to cross-examine the deponent after the presentation of the affidavit evidence. At the instance of the parties, or at the request of the arbitrator, the parties may be required to submit additional documents and materials after the oral hearing to enable the issue or issues to be settled conclusively. The law confers enormous powers on the arbitrator to regulate the procedure dealing with the calling of witnesses. The parties are obliged to provide only material evidence.

Witnesses are required to provide relevant evidence that is necessary to the determination of the issues in dispute. Subject to the rules of natural justice, the arbitrator has the prerogative of determining whether evidence given is relevant and material to the issues in contention. The Arbitration Act makes provision for the appointment of experts to assist in the conduct of the proceedings. The law does not give pre-eminence to either tribunal-appointed experts or party-appointed experts. It provides that the arbitrator may appoint an independent expert to report to the arbitrator or tribunal in writing on any specified issue. In such a case, the parties are required to cooperate with the expert by providing him or her with the required information and evidence. On the submission of the report of the tribunal-appointed expert, the parties are entitled to cross-examine the expert at the hearing or call their own experts to comment on the report of the tribunal-appointed expert. As part of the process of obtaining evidence, the arbitral tribunal may request that documents submitted by parties should be inspected. The arbitral tribunal is required to provide notice to the parties indicating the time and date for the inspection. On completion of the inspection, the arbitral tribunal is required to furnish the parties with copies of its report for their comments.

The rules of evidence in Ghana are quite exhaustive for the purposes of conducting arbitral proceedings. That notwithstanding, an arbitral tribunal or arbitrator may seek guidance from the IBA or any other body when it becomes necessary.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The Arbitration Act does not contain any express provisions on the instances where the arbitral tribunal can request assistance from the court. The court is empowered to refer any matter brought before it to arbitration where it is satisfied that the action or part thereof can be resolved through arbitration. The court may intervene when any issues arise with regards to the appointment procedure of the arbitrator. Where the appointment procedure of the arbitrator is called into question, a party may apply to the High Court for the purposes of setting aside the appointment.

In addition, a party may apply to the High Court for the revocation of the arbitrator's authority where it is established that the arbitrator has violated the requirements of neutrality or impartiality in the discharge of his or her responsibilities. The Arbitration Act further provides that a party to

a proceeding who is dissatisfied with an arbitrator's ruling on jurisdiction in an arbitration proceeding may apply to the High Court for the determination of the arbitrator's jurisdiction. The Court's intervention will also be triggered when a party to an agreement who has not been notified of an arbitration proceeding applies to the Court to set the proceedings aside. The Court may also intervene where a party applies to set aside an arbitral award. A party is entitled to challenge the validity of an award where the court is satisfied, inter alia, that a party to an agreement was under some form of disability, the law applicable to the arbitration agreement was not valid, or the party was not given notice of the appointment of the arbitrator or was unable to present his or her case. An arbitral award is also liable to be set aside where the Court discovers that the subject matter of the arbitration was not capable of settlement by arbitration.

With respect to evidence, the law confers considerable power on the arbitrator to regulate the process. For instance, the arbitrator determines the materiality and relevance of evidence submitted by the parties. The Court cannot intervene directly with regards to the taking of evidence. Its power to support arbitral proceedings on issues of evidence is subject to the consent of the parties.

27 Confidentiality

Is confidentiality ensured?

The Arbitration Act enjoins the arbitrator or the arbitral tribunal to maintain confidentiality at all stages of the proceedings. The arbitrator is required to keep any information relating to the dispute in strict confidence. For instance, the arbitrator is required to conduct the oral hearing in private and is mandated to keep information regarding any material submitted in confidence, unless the parties request otherwise. In addition, a party who seeks to enforce an award is only required to apply to the High Court for an order. Confidentiality can still be maintained at this stage, since the Court will not go into the substantive issues that gave rise to the arbitration proceedings or the award.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The Arbitration Act permits parties to request the High Court to order an interim measure before or during arbitral proceedings.

The High Court may make an interim order for the taking and preservation of evidence or assets, or on issues affecting property rights that are the subject of the proceedings, make an interim injunction or address issues regarding the appointment of a receiver.

Under section 40 of the Arbitration Act, the High Court may also determine any questions of law that arise in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party. The High Court is also entitled to make an order that any question of law arising from an arbitration proceeding be referred to it for determination. The exercise of this power is, however, subject to the agreement of the parties. In addition, the arbitration law provides that, unless the parties otherwise agree, an application to the High Court shall not serve as a stay of the arbitral proceedings.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

No; domestic arbitration law does not contain any provisions for an emergency arbitrator. However, the arbitration law provides that, where there is a sudden vacancy in the arbitral tribunal, the parties may agree on whether and how the vacancy should be filled.

However, with regard to the National Labour Commission, where a vacancy occurs in the number of arbitrators, the remaining arbitrators may, with the consent of the parties, act despite the vacancy; failing that, the party whose number of arbitrators is affected by the vacancy shall appoint another arbitrator to fill the vacancy immediately; failing this, the Commission shall appoint another arbitrator to fill the vacancy.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The arbitrator may, at the request of a party, grant any interim relief the arbitrator considers necessary for the protection or preservation of property. An interim relief may be in the form of an interim award, and the arbitrator may require the payment of costs for such relief. The applicant is required under the law to bear liability for the cost of granting the interim relief.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration?

Once the arbitral tribunal is constituted and has adopted particular rules for settling the dispute, the arbitral tribunal will derive its powers from those rules. Section 31(2) of the Arbitration Act places an obligation on the arbitral tribunal, subject to the other requirements of the Arbitration Act, to conduct the arbitration so as to avoid unnecessary delay and expenses. This section also allows the arbitral tribunal to adopt measures that will expedite resolution of the dispute. The Arbitration Act further prescribes that the arbitral tribunal has the power to decide on matters of procedure and evidence subject to the rights of the parties. Thus, the arbitral tribunal, for example, has the power to determine the manner in which witnesses are examined.

At the Ghana Arbitration Centre, once the arbitral tribunal has adopted the rules for settling the dispute, the arbitral tribunal may proceed if a party attempts to delay the proceedings. However, this party must be notified of the proceedings that took place in his or her absence.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The arbitrator is required to encourage the parties to resolve their differences during the proceedings. The law does not impose any requirement that the decision of the arbitrators should be unanimous in the event that the parties are unable to reach an agreement.

In rendering an award, it is sufficient if the decision of the arbitral tribunal is made by a majority. The validity of the award is not impugned by a dissenting opinion expressed by an arbitrator.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

In all cases in which a dissenting opinion is expressed by a member of an arbitral tribunal, it will not count towards the final decision of the tribunal. Where a unanimous decision cannot be reached, the decisive opinion is that expressed by the majority.

34 Form and content requirements

What form and content requirements exist for an award?

The parties have the liberty to determine the form and content of the arbitral award. In the absence of such an agreement, the award must satisfy the following requirements:

- the award should be in writing;
- the award should be signed by the arbitrator or the tribunal, as the case may be;
- the date and place where the award was made must be indicated; and
- the reasons for the award must be indicated, unless the parties otherwise agree not to.

In the case of awards granted by a tribunal, the signature of the majority shall be sufficient, provided that the reason for the omission of the signatures of some of the arbitrators is stated.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Act has not set out any specific time frame for the delivery of the award. However, it must be noted that the parties to an arbitration proceeding expect to resolve their differences as quickly as possible. Thus, the arbitration proceeding is expected to be conducted expeditiously and the award handled within a reasonable time. What amounts to a reasonable time is a question of fact to be determined on a case-by-case basis. Even though the arbitration law does not specify the time limit for the delivery of the award, it expressly prohibits the arbitrator from extending the time limit agreed by the parties for the delivery of the award.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the delivery of the award and the date of its receipt by the parties are significant for a number of reasons. The date of the delivery of the award is relevant for purposes of adding to or correcting any clerical, typographical, technical or computation of error in the award. This may be effected either at the request of a party to the proceedings or at the instance of the arbitrator within a period of 28 days after the delivery of the award. The date of the receipt of the award by the parties is relevant for the purposes of challenging its validity. A party who wishes to set aside an award is required to submit his or her application to the High Court within a period of three months from the date the party received or is notified of the award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The law provides for three main types of awards: interim relief, settlement before conclusion of arbitration and the final arbitral award.

With regard to interim relief, an arbitrator is permitted, at the request of a party, to grant any interlocutory relief that he or she considers necessary for the preservation or protection of property.

In addition, a relief in the form of an award may be granted by an arbitrator where, in the course of a proceeding, the parties settle their dispute before the arbitral award is given. An arbitrator may also deliver a final award on the conclusion of an arbitration proceeding.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The arbitral proceedings may be terminated if:

- the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- the parties agree on the termination of the proceedings;
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible; or
- the parties have settled their dispute before the delivery of the final award. In such circumstances, the law permits the arbitrator to terminate the proceedings, and with the consent of the parties, record the settlement in the form of an arbitral award on agreed terms.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The assessment of the costs and expenses arising from an arbitration proceeding is done by the arbitrator. Parties are liable to bear equally all the administrative costs arising from the proceedings, unless they agree to the contrary. The parties are also required to pay for the services of their attorneys and any other statutory fees.

The law also provides that a party may, within 28 days after the date of the determination of the amount of fees, apply to the appointing authority or the court, upon notice to the other party and the arbitrators, for an order adjusting the amount. Any excess payment made as a result of the adjustment may be ordered to be repaid.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The Arbitration Act makes provision for the recovery of interest on principal claims in appropriate circumstances. The mode of payment and the rate of interest on any sum are determined by the arbitrator. In the case of disputes relating to contracts, the arbitrator can grant the appropriate pre-award or post-award relief at simple or compound interest under the terms of the contract and the applicable law.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The Arbitration Act grants the arbitrator the power to correct any clerical, typographical, technical or computational error in the award, and to make an additional award in respect of a claim presented to the arbitrator but omitted from the award. Such corrections can be effected at the instance of the arbitrator or at the request of a party, within 28 days of delivering an award or such longer period as the parties may agree on, upon giving 14 days' notice to the parties. The law is quite silent with respect to the power of the tribunal to interpret the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The validity of an award can be challenged on a number of grounds. Among several others, the existence of any of the factors outlined below can provide a basis for challenging the award:

- a party to the arbitration was under some form of disability or incapacity;
- the law applicable to the arbitration agreement is not valid;
- the applicant was not given notice of the appointment of the arbitrator or of the proceedings, or was unable to present the applicant's case;
- the award deals with a dispute not within the scope of the arbitration agreement or outside the agreement, except that the court shall not set aside any part of the award that falls within the agreement;
- there has been a failure to conform to the agreed procedure by the parties;
- the arbitrator has an interest in the subject matter of arbitration that the arbitrator failed to disclose;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Ghana; or
- the award is in conflict with public policy.

A party who alleges that any of the above-stated factors have impugned the credibility of the award is required to apply to the High Court to set aside the award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

A party who wishes to set aside an arbitral award for any irregularity is required to apply to the High Court. If the party is dissatisfied with the ruling of the High Court, an appeal lies as of right to the Court of Appeal. The Arbitration Act is silent on the costs to be incurred and the time frame. The parties will be required to bear their own costs unless the court decides otherwise. Regarding the time frame, it is quite difficult to determine beforehand how long it will take for a challenge to be decided at each

level. It will depend largely on the number of cases to be decided by the Court at each period.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An award will generally be recognised when it satisfies the requirements of due process and natural justice. An award shall be enforced in the same manner as a judgment or order of the High Court.

In order for a foreign award to be enforceable, it must satisfy the following requirements:

- the award was rendered by a competent authority under the laws of the country where the award was made;
- a reciprocal agreement exists between Ghana and the country in which the award was made;
- the award was made under the International Convention specified in the First Schedule to the Arbitration Act;
- the party has produced the original award or a certified copy thereof, and the agreement pursuant to which the award was made or a duly authenticated copy; and
- there is no appeal pending against the award in any court under the law applicable to the arbitration.

An award may not be enforced where it is shown that the arbitrator lacked jurisdiction to make the award.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Arbitration Act clearly provides that a foreign arbitral award that has been annulled (and by implication set aside) in the country in which it was given cannot be enforced in Ghana, and the courts are likely to uphold this provision.

46 Cost of enforcement

What costs are incurred in enforcing awards?

The Arbitration Act does not have express provisions dealing with the costs of enforcing awards. However, it can be reasonably expected that the person who seeks to enforce either a domestic or foreign award shall bear the full costs associated with the enforcement.

Other

47 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The legal system of Ghana follows the common law tradition. The various rules pertaining to this system in the area of evidence and procedure will provide the guiding framework for the conduct of arbitration in Ghana. An arbitrator will therefore be required to follow and observe the general rules of common law and equity in the discharge of his or responsibilities.

As a general rule, parties are required to appear in person or be represented by counsel during the arbitral proceedings. This does not preclude the possibility of submitting a written statement in lieu of appearance before the arbitrator or the tribunal.

In effect, the law provides a great deal of discretion to the parties to decide the mode of submitting evidence for the consideration of the arbitrator or the tribunal.

48 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The Arbitration Act does not specify any specific professional or ethical rules to be followed by counsel in international arbitration. However, generally, lawyers have an ethical duty to the court, the client and the legal profession. Under the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 623), a lawyer has a duty to behave with the utmost honesty and with frankness when dealing with clients and the courts.

The Arbitration Act, provides in relevant part that a party may be represented by counsel or any other person chosen by the party. Also, where a party intends to be represented at the arbitration proceedings, the person is required to give at least seven days' notice to the other party before the commencement of the arbitration.

Although the Arbitration Act does not specifically state how a party's representative can be changed during the proceedings; largely the best practice is that it is not advisable for the parties' to change their representatives once the proceedings has begun.

49 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

The Arbitration Act does not place any limitation on the participation of foreigners in an arbitration proceeding. The parties to the arbitration are at liberty to appoint a person without experience or qualifications relevant to the subject of the dispute as an arbitrator.

However, a foreign practitioner must be conversant with the common law system used in Ghana and the impact it has on arbitration practice generally.

A foreign practitioner will also be required to obtain a resident and work permit to engage in any form of employment. The practitioner is further required to pay the appropriate taxes on the income obtained from rendering professional services.

Apart from these general observations, a practitioner will not face any other legal and administrative challenges in the discharge of his or her responsibilities.

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